

No. 19-

IN THE
Supreme Court of the United States

Jorge Sosa,
Petitioner,
v.

United States,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether a VICAR conviction under 18 U.S.C. § 1959(a) can be sustained when a gang member commits a violent act that is unrelated to the racketeering enterprise?
- II. Whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague? This identical question is pending before this Court in *United States v. Davis*, No. 18-431 (cert. granted, Jan. 4, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Jorge Sosa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The Fourth Circuit Court of Appeals erred by interpreting 18 U.S.C. § 1959 so broadly that any violence committed by a gang member would fall within its ambit, whether or not the violence related to gang membership.

Here, Defendant Jorge Sosa was charged with and convicted under 18 U.S.C. § 1959's violent crime in aid of racketeering (VICAR) provisions. At trial the government put on witnesses and presented evidence establishing that Mr. Sosa was a member of MS-13. The government also presented evidence that Mr. Sosa, along with his cousin, took part in a shooting outside of a liquor house.

However, what the government failed to prove was a connection between the liquor house shooting

and Mr. Sosa’s membership in MS-13. The dispute involved a fight over a bar tab within the liquor house that spilled out into the street and finally erupted into the shooting. None of the other parties involved in the shooting (including Sosa’s cousin) were gang members, no gang signs were flashed, and there was no evidence to suggest that Mr. Sosa maintained or increased his position as a result of the violence.

The majority opinion in the Fourth Circuit noted the primary reason for upholding the conviction was that a jury could permissibly infer that Sosa was making a statement based on the “excessive nature” of his response to the dispute. *United States v. Zelaya*, __ F.3d __, 2018 WL 5930400 (2018) (rehearing and rehearing *en banc* denied December 11, 2018) at *4.

However, the opinion broadens VICAR liability to an extent well beyond Fourth Circuit precedent, putting the decision in conflict with decisions arising from the Second and Ninth Circuits. *See, e.g. United States v. Thai*, 29 F.3d 785, 818 (2nd Cir., 1994); *United States v. Banks*, 514 F.3d 959, 968 (9th Cir., 2008).

Moreover, the court’s interpretation is inconsistent with Congress’s purposes in enacting the law. *See* S. Rep. No. 98-225, at 3483 (1983) (congressional intent was to prosecute under § 1959(a) where the violent crime was committed “as an integral aspect of an organization engaged in racketeering.”).

This Court should take up Sosa’s petition because the conflict between circuits is indicative of a need for guidance from this Court. The ambit of VICAR is a significant question—particularly given the staggering sentences associated with a conviction for the same. And it is one this Court has never previously addressed. Now is an excellent time for review, given the dissent’s comment that “the majority comes perilously close to holding that an act of violence by a gang member is gang-related by default, which robs the purpose element of any force or authority.” *Zelaya* at 8.

Additionally, this Court should hold this case for

disposition pending this Court’s decision in *United States v. Davis*, No. 18-431 (cert. granted, Jan. 4, 2019). The question of whether the residual clause at 18 U.S.C. § 924(c)(3)(B) is one that divides seven circuits. Sosa’s case is implicated as he received a consecutive 10-year sentence as a result of a conviction under § 924(c)(3)(B) for discharging a firearm in furtherance of a crime of violence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. p. 1a) is reported at __ F3d __, 2018 WL 5930400 (2018) (J. Floyd dissenting). Sosa’s petition for rehearing and rehearing *en banc* was denied on December 11, 2018. The trial court case number, originating out of the Western District of North Carolina, is 3:15-cr-121-29.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 14th, 2018. (App. p. 1a). A timely petition for rehearing *en banc* was denied on December 11, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

The district court possessed jurisdiction based on 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction to review Sosa’s appeal based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1959(a) provides:

Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting

in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

18 U.S.C. § 924(c)(3)(B) provides:

For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

- (A) Has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or,
- (B) That by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

A. Factual Background

At Petitioner Jorge Sosa’s trial, the government presented evidence that he was a member of a Charlotte-based section of the MS-13 gang. *Zelaya* at

*1. The Fourth Circuit noted that the gangs would extort local businesses and drug dealers, and participate in narcotics trafficking. *Id.* The Fourth Circuit noted Sosa's involvement in the gang included having "participated in gang fights." *Id.*

On June 20, 2013, Sosa went to a liquor house to drink with his cousin, Tomas Maradiaga. *Id.*; App. 31a. Maradiaga was not a member of MS-13. (App. p. 28a). While inside the house, Sosa got into an argument with some other individuals who had not paid their bar tab. (App. p. 31a). The argument escalated into physical violence and spilled out into the front lawn. (App. pp. 32a-33a). One of those individuals then pushed Sosa and picked up a stick to use as a weapon against him. *Id.*

Sosa and Maradiaga returned with a firearm and fired multiple shots into the other party's vehicle. (App. pp. 36a-38a). Sosa's participation in the shooting formed the basis for his VICAR charge—attempted murder in furtherance of a racketeering organization.

Sometime after the shooting, a MS-13 member called Maradiaga to warn him that he should skip town. (App. p. 43a).

There was no evidence to suggest that Sosa either increased or maintained rank as a result of the shooting, or even that he mentioned the shooting to any gang members. *Zelaya* at *7-*8; App. pp. 22a-60a. The evidence instead indicates that Sosa denied responsibility for the shooting. App. p. 44a.

Sosa was arrested after the shooting and prosecuted in State court, where he received a 55 to 78-month sentence. While he was serving that sentence, he was federally indicted on racketeering charges that included a VICAR charge predicated on the shooting offense.

B. Proceedings Below

On May 19, 2015, the United States Attorney's Office for the Western District of North Carolina

indicted Jorge Sosa on charges of RICO conspiracy, VICAR, and discharging a firearm in furtherance of a crime of violence (the crime of violence being the attempted murder) under 18 U.S.C. § 924(c).

On December 16, 2016, Sosa was convicted on all counts in a trial by jury. He was sentenced to a total sentence of 327 months. App. p. 55a

Sosa timely appealed his conviction to the Fourth Circuit. His primary argument challenged whether the government had met its burden with respect to the purpose element, and whether the VICAR and accompanying § 924(c) charge should be dismissed on that basis.

The majority opinion disagreed with Sosa and found that, “although Sosa’s sufficiency challenge requires a more complex inquiry” than the other defendants, that a jury could infer sufficient evidence to support the verdict based on a theory that the shooting “was expected of” Sosa. *Zelaya* at 4. The majority reasoned that Sosa’s excessive response to the fight in the liquor house suggested that Sosa’s motive may have been “making a statement rather than merely exacting payback.”

The dissent vigorously argued that a conviction on these facts was insufficient, and the majority was allowing the government to succeed with a lowered burden. *Zelaya* at 7-8. The dissent noted:

The government did not produce such evidence regarding Sosa’s violent acts. The shooting underlying Sosa’s VICAR conviction was not conducted alongside other MS-13 gang members and was not directed against rival gang members. The residence where the dispute originated was not affiliated with any gang. There is no evidence that Sosa picked a fight with his victim at the behest of a fellow MS-13 member or boasted to any gang members about the shooting after it occurred. There is simply not enough evidence for a jury to “properly infer” a connection between the

crime and the criminal enterprise as required to support a VICAR conviction.

Zelaya at 8.

Sosa subsequently filed a timely petition for *en banc* review with the Fourth Circuit. The court denied the petition on December 11, 2018. (App. p. 1).

REASONS FOR GRANTING THE PETITION

- I. The Fourth Circuit’s erroneous interpretation of 18 U.S.C. § 1959(a) merits this Court’s attention because it allows the government to use the VICAR statutes and their staggering punishments to prosecute any gang member who commits a violent act despite the lack of statutory authority to do so.**

In 1984, Congress enacted the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Ch. X, Part A (Oct. 12, 1984), from which VICAR was born. The Act was designed to punish violent crime committed “as an integral aspect of an organization engaged in racketeering.”. S.Rep. No. 98-225, at 3483 (1983).

The government has strayed far from the Act’s intended purpose, as well as its text (“*for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.*”) (emphasis added).

Sosa, a gang member, committed an admittedly reprehensible act in firing into an occupied vehicle outside the liquor house. However, the act was wholly unrelated to his membership in the racketeering enterprise. There was no evidence to suggest there were gang ties to the shooting, and certainly none to show that the act assisted him in advancing or maintaining his position within the enterprise.

With the Sosa decision, the Fourth Circuit has separated itself from its sister circuits and become an outlier. More significantly, its precedent now suggests that “an act of violence by a gang member is gang-

related by default, robbing the purpose element of any force or authority.” *Zelaya* at *8. The prioritization of gang-related prosecutions and the associated staggering punishments underscore the need for judicial checks on such prosecutorial authority.¹

The decision directly conflicts with authority from the Second Circuit delineating gang violence and private violence committed by gang members. *See e.g. United States v. Thai*, 29 F3d 785, 818 (2nd Cir., 1994) (overturning § 1959 conviction related to nightclub bombing where evidence of purpose element was “entirely speculative.”); *United States v. Bruno*, 383 F.3d 65, 84-84 (2nd Cir., 2014) (connection between murder of member of rival family was “pecuniary” and “too tenuous” to support a § 1959 conviction). The decision is also in tension with the Ninth Circuit and at least one district court. *See United States v. Banks*, 514 F.3d 959, 968 (9th Cir., 2008) (reach of purpose element “must be cabined” otherwise “mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation.”); *United States v. Jones*, 291 F.Supp.2d 78, 88-89 (D.Conn., 2003) (Granting Rule 29 motion because “the government dramatically and impermissibly expands the breadth of its respect theory” in advancing a theory of guilty “rel[ying] on evidence that Jones and Enterprise members did not tolerate acts of disrespect.”).

At minimum, the other circuits enunciate a threshold—that the violence be “committed ‘as an integral aspect of membership’ in the enterprise.” *Thai* at 817 (quoting *United States v. Concepcion*, 983 F.3d 369, 381 (2nd Cir., 1992)); *See also, United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir., 1997) (vacated in part on other grounds in *United States v. Brown*, 161 F.3d 256 (1998)). The Fourth Circuit decision in

¹ *See e.g.*, “Sessions: MS-13 street gang a ‘priority for law enforcement,’ AP News, October 23, 2017 (available at: <https://www.apnews.com/4c32e4a333c04b4592c1d09caf8ef8d8>); “Under Trump, federal death penalty cases are ticking up,” October 31, 2018 (available at: <https://www.apnews.com/20bb9bfc954248bda8b13b4a4240adad>).

Sosa eliminates all such principled basis for distinguishing gang-related violence.

The Court should grant Sosa's petition because it presents an important question that has not, but should be, decided by this Court, and because the Fourth Circuit decision conflicts with decisions of sister Circuits.

A. The decision below is wrong because it is inconsistent with the plain language of the statute and congressional intent.

Sosa's conduct without question merited punishment. However, VICAR could not provide the appropriate hook because there was no evidence to connect the shooting with the racketeering operation.

18 U.S.C. § 1959(a) requires the Government to prove Sosa committed a violent crime "for the purpose of ... maintaining or increasing [his] position in an enterprise engaged in racketeering activity..." The statutory text requires that the Government prove that *the* purpose of the violent act was to maintain or increase position. However, circuits interpreting the statute have read some flexibility into the element. *See United States v. Tipton*, 90 F.3d 861, 891 (4th Cir., 1996) (holding that gang furtherance need not be the "only or primary concern" so long as the jury can infer "it was expected of him by reason of his membership...or that he committed it in furtherances of that membership.") (citing *United States v. Concepcion*, 983 F.2d 369, 381 (2nd Cir., 1992)).

Prior to Sosa's case, the Fourth Circuit had at least acknowledged precedent from other circuits that the violence related to an "integral aspect of [their] membership." *Tipton* at 890 (quoting *United States v. Concepcion*, 983 F.2d 369, 381 (2nd Cir., 1992)). As well, the actions of the principals in the *Tipton* case bore significant indicia of gang action as one gang member recruited the other gang member (who had no connection to the victim) to assist with the kill. *Tipton* at 891. However, the interpretation advanced in the instant decision is inconsistent with 18 U.S.C. §

1959(a) and the Fifth Amendment's Due Process Clause.

There was no connection between Sosa's retaliatory violence and MS-13. Sosa acted in concert with his cousin, Tomas Maradiaga, who was not part of the gang. *Zelaya* at *8. The shooting stemmed from a private dispute between Sosa and another group of individuals who were not gang-related. There is no evidence of gang-related conversations, gang signs flashed, or other gang connections. Instead, the dispute was over a bar tab. *Id.*

Nor could the conviction be bootstrapped under a 'reputation' theory.² No evidence suggested the liquor house was gang territory, that any gang members or affiliates were present, and no evidence that he maintained or advanced position as a result. In fact, no evidence exists to suggest he took credit for the shooting or that reputational violence was a motivation. *See Zelaya* at *8. Finally, the evidence actually suggests that Sosa attempted to place the blame on others, not to take credit for the shooting. App. p. 44a.

The after-the-fact involvement of a fellow gang member in the cover-up has no bearing on Sosa's motive. Additionally, there is no evidence to suggest that Sosa actually involved the gang member or whether he intervened of his own volition, as he was Maradiaga's cousin. App. pp. 43-44.

The Fourth Circuit's theory of legal sufficiency rests on an unduly expansive reading of 18 U.S.C. § 1959(a), and an enlargement of its statutory purpose to a degree meriting reversal. *See e.g., McDonnell v. United States*, __ U.S. __, 136 S.Ct. 2355, 2367-68 (2016) (finding that government's interpretation of official act to "encompass[] nearly any activity by a public official" was too broad a sweep.).

Under the plain text of the statute, the statutory

² See c.f. *United States v. Vernace*, 811 F.3d 609, 616 (2nd Cir., 2006) (affirming VICAR murder "over a spilled drink" where evidence suggested the bar was a Gambino territory and the murder was an affirmation that the Gambinos "ran the place.") (internal citation omitted).

purpose enunciated by Congress (S.Rep. No. 98-225, at 3483), and the guidance provided by other circuits, the Fourth Circuit impermissibly “lightens the government’s burden” (*Zelaya* at *8) in finding sufficient evidence.

B. The Fourth Circuit decision presents an important question of federal law that should be settled by this Court.

The panel’s sweeping decision presents an issue of extraordinary importance. The panel expanded § 1959(a), which criminalizes violent acts committed for *the* purpose of advancement of or within an enterprise, such that, in the Fourth Circuit, “an act of violence by a gang member is gang-related by default.” *Zelaya* at *8.

Under the limitless conception of the purpose element advanced by the majority, a jury could find sufficient evidence of VICAR with respect to any violent act by anyone associated with a gang. The majority’s argument—that the violence was excessive—would apply to any criminal act of violence. Criminal violence is violence beyond what is permitted by the law. Under the argument, imperfect self-defense is excessive violence, as is domestic violence, as is a violent response during a sporting contest. By broadening the purpose element, the majority opinion eliminates the distinction between violence that is gang-related and that which is not.

The rule gives prosecutors a basis to investigate and indict any gang member or gang associate who has committed a crime. And that is what happened here. Sosa was serving a 55 to 78-month sentence for the same conduct that served as the basis for his VICAR charge. Nor is the issue limited to Sosa—the executive has repeatedly announced its eagerness to pursue prosecution of MS-13 gang members, and its willingness to use any available means of doing so.³

³ See Jeff Sessions remarks to International Association of Chiefs of Police, Philadelphia, Pennsylvania, October 23, 2017 (available at

Scholars have long recognized that prosecutors have repeatedly pushed the limits of laws targeting organized crime. One scholar noted, nearly thirty years ago, that under those law, “defendants have been tried for engaging with others in series of crimes having looser connections than have traditionally been permitted even in conspiracy prosecutions....and frequently present an equally ill-assorted set of charges against codefendants.” Gerard Lynch, “RICO, the crime of being a criminal, parts I & II, 87 Colum. L. Rev. 661, 663 (1987); *See also*, Randy Gordon, “Crimes that count twice, a reexamination of RICO’s nexus requirement under 18 U.S.C. § 1962 §§ 1962(c) and 1964(c),” 32 Vt. L. Rev. 171, 181 (2007) (“There are often cases in which a defendant participates in an enterprise in one capacity, yet allegedly commits racketeering acts in another. Courts and litigants sometimes overlook the nexus requirement in this context, as evidenced by the paucity of relevant caselaw.”).

This Court has not previously addressed the purpose element of the VICAR statute, and has had few opportunities to review clean legal disputes over the its reach. The staggeringly broad legal rule adopted below warrants this Court’s review.

C. The Sosa decision has made the Fourth Circuit an outlier, and its incorrect reading of § 1959(a) conflicts with two other circuits.

In an important early § 1959(a) case, the Second Circuit rejected an expansive reading of the purpose element that would have easily encompassed the acts here. In *United States v. Thai*, 29 F.3d 785 (2nd Cir., 1994), which has been cited by hundreds of courts, the Second Circuit affirmed the significance of the

<https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-international-association-chiefs-police>) (“Just like we took Al Capone of the streets with our tax laws, we will use whatever laws we have to get MS-13 off our streets.”); Fabian, Jordan, *Trump on MS-13: ‘These are not people, they are animals,’* May 23, 2018, (available at: <https://thehill.com/homenews/administration/389037-trump-on-ms-13-these-are-not-people-these-are-animals>) (“These are not people, these are animals, and we have to be very, very tough.”).

purpose language of 18 U.S.C. § 1959. In finding the evidence of purpose “entirely speculative” as to a gang leader accused of a bombing a nightclub, the court noted:

We do not see in this testimony any implication of a motive of the sort envisioned by § 1959. There was no evidence, for example, that the bombing was to be a response to any threat to the BTK organization or to Thai's position as BTK's leader, nor any evidence that he thought that as a leader he would be expected to bomb the restaurant. And though Thai paid the expenses of gang members, any suggestion that he undertook to bomb the Pho Bang to obtain money in order to carry out that responsibility would be entirely speculative, since the government concedes that there was no evidence as to Thai's intended use of the money.

Id. at 818.

Unlike the majority opinion here, the Second Circuit rejected the same theory advanced by the government in Sosa's case. The court responded: “the government's argument reveals too much: if it were valid, any Hobbs Act robbery or robbery conspiracy ordered by the leader of a RICO enterprise would automatically constitute a violation of § 1959.” *Id.*

Similarly, the Second Circuit enforced a line in *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004). There, the court dismissed a § 1959 VICAR charge where the evidence only supported a pecuniary motive despite the defendant's status as a mobster. The connection to purpose element was “too tenuous,” as such, “no rational juror could have found that Polito participated in the shootings to maintain or increase his position in the Genovese Family.” *Id.* at 84, 85. In *United States v. Ferguson*, 246 F.3d 129, 134-37 (2nd Cir. 2001), the court ordered dismissal of a § 1959(a) charge based on the killing of a rival gang member where the evidence was speculative as to the

defendant's purpose.

Under any of the factual scenarios addressed by the Second Circuit, sufficient evidence would have existed under the expansive interpretation of § 1959 recognized by the Fourth Circuit in Sosa's case.

Additionally, one of the district courts in that circuit provided apt analysis in rejecting a similar theory of prosecution. In *United States v. Jones*, 291 F.Supp.2d 78, 88-89 (D.Conn., 2003), the court granted a Rule 29 motion under more egregious facts based on its observation that "the government dramatically and impermissibly expands the breadth of its respect theory" in advancing a theory of guilt "rel[ying] on evidence that Jones and Enterprise members did not tolerate acts of disrespect."

Although the tension is present to a lesser degree with respect to the Ninth Circuit, that court also agrees that the reach of § 1959(a) "must be cabined" otherwise "mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation." *United States v. Banks*, 514 F.3d 959, 968 (9th Cir., 2008). The court there also reiterated the significance of the "general" or "integral" purpose requirement that circuits have read into the statute. *Id.* at 965 (quoting *United States v. Concepcion*, 983 F.3d 369, 381 (2nd Cir., 1992), and *United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir., 1997)).

Although the Fourth Circuit had previously favorably cited to Congressional remarks proscribing that the violent act must be committed as "an integral aspect of membership" in such enterprises,⁴ the majority stepped back from that position in Sosa's case. The majority described the proper interpretation of § 1959(a) as "a defendant may be convicted under VICAR even if maintaining or increasing his position in a racketeering enterprise is not his 'only or primary concern' in carrying out a violent crime." *Zelaya* at *4 (quoting *United States v. Tipton*, 90 F.3d 861, 891 (4th Cir., 1996)).

⁴ *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir., 1994) (citing S. Rep. No. 225, at 304).

II. Alternatively, the Court should hold Sosa’s case for disposition pending its decision in *United States v. Davis*, No. 18-431.

In *United States v. Davis*, No. 18-431 (cert. granted, Jan. 4, 2019) this Court will resolve a circuit split on the question of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under the Fifth Amendment’s Due Process Clause.

Since this Court decided *Sessions v. Dimaya*, __ U.S. __, 138 S.Ct. 1204 (2018), seven circuits have split over the question of whether the residual clause definition of “crime of violence” contained in § 924(c)(3)(B) is void for vagueness.

In *United States v. Davis*, 903 F.3d 483, (5th Cir., 2018), that court held, “because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)’s residual clause is unconstitutionally vague.” *Citing Dimaya* at 1223, and *Johnson v. United States*, __ U.S. __, 135 S.Ct. 2551 (2015).

Three other circuits join the Fifth Circuit. *See United States v. Eshetu*, 898 F.3d 36 (D.C. Cir., 2018) (per curiam); *United States v. Salas*, 889 F.3d 681 (10th Cir., 2018); *United States v. Simms*, __ F.3d __, 2019 WL 311906 (4th Cir., 2019). In *Simms*, the Fourth Circuit noted that “the text and structure of § 924(c)(3)(B) plainly set forth a definition of ‘crime of violence’ that fails to comport with due process.”

Three circuits have found the clause survives constitutional scrutiny through abandonment of the traditional categorical approach and engaging in case specific inquiry. *See United States v. Douglas*, 907 F.3d 1 (1st Cir., 2018); *Ovalles v. United States*, 905 F.3d 1231 (11th Cir., 2018) (en banc); *United States v. Barrett*, 903 F.3d 166 (2nd Cir., 2018).

Because this Court previously struck down a statute containing language identical in substance in

Dimaya, and for the reasons set forth in more detail in the response for the petition for certiorari in *Davis*, this Court should find that Sosa’s conviction and sentence for a violation of 18 U.S.C. § 924(c)(3)(B) are invalid.

Sosa’s indictment alleged that “during and in relation to a crime of violence, that being Attempted Murder in Aid of Racketeering, a violation of Title 18, United States Code, Section 1959...did knowingly and unlawfully use and carry one or more firearms, and in furtherance of such crime of violence, did possess one or more firearms.” (App. p. 21a). He was convicted of the same, and received a ten-year sentence, which the district court ran consecutive to his conviction under 18 U.S.C. § 1959(a).

Sosa’s conviction and sentence therefore fall under the statutory provisions this Court will review in *Davis*.

However, because the issue was not raised before the trial court or the appellate court, the inquiry is whether plain error review applies. *See e.g.*, Fed. Rule of Crim. Pro. 52(b); *United States v. Olano*, 507 U.S. 725, 731 (1991). Because *Davis* has yet to be decided by this Court, and because *Simms* did not become law in the Fourth Circuit until January 29, 2019, after the panel decided Sosa’s case on November 14, 2018, and long after the jury verdict on April 12, 2016, the failure of trial counsel to object is excusable. *Henderson v. United States*, 568 U.S. 266, 273-74 (2013) contemplates this very scenario—permitting review where the law is unsettled at the time the objection could have been raised.

Moreover, new rules for the conduct of criminal prosecutions are to be applied to all cases pending on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Even under plain error, should the Court uphold the Fifth Circuits decision in *Davis*, Sosa meets the criteria for plain error, in that error occurred, it was plain, and it affected his substantial rights. *See Olano* at 734; *Henderson* at 274.

If certiorari is not granted in the ordinary course

on the first question presented, this case should be held pending the decision in *Davis* and then disposed of appropriately in light of that opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, this the 5th day of February, 2019.

s/Rob Heroy
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FILED: December 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4859
(3:15-cr-00121-RJC-DSC-29)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JORGE SOSA, a/k/a Koki, a/k/a Loco

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Duncan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

2018 WL 5930400

Only the Westlaw citation is currently available.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.

Miguel ZELAYA, a/k/a Most
Wanted, Defendant – Appellant.

United States of America, Plaintiff – Appellee,
v.

Luis Ordonez-Vega, a/k/a Big
Boy, Defendant – Appellant.

United States of America, Plaintiff – Appellee,
v.

Jorge Sosa, a/k/a Koki, a/k/
a Loco, Defendant – Appellant.

United States of America, Plaintiff – Appellee,
v.

William Gavidia, a/k/a Duro,
Defendant – Appellant.

No. 16-4752, No. 16-4857, No. 16-4859, No. 17-4052

Argued: September 28, 2018

Decided: November 14, 2018

Synopsis

Background: Defendants were convicted in the United States District Court for the Western District of North Carolina, 3:15-cr-00121-RJC-DSC-37, 3:15-cr-00121-RJC-DSC-22, 3:15-cr-00121-RJC-DSC-29, 3:15-cr-00121-RJC-DSC-13, [Robert J. Conrad, Jr.](#), J., of participating in racketeering conspiracy under Racketeer Influenced and Corrupt Organizations Act (RICO), committing violent crimes in aid of racketeering (VICAR), and using firearm in furtherance of violent crime, and they appealed.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

[1] jury's finding that enterprise affecting interstate commerce existed, as required for conviction for RICO conspiracy, was supported by sufficient evidence;

[2] jury's finding that defendants were members of gang who agreed to commit multiple overt acts in furtherance of the conspiracy, as required for conviction for RICO conspiracy, was supported by sufficient evidence;

[3] VICAR convictions were supported by sufficient evidence;

[4] framework for prior bad act evidence did not apply to evidence of defendant's gang membership;

[5] two defendants failed to show clear prejudice arising from joint trial with two other defendants;

[6] district court did not abuse its discretion in declining to declare mistrial based on witness's reference to uncharged gang murder; and

[7] defendant's sentence was substantively reasonable.

Affirmed.

[Floyd](#), Circuit Judge, file opinion concurring in part and dissenting in part.

West Headnotes (29)

[1] [Criminal Law](#)

 [Review De Novo](#)

The Court of Appeals reviews a district court's denial of a motion for acquittal de novo. [Fed. R. Crim. P. 29](#).

[Cases that cite this headnote](#)

[2] [Criminal Law](#)

 [Substantial evidence](#)

Denial of a motion for acquittal is proper where, viewed in the light most favorable to the prosecution, substantial evidence supports a guilty verdict. [Fed. R. Crim. P. 29](#).

[Cases that cite this headnote](#)

[3] [Criminal Law](#)

🔑 Reasonable Doubt

Substantial evidence is evidence sufficient for a reasonable jury to find proof beyond a reasonable doubt of each element of the charged offense.

[Cases that cite this headnote](#)

[4] Criminal Law**🔑 Credibility of Witnesses**

In evaluating the sufficiency of evidence, the Court of Appeals does not consider the credibility of witnesses.

[Cases that cite this headnote](#)

[5] Conspiracy**🔑 Particular crimes**

A conspiracy conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO) requires proof that: (1) an enterprise affecting interstate commerce existed; (2) each defendant knowingly and intentionally agreed with another person to conduct or participate in its affairs; and (3) each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts. [18 U.S.C.A. § 1962\(d\)](#).

[Cases that cite this headnote](#)

[6] Conspiracy**🔑 Knowledge, intent, and participation**

A defendant need not have a managerial role in a racketeering enterprise to be convicted for conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO). [18 U.S.C.A. § 1962\(d\)](#).

[Cases that cite this headnote](#)

[7] Commerce**🔑 Criminal or racketeer influenced and corrupt organizations****Conspiracy****🔑 Narcotics and dangerous drugs**

Jury's finding that enterprise affecting interstate commerce existed, as required for conviction for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, was supported by sufficient evidence, including evidence that defendants sold cocaine as part of the enterprise, which had national and international ties. [18 U.S.C.A. § 1962\(d\)](#).

[Cases that cite this headnote](#)

[8]**Conspiracy****🔑 Narcotics and dangerous drugs**

Jury's finding that defendants were members of gang who agreed to commit multiple overt acts in furtherance of the conspiracy, as required for conviction for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, was supported by sufficient evidence, including evidence that defendants engaged in gunfights with rivals on behalf of gang, and that defendants taxed drug dealers. [18 U.S.C.A. § 1962\(d\)](#).

[Cases that cite this headnote](#)

[9]**Racketeer Influenced and Corrupt Organizations****🔑 Nexus between enterprise and acts**

To sustain a violent crimes in aid of racketeering (VICAR) conviction, the government must prove that: (1) there was a Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise; (2) it was engaged in racketeering activity as defined in RICO; (3) the defendant in question had a position in the enterprise; (4) the defendant committed the alleged crime of violence; and (5) his general purpose in so doing was to maintain or increase his position in the enterprise. [18 U.S.C.A. § 1959](#).

[Cases that cite this headnote](#)

[10]**Racketeer Influenced and Corrupt Organizations****🔑 Weight and sufficiency**

Convictions for committing violent crimes in aid of racketeering (VICAR) were supported by sufficient evidence, including evidence that defendants murdered rival gang members and murdered other victims in excessive manner in order to make statement. [18 U.S.C.A. § 1959](#).

[Cases that cite this headnote](#)

[11] [Racketeer Influenced and Corrupt Organizations](#)

↳ Nexus between enterprise and acts

In a prosecution for violent crimes in aid of racketeering (VICAR), the government need not show any nexus between the act of violence and the racketeering activity to prove that a defendant committed a violent crime in order to maintain or increase his position in a racketeering enterprise. [18 U.S.C.A. § 1959](#).

[Cases that cite this headnote](#)

[12] [Racketeer Influenced and Corrupt Organizations](#)

↳ Presumptions and burden of proof

In a prosecution for violent crimes in aid of racketeering (VICAR), the government need only establish that the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership. [18 U.S.C.A. § 1959](#).

[Cases that cite this headnote](#)

[13] [Racketeer Influenced and Corrupt Organizations](#)

↳ Nexus between enterprise and acts

A defendant may be convicted of committing violent crimes in aid of racketeering (VICAR) even if maintaining or increasing his position in a racketeering enterprise is not his only or primary concern in carrying out a violent crime. [18 U.S.C.A. § 1959](#).

[Cases that cite this headnote](#)

[14] [Criminal Law](#)

↳ Reception and Admissibility of Evidence

The Court of Appeals reviews the admission of evidence for abuse of discretion.

[Cases that cite this headnote](#)

[15] [Criminal Law](#)

↳ Other Misconduct Inseparable from Crime Charged

The evidentiary rule regarding prior bad act evidence does not apply to evidence introduced to prove a substantive element of the offense charged. [Fed. R. Evid. 404\(b\)](#).

[Cases that cite this headnote](#)

[16] [Criminal Law](#)

↳ Conspiracy, racketeering, and money laundering

Evidence that defendant was gang member was introduced to prove substantive element of Racketeer Influenced and Corrupt Organizations Act (RICO) and violent crimes in aid of racketeering (VICAR) charges, and thus framework for prior bad act evidence did not apply. [18 U.S.C.A. §§ 1959, 1962\(d\)](#); [Fed. R. Evid. 404\(b\)](#).

[Cases that cite this headnote](#)

[17] [Criminal Law](#)

↳ Joint or Separate Trials of Codefendants

In general, defendants who are indicted together are tried together.

[Cases that cite this headnote](#)

[18] [Criminal Law](#)

↳ Preliminary proceedings

The Court of Appeals reviews a district court's denial of a motion to sever for abuse of discretion.

[Cases that cite this headnote](#)

[19] [Criminal Law](#)

🔑 Joinder or severance of counts or codefendants

Defendants must show clear prejudice arising from a joint trial to establish an entitlement to reversal of their convictions.

Cases that cite this headnote

[20] Criminal Law

🔑 Joinder or severance of counts or codefendants

Two defendants in Racketeer Influenced and Corrupt Organizations Act (RICO) prosecution failed to show clear prejudice arising from joint trial with two other defendants, and thus they were not entitled to reversal of their convictions; although other defendants were charged with murder, one defendant was charged with attempted murder, and second defendant was also active participant in multiple gang shootings. 18 U.S.C.A. § 1962(d).

Cases that cite this headnote

[21] Criminal Law

🔑 Issues related to jury trial

The Court of Appeals reviews a district court's denial of a motion for mistrial for abuse of discretion.

Cases that cite this headnote

[22] Criminal Law

🔑 Conduct and Deliberations of Jury

The Court of Appeals will reverse a denial of a mistrial only under the most extraordinary of circumstances.

Cases that cite this headnote

[23] Criminal Law

🔑 Other Misconduct;Character of Accused

In Racketeer Influenced and Corrupt Organizations Act (RICO) prosecution, district court did not abuse its discretion in declining to declare mistrial based on witness's

reference to uncharged gang murder; it was proper for government to ask witness to explain defendant's threat to her, government did not question witness about uncharged murder any further and did not refer to it again during trial, and court provided limiting instruction at defendant's request, stating that defendants were not on trial for any act, conduct, or offense not alleged in indictment. 18 U.S.C.A. § 1962(d).

Cases that cite this headnote

[24] Criminal Law

🔑 Custody and conduct of jury

Jurors are presumed to understand and follow instructions.

Cases that cite this headnote

[25] Criminal Law

🔑 Sentencing

The reasonableness of a sentence is reviewed for abuse of discretion.

Cases that cite this headnote

[26] Criminal Law

🔑 Judgment, sentence, and punishment

The Court of Appeals presumes that sentences within or below the guidelines range are reasonable.

Cases that cite this headnote

[27] Criminal Law

🔑 Sentencing

When reviewing a sentence for reasonableness, the Court of Appeals considers both substantive reasonableness, considering the totality of the circumstances, and procedural reasonableness, ensuring that the district court committed no significant procedural error, such as miscalculating the sentencing guidelines, failing to consider the criminal and personal history factors, or selecting a sentence based on erroneous facts. 18 U.S.C.A. § 3553(a).

[Cases that cite this headnote](#)**[28] Conspiracy****↳ Sentence and Punishment****Sentencing and Punishment****↳ Childhood or familial background****Sentencing and Punishment****↳ Other offender-related considerations**

Sentence of 216 months' imprisonment for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy conviction was substantively reasonable; sentence was below recommended sentence of 240 months, and district court granted downward variance based on defendant's difficult childhood and good conduct in prison. [18 U.S.C.A. §§ 1962\(d\), 3553\(a\)](#).

[Cases that cite this headnote](#)**[29] Conspiracy****↳ Sentence and Punishment****Sentencing and Punishment****↳ Scope of activity undertaken**

Sentence of 216 months' imprisonment for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy conviction was procedurally reasonable; defendant's base offense level was properly set by referring to attempted murder in which he was involved and which was within scope of his gang's criminal activities. [18 U.S.C.A. § 1962\(d\); U.S.S.G. § 1B1.3\(a\)\(1\)\(B\)](#).

[Cases that cite this headnote](#)

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:15-cr-00121-RJC-DSC-37; 3:15-cr-00121-RJC-DSC-22; 3:15-cr-00121-RJC-DSC-29; 3:15-cr-00121-RJC-DSC-13)

Attorneys and Law Firms

ARGUED: [William Robinson Heroy](#), GOODMAN, CARR, LAUGHRUN, LEVINE & GREENE, Charlotte, North Carolina; [Lisa S. Costner](#), [LISA S. COSTNER](#), PA, Winston-Salem, North Carolina; [Walter Hoyt Paramore, III](#), [LAW OFFICES OF W.H. PARAMORE, III](#), Jacksonville, North Carolina; [Aaron Edmund Michel](#), Charlotte, North Carolina, for Appellants. [William Michael Miller](#), OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. ON BRIEF: [Dana O. Washington](#), OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

Before [KING](#), [DUNCAN](#), and [FLOYD](#), Circuit Judges.

Opinion

Affirmed by published opinion. Judge [Duncan](#) wrote the opinion, in which Judge [King](#) joined. Judge [Floyd](#) wrote an opinion concurring in part and dissenting in part.

[DUNCAN](#), Circuit Judge:

*1 Appellants Miguel Zelaya, Luis Ordóñez-Vega, Jorge Sosa, and William Gavidia were each convicted of participating in a racketeering conspiracy under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1962\(d\)](#). Zelaya, Ordóñez-Vega, and Sosa were also convicted of committing violent crimes in aid of racketeering under [18 U.S.C. § 1959](#) ("VICAR") and of using a firearm in furtherance of a violent crime under [18 U.S.C. § 924](#) for their respective roles in several unrelated shootings. Appellants challenge these convictions on twelve separate grounds, and Appellant Gavidia challenges his sentence. Finding no reversible error, we affirm.

I.

Appellants are members of the street gang La Mara Salvatrucha, or MS-13. Formed in the 1980s by Salvadoran immigrants to Los Angeles for protection against rival street gangs, MS-13 has grown into a violent organization with active "cliques," or local chapters with varying levels of autonomy, operating throughout the United States and several Central American countries.

MS-13 cliques may extort local businesses or drug dealers, participate in international narcotics trafficking, and remit funds to gang leadership in El Salvador. Appellants were members of MS-13 cliques in and around Charlotte, North Carolina. We briefly describe the relevant background of each Appellant and provide additional information as necessary in the context of their respective arguments.

Zelaya became interested in MS-13 at a young age. He held himself out to MS-13 leaders in Charlotte as a fully-initiated member and engaged in bar fights with rival gangs alongside MS-13 associates. On December 18, 2013, Zelaya shot and killed Jose Ibarra outside of a bar, believing that Ibarra had threatened a friend. Ballistics evidence connected Zelaya to the shooting, and he confessed to police after waiving his *Miranda* rights. In his confession he accurately described the murder scene. Before trial but while imprisoned, he bragged to another MS-13 member about the killing.

Ordonez-Vega was already an MS-13 member when he moved from New York to Charlotte. Police in New York had encountered Ordonez-Vega in connection with anti-gang efforts, and had noted a "Mara Salvatrucha" tattoo across his chest. On June 6, 2014, Ordonez-Vega and several other MS-13 members, including Christian Pena, were gathered in a parking lot outside of a strip mall. They noticed Noel Navarro-Hernandez riding his bicycle in circles around a parked car belonging to one of the MS-13 members. After Navarro-Hernandez entered the mall, the MS-13 members determined that he was likely a rival and plotted to rob him. Pena and Ordonez-Vega executed the plan. When Navarro-Hernandez came out of the mall, Pena directed him to go behind the building where Ordonez-Vega was waiting. Pena accompanied Navarro-Hernandez. When they arrived behind the mall, Ordonez-Vega shot Navarro-Hernandez to death.

Sosa was a member of the MS-13 clique Charlotte Locotes and also participated in gang fights as an MS-13 member. On the evening of June 30, 2013, Sosa was drinking at a private residence with his cousin Tomas Maradiaga (who is not affiliated with MS-13). Sosa started arguing with a man who had not paid for his drinks, and the argument escalated. It spilled onto the front lawn of the house, where the man brandished a stick at Sosa. Sosa left the party with Maradiaga and retrieved an assault rifle. They returned as the individual with whom Sosa had argued was leaving

in a car with another guest. Sosa and Maradiaga drove after them and shot at their car repeatedly, although no one was killed. After the shooting, Fec Rodriguez Vareal, or "Chelito," a fellow MS-13 member, called Maradiaga to warn him to leave town.

*2 Gavidia was a member of the Coronados Little Cycos Salvatrucha clique. As part of the clique, he committed robberies, sold cocaine, and taxed drug dealers. Eyewitnesses described several gang-related gunfights in which Gavidia participated. In January 2010, Gavidia was involved in a shootout between his clique and a rival gang outside of a Charlotte club. Although he did not fire a weapon during the fight, he helped another gang member reload his gun. In January 2013, Gavidia was involved in another fight outside of a club during which he went looking for but could not locate his gun. Albert Vela Garcia, a fellow MS-13 member, ultimately found the gun and shot at their rivals while fleeing. Gavidia then helped Vela Garcia paint the car in which he had fled to disguise the bullet hole from the altercation.

II.

Appellants were indicted along with thirty-three codefendants in May 2015. Before trial, Sosa and Gavidia unsuccessfully moved for severance because the charges against them, unlike those against Zelaya and Ordonez-Vega, did not involve murder. Ordonez-Vega also unsuccessfully moved to exclude testimony from two New York police officers about his gang affiliation.

Of the thirty-seven indicted defendants, Appellants alone proceeded to trial. Several codefendants agreed to testify against Appellants at trial as cooperating government witnesses. The jury heard evidence over five days in early April 2016. Sergeant Samuel Arnold of the Los Angeles Police Department testified about the history and evolution of MS-13 nationally and internationally, and William Hastings, a gang intelligence officer in the Charlotte-Mecklenburg Police Department, testified about MS-13's activity in Charlotte. Cooperating witnesses testified to the gang affiliations of Zelaya, Ordonez-Vega, Sosa, and Gavidia. Pena, a cooperating witness, testified as an eyewitness to Ordonez-Vega's murder of Navarro-Hernandez. Maradiaga testified about Sosa's shooting incident. Vela Garcia, another cooperating witness, testified about Gavidia's gang

activities, including the shootouts with rival gangs. Zelaya testified, asserting innocence. Ordonez-Vega testified, maintaining that he shot Navarro-Hernandez in self-defense.

On the third day of trial, Sosa moved for a mistrial based on a witness's reference to an uncharged MS-13 murder during her testimony establishing Sosa as a gang member. At the close of trial, all four Appellants moved for a judgment of acquittal based on insufficient evidence. The court denied these motions, and after two days of deliberation the jury returned a guilty verdict on all counts on April 12, 2016. Gavidia moved for a new trial following the verdict; his motion was denied.

These appeals followed.

III.

Appellants raise several challenges to their convictions. All four challenge the district court's denial of their Rule 29 motions for acquittal. *See Fed. R. Crim. P. 29*. In addition, Sosa and Gavidia challenge the district court's refusal to sever their trials and denial of their motions for new trials. Ordonez-Vega challenges the admission of certain evidence, and Sosa challenges certain jury instructions and seeks a new trial based on the cumulative effect of various alleged errors. Gavidia also challenges his sentence. We address each issue in turn.

A.

All four Appellants challenge the district court's denial of their motions for acquittal under *Rule 29*. *See id.*

[1] [2] [3] [4] We review a district court's denial of a motion for acquittal de novo. *United States v. Kellam*, 568 F.3d 125, 132 (4th Cir. 2009). Denial is proper where, viewed in the light most favorable to the prosecution, substantial evidence supports a guilty verdict. *United States v. Smith*, 451 F.3d 209, 216 (4th Cir. 2006). Substantial evidence is evidence sufficient for a reasonable jury to find proof beyond a reasonable doubt of each element of the charged offense. *Id.* In evaluating the sufficiency of evidence, “[w]e don't consider the credibility of witnesses.” *United States v. Burfoot*, 899 F.3d 326, 334 (4th Cir. 2018).

1.

*3 [5] [6] Zelaya and Gavidia argue that there was insufficient evidence to support their RICO convictions. We have held that a RICO conviction under 18 U.S.C. § 1962(d) requires proof that: (1) “an enterprise affecting interstate commerce existed;” (2) “each defendant knowingly and intentionally agreed with another person to conduct or participate in [its] affairs;” and (3) “each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts.” *United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015) (citation and internal quotations omitted). A “defendant need not have a managerial role in an enterprise to be convicted.” *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012).

[7] Gavidia argues that there was insufficient evidence to establish the first element of his RICO conviction. To the contrary, however, ample evidence demonstrated that MS-13 is an enterprise with at least a de minimis effect on interstate commerce. *See Cornell*, 780 F.3d at 622–23 (finding that evidence that an enterprise had a de minimis effect on interstate commerce sufficed to satisfy jurisdictional requirements under RICO); *see also United States v. Palacios*, 677 F.3d 234, 248–50 (4th Cir. 2012) (rejecting a sufficiency challenge to evidence that MS-13 is a racketeering enterprise). Here, the government introduced Sergeant Arnold's expert testimony about the scale, structure, symbology, and rules of MS-13 nationally and internationally and the testimony of Detective Hastings about its history in Charlotte, North Carolina specifically. Cooperating witnesses testified repeatedly and consistently about the “rules” of the gang. Pena also testified that he and Gavidia sold cocaine as part of this enterprise. This was more than sufficient to prove the existence of MS-13 as an enterprise with at least a de minimis effect on interstate commerce within the reach of the RICO statute.

[8] Gavidia and Zelaya each challenge the sufficiency of the evidence on the second and third elements of their respective RICO convictions. However, the government presented more than sufficient evidence to show that both were MS-13 members who agreed to commit multiple overt acts in furtherance of the conspiracy. This evidence included testimony from cooperating witnesses

that Gavidia and Zelaya were MS-13 members who repeatedly fought rivals on behalf of the gang. For example, MS-13 members Vela-Garcia and Osler Anuar Portillo-Lara testified that they and Gavidia engaged in multiple gunfights with rival gang members at clubs in and around Charlotte. Similarly, Pena testified that he repeatedly fought rival gang members and taxed drug dealers with Zelaya. Gavidia and Zelaya attack the credibility of these witnesses in their sufficiency challenges, but this is not a basis for acquittal. *See Burfoot, 899 F.3d at 334* (noting that “[w]e don’t consider the credibility of witnesses” on appeal of a Rule 29 motion). Accordingly, we affirm.

2.

[9] Zelaya, Ordonez-Vega, and Sosa argue that there was insufficient evidence as a matter of law to support their VICAR convictions, and, in consequence, the § 924 convictions predicated on their VICAR offenses. To sustain a VICAR conviction under 18 U.S.C. § 1959 the government must prove that: (1) there was a RICO enterprise; (2) it “was engaged in racketeering activity as defined in RICO;” (3) “the defendant in question had a position in the enterprise;” (4) “the defendant committed the alleged crime of violence;” and (5) “his general purpose in so doing was to maintain or increase his position in the enterprise” (the “purpose” element). *United States v. Fiel, 35 F.3d 997, 1003* (4th Cir. 1994) (citation omitted).

*4 [10] Zelaya’s sufficiency challenge regarding membership fails for reasons described above. *See Fiel, 35 F.3d at 1003* (“The legislative history of the [VICAR] statute indicates that ‘enterprise’ in this section and in RICO are intended to ‘have the same scope.’”) (citation omitted). His sufficiency challenge regarding the murder similarly fails. His confession to police officers, in which he demonstrated familiarity with the murder scene, as well as ballistics evidence matching a shell casing from the scene to a firearm that Zelaya attempted to abandon, provide sufficient evidence that he shot Ibarra.

Zelaya also challenges the sufficiency of the evidence that he committed the shooting for the purpose of maintaining or increasing his position in the enterprise. Ordonez-Vega and Sosa challenge their convictions on the same basis.

[11] [12] [13] The government need not show any “nexus between the act of violence and the racketeering activity” to prove that a defendant committed a violent crime “in order to maintain or increase his position” in a racketeering enterprise. *Fiel, 35 F.3d at 1005*. The government need only establish that “the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.” *Id. at 1004* (citation omitted). A defendant may be convicted under VICAR even if maintaining or increasing his position in a racketeering enterprise is not his “only or primary concern” in carrying out a violent crime. *United States v. Tipton, 90 F.3d 861, 891* (4th Cir. 1996) (citation omitted).

Evidence at trial that Zelaya had a gang-related purpose included Zelaya’s statement in his confession that he believed Jose Ibarra to be a rival gang member, his testimony at trial that Steven Ibarra was a rival gang member who along with Jose Ibarra had threatened his friend, and testimony from a cooperating witness that he bragged about the killing to bolster his position in MS-13 after the event. This is sufficient evidence to allow a jury to infer a gang-related motive, and so it satisfies the “purpose” element. *See United States v. Umana, 750 F.3d 320, 335* (4th Cir. 2014) (finding that the “motive element” of § 1959 could be satisfied “if the [gang] member returned to mafia headquarters to boast about his exploits with a mind toward advancement”).

For similar reasons, Ordonez-Vega’s sufficiency challenge also fails. Evidence indicates that Ordonez-Vega was with fellow MS-13 members, in MS-13 territory, when he killed Navarro-Hernandez, who he perceived to be a member of a rival gang. This suffices to satisfy the “purpose” element because it provides a reasonable basis for inferring that Ordonez-Vega believed his fellow gang members may have expected him to carry out the shooting. *See Tipton, 90 F.3d at 891* (“[E]vidence suffices if from it a jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise.”) (citation and internal quotations omitted). Because Ordonez-Vega sought acquittal on the § 924 charge solely on the basis that there was insufficient evidence to support his VICAR conviction, his challenge to that conviction also fails.

Only Sosa's sufficiency challenge requires a more complex inquiry. The shooting on which Sosa's VICAR and § 924 convictions were predicated was not conducted alongside other MS-13 gang members and was not directed against rival gang members. However, for purposes of assessing whether it was permissible to allow a jury to infer that the shooting was "expected of" Sosa by reason of his position in MS-13, or done in order to "maintain" that position, the combination of the shooting's nature as a grossly disproportionate retaliation to a public slight and Sosa's after-the-fact engagement of a fellow MS-13 member to help him manage the consequences of the crime by directing Maradiaga to leave town suffice to permit the jury to infer a gang-related motive. In particular, the excessive nature of the response, which was objectively apparent and involved Sosa shooting nearly a dozen rounds from an assault rifle at the victims, suggests a motive of making a statement rather than merely exacting payback. While we agree with the district court that "not every violent crime is necessarily an MS-13 crime," J.A. 1126, we also agree that, looking cumulatively at the circumstances present in this case, there was sufficient evidence for the question to go to the jury. We therefore affirm Sosa's convictions.

B.

*5 Sosa also seeks to reverse his VICAR and § 924 convictions on the ground that the jury was not instructed on the "purpose" element of a VICAR offense. However, Sosa's contention is factually incorrect. The district court instructed the jury that it was required to find the elements of a VICAR offense beyond a reasonable doubt in order to convict Sosa of that offense. J.A. 1462–63. Along with this instruction, the district court incorporated by reference the definition of a VICAR offense that it had previously used to instruct the jury on the VICAR charge against Zelaya. *See* J.A. 1463 ("I have previously defined ... 'murder in aid of racketeering' for you and I instruct you to use th[at] definition[] here."). The district court correctly defined the "purpose" element in its jury instructions as requiring the jury to find "[t]hat the defendant's purpose in committing the murder was to maintain or increase position in the enterprise." J.A. 1453. Although the district court would not have been remiss to expressly reiterate this instruction in reading the charge against Sosa in light of his sufficiency challenge, it nevertheless committed no error.

C.

Ordonez-Vega challenges the admission of testimony from two New York police officers who encountered him in New York in 2002 and 2004 in connection with gang-related policing. The officers testified that they saw Ordonez-Vega's gang tattoos and that he admitted that he was a member of MS-13. Ordonez-Vega argues that this is impermissible "bad acts" evidence that should have been excluded under Rule 404(b). *Fed. R. Evid. 404(b)*. This argument misfires.

[14] [15] [16] We review the admission of evidence for abuse of discretion. *United States v. Basham*, 561 F.3d 302, 325 (4th Cir. 2009). Rule 404(b) sets out a detailed framework for the admission of evidence regarding a defendant's prior bad acts. *Fed. R. Evid. 404(b)*. However, *Rule 404(b)* does not apply to evidence introduced to prove a substantive element of the offense charged. *Palacios*, 677 F.3d at 244–45. Here, the government had to prove that Ordonez-Vega was a member of MS-13 as an element of its RICO and VICAR charges. It submitted the contested evidence for that narrow purpose, and therefore, the evidence is not subject to a *Rule 404(b)* analysis. We find no error here.

D.

[17] [18] [19] Appellants Sosa and Gavidia both argue that the district court erred in refusing to sever their trials from the trials of Zelaya and Ordonez-Vega. In general, defendants who are indicted together are tried together. *United States v. Dinkins*, 691 F.3d 358, 368 (4th Cir. 2012). We review a district court's denial of a motion to sever for abuse of discretion. *Id.* at 367. Defendants must show clear prejudice arising from a joint trial to establish an entitlement to reversal of their convictions. *Id.* at 368.

[20] Sosa and Gavidia contend that they were prejudiced because they had "markedly different degrees of culpability" from Zelaya and Ordonez-Vega, who were charged with murder, thus "prevent[ing] the jury from making a reliable judgment about guilt or innocence." *See Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). This argument clearly fails with respect to Sosa, who was charged with attempted murder.

Sosa shot repeatedly into a moving vehicle with an assault rifle in an attack on its occupants. That conduct does not involve “markedly different” culpability from the murders underlying Zelaya’s and Ordonez-Vega’s charges.

Gavidia, who was also an active participant in multiple gang shootings, makes general criticisms of the breadth of RICO liability and points to the absence of a common factual nexus among the Appellants’ charged conduct. While these points may suggest that the efficiency gains generally presumed to arise from indicting and trying coconspirators together were absent in this case, that is not the same as showing the “clear prejudice” required to warrant reversal. *See Dinkins*, 691 F.3d at 368. Accordingly, we affirm the district court’s denial of Sosa’s and Gavidia’s motions to sever.

E.

[21] [22] Sosa and Gavidia each requested a mistrial, and their requests were denied. We review a district court’s denial of a motion for mistrial for abuse of discretion. *United States v. Wallace*, 515 F.3d 327, 330 (4th Cir. 2008). We reverse “only under the most extraordinary of circumstances.” *Id.* (citing *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997)).

*6 [23] Sosa’s argument is based on the testimony of Maria Rodriguez, a government witness who testified about an incident in which Sosa threatened her son. The government introduced this testimony in order to demonstrate Sosa’s MS-13 membership. Rodriguez testified that Sosa pulled up to her in a car with other gang members and told her that she would cry for her son like she cried for “Hugo.” When asked who Hugo was, Rodriguez explained that Hugo was “the guy they had killed before.” J.A. 677. It was unclear whether “they” referred to Sosa and his companions in the car or to MS-13 generally.

[24] Sosa contends that the government intentionally solicited this testimony and that the testimony prevented the jury from making “individual guilt determinations” about the crime charged. *United States v. West*, 877 F.2d 281, 288 (4th Cir. 1989). However, the record does not indicate any effort to sow confusion about which crimes Sosa stood accused of. As the district court noted at trial, it was proper for the government to ask Rodriguez

to explain what she understood Sosa to be saying to her. The government did not question Rodriguez any further about the uncharged murder and did not refer to it again during the trial. Rather, it focused its arguments and evidentiary presentation on the shooting involving Maradiaga, and Sosa has not pointed to anything else in the record indicating juror confusion about which crime was at issue at trial. Furthermore, at Sosa’s request, the district court included a limiting instruction in the jury charge at the end of trial, stating that the defendants were “not on trial for any act, conduct, or offense not alleged in the indictment.” J.A. 1316. Jurors are presumed to understand and follow instructions. *Tipton*, 90 F.3d at 893. Under these circumstances it was well within the district court’s discretion to not declare a mistrial.¹

Gavidia invokes the testimony of Sergeant Arnold and Detective Hastings about MS-13 graffiti in Charlotte and the admission of evidence from his Facebook page to argue for a mistrial. Gavidia argues that the government’s use of this evidence to prove that MS-13 is a structured RICO enterprise of which Gavidia was a member was, in fact, a generalized indictment of Central Americans. However, this evidence was necessary to prove elements of the RICO offense and was properly admitted by the district court. Gavidia has not articulated a basis for departing from our practice of allowing expert testimony on gang communications, structures, and practices. *See Palacios*, 677 F.3d at 243 (construing gang expert’s testimony as admissible and finding that it did not violate the Confrontation Clause); *United States v. Ayala*, 601 F.3d 256, 274–75 (4th Cir. 2010) (same). Consequently, he cannot show that he is entitled to a mistrial.

F.

[25] Gavidia’s presentence report recommended that he be sentenced to the RICO statutory maximum sentence of 240 months in prison based on a total offense level of 38. The district court granted a downward variance, issuing a below-guidelines sentence of 216 months in prison. Gavidia challenges the reasonableness of his sentence, which we review for abuse of discretion. *See United States v. Susi*, 674 F.3d 278, 282 (4th Cir. 2012).

[26] [27] We presume that sentences within or below the guidelines range are reasonable. *Id.* at 289. When reviewing a sentence for reasonableness, we consider

both substantive reasonableness, considering the totality of the circumstances, and procedural reasonableness, “ensur[ing] that the district court committed no significant procedural error,” such as miscalculating the sentencing guidelines, failing to consider the § 3553(a) criminal and personal history factors, or selecting a sentence based on erroneous facts. *Susi*, 674 F.3d at 282.

*7 [28] Here, Gavidia identifies nothing that would overcome this presumption. Gavidia’s sentence was substantively reasonable. The district court properly considered Gavidia’s criminal and personal history under 18 U.S.C. § 3553(a), which instructs the court to consider “the history and characteristics of the defendant” in determining a sentence. It referred to Gavidia’s difficult childhood and to his good conduct in prison, including his assistance of a guard with an inmate who attempted suicide, in providing a downward variance from the statutory maximum sentence.

[29] Furthermore, no procedural errors affected Gavidia’s sentence. The Sentencing Guidelines for RICO offenses set defendants’ base offense levels by referring to crimes committed as part of the conspiracy.² Gavidia’s presentence report properly relied on “attempted murder” from the August 2013 shooting in which Gavidia was involved to set his base offense level. The shooting was within the scope of MS-13’s criminal activities, in furtherance of them, and reasonably foreseeable in light of them, so it constituted a crime committed as part of the conspiracy. See U.S.S.G. § 1B1.3(a)(1)(B).

Gavidia also challenges the district court’s decision not to apply a mitigating adjustment for his allegedly “minimal” involvement in the shooting. The court acted within its discretion in considering Gavidia’s role in MS-13, both generally and in the August 2013 shooting specifically, and declining to reduce Gavidia’s sentence on this basis.

Because Gavidia points to nothing to reverse the presumption of reasonableness attaching to his sentence, see *Susi*, 674 F.3d at 282, we affirm.

IV.

For the reasons stated above, the convictions are

AFFIRMED.

FLOYD, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues in the majority that we should uphold the convictions of appellants Miguel Zelaya, Luis Ordonez-Vega, and William Gavidia for the reasons stated in the majority opinion. However, I do not agree that there was sufficient evidence to support appellant Jorge Sosa’s conviction of violent crimes in aid of racketeering (“VICAR”). Therefore, I must dissent from the majority’s conclusion in Part III(A)(2) that the district court correctly denied Mr. Sosa’s motion for acquittal.

The majority correctly lays out the elements required to obtain a VICAR conviction under 18 U.S.C. § 1959. The fourth and final element, known as the “purpose element,” is at the heart of Sosa’s appeal. Under the purpose element, a defendant may be convicted of violating VICAR only if the government proves that he committed a violent act “for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity” 18 U.S.C. § 1959(a). To show that the defendant had the requisite purpose, the government must produce evidence from which “the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.” * *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994) (quoting *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992)).

*8 The government did not produce such evidence regarding Sosa’s violent acts. The shooting underlying Sosa’s VICAR conviction was not conducted alongside other MS-13 gang members and was not directed against rival gang members. The residence where the dispute originated was not affiliated with any gang. There is no evidence that Sosa picked a fight with his victim at the behest of a fellow MS-13 member or boasted to any gang members about the shooting after it occurred. There is simply not enough evidence for a jury to “properly infer” a connection between the crime and the criminal enterprise as required to support a VICAR conviction.

We have never held that the government can satisfy the purpose element with so little evidence. For example, in *United States v. Umana*, the evidence showed that

the defendant, after killing two victims “for their failure to respect his gang,” “boasted to his fellow MS-13 members about the murders.” [750 F.3d 320, 335 \(4th Cir. 2014\)](#). We stated that this evidence was enough to satisfy the purpose element. *Id.* at 336. In [United States v. Tipton](#), the defendant recruited a fellow member of a drug-trafficking enterprise to help him seek vengeance for a purely personal grievance. [90 F.3d 861, 891 \(4th Cir. 1996\)](#). Although “the evidence clearly established private revenge as [the defendant’s] primary purpose,” we reasoned that the evidence “also supported a finding that once [the defendant] had enlisted the aid of his fellow enterprise members in his behalf,” he acted with the *additional* purpose of “furthering … the enterprise’s policy of treating affronts to any of its members as affronts to all” *Id.* Thus, we held that the government had satisfied the purpose element.

In contrast to [Umana](#) and [Tipton](#), Sosa neither bragged about his violent act to fellow gang members nor enlisted the aid of fellow gang members in committing the act. There is no indication that his motive for or method of carrying out the shooting was gang-related in any way.

The majority’s two asserted connections between the crime and the enterprise are unpersuasive. First, the majority makes much of the fact that after the shooting, another MS-13 member, “Chelito,” called Sosa’s cousin

who participated in the shooting and told him to leave town. But there is no evidence that Sosa directed Chelito to make this call, and the call itself reveals nothing about Sosa’s motive for committing the crime. Second, the majority reasons that the “excessive nature of the response … suggests a motive of making a statement.” The majority may indeed believe that the act at issue here was disproportionately violent, but to say that this disproportion “suggests a motive of making a statement” looks more like speculation than a proper inference. Such speculation has no place in a criminal trial.

There is no evidence tying Sosa’s crime to his gang involvement. For that reason, I would reverse the district court’s denial of Sosa’s motion for acquittal. By affirming Sosa’s conviction, the majority lightens the government’s evidentiary burden to an extent unsupported by our precedent. Indeed, I believe the majority comes perilously close to holding that an act of violence by a gang member is gang-related by default, which robs the purpose element of any force or authority. I cannot join the majority on this point, and therefore, I respectfully dissent from the affirmance of Sosa’s conviction.

All Citations

--- F.3d ----, 2018 WL 5930400

Footnotes

- ¹ Because we find no error in the trial proceedings, we need not address Sosa’s contention about the “cumulative” effects of harmless errors.
- ² Gavidia challenges the use of multiple count guidelines, but their use is explicitly anticipated in the sentencing guidelines for racketeering convictions. See [U.S.S.G. § 2E1.1\(a\)\(2\)](#) (defining the “Base Offense Level” for RICO charges to be “the offense level applicable to the underlying racketeering activity”); *id.* cmt. n.1 (noting that “[w]here there is more than one underlying offense,” the district court should “treat each underlying offense as if contained in a separate count of conviction”).
- * Activity showing the requisite purpose “could occur before commission of a violent crime covered by the statute—for example if a mafia boss instructed a member to commit murder or else be cast out of the organization—or after commission of a violent crime—for example, if the member returned to mafia headquarters to boast about his exploits with a mind toward advancement.” [United States v. Umana](#), [750 F.3d 320, 335 \(4th Cir. 2014\)](#).

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA

v.

JORGE SOSA

) **JUDGMENT IN A CRIMINAL CASE**
) (For Offenses Committed On or After November 1, 1987)
)
)
) Case Number: DNCW315CR000121-029
) USM Number: 30145-058
)
) Reggie E. McKnight
) Defendant's Attorney

THE DEFENDANT:

- Pleaded guilty to count(s).
- Pleaded nolo contendere to count(s) which was accepted by the court.
- Was found guilty on count(s) 1, 10 & 11 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1962(d) & 1963	Racketeer Influenced Corrupt Organization-RICO conspiracy	5/19/15	1
18:1959(a)(5)	Attempted murder in aid of racketeering and aiding and abetting the same (18:2)	6/30/13	10
18:924(c) & (c)(1)(A)(iii)	Use, carry, and discharge firearm during and in relation to a crime of violence and aiding and abetting the same (18:2)	6/30/13	11

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

- The defendant has been found not guilty on count(s).
- Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 12/15/2016

Signed: December 27, 2016


 Robert J. Conrad, Jr.
 United States District Judge



Defendant: Jorge Sosa
Case Number: DNCW315CR000121-029

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Count 1: TWO HUNDRED SEVEN (207) MONTHS. Count 10: ONE HUNDRED TWENTY (120) MONTHS to run concurrently with Count 1 and to the undischarged term of imprisonment imposed in 13CR226728 and 13CR226729 in Mecklenburg County Superior Court. Count 11: ONE HUNDRED TWENTY (120) MONTHS to run consecutively to any other term of imprisonment as required by 18 U.S.C. § 924(c) for a TOTAL OF THREE HUNDRED TWENTY-SEVEN (327) MONTHS.

- The Court makes the following recommendations to the Bureau of Prisons:
 - Defendant shall support all dependents from prison earnings.
- The Defendant is remanded to the custody of the United States Marshal.
- The Defendant shall surrender to the United States Marshal for this District:
 - As notified by the United States Marshal.
 - At _ on _.
- The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - As notified by the United States Marshal.
 - Before 2 p.m. on _.
 - As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

By: _____
Deputy Marshal

Defendant: Jorge Sosa
Case Number: DNCW315CR000121-029

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 1, 10 & 11: THREE (3) YEARS each count to run concurrently.

The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively; The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of supervision.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office, vehicle and/or any computer system including computer data storage media, or any electronic device capable of storing, retrieving, and/or accessing data to which they have access or control, to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.
25. The defendant shall participate in transitional support services under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.

Defendant: Jorge Sosa
Case Number: DNCW315CR000121-029

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
\$300.00	\$0.00	\$0.00

The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

FINE

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived.

The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

The defendant shall pay court appointed counsel fees.

The defendant shall pay \$0.00 towards court appointed fees.

Defendant: Jorge Sosa
Case Number: DNCW315CR000121-029

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$0.00 due immediately, balance due
 Not later than _____
 In accordance (C), (D) below; or

B Payment to begin immediately (may be combined with (C), (D) below); or

C Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court costs:
 The defendant shall forfeit the defendant's interest in the following property to the United States

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Defendant: Jorge Sosa
Case Number: DNCW315CR000121-029

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STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____ months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

COUNT TEN

**(Attempted Murder in Aid of Racketeering)
(18 U.S.C. §§ 1959(a)(5) and 2)**

41. Paragraphs 1 through 16 and 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

42. On or about June 30, 2013, in Mecklenburg County, Western District of North Carolina, and elsewhere, defendant,

**(29) JORGE SOSA
a/k/a "Koki"
a/k/a "Loco"**

aided and abetted by others known and unknown to the Grand Jury, for the purpose of gaining entrance to and maintaining and increasing position in MS-13, an enterprise engaged in racketeering activity, unlawfully and knowingly attempted to murder individuals known to the Grand Jury, Victims No. 4 and No. 5, with a dangerous weapon, that being a firearm, in violation of North Carolina law, N.C. Gen. Stat. §§ 14-17 and 14-2.5

All in violation of Title 18, United States Code, Sections 1959(a)(5) and 2.

COUNT ELEVEN

**(Use or Carry a Firearm in Relation to a Crime of Violence
and Possession of Firearm in Furtherance of a Crime of Violence)
(18 U.S.C. §§ 924(c) and 2)**

43. Paragraphs 1 through 16 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

44. On or about June 30, 2013, in Mecklenburg County, in the Western District of North Carolina, and elsewhere, defendant,

**(29) JORGE SOSA
a/k/a "Koki"
a/k/a "Loco"**

aided and abetted by others known and unknown to the Grand Jury, during and in relation to a crime of violence, that being Attempted Murder in Aid of Racketeering, a violation of Title 18, United States Code, Section 1959, which is set forth in Count Ten of this Indictment, for which he may be prosecuted in a court of the United States, did knowingly and unlawfully use and carry one or more firearms, and in furtherance of such crime of violence, did possess one or more firearms.

It is further alleged that said firearm was brandished in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii).

It is further alleged that said firearm was discharged in violation of Title 18, United States Code, Section 924(c)(1)(A)(iii).

All in violation of Title 18, United States Code, Sections 924(c) and 2.

1 A. Yes.

2 MR. McKNIGHT: That's all.

3 MS. COSTNER: No questions.

4 THE COURT: You may step down and be excused.

5 Call your next witness.

6 MR. MILLER: Thank you, Your Honor. The government
7 calls Tomas Maradiaga.

8 This witness will need an interpreter.

9 (Interpreter Monica Bew.)

10 TOMAS MARADIAGA, GOVERNMENT WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. MILLER:

13 Q. Mr. Maradiaga, could you start off by stating your name,
14 please?

15 A. My name is Tomas Maradiaga.

16 Q. And, Mr. Maradiaga, where have you been living for the
17 past few years?

18 A. Charlotte.

19 Q. Are you in prison, Mr. Maradiaga?

20 A. Yes.

21 Q. What are you in prison for?

22 A. Apparently, for attempted murder.

23 Q. What did you do to wind up in prison?

24 A. I shot some guys.

25 Q. Did you plead guilty?

1 A. Yes.

2 Q. And what was your sentence?

3 A. Four to five years.

4 Q. And, Mr. Maradiaga, do you know if you pled guilty in
5 state court or in federal court?

6 A. State.

7 Q. Now before you pled guilty, did you speak to the police?

8 A. Yes.

9 Q. And when you spoke to the police for that first time, did
10 you tell them that you were not involved in the shooting?

11 A. Uh-uh.

12 Q. That wasn't true, was it?

13 A. No.

14 Q. Why did you tell the police that you weren't involved,
15 initially?

16 A. Well, no. I mean, I said I wasn't. I was with him, but
17 I was not -- I had not done what I was being accused of.

18 Q. Now, Mr. Maradiaga, where are you from originally?

19 A. Honduras.

20 Q. Did you grow up in Honduras?

21 A. Yes.

22 Q. And how old are you?

23 A. Twenty-seven.

24 Q. Do you have any brothers and sisters, Mr. Maradiaga?

25 A. Yes, we're ten.

1 Q. You have ten brothers and sisters?

2 A. Five boys, five girls.

3 Q. Mr. Maradiaga, when did you come to the United States?

4 THE INTERPRETER: Interpreter needs clarification.

5 THE WITNESS BY THE INTERPRETER: 2013.

6 Q. Did you come to the United States legally or illegally?

7 A. Illegal.

8 Q. And when you came to the United States, where did you go?

9 A. Charlotte.

10 Q. And who were you living with?

11 A. With my sister.

12 Q. Do you have any other family that lives in Charlotte?

13 A. The cousin's family that I got arrested with.

14 Q. Did you have any family that was living in Charlotte at
15 the time when you first came, other than your sister?

16 A. Yes, I had another brother.

17 Q. Why did you come to North Carolina to live with your
18 sister?

19 A. Well, they were here and my sister was here too.

20 Q. And why -- what did you come to do?

21 A. To work.

22 Q. And what would you do with the money that you made from
23 working?

24 A. I would send all of it to my family.

25 Q. Where was your family?

1 A. In Honduras.

2 Q. Now, Mr. Maradiaga, do you know Jorge Sosa?

3 A. Yes, he's my cousin.

4 Q. What name do you know him by?

5 A. Jorge Sosa.

6 Q. Does he have a nickname?

7 A. Koki.

8 Q. Do you see your cousin Jorge Sosa or Koki in the
9 courtroom today?

10 A. Yes.

11 Q. Would you point to him and describe something that he's
12 wearing?

13 THE WITNESS: (Indicating.) The one with the jacket
14 by the darker guy.

15 MR. MILLER: Will the record reflect that he's
16 identified the Defendant Jorge Sosa?

17 THE COURT: Ask him how many people down from the
18 left is Mr. Sosa sitting.

19 THE WITNESS: Fourth.

20 THE COURT: It will.

21 Q. Now, had you met Jorge before you came to North Carolina?

22 A. Only when we were young. They went to Honduras once.

23 Q. And now after you came to North Carolina to live with
24 your sister, how often did you see your cousin Koki?

25 A. Fridays, because I used to go with my sister.

1 Q. And where would you typically see him?

2 INTERPRETER: Interpreter needs clarification.

3 THE WITNESS: At my brother's house.

4 Q. What types of occasions would you see Koki at?

5 A. Fridays and sometimes Saturdays.

6 Q. Do you remember meeting any of Koki's friends?

7 A. Yes, like two.

8 Q. And who do you remember meeting?

9 A. Guanaco, Chilito, and Oso.

10 Q. When did you meet Guanaco, Chilito and Oso?

11 A. One time when we were drinking outside the cousin house
12 and they got -- they arrived there.

13 Q. Who arrived there?

14 A. Chelito -- no, it wasn't Chelito. Oso and Guanaco.

15 Q. When you first met Guanaco and Oso, was there anyone else
16 with them?

17 A. There were like three more people, but I don't know who
18 they were.

19 Q. And when Guanaco and Oso arrived, did your cousin greet
20 them in any particular way?

21 A. Yes.

22 Q. How did he greet them?

23 A. I don't know how to do what they did.

24 Q. Can you just describe what they did?

25 THE INTERPRETER: Interpreter needs clarification.

1 THE WITNESS: By making signs.

2 Q. Were they making signs with their hands?

3 A. Yes.

4 Q. What did you recognize these hand signs to be, if you
5 did?

6 A. No, I don't know.

7 Q. I'd like to show you what's been entered into evidence as
8 Government's Exhibit 49.

9 Mr. Maradiaga, if you'll just take a look at that screen
10 there in front of you.

11 A. Yes.

12 Q. Do you recognize the person in Government's Exhibit 49?

13 A. Yes.

14 Q. Who is that?

15 A. Guanaco.

16 Q. I'd also like to show you what's been marked as
17 Government's Exhibit 58. Do you recognize the person in
18 Government's Exhibit 58?

19 A. Yes.

20 Q. And who is that?

21 A. Oso.

22 Q. Is that what Oso looked like, basically, when you met
23 him?

24 A. Yes.

25 Q. And what do you remember about Guanaco that day? Did you

1 have any trouble with him?

2 MR. McKNIGHT: Objection.

3 THE COURT: Overruled.

4 THE WITNESS: Nah. Oh, he didn't like the way I was
5 dressed.

6 Q. And what did he do about that?

7 MR. McKNIGHT: Objection. Relevance.

8 THE COURT: Overruled.

9 THE WITNESS: Like, he was asking the cousin why was
10 I dressed like that; not the way they were.

11 Q. And when you say the cousin, are you talking about Koki?

12 A. Yes.

13 Q. What did Koki say?

14 A. No, I did not hear what he said.

15 Q. Mr. Maradiaga, are you in a gang?

16 A. No.

17 Q. Have you ever been in a gang?

18 A. No. Never.

19 Q. All right. I want to talk to you about the night of the
20 incident that you pled guilty to. Okay?

21 A. Okay.

22 Q. Did you see Koki that night?

23 A. Yes.

24 Q. Where did you first see him?

25 A. We were together.

1 Q. Where were you together?

2 A. At my brother's.

3 Q. And did you and Koki go anywhere that night?

4 A. Yes.

5 Q. Where did you go?

6 A. To Las Torres.

7 Q. What is Las Torres?

8 A. A disco here in Charlotte.

9 Q. And how did you and Koki get to Las Torres?

10 A. To dance.

11 Q. Did you drive?

12 A. He did because I don't know.

13 Q. What kind of car was Koki driving that night?

14 A. A little red Honda.

15 Q. And did Koki have any issues with anyone there at Las
16 Torres?

17 A. No. But all of a sudden there were these weird people
18 that showed up.

19 Q. And what happened when these people showed up?

20 A. Well, one approached him to speak with him and I saw like
21 there was going to be a fight.

22 Q. And who approached who?

23 A. Both of them approached each other.

24 Q. And was one of the people Koki?

25 A. Yes.

1 Q. And was one -- was the other person someone from that
2 other group?

3 A. Yes.

4 Q. And what happened when Koki and the person from the other
5 group approached one another?

6 A. Well, they started talking and after that -- well, no,
7 before that, the cousin said, like, we were going to fight.

8 Q. Did he say why you were going to fight?

9 A. Like, the other guys were Surenos.

10 Q. And did Koki tell you why it was important that -- why he
11 might have trouble with Surenos?

12 A. Yes. Because apparently they're a rival.

13 Q. Rivals with who?

14 A. Their gang.

15 Q. Whose gang?

16 A. Koki's.

17 Q. Do you know what gang Koki's in?

18 A. No. But I know it's, like, 13, something like that. I
19 don't know.

20 Q. What happened when Koki and this member of the Surenos --
21 as he called them -- confronted one another?

22 A. No. Nothing happened. And the cousin came and we left.

23 Q. During the confrontation, did either Koki or the other
24 person make any hand signs?

25 MR. MCKNIGHT: Object to the leading, Your Honor.

1 THE COURT: Overruled.

2 THE WITNESS: No.

3 Q. All right. What happened next?

4 A. We left.

5 Q. Where did you go?

6 A. Home.

7 Q. Did you ever go to another place to have drinks that
8 night?

9 A. Yes, we left, and then from the house we went somewhere
10 else.

11 Q. Where did you go?

12 A. To a house to drink.

13 Q. And what -- can you describe this house where you went to
14 drink?

15 A. No, but I did hear the name of the Mrs that was in
16 charge.

17 Q. So what type of place was this?

18 A. It was, like, an illegal house.

19 Q. And did you buy drinks there?

20 A. Yes, beer.

21 Q. And you said that there was a woman who was the owner.
22 Did I hear you correctly?

23 A. Yes.

24 Q. Did Koki know the owner?

25 MR. McKNIGHT: Objection, Your Honor, as to what he

1 knew.

2 THE COURT: Sustained as to form. Don't answer that
3 question.

4 Q. What interaction, if any, did Koki have with the owner?

5 A. What are you saying? I'm sorry.

6 Q. Did Koki interact with the owner at all?

7 A. No, not with her.

8 Q. What happened at that liquor house?

9 A. There were three more -- three or four more people there.

10 Q. Did Koki ever have an argument with anyone?

11 A. Yes.

12 Q. Describe what happened.

13 A. There were some people there, and one of them did not
14 want to pay the Mrs so that's when they started arguing.

15 Q. And who was arguing?

16 A. The cousin with the other person.

17 Q. Can you describe this argument?

18 A. They were arguing that the other guy didn't want to pay.
19 So the cousin start arguing that he had to pay.

20 Q. And did you ever -- did the argument ever move outside?

21 A. Yes. We were leaving already, and like the other guy
22 start following us, and like he pushed him.

23 Q. Who pushed who?

24 A. The other guy pushed the cousin Koki.

25 Q. And what happened after you got outside?

1 A. They kept arguing outside.

2 Q. And did anyone ever pick up any objects?

3 A. Yes, the other guy.

4 Q. What did he pick up?

5 A. Like, a big stick that was there in the grass.

6 Q. What happened at that point?

7 A. So I came and we had in the car some painting extensions
8 so I pulled one out.

9 Q. And what happened next?

10 A. And when I saw that he pulled out a big stick, I said,
11 "Well, no, let's go." I told the cousin.

12 Q. And did you guys get into a fight at that point?

13 A. No. There were no blows, but then the cousin got upset
14 and said we were going to fight. But then the other guy
15 didn't want to then.

16 Q. Okay. So what happened at that point?

17 A. So the cousin said to start the car. The other guy
18 stopped the other car and we left.

19 Q. When you got in the car to leave, what did Koki say to
20 you if anything?

21 A. That he wanted to get back with the guys but he needed to
22 get something -- look for something.

23 Q. What did you understand that he needed to look for?

24 MR. McKNIGHT: Objection. Calls for inspection.

25 THE COURT: Overruled.

1 THE WITNESS: Like a weapon.

2 Q. And do you recall what his exact words were when you got
3 back in the car?

4 A. "Guys, you're gonna pay for this."

5 Q. And what happened next?

6 A. I went to the back of the car and I fell asleep.

7 Q. Did you at some point wake up?

8 A. A while back, later.

9 Q. And were you still in the car when you woke up?

10 A. Yes.

11 Q. And did your cousin tell you where you guys were going?

12 A. I saw that we were coming back already.

13 Q. Back where?

14 A. To where the guys were.

15 Q. And what if anything was in the car at this point?

16 A. A towel, on the floor.

17 Q. And do you know what was under the towel?

18 A. Yes.

19 Q. What was under that towel?

20 A. A long weapon.

21 Q. Had you seen that long weapon before?

22 A. Yes, I had seen that somewhere, but I do not remember
23 where. I had taken pictures with my cell phone of it.

24 Q. So you had seen that weapon before and had taken pictures
25 with your cell phone; is that right?

1 A. Yes.

2 Q. And that was prior to seeing it there in the car?

3 A. Yes.

4 Q. I'm going to show you up on that screen there what's been
5 marked as Government's Exhibit 59. Do you recognize that?

6 A. Yes.

7 Q. What is that?

8 A. The weapon that I took pictures of.

9 Q. And is this the weapon that you took pictures of, also
10 the weapon that was in Sosa's car?

11 A. Yes.

12 Q. And is that a fair depiction of the gun?

13 A. Yes.

14 MR. MILLER: Your Honor, at this time the government
15 would offer Exhibit 59.

16 THE COURT: Any objection?

17 MR. McKNIGHT: No, Your Honor.

18 THE COURT: Let it be admitted.

19 MS. GREENE: I ask it be published, Your Honor.

20 THE COURT: You may.

21 (Government's Exhibit No. 59 was received into
22 evidence and published.)

23 Q. Now, what happened after you saw this gun under the
24 towel?

25 A. He told me to grab it.

1 Q. Who told you to grab it?

2 A. Koki.

3 Q. And was there anyone else with you guys in the car at
4 this point?

5 A. No.

6 Q. And what did Koki tell you to do with the gun?

7 A. To shoot.

8 Q. And who did he tell you -- why did he tell you to shoot?

9 A. He told me for me to shoot.

10 Q. And where were you when he told you this?

11 A. The back of the car.

12 Q. And where was the car?

13 A. I'm sorry.

14 Q. Where was the car?

15 A. It was running.

16 Q. Where were you guys at this point? You and your cousin.

17 A. We're on our way.

18 Q. On your way where?

19 A. Where the guys were.

20 Q. And did you ever see the guys again?

21 A. Yes.

22 Q. And where did you see them?

23 A. At the same place where the problem was.

24 Q. And is that same place where the problem was, where Koki
25 made the statement to you to shoot?

1 A. Yes.

2 Q. Did you shoot the gun at that point?

3 A. No.

4 Q. What happened?

5 A. So the guy saw the car coming and they got in their car.

6 Q. Could you tell which guys saw your car coming?

7 A. The guys that they had the problem with when we were at
8 the Mrs.

9 Q. And was the guy that you had the problem with at the Mrs
10 with anyone else at this point?

11 INTERPRETER: I'm sorry.

12 Q. Was the guy that you had a problem with, with anyone
13 else?

14 A. Yes.

15 Q. And what did the guy you had a problem with and the other
16 guy do at that point?

17 A. They got in the car and they tried to flee.

18 Q. And what kind of car did they get into?

19 A. I don't know the brand. It was black. A four-door.

20 Q. A black four-door?

21 A. Yes.

22 Q. And what did -- was your cousin still driving at this
23 point?

24 A. Yes.

25 Q. And so what happened next?

1 A. He was telling me to shoot him.

2 Q. And did you and your cousin follow these men?

3 A. Yes.

4 Q. Where did you follow them?

5 A. I don't know. But we were trying to get to them.

6 Q. How long did you follow to try to get to them, if you
7 remember?

8 A. I don't know, more or less, but we got to them.

9 Q. And where did you get to them?

10 A. There was like a store.

11 Q. And where were you relative to the store?

12 A. The store is on the side. It had an exit here and an
13 entrance over here. The guys were coming this way. We came
14 out this way.

15 Q. And was everyone still in the cars at this point?

16 A. Yes.

17 Q. And so what happened when your car met up with the guy
18 you had a problem with car?

19 A. Cousin was telling me to shoot him.

20 Q. And what did you do?

21 A. I didn't not want to shoot him.

22 Q. Did you shoot?

23 A. Yes, twice.

24 Q. And where were you seated in your cousin's car at the
25 time that you shot him?

1 A. In the back.

2 Q. And which side of the vehicle did you fire out of?

3 A. Where the driver was. The cousin.

4 Q. So you were seated behind your cousin and firing out the
5 driver's side?

6 A. No. I was in the back, but behind him.

7 Q. Okay. And did you hit the other car when you shot?

8 A. Yes. Well, I didn't want to shoot at them. But I -- I
9 got the store. Maybe I got the rear windows of their car.

10 Q. And after you shot those two times, what happened next?

11 A. The guys sped up and then the cousin went to -- went
12 around.

13 Q. And what happened after the cousin went around?

14 A. The guys had stopped and he asked me again to shoot.

15 Q. And what happened then?

16 A. I did not want to shoot at them. So he came to me,
17 grabbed the weapon, and he shot at them.

18 Q. How many times, approximately, did your cousin shoot at
19 them?

20 A. Like seven or eight times.

21 Q. And could you tell if when your cousin was shooting at
22 the other vehicle, if he struck the vehicle?

23 A. Yes.

24 MR. MILLER: Your Honor, at this time the government
25 offers into evidence what's been previously marked as

1 Government's Exhibit 60, with 60A and B being clips off of
2 that. This is pursuant to stipulation of the parties that the
3 real time crime center footage, depicting the intersection of
4 Old Pineville and Woodlawn and surrounding area is authentic
5 and admissible.

6 THE COURT: Let it be admitted.

7 MR. MILLER: Thank you.

8 Q. Now, Mr. Maradiaga, I'm going to play a video for you
9 there on the screen. Did you recognize that vehicle there?

10 A. Yes, that was the guy's vehicle.

11 Q. What about that car?

12 A. That was the cousin's car.

13 Q. And were you and your cousin in the car at this point?

14 A. Yes.

15 MR. MILLER: And this is going to be 60B.

16 Q. Now, where is the area here -- do you see your cousin's
17 car at this point?

18 A. Yes.

19 Q. And where is your cousin's car in this picture?

20 A. Over there.

21 Q. Is it on the left side or the right side?

22 A. Left.

23 Q. And is this your cousin's car here (indicating)?

24 A. Yes.

25 Q. And is this the area at the business where you said you

1 met up with the black car?

2 A. Yes.

3 Q. Explain what's happening at this point.

4 A. That's when the guys are stopped and I shot him twice.

5 Q. So was the black car already in the parking lot when this
6 video started?

7 A. Yes.

8 Q. Now which car is that that we see there leaving the
9 parking lot?

10 A. That's the car where the other two guys were.

11 Q. And where are you and your cousin at this point?

12 A. We're pulling out from the other side behind there.

13 Q. So is there another entrance?

14 A. Yes.

15 Q. Now did you see something flash there?

16 A. Yes.

17 Q. What was that?

18 A. A shot.

19 Q. What was that?

20 A. A shot.

21 Q. And who fired that shot?

22 A. The cousin.

23 Q. And where is your cousin's car at this point?

24 A. Around here, the back.

25 Q. Is it to the left or to the right of the black car?

1 A. Left -- right.

2 Q. But the car's right?

3 A. Yes.

4 Q. And what is that?

5 A. That's the car we were in.

6 Q. Now after the shooting, what happened next?

7 A. We went to the house.

8 Q. Whose house?

9 A. We got to an apartment where his girl used to live, some
10 parking lot.

11 Q. Whose girl?

12 A. Cousin's wife.

13 Q. And what did you guys do with the gun?

14 A. With the gun, I don't know. Once we got there he left
15 the red car and he took his car.

16 Q. Did your cousin leave the gun in the car at that point?

17 A. Yes, he left it there.

18 Q. And did you and your cousin get into a different car?

19 A. Yes.

20 Q. And what color was that car?

21 A. Black.

22 Q. After you got out of the red car and into the black car,
23 where did you go?

24 A. To his mother's.

25 Q. And what happened next?

1 A. I stayed there sleeping.

2 Q. Did Koki stay there as well, or did he leave?

3 A. No, he dropped me off and he left.

4 Q. All right. Now did you hear from Koki again that day?

5 A. No, until the evening that he called me.

6 Q. And what did he say when he called you that evening?

7 A. He called me and he said that the guys did not die.

8 Q. What if anything did he tell you that you should do?

9 A. To leave.

10 Q. And why did he tell you to leave?

11 A. I don't know.

12 Q. What did you do?

13 A. What I did is, I stayed there with my sister only.

14 Q. Did you leave?

15 A. No.

16 Q. Did anyone aside from Koki call you about the shooting?

17 A. The next day, yes.

18 Q. And what if anything -- who called you?

19 A. Chelito.

20 Q. And did you know Chelito from before?

21 A. Yes. Because he's the husband of the sister.

22 Q. And did you ever work with Chelito?

23 A. Yes.

24 Q. Do you know if Chelito is in a gang?

25 A. No, back then I did not know.

1 Q. What did Chilito tell you?

2 MR. McKNIGHT: Objection.

3 THE COURT: Overruled.

4 THE INTERPRETER: I'm sorry?

5 Q. When Chilito called you the next day, what did he tell
6 you?

7 A. That the cousin had turned himself in and he had blamed
8 me.

9 Q. And did -- what did Chilito tell you to do, if anything?

10 A. If I could leave.

11 Q. But Chilito also told you to leave.

12 A. Yes.

13 Q. I'm going to show you, at this point, the second page of
14 the exhibit I showed you a moment ago, which I believe is
15 Government's Exhibit 59 -- 58.

16 Do you recognize the person there in that picture?

17 A. Yes.

18 Q. And who is that?

19 A. Chilito.

20 MR. MILLER: Your Honor, at this time the government
21 would offer Exhibit 58 and ask that it be published.

22 THE COURT: Any objection?

23 MR. McKNIGHT: No, Your Honor.

24 THE COURT: Let it be admitted. You may publish.

25 MS. GREENE: Thank you.

1 (Government's Exhibit No. 58 was received into
2 evidence and published.)

3 Q. Now what happened after Chilito called you?

4 A. He hung up and Koki's brother called me.

5 Q. Did Koki's brother call you almost right after you hung
6 up with Chilito?

7 A. Yes. Like ten minutes later, more or less.

8 Q. And what did Koki's brother tell you?

9 MR. McKNIGHT: Objection, Your Honor.

10 THE COURT: Hang on a second.

11 MR. MILLER: It's not offered for the truth, rather
12 the effect on the listener.

17 Q. So, Mr. Maradiaga, what did Koki's brother tell you?

18 A. The same thing that Chilito told me, the cousin had
19 turned himself in. He had blamed me, and if I could leave.

20 Q. Were you ever -- did you ever get arrested for that
21 shooting?

22 A. I turned myself in.

23 MR. MILLER: May I have one moment, Your Honor?

24 Q. Why did you turn yourself in?

25 A. Because I did not -- I did not feel guilty what had

1 happened.

2 Q. Did you eventually tell the police officers that you were
3 involved in the shooting?

4 A. Yes.

5 MR. MILLER: No further questions.

6 THE COURT: I think we'll take an afternoon break
7 before cross-examination of this witness.

8 Members of the jury, we'll take our afternoon break.
9 Don't talk about the case. Keep an open mind and we'll see
10 you in 15 minutes.

11 (Recess at 4:08 until 4:25.)

12 THE COURT: Are we ready for the jury?

13 MR. MICHEL: Yes, Your Honor.

14 THE COURT: Call the jury.

15 (The jury was returned to the courtroom.)

16 THE COURT: Mr. Michel, do you have any cross?

17 MR. MICHEL: No cross.

18 THE COURT: Mr. Smith.

19 MR. SMITH: No, Your Honor.

20 THE COURT: Mr. McKnight.

21 MR. McKNIGHT: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. McKNIGHT:

24 Q. Now, Mr. Maradiaga, you said you know Mr. Sosa by the
25 name "Koki," right?

1 A. Yes.

2 Q. His family members call him that sometimes as well; isn't
3 that correct?

4 A. Yes.

5 Q. Okay. Now you also testified earlier that you -- you
6 pled guilty to attempted murder. But that's not actually what
7 you were charged with, was it?

8 A. No.

9 Q. You were actually charged with discharging a weapon into
10 an occupied vehicle and, initially, assault with a deadly
11 weapon with intent to kill. Do those two charges sound
12 familiar to you?

13 A. Yes.

14 Q. And you -- eventually, you pled guilty to discharging a
15 weapon into an occupied vehicle and assault with a deadly
16 weapon inflicting serious injury; is that right?

17 A. Yes.

18 Q. So you were never charged with attempted murder, right?

19 A. No.

20 Q. Now, this isn't the first time you talked to people about
21 this incident that happened back on June 30, 2013, is it?

22 A. No.

23 Q. And, in fact, you testified earlier that you voluntarily
24 went to the police station back on July 1, 2013, and
25 voluntarily went in to give a statement to the police, right?

1 A. Yes. They went to get me to the cousin's house. I told
2 them I was there and they picked me up.

3 Q. Okay. Now, because you pled guilty, you went to the
4 state court process where you were charged, you had a lawyer,
5 and at some point in time you were given or you seen a copy of
6 something called "discovery" or the information or the
7 evidence in your case, right?

8 A. They never gave me my discovery.

9 Q. So you never saw any of the videos, never saw any
10 audio -- heard any audio recordings of interviews that you did
11 with the police officers; is that your testimony?

12 A. No. Nothing like that.

13 Q. But when you went down the first and the second time to
14 interview with the police officers, you knew that it was being
15 recorded, right?

16 A. Yes.

17 Q. Now, the very first time you went in, do you recall the
18 first thing that you said when they asked you about this
19 situation is, "I wasn't there." Do you remember you saying
20 that?

21 A. Yes.

22 Q. And after that the next thing you went on to say, not
23 only that you weren't there, you said that you were drinking,
24 that some boys started a fight with your cousin, but you
25 didn't get involved; remember you saying that?

1 A. Yes.

2 Q. But that wasn't true, was it? You -- actually not only
3 were you there, not only were you in the car, but you actually
4 shot at them, didn't you?

5 A. Yes.

6 Q. Now, you told detectives in that first interview that you
7 actually were drunk before you got to the -- well, it's a
8 little liquor house, right? Is that what it was?

9 A. Yes.

10 Q. Now, in the first interview you did, there were two
11 detectives in the room, one spoke Spanish, one didn't. Do you
12 remember that?

13 A. Um-hmm.

14 Q. And in that first interview, you never mentioned anything
15 about Mr. Sosa running into any rival gang members or any
16 rivals at the club you went to before you went to the liquor
17 house, right?

18 A. No.

19 Q. And, in fact, what you told the detective is after you
20 left the liquor house you went back to the house that you guys
21 came from, and you said you went to bed. Isn't that what you
22 said?

23 A. Yes.

24 Q. You said you went in the bedroom and laid down. And you
25 said Mr. Sosa was on the couch, right?

1 A. Yes, after that he left.

2 Q. Okay. And then you also told the police in that first
3 interview that you woke up around 11:30, and you said
4 something -- and you said that you went and played ball. Do
5 you remember telling them that?

6 THE INTERPRETER: I'm sorry, played...

7 MR. McKNIGHT: Played ball.

8 THE WITNESS: Yes.

9 Q. Were you talking about soccer?

10 A. Soccer, yes.

11 Q. Now, do you remember being confronted in that interview
12 about telling the truth? And do you remember telling them,
13 "He's lying to you. I wasn't there." Do you remember saying
14 that?

15 A. Yes.

16 Q. And do you remember repeatedly telling them that, "Like,
17 I tell you before -- like, I told you before, he left me at
18 the house." Do you remember saying that? You were referring
19 to Mr. Sosa leaving you at the house, right?

20 INTERPRETER: I'm sorry, which house?

21 MR. McKNIGHT: The house that he originally came
22 from.

23 THE WITNESS: Yes.

24 Q. And do you recall when you were being confronted and told
25 that there are cameras all over the city. In fact, the video

1 involving what happened, that your response still was, "I was
2 asleep. I played basket -- or I played ball." Do you
3 remember saying that?

4 A. Yes.

5 Q. And do you recall actually telling -- in that first
6 interview on July 1st -- that Mr. Sosa called you and told you
7 about the shooting afterwards. Do you recall telling them
8 that?

9 A. Yes.

10 Q. And do you recall being confronted in that first
11 interview, in terms of, you were telling the officers you
12 weren't there, and they confronted you about you having a
13 smile on your face. Do you remember that conversation?

14 A. Yes.

15 Q. Do you remember being asked, "Do you think this is a
16 joke?"

17 A. Yes.

18 Q. Do you remember during the course of that first interview
19 being asked about -- or strike that.

20 Do you remember them explaining to you what DNA evidence
21 is because you didn't know. Do you remember that?

22 A. Uh-huh.

23 Q. And do you remember having a conversation about the fact
24 that a person may have respect for someone saying, I was drunk
25 and I just made a mistake. Do you remember somebody having a

1 conversation with you like that?

2 A. Yes.

3 Q. Would it surprise you that in that first interview, you
4 said over 17 times, "I wasn't there."

5 A. Yes.

6 Q. Now I'm going to turn your attention because -- about two
7 days later at the request of one of your family members you
8 went back and wanted to talk to the officers some more, right?

9 A. Yes.

10 Q. And this time it was at your request, right?

11 A. Yes.

12 Q. And the officers explained to you what you had been
13 charged with -- strike that. Let's go back.

14 Because at the end of the first interview, you were
15 arrested, weren't you?

16 A. No.

17 Q. So at the end of the first interview that you gave on
18 July 1st, you weren't taken into custody by the officers? You
19 weren't allowed -- that didn't happen?

20 A. Oh, yes. Yes. Yes.

21 Q. So they didn't believe you.

22 A. No.

23 Q. Okay. So going back to some two days later at the
24 request of one of your family members, you asked to go back
25 and talk to them again, right?

1 A. Yes.

2 Q. And during the second interview you once again told them
3 that you were drunk before you even got to the liquor house,
4 right?

5 A. Yes.

6 Q. And you also told them -- well, strike that.

7 In the second interview on July 3rd, you also never
8 mentioned anything about running into any rival gang members
9 at the club before you went to the liquor house, right?

10 A. No, I never said that.

11 Q. And also on the second interview you gave a little bit
12 more description about what happened inside the liquor house.
13 But you said that it was the other guy who had the argument
14 with the Mrs -- the owner of the house with Mr. Sosa, right?

15 A. Yes.

16 Q. And, in fact, this person followed you and Mr. Sosa out
17 of the liquor house, right?

18 A. Yes.

19 Q. And once they got outside, it was this other person who
20 picked up some kind of object out of the yard, right?

21 A. Yes.

22 Q. Do you remember what he picked up?

23 A. It was like a big tip.

24 Q. A big tip?

25 A. Something like this.

1 Q. Okay. And you were in the car, right?

2 THE INTERPRETER: I'm sorry?

3 Q. You were in the car.

4 A. Yes.

5 Q. And eventually you -- you took the handle off the paint
6 roller, didn't you?

7 INTERPRETER: I'm sorry?

8 Q. You took the handle off a paint roller.

9 A. Yes.

10 Q. So you basically went and got a stick, right?

11 A. Yes.

12 Q. Now, in the second interview that you did with the
13 detectives, you never mentioned anything about Mr. Sosa saying
14 he needed to go get something, did you?

15 A. No.

16 Q. And in the second interview you told them that you
17 climbed into the seat -- you climbed into the back seat and
18 went to sleep; is that right?

19 A. Yes.

20 Q. Now, let's go back to this -- to the photo of the rifle.

21 INTERPRETER: To the photo...

22 MR. McKNIGHT: Of the rifle.

23 Q. In your first interview on July 1st, you never mentioned
24 to the police that you had a photo, supposedly, of the rifle
25 that you used in your phone, did you?

1 A. No.

2 Q. And in your second interview with police, you once again
3 never mentioned anything about having a photo in the phone of
4 the rifle that you supposedly used either, did you?

5 A. Yes. No, no, no.

6 Q. And, in fact, when you were last interviewed about a week
7 ago by the government, you said that you weren't sure if that
8 was the same weapon; isn't that right?

9 A. Yes.

10 Q. Now the phone that we're talking about, was that phone
11 taken from you back in 2013?

12 A. Yes.

13 Q. So that phone has been with the police for two years or
14 more?

15 A. Yes.

16 Q. And this is the first time you've mentioned anything
17 about the rifle being -- a photo of the rifle being in the
18 phone, right?

19 A. Yes.

20 Q. Now, do you recall telling the police the second time you
21 were interviewed, that you didn't -- you had never held a gun.
22 You told them that, right?

23 A. Yes. No, no, never.

24 Q. Okay. But the rifle that you fired, did you have to
25 chamber it? Did you have to cock it?

1 A. No.

2 Q. Okay. You testified that when you woke up you were on
3 your way back to the house. That's what you testified to
4 today, right?

5 A. Yes.

6 Q. But -- and you testified that Mr. Sosa told you to shoot,
7 right?

8 A. Yes.

9 Q. But, so we're clear, in the second interview that you did
10 with the police, you never told them when you got back to the
11 house that Mr. Sosa told you to shoot, right?

12 A. Yes, I told them, I think.

13 Q. In fact, do you recall telling them that Mr. Sosa told
14 you, "We're going to scare them."

15 A. Yes.

16 Q. Now, in the second interview you stated that you left the
17 liquor house and then you and Mr. Sosa followed the men,
18 right?

19 INTERPRETER: I'm sorry. You and Mr. Sosa...

20 MR. MCKNIGHT: Followed the men.

21 THE WITNESS: Yes.

22 Q. But, in the second interview, you told them that you were
23 being insulted by Mr. Sosa and that's why you shot. Do you
24 remember saying that?

25 A. Yes.

1 Q. But do you also remember telling them when they asked you
2 later on -- in the second interview when they asked you why
3 you shot you said, "You know, maybe because I was drunk." Do
4 you remember saying that?

5 A. No, I do not remember.

6 Q. Now, when you shot at them, though, you were in the back
7 seat; is that right?

8 A. Yes.

9 Q. And this was, you said, "A little red car," right?

10 A. Yes.

11 Q. It was a two-door car, right?

12 A. Yes.

13 Q. And it was a manual or a stick shift, right?

14 A. Manual.

15 Q. So it was a stick shift, right?

16 A. Yes.

17 Q. Okay. And you testified earlier that Mr. Sosa was
18 driving because you don't know how to drive, right?

19 A. Yes.

20 Q. And so, from the back seat of that two-door car, you
21 stuck a gun out the driver's side window and you shot at them,
22 right?

23 A. Yes.

24 Q. Okay. Now today you testified that you only shot two
25 times. But back on -- back in July of 2013 you said it was

1 three times; is that right?

2 A. No, two times.

3 Q. Okay. So on July -- back in July 2013 -- July 3rd to be
4 exact -- in your second interview, it's your testimony today
5 that you did not tell the detective that you shot three times.

6 MR. MILLER: Objection. Asked and answered.

7 THE COURT: Overruled.

8 THE WITNESS: First interview I did not.

9 Q. What about your second interview?

10 A. Yes.

11 Q. Did you remember telling the police after your second
12 interview, at first, that you didn't hit the car. Do you
13 remember telling them that?

14 A. Uh-huh.

15 Q. And do you remember changing it afterwards and saying,
16 yes, you did in fact hit the car when you shot at it?

17 A. Yes, I thought I had hit it.

18 Q. Now going back to the incident inside the liquor house.
19 Based on what you saw, would you say the -- what you describe
20 as the tall guy, or the other guy, was he the one being the
21 aggressor towards your cousin?

22 A. The tall guy.

23 Q. Back at the liquor house you never saw Mr. Sosa or any of
24 the other guys involved do anything with their hands that may
25 have been a gang sign, did you?

1 A. No.

2 Q. And to the best of your recollection, the argument was
3 around the other guy not paying a bill, right?

4 A. Yes.

5 Q. And when they walked outside and they confronted your
6 cousin, again, you didn't see anybody flash any gang signs,
7 did you?

8 A. No.

9 Q. And after you got in the car -- well, you said after you
10 got in the car you went to sleep; is that right?

11 A. Yes.

12 Q. After you woke up, between the time that you woke up and
13 the time that you went back -- or dropped off back at the
14 house -- did you ever hear Mr. Sosa talking on the phone with
15 anybody that sound like anything concerning anything involving
16 a gang?

17 A. No.

18 Q. Now, how long have you been in custody, Mr. Maradiaga?

19 A. 33 months.

20 Q. And is it safe to say that when you thought you were
21 being solely blamed for the shooting you were upset, right?

22 A. Yes.

23 Q. You were a little angry, felt betrayed, right?

24 A. Yes.

25 MR. McKNIGHT: One moment, Your Honor.

1 That's all I have.

2 THE COURT: Ms. Costner, Mr. Beechler.

3 MR. BEECHLER: No questions, Your Honor.

4 THE COURT: You may step down.

5 Call your next witness.

6 MS. GREENE: The government calls Trena Cadenhead.

7 TRENA CADENHEAD, GOVERNMENT WITNESS, SWORN

8 DIRECT EXAMINATION

9 BY MS. GREENE:

10 Q. Good afternoon.

11 A. Hi.

12 Q. Would you please tell the jurors your name.

13 A. Trena, T-r-e-n-a. Cadenhead, C-a-d-e-n-h-e-a-d.

14 Q. And, Ms. Cadenhead, where do you work?

15 A. I was employed by the City of Charlotte.

16 Charlotte-Mecklenburg Police Department, and I retired last
17 August 1st.

18 Q. So you recently retired?

19 A. Yes, ma'am.

20 Q. And how long were you employed by CMPD?

21 A. Thirty-one years.

22 Q. And what did you do for CMPD for all those years?

23 A. I was a supervisor in the crime scene search unit. And
24 when I originally went to the police department I dispatched,
25 and then two years later I transferred to the crime scene

1 MR. SMITH: I know. But I do not hope to be that
2 long. I think that would be detrimental, actually.

3 THE COURT: All right. So we'll go in at 9:30.
4 We'll finish with the Zelaya evidence. And then I'll give the
5 introductory instructions, you all will argue, I'll give the
6 substantive instructions, and then we'll give the case to the
7 jury.

8 Have you all looked at the verdict forms for each of
9 your clients?

10 ALL COUNSEL: Yes, Your Honor.

11 MS. GREENE: Yes, Your Honor.

12 THE COURT: All right. Anything else?

13 MR. MICHEL: I had wanted to renew my motion at the
14 close of defense. I assume, I guess we should do that once we
15 get there.

16 THE COURT: No, you can do it right now.

17 MR. MICHEL: Okay.

18 THE COURT: Do you wish to be heard on it?

19 MR. MICHEL: Mr. Gavidia renews the motion, does not
20 wish to be heard on it, the motion for dismissal.

21 THE COURT: All right. I'll deny that.

22 MR. McKNIGHT: Do you want us to be heard on that
23 now, Your Honor?

24 THE COURT: (Nodding head affirmatively.)

25 MR. McKNIGHT: Your Honor, I would renew my motion

1 pursuant to Rule 29 as well. Specifically as it relates to
2 the purpose element, as it relates to Count 10, to Mr. Sosa.
3 Your Honor, as it relates to that, what I draw the Court's
4 attention to is actually a Second Circuit case as well --

5 THE COURT: Well, you require me to skip by *Tipton*
6 if you're doing that.

7 MR. McKNIGHT: Which is fine, Your Honor. Because
8 there is a case -- actually the government cites it in their
9 motion as well, as a prediction of evidence, the *U.S. v Todd*
10 case.

11 And Your Honor, the crux of what my argument is
12 regarding this purpose -- purpose driven element, and a lot of
13 the language, including the language that I just referred to
14 the Court, talks about the fact that it cannot be this general
15 connection in terms of what the government has to prove.

16 I think where we are in terms -- I think where the
17 Government's position is, they would like that language to be
18 a tad bit broader. That's why I mention the language in the
19 Fifth Circuit, because it encompasses both. It encompasses
20 both the element that it doesn't have to be the sole purpose.
21 But it also, by term -- it talks about specificity as it
22 relates to --

23 THE COURT: I'm pretty familiar with your argument
24 in light of your request for a jury instruction, but refine it
25 so that the standard I use, taking the evidence in the light

1 most favorable to the government, addressed why the jury
2 wouldn't be allowed to infer the substantial purpose that --

3 MR. McKNIGHT: Because, Your Honor, there is --
4 there aren't any facts that surround that particular violent
5 act, in terms of the shooting, that they can infer relate back
6 to MS-13.

7 The facts as it relates to that particular event, I
8 think what the Court may have referenced -- I know Your Honor
9 remembers the testimony very well -- but you reference in
10 terms of Mr. Sosa running into some rival gang members, which
11 came from the testimony of Mr. Maradiaga. I need to clarify,
12 that incident -- I shouldn't say incident -- that conduct
13 occurred at Club La Torres, which was prior to them going to
14 the liquor house.

15 At the liquor house, I think all the evidence from
16 that scenario to the point of the shooting thereafter, that
17 there was nothing in that incident that -- there's been no
18 evidence that the victims in that case were gang members.
19 There's been no evidence that there were any gang members.
20 There been no evidence that Mr. Sosa bragged to any other
21 members about the shooting.

22 THE COURT: How is it different than *Tipton*?

23 MR. McKNIGHT: Your Honor, well, Your Honor, in
24 *Tipton*, one of the individuals who committed the actual
25 violent crime was actually a co-defendant or a co-conspirator

1 within the actual enterprise.

2 THE COURT: So whether it's co-conspirator or
3 someone directed by the -- I mean, in *Tipton* it was a
4 co-conspirator and the defendant himself as a member of the
5 MS-13. So how is Sosa different than that?

6 MR. McKNIGHT: Sosa -- because the only person that
7 was involved in the shooting with Mr. Sosa, Your Honor, was
8 his cousin.

9 THE COURT: I'm just -- I'm talking about Sosa.

10 MR. McKNIGHT: Yes, he is a member -- well, here's a
11 question. If the jury can believe that he is a member of
12 MS-13, the question then becomes, your membership doesn't mean
13 that every violent act that it does relates back to --

14 THE COURT: So why isn't it a jury question as to
15 whether this specific act is or is not an act of violence in
16 aid of racketeering?

17 MR. McKNIGHT: Because when you look at the overall
18 facts --

19 THE COURT: Taken in the light most favorable to the
20 government.

21 MR. McKNIGHT: Well, I would -- even in the light
22 most favorable to the government, Your Honor, there still has
23 to be some specificity and purpose shown as it relates to his
24 state of mind.

25 There was evidence in this case that Mr. Sosa said

1 to Mr. Maradiaga, we're just going to scare them. There was
2 no mention of gangs. There was no mention of how this might
3 enhance. There was no evidence of how it either enhanced or
4 improved or even maintained his status in MS-13.

5 The mere fact that he may or may not be a member of
6 MS-13 doesn't mean that every violent act that's committed
7 by --

8 THE COURT: Right. And I've already agreed with you
9 on that.

10 MR. McKNIGHT: Right. And so, Your Honor, I'm going
11 back, Your Honor -- what I'm arguing, is that when you look at
12 the language not just from *Tipton*, Your Honor, because -- you
13 know, *Tipton* is one portion of a broader argument from the
14 Second Circuit and different circuits as it relates to that
15 purpose driven element.

16 When you get into the language of purpose, motive,
17 you're getting into a conversation about the state of mind of
18 the defendant. And when you get to that as is the case in the
19 Fifth Circuit, you have to start delving into, as the Fifth
20 Circuit said, looking at the facts and circumstances to try to
21 get to what that intent was for the individual at the time of
22 the event.

23 There are no facts that relate back, that this was
24 done in any way, shape or form for the purpose to enhance or
25 maintain, or that it did actually enhance or maintain an

1 alleged position in MS-13.

2 And that's why I'm arguing that particular portion
3 of that particular -- of that element for that particular
4 count. It fails because there was no evidence of it.

5 THE COURT: Understand your argument, and will deny
6 your renewed motion based on the evidence in this case, taken
7 in the light most favorable to the government.

8 All right. We'll see you all again at 9:30.

9 (Charge conference was concluded.)

10 (The following takes place in open court.)

11 THE COURT: Ready for the jury.

12 ALL COUNSEL: Yes, Your Honor.

13 THE COURT: Hold off a minute.

14 Ms. Costner, Mr. Beechler, is your client intending
15 to testify?

16 MR. MICHEL: Yes, Your Honor.

17 THE COURT: Why don't we have Mr. Zelaya take the
18 stand before the jury comes in.

19 Everybody have a seat. I wanted to mention -- I
20 looked at Mr. McKnight's requested instruction.

21 MR. McKNIGHT: Your Honor, I just wanted to --

22 THE COURT: Mr. McKnight, I'm about to rule in your
23 favor. I think you should listen.

24 MR. McKNIGHT: I apologize.

25 THE COURT: I've looked at the Fifth Circuit pattern

-  KeyCite Red Flag - Severe Negative Treatment
- Enacted LegislationAmended by [PL 115-391, December 21, 2018, 132 Stat 5194](#),
-  KeyCite Red Flag - Severe Negative TreatmentUnconstitutional or Preempted
-  KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated**Title 18. Crimes and Criminal Procedure (Refs & Annos)****Part I. Crimes (Refs & Annos)****Chapter 44. Firearms (Refs & Annos)**

18 U.S.C.A. § 924

§ 924. Penalties

Effective: October 6, 2006

[Currentness](#)

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in [section 929](#), whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates [subsection \(a\)\(4\), \(f\), \(k\), or \(q\) of section 922](#);

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of [section 922\(l\)](#); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates [subsection \(a\)\(6\), \(d\), \(g\), \(h\), \(i\), \(j\), or \(o\) of section 922](#) shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates [subsection \(m\) of section 922](#),

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates [section 922\(q\)](#) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of [section 922\(q\)](#) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates [subsection \(s\)](#) or [\(t\)](#) of [section 922](#) shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates [section 922\(x\)](#) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of [section 922\(x\)](#) [\(2\)](#); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under [section 922\(x\)](#) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates [section 922\(x\)](#)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates [section 931](#) shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i)** be sentenced to a term of imprisonment of not less than 5 years;
- (ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

- (i)** is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
- (ii)** is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

- (i)** be sentenced to a term of imprisonment of not less than 25 years; and
- (ii)** if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

- (i)** a court shall not place on probation any person convicted of a violation of this subsection; and
- (ii)** no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in [section 1111](#)), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in [section 1112](#)), be punished as provided in [section 1112](#).

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of [subsection \(a\)\(4\), \(a\)\(6\), \(f\), \(g\), \(h\), \(i\), \(j\), or \(k\) of section 922](#), or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of [section 922\(l\)](#), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions

of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)) or the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#));

(C) any offense described in [section 922\(a\)\(1\)](#), [922\(a\)\(3\)](#), [922\(a\)\(5\)](#), or [922\(b\)\(3\)](#) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in [section 922\(a\)\(1\)](#), [922\(a\)\(3\)](#), [922\(a\)\(5\)](#), or [922\(b\)\(3\)](#) of this title;

(D) any offense described in [section 922\(d\)](#) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in [section 922\(i\)](#), [922\(j\)](#), [922\(l\)](#), [922\(n\)](#), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates [section 922\(g\)](#) of this title and has three previous convictions by any court referred to in [section 922\(g\)\(1\)](#) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under [section 922\(g\)](#).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)), the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#)), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. 802](#))), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates [section 922\(p\)](#), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in [section 1961\(1\)](#),

(2) is punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)), the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#)), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act ([21 U.S.C. 802\(6\)](#))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates [section 922\(u\)](#) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in [section 1111](#)), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in [section 1112](#)), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act ([21 U.S.C. 801 et seq.](#)), the Controlled Substances Import and Export Act ([21 U.S.C. 951 et seq.](#)), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, [21 U.S.C. 802](#)); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of [section 922\(a\)\(1\)\(A\)](#), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of [section 922\(z\)\(1\)](#) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than \$2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under [section 923\(f\)](#).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added [Pub.L. 90-351](#), Title IV, § 902, June 19, 1968, 82 Stat. 233; amended [Pub.L. 90-618](#), Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; [Pub.L. 91-644](#), Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; [Pub.L. 98-473](#), Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; [Pub.L. 99-308](#), § 104(a), May 19, 1986, 100 Stat. 456; [Pub.L. 99-570](#), Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; [Pub.L. 100-649](#), § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; [Pub.L. 100-690](#), Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373,

4374, 4402, 4403; [Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702\(b\)\(3\), Title XXII, §§ 2203\(d\), 2204\(c\), Title XXXV, §§ 3526, 3527, 3528, 3529](#), Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; [Pub.L. 103-159, Title I, § 102\(c\), Title III, § 302\(d\)](#), Nov. 30, 1993, 107 Stat. 1541, 1545; [Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102\(c\), 110103\(c\), 110105\(2\), 110201\(b\), 110401\(e\), 110503, 110504\(a\), 110507, 110510, 110515\(a\), 110517, 110518\(a\), Title XXXIII, §§ 330002\(h\), 330003\(f\)\(2\), 330011\(i\), \(j\), 330016\(1\)\(H\), \(K\), \(L\)](#), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; [Pub.L. 104-294, Title VI, § 603\(m\)\(1\), \(n\) to \(p\)\(1\), \(q\) to \(s\), Oct. 11, 1996, 110 Stat. 3505](#); [Pub.L. 105-386, § 1\(a\)](#), Nov. 13, 1998, 112 Stat. 3469; [Pub.L. 107-273](#), Div. B, Title IV, § 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; [Pub.L. 109-92](#), §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; [Pub.L. 109-304, § 17\(d\)\(3\)](#), Oct. 6, 2006, 120 Stat. 1707.)

AMENDMENT OF SECTION

<[Pub.L. 100-649](#), § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended [Pub.L. 101-647, Title XXXV, § 3526\(b\)](#), Nov. 29, 1990, 104 Stat. 4924; [Pub.L. 105-277](#), Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; [Pub.L. 108-174](#), § 1, Dec. 9, 2003, 117 Stat. 2481; [Pub.L. 113-57](#), § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of [Pub.L. 100-649](#), set out as a note under 18 U.S.C.A. § 922], subsec. (a)(1) of this section is amended by striking “this subsection, subsection (b), (c), or (f) of this section, or in section 929” and inserting “this chapter”; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesignated as subsecs. (f) through (n), respectively.>

VALIDITY

<The United States Supreme Court has held that the imposition of an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (e)(2)(B)(ii)), violates the Constitution's guarantee of due process, see [Johnson v. U.S., U.S.2015, 135 S.Ct. 2551, 192 L.Ed.2d 569](#). >

Notes of Decisions (3957)

18 U.S.C.A. § 924, 18 USCA § 924

Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, and 115-335 to 115-338. Title 26 current through P.L. 115-442.

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by [United States v. Conyers](#), S.D.N.Y., Dec. 29, 2016

 KeyCite Yellow Flag - Negative TreatmentProposed Legislation

[United States Code Annotated](#)

[Title 18. Crimes and Criminal Procedure \(Refs & Annos\)](#)

[Part I. Crimes \(Refs & Annos\)](#)

[Chapter 95. Racketeering \(Refs & Annos\)](#)

18 U.S.C.A. § 1959

§ 1959. Violent crimes in aid of racketeering activity

[Currentness](#)

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished--

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of ¹ under this title, or both.

(b) As used in this section--

(1) "racketeering activity" has the meaning set forth in [section 1961](#) of this title; and

(2) “enterprise” includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

CREDIT(S)

(Added [Pub.L. 98-473, Title II, § 1002\(a\)](#), Oct. 12, 1984, 98 Stat. 2137, § 1952B; renumbered § 1959, [Pub.L. 100-690, Title VII, § 7053\(b\)](#), Nov. 18, 1988, 102 Stat. 4402; amended [Pub.L. 103-322, Title VI, § 60003\(a\)\(12\)](#), Title XXXIII, §§ 330016(1)(J), (2)(C), 330021(1), Sept. 13, 1994, 108 Stat. 1969, 2147, 2148, 2150.)

Notes of Decisions (157)

Footnotes

¹ So in original. The word “of” probably should not appear.

18 U.S.C.A. § 1959, 18 USCA § 1959

Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, and 115-335 to 115-338. Title 26 current through P.L. 115-442.