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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHANGO JAJA GREER, AKA GO, Defendant-Appellant.	No. 18-16281 D.C. Nos. 2:12-cv-00397-MCE-EFB 2:03-cr-00042-MCE-EFB Eastern District of California, Sacramento ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHANGO JAJA GREER, AKA GO, Defendant-Appellant.	No. 18-16281 D.C. Nos. 2:12-cv-00397-MCE-EFB 2:03-cr-00042-MCE-EFB Eastern District of California, Sacramento ORDER

Before: SILVERMAN and CALLAHAN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. SHANGO JAJA GREER, Movant.	No. 2:03-cr-0042-MCE-EFB P ORDER

Movant, a federal prisoner, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 10, 2017, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Movant has filed objections to the findings and recommendations and respondent has filed a response thereto.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 10, 2017 (ECF No. 1212), are ADOPTED in full;

2. Greer's motion to set aside, vacate, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1126) is DENIED; and

3. The Clerk of the Court is directed to close the companion civil case, No. 2:12-cv-00397-MCE-EFB.

IT IS SO ORDERED.

Dated: June 13, 2018

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, vs. SHANGO JAJA GREER, Movant.	No. 2:03-cr-0042-MCE-EFB P FINDINGS AND RECOMMENDATIONS

Movant Shango Jaja Greer is a federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[1] On April 7, 2006, Greer was convicted by a jury of conspiring to conduct the affairs of an enterprise known as the Pitch Dark Family (or PDF) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d); and conducting the affairs of that enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Greer now seeks post-conviction relief on the grounds that his trial and appellate counsel rendered ineffective assistance. Upon careful consideration of the record and the applicable law, the undersigned recommends that Greer's § 2255 motion be denied.

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[1] This motion was assigned, for statistical purposes, the following civil case number: 2:12-cv-00397-MCE-EFB.

I. Overview

Greer presented the following overview of his criminal proceedings in his opening brief on appeal, which this court includes here, in part:

> The government sought and obtained [movant's and others] convictions for their alleged involvement with the Pitch Dark Family, a Vallejo group which the government alleged was a criminal enterprise. There was, however, no dispute that there was also a group that wrote and performed rap music by the name of the Pitch Dark Family (hereinafter, "PDF"), and that the persons the government contended were gang members were also members of PDF, the rap group. The predicate acts charged were, in the main, old state cases – some as much as a decade old at the time of trial – that the state authorities had declined to prosecute.
>
> Although [movant and others] hotly contested the validity of the predicate acts, the overarching issue in the case was whether or not the PDF was a group of rappers consisting of friends who had grown up together in Vallejo, some of whom earned a living by selling drugs, or whether PDF was, as the government alleged, a coordinated criminal enterprise that controlled an area of west Vallejo.

ECF No. 1184-10 at 12-13.

II. Procedural Background

On January 29, 2003, an indictment was filed charging Greer and various other persons with participating in a street gang known as the Pitch Dark Family, an enterprise conducting its affairs through a pattern of racketeering activity. ECF No. 1. Count One charged Greer and five others with conducting the affairs of an enterprise (PDF) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c), and alleged nine racketeering acts, as follows: (1) the murder of Jewel Hart; (2) the attempted murder of Jason Hickerson; (3) the murder of Keith Roberts, aka York; (4) the murder of Richard Garrett; (5) possession of cocaine base for sale on or about April 26, 1997; (6) the murder of Devin Russell; (7) possession of cocaine base for sale on November 29, 1998; (8) the murder of Larry Cayton; and (9) conspiracy to distribute illegal narcotics. *Id.* at 1-8.

Count Two alleged that Greer and seven others conspired to conduct the affairs of an enterprise (the PDF) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). *Id.* at 8-9. Count Four alleged that Greer committed the murder of Larry Cayton in

aid of racketeering activity, or aiding and abetting racketeering activity, in violation of 18 U.S.C. § 1959(a)(1) and (2). *Id.* at 11-12.[2] The case went to trial against Greer and co-defendant Jason Keith Walker in November 2005. Trial concluded in March, 2006.

On April 7, 2006, the jury returned verdicts finding Greer guilty on Counts One and Two and not guilty on Count Four. ECF No. 681. With respect to Count One, the jury found that Greer: (1) committed the attempted murder of Jason Hickerson on July 15, 1994, or aided and abetted in the commission of that crime; (2) committed the crime of possession of cocaine base with the intent to distribute on April 26, 1997, or aided and abetted in the commission of that crime; and (3) committed the murder of Larry Cayton on April 8, 2000, or aided and abetted in the commission of that crime. *Id.* With respect to Count Two, the jury found that: (1) the pattern of racketeering activity agreed to by Greer included an act involving murder; (2) the pattern of racketeering activity agreed to by Greer included an act involving attempted murder; (3) the pattern of racketeering activity agreed to by Greer included an act involving possession of a controlled substance with the intent to distribute; (4) the pattern of racketeering activity agreed to by Greer included an act involving conspiracy to distribute illegal narcotics; (5) Greer committed the attempted murder of Jason Hickerson on July 15, 1994, or aided and abetted in the commission of that crime; (6) Greer committed the murder of Keith Roberts on August 3, 1994, or aided and abetted in the commission of that crime; (7) Greer committed the crime of possession of cocaine base with the intent to distribute on April 26, 1997, or aided and abetted in the commission of that crime; (8) Greer committed the murder of Larry Cayton on April 8, 2000, or aided and abetted in the commission of that crime; and (9) Greer committed the crime of conspiracy to distribute illegal narcotics. *Id.*

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[2] Count Three of the Indictment was not charged against Greer. ECF No. 1 at 9. Accordingly, during Greer's trial and on his verdict forms the parties and the court referred to Count Four of the indictment as Count Three. ECF No. 12 at 2 n.3.

III. Factual Background[3]

A. Facts relating to the Enterprise

Several witnesses testified at Greer's trial about the origins of Pitch Dark Family. Jason Hickerson testified that he lived on the west side of Vallejo from 1990 to 1993, and bought and sold drugs there. Reporter's Transcript (RT), Dec. 7, 2005, 80-81. Hickerson said it was important to know who sold drugs on the west side so you would "know what you were up against." *Id.* at 81. He agreed that "you could get into trouble if you didn't know who was dealing drugs on the west side" and explained that this was "[b]ecause you would be dealing in someone else's territory." *Id.* at 81-82. In those days, the drug trade on the west side was controlled by the Five Deuce Waterfront Gangsta Crips (hereinafter Five Deuce), also known as West Side and City Park Crips. *Id.* at 82. That group included Charles White, Leroy Vance, Charles McClough, Louis Walker, Shawn Brown, and Marc Tarver. *Id.* at 83-85. Sometime around 1991-92, Five Deuce started calling itself Pitch Dark Family (PDF). *Id.* at 86. PDF consisted of the same members plus movant Greer ("G.O."), Jason Walker ("Fade"), Eric Jones, Anthony Monroe ("Tone"), Elliott Cole ("LL"), Oscar Gonzales, Arnando Villafan, Ricardo White, Demetrius Thompson, and Tito Manuel. *Id.* at 86:19-89:19. Hickerson testified that in 1992 and beyond, he personally bought crack cocaine from PDF members Jason Walker and Marc Tarver. *Id.* at 90:6-92:8.

Hickerson also testified that PDF sold drugs in an area from Sutter Street to Santa Clara Street and from Tennessee Street to Florida. *Id.* at 94. Generally, only PDF members could sell drugs in PDF territory. *Id.* at 95. Hickerson explained that he was allowed to occasionally sell drugs in PDF territory, even though he was not a PDF member, because he lived on the west side and purchased his drugs from a PDF member. *Id.* at 96-98.

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[3] The factual background that follows is derived from Greer's § 2255 motion, the statement of facts contained in the government's opposition to Greer's § 2255 motion (ECF No. 1184 at electronic pgs. 16-33), the statement of facts contained in Greer's opening brief on appeal (ECF No. 1184-10 at 7-39), and this court's review of the trial record. The facts are presented in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ngo v. Giurbino*, 651 F.3d 1112, 1115 (9th Cir. 2011).

Dante Webster also testified about the membership of Pitch Dark Family and its character as a street gang. Webster lived in West Vallejo for most of the period from 1991 to 2005. RT, Dec. 15, 2005, at 25. Webster testified that, during the 1990s, he was one of the leaders of a group called The Folks (also known as the Sutter Street Crew or Gutter Street), that sold drugs in an area adjacent to PDF territory. *Id.* at 42, 44-45. Webster testified that there were other gangs on the west side that sold drugs and that these gangs divided up the area and generally got along with one another. *Id.* at 45, 46. Because he socialized with members of the other gangs, he was familiar with other gangs and their membership. *Id.* One of these gangs was Pitch Dark Family, which was also known as the Five Deuce Waterfront Crips and City Park. *Id.* at 46-47. Webster identified some of the members of PDF, including: Shango Greer ("G.O."), Jason Walker ("Fade"), Charles White ("Shady"), "EJ Rabbit", Mark Tarver ("Bowlegs"), Tone Monroe, Louis Walker ("Lou Dog"), Elliott Cole ("LL"), and Oscar Gonzales. *Id.* at 53-55. Webster testified that PDF members associated with the Crips "from time to time" and frequently wore Crip colors, which were blue, black and brown. *Id.* at 58-59. PDF members also spoke disrespectfully of the Bloods. *Id.* at 75-76.

Webster also testified that from time to time members of PDF - usually "Shady" (Charles White) - would ask for a meeting to discuss what was going on in the neighborhood - that is, whether there was anyone new in the neighborhood trying to sell drugs "[b]ecause if no one knew you, you wasn't supposed to be around there." *Id.* at 59. Webster explained that only PDF members or their friends could sell in PDF territory. *Id.* at 60-61. Webster also described an incident at Nations Burgers where PDF member "EJ Rabbit" was shot after he confronted an Oakland drug dealer. After the shooting, PDF called a meeting to discuss retaliation because the Oakland dealer was selling drugs on PDF turf. *Id.* at 77-81. Webster cooperated with the government in this case in order to obtain sentencing leniency in connection with his own federal drug case. RT Dec. 15, 2005, at 111-12, 166-76.

Prosecution witness Sedrick Perkins was a member of the Sutter Street Crew who had been selling cocaine and heroin on the streets of West Vallejo since he was eleven years old. RT Jan. 26, 2006, at 6364-65. When asked if he had ever heard of the name Pitch Dark Family, he

answered, "Yeah. They was a gang too." *Id.* at 6365. Perkins' identification of the members of PDF and its territory was consistent with the testimony provided by other witnesses. He said that the leaders of PDF were Shango (Greer), Fade (Walker), and Shady (Charles White) and that the younger kids like Nando and Oscar were not high up in the hierarchy. *Id.* at 6366. Perkins also corroborated the testimony of the other witnesses that PDF had originally been called the Five Deuce Waterfront Crips but then changed its name to Pitch Dark Family. RT Jan. 26, 2006 (p.m.), at 6475.

Witness Anthony Freeman met movant Greer in 1985 when they were both in the fifth grade and they became very close friends. *Id.* at 6551-52. During the next four years, Greer and Freeman sold drugs together and Freeman met Greer's other friends, who also sold drugs. *Id.* at 6552-54. These friends included Fade, Shady, Eric Jones and [Marc] Tarver. *Id.* at 6554. Freeman testified that during the period 1984 to 1989 Greer and his other friends were associated with a group called the City Park Thugs, also known as Pitch Dark Family. *Id*.

Freeman also testified about the Nations Burgers incident in which PDF member Eric Jones (aka EJ Rabbit) was shot. Freeman testified that Greer told him the shooting was precipitated when Jones confronted out-of-towners who were selling drugs in the neighborhood. RT Jan. 30, 2006, at 6612-13.

Witness Derrick Shields moved to west Vallejo in 1990 and continued to live there up through the date of Greer's trial in 2006. RT Feb. 2, 2006, at 7071-72. When he first moved to west Vallejo, he met several individuals who were members of a group called City Park, including Shango, Jason, Tone, Marc, Louis, Butch (Marlin), Meech (Demetrius Thompson), Bowleggs (Marc Tarver), EJ Rabbit (Eric), Nando, and Oscar Gonzales. *Id.* at 7072-76. When he first heard about Pitch Dark Family in the early 1990's, Butch told him that it was the name of a rap group. *Id.* at 7077. Later, the same people who were in City Park adopted the name Pitch Dark Family. *Id.* at 7078. Shields testified that the members of PDF sold drugs in an area bounded by Alabama, Louisiana, Ohio and Sonoma streets, mainly at the Beacon gas station and the burrito truck on Ohio. *Id.* at 7079-81. To sell drugs there you had to have PDF's permission. *Id.* at 7081.

Witness Derrick Washington moved to Vallejo in 1989 and began associating with a gang called The Folks. RT Jan. 18, 2006, at 5683-84. He also got to know individuals who were members of Pitch Dark Family, including Fade, Greer, Lou, Bowleggs, and Dogg. *Id.* at 5685. He witnessed several of them selling rock cocaine on the west side of Vallejo in the early to mid-90's. *Id.* at 5686.

Witness Jason McGill testified that, growing up in west Vallejo, he was familiar with the gang scene in that area. RT Jan. 11, 2006, at 5215. He identified numerous individuals as being members of a gang known as Pitch Dark Family, including movant Greer, "Fade" (Jason Keith Walker), "Shady" (Charles White), Oscar [Gonzales], Arnando Villafan, Elliott Cole, Lou Walker, "EJ Rabbit," and "Bowleggs" (aka Mark). *Id.* at 5213-15. McGill testified he was an "associate" of PDF and "hung around with them," even though he was not a member himself. *Id.* at 5216. He personally witnessed these members selling guns and drugs. *Id.* at 5216-17. McGill was allowed to sell drugs in PDF territory, even though he was not a member of PDF, because he lived in West Vallejo. *Id.* at 5217-18. Other people who were from West Vallejo but were not members of PDF were also allowed to sell there. *Id.* at 5218.

McGill further testified that the leaders of PDF appeared to be Jason Walker ("Fade") and Lou Walker; he described Greer and "Shady" as the "muscle." *Id.* at 5218-19. He was present on a couple of occasions in the mid-90's when PDF got together to discuss gang business. *Id.* at 5220. On those occasions, the topics of discussion were "who's getting money in the neighborhood" and "people they could rob." *Id.* at 5220-21. He stated one such meeting occurred at a garage located behind an apartment complex next to the home of Jason Walker's grandmother, where Mr. Walker lived. *Id.* at 5243-44.[4] In 1994, McGill saw Jason Walker frequently and often saw him with a firearm. *Id.* at 5222-24. During this time he saw Greer "every now and then" and, on a couple of occasions, saw him with a firearm, which he carried in his front waistband. *Id.* at 5224.

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[4] Greer testified that Jason Walker's grandmother did not have a garage. RT Feb. 21, 2006, at 8028-29.

On cross-examination, McGill testified that he had previously been a member of the 415 prison gang and that he was currently in custody on a parole violation. RT Jan. 11, 2006, at 5236-37. He had previously been convicted of giving false information to a peace officer, possession for sale of crack cocaine, and inflicting corporal injury on a spouse. *Id.* at 5331-32.

Witness Charles McClough lived in West Vallejo all his life and was familiar with the gang scene in the 1980s and 1990s. RT Jan. 12, 2006, at 5484. McClough admitted that he is a Five Deuce Waterfront Crip. *Id.* at 5574. He first became associated with the Five Deuce Waterfront Crips in 1984, when he was about 11 years old. *Id.* at 5484-85. McClough identified the other gangs on the west side as Downtown, City Park, and Pitch Dark Family. *Id.* at 5486. McClough identified the following individuals as members of Pitch Dark Family: "Bowleggs," "EJ Rabb," "Tone," "Fade," Lou Walker, Greer, Elliott Cole, "Shady," Oscar Gonzalez, and Arnando Villafan. *Id.* at 5504-06. McClough personally witnessed PDF members selling guns and drugs (cocaine and heroin) on the west side. *Id.* at 5507-10. McClough had a lengthy criminal history, beginning at age 11 when he was sent to the California Youth Authority and the state mental hospital. *Id.* at 5483-85; RT Jan. 17, 2006 (afternoon session), at 5620-21.

Natalie Thomas, nee Fitzgerald, testified that she saw Greer sell drugs to her brother on one occasion. RT December 20, 2005, at 4538-42. She stated that Jason Walker told her he was a member of PDF. *Id.*at 4573.

Government Exhibit 1304B is a letter written from prison by Jason Walker to PDF member Oscar Gonzalez. RT Feb. 23, 2006, at 8330. Part of the letter states: "It's hella crips down there. The 415 is still trying to recruit a nigga. Negative. 707 4 life. CPG. WSV. PDF till I die." *Id.* at 8331-333. During his testimony, Greer admitted that the statement "its hella crips down there" meant that there were a lot of members of the Crips gang in prison. He also agreed that the phrase "415 is trying to recruit a nigga. Negative" meant that the 415 prison gang was trying to recruit Walker but that he had said no. Greer further admitted that "707" was a reference to Vallejo's area code. *Id.* With regard to the meaning of "CPG" Greer testified as follows:

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Q: All right. And "CPG," what's that.

A: City Park G.

Q: City Park G?

A: G.

Q: City Park G?

A: Yes

Q: What's the "G" stand for?

A: G.

Q: It's just a G?

A: Yes.

Q: You don't know what that stands for?

A: It's just a G.

Q: Doesn't stand for City Park Gangsters?

A: It could.

Q: But in this context, you just don't know?

A: I don't know what he – you know, he could have said City Park Gangster. City Park G. He could, you know. It has a lot of different meanings.

Id. at 8332-33.

Greer was also asked about Government Exhibit 1410, a letter that he had written, which also concluded with the initials "CPG." RT Feb. 28, 2006, at 8444. The following exchange occurred:

Q: And "CPG"?

A: City Park G, yes.

Q: City Park G still stands for City Park G?

A: Yeah. It could be gangsta. You call it what you want. It's a G.

Q: Does it stand for "gangsta"?

A: It's an open ended question. It can stand for a lot of things.

. . . .

Q: It does not stand for "City Park Gangsta"?

A: It can. Some people refer to it as that.

Q: You refer to it that way, don't you?

A: Sometimes.

Q: Jason Walker refers to it that way also; right?

A: Sometimes. Nothing wrong with being a G.

RT Feb. 28, 2006, at 8447-48.

Prosecution expert witness Steven Fowler, a former gang intelligence officer from the Vallejo Police Department, testified that a street gang was "a group of people, general [sic] three or more that are bound together by some type of social need, whether they grew up in the same neighborhood or not, that are involved in committing criminal acts that generally put the safety of the citizenry at risk." RT Feb. 15, 2006, at 7780-81. He testified that usually a gang controlled the "criminality" in an area, or "turf," and that this was necessary to successfully sell drugs. *Id.* at 778-82, 7786. He opined that street gang members frequently were involved in drug sales but usually were not highly organized. *Id.* at 7784-85. He explained that street gangs commonly engaged in acts of violence to protect their turf and prevent others from revealing criminal gang activity to the police. *Id.* at 7786, 7790-91. Fowler acknowledged that Vallejo street gangs were not large and that members might sell or possess only ounces of controlled substances. *Id.* at 7787-88.

Fowler further testified that PDF was a street gang in West Vallejo from approximately 1993 to 2001 and that movant Greer and Jason Walker were members. *Id.* at 7794-95. His opinion in this regard was based in part on "street intelligence," which consisted of conversations with people on the street, including victims, and his own observations of graffiti, tattoos, clothing with logos or monograms, and photographs obtained in searches. *Id.* at 7793. Fowler also testified that he saw baseball caps with the initials "PDF" or the name "Pitch Dark Family." *Id.* His opinion was also based, in part, on the fact that Elliot Gus Cole, Eric Jones, Louis Walker, Arnando Villafan, Oscar Gonzales, and Mark Tarver had admitted in connection with their guilty pleas that they were "members of Pitch Dark Family which was an association of individuals

engaged in gang-related activities." *Id.* at 7794. Fowler further relied on a section of graffiti near the Beacon gas station in which the monikers of numerous individuals, including movant Greer, Jason Walker, and White, had been etched into wet cement. RT Jan. 25, 2006, at 4881-87. He also relied on the letter from inmate Jason Walker to PDF member Oscar Gonzalez, described above. RT Feb. 15, 2006, at 7797-99. Fowler interpreted that letter to mean that a California prison gang was trying to recruit Jason Walker, but he declined because he felt loyalty to PDF, his gang. *Id.* at 7798-99. Fowler also testified that the leaders of the PDF were Greer, Jason Walker, White and Louis Walker. *Id.* at 7795.

In its opinion on Greer's appeal, the U.S. Court of Appeals for the Ninth Circuit concluded that the trial court did not abuse its discretion when it determined that Fowler's testimony was "reliable and relevant and thus admissible," and that it was not "an abuse of discretion for the district court to admit the substance of the co-defendants' admissions to being PDF members as a basis for Detective Fowler's opinion." *Walker*, 2010 WL 30699, at *1.

As noted by Greer in his appellate brief, "there was no evidence that PDF had rules, a steering committee, regular meetings or even that they regularly stood up for each other." ECF No. 1184-10 at 24. Further, Dante Webster testified that that PDF members did not share their profits from drug sales. Rather, each person kept his own profits. RT December 15, 2005 (afternoon session) at 132.

B. Racketeering Acts

1. Murder of Jewel Hart

Elliott Cole shot and killed Jewel Hart in 1994. RT Jan. 19, 2006, at 5936. Devin Russell testified against Cole at his preliminary hearing. *Id.* at 5936-37. Cole later pled guilty to involuntary manslaughter. *Id.* at 5947.

2. Attempted Murder of Jason Hickerson

Lakisha Gooch testified that on July 15, 1994, she was driving a car in which Jason Hickerson was a passenger. RT Dec. 7, 2005 (a.m.), at 17-20. A PDF member named Eric Jones (EJ) approached the car and asked Hickerson why Hickerson took "his friend's stuff." *Id.* at 20. Gooch dropped off Hickerson and drove away because EJ was clearly agitated with Hickerson

and she was afraid for her children, who were also in the car. *Id.* at 21-22. Gooch's car was then pursued by a grey car occupied by Greer, EJ and some other men she did not know. *Id.* at 22-24. Greer asked Gooch where Hickerson was. She told him she'd dropped Hickerson off and didn't know where he was, and then got away from them. *Id.* When she went home a short time later, the same people who had been in the car were waiting for her across the street. *Id.* at 24-25. PDF member Ricardo White approached Gooch from the group and asked where Hickerson was, told her they were angry at Hickerson, and advised her to keep Hickerson out of her car because he stole a gun and some drugs. *Id.* at 25-30. White told Gooch "they" had guns, specifically a sawed-off shotgun. *Id.* at 29-30. White then searched Gooch's house to see if any of "their" stuff was there, after which White got in his car and left. The other men (Jones, Greer, and the others in the car she did not know) walked away down the street. *Id.* at 30:9-31:7.

Witness Cindy Smith was outside her house that same day and heard a shotgun blast. *Id.* at 67-68. She looked in the direction of the noise and saw a "bluish-gray car, probably a Nissan Maxima or something of that style," with "two black men in the front of the car," and "a shotgun at the window ledge." *Id.* She couldn't tell whether or not there was anyone in the back of the car. *Id.* at 68-69.

Dante Webster testified that within a week before Jason Hickerson got shot, he saw Hickerson with a machine gun. RT Dec. 15, 2005 (a.m.), at 84. Webster said that the day Jason Walker's car had been broken into "he was walking around the neighborhood pretty hot about Hickerson." *Id.* Walker asked Webster if he'd seen Hickerson because Walker thought Hickerson "had broken into his car and stole some guns and drugs from him." *Id.* at 84-85.

Greer testified that Hickerson was known for "being a thief." RT Feb. 21, 2006, at 8006. He testified that on the day of Hickerson's shooting he, Greer, was driving a gray Honda Civic. He and another car full of people started following a car in which Hickerson was a passenger. *Id.* at 8009. Greer caught up to the car and spoke with Gooch, asking where Hickerson was because Hickerson had stolen something from Greer's father. *Id.* at 8012. Gooch drove off and Greer proceeded to Hillcrest Park, because he knew Hickerson lived in the area. RT Feb. 22, 2006, at

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8194. He testified that, to his knowledge, Gooch did not lie about anything during her testimony. *Id.* at 8208.

Jason Hickerson testified that in July 1994 he broke into Jason Walker's car, and took a bag of crack cocaine, an Uzi submachine gun, and a sawed-off shotgun. RT Dec. 7, 2005, at 100-102. On the day he was shot, Hickerson was riding with Gooch when they saw members of PDF, including Walker and Greer, standing in front of a business. *Id.* at 102-103. A grey Honda Accord was next to the group. *Id.* at 103. At a nearby stoplight, Eric Jones, a member of PDF, approached Gooch's car and confronted Hickerson in a hostile manner, looking back toward the grey Honda. *Id.* at 104. Hickerson directed Gooch to let him out, after which the group in the grey car, including Greer, Walker, Jones, and Marcus Taplin, spotted him and engaged in a short chase before Hickerson hid himself in a garage. *Id.* at 104-106. After he left the garage, the group in the grey car found him again. *Id.* at 111. Greer, Walker, Jones, and Taplin others jumped out of the car; Walker had a "38," and Jones had a shotgun. Greer was unarmed. *Id.* at 111-112. As Hickerson was running away, he was shot in the back. *Id.* at 112.

Police interviewed Hickerson at the hospital, where he provided a false name and denied knowing who shot him. *Id.* at 114-15. At the time he testified, Hickerson was facing charges of cocaine possession, which carried a three year, eight month sentence. *Id.* at 134. As a result of his testimony, the District Attorney indicated he would recommend a two year sentence. *Id.* at 135.

PDF member Jones was convicted of the attempted murder of Jason Hickerson in state court. *Id.* at 47.

3. <u>Murder of Keith Roberts</u>

On August 3, 1994, at approximately 3:30 a.m., Vallejo police officers responded to a shooting that occurred at the intersection of Sonoma and Louisiana in Vallejo. RT Jan. 3, 2006, at 4698. Upon arriving at the scene, officers saw a black male, later identified as Keith Roberts, lying face down in the street. *Id.* Roberts had sustained multiple gunshot wounds and was pronounced dead at the scene. *Id.* at 4702. Officers collected nine .38 Super automatic shell casings at the crime scene. *Id.* at 4711-12. These casings surrounded Roberts' body. *Id.* at 4700.

Forensic analysis matched the .38 super shell casings to shell casings recovered from the scene of a carjacking that occurred two weeks later in the same area as the Roberts murder. RT Jan. 12, 2006, at 5459. The shell casings also matched one of the weapons used to kill Richard Garrett (Racketeering Act Four). *Id.* The .38 Super is a fairly rare caliber ammunition. RT Jan. 5, 2006, at 4978.

Joseph Thompson testified that on August 19, 1994, two black males came into his gun store and purchased .38 Super ammunition. *Id.* at 4978-79. Thompson recalled that these two individuals had been in the store a week or two earlier. *Id.* at 4979. At their request, he ordered a magazine for a Llama .38 Super Auto handgun. *Id.* at 4980. After the two men departed the store, Thompson copied down the license plate of the brownish-colored Chevrolet the men were driving. *Id.* at 4982. He forwarded this information to the Vallejo Police Department. *Id.* at 4983.

On September 1, 1994, officers were conducting surveillance on the Chevrolet described in the preceding paragraph. *Id.* at 5022. While on duty, they observed a Buick pull into the parking lot and park next to the Chevrolet. *Id.* at 5023, 5026. The officers then saw Jason Walker and another black male exit the Buick and enter an unknown apartment. *Id.* at 5023-5024. Approximately 45 minutes later, Walker came out of the apartment complex and opened the trunk of the Chevrolet. *Id.* at 5024. After a few minutes, Walker returned to the apartment. *Id.* at 5025.

Charles McClough testified that in March, 1995, Walker and White told him that the two of them, along with Shango Greer and Marc Tarver, were involved in the Keith Roberts homicide. RT Jan. 12, 2006, at 5513, 5515, 5517-18. According to McClough, White told him that several of them participated in the shooting. *Id.* at 5518:12-17. McClough testified that the subject of Roberts's murder came up again approximately a week later at Marc Tarver's residence, where White, Tarver, and Walker again talked about the killing. *Id.* at 5519. The subject later came up a third time, again at Tarver's residence, with the same participants, except that Greer was also present. *Id.* at 5520-21. During one of these conversations, it was revealed that while several different people in the group had shot Roberts, Walker had fired the final, fatal

shot. *Id.* at 5528-29. Neither Greer nor Walker disputed White's characterization of the events. *Id.* at 5526-27.

Derrick Washington testified that Walker admitted his role in the Roberts homicide. According to Washington, Walker said he had shot Roberts on Louisiana Street because Roberts had attempted to steal drugs from him. RT Jan. 18, 2006, at 5698-99.

4. Murder of Richard Garrett

On August 28, 1994, at approximately 10:50 p.m., Richard Garrett was shot and killed on the sidewalk adjacent to the Beacon gas station on Sonoma Boulevard. RT Jan. 4, 2006 (p.m.), at 4767-71. Forensic examination revealed that Garrett was shot both with a .25 caliber and a .38 Super auto. RT Jan. 12, 2006, at 5458-59. Forensics determined that the same .38 super used in the Garrett homicide was used to kill Keith Roberts earlier in the month. *Id.* at 5459. That weapon was also used in a carjacking that took place in the same area on August 17, 1994. *Id.* at 5458-59. Forensic examination also revealed that the .25 caliber weapon used in the Garrett homicide was used in the attempted homicide of Lawrence Rude. *Id.* at 5459-60.

Derrick Washington testified that he witnessed the murder of Richard Garrett. RT Jan. 18, 2006, at 5688. Washington testified that on the night of the murder, his girlfriend at the time, Teresa Williams, drove Washington, Greer, Louis Walker, and Tarver to the Beacon Gas Station on Sonoma Boulevard. *Id.* at 5689-91. They observed Garrett appear to be arguing with Greer's girlfriend. *Id.* at 5693. Greer, Walker, and Tarver got out of Williams's car and approached Garrett. *Id.* at 5691. Garrett and Greer got into a fight, and Garrett hit Greer on the head with a beer bottle. *Id.* at 5693. Washington knew that Louis Walker was in possession of a chrome .25 caliber semi-automatic pistol, and Washington saw him shoot Garrett twice with the pistol. *Id.* at 5694-95. Washington also saw Jason Walker cross the street, walk over to Garrett, and shoot him once with a black .38 caliber automatic. *Id.* at 5695-96. Washington had seen Walker in possession of that gun several times previously. *Id.* at 5696.

Jason McGill testified that he was across the street from the Beacon gas station when he heard a commotion across the street. RT Jan. 11, 2006, at 5226. He saw Greer and Garrett wrestling with each other. *Id.* at 5226-27. While they were wrestling, McGill saw Jason Walker

approach Garrett and then shoot him with a black semiautomatic pistol from a distance of five or six feet. *Id.* at 5227-28. He only saw one shot, but heard two more after he turned to run away. *Id.* at 5228. McGill testified that the second two shots sounded different than the first shot, as if they came from a smaller weapon. Id. at 5228-29.

Sharolette Simpson testified that she accompanied Nishetia Jones (Greer's girlfriend) to the Beacon station and was present when Garrett was killed. RT Jan. 5, 2006, at 4904-05. Simpson saw Jones arguing with Garrett outside of the Beacon station when a black car arrived at the gas station. *Id.* at 4909. Greer approached Jones and Garrett from the direction of the car and started arguing and fighting with Garrett. *Id.* at 4911-12. Simpson saw several other people approach the scene from the direction of the car and begin to attack Garrett as well. *Id.* at 4913-14. Simpson then saw a person whom she later identified as Louis Walker shoot Garrett twice. *Id.* at 4915-18.

Jason Hickerson testified that he spoke with PDF member Willis Nelson about Garrett. RT Dec. 7, 2005 (afternoon session), at 60-62. Nelson told Hickerson that Garrett had previously shot Nelson and that Garrett was selling drugs in PDF territory. *Id.* at 62. Nelson told Hickerson that he had "killers on the payroll." *Id.* at 63. Hickerson testified that, according to Nelson, Garrett, who was not a member of PDF, was selling drugs in the gang's territory and refused to stop when warned to, prompting threats of violence from PDF. *Id.* at 59. Hickerson relayed this threat to Garrett, who ignored it and continued to sell drugs in PDF territory. *Id.* at 60. *See also* RT Dec. 7, 2005 (morning session) at 129-131.

Two days after the Garrett killing, Dante Webster had a conversation with Jason Walker about what happened at the Beacon Station. Walker told Webster that Garrett was "out of pocket," meaning that he was "in violation" or "he did something he wasn't supposed to do." RT Dec. 15, 2005, at 86-87. Walker also said that that's "how the West get down." *Id.*

5. Murder of Devin Russell

On January 29, 1998, at approximately 2:30 a.m., Devin Russell was shot with a shotgun at the intersection of Sonoma Boulevard and Kentucky Street, which is in PDF territory. RT Jan. 19, 2006, at 5927. Prior to being admitted to emergency surgery, Russell told the Vallejo Police

Department (VPD) that he had been shot by someone he knew, but he did not mention the name of that person. *Id.* at 5930.

Corporal Herndon of the Vallejo Police Department was the first officer to arrive at the scene. *Id.* at 5883. He observed that Russell had suffered several shotgun wounds and was having a hard time breathing; his eyes were starting to roll back in his head. *Id.* Based upon these observations, Herndon told Russell, "Dude, you are going to die, tell me what happened." *Id.* at 5884. Russell indicated that a young Mexican male named Oscar was present during the shooting, and that a black man who was with Oscar was the shooter. *Id.* at 5885.

Uvonda Parks testified that she saw Charles White shoot Russell with a sawed-off shotgun. RT Jan. 24, 2006 (afternoon session), at 6186, 6204, 6206. According to Parks, Oscar Gonzales and others were present during the homicide, and Gonzales gave White the shotgun. *Id.* at 6202-03. Parks testified that she approached White, Gonzales, and the others as they were confronting Russell and asking him "where's the money." *Id.* at 6191-93. Parks heard Russell repeatedly beg the three men to believe him that he "wouldn't do you no wrong" and "never would rob you." *Id.* at 6200-6201. Russell also pled with Parks to vouch for him. *Id.* at 6199-6200. The crowd formed a circle around Russell, at which point both White and Gonzales attempted to hit Russell with their fists, but missed. *Id.* at 6201.

Gonzales disappeared for a few moments and then reemerged a few minutes later. *Id.* at 6201-02. Gonzales then walked over to White and they appeared to speak to each other. *Id.* at 6203. Soon afterward, White displayed a sawed-off shotgun, pointed it at Russell, and fired. *Id.* at 6204, 6206. At this point Parks turned to leave the scene and heard a second shot, but did not see who fired it. *Id.* at 6208. Parks then saw White, Gonzales, and their colleagues all approach Russell and kick him as he was on the ground. *Id.* at 6209-6210. After the killing, White caught up with Parks and followed her home. *Id.* at 6210. White told Parks that Russell was killed because he had been a "snitch." *Id.* at 6211-12.

Parks later contacted the police, who sent detectives to interview her. RT Jan. 24, 2006, at 6220-24. She gave the police White's street name, but falsely told them that a nonexistent man

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named "Tray" participated in the shooting. *Id.* Parks refused to participate in the photographic lineup process. RT Jan. 24, 2006, at 6225.

Derrick Shields testified that prior to Russell's murder, White told him he planned to "get" Russell because Russell had testified against PDF member Elliott Cole in the Jewel Hart homicide case. RT Feb. 2, 2006, at 7135-37. Shields observed White and Gonzales together at the latter's home around 11:40 p.m. on the night Russell was killed. *Id.* at 7140. The following day, Shields again saw White and Gonzales near Gonzales's house. *Id.* at 7141-42. White and Gonzales bragged about having "got that fool," a reference to Russell the night before. *Id.* at 7142:6-19.

Mickalla Oliver, who was dating Russell at the time, broke off the relationship because she had learned that Russell would be targeted for testifying against Cole, which frightened her. RT Jan. 31, 2006 (morning session), at 6775-76. Charles McClough testified that Elliott Cole told him that "something needed to happen" to Russell to punish him for testifying against Cole in the Jewel Hart homicide, which resulted in Cole going to prison. RT Jan. 12, 2006, at 5530. According to McClough, White and Arnando Villafan told him that White shot Russell with a 12-gauge shotgun. *Id.* at 5532-34. McClough was told that White's initial plan was to shoot Russell from the roof overlooking an alley where others were leading Russell. *Id.* at 5534. When White tried to shoot Russell from the roof, however, the shotgun jammed. *Id.* at 5534-35. After White fixed the jam, he shot Russell twice. *Id.* at 5535.

Sedrick Perkins testified that before Russell's murder, Greer warned him not to associate with Russell because Russell was snitching. RT Jan. 26, 2006 (morning session), at 6371-72. Perkins saw White with a sawed-off shotgun a few months before Russell's murder. *Id.* at 6372-73. About half an hour after Russell was killed, Perkins saw White and Cole a few blocks from where Russell was killed. *Id.* at 6375-76. White was carrying an army bag that looked like it had a shotgun inside and he remarked that they "got that snitch." *Id.* at 6376-77. Cole said "that's how we do it in the West." *Id.* at 6377. Cole made similar statements to Perkins again a couple weeks later when they were talking about the Russell killing. *Id.* at 6378.

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Emily Garcia, Gonzales's cousin, testified that the night Russell was killed, Gonzales, White, and two friends were at Gonzales's house shortly before the murder. RT Jan. 24, 2006 (afternoon session), at 6165-66. Dorothy Jansen, Gonzales's aunt, testified that after the shooting she saw Gonzales, White, and Villafan going up the stairs of Gonzales's house. *Id.* at 6159.

6. Murder of Larry Cayton

On the morning of April 7, 2000, the Redwood Credit Union in Novato, California, was robbed. RT Jan. 26, 2006 (afternoon session), at 6503-04. The perpetrators wore ski masks and gloves, *id.* at 6508, and announced that they carried guns, *id.* at 6506. After entering the bank, they told everyone to get down, got behind the teller line, and started taking cash from the teller drawers. *Id.* at 6504, 6506. The robbers took approximately $15,000 from the bank. *Id.* at 6509. As they made their escape, their car was followed by two witnesses. *Id.* at 6523-27. At some point, the robbers leapt out of the car and fled on foot. *Id.* at 6528-29. The police arrived after the robbers had fled the scene. *Id.* at 6531.

In March 2000, Greer, Jason Walker, Charles White, and Larry Cayton visited Anthony Freeman, a friend of Greer, and expressed interest in buying a car Freeman owned. *Id.* at 6557-59. Greer, Walker, and White, along with Mark Tarver and two other unidentified men, returned a second time to view the car and discuss a purchase. *Id.* at 6559-60. Approximately one or two weeks later, the car disappeared from Freeman's house. *Id.* at 6560-61. Sometime later, after the bank robbery, Freeman told Greer that law enforcement had inquired about the car. *Id.* at 6561-62. Greer responded that Freeman should tell the FBI that the car was stolen, and instructed Freeman, "Don't worry about anything because you didn't do anything." *Id.* at 6562.

Mickalla Oliver, the girlfriend of Larry Cayton, told law enforcement that when she and Cayton were together Cayton would point out banks and indicate which ones he would rob and which ones he would not rob. RT Jan. 31, 2006 (morning session), at 6743. He would articulate the reasons to her why a particular bank would be a good or bad target. *Id.* at 6743-44. She also testified that Cayton and Greer were together most of the time during the days before the robbery of the Redwood Credit Union. *Id.* at 6746-50.

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Shortly after the April 7 robbery at the credit union, Oliver was traveling from Vallejo to Novato on Highway 37. *Id.* at 6754. Oliver saw Cayton driving on Highway 37 in the opposite direction, toward Vallejo, in Oliver's car that she had let him borrow the day before. *Id.* at 6754-55. Later that day, Oliver asked Cayton where he was that morning and he told Oliver he was at home the entire morning. *Id.* at 6757-58. Oliver confronted Cayton in front of Greer and told him that she had seen him driving her car on Highway 37 toward Vallejo earlier that morning. *Id.* at 6758. Cayton and Oliver then went outside so they could talk on the porch. *Id.*

Cayton told Oliver that he did what he had to do because he was "tired of being broke." *Id.* at 6759. Oliver then asked him what he did with her car and Cayton told her that her car had not been involved in what he had done. *Id.* at 6759. Cayton then told Oliver not to tell Greer anything about the incident and suggested a story to explain to Greer why Cayton and Oliver had to speak in private on the porch. *Id.* at 6759:20-6760:7.

The next morning, Oliver returned to work in Novato. *Id.* at 6765-66. Oliver testified that while she was at work she saw an article in the local newspaper about the bank robbery that had occurred the previous day in Novato. *Id.* at 6766. Oliver recognized a photograph of the car depicted in the article as belonging to Greer. *Id.* at 6767-69. Oliver recognized Greer's car because during the time she lived at Lee Street she had seen the car parked there on a number of occasions. *Id.* at 6768. Greer made comments in her presence indicating that the car was his. *Id.* at 6768.

Larry Cayton was killed in Oakland on the morning of April 8, 2000. RT Jan. 31, 2006 (afternoon session), at 6864. Connie Phillips, who allowed Cayton to stay at her residence temporarily, testified that the afternoon prior to Cayton's death, she arrived home from work to find Cayton and Greer at her apartment watching a movie. *Id.* at 6859. At some point they left the apartment, although Cayton returned later that evening for about five minutes to retrieve some clothes. *Id.* at 6860. At about 4:00 a.m. the following morning, Phillips heard knocking at her front door. *Id.* at 6861. Phillips's boyfriend, Irwin Crews, went to see who was at the door. *Id.* Crews testified that he opened the front door and found Greer, who told him that he had left an

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article of clothing at the apartment. *Id.* at 6883-84. Greer went to a closet and looked around briefly before leaving. *Id.* at 6884-85.

Approximately twenty minutes later, Cayton came into the apartment through the back door. *Id.* at 6862. Cayton then shut the door to the bedroom where Phillips and Crews were located. *Id.* Phillips heard footsteps and muffled voices of at least two other men with Cayton. *Id.* at 6862-63. Phillips was unable to tell who these two men were. *Id.* at 6863. Phillips testified that at one point Cayton said, in an agitated tone, "Don't even come at me like that." *Id.* at 6863-64. Cayton and the men left the apartment shortly thereafter. *Id.* at 6864:5-6.

At approximately 5:30 a.m. on April 8, Clifford Rosa, a homeless person, was camped underneath a freeway overpass on 29th Street in Oakland. RT Mar. 1, 2006 (afternoon session), at 8675. Rosa observed a light blue Ford Taurus carrying three people turn a corner, pull over, and turn its lights off. *Id.* at 8676. The occupant of the front passenger seat walked to the rear door, pulled out the passenger by the collar, and shot him. *Id.* at 8680. When the victim fell to the ground, the shooter stood over him and fired several more rounds into him. *Id.* at 8685. The driver then said, "We got to get out of here," the shooter got back into the vehicle, and the vehicle left the area. *Id.* at 8686. Rosa flagged a passing CHP officer and told him what had happened. *Id.* The victim was later identified as Larry Cayton. Rosa described the shooter and the driver as Caucasian or light-skinned. *Id.* at 8676-78. Rosa admitted, however, that he was ingesting two dime bags of heroin a day during that time period. *Id.* at 8692-93. He also had trouble seeing things at a distance. *Id.* at 8721-22.

At about 4:00 p.m. on that same day, Phillips was informed by the Oakland Police that Cayton had been shot and killed. RT Jan. 31, 2006 (afternoon session), at 6864. Two days later, on Monday, Phillips and Crews stayed home from work. *Id.* at 6886; 6864-65. That day, Greer and a companion paid a visit to Phillips's apartment to find out what Phillips and Crews knew about Cayton's death. *Id.* at 6886-87. Two days later, on Wednesday, Phillips and Crews went back to work. *Id.* at 6867-68; 6887. On that day, Phillips's home was broken into. A key was used to unlock the back door, but because there was a chain across the door the intruder still had

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to force his way into the residence. *Id.* at 6887-88. Cayton was the only person who had a key to the back door. *Id.* at 6869-70.

Although there was money out in the open in Phillips' residence, as well as valuable electronics, the only thing taken by the intruder was the video Cayton and Greer had been watching the afternoon before the murder, as well as a few rap CDs by local artists. *Id.* at 6871-72. The only portion of the residence the intruder disturbed was the closet Cayton used to store his clothes and belongings. *Id.* at 6889. Phillips and Crews could not tell if anything had been taken from this closet. *Id.* at 6890. They were, however, able to ascertain that no other portion of the residence had been disturbed, and that other than the video and CDs nothing else had been taken. *Id.*

Derrick Shields testified that he met Greer and Cayton in prison and they discussed having committed bank robberies. RT Feb. 2, 2006 (morning session), at 7091-92; 7096-7100. Shields and Cayton spent a good deal of time together in the late winter and early spring of 2000, after they both had been released from prison. *Id.* at 7100-01. The afternoon after the Redwood Credit Union robbery, Shields encountered Cayton at a gas station, where Cayton inquired about purchasing a large quantity of marijuana from Shields and showed Shields $1,500 in cash he proposed to use to buy the drugs. *Id.* at 7101-03.

Shields learned of Cayton's death the next morning, from Elliot Cole. *Id.* at 7105. Later that day, Greer approached Shields and told him that he felt he had no choice but to kill Cayton. *Id.* at 7107-08. Shields also testified that before Cayton's death, Greer had complained that Cayton was starting to talk too much to other people about confidential information. *Id.* at 7107-08.

Shields cooperated with the government's investigation of this case. He was in custody on May 9, 2000, on unrelated charges when the FBI interviewed him about the murder of Larry Cayton. ECF No. 1184-1, at 2. Ex. A (FBI-302). The FBI arranged for Shields to be released from custody for two weeks for the purpose of wearing a wire on Greer, Walker, White, and others, in order to get information about PDF and the Cayton murder, after which Shields was returned to custody and completed his sentence. RT Feb. 2, 2006 (afternoon session), at 7158-59;

7147-48. During one of these wired calls, Shields discussed the Cayton homicide with Greer, Greer stated that Cayton was talking to various women about their "business," which Greer considered unacceptable. ECF No. 1184-2; RT Feb. 2, 2006 (afternoon session), at 7116-19. During this tape-recorded conversation, Greer also told Shields, "I'd do the same thing again . . . if it all came down to it." ECF No. 1184-2 at 3.

Following the Cayton homicide, there was an extensive investigation by both the Oakland Police Department and the FBI. When Mickalla Oliver confronted Charles White about Cayton's death, White asked Oliver for Cayton's cell phone (which White had already given to the police), and then made her promise that she wouldn't snitch on them. RT Jan. 31, 2006 (morning session), at 6777-79. Oliver was afraid for her life and left the state of California. *Id.* at 6780:10-20.

Anthony Freeman testified that Greer left California and went to Philadelphia in the summer of 2000 to live with his brother there. RT Jan. 26, 2006 (afternoon session), at 6564. According to Freeman, Greer told him that it was "getting hot" in Vallejo as a result of the police and FBI investigation into the Cayton homicide, and Greer wanted to "let it cool down a little bit." *Id.* After Greer's return to California, Freeman had several contacts with him. Greer, White, and Marc Tarver came to see Freeman in July 2000. *Id.* at 6565. Greer told Freeman that Cayton was "gone," but declined to provide any other details because Freeman didn't "need to know about it." RT Jan. 30, 2006 (morning session), at 6583.

7. Greer's Possession of Cocaine Base

Eric Teed, a cashier at Palace Billiards in Vallejo, testified that on April 26, 1997, he heard several gunshots and saw a man get into a Mustang driven by another person and drive away. RT Dec. 13, 2005, at 10-16. He gave a description of this man to the police when they arrived. *Id.* at 17. The police later stopped the Mustang. *Id.* at 18. Greer was seated in the rear seat, behind the front passenger, Jason Walker was seated behind the driver, and Arnando Villafan was seated next to the driver. *Id.* at 76. Police discovered two bags containing cocaine base under the right front passenger seat, directly in front of Greer. *Id.* at 77-79. Police seized $53.00 from Greer, $243 from Villafan, and $184 from the driver of the vehicle. *Id.* at 81, 108.

No money was taken from Jason Walker. *Id.* at 108. At trial, Greer denied that the drugs were his. However, he acknowledged that he was convicted of possession of cocaine base in connection with this incident. RT Feb. 22, 2006, at 8079-80.

C. The Defense Case

The following summary of the defense case is taken from the opening brief on appeal filed by Greer and his co-defendant, Jason Keith Walker.

> The defense theory was that the PDF was a rap group, not a street gang. The defendants and other PDF members were struggling to become rap artists. RT 7090-91, 7315-17. Derrick Shields had written and recorded a song with Mr. Walker. RT 7325. Mary Downs, who ran "Murderdog," a magazine devoted to rap music, testified that PDF appeared in Murderdog in 1993 or 1994. RT 8799. She vaguely recalled the rap group, but believed it had not been successful, not an uncommon occurrence. RT 8799, 8816.
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> Appellants also sought to raise a reasonable doubt as to the truth of the charges. With few exceptions, the government witnesses were highly unreliable. In some instances, they were themselves suspected in the crimes about which they testified. The defense also presented testimony that disputed the version of events put forth by government witnesses.
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> For example, the defense presented evidence that Connie Townley, who testified about the Roberts murder but claimed that she did not witness the shooting, had previously admitted, both to FBI agents and a defense investigator, that she was an eyewitness to the homicide. Although she could not positively identify the shooter, she previously stated that she had seen a single shooter get out of the car that was chasing Roberts and fire several shots into him. RT 8224-25, 8530, 8540-42. Townley also had previously identified "E" as Eric Webster and made statements that the vehicle chasing Roberts was similar to his. RT 8525, 8532-33, 8543. Townley's prior statements thus contradicted McClough's testimony that several people were involved in shooting Roberts, as well as the government's theory that three people stood over the victim and took turns shooting him as he lay on the ground.
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> The government's theory that multiple defendants shot Roberts also was contradicted by the testimony of Henry Younger, a local accountant, who was working in his office when Roberts was killed. He heard several gunshots, fired in rapid succession, too quickly for the gun to have been passed around. RT 8664-65.
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> Many of the government's important witnesses lacked credibility. Hickerson, McGill, Perkins, Webster, and Shields all had lengthy criminal histories, belonged to rival gangs, and made numerous inconsistent statements. *E.g.* 12/7/05 78-82; 12/15/05 RT 115-18, 194; RT 5210, 5236-49, 5331-32, 5366-74, 5384-86, 5483-85, 5620, 5624. Derrick Washington committed perjury while trying to

frame Greer for shooting Larry Rude. RT 5711-12. Washington tardily admitted that he was involved in the shooting, but not before he falsely testified before a federal grand jury. RT 5703-06, 5715-31. Witness testimony also supported an inference that Washington, rather than Jason Walker, was the second shooter of Richard Garrett. *See supra* at 22-23. Two witnesses placed Washington at the scene, and testified that the shooting occurred shortly after he joined the altercation. RT 4837-38. Accordingly, Washington had a powerful motive to inculpate the defendants.

Webster was a suspect in the shooting of Eric Jones, a friend of Shango Greer's. RT 8902. McClough had a grudge against White and a lengthy history of serious mental problems. Furthermore, Sedrick Perkins testified that McClough had been shunned by other West Vallejo gang members, after it was revealed that he was gay. RT 6406-07, 6438-39. Furthermore, after first testifying for the government, McClough testified for the defense that when White made the statements about the Roberts murder, White also told McClough that he was lying. RT 8552-53.

Uvonda Parks was particularly unbelievable. *See supra* at 26-27. In addition to making up a person who allegedly participated in the homicide, she was an admitted drug dealer, with a history of providing false information to law enforcement.

Shango Jaja Greer took the stand in his own defense. Having lived in west Vallejo since he was five, Mr. Greer knew many of the codefendants from school, Little League, and Pop Warner football. RT 7931-32. Mr. Greer was incarcerated in the California Youth Authority from the end of 1989 until July, 1992, making it impossible for Dante Webster to have met Mr. Greer in 1991 as he testified. RT 7938. While he was in CYA, Mr. Greer became opposed to drugs. "I seen the effect I [sic] was having on my community." He never sold drugs after he was released from CYA. RT 7944-7945. Some of the friends that he grew up with joined the Crips, but Mr. Greer did not, although he continued to associate with them. RT 7949.

In 1993, Mr. Greer moved to Sunnyvale and then to Palo Alto. In 1997, when his mother was diagnosed with cancer, he returned to Vallejo. After a prison term, he moved back to Palo Alto. RT 7974, 7975.

Mr. Greer became involved with music at a young age. His mother and his uncle were singers, his brother is a rapper, and Mr. Greer has been writing rap music since he was in his early teens. RT 7942. Within a few months of getting out of CYA, Mr. Greer and his friends took the name "Pitch Dark Family" for their rap group. Greer testified: "We never conspired to be a gang, sell no drugs. All we do is make music." RT 7962. Greer testified that PDF did not cease to exist in 2001, but "That is basically when we were at our peak . . . [I]n 2000, 2001, we were all home, working with different individuals. We had compilation albums coming out . . . I was . .. touring with my brother. We were doing all kinds of things together." RT 7963.

> The PDF published a number of rap songs and performed in Vallejo. Mr. Greer toured with his brother in Texas, Florida, Louisiana, and Los Angeles. RT 7977. While Mr. Greer was in Los Angeles, promoting a PDF demo CD, he had some PDF hats made up which he occasionally passed out at shows. RT 7979.
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> When Cayton was murdered in Oakland, Mr. Greer was in Vallejo. Late that same evening, Anastasia Ingram, Mr. Greer's wife, picked Mr. Greer up in Vallejo and took him back to East Palo Alto. The next day, she was present with Mr. Greer when he got a phone call informing him that Mr. Cayton had been murdered. RT 8475.
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> Mr. Greer denied having anything to do with the murder of Larry Cayton. RT 8168, 8177. He denied involvement in the Redwood Credit Union robbery, which the government claimed was the motive for the Cayton murder. Mr. Greer testified that he and Cayton were "good friends," and were housed together in the same dorm in prison. RT 8086, 8088. Derrick Shields was in a different dorm and they rarely saw each other, contrary to Shields' testimony. RT 8098. When Mr. Cayton got out of prison, Mr. Greer gave him $500. RT 8101.
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> On the night Richard Garrett was murdered, Mr. Greer got into a fistfight with him over the way he was treating Nashitia Jones, the mother of Mr. Greer's oldest daughter. Mr. Greer did not know Garrett. "[T]he guy was towering over her all in her face . . . [S]he was scared." RT 8027, 8031, 8040. Greer told Garrett that he shouldn't be treating Nashitia like that. Garrett tried to hit Greer with a beer bottle, he blocked it, hit him, and the fistfight began. RT 8043. Mr. Greer heard two shots, Garrett dropped to the ground, he turned around and saw Derrick Washington holding a gun and Sedrick Perkins walking with a gun in his hand. As Mr. Greer ran off, he heard two more shots. RT 8045, 8049-8051.

ECF No. 1184-10 at 44-49.

IV. Law Applicable to Motions Pursuant to 28 U.S.C. § 2255

A federal prisoner making a collateral attack against the validity of his or her conviction or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255, filed in the court which imposed sentence. *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344-45 (1974); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also*

United States v. Montalvo, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.") Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346. *See also United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

Under § 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section, '[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting 28 U.S.C. § 2255). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996) (internal quotation marks omitted). *See also United States v. Withers*, 638 F.3d 1055, 1062-63 (9th Cir. 2011); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003). To warrant a hearing, therefore, the movant must make specific factual allegations which, if true, would entitle him to relief. *Withers*, 638 F.3d at 1062; *McMullen*, 98 F.3d at 1159. Mere conclusory assertions in a § 2255 motion are insufficient, without more, to require a hearing. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980).

V. Greer's Claims

Greer raises numerous claims in his § 2255 motion alleging that his trial and appellate counsel rendered ineffective assistance. In the traverse, Greer describes the framework of his claims as follows:

> Was the evidence sufficient to establish beyond a reasonable doubt that Pitch Dark Family (PDF) was an "enterprise" (not merely an undefined street gang), as defined by the RICO statute and case law, and (2) did Greer and/or Walker participate in the "affairs" of an "enterprise" through a "pattern" of racketeering activity? (3) Did appellate counsel provide ineffective assistance in violation of the Sixth Amendment by omitting a challenge to the sufficiency of the evidence on direct appeal?

ECF No. 1205 (Traverse) at 9-10. The specific claims described in the traverse are: (1) there was insufficient evidence introduced at Greer's trial to support the racketeering charges; (2) Greer's

trial and appellate counsel rendered ineffective assistance through numerous errors; (3) the government committed misconduct, in violation of *Brady v. Maryland* 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972); and (4) Greer's appellate counsel rendered ineffective assistance in failing to challenge the government's expert opinion testimony concerning the origin of cocaine base.

On direct appeal, Greer raised the following claims: (1) the trial court's admission into evidence of the testimony of Detective Fowler violated Fed. R. Evid. 703 (permissible bases of an expert's opinion testimony) and Greer's Sixth Amendment right to confrontation; (2) the trial court erred in admitting the testimony of Charles McClough regarding three conversations during which Greer and Walker failed to deny their participation in the alleged predicate racketeering act of the murder of Keith Roberts; (3) evidence of "other acts" was improperly admitted into evidence at Greer's trial; (4) Special Agent French's statements about the truthfulness of Danyea Gray's testimony to the grand jury warranted reversal of Greer's convictions under the plain error standard; and (5) the prosecutor committed misconduct in the following particulars: (a) when asking witnesses about the difficulty of testifying against the defendants; (b) when asking Special Agent French about the potential consequences of alleged instances of witness intimidation; (c) by giving personal assurances as to the veracity of the witnesses; (d) by insinuating that extra-record material supported the witnesses' testimony; and (e) by vouching for the testimony of Special Agent French. *United States v. Walker*, 391 F. App'x 638 (9th Cir. 2010) at **1-3.

To the extent Greer is attempting to raise in his § 2255 motion the same claims or arguments that he raised on appeal, his claims are not cognizable. *See United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (claims previously raised on appeal "cannot be the basis of a § 2255 motion."); *United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979) ("[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding."). *See also Davis v. United States*, 417 U.S. 333, 342 (1974) (issues determined in a previous appeal are not cognizable in a § 2255 motion absent an intervening change in the law). Further, claims challenging the sufficiency of the evidence are not cognizable in § 2255 motions. *See United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) (movant's "evidence-based" claim that

"called into doubt the overall weight of the evidence against him" was not cognizable in § 2255 motion); *Barkan v. United States*, 362 F.2d 158, 160 (7th Cir. 1966) ("a collateral proceeding under section 2255 cannot be utilized in lieu of an appeal and does not give persons adjudged guilty of a crime the right to have a trial on the question of the sufficiency of the evidence or errors of law which should have been raised in a timely appeal"); *United States v. Collins*, 1999 WL 179809 (N.D. Cal. Mar. 25, 1999) (insufficiency of the evidence is not a cognizable attack under section 2255).

Similarly, claims that could have been, but were not, raised on appeal are not cognizable in § 2255 motions. *United States v. Frady*, 456 U.S. 152, 168 (1982((a collateral challenge is not a substitute for an appeal); *Sunal v. Large*, 332 U.S. 174, 178 (1947) ("So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal"); *Unites States v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985) ("Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal"). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice," or that he is "actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted).

Greer has not demonstrated that he is "actually innocent." However, "[i]neffective assistance of counsel constitutes 'cause' for failure to raise a challenge prior to section 2255 collateral review." *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). Thus, Greer's claims of ineffective assistance of counsel are cognizable in this § 2255 motion. After setting forth the applicable legal principles, the court will address Greer's claims of ineffective assistance of counsel below.

1. Legal Principles: Ineffective Assistance of Counsel

The applicable legal standards for a claim of ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a *Strickland* claim, a defendant must show that (1) his counsel's performance was deficient and that (2) the "deficient

performance prejudiced the defense." *Id.* at 687. Counsel is constitutionally deficient if his or her representation "fell below an objective standard of reasonableness" such that it was outside "the range of competence demanded of attorneys in criminal cases." *Id.* at 687–88 (internal quotation marks omitted). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687).

A reviewing court is required to make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 669; *see Richter*, 562 U.S. at 106. Reviewing courts must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This presumption of reasonableness means that the court must "give the attorneys the benefit of the doubt," and must also "affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks and alterations omitted).

Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. A reviewing court "need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

The *Strickland* standards apply to appellate counsel as well as trial counsel. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). However, an indigent defendant "does not have a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Counsel "must be allowed to decide what issues are to be pressed." *Id.* Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." *Id. See also Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (Counsel is not required to file "kitchen-sink briefs" because it "is not necessary, and is not even particularly good appellate advocacy.") There is, of course, no obligation to raise meritless arguments on a client's behalf. *See Strickland*, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing to raise a weak issue. *See Miller*, 882 F.2d at 1434. In order to establish prejudice in this context, Greer must demonstrate that, but for counsel's errors, he probably would have prevailed on appeal. *Id.* at 1434 n.9.

2. Ineffective Assistance of Trial Counsel

a. Failure to Interview and Call Marcus Taplin and Eric Webster to the Stand

Greer claims that his trial counsel rendered ineffective assistance in failing to call Marcus Taplin and Eric Webster as trial witnesses. The court will address these claims in turn below.

i. Marcus Taplin

As set forth above, Jason Hickerson testified about his attempted murder. Among other things, he stated that a group of people, including Greer, Jason Walker, Jones, and Marcus Taplin, exited a grey vehicle and chased him before he hid in a garage. RT Dec. 7, 2005, at 104-06. After he left the garage, the same group of people, including Marcus Taplin, found and chased him again, at which point he was shot. *Id.* at 111-12. Jones was later convicted of the attempted murder of Jason Hickerson in state court after his plea of guilty. *Id.* at 47.

Greer states that FBI agents interviewed Marcus Taplin about his involvement in the attempted murder of Jason Hickerson. ECF No. 1126 at 38. Greer explains that during this interview:

> Marcus Taplin stated that he did not know anyone named Jason Hickerson. He further stated that he did not know Jason Walker/Shango Greer nor did he ever hear of a gang called "Pitch Dark Family".

Id.[5] Greer argues that his trial counsel should have interviewed and called Marcus Taplin as a witness to "refute" Jason Hickerson's testimony that Taplin was involved in his attempted murder. *Id.* He argues that Taplin's testimony could have provided a challenge to Hickerson's claim that Taplin was in the grey vehicle and could have resulted in "the likelihood that the jury would have believed that Petitioner Greer was not in that automobile either." *Id.* at 42. Greer further argues that Taplin's testimony "would have possibly acquitted Petitioner Greer for the Racketeering Act 2 (the attempted murder of Jason Hickerson).

In the traverse, Greer informs the court that Hickerson did not mention at the preliminary hearing, as he did at Greer's trial, that he saw Marcus Taplin jump out of a car and chase him into a garage. ECF No. 1205 at 75. He also notes that Hickerson's testimony at the preliminary hearing was inconsistent in several other respects with his trial testimony (e.g., Hickerson testified at the preliminary hearing that he found some drugs in an alley, whereas at trial he admitted he stole the drugs from a car; and he stated at the preliminary hearing that he only saw Greer and another person inside the car before he was shot but identified additional persons in the car at trial). *Id.* at 76. Greer asserts that Hickerson was "a proven and admitted liar," and that testimony from Taplin that he was not involved in Hickerson's attempted murder would have further impeached Hickerson's credibility as a witness. Specifically:

> Had Taplin testified that he did *not* know Hickerson, Greer, Walker, or anything about PDF and was *not* in a car with Greer, or Walker and others who chased and eventually shot Hickerson, Hickerson's account of the incident would have been further impeached, raising a reasonable doubt as to the presence of [Greer or Jason Walker] at the time Hickerson was shot.

Id. at 76-77. Greer notes that he (Greer) was the only witness allegedly involved in the pursuit and shooting of Hickerson to testify about that incident at trial. *Id.* at 76.

The government counters that any error resulting from the failure of Greer's trial counsel to call Taplin as a witness was harmless. ECF No. 1184 at 38. It notes that Greer testified at his

[5] The record reflects that, while Taplin denied knowing these individuals, he later admitted he might have heard their names or "said hi or bye to them." ECF No. 1184-3 at 2. Taplin denied being present at a shooting that took place in Vallejo. *Id.*

trial that he had been with the group in the car that was following Hickerson on the day he was shot, even though he stated that he left the group before the shooting. RT Feb. 21, 2006, at 8009-17. It argues that Greer's testimony regarding the Hickerson shooting was not credible and that testimony by Taplin that he was unaware of PDF or any of its members would have been similarly incredible. ECF No. 1184 at 39. The government notes that the involvement of Marcus Taplin in the shooting of Hickerson formed only a limited portion of the trial testimony on that subject. *Id.* It argues that "trial counsel's choice not to call Taplin to the stand was well-within the realm of an objectively reasonable strategic decision." *Id.* at 40.

ii. Eric Webster

Greer also argues that his trial counsel rendered ineffective assistance in failing to call Eric Webster as a witness at his trial. Evidence introduced at Greer's trial reflected that Eric Webster, brother of Dante Webster, supplied PDF with guns and drugs. RT Jan. 11, 2006, at 5218, 5288; RT Jan. 18, 2006, at 5702, 5741, 5742; RT Dec. 15, 2005, at 96, 104-05, 121. Eric Webster was also implicated in the Keith "York" Roberts murder. *See, e.g.,* RT March 1, 2006, at 8527-36; 8539-44. Greer claims that his trial counsel should have called Eric Webster to the stand to "refute these allegations as Petitioner Greer urged his attorney to do." ECF No. 1126 at 39. He suggests that Eric Webster:

> could have told investigators and testified at trial that he never supplied Petitioner Greer nor "PDF" with any drugs or guns as alleged at trial. He could have been out of state on business and thus proved so during the time of the conspiracy. Or even incarcerated. He also could have been cross-examined about the Keith Roberts murder. Possibly giving an negative impression which would have added on to Townley's testimony.

Id. at 41.

The government argues that counsel's decision not to call Eric Webster as a witness was consistent with the defense strategy that another gang ("Folks"), and not PDF, had committed all of the crimes alleged in the indictment but had "set up" PDF to take the blame. ECF No. 1184 at 40-42. The government cites portions of the defense closing argument to support its argument that a failure to call Eric Webster to the stand was consistent with the defense theory that "many of the witnesses were Folks members or associates and were all trying to set up the completely

innocent rap group, PDF, and its members." *Id.* at 41. The government argues that Eric Webster would likely not have testified consistent with this defense theory and this is why Greer's trial counsel chose not to call him as a witness. *Id.* at 42.

iii. Analysis

Greer's claim that his trial counsel rendered ineffective assistance in failing to call Marcus Taplin and Eric Webster as trial witnesses should be rejected due to Greer's failure to make a sufficient showing of prejudice with respect to either witness. Without credible evidence as to what additional witnesses would have testified to at trial, a habeas petitioner cannot establish prejudice with respect to a claim of ineffective assistance of counsel for failing to call trial witnesses. *See Dows v. Wood*, 211 F.3d 480, 486-87 (2000) (no ineffective assistance of counsel for failure to call an alleged alibi witnesses where petitioner did not identify an actual witness, did not provide evidence that the witness would have testified, nor presented an affidavit from the alleged witness he claimed should have been called); *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) (same); *United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (no ineffective assistance because of counsel's failure to call a witness where, among other things, there was no evidence in the record that the witness would testify); *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (appellant failed to satisfy the prejudice prong of an ineffectiveness claim because he offered no indication of what potential witnesses would have testified to or how their testimony might have changed the outcome of the hearing).

Greer has failed to demonstrate that Marcus Taplin and Eric Webster would have testified at his trial or, even if they had, that they would have testified in the manner that Greer suggests. Although Greer proposes possible testimony that these witnesses may have given, his speculation in this regard is insufficient to demonstrate prejudice. It is also possible that Greer's trial counsel investigated the possibility of calling these two witnesses but determined that their testimony was not credible and/or would not be helpful to the defense theory. As set forth above, this court must give defense counsel the benefit of the doubt and must also "affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did." *Cullen,* 563 U.S. at 196.

Greer has failed to demonstrate that trial counsel's failure to call either of these witnesses fell outside the wide range of professional assistance or rendered his trial fundamentally unfair. Accordingly, he is not entitled to federal habeas relief on these two claims ineffective assistance of counsel.

b. Failure to Challenge the Testimony of Detective Fowler pursuant to Fed. R. Crim. P. 16(a)(1)(G)

Fed. R. Crim. P. 16(a)(1)(G) provides as follows:

> Expert witnesses.--At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

In his next claim for relief, Greer argues that the government failed to comply with Rule 16(a)(1)(G) in that it did not adequately disclose the opinions about which prosecution expert witness Detective Fowler was going to testify or "the foundation, bases and reasons" for Fowler's opinions. ECF No. 1126 at 118-19. He claims that his trial counsel rendered ineffective assistance in failing to raise an objection to Fowler's testimony based on the government's violation of Rule 16. *Id.*

Greer states that "one of the key elements of a RICO conspiracy is the structure, organization, and management of the affairs of a racketeering enterprise, all as they relate to conducting the affairs of an enterprise through a pattern of racketeering activity." *Id.* at 120. He asserts that Detective Fowler was "called as the final witness in the government's case-in-chief to tie the case all together, providing an expert opinion that PDF was a street drug gang that controlled a section of West Vallejo where its members dealt drugs." *Id.* at 122. He argues that whether or not PDF was a RICO enterprise should have been proven with "facts," and not the opinion of Detective Fowler. *Id.* In support of this argument, Greer cites *United States v. Mejia*,

545 F.3d 179, 195 (2d Cir. 2008), in which the Second Circuit vacated the defendant's conviction for racketeering-related crimes because essential elements had been proven through opinion testimony. He argues that his trial counsel's failure to object to the Fowler's testimony based on the government's failure to comply with Fed. R. Crim. P. 16(a)(1)(G) improperly "allowed the government to prove a RICO case through Detective Fowler's testimony." *Id.* at 125.

Greer notes that Fowler testified he wrote a complete report and gave it to the prosecutors. *Id.* He states that no such report was turned over to the defense. *Id.* He further argues that Fowler's testimony was not admissible under the Federal Rules of Criminal Procedure and that "there can hardly be anything more prejudicial to Petitioner Greer than allowing the jury to hear evidence that is not admissible in a RICO prosecution." *Id.* at 126. In essence, Greer argues that Detective Fowler was not qualified to render an opinion as to whether PDF was a RICO enterprise and that his trial counsel rendered ineffective assistance in failing to challenge Fowler's testimony under Fed. R. Crim. P. 16(a)(1)(G).

Among other arguments, the government points out that Greer's trial counsel did raise an objection to Detective Fowler's testimony on the grounds that the government failed to comply with Rule 16(a)(1)(G). The government argues that, for this reason, Greer's ineffective assistance of counsel claim lacks a factual basis and should be denied. This court agrees.

Greer's trial counsel and counsel for Jason Walker filed a joint motion in limine entitled "Motion in Limine – Challenge to Government's Proferred Gang Expert's Qualifications." ECF No. 497. Therein, Greer and Walker argued that the government had failed to provide the disclosures required by Rule 16(a)(1)(G) and 18 U.S.C. § 3500 with regard to the testimony of Detective Fowler. *Id.* at 2. They requested an *in limine* "Daubert" hearing.[6] *Id.* at 3.

Subsequently, trial counsel for Jason Walker and Greer filed a joint motion "for Discovery of Gang Expert's Required Disclosures." ECF No. 531. Therein, they detailed their attempts to

[6] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), the United States Supreme Court defined the "gatekeeping role" of district courts with respect to expert testimony, declaring that "the Rules of Evidence - especially Rule 702 - [ ] assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."

obtain from the government "a written summary of Det. Fowler's testimony, his opinions, the bases and reasons for those opinions, his qualifications, and a copy of all court transcripts in which Det. Fowler had testified and qualified as an expert witness in both state and federal courts." *Id.* at 3. Walker and Greer argued that the government had not "appropriately or substantively complied with Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure." *Id.* at 3-4. Their motion included a detailed list of documents sought pursuant to Rule 16(a)(1)(G). *Id.* at 4-7. The joint motion for discovery was heard on November 14, 15 and 17, 2005. During that hearing, the issue of appropriate disclosures under Rule 16(a)(1)(G) was extensively addressed. ECF Nos. 535, 538, 541; RT, November 14, 15, 17, 2005.

As described above, Greer's trial counsel filed several motions challenging the testimony of Detective Fowler based on the government's failure to comply with Fed. R. Crim. P. 16(a)(1)(G). Those motions were given a full hearing in the trial court. Greer's claim that his trial counsel failed to raise such a challenge simply lacks a factual basis and must be denied.[7]

c. Failure to Challenge Perjury Committed by Uvonda Parks During the Grand Jury Stages

This claim is discussed below, in connection with Greer's claims of ineffective assistance of appellate counsel.

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[7] The government also argues that some of Greer's arguments of ineffective assistance of trial counsel were raised and rejected on appeal and may not be raised again in this § 2255 motion. Greer argues in this motion that Fowler's testimony as a gang expert was inadequate to demonstrate that PDF was a RICO enterprise because it was based on his "opinion" and not on facts, and that the testimony of other trial witnesses failed to make the required showing. Greer made similar arguments on direct appeal, claiming that: (1) the trial court erred in admitting Detective Fowler's testimony on "street intelligence" and admissions by Greer's co-defendants, because whether PDF was a RICO enterprise was a factual matter that did not require "expert interpretation;" (2) an expert witness cannot be used as a "conduit" for introducing otherwise inadmissible hearsay evidence; and (3) the opinion testimony of Detective Fowler was not sufficient, standing alone, to establish that PDF was a RICO enterprise. ECF No. 1184-10 at 72-75. The Ninth Circuit concluded that Detective Fowler's testimony was "both reliable and relevant and thus admissible" under Federal Rule of Evidence 702." *Walker,* 2010 WL 3069915, at *1. Thus, to the extent that Greer is making the same arguments in this § 2255 motion, or raising the same claims that he made on appeal, they are not cognizable. *See Redd*, 759 F.2d at 701 (claims previously raised on appeal "cannot be the basis of a § 2255 motion). The question whether Detective Fowler was qualified to testify at Greer's trial was extensively litigated in the trial court and on appeal and may not be re-litigated in this § 2255 motion.

d. Misinforming Greer about his Maximum Penalty

Greer was sentenced to life in prison. ECF No. 775. He claims that his trial counsel "misinformed" him about the maximum penalty he faced. ECF No. 1126 at 139. He claims that: (1) his trial counsel told him that the maximum sentence he could receive was "20-years for a violation of § 1962(d);" (2) prior to trial, counsel told Greer that the government had offered him a 13-year sentence to plead guilty to the RICO violations; (3) his trial counsel failed to explain the sentencing guidelines to him; (4) trial counsel failed to discuss with him "the advisability of whether to accept or reject the government's plea offer due to the fact that he could be enhanced for predicate acts pursuant to the Sentencing Guidelines;" and (5) counsel did not convey to him "his opinion as to the wisdom of the plea nor did he give any suggestions as to how to deal with the government's plea offer." *Id.* at 139-40; *see also* ECF No. 1141 at 6. Greer states that he did not think he could receive a mandatory life sentence for a RICO violation and that "if properly advised by counsel, he would have accepted the [plea offer of 13 years] instead of proceeding to trial." ECF No. 1126 at 140. In essence, Greer claims that his trial counsel failed to advise him "of the correct maximum penalty, a mandatory life sentence." ECF No. 1205 at 79. He requests that "this issue be bifurcated and addressed only if the Court finds the evidence was sufficient to support the RICO convictions beyond a reasonable doubt." *Id.* at 81.

The government counters that Greer's representations about the advice he received from his trial counsel are not supported by the record facts. First, the government provides evidence that Peter Kmeto, Greer's trial counsel, was aware of the maximum sentence that Greer faced. In a letter sent to the government prosecutors more than a year prior to Greer's trial, counsel stated as follows:

> It bears noting that if the government decides against seeking the death penalty for Mr. Greer, the offenses charged in Counts I and II of the Indictment, if proven, subject our client to a sentence of life imprisonment. See 18 U.S.C. § 1963(a) which provides that a violation of any section of 1962 shall be punished by not more than twenty years or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. In the instant case the racketeering acts alleged in Counts I and II are based, in part on allegation [sic] for which the maximum penalty includes life imprisonment.

ECF No. 1184-4 at 4.

The government also provides evidence that Greer was informed from other sources that he could receive a maximum sentence of life in prison. Specifically, during his initial appearance and arraignment, the trial court informed Greer that counts one and two of the indictment carried a "maximum potential penalty of life," and that count four carried a potential sentence of "the death penalty or life in prison." ECF No. 1180 at 3. At a subsequent court hearing at which Greer was present, Mr. Kmeto stated that Greer and Jason Walker were "facing life sentences." RT Feb. 7, 2006, at 7206. The government argues that "one can fairly infer that [Greer's and Walker's] very competent attorneys had in fact previously advised them of the maximum penalty." ECF No. 1184 at 51. The government also provides evidence that the trial court carefully selected counsel for defendants in this case based on their "experience and qualifications." *See* RT Mar. 10, 2003, at 4. The government also argues that this court "need not abandon its practical experience because [Greer] makes highly dubious claims" about the advice he received from his trial counsel about his possible sentence. The government requests that this court examine Greer's claim in light of the trial record as a whole and the experience and credentials of Greer's trial counsel. ECF No. 1184 at 53.

The *Strickland* standards apply to claims of ineffective assistance of counsel involving counsel's advice offered during the plea bargain process. *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2009); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *Nunes v. Mueller*, 350 F.3d 1045, 1052 (9th Cir. 2003). Trial counsel must give the defendant sufficient information regarding a plea offer to enable him to make an intelligent decision. *Id.* at 881. "[W]here the issue is whether to advise the client to plead or not 'the attorney has the duty to advise the defendant of the available options and possible consequences' and failure to do so constitutes ineffective assistance of counsel." *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981)). The relevant question is not whether "counsel's advice [was] right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759,

771 (1970) (holding that all defendants facing felony charges are entitled to the effective assistance of competent counsel).

To show prejudice in the context of plea offers, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S. Ct. at 1384. In cases where trial counsel's defective advice caused the defendant to reject a plea offer and proceed to trial, prejudice is demonstrated where "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 1385.

Greer's unsupported and self-serving statements (that he relied on inaccurate advice from his counsel when deciding to proceed to trial) fail to establish either deficient performance or prejudice. *See, e.g., Womack v. Del Papa*, 497 F.3d 998, 1004 (9th Cir. 2007) (ineffective assistance of counsel claim denied where, aside from his self-serving statement, which was contrary to other evidence in the record, there was no evidence to support his claim); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (noting that there was no evidence in the record to support petitioner's ineffective assistance of counsel claim, "other than from Dows's self-serving affidavit"); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (defendant's self-serving statement, under oath, that his trial counsel refused to let him testify insufficient, without more, to support his claim of a denial of his right to testify); *Elizey v. United States*, 210 F. Supp. 2d 1046, 1051 (C.D. Ill. 2002) (petitioner's claim that his trial counsel failed to advised him to accept a proffered plea agreement not sufficiently supported where only evidence was petitioner's "own self-serving affidavit and record facts contradicted petitioner's affidavit."). There is no evidence in the record before the court, aside from Greer's unsupported allegations, that Greer's trial counsel guaranteed a certain sentence, that he failed to advise Greer of his options, that he failed to explain the sentencing guidelines, or that he completely failed to discuss the government's plea offer with him. On the other hand, the record provides abundant evidence that trial counsel and

Greer were both aware of the fact that Greer could receive a life sentence if he proceeded to trial. The court also observed that the identical nature of the claims being made by Walker and Greer about the advice given by their separate trial counsel casts doubt on the veracity of their claims.

After a review of the record in this case, this court concludes that Greer has failed to show that trial counsel's advice at the plea bargain stage was outside the range of competence demanded of attorneys in criminal cases. Accordingly, Greer is not entitled to relief on this claim.

3. Ineffective Assistance of Appellate Counsel

a. Counsel's Failure to Challenge Perjury Committed during Grand Jury Proceedings by Derrick Washington, Jason Hickerson, Uvonda Parks, and Dante Webster

Greer contends that the grand jury indictment was based on false and material testimony given by Derrick Washington , Jason Hickerson, Uvonda Parks, and Dante Webster. ECF No. 1205 at 16; ECF No. 1126 at 4-20, 21-31, 127-139. He claims his appellate counsel rendered ineffective assistance in failing to challenge the indictment on this basis. ECF No. 1126 at 32. The court will address these claims in turn below.

i. Derrick Washington

On December 6, 2000, Derrick Washington testified before the grand jury. He stated that Greer was involved in the murder of Larry Rude. ECF No. 370 (sealed) at 34-36; ECF No. 1126 at 5-7. Washington also testified about the history, structure, membership, and activities of PDF, including shootings and sales of illegal drugs. ECF No. 370 at 25-50. Washington's testimony about Larry Rude's murder was false.

On December 18, 2002, after the grand jury was disbanded, a new grand jury met to read transcripts of the testimony of witnesses who had testified before the December 6, 2000 grand jury and to hear additional testimony in this case. ECF No. 402 (sealed), at 2. One of the transcripts the new grand jury reviewed was Derrick Washington's previous testimony about Rude's murder. *Id*. After the grand jury had reviewed the transcript, the prosecutor informed the grand jurors that:

> With respect to Derrick Washington . . . we also had sort of had information come in that raised some questions about what happened the night of the Larry Rude shooting. And without us specifically telling him we knew, he came clean with us and acknowledged that he had, he had lied. He had not been truthful about the Larry Rude shooting in that it was not Shango [Greer] who was the second shooter with Lou, that it was him . . .

Id. at 21.[8] The prosecutor also informed the grand jurors that Washington had "some severe learning disabilities" and "is not a really intelligent person;" that he "felt very badly" about the murder and wished he could apologize to Rude; that he was afraid of Greer because he was "the most frightening of the people in the group;" that he had "seen and heard about [Greer] doing really bad things" and for that reason Washington decided to implicate Greer; and that "it's the only thing like this he's [Washington] ever been involved in." *Id.* at 22-23.

After making these statements, the prosecutor asked the grand jurors if they could believe the rest of Washington's testimony to the previous grand jury after hearing that he had lied about the Larry Rude murder. *Id.* at 23. One juror responded that he could believe the rest of Washington's testimony, notwithstanding his perjury about the Larry Rude murder. Several other jurors responded that they could not believe any of Washington's testimony after hearing about the perjury. *Id.* at 23-24, 27. Approximately one month later, the second grand jury returned the indictment against Greer and Jason Keith Walker.

Greer argues that Washington's testimony was crucial to the government's case that the PDF was a racketeering enterprise. ECF No. 1126 at 8. He argues that Washington "provided essential testimony to [sic] PDF shooting people, selling dope having gang signs and tattoos." *Id.* He argues that "Derrick Washington's 'perjurious' testimony gave the crucial link the Grand Jury needed to indict pursuant to RICO" and that Washington's perjurious testimony was directly relevant to the RICO allegations and whether PDF was an "enterprise" under that statute. *Id.* at 8, 16. Greer argues that without Washington's false testimony, "the Grand Jury had no evidence

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[8] Washington testified at Greer's trial that he, and not Greer, shot and killed Rude, but that he falsely told the police that Greer was involved in this shooting. RT Jan. 18, 2006, at 5710-11. He explained that he made the initial false report because he was "scared" and didn't want to go to jail. *Id.* at 5711. The murder of Larry Rude was not a predicate act in this case, nor was it referenced in the indictment.

that PDF was an ongoing organization, nor that they functioned as a continuing unit," and that without Washington's testimony "the government did not provide the Grand Jury any ascertainable structure distinct from the alleged racketeering activity itself." *Id.* at 8, 19. Greer notes that Washington provided testimony with respect to shootings by PDF members, selling narcotics, and using gang signs and tattoos. *Id.* He states that Washington's grand jury testimony provided the history of PDF and "the beginning of a so called organization titled "PDF." *Id.*

Greer also argues that Washington's testimony to the December 6, 2000 grand jury that Greer was a shooter in the Larry Rude murder was "'material' to the Grand Jury returning an indictment for the RICO charges." *Id.* He further argues that Washington's testimony that Greer shot Rude because PDF member Lew was also shooting him provided a link between Greer himself and the activities of PDF. *Id.* at 8-9. Greer notes that although the prosecutor specifically corrected Washington's testimony about who was responsible for Rude's murder, she did not ask Washington if he lied about other testimony, such as the shooting being connected to PDF activities. *Id.* at 9. Greer complains that the prosecutor "did not return Washington to the Grand Jury to correct his perjury making 'PDF' an organization with a chain of command and structure." *Id.* at 10. Instead, according to Greer, the prosecutor "vouched" for Washington and tried to rehabilitate Washington's credibility. *Id.*

Greer notes that Washington was implicated in the Richard Garrett shooting as well. *Id.* at 12-13. He argues that because the jury foreman stated he would not believe "anything Washington had to say" after learning that Washington had lied to the first grand jury, the veracity of Washington's testimony on other subjects, such as testimony about the Garrett and Roberts murders, was also suspect. *Id.* at 13. He argues that the prosecutor "tried to clean up [Washington's] testimony." *Id.*

"When a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision." *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) (citing *Costello v. United States*, 350 U.S. 359 (1956). However, the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the

government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel - and, if the perjury may be material, also the grand jury - in order that appropriate action may be taken. *Basurto*, 497 F.2d at 785-86. The prosecution has a duty "not to permit a person to stand trial when he knows that perjury permeates the indictment." *Id.* at 785. On the other hand, a prosecutor does not have a duty to disclose substantial exculpatory evidence to a grand jury, even if that evidence impeaches the credibility of grand jury witnesses. *United States v. Haynes*, 216 F.3d 789, 298 (9th Cir. 2000).

In this case, the government argues that any error in presenting the testimony of Washington to the grand jury was cured by a guilty verdict from the trial (petit) jury. ECF No. 1184 at 55. *See United States v. Navarro*, 608 F.3d 529, 536 (9th Cir. 2010) ("Even if error in the grand jury proceedings . . . was brought to the attention of the district court prior to trial, where the motion was denied and a guilty verdict was returned, the error is rendered harmless by the verdict); *United States v. Mechanik*, 475 U.S. 66, 70 (1986) ("the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt").

Greer counters that the prosecutor improperly attempted to rehabilitate Washington before the grand jurors and, in effect, recruited them to collaborate in neutralizing any negative effect from Washington's perjury. ECF No. 1205 at 85-89. Greer argues that the prosecutor's conduct "resulted in a grand jury which was neither neutral nor detached, but actively engaged in ensuring the conviction of [Greer and Jason Walker] before they had determined whether they should be indicted." *Id.* at 85. He contends that the prosecutor essentially vouched for the credibility of Washington, notwithstanding his perjury, through her own unsworn statements about his motives and his fear of Greer. Greer further argues, "this was not a mere 'defect' in the process but rather intentional conduct meant to steer the grand jury not only to an indictment by glossing over

Washington's admitted perjury and murder of Lawrence Rude but to enlist the grand jury in convicting petitioners." *Id.*

In support of this argument, Greer cites *United States v. DeRosa*, 783 F.2d 1401, 1404 (9th Cir. 1986), which held that "the prosecutor may not circumvent the constitutional safeguard of a grand jury by overreaching conduct that impinges on the grand jury's autonomy and interferes with its exercise of unbiased judgment." *Id.* at 1404. Greer argues the prosecutor's attempts to explain to the grand jurors why Washington lied before the previous grand jury violates this rule.

Greer also criticizes the following exchanges between the prosecutor and the grand jury, which occurred after the jurors had been advised about Washington's perjury but before they had decided whether to issue an indictment:

> GRAND JUROR: I have another question. So if, if you just cut him (Washington) loose, it probably doesn't come into it at all. Yeah, I guess I, if I'm the family of the victim here, whether this guy gets off scot-free or whatever, I'd at least like to have it stated that I'd like to hear for myself that guy shot my whoever, and killed my – you know what I mean? So I guess –
>
> MS. RAFKIN (the prosecutor): Okay. But that's not going to come out at the trial.

ECF No. 402 (sealed) at 31.

> GRAND JUROR: Are you going to be the attorney who's going to be there trying to sell the jury on how –
>
> MS. RAFKIN: Oh, yeah. Yeah. Do you think I could get anybody else to take this for me?
>
> (Laughter.)
>
> * * *
>
> GRAND JUROR: You have to really establish why he changed, you know –
>
> MS. RAFKIN: Yeah. So, but I still want to know, even if –
>
> GRAND JUROR: Well, because his own neck was on the line.
>
> MS. RAFKIN: I, my sense is even if I give you all of that, that there are some of you that that's not going to make a difference. And I want to know that. There are –

* * *

So, the question is, all right, if you reject him, and a defense attorney came at you that this tainted the whole case, knowing what else you know, would you go all right, I'm going to follow him to the extent that I think this guy's full of shit and I'm not going to believe anything he says, but that doesn't mean I'm going to throw out the rest of the government's case.

You know, if you threw, if you disregarded his testimony, would that change the way you viewed the rest of the evidence you saw, knowing what you've known before?

GRAND JUROR: And you've still heard it. You've still heard it.

MS. RAFKIN: Yes.

Id. at 32-34.

GRAND JUROR: No, I, I'd leave him in.

GRAND JUROR: I would, too.

GRAND JUROR: I would, too.

GRAND JUROR: I've been in three, three jury trials all the way through, and your, your concerns are very valid, and somebody may just pick it up and say this doesn't belong at all, but the, the majority of the people will say take the parts that they believe and take the parts that they don't believe, and then there'll be a big argument. And – and, however it sorts out is – but I would fear more leaving him out and not having that additional information myself. That's my feeling.

GRAND JUROR: And if you handle it right, you'll, you'll have sympathy from the jury for him. If he was one summer and he's extraordinarily sorry about it.

GRAND JUROR: I'd stick him in the middle of the mix.

(Laughter.)

Id. at 36.

GRAND JUROR: But can you use him in the, in the trial, then? I mean –

MS. RAFKIN: Oh yeah. That'll be, that'll be a year or two down the road . . .

Id. at 37-38.

> GRAND JUROR: . . . if you had an expert with Washington to explain that, would that help?
>
> MS. RAFKIN: It may. And it certainly is something that I, you know, you run, you run the – I would, I would want to think everything through, is a jury going to think it's worse and that it's more – does it draw more attention to it by putting an expert . . . I definitively would think about. And some of it would probably depend on what – because it would be in rebuttal, or later in the case. I would see what happened with the cross examination, and how well he came off.

Id. at 41-42.

Greer argues that the prosecutor's actions in essentially engaging the grand jurors in strategy sessions "placed in jeopardy 'the integrity of the criminal justice system,' denying [Greer and Jason Walker] their right to have the indictment tested by its independent judgment." ECF No. 1205 at 89. Greer argues that dismissal of the indictment was warranted by the prosecutor's misconduct and that appellate counsel's failure to raise this issue on appeal constituted ineffective assistance, in violation of the Sixth Amendment. *Id.*[9]

Greer filed a motion in the trial court to dismiss the indictment on the grounds of abuse of the grand jury and prosecutorial misconduct. Therein, he raised all of the arguments that he raises in the § 2255 motion before this court. ECF No. 195. The trial judge denied the motion to dismiss after hearing extensive argument from the parties. He ruled as follows:

> With respect to the perjury of Derrick Washington and the comments of Ms. Rafkin that accompanied an apparent explanation of his statements or his testimony, perjured testimony, Ms. Rafkin did say to the Grand Jury that he, Washington, came clean with us and acknowledged that had lied; he had not been truthful about the Larry Rude shooting and it was not Shango who was the second shooter with Lou. It was him.
>
> I think that admission, even though accompanied by what Mr. Lapham [attorney for the United States] said, certain unsworn statements by the prosecutor, is not good. That would be at least not good, Mr. Lapham. I'm not here to approve Ms. Rafkin's conduct in this case, but I am here to impose what I think is a very – I think [defense counsel] would agree as would all the lawyers in this case, this is a very difficult and high standard I have by exercising my supervisorial powers to set aside an Indictment.

[9] The government informs the court that it "does not endorse" the practice of having a prosecutor request the grand jurors' perspective on trial strategy. ECF No. 1184 at 58 n.25. However, it argues that the prosecutor's actions in this case were harmless.

> The standard has been described in several places, but the Ninth Circuit, *Busher*[10] states: "A defendant challenging and [sic] Indictment carries a heavy burden. He must demonstrate that the prosecutor engaged in flagrant misconduct that deceived the Grand Jury or that significantly impaired its ability to exercise independent judgment."
>
> I don't think that standard has been met here. The prosecutor did inform the Grand Jury of Washington's perjury. In fact, the Rude shooting was not part of the Indictment and I would find that it is not material to the Indictment, that perjurious testimony, because it related to the Rude shooting.
>
> Obviously, with respect to Washington and his credibility, the government is not obligated to impeach witnesses appearing before the Grand Jury. I just don't feel that the facts in this case meet the standard and warrant dismissal of the Indictment, despite the conduct of Ms. Rafkin.

Reporter's Transcript (RT), Change of Plea for Defendant Gonzales; Motions Hearing, September 19, 2005, at 23-24.

In light of the record before the court, Greer has failed to demonstrate either deficient performance or prejudice with respect to this claim of ineffective assistance of appellate counsel. As the trial judge observed, Washington's false testimony involved only the murder of Rude; there is no evidence he testified falsely about the structure and activities of PDF. Although petitioner argues Washington's false testimony about the Rude murder permeated his grand jury testimony as a whole, there is no evidence of that in the court record. In any event, the jury found Greer guilty of the racketeering charges after hearing all of the evidence, including Washington's testimony. This rendered any error in the grand jury proceedings harmless. *Mechanik*, 475 U.S. at 70. Further, Washington's perjury was not material to this case because the Rude murder was not alleged in the indictment. *Cf. Basurto*, 497 F.2d at 785 ("the perjury before the grand jury was material"). This court also notes that, unlike in *Basurto*, the grand jurors here knew about Washington's perjury before the indictment was issued, leaving them free to exercise independent judgment while in possession of the relevant facts regarding Washington's credibility.

Given the high standard to prevail on a motion to set aside an indictment, there is no reasonable probability a claim of prosecutorial misconduct would have prevailed on appeal under

[10] *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

the circumstances of this case. *See United States v. Trass*, 644 F.2d 791, 796 (9th Cir. 1981) ("(d)ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way") (citations omitted). Appellate counsel's decision not to include this claim in Greer's direct appeal, but instead to focus on claims that counsel believed had more merit was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Accordingly, Greer is not entitled to relief on this claim of ineffective assistance of appellate counsel.[11]

ii. Jason Hickerson

Greer's next claim is that his trial counsel rendered ineffective assistance "by not challenging the knowingly committed perjury by Jason Hickerson during the Grand Jury proceedings." ECF No. 1126 at 21. He argues that "such misconduct should be punished through the supervisory powers of this Court by ordering dismissal of the indictment in this case." *Id.* at 28. In the traverse, Greer argues that none of Hickerson's testimony (presumably, before the grand jury and at trial) "can support any RICO conviction in this case beyond a reasonable doubt." ECF No. 1205 at 20.

The background to this claim is the following. Jason Hickerson testified at the preliminary hearing about his attempted murder. He also testified about these matters before the grand jury in this case and during Greer's trial. At the preliminary hearing, Hickerson testified that Greer was involved in his attempted murder, but he did not implicate Jason Walker.

Hickerson testified that prior to the time of his attempted murder, he broke into a Chevrolet in order to steal a stereo and found two ounces of crack cocaine, an Uzi submachine gun, and a sawed-off shotgun, which he took from the vehicle. ECF No. 1126-1 at 21-22. At the preliminary hearing, Hickerson testified that after he took these items, several people in a car, including Greer and Eric Jones, shot him. *Id.* at 25-31. However, before the grand jury and at Greer's trial, Hickerson identified several other people as being in the car as well, including Jason

[11] Any direct claim of prosecutorial misconduct in connection with the testimony of Derrick Washington is not cognizable in this § 2255 motion because it was or could have been raised on direct appeal. *Sunal*, 332 U.S. at 178; *Frady*, 456 U.S. at 168.

Walker. ECF No. 1126 at 27. Greer also informs the court that Hickerson testified at the preliminary hearing that he found the drugs in some bushes in an alley, but at Greer's trial he testified that he stole the drugs from the Chevrolet. *Id.* at 35; ECF No. 1205 at 20.[12] Greer notes that Hickerson did not testify at the preliminary hearing that Jason Walker was involved in his shooting. ECF No. 1126 at 27-28.

Greer contends that the government was aware prior to his trial that Hickerson had committed perjury because "Jason Hickerson had testified during state proceedings that Eric Jones and Shango Greer were the only individuals inside of the Honda." *Id.* at 28. He argues that the prosecutor "knew along [sic] that Jason Hickerson had testified to differing events during the state preliminary hearing in 1994." *Id.* at 30. He argues that "to knowingly submit perjured testimony to the Grand Jury in this case" violated his right to due process. *Id.* In his § 2255 motion, Greer claims that his appellate counsel rendered ineffective assistance in "not challenging the knowingly committed perjury by Jason Hickerson." *Id.*

Greer argues that he suffered prejudice from his appellate counsel's failure to raise this issue on appeal because Hickerson's trial testimony was essential to Racketeering Act Two (the attempted murder of Hickerson). *Id.* at 31. Greer argues that "had appellate counsel raised the *Basurto* line of cases, there is a likelihood that Petitioner Greer's indictment would have been dismissed for perjury at the grand jury." *Id.* at 32. He also argues that Hickerson's testimony about the attempted murder helped to establish that PDF was a criminal enterprise whose members engaged in acts of violence. *Id.* He contends that had his appellate counsel challenged Hickerson's testimony, "the government would not have had the necessary two Racketeering Acts that are needed for a RICO offense." *Id.* In the traverse, Greer argues that "none of Hickerson's impeached, untruthful, unreliable, unbelievable testimony can support any RICO conviction in this case beyond a reasonable doubt." ECF No. 1205 at 20.

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[12] At Greer's trial, Hickerson testified he originally stated he found the drugs in the bushes because he "didn't want to get a burglary charge." RT Dec. 7, 2005, at 48.

The government counters that the testimony of Hickerson was "only arguably inconsistent, not perjured," and that the government had no duty to impeach his credibility before the grand jury. ECF No. 1184 at 60. The government also argues that Greer's appellate counsel acted reasonably in failing to challenge Greer's conviction on this ground, noting that the trial jury later found Greer guilty of the charges beyond a reasonable doubt. *Id.* at 60-61. The government argues that counsel's decision not to raise this issue "demonstrates a valid, strategic choice to refrain from raising a weak issue on appeal." *Id.* at 61.

The government also argues that there is no evidence Hickerson's testimony at Greer's trial was false. *Id.* The government explains that Hickerson omitted Walker's name during his 1994 preliminary hearing testimony because he was afraid of Walker, who was in the courtroom during the testimony, "staring Hickerson down." *Id.* at 62. *See* RT, Dec. 7, 2005, at 47-48; RT Dec. 12, 2005, at 9-11. Hickerson testified he did not mention Walker's involvement in the crime because he was afraid of retaliation from Walker. RT. Dec. 12, 2005, at 10-12. The government also notes that defense counsel raised the inconsistencies between Hickerson's preliminary hearing testimony and his trial testimony at trial when he cross-examined Hickerson. *See* RT Dec. 7, 8, 12, 2005.

The government provides evidence that on January 15, 2003, shortly before the indictment was presented to the grand jury, FBI agents interviewed Hickerson about the differences between his 1994 preliminary hearing testimony and his 2001 grand jury statements. Hickerson stated that he had decided not to implicate Walker in his attempted murder at the preliminary hearing because he was concerned for his safety after observing Walker making threatening gestures during his preliminary hearing testimony. ECF No. 1184-6. The government argues, "[t]hus having information that Hickerson's grand jury testimony was the accurate version of events, there was no misconduct in presenting the indictment to the grand jury." ECF No. 1184 at 63.

Greer has failed to substantiate his claim that the prosecutor in this case knew that Hickerson's testimony in any of the three tribunals was "perjured." As noted by the government, the fact that a witness testifies inconsistently does not support a claim that the prosecutor committed misconduct in presenting his testimony, without evidence that the prosecutor knew, or

shown have known that the testimony was false. *See Allen v. Woodford*, 395 F.3d 979, 995 (9th Cir. 2005) ("Allen asserts no evidence, even assuming that Kenneth's trial testimony was false, that the State 'knew or should have known' that it was false"); *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) ("The fact that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false"); *United State v. Sutherland*, 656 F.2d 1181, 1203 (5 Cir. 1981) (insufficient evidence that prosecution knew witness' testimony was false where it was inconsistent with her grand jury testimony, where the grand jury testimony was available to defendants and formed the basis of cross-examination as to the prior inconsistent statements).

In this case, the defense knew about the inconsistencies in Hickerson's testimony, and those inconsistencies were explored during counsel's cross-examination of Hickerson. RT Dec. 7, 2005, Dec. 8, 2005. Indeed, Hickerson testified that he lied at the preliminary hearing, but he explained that he did so because he was afraid of Jason Walker, who was sitting in the courtroom and staring at him during his testimony. RT Dec. 7, 2005, at 47-48; Dec. 12, 2005, at 9-11. Greer's failure to challenge Hickerson's testimony on appeal constitutes a waiver of the claim in this § 2255 motion. *Frady*, 456 U.S. at 168, *Sunal*, 332 U.S. at 178.

The court also notes that there is no evidence the prosecutor knew Hickerson's testimony was false in any material respect. In this regard, Hickerson testified consistently at all three venues that Greer was involved in his shooting. As in the claim above, appellate counsel's decision not to include this ineffective assistance claim in Greer's direct appeal, but instead to focus on claims that counsel believed were more meritorious, was "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771. Accordingly, Greer is not entitled to federal habeas relief on this claim.

iii. Uvonda Parks

Greer also claims that his trial and appellate counsel provided ineffective assistance in failing to challenge "Uvonda Parks perjury during the grand jury stages." ECF No. 1126 at 127. At set forth above, Parks testified that she saw Charles White shoot Devin Russell with a sawed-off shotgun. She had previously falsely told police that a non-existent man named "Tray"

participated in the shooting. Parks testified at trial that she "made Tray's name up." RT Jan. 24, 2006, at 6914. She also refused to participate in the photographic lineup process. *Id.* at 6225.

Greer challenges the following portions of Parks' testimony, both before the grand jury and at Greer's trial:

- Parks testified before the grand jury that she knew "Shady and E and Oscar and Nando" because they "stayed around [her] building," she "knew what they did," and Shady "liked" her. ECF No. 1126, at 128-29; ECF No. 1126-1 at 62. However, at trial, Parks testified that while she sold heroin and cocaine to Shady (Charles), she did not know him "as a friend" and did not "consider him a . . . knowing him," but they did business together. RT Jan. 24, 2006, at 6187. Greer argues that Parks' testimony before the grand jury that she knew Shady was "perjury" that "the government was aware of." ECF No. 1126 at 130.
- At Greer's trial Parks testified that before Devin Russell was shot she and a group of people were walking down Sonoma Boulevard and encountered a person named Smooth on the street. They spoke to Smooth briefly and then moved on, leaving Smooth behind. RT Jan. 24, 2006, at 6195. However, Parks testified a short time later that Smooth was standing against the wall at the time of the shooting, thus implying that the group did not leave Smooth behind, as she had earlier testified. *Id.* at 6206.
- During the grand jury proceedings on June 12, 2002, Parks stated that Nando kicked the shooting victim, but at trial she stated that three other men kicked the victim; she did not mention Nando. ECF No. 1126-1 at 59; RT Jan. 24, 2006, at 6209.
- Parks told the grand jury on June 12, 2002, that after the shooting Oscar said "Everybody get lost" or "everybody get out," but at Greer's trial she testified that Shady made this statement. ECF No. 1126-1 at 60; RT Jan. 24, 2006, at 6210.
- Parks told the grand jury that "Darnell," whose nickname was "Boo," told her about the Devin Russell murder and that she did not get this information from Charles McClough. However at trial, she testified that "Boo" was actually Charles McClough. ECF No. 1126-1 at 56-58, 208.

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- Parks testified at trial that she saw Oscar Gonzales driving a car in Vallejo with a shotgun in the back seat "days after" the murder of Devin Russell. RT Feb. 1, 2006, at 7008. When confronted with the fact that Gonzales was taken into custody on the date of the Russell shooting and could not have been driving a van in Vallejo on that date, Parks stated that she had apparently "picked the wrong name of who was there." *Id.* at 7008-09.

Greer argues that the "totality" of the lies told by Parks "demonstrate the complete unreliability and unbelievability of her testimony." ECF No. 1205 at 21. Greer points to evidence that Parks could not identify a photograph of Charles White, even though she testified before the grand jury about his involvement in the Russell murder. *Id.* at 21-26. Greer claims that Parks perjured herself before the grand jury by misleading the jurors about who gave her the names of the alleged participants in the Russell murder. *Id.* at 26. He argues that Parks, "in all likelihood," did not witness the Russell homicide, did not know the participants in that homicide, and was only repeating information she was given by Charles McClough. *Id.* at 27. Greer argues that Parks' testimony was prejudicial because: (1) she testified about a murder committed by the PDF in retaliation for Russell testifying against Elliot Cole, an alleged PDF member, and therefore provided a link between the Russell murder and the entity PDF; (2) she was "the only witness to testify that she sold PDF members 'large quantities' of drugs that were not for personal use;" and (3) she testified that Russell was selling drugs for PDF members. In essence, Greer argues that "the government used [Parks'] testimony to establish PDF as a criminal enterprise." *Id.* at 28.

The government argues that Greer defaulted this claim of ineffective assistance of trial counsel by failing to raise it on appeal. ECF No. 1184 at 46. This court agrees. As set forth above, claims that could have been, but were not, raised on appeal are not cognizable in a § 2255 motion. *Sunal*, 332 U.S. at 178. Greer concedes that his trial counsel became aware of Parks' "perjury" at the end of her trial testimony. ECF No. 1205 at 27. Accordingly, a challenge to Uvonda Parks' grand jury testimony could have been raised on appeal. Because it was not, the claim is waived.

The government also argues that, in any event, Greer's trial counsel did challenge Uvonda Parks' grand jury testimony on the ground that it was perjured. ECF No. 1184 at 63. The government notes that trial counsel cross-examined Parks on many of the same topics now challenged by Greer in the instant § 2255 motion. *Id.* at 48. *See also* RT Feb. 1, 2006, at 6915-17, 6920-21, 6928-30. Greer concedes that his trial counsel challenged Parks' testimony, arguing that "time and time again her stories changed." ECF No. 1205 at 27. Based on the foregoing, Greer has failed to demonstrate either deficient performance or prejudice with respect to his claim that his trial counsel rendered ineffective assistance in failing to challenge the inconsistencies in Uvonda Parks' testimony.

Greer has also failed to show that any claim of ineffective assistance of counsel on this basis would have prevailed on appeal. Accordingly, he is not entitled to federal habeas relief on his claim that his appellate counsel rendered ineffective assistance in failing to raise a claim of ineffective assistance of trial counsel for failing to challenge perjury by Uvonda Parks.

iv. Dante Webster

As described above, Dante Webster testified about an incident at Nations Burgers where PDF member Eric Jones ("EJ Rabbit") was shot after he confronted an Oakland drug dealer. Greer contends that Webster's testimony in this regard was contradicted by the testimony of Dina Gutierrez, another trial witness, who saw Webster himself shoot a man running out of Nations Burgers. ECF No. 1205 at 28. *See* RT March 2, 2006, at 8897-8901. Greer notes that Vallejo Police later went to Webster's home and confiscated a handgun which was the same caliber as the gun used to shoot Jones. RT Dec. 15, 2005 (afternoon session), at 201. Webster denied shooting Eric Jones. *Id.* at 204.

Webster testified he did not mention PDF in his interviews with Vallejo police after the shooting at Nations Burgers. *Id.* at 110. He didn't mention it because "the whole situation didn't have anything to do with me." *Id.* He stated that the first time he mentioned PDF to the police was after he was arrested for possession of cocaine. *Id.* at 165. He brought it up then because that was the first time he was asked about PDF. *Id.* at 165-66. As noted above, Webster testified

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in Greer's case in order to obtain sentencing leniency in connection with his own drug case. *Id.* at 111-12.

Greer claims that his appellate counsel rendered ineffective assistance because he "failed to challenge the perjury in front of the Grand Jury pursuant to the *Basurto* line of cases." ECF No. 1126 at 30. He argues that the above facts demonstrate that "Webster's testimony was completely tainted with bias and unreliability and could not support any RICO conviction beyond a reasonable doubt." ECF No. 1205 at 29.

Greer has failed to demonstrate prejudice with respect to this claim. Because Greer was found guilty after a trial, any error in the grand jury proceeding with respect to Webster's testimony was harmless beyond a reasonable doubt. In addition, Greer has failed to demonstrate that Webster's testimony before the grand jury was false. Accordingly, he is not entitled to federal habeas relief.

b. Failure to Raise a Claim Concerning Agent French's Testimony to the Grand Jury that Most Cocaine comes from Outside the United States

In his next claim for relief, Greer argues that his appellate counsel provided ineffective assistance in failing to raise a claim "challenging Agent French's testimony during the Grand Jury proceedings that most cocaine comes from outside of the United States." ECF No. 1126 at 43. The specific testimony to which Greer objects is as follows:

> Q. You mentioned the distribution of narcotics. What kind of narcotics did the investigation indicate that these individuals were involved with?
>
> A. Cocaine base.
>
> Q. Based on your training and experience, does most cocaine come from outside the United States?
>
> A. Yes.
>
> Q. Does that mean that the group's distribution of cocaine affected interstate and foreign commerce?
>
> A. Yes, it did.

ECF No. 1126-1 at 35. Greer argues that Agent French's testimony was "improper opinion

testimony" and that it provided "the crucial link that gave the Grand Jury the power to indict Petitioner Greer under the Commerce Clause." ECF No. 1126 at 43-44. He argues that "had Agent French's improper testimony been challenged on appeal there would have been insufficient evidence that the racketeering crimes affected interstate commerce." *Id.* at 45.

Greer informs the court that cocaine may be used for legitimate medicinal purposes. He also states that "cocaine is manufactured in the state of California," and that "cocaine dispensed in this state generally comes from Los Angeles from the Merck Company and the balance comes from Mallincrodt and Penna, the other manufacturers, all of which are domestic." *Id.* at 44. He argues that French's testimony to the contrary is untrue "and the government knew that it was not true." *Id.* Greer also contends that Agent French did not know whether "the alleged cocaine was imported from any foreign country" and he failed to conduct "any tests" to make this determination. *Id.* In support of this claim, Greer cites *Turner v. United States*, 396 U.S. 398, 423 (1970), in which the Supreme Court made the following observation:

> While one can be confident that cocaine illegally manufactured from smuggled coca leaves or illegally imported after manufacturing would not appear in a stamped package at any time, cocaine, unlike heroin, is legally manufactured in this country; (footnote omitted) and we have held that sufficient amounts of cocaine are stolen from legal channels to render invalid the inference authorized in § 174 that any cocaine possessed in the United States is smuggled cocaine.

The government, on the other hand, argues that Greer has failed to demonstrate Agent French's testimony was inaccurate and that Greer has failed to effectively challenge the trial evidence which supported a finding of an interstate nexus. ECF No. 1184 at 66. The government also argues that any error in presenting the testimony of Agent French to the grand jury was cured by the guilty verdict after a trial. *Id.* at 65. *See Navarro*, 608 F.3d at 536; *Mechanik*, 475 U.S. at 70.

As the government points out, Greer's jury was instructed they had to find that the RICO enterprise affected interstate commerce. The jury verdict demonstrates they found such a nexus. Thus, any error in Agent French's testimony before the grand jury was harmless. *Mechanik*, 475 U.S. at 70 ("Measured by the petit jury's verdict, then, any error in the grand jury proceeding

connected with the charging decision was harmless beyond a reasonable doubt"). Counsel is not ineffective in failing to raise a meritless argument. *See Jones v. Smith*, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985)) (an attorney's failure to make a meritless objection or motion does not constitute ineffective assistance of counsel)); *see also Matylinsky v. Budge*, 577 F.3d 1083, 1094 (9th Cir. 2009) (counsel's failure to object to testimony on hearsay grounds not ineffective where objection would have been properly overruled); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"). Accordingly, Greer is not entitled to relief on this claim of ineffective assistance of appellate counsel.

c. Failure to Challenge Constructive Amendment of the Indictment and Legally Inadequate Theory Submitted to the Jury

In his next ground for relief, Greer claims that his appellate counsel rendered ineffective assistance in failing to challenge "the constructive amendment of the indictment, as well as the legally inadequate theory submitted to the jury." ECF No. 1126 at 45. Greer claims that the government's introduction of evidence that the guns used in various crimes were transported in interstate commerce (in order to provide the required link with interstate commerce) constituted a constructive amendment of the indictment. Greer notes that he was not charged with any firearm or ammunition violations (18 U.S.C. §§ 924(c) and 922(g)). *Id.* at 49. In other words, Greer argues that the trial court allowed the jury to convict him based on the "legally inadequate theory" that the nexus between PDF and interstate commerce could be proven by evidence about guns and the transportation of guns, when he was not charged with any firearms offenses in the indictment. *Id.* at 51. Greer also argues that the indictment charged that "drug distribution," and not firearm use, "gave the government jurisdiction over this case." *Id.* at 47.

In support of this argument, Greer cites *Yates v. United States*, 354 U.S. 298 (1957), o*verruled on other grounds* by *Burks v. United States*, 437 U.S. 1 (1978), in which the United States Supreme Court held that where a general verdict is supportable on one ground but an alternative ground is invalid due to a statute of limitations bar, and it is impossible to tell which

ground the jury selected, the verdict must be set aside. Greer argues that he was convicted on charges for which he had "no notice and thus no opportunity to plan a defense." *Id.* at 53. He further claims that testimony about the use of firearms manufactured in another state constituted "a variance with the indictment." *Id.* He explains:

> The activities that the Grand jury relied upon to find that Petitioner Greer was in violation of the commerce clause was the distribution of cocaine base, as well as residents not being able to rent apartments or open businesses. However, the jury in this case was erroneously given the option of finding Petitioner Greer guilty of a separate charge of a jurisdictional element that is required in a RICO prosecution. That is the Commerce Clause violation.

Id. at 50.

Greer's jury was given an instruction which stated that the element of interstate commerce could be proved by the sale of illegal narcotics or the use of firearms and ammunition manufactured outside the state of California. *Id.* Greer argues that this constituted a constructive amendment of the indictment because he was not charged with use or possession of firearms. He also argues that "none of any of the firearms that the government did seize were ever used in the charged crimes." *Id.* Greer contends that "the government could not have made the connection to interstate or foreign commerce without the illegal impermissible instruction to the jury concerning the weapons and ammunition that Petitioner Greer was not indicted for." *Id.* at 52. Greer argues that "had his appellate counsel raised such issues under the relevant case law, his conviction would have likely been vacated by the Ninth Circuit Court of Appeals." *Id.*

The government notes that the indictment alleges that PDF engaged in acts affecting interstate commerce, but does not specify which acts fulfilled that requirement. ECF No. 1184 at 67; January 29, 2003 Indictment, ¶¶ 2, 6, 18. More specifically, the indictment did not limit those acts to distribution of drugs and did not state that "drug distribution gave the government jurisdiction over this case." Citing *United States v. Fernandez*, 388 F.3d 1199, 1218-19 (9th Cir. 2004), the government argues that the indictment in this case is legally sufficient even though it alleges that PDF engaged in and conducted activities that affected interstate and foreign

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commerce without specifying those activities.[13] *Id.* at 68. The government contends that Greer's argument that the indictment was constructively amended is "patently frivolous." *Id.* at 69.[14]

The government also argues that admitting evidence that the guns used in the various predicate acts traveled in interstate commerce, in order to satisfy the interstate commerce element of RICO, even when no gun charges were alleged, does not constitute a constructive amendment to, or a fatal variance of the indictment. The government reasons that: (1) only a *de minimus* showing of impact on interstate commerce is required, and showing guns traveling in interstate commerce is "a very common method of proof of such elements;" and (2) Greer could have anticipated from the indictment that the gun evidence would be presented at trial. The government points out that the prosecutor stated in her opening remarks that she would be presenting evidence that the guns used in some of the predicate racketeering acts had traveled in interstate commerce, in order to prove an effect on interstate commerce. Specifically, the prosecutor argued:

> Fourth and finally, the government is required to prove that this enterprise had an effect on interstate commerce, and that can be minimal. The evidence in this case is that cocaine, heroin – those are drugs that are not manufactured in the State of California. They're manufactured in foreign countries. That has an effect on interstate commerce, and that will be the evidence at trial.
>
> Weapons that were used will also – you'll hear evidence those are manufactured outside the State of California. That will be offered as further evidence of further activities of the enterprise that effect interstate commerce.

RT Dec. 5, 2005, at 64.

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[13] In *Fernandez*, the Ninth Circuit held that an indictment under the RICO statute need not set forth facts alleging how interstate commerce was affected or state any theory of interstate impact. *Fernandez*, 388 F.3d at 1218-19.

[14] One of Greer's co-defendants filed a motion to dismiss in the trial court, claiming that the indictment was insufficient in failing to set forth facts alleging how interstate commerce was affected by the actions of the criminal enterprise. ECF No. 375 (sealed). At the hearing on that motion the trial judge concluded, relying on the *Fernandez* decision, that "an Indictment need not set forth facts alleging how interstate commerce was effected or state any theory of interstate impact." RT Sept. 19, 2005, at 28. The judge ruled that "the ability to prove nexus at trial is a matter for trial, not for dismissal of an Indictment consideration." *Id.* at 29.

The government also argues that Greer waived any claim of variance in failing to request a continuance of trial in order to meet the government's offer of proof. ECF No. 1184 at 69. S*ee Ridgeway v. Hutto*, 474 F.2d 22, 24 (8th Cir. 1973) (per curiam) (no fatal variance where "there is no indication that the appellant was surprised by the variant proof and no motion was made to the court for a continuance for the purpose of preparing a new defense"); *United States v. Costello*, 381 F.2d 698, 701 (2d Cir. 1967) (no fatal variance where defendant "did not claim surprise below or request a continuance"). The government contends that, under the circumstances set forth above, Greer's appellate counsel did not render ineffective assistance in failing to raise a claim of constructive amendment or variance of the indictment. *Id.* at 70.

"A defendant in a felony trial can only be convicted of charges upon which a grand jury has returned an indictment." *United States v. Arreola*, 467 F.3d 1153, 1162 (9th Cir. 2006). "It is the exclusive prerogative of the grand jury finally to determine the charges, and once it has done so neither a prosecutor nor a judge can change the charging part of an indictment to suit [his or her] own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *United States v. Leichtnam*, 948 F.2d 370, 375–76 (7th Cir. 1991) (quoting *Ex parte Bain*, 121 U.S. 1, 10 (1887)) (alteration in original) (internal quotation marks omitted); *see also United States v. Miller*, 471 U.S. 130, 138 (1985); *Stirone v. United States*, 361 U.S. 212, 216 (1960).

"An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *United States v. Jingles*, 702 F.3d 494, 500 (9th Cir. 2012) (quoting *United States v. Von Stoll*, 726 F.2d 584 (9th Cir. 1984) (quoting *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir. 1981)). An indictment is constructively amended where "the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment." *United States v. Streit*, 962 F.2d 894, 899-900 (9th Cir. 1992). "A variance involves a divergence between the allegations set forth in the indictment and the proof offered at trial." *United States v. Ward*, 747 F.3d 1184, 1189 -1190 (9th Cir. 2014). Put another way, a variance occurs "when the charging terms of the indictment are

left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Jingles*, 702 F.3d at 500. The terms "variance" and "amendment" "can, and often do, mean the same thing." *Id.*

Assuming arguendo that Greer's claim in this regard was not waived for purposes of appeal, it must be denied. The indictment in this case did not state that the nexus to interstate commerce was solely the result of PDF's drug distribution. As set forth above, it was more broadly worded. Pursuant to the authorities cited above, when the nexus requirement has been broadly stated in the indictment the introduction of evidence to show an interstate nexus does not necessarily constitute a fatal variance. The introduction of evidence about use of firearms to show a nexus to interstate commerce in this case did not constitute facts "materially different" from the general allegations contained in the indictment. This can be demonstrated by the fact that none of the defendants objected or showed any surprise during trial when this evidence was discussed or introduced. There is also no reasonable possibility in this case that Greer was convicted of an offense other than that charged in the indictment simply because the government introduced evidence of gun use in order to support the element of interstate commerce.

Appellate counsel's decision not to include this claim in Greer's direct appeal, but instead to focus on claims that counsel believed were more meritorious, was "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771. Accordingly, Greer is not entitled to federal habeas relief on his claim that his appellate counsel rendered ineffective assistance in failing to challenge the constructive amendment of the indictment.

d. Failure to Challenge Insufficiency of Evidence to Support a RICO Conviction under 18 U.S.C. §§ 1962(c),(d)

Greer claims that his appellate counsel rendered ineffective assistance in failing to challenge the evidence offered by the government to support the RICO charge. Specifically, he argues that the "government adduced insufficient evidence to prove that the Pitch Dark Family was a criminal enterprise within the meaning of 18 U.S.C. § 1961(4)." ECF No. 1126 at 60. Greer argues that PDF "lacked the organizational infrastructure and decision-making apparatus required of a RICO enterprise." *Id.* According to Greer, PDF did not have a hierarchical

structure, or any mechanism for controlling and directing the affairs of the group. *Id.* at 63. He contends that the witnesses who testified at his trial about the structure and membership of PDF were unclear, contradictory, inconclusive and, at times, contradicted the government's theory that PDF was a criminal enterprise. *Id.* at 64.

Greer also contends there was insufficient evidence he "conspired with anyone" to commit crimes, that he had any particular role in the organization, or that there was "any ascertainable structure distinct from the alleged racketeering activity itself." *Id.* Greer argues that the criminal acts committed by PDF members were individual crimes, unconnected with the group or its goals. *Id.* at 63-64. He notes there was testimony indicating that other drug dealers operated or were allowed to operate in PDF territory and that PDF did not try to "protect turf." *Id.* at 64-67. Greer argues,

> none of the governments witnesses testified that Petitioner Greer conspired to belonged to a consensual decision-making, structured organization. Nor did the witnesses prove that Greer was a part of a continuing unit.

Id. at 86.

In a related argument, Greer claims that his appellate counsel rendered ineffective assistance in failing to raise a claim that the evidence introduced at his trial was insufficient to support his RICO conviction because the government failed to show he "conspired to engage in PDF's enterprise 'through a pattern of racketeering activity' as required by 18 U.S.C. § 1962(c). *Id.* at 108-09. Specifically, Greer argues that the alleged racketeering acts were not interrelated or a part of continued racketeering activity, but were only isolated or sporadic criminal acts. *Id.* at 109-110. Greer also emphasizes that the government's trial witnesses were not credible and that they failed to prove the elements of a racketeering charge. Greer summarizes his argument in this regard as follows:

> A review of the evidence produced at trial establishes that there was insufficient proof to establish beyond a reasonable doubt that PDF was (1) an "enterprise," having (2) a "common purpose," (3) that PDF functioned as a "continuing unit" and (4) that Greer and [co-defendant] Walker participated in a "pattern of racketeering activities" conducted by PDF.

ECF No. 1205 at 14.

18 U.S.C. § 1961 (4) defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The indictment in this case alleged that the PDF enterprise was "a group of individuals associated in fact," whose members "functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." ECF No. 1 at 2. *See United States v. Turkette*, 452 U.S. 576, 583 (1981) (an associated-in-fact enterprise "is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct"). An associated-in-fact enterprise may be proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

A RICO enterprise is a "group of persons associated together for a common purpose of engaging in a course of conduct," proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id*. In order to prove the racketeering charges against Greer and Jason Walker, the prosecution was required to demonstrate beyond a reasonable doubt that Greer and Walker were involved in an "enterprise" that conducted a "pattern of racketeering activity;" that is, at least two acts of racketeering activity within ten years. *Id.*; 18 U.S.C. § 1961(4), (5). The acts had to be shown to have been related to each other and to "pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

Racketeering acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. A pattern of racketeering activity "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Id.* "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.´ *Id.*

There is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[T]he dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 318). "A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, ___ U.S. ___, 132 S.Ct. 2, *3 (2011).

Greer has failed to meet *Strickland's* deficient performance component with respect to his claim that appellate counsel improperly failed to raise a claim of insufficient evidence to support the RICO charge. Appellate counsel did not render ineffective assistance in focusing on the prosecutorial misconduct and admission of evidence claims that he raised on appeal, rather than challenging the sufficiency of the evidence to support Greer's RICO conviction. Appellate counsel need not raise every non-frivolous issue. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). "'[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). An appellate advocate provides effective assistance by "winnowing out" a weaker claim and focusing on a stronger claim. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential."). *See also Jones v. Barnes*, 463 U.S. 745, 746 (1983) (an experienced attorney knows the importance of "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues"); *Smith v. Murray*, 477 U.S. 527, 536 (1986) ("Th[e] process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.").

In light of the extensive evidence introduced at Greer's trial, set forth above, reflecting that PDF was an organization of associated individuals who engaged in a pattern of conduct, including murder, attempted murder, and sales of controlled substances, within a ten year period, appellate counsel's decision to focus on claims that he believed had more merit than a claim challenging the sufficiency of the evidence to support a RICO charge did not constitute deficient performance under *Strickland*. In this regard, the court also notes that the Ninth Circuit

concluded there was "strong, independent evidence of [Greer's and co-defendant Jason Keith Walker's] involvement with the alleged racketeering organization." *Walker*, 391 F. App'x 638 at *2.[15]

Furthermore, even if appellate counsel was deficient in failing to raise all non-frivolous claims, Greer has failed to demonstrate prejudice. The evidence introduced at Greer's trial, when viewed in the light most favorable to the verdict, was sufficient to demonstrate that the activities of PDF constituted a racketeering enterprise under the authorities cited above. Detective Fowler's testimony that PDF was a drug dealing enterprise in West Vallejo was based, in part, on the fact that "six different members of Pitch Dark Family made statements about Pitch Dark Family . . . all separately admitted they were members of Pitch Dark Family, which was an association of individuals engaged in gang-related activities." RT Feb. 15, 2006, at 7794. Other government witnesses testified about the nature and existence of PDF, including its territory, activities and leadership, and the nature of the crimes committed by the group. The jury chose to credit this evidence. *Johnson*, 132 S.Ct. at 2064 (juries have "broad discretion in deciding what inferences to draw from the evidence presented at trial").

The fact that Greer believes some of the witnesses who testified for the government were not credible is immaterial. If the record supports conflicting inferences, the reviewing court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *McDaniel,* 558 U.S. at 133 (per curiam) (quoting *Jackson*, 443 U.S. at 326). In evaluating the evidence presented at trial, this court may not weigh conflicting evidence or consider witness credibility. *Wingfield v. Massie*, 122 F.3d 1329, 1332 (10th Cir. 1997). Given the record evidence in this case, viewed in the light most favorable to the jury's verdict, a rational trier of

[15] The government points out that there is a different appellate standard of review applicable to this claim, depending on whether the defendant raised or did not raise a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. ECF No. 1184 at 70-71. The trial record is inconclusive with regard to whether Greer filed such a motion. However, regardless of the standard of review that would have been applicable to an appellate claim of insufficient evidence, this court concludes, for the reasons stated above, that Greer's appellate counsel did not render ineffective assistance in failing to raise such a claim.

fact could have concluded that PDF was a RICO enterprise. Accordingly, Greer did not suffer prejudice from his appellate counsel's failure to raise this issue on appeal.

e. Failure to Raise Appellate Claims that the Evidence was Insufficient to Support Greer's Aiding and Abetting Convictions for the Attempted Murder of Jason Hickerson and the murders of Keith Roberts, Richard Garrett, and Larry Cayton; and the Allegation that Greer Engaged in an Enterprise Through a Pattern of Racketeering

Greer argues that his appellate counsel rendered ineffective assistance in failing to raise a claim that the evidence introduced at his trial was insufficient to support his convictions relating to the attempted murder of Hickerson and the murder of Roberts and Garrett. ECF No. 1126 at 89. Specifically, Greer argues that "the evidence was insufficient to show that the Attempt [sic] Murder of Jason Hickerson, the murders of Keith Roberts, Richard Garrett was done with the statutorily required motive – to maintain or increase his position within a racketeering enterprise," as required for a conviction under 18 U.S.C. § 1962(d). *Id.* at 90.

Greer argues that Jason Hickerson was assaulted for personal reasons related to his stealing activities, and not for reasons related to the business of PDF. He contends there was not a "scintilla" of evidence that he conspired to assault Hickerson in order to increase his position within the PDF enterprise, to enrich the membership of PDF, or to protect turf. *Id.* at 93. Greer also argues, "there is no evidence from which the jury could have concluded that Petitioner Greer's motive for wanting to assault Jason Hickerson was other then purely speculative and mercenary." *Id.* at 91. He contends that "[n]othing was testified to that states 'PDF' as a group did anything . . . It was all alleged individualism." *Id.*

With regard to Richard Garrett, Greer argues that Garrett was murdered "because of a personal relationship with Nashita Jones at best." *Id.* at 95. He argues Garrett's murder had "nothing to do with PDF's alleged drug enterprise or even the selling of firearms." *Id.*

With regard to Keith Roberts, Greer argues that the government's "theory of Roberts murder was never produced to the jury so that the jury could decide why his murder occurred. . .

Therefore, there was insufficient evidence to prove that Petitioner Greer conspired to murder Keith Roberts to enrich members or protect turf on behalf of PDF, as an organization." *Id.* at 97.

Greer also argues there was insufficient evidence that he committed the murder of Larry Cayton "for the purpose of 'maintaining or increasing' his position within PDF enterprise under § 1962(c) & (d)." *Id.* at 98. He contends that "there is no evidence from which the jury could conclude that Petitioner Greer's motive for aiding and abetting the murder of Larry Cayton was other than purely mercenary." *Id.* at 101. He notes that the only testimony introduced at his trial regarding the motive for the Cayton murder came from Derrick Shields. *Id.* Shields testified that he (Greer) told him that he had no choice but to kill Cayton because Cayton was "starting to talk too much to other people about confidential information that was supposed to stay between Petitioner Greer and Cayton." *Id.* at 101. Greer insists that Shields' testimony in this regard does not support the government's theory that Cayton's murder was in response to a threat to the PDF organization or to his position as a PDF leader, or that it was committed in order to increase Greer's position within the organization. *Id.* Thus, Greer contends, the argument that the Cayton murder was committed in furtherance of a racketeering enterprise is "based on no more than guesswork." *Id.* at 102.

Greer also contends that there was insufficient evidence he aided and abetted the Cayton murder. *Id.* at 103. Specifically, he argues there was no evidence he "shared some intent with the unamed individuals (who shot Cayton) and took some affirmative action to assist them in carrying out their plan to kill Cayton." *Id.* He explains:

> Petitioner Greer was not a member of a conspiracy with alleged white males that killed Cayton. In addition, the charges in this case were for drug violations. Larry Cayton's murder did not pertain to the PDF alleged drug crimes that threatened PDG's alleged drug operation.

Id. at 107. Greer's argument continues that: "there was no testimony provided to the jury that Petitioner Greer knew it was expected of him to aid and abet the murder of Larry Cayton, nor that he aided and abetted it in furtherance of that membership." *Id.* at 107-08. Greer's claim before this court is that his appellate counsel rendered ineffective assistance in failing to challenge his

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conviction for aiding and abetting the murder of Larry Cayton on the grounds described above, instead of "offering weaker arguments." *Id.* at 108.

The government responds that these challenges by Greer to the sufficiency of the evidence are moot because "the element [Greer] claim[s] the government failed to prove is not an element of any crime of which [Greer was] convicted." ECF No. 1184 at 75. Greer dismisses this assertion as "incomprehensible." He notes that he was convicted of Counts One and Two of the indictment, which allege racketeering activities pertaining to the attempted murder of Jason Hickerson and the murders of Roberts, Cayton and Garrett. ECF No. 1205 at 93-94.

Assuming arguendo that these claims of ineffective assistance of appellate counsel are not moot, they nonetheless must be denied. The indictment in this case alleged that the racketeering enterprise existed "no later than on or about January 1, 1994, through on or about July 30, 2000." ECF No. 1 at 4. The indictment also alleged the purposes of the racketeering enterprise, as follows:

- Enriching the members and associates of the enterprise through, among other things, murder, attempted murder, and distribution of narcotics.
- Preserving and protecting the power, territory and profits of the enterprise through the use of intimidation, violence, threats of violence, assaults and murder.
- Promoting and enhancing the enterprise and its members' and associates' activities
- Keeping victims in fear of the enterprise and in fear of its members and associates through violence and threats of violence.

Id. at 2-3. The indictment also alleged predicate acts related to the enterprise; to wit, three murders in 1994, an attempted murder in 1994, possession of cocaine base for sale in 1997, a murder in 1998, possession with intent to distribute cocaine base in 1998, the murder of Larry Cayton in 2000, and a conspiracy to sell narcotics from 1994 to 2000. *Id.* at 5-8.

In Count Two, the indictment alleged that from on or about January 1, 1994 through July 30, 2000, Greer and other co-defendants conspired to conduct the affairs of PDF, an enterprise, through a pattern of racketeering activity consisting of the predicate acts set forth above. *Id.* at 8-9. It was also alleged that it was part of the conspiracy that each defendant agreed that a

conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise. *Id.* at 9.

This court concludes that Greer has failed to demonstrate he was prejudiced by his appellate counsel's failure to raise these claims of insufficient evidence on appeal. After a careful review of the record in the light most favorable to the verdict, the court finds there was sufficient evidence introduced at Greer's trial to support his convictions on Counts One and Two, including the allegations related to the attempted murder of Jason Hickerson and the murders of Keith Roberts, Richard Garrett, and Larry Cayton. The court reaches this conclusion even though some of the trial testimony was conflicting and/or impeached. As explained above, this court must defer to the jury's resolution of any conflicts in the evidence and must not weigh that evidence itself or consider witness credibility. *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (per curiam) (quoting *Jackson*, 443 U.S. at 326); *Wingfield*, 122 F.3d at 1332. As the Ninth Circuit has explained, "[t]he relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict." *United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991). Put another way, this court need not find that the conclusion of guilt was compelled, only that it rationally could have been reached. *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000). The jury verdict in this case satisfies these standards. Even if appellate counsel was deficient in failing to raise these non-frivolous claims on appeal, Greer has failed to demonstrate prejudice, or that he probably would have prevailed. Accordingly, Greer is not entitled to federal habeas relief.

f. Improperly Allowing Detective Fowler to Testify as a Gang Expert under Rule 16(a)(1)(G)

Greer claims that his appellate counsel rendered ineffective assistance in failing to raise a claim that his trial counsel: (1) improperly failed to challenge the testimony of Detective Fowler on the grounds that Fowler was not competent to establish that PDF was a RICO enterprise; and (2) improperly failing to challenge Fowler's testimony on the grounds that the government failed to comply with Fed. R. Crim. P. 16(a)(1)(G).

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As discussed above, Greer's trial counsel did challenge the admission of Detective Fowler's trial testimony on both of these grounds. Appellate counsel's failure to raise this frivolous claim on appeal does not constitute ineffective assistance. *Jones*, 231 F.3d at 1239 n.8; *Boag*, 769 F.2d at 1344; *Rhoades*, 596 F.3d at 1179; *Rupe*, 93 F.3d at 1445.

4. Claims Based on Prosecutorial Misconduct

a. Testimony of Charles McClough

Greer claims that the government violated his right to due process in knowingly presenting the false testimony of Charles McClough and that his appellate counsel rendered ineffective assistance in failing to raise this claim on appeal. ECF No. 1126 at 145. Greer argues that McClough "was subject to unlawful threats, and official misconduct which forced him to testify falsely." *Id.* He asserts that he is entitled to an evidentiary hearing to determine whether McClough's testimony regarding his "alleged recantation" is truthful. *Id.*

The background to this claim is the following. At the beginning of McClough's trial testimony, he stated that there were several gangs in West Vallejo when he was growing up there, including PDF, and that all of these gangs were "allies." RT Jan. 12, 2006, at 5483-86. When he was asked whether Greer was in a gang, he stated he did not want to testify. *Id.* at 5486-87. The court then took a recess. *Id.* In a conference outside the presence of the jury, the trial judge was told that McClough refused to testify because someone in jail had threatened him. *Id.* at 5496. Defense counsel expressed concern that if McClough resumed the witness stand and explained why he didn't want to testify, the jury would assume the defendants had something to do with the threat. *Id.* at 5496-97. The court ruled that neither side could ask Mr. McClough in front of the jury why he had refused to testify. *Id.* at 5501.

When he resumed the witness stand, McClough testified about the structure and membership of PDF. He identified the following individuals as members of PDF: "Bowleggs," "EJ Rabb," "Tone," "Fade," Lou Walker, Greer, Elliott Cole, "Shady," Oscar Gonzalez, and Arnando Villafan. *Id.* at 5504-06. McClough stated that he personally witnessed PDF members selling guns and drugs (cocaine and heroin) on the west side. *Id.* at 5507-10.

/////

McClough also testified about the murders of Keith Roberts and Devin Russell. He stated that in March, 1995, Walker and White told him that the two of them, along with Greer and Marc Tarver, were involved in the Keith Roberts homicide. *Id.* at 5513, 5515, 5517-18. According to McClough, White told him that several of them participated in the shooting. *Id.* at 5518:12-17. McClough testified that the subject of Roberts's murder came up again approximately a week later at Marc Tarver's residence, where White, Tarver, and Walker again talked about the killing. *Id.* at 5519. The subject came up a third time, again at Tarver's residence, with the same participants, except that Greer was also present. *Id.* at 5520-21. During one of these conversations, it was revealed that while several different people in the group had shot Roberts, Walker had taken the final and fatal shot. *Id.* at 5528-29. Neither Greer nor Walker disputed what was said at these meetings. *Id.* at 5526-27.

With respect to the murder of Devin Russell, McClough testified that Elliott Cole told him that "something needed to happen" to Russell to punish him for testifying against Cole in the Jewel Hart homicide, which resulted in Cole going to prison. *Id.* at 5530. According to McClough, White and Arnando Villafan told him that White shot Russell with a 12-gauge shotgun. *Id.* at 5532-34. McClough was told that White's initial plan was to shoot Russell from the roof overlooking an alley where others were leading Russell. *Id.* at 5534. When White tried to shoot Russell from the roof, however, the shotgun jammed. *Id.* at 5534-35. After the jam was fixed, he shot Russell twice. *Id.* at 5535.[16]

Approximately a month after this testimony, McClough was called to the witness stand by the defense. At that time, he recanted his trial testimony, claiming that he had been threatened by FBI agents and that the FBI had suggested to him what he should say at trial. RT Mar. 1, 2006 at

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[16] McClough's trial testimony that the various gangs in western Vallejo were "allies," his identification of the members of Pitch Dark Family, and his description of the killing of Devon Russell, is consistent in many respects with his prior testimony before the grand jury and during FBI interviews. *See* ECF No. 1184-8 at 4-5, ECF No. 1191-1. During his second testimony before the grand jury, McClough refused to testify based on threats to him and his family from other inmates with whom he was incarcerated. ECF No. 1191-1 at 4-6. After speaking further with FBI agents on the case about his safety concerns, McClough resumed his testimony. *Id.* at 6.

8551. McClough stated that when he took a break during his initial testimony, he had a conversation with FBI Agent French about the following:

> About my kids and I must testify because they – you know, they can take care of my kids because they already knew that my kids had been took before. So they manipulated me and tell me, you know, I better do this. If you don't, people are going to kill me, and this and that. And, you know, by them utilizing my kids like that, I was forced.

Id. McClough further testified that FBI Agent French

> told me he was going to take – because my wife has a mental problem. So my kids had got took before, and he didn't say – he was going to make sure that my kids don't get took, and he would provide housing for my wife and all this. He manipulated me.

Id. at 8556.

McClough then testified that PDF was "nothing but a rap group." *Id.* at 8552. He testified the FBI "was putting the emphasis towards me, if I didn't say that certain things, would happen to me." *Id.* He stated the FBI was "coaxing [him] on what to say" and suggesting what he should and should not say during his testimony. *Id.* at 8552-56, 8557-58. For instance, Agent French told McClough not to say that the murder of Roberts took place in an alley. *Id.* at 8557. McClough later elaborated:

> What they told me to lie about is the alley and all the stuff that I didn't know nothin' about. You know, they brought this to me. He said – you know, they said he died here and this is what happened and this is how they shot him. I didn't know nothin' about that.

Id. at 8575.

When he was asked whether any of his previous testimony had been "false," McClough stated: "Well, not really false, it just – the particular questions, when asked to me, how they're asked to me now." *Id.* at 8559. He explained that he didn't want to see "no innocent people go to jail." *Id.* at 8560. McClough acknowledged that during his previous testimony he stated that he had not been threatened or pressured by the FBI for his testimony, but he stated that this testimony was "inaccurate." *Id.* He also acknowledged that he had previously denied the FBI had threatened to take his children away from him, but he stated that testimony was not true

either. *Id.* at 8561. McClough explained, "[t]hey threatened in certain ways to take my kids, but they made it sound a little – you know, where if I don't say certain things, that they're going to . . . make sure that my wife, you know, basically ain't going to have no control over my kids." *Id.* at 8561-62. McClough also testified that FBI Agent French indicated he could "take care" of a pending criminal case against McClough in exchange for favorable testimony, and that the FBI would ensure he was housed in Yolo County so that he could see his family. *Id.* at 8562-63.

McClough denied that the reason he refused to proceed with his initial testimony was that he had received a threat from a jail inmate. *Id.* at 8565-66. He explained that he didn't think the message he got from the inmate was a threat. *Id.* at 8566. He stated that he stopped testifying in order to give the prosecutor the following information:

> Only thing I said is this person knows my family and knows where my wife stays at. That's only – that's the only sing [sic] I said, sir. That's the only thing I said. And you guys blew it out of proportion because you guys told me that, Hey, we're going to put you here where no one knows you at, and this and that. And I just, you know, brought it to your attention. That was it, sir.

Id. at 8570.

After McClough's recantation, several FBI agents testified that McClough was never threatened, intimidated, or coached by the FBI. RT Mar. 14, 2006, at 9633, 9677-79, RT Mar. 9, 2006, at 9457-58. In addition, FBI Agent David Sesma testified:

> Q. Now, did Mr. McClough indicate to you and Agent French and to me the reason for his reluctance to testify?
>
> A. Yeah. He received a threat when he was at the Yolo County Jail from an individual known to him as Bracie, and Bracie had indicated to Mr. McClough that he knew where his family lived and he also knew that a cousin had lived down the street.
>
> And I think Mr. McClough took this as a direct threat that this guy had talked to him. And Bracie also indicated that he knew that Bowleggs was out, which is a someone [sic] indicted in the case.
>
> * * *
>
> Q. Did Mr. McClough express any concern about this?
>
> A. Yes, he did.
>
> Q. How much concern?

> A. I think that was part of the reason why he didn't want to testify was because of this threat.

RT Mar. 14, 2006, at 9632-33.

In his claim before this court, Greer argues that McClough "was pressured to testify falsely in this case and that the government was fully aware that he was providing false testimony." ECF No. 1126 at 150. Greer argues that "the police knew that Charles McClough was testifying about events and situations that he did not know anything about." *Id.* Greer contends that "a Due Process violation occurred in this case because the government left his conviction in place after a credible recantation of material testimony." *Id.* at 162.

Greer's claim that his appellate counsel rendered ineffective assistance in not pursuing these claims of prosecutorial misconduct on appeal lacks merit.[17] To demonstrate ineffective assistance of counsel, Greer must show prejudice, or that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Greer is unable to make this showing.

It is clearly established that "a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985). *See also Morales v. Woodford*, 388 F.3d 1159, 1179 (9th Cir. 2004) ("The due process requirement voids a conviction where the false evidence is 'known to be such by representatives of the State.'") (quoting *Napue*, 360 U.S. at 269 (1959). This rule applies even where the false testimony goes only to the credibility of the witness. *Napue*, 360 U.S. at 269; *Mancuso v Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). There are three components to establishing a claim for relief based on the prosecutor's introduction of perjured testimony at trial. Specifically, the petitioner must establish that: (1) the testimony or evidence was actually false; (2) the prosecutor knew or should have

[17] Greer's claims, if any, that the prosecutor committed misconduct in introducing the knowingly false testimony of McClough, and that the government violated his right to due process by leaving his conviction "in place" after McClough recanted his testimony are not cognizable in this § 2255 motion because they could have been raised on direct appeal. *Sunal*, 332 U.S. at 178; *Frady*, 456 U.S. at 168.

known that the testimony or evidence was actually false; and (3) the false testimony or evidence was material. *Hein v. Sullivan*, 601 F.3d 897, 908 (9th Cir. 2010). Mere speculation regarding these factors is insufficient to meet petitioner's burden. *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991). However, "[w]here the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts," even if the "defense counsel knows, and the jury may figure out, that the testimony is false." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).

The Ninth Circuit has held that a conviction based on false testimony, even without any evidence of prosecutorial misconduct in presenting the testimony, may result in a violation of a defendant's due process rights under the Fourteenth Amendment. *Maxwell v. Roe*, 628 F.3d 486, 506-07 (9th Cir. 2010) ("[A] defendant's due process rights were violated ... when it was revealed that false evidence brought about a defendant's conviction."); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("we assume without deciding that the prosecutor neither knew nor should have known of Masse's perjury about his deal. Thus our analysis of the perjury presented at Killian's trial must determine whether 'there is a reasonable probability that [without all the perjury] the result of the proceeding would have been different.'"); *Hall v. Director of Corrections*, 343 F.3d 976, 981–82 (9th Cir. 2003) (use of jailhouse notes, subsequently proven to have been altered from their original state without knowledge of the prosecutor, violated defendant's right to due process).

In this case, Greer has failed to demonstrate that the trial testimony initially given by McClough was actually false or that the prosecutor knew or should have known that it was false. Indeed, when asked whether any of his previous testimony had been "false," McClough stated: "Well, not really false." RT Mar. 1, 2006, at 8559. The government believed, and still believes, that McClough's initial trial testimony was true. Further, the jurors heard McClough's initial testimony and also his recantation of that testimony. Notwithstanding the recantation, the jury found Greer guilty of the charges against him. Under these circumstances, there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 679 n.9.

Appellate counsel's decision not to include this claim in Greer's direct appeal, but instead to focus on claims that counsel believed were more meritorious, was "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771. Accordingly, Greer is not entitled to relief on this claim of ineffective assistance of counsel.

b. Failure to Disclose Compensation Paid to Witness Derrick Shields

Greer claims that the prosecution violated his federal constitutional rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972) when it: (1) failed to disclose to the grand jury or to defense counsel that witness Derrick Shields was paid by the FBI for information and testimony; (2) failed to correct Shields' trial testimony that he had not received payments from the FBI; and (3) failed to turn over FBI notes that document the payments that were distributed to Shields. ECF No. 1126 at 57-58; ECF No. 1205 at 81-84.

Greer has attached to his § 2255 motion an FBI memo dated December 12, 2001, and signed by FBI Special Agents Butler and French. The memo states:

> A few days ago, Source saw GREER on the street in Vallejo and GREER was looking at him in an intimidating manner. Source approached GREER and began a conversation with him. Source stated that GREER knew how much money that the FBI had provided to Source.

ECF No. 1126-1 at 53. "Source" (apparently Derrick Shields) later informed the agents that he would no longer cooperate in the criminal action against Greer and Jason Walker. *Id.* Greer argues this memo demonstrates that Shields was "paid money to be a confidential informant in this case." ECF No. 1126 at 58. He states that "this information was never turned over to Petitioner Greer during trial." *Id.* Greer further argues that "the only reasonable inference that could be made is that the money that was given to Shields was paid to him to testify." *Id.* Greer argues that if he had known about these payments, "he would have been able to pursue discovery and used that information as powerful impeachment testimony." *Id.*

Derrick Shields testified at Greer's trial that he never had a conversation with Greer about money paid to him by the FBI, and that he "never was paid any money." RT Feb. 9, 2006, at 7337-38. His testimony was as follows:

> Q. Now, let me ask you this: You told us that the FBI didn't do anything for you to get your testimony; is that right?
>
> A. Yes.
>
> Q. You're sure about that, right?
>
> A. Yes.
>
> Q. Now, in 2000 or 2001, did Shango Greer come up to you and say that the word's out on the street that you got $3500 from the FBI?
>
> A. No.
>
> Q. That never happened?
>
> A. No.
>
> Q. Well, do you remember telling the FBI in an interview on December the 12th of 2001, by agents Butler and French, that Greer knew how much money that the FBI had provided to you?
>
> Did you tell them that?
>
> A. I don't remember saying that because I didn't get no money.
>
> Q. You don't remember saying that to the FBI, to Agent French, who is here, and Agent Butler on December the 12th of 2001?
>
> A. No. I don't remember saying that.
>
> Q. You never told them that?
>
> You never complained that, "Hey, Shango Greer knows how much money you guys paid me?
>
> You never complained like that to them?
>
> A. Never was paid any money.

Id. at 7337-38.

Greer argues that this testimony by Shields was false and that the government's failure to correct the testimony violated his right to due process. He argues, "the government knew that Derrick Shields had been compensated for his cooperation and testimony and never interposed in this case." ECF No. 1126 at 59. He argues that evidence concerning payments to Shields by the FBI was material because:

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> Perjuring Derrick Shields would have excluded the testimony about Shields testifying about Petitioner Greer's alleged ties to "PDF". Thus, destroying a critical element of the RICO violation. In addition, had Petitioner Greer been able to impeach him, his testimony about Petitioner Greer selling drugs would have been discredited. Therefore, the false testimony was material to the charges brought against Petitioner Greer.

Id.

The government counters that Greer and the other defendants were aware by the time of trial that Shields had received payment from the FBI because the FBI memo signed by Agents French and Butler was provided to them in discovery. ECF No. 1184 at 89. The government argues that Greer's trial counsel must have used the information in this FBI memo that it received in discovery to impeach Shields at trial. *Id.*[18]

Attached to the government's answer is a June 1, 2001 letter from FBI Special Agent Michael C. Riedel to the United States Attorney for the Eastern District of California informing him that a cooperating witness (presumably Derrick Shields) had been released from prison and was paid a total of $3,150.00 for "lodging, transportation, communication, meals, and entertainment in furtherance of the investigation." ECF No. 1184-7. This letter also reflects that the cooperating witness received a sentence reduction and a prison transfer in exchange for his cooperation and assistance to the FBI. *Id.* Also attached to the answer is a June 4, 2001 letter from "AUSA Jodi B. Rafkin" to defense counsel Johnny L. Griffin, which reflects that the June 1, 2001 letter was turned over to the defense in discovery on June 4, 2001. *Id.* at 2. However, in its answer, the government clarifies that the June 1, 2001 letter was actually turned over to Greer's co-defendant, Jason Walker, in an earlier case against Walker. ECF No. 1184 at 90. Government counsel concedes, in the absence of evidence to the contrary, that the June 1, 2001 letter was not "formally produced" to Greer in the instant case. *Id.* at 92 n.51. However, he suggests that Walker must have shared this letter with others, including Greer, "resulting in Greer approaching Shields sometime in December 2001 to confront him about getting paid." *Id.*

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[18] Greer does not deny that the FBI memo was turned over in discovery. In any event, the record reflects that Greer's trial counsel had seen the memo by the time of trial. In his questions to Shields, counsel mentioned the interaction between Shields and Greer described in the memo, referred to the exact date of the memo, and mentioned Agents French and Butler.

The government's position that Greer's trial counsel had seen the June 1, 2001 letter, with its mention of a payment to Shields, is supported by the record. As set forth above, Greer's trial counsel specifically asked Shields whether Greer told him "word's out on the street that you got $3500 from the FBI."[19] RT Feb. 9, 2006 at 7337. Thus, it is apparent that defense counsel was aware of the pertinent information and able to use it on cross-examination.

The government argues that Greer has waived this claim by failing to raise it on appeal. ECF No. 1184 at 90. This court agrees. It is clear from the record, as described above, that Greer was aware of these issues at trial. His failure to raise them on appeal constitutes a waiver of the claim in this § 2255 motion. *Frady*, 456 U.S. at 168, *Sunal*, 332 U.S. at 178.

But even if the claim had not been waived, it lacks merit. "[W[here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense." *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (quoting *United States v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978)).[20] At the very least, Greer's trial counsel had enough information to alert him to the fact that Shields had been compensated for his cooperation and to seek these documents through discovery. *See Cunningham v. Wong*, 704 F.3d 1143, 1154 (9th Cir. 2013) (when the defendant is aware of essential facts enabling him to take advantage of any exculpatory evidence, "the government's failure to bring the evidence to the direct attention of the defense does not constitute 'suppression.'"). Counsel was not only alerted to it, he used it in

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[19] The letter clearly specifies that the relevant amount was $3150. ECF No. 1184-7. It is unclear whether reference to the 3500 dollar amount was an error or merely an exact recounting of what Greer purportedly asked Shields.

[20] In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. *See also Bailey v. Rae*, 339 F.3d 1107, 1113 (9th Cir. 2003). The duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and encompasses impeachment evidence as well as exculpatory evidence. *Bagley*, 473 U.S. at 676. Failure to disclose a promise of benefit to a witness in exchange for cooperation with the government constitutes a due process violation. *Giglio*, 405 U.S. at 153-55.

cross examination. Accordingly, Greer has failed to show that the information was "suppressed" by the government.

5. Claims Raised in the Traverse

It is not entirely clear whether Greer's traverse contains claims that were not raised in his original § 2255 motion. To the extent Greer is attempting to belatedly raise new claims in the traverse, relief should be denied. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (a traverse is not the proper pleading to raise additional grounds for relief); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) ("we review only issues which are argued specifically and distinctly in a party's opening brief"). Even if new claims contained in the traverse had been properly raised, Greer has failed to demonstrate that federal constitutional error at his trial or before his trial violated his right to due process or any other federal constitutional right.

VI. Conclusion

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that Greer's motion to set aside, vacate, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1126) be denied; and

2. The Clerk be directed to close the companion civil case: 2:12-cv-00397-MCE-EFB.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In his objections Greer may address whether a certificate of appealability should issue in

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the event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section 2255 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: August 9, 2017.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

v.

SHANGO JAJA GREER,

Movant.

UNITED STATES OF AMERICA,

Respondent,

v.

JASON KEITH WALKER,

Movant.

CASE NO. 2:03-CR-042 MCE JFM P

GOVERNMENT'S RESPONSE TO MOTIONS UNDER SECTION 2255

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STATUTES

I. BACKGROUND OF THE CASE

A. The Investigation

Pitch Dark Family was identified by the FBI and its local partners as a violent gang in west Vallejo in the 1990s. By 2000, the investigation entered the grand jury in the Eastern District of California, and from 2000 to 2003, over sixty witnesses testified in front of the grand jury, some of them multiple times. In January 2003, FBI Special Agent Peter French was the final witness appearing in front of the grand jury, summarizing the investigation as the indictment was at last presented to the second grand jury investigating the case. The indictment named Shango Jaja Greer (aka G.O.), Jason Keith Walker (aka Fade), Charles Lee White (aka Shady), Louis Walker (aka Lou Dog), Eric Jones (aka E.J. Rabbit), Oscar Gonzales, Elliot Gus Cole (aka L.L.), Arnando Villafan, and Marc Tarver (aka Bowleggs). DN 1,[1] Jan. 29, 2003.

Count One was alleged under 18 U.S.C. § 1962(c), Conducting the Affairs of an Enterprise through a Pattern of Racketeering Activity, and included the following predicate acts:

Predicate Act	**Alleged as To**
Murder of Jewel Hart	Elliot Gus Cole Others known and unknown
Attempted Murder of Jason Hickerson	Shango Jaja Greer Jason Keith Walker Eric Jones Others known and unknown
Murder of Keith Roberts, aka York	Shango Jaja Greer Jason Keith Walker Charles Lee White Others known and unknown
Murder of Richard Garrrett	Jason Keith Walker Louis Walker Others known and unknown
Possession of Cocaine Base for Sale	Shango Jaja Greer

[1] Documents in the Court's record are referenced by docket number ("DN").

Predicate Act	**Alleged as To**
Murder of Devin Russell	Charles Lee White Eric Jones Elliot Gus Cole Arnando Villafan Oscar Gonzales Others known and unknown
Possession of Cocaine Base for Sale	Louis Walker
Murder of Larry Cayton	Shango Jaja Greer Others known and unknown
Conspiracy to Distribute Illegal Narcotics	Shango Jaja Greer Jason Keith Walker Charles Lee White Louis Walker Eric Jones Oscar Gonzales Mark Tarver

Count Two was alleged under 18 U.S.C. § 1962(d), conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, and named Shango Jaja Greer, Jason Keith Walker, Charles Lee White, Louis Walker, Eric Jones, Oscar Gonzales, Elliot Gus Cole, and Mark Tarver.

Count Three was alleged under 18 U.S.C. §§ 2, and 1959(a)(1), violent crime in aid of racketeering activity, or aiding and abetting the same, based on the murder of Devin Russell,[2] and named Charles Lee White, Arnando Villafan, Elliot Gus Cole, Eric Jones, and Oscar Gonzales.[3]

Count Four was alleged under 18 U.S.C. §§ 2, and 1959(a)(1), violent crime in aid of

[2] In Petitioner Greer's arguments regarding the testimony of Uvonda Parks, he claims that Ms. Parks' trial testimony about the murder of Devin Russell was so poor that the Government removed this crime from their verdict form. DN 1125 (Petitioner Greer's 2255 Motion, hereinafter "Greer"), at 135 (DN 1124, Petitioner Walker's 2255 Motion, will be referred to hereinafter as "Walker"). Neither Petitioner was charged with the VCAR count alleging Russell's murder, nor was either named in the predicate act relating to Russell in Count One. It would have been inappropriate to include Devin Russell's murder on the verdict form. Petitioners' co-defendant, Charles White, went to trial in 2007 and was convicted of the VCAR charge relating to Russell. DN 968.

[3] At Petitioners Greer and Walker's trial, this Count was moot. Thus, the parties and the Court referred to Count Four of the indictment, which named Greer, as Count Three.

racketeering activity, or aiding and abetting the same, based on the murder of Larry Cayton, and named Shango Jaja Greer.

B. An Overview of the Litigation

1. **The Pretrial Litigation**

The case went to trial against two defendants, Petitioners Greer and Walker, in November 2005, and concluded in March 2006.[4] Between 2003 and 2005, when trial commenced, the case was heavily litigated and negotiated. Many of the defendants in the case, including Petitioner Greer, were death eligible. The initial portion of the negotiation involved defense and Government counsel discussing whether the death penalty would remain on the table as to any or all defendants originally death eligible. Eventually, the death penalty was taken off the table for all defendants.

In October 2004, Petitioner Greer filed a motion to dismiss the indictment based on alleged abuse of the grand jury and prosecutorial misconduct, a motion that all defendants eventually joined, including Petitioner Walker. DN 195, 196; R.T., Dec. 6, 2005, at 16:12-15. That motion was extensively litigated, and ultimately denied by Judge Damrell, but not before the following briefing and motion hearings took place:

- October 22, 2004, Petitioner Greer's Notice and Motion to Dismiss the Indictment for Prosecutorial Misconduct and Abuse of the Grand Jury (DN 195, 196) (including three volumes of exhibits filed under seal)
- November 15, 2004, Government's Opposition to Motion to Dismiss (DN 211)
- Dec. 6, 2004, Hearing on Motion to Dismiss (transcript in Court files)
- December 20, 2004, Greer's Supplemental Memo in Support of Motion to Dismiss (DN 249)
- January 4, 2005, Government's Response to Supplemental Memo in Support of Motion to Dismiss (DN 258)
- Jan. 10, 2005, Hearing on Motion to Dismiss (transcript in Court files)

[4] A third defendant, Charles White, was involved in competency proceedings. His trial was severed to prevent delay of trial of Petitioners Greer and White. He went to trial in 2007, and was found guilty as well.

- May 16, 2005, Greer's Second Supplemental Memo in Support of Motion to Dismiss (DN 366, filed under seal)
- May 16, 2005, Greer's Supplemental Exhibits ISO Motion to Dismiss (DN 370, filed under seal)
- May 25, 2005, Greer's Amendment to Second Supplemental Memo ISO Motion to Dismiss (DN386)
- July 11, 2005, Government's Supplemental Opposition to Defendant Greer's Motion to Dismiss (DN 402, filed under seal)
- September 19, 2005, Hearing on Motion to Dismiss (transcript in Court files)

Judge Damrell denied the motion. DN 445. Petitioners Greer and Walker renewed that motion at the end of trial, and it was again denied. DN 664; DN 665.

Defendants Louis Walker and Oscar Gonazalez also raised concerns about an alleged lack of interstate commerce associated with the RICO charges in this case. Petitioners Greer and Walker joined in these motions, which were also denied, after the following briefing and motions hearings:

- January 14, 2005, Louis Walker's Notice and Motion to Dismiss for Lack of Jurisdiction (based on interstate commerce issues), DN 267.
- January 31, 2005, Government's Opposition to L. Walker's Motion to Dismiss for Lack of Jurisdiction (DN 279)
- February 4, 2005, L. Walker's Reply on MTD for Lack of Jurisdiction, DN 288
- February 7, 2005, Supplemental Reply to MTD, DN 292
- Feb. 9, 2005, Hearing on motion (transcript in Court files, DN 833)
- February 15, 2005, Supplemental Reply to MTD, DN 306
- February 15, 2005, Supplemental Reply to MTD, DN 307
- February 17, 2005, Additional Authority Submitted by L. Walker, DN 309
- May 16, 2005, Notice of Gonzales Motion to Dismiss and Motion to Dismiss Counts One and Two for Failure to Allege Necessary Elements of RICO Violations (nexus between acts and interstate commerce), DN 368
- May 18, 2005, Notice of Gonzales Motion to Dismiss Due to Insufficient Effects on

Interstate Commerce, DN 375, filed under seal

- September 14, 2005, Government's Opposition to MTD Due to Insufficient Effects on Interstate Commerce, DN 439
- Sept. 19, 2005, Hearing on motion (transcript in Court files, DN 837)

As the parties approached trial, Petitioners Greer and Walker objected, vigorously, to use of Detective Steven Fowler as an expert on gangs and the Pitch Dark Family, basing their objections on substantive and procedural issues, specifically including a purportedly inadequate expert disclosure under Federal Rules of Criminal Procedure, Rule 16(a)(1)(G). Several briefs were filed, one motion hearing was held, and the Court entertained two days of *Daubert* hearings for Detective Fowler, as outlined below:

- October 27, 2005, Motion In Limine- Challenge To Government's Proferred Gang Expert's Qualifications, DN 497
- November 8, 205, PLAINTIFF(S) MOTION IN LIMINE Regarding Admissibility of a Gang Expert by USA as to Shango Jaja Greer, Jason Keith Walker, Charles Lee White, Louis Walker, Eric Jones, Oscar Gonzales, Elliot Gus Cole, Arnando Villafan, Marc Tarver, DN 524
- November 13, 2005, Notice of Motion and Motion For Discovery of Gang Experts Required Disclosures and Motion to Defer Hearings on Daubert Motion and on Motion to Challenge Gang Experts Qualifications, DN 531
- November 14, 2005, Hearing on Expert Disclosure
- November 15, 2005, *Daubert* Hearing re: Det. Fowler
- November 17, 2005, Continued *Daubert* Hearing re: Det. Fowler
- January 30, 2006, Government's Response to Defendant's Motion in Limine Regarding Expert Opinion, DN 616

2. **The Trial.**

In 39 days of trial, the Government presented over 80 witnesses and dozens of exhibits in its case in chief. *See, generally*, Minutes from December 6, 2005 to February 15, 2006. In the next 11 trial days, the defense presented over 30 witnesses. *See, generally*, Minutes from February 21, 2006 to

March 9, 2006. The Government's rebuttal case, over two days, included testimony from about a dozen witnesses. *See, generally*, Minutes from March 9, 2006 to March 14, 2006.

C. What the Evidence Showed at Trial

1. **The Origins and Membership of Pitch Dark Family**

Several witnesses testified at trial about the origins of Pitch Dark Family. Jason Hickerson testified that he lived on the west side of Vallejo from 1990 to 1993, and bought and sold drugs there. R.T., Dec. 7, 2005, 80:16-81:16. Hickerson said it was important to know who sold drugs on the west side because "you could get into trouble if you didn't know who was dealing drugs on the west side . . . [b]ecause you would be dealing in someone else's territory." *Id.* at 81:17-82:3. In those days, the drug trade on the west side was controlled by the Five Deuce Waterfront Gangsta Crips (hereinafter Five Deuce), also known as West Side and City Park Crips. *Id.* at 82:4-14. That group included, among others, Charles White, Leroy Vance, Charles McClough, Louis Walker, and Marc Tarver. *Id.* at 83:5-84:23. Sometime around 1991-92, Five Deuce started calling itself Pitch Dark Family (PDF). *Id.* at 86:8-16. PDF consisted of the same members plus Shango Greer ("G.O."), Jason Walker ("Fade"), Eric Jones, Anthony Monroe ("Tone"), Elliott Cole ("LL"), Oscar Gonzales, Arnando Villafan, Ricardo White, Demetrius Thompson, and Tito Manuel.[5] *Id.* at 86:19-89:19. Altogether, Hickerson identified at least 16 individuals as members of Pitch Dark Family. *Id*. Hickerson testified that PDF continued to sell drugs and that he personally bought crack cocaine from PDF members Jason Walker and Marc Tarver. *Id.* at 90:6-92:8.

Hickerson also testified that PDF's turf was roughly from Sutter Street to Santa Clara Street and from Tennessee Street to Florida. *Id.* at 94:9-19. Generally, only PDF members could sell drugs in PDF territory. *Id.* at 95:3-14. Hickerson explained that he was allowed to occasionally sell drugs in PDF territory, even though he was not a PDF member, because he lived on the west side and purchased his drugs from a PDF member. *Id.* at 96:6-98:16.

Dante Webster also testified about the membership of Pitch Dark Family and its character as a

[5] By the time of trial, Elliot Gus Cole, Eric Jones, Louis Walker, Arnando Villafan, and Oscar Gonzales, and Mark Tarver had all pleaded guilty. Each admitted membership in PDF. Their admissions to membership and the nature of the group were admitted at trial. R.T., Feb. 15, 2006, at 7794:14-21.

street gang. Webster lived on the west side for most of the period from 1991 to 2005. R.T., Dec. 15, 2005, at 25:11-27:4. Webster testified that, during the 1990s, he was one of the leaders of a group called The Folks (also known as the Sutter Street Crew or Gutter Street), that sold drugs in an area adjacent to PDF territory. *Id.* at 42:2-18; 44:3-45:6. Webster testified that there were other gangs on the west side that sold drugs and that these gangs divided up the area and generally got along with one another. *Id.* at 45:7-22; 46:5-17. Because he socialized with members of the other gangs, he was familiar with both the gangs and their membership. *Id*. One of these gangs was Pitch Dark Family, which began as the Five Deuce Waterfront Crips, then began calling themselves City Park, until finally settling on the Pitch Dark name. *Id.* at 46:18-47:12. Webster described an area that was controlled by PDF that was consistent with that identified by other witnesses. *Id.* at 47:18-49:11. Webster also identified some of the members of PDF, including: Shango Greer ("G.O."), Jason Walker ("Fade"), Charles White ("Shady"), "EJ Rabbit", Mark Tarver ("Bowlegs"), Tone Monroe, Louis Walker ("Lou Dog"), Elliott Cole ("LL"), and Oscar Gonzales. Webster testified that PDF members associated themselves with the Crips and frequently wore Crip colors, which were blue, black and brown. *Id.* at 58:5-59:3. They also spoke disrespectfully of the Bloods. *Id.* at 75:1-76:4.

Webster testified that from time to time members of PDF - usually "Shady" (Charles White) - would ask for a meeting to discuss what was going on in the neighborhood - that is, whether there was anyone new in the neighborhood trying to sell drugs "[b]ecause if no one knew you, you wasn't supposed to be around there." *Id.* at 59:8-22. Webster explained that only PDF members or their friends could sell in PDF territory. *Id.* at 60:2-61:15. Webster also described an incident at Nations Burgers where PDF member "EJ Rabbit" was shot after he confronted an Oakland drug dealer. After the shooting, PDF called a meeting to discuss retaliation because the Oakland dealer was selling drugs on PDF turf. *Id.* at 77:18-81:3.

Sedrick Perkins also testified about Pitch Dark Family's membership and its character as a west side gang. Perkins was a member of the Sutter Street Crew who had been selling cocaine and heroin on the streets of West Vallejo since he was eleven. R.T., Jan. 26, 2006 (a.m.), at 6365:1-10. When asked if he had ever heard of the name Pitch Dark Family, he answered, "Yeah. They was a gang too." *Id.* at 6365:16. Perkins' identification of the members of PDF and its territory was consistent with the

testimony provided by other witnesses. He said that the leaders of PDF were Shango (Greer), Fade (Petitioner Walker), and Shady (Charles White) and that the younger kids like Nando and Oscar were not high up in the hierarchy. *Id.* at 6366:15-22. Perkins also corroborated the testimony of the other witnesses that PDF had originally been called the Five Deuce Waterfront Crips. R.T., Jan. 26, 2006 (p.m.), at 6475:18-25.

Anthony Freeman met Shango Greer in 1985 when they were both in the fifth grade and they became very close friends. R.T. 6551:4-6552:7. During the next four years, Greer and Freeman sold drugs together and Freeman met Greer's other friends, who also sold drugs. *Id.* at 6552:23-6554:13. These friends included Fade, Shady, Eric Jones and [Marc] Tarver. *Id*. Freeman testified that during the period 1984 to 1989 Greer and his other friends were associated with a group called the City Park Thugs and that later this group began calling itself Pitch Dark Family. *Id.* at 6554:14.

Freeman also had a little bit to contribute on the Nations Burgers incident in which PDF member Eric Jones (aka EJ Rabbit) was shot. Freeman testified that Greer had told him that the shooting was precipitated when Jones confronted out-of-towners who were selling drugs in the neighborhood. *Id.* at 6612:28-6613:20.

Derrick Shields moved to west Vallejo in 1990 and continued to live there up through the date of the trial in 2006. R.T., Feb. 2, 2006, at 7071:17-7072:8. When he first moved to west Vallejo, he met several individuals who were members of a group called City Park, including Shango, Jason, Tone, Marc, Louis, Butch (Marlin), Meech (Demetrius Thompson), Bowleggs (Marc Tarver), EJ Rabbit (Eric), Nando, and Oscar Gonzales. *Id.* at 7072:9-7076:20. When he first heard about Pitch Dark Family in the early 1990's, Butch told him that it was the name of a rap group. *Id.* at 7077:15-20. Later, the same people who were in City Park adopted the name Pitch Dark Family. *Id.* at 7078:6-12. Shields testified that the members of PDF sold drugs in an area bounded by Alabama, Louisiana, Ohio and Sonoma streets, mainly at the Beacon gas station and the burrito truck on Ohio. *Id.* at 7079:17-21. This was PDF territory and to sell drugs there you had to have PDF's permission. *Id.* at 7079:22-7081:14.

Derrick Washington moved to Vallejo in 1989 and began associating with a gang called The Folks. R.T., Jan. 18, 2006, at 5683:1-5684:11. He also got to know individuals who were members of Pitch Dark Family, including Fade, Shango, Lou, Bowleggs, and Dogg. *Id.* at 5685:5-12. He witnessed

several of them selling rock cocaine on the west side in the early to mid-90's. *Id.* at 5686:1-12.

Jason McGill testified that, growing up in west Vallejo, he was familiar with the gang scene in that area. R.T., Jan. 11, 2006, at 5215. He identified numerous individuals as being members of a gang known as Pitch Dark Family, including Shango (Petitioner Greer), "Fade" (Petitioner Walker), "Shady" (Charles White), Oscar [Gonzales], Arnando Villafan, Elliott Cole, Lou Walker, "EJ Rabbit," "Bowleggs" (aka Mark). *Id.* at 5213:3-5215:3. He knew these individuals and their gang affiliation because he was an "associate" and "hung around with them." *Id.* at 5216:14-18. He personally witnessed them selling guns and drugs. *Id.* at 5216:21.

McGill testified that the leaders of the group appeared to be Jason Walker ("Fade") and Lou Walker; he described Shango Greer and "Shady" as the "muscle." He was present on a couple of occasions in the mid-90's when PDF got together to discuss gang business. On those occasions, the topics of discussion were "whose getting money in the neighborhood" and "people they could rob." R.T., Jan. 11, 2006, at 5220:11-5222:21. In 1994, McGill saw Jason Walker frequently and often saw him with a firearm. *Id.* at 5222:22-5224:2. During this time he saw Shango Greer "every now and then" and, on a couple of occasions, saw him with a firearm, which he carried in his front waistband. *Id.* at 5224:3-15.

Charles McClough, having lived in West Vallejo all his life, was familiar with the gang scene in the 1980s and 1990s. R.T., Jan. 12, 2006, at 5484:4-8. In fact, McClough admitted that he is a Five Deuce Waterfront Crip. *Id.* at 5574:19. He first became associated with the Five Deuce Waterfront Crips in 1984, when he was about 11 years old. *Id.* at 5484:23- 5485:9. McClough identified the other gangs on the west side as Downtown, City Park, and Pitch Dark Family. *Id.* at 5486:4-18. McClough identified the following individuals as members of Pitch Dark Family: "Bowleggs," "EJ Rabb," "Tone," "Fade," Lou Walker, Shango, Elliott Cole, "Shady," Oscar Gonzalez, and Arnando Villafan. *Id.* at 5504:12-5506:20. McClough personally witnessed PDF members selling guns and drugs - cocaine and heroin - on the west side. Id. at 5507:1-22; 5508:22-5510:16. As indicated later in this brief, McClough had several conversations with PDF members about the crimes they had committed. *See infra* at 16, 52-55.

Petitioners Shango Greer and Jason Walker corroborated much of this testimony. Government

Exhibit 1304B was a letter written from prison by Jason Walker to PDF member Oscar Gonzalez. Part of the letter states: "It's hella crips down there. The 415 is still trying to recruit a nigga. Negative. 707 4 life. CPG. WSV. PDF till I die." Greer admitted that the statement "its hella crips down there" meant that there were a lot of members of the Crips gang there. He also agreed that the phrase "415 is trying to recruit a nigga. Negative" meant that the 415 prison gang was trying to recruit Walker but that he had said no. Greer further admitted that "707" was a reference to Vallejo's area code. So far, this coincided precisely with Detective Fowler's interpretation. But when it came to explaining "CPG" - which Fowler quite sensibly said stood for City Park Gangstas - Greer testified as follows:

Q: All right. And "CPG," what's that.

A: City Park G.

Q: City Park G?

A: G.

Q: City Park G?

A: Yes

Q: What's the "G" stand for?

A: G.

Q: It's just a G?

A: Yes.

Q: You don't know what that stands for?

A: It's just a G.

Q: Doesn't stand for City Park Gangsters?

A: It could.

Q: But in this context, you just don't know?

A: I don't know what he – you know, he could have said City Park Gangster. City Park G. He could, you know. It has a lot of different meanings.

R.T. Feb. 23, 2013, at 8332:14-8333:6.

Later, Greer was asked about Government Exhibit 1410, a letter that he himself had written which concluded, in similar fashion, with "CPG." The following exchange occurred:

Q: And "CPG"?

A: City Park G, yes.

Q: City Park G still stands for City Park G?

A: Yeah. It could be gangsta. You call it what you want. It's a G.

Q: Does it stand for "gangsta"?

A: It's an open ended question. It can stand for a lot of things.

. . . .

Q: It does not stand for "City Park Gangsta"?

A: It can. Some people refer to it as that.

Q: You refer to it that way, don't you?

A: Sometimes.

Q: Jason Walker refers to it that way also; right?

A: Sometimes. Nothing wrong with being a G.

R.T., Feb. 28, 2006, at 8847:14-8848:8.

2. **Pitch Dark Family's History of Violence**

The summer of 1994 was an especially violent one for Pitch Dark Family. As described below, on July 15, 1994, PDF members Shango Greer, Jason Walker and Eric Jones participated in the attempted murder of Jason Hickerson (Racketeering Act 2). On August 3, 1994, PDF members Greer, Jason Walker, Charles White and Marc Tarver participated in the murder of Keith Roberts (Racketeering Act 3). On August 17, 1994, PDF gang members Jason Walker and Leroy Vance participated in a car jacking. And on August 28, 1994, PDF members Greer, Jason Walker, and Louis Walker participated in the murder of Richard Garrett. The latter three crimes are connected by common ballistics.

On January 29, 1998, PDF members Charles White and Oscar Gonzalez participated in the murder of Devin Russell.

a. **Hickerson Attempted Murder**

Multiple witnesses testified about the attempted murder of Jason Hickerson by Shango Greer and other PDF family members, including: Jason Hickerson, Lakisha Gooch, Cindy Smith, Dante Webster,

and, for the defense, Shango Greer himself.

Gooch testified that she was driving a car in which Hickerson was a passenger on July 15, 1994. R.T., Dec. 7, 2005 (a.m.), at 17:19-18:12. A PDF member named EJ approached the car and asked Hickerson why Hickerson took "his friend's stuff." *Id.* at 20:1-19. She dropped off Hickerson because EJ was clearly agitated with him. *Id.* at 21:1-22:10. Her car was then pursued by a grey car with Shango Greer, EJ and some other males she did not know. *Id.* at 22:13-24:16. Greer yelled at her and wanted to know where Hickerson was, she told him she'd dropped Hickerson off and didn't know where he was, and then got away from them. *Id*. When she went home a short time later, the same people who had been in the car were waiting for her across the street. *Id.* at 24:15-25:9. PDF member Ricardo White approached from the group and asked where Hickerson was, told Gooch they were angry at Hickerson, and advised Gooch to keep Hickerson out of her car because he stole guns and drugs. *Id.* at 25:13-30:6. White told Gooch "they" had guns, specifically a sawed-off shotgun. *Id.* at 29:24-30:5. White then searched Gooch's house to see if any of "their" stuff was there, after which White got in his car and left, and the others (Jones, Greer, and the others in the car she did not know) walked down the street. *Id.* at 30:9-31:7.

Witness Cindy Smith was outside her house that day and heard a shotgun blast. She looked in the direction of the noise and saw a "bluish-gray car, probably a Nissan Maxima or something of that style," with "two black men in the front of the car," and "a shotgun at the window ledge." She couldn't tell whether or not there was anyone in the back of the car. R.T., Dec. 7, 2005 (a.m.), at 68-69.

Dante Webster testified that within a week before Jason Hickerson got shot, he saw Hickerson with a machine gun. R.T., Dec. 15, 2005 (a.m.), at 84:4-14. Webster said that the day Jason Walker's car had been broken into "he was walking around the neighborhood pretty hot about Hickerson." *Id.* at 84:15-20. Walker asked Webster if he'd seen Hickerson because Walker thought Hickerson "had broken into his car and stole some guns and drugs from him." *Id.* at 84:25-85:2.

Greer testified that Hickerson was known for breaking into people's cars. Greer said on the day of Hickerson's shooting he, Greer, was driving a gray Honda Civic and that he and another car full of people started following a car Hickerson was in. Greer caught up to the car and spoke with Gooch,

asking where Hickerson was because "he stole my father's sh*t." R.T., Feb. 21, 2006, at 8012:22-24.[6] Gooch drove off and Greer proceeded to Hillcrest Park, because he knew Hickerson lived in the area. *Id.* at 8194:17-25. He said Gooch did not lie about anything to his knowledge. R.T., Feb. 22, 2006, at 8208:14-16.

Jason Hickerson testified at trial that in July 1994 he broke into Jason Walker's car, and took a bag of crack cocaine, an Uzi submachine gun, and a sawed-off shotgun. R.T., Dec. 7, 2005, at 100:7-101:12; 101:16-18; 101:19-102:5. On the day he was shot, Hickerson was riding with Gooch when they saw members of PDF, including Walker and Greer, standing in front of a business. *Id.* at 102:6-103:10. A grey Honda Accord was next to the group. *Id.* at 103:17-25. At a nearby stoplight, Eric Jones, a member of PDF, approached Gooch's car and confronted Hickerson in a hostile manner, looking back toward the grey Honda. *Id.* at 104:8-19. Hickerson directed Gooch to let him out, after which the group in the grey car, including Greer, Walker, Jones, and Marcus Taplin, spotted him and engaged in a short chase before Hickerson hid himself in a garage. *Id.* at 104:25-105:25. After he left the garage, the group in the grey car found him again. *Id.* at 111:13-24. Greer, Walker, Jones, and Taplin others jumped out of the car; Walker had a "38," and Jones had a shotgun. Greer was unarmed. *Id.* at 111:25-112:21.

PDF member Jones was convicted of the attempted murder of Jason Hickerson in state court. R.T., Dec. 7, 2005 (p.m.), at 47:4-5.

b. **Roberts Murder**

On August 3, 1994, at approximately 3:30 a.m., Vallejo police officers responded to a shooting that occurred at the intersection of Sonoma and Louisiana in Vallejo, which is in PDF territory. R.T., Jan. 3, 2006, at 4698:10-11. Upon arriving at the scene, officers saw a black male, later identified as Keith Roberts, lying face down in the street. *Id.* at 4698:14-16. Roberts had sustained multiple gunshot wounds, R.T. 4698:21; and was pronounced dead at the scene. *Id.* at 4702:4-9. Officers collected nine

[6] Greer testified that Hickerson had stolen his father's stereo in 1994. Greer's father, Harl Greer, however, testified that Hickerson stole a video camera (not a stereo) from him in 1999 or 2000 (five years after the attempted murder in 1994). R.T., Mar. 2, 2006, at 8877:16-8878:5; 8888:1-6. Mr. Harl Greer's stereo had been stolen at an unspecified earlier date by "Leon Gooch's son," but Mr. Harl Greer didn't recall discussing that incident with his son Shango. *Id.* at 8892:5-8893:9.

.38 Super shell casings at the crime scene. *Id.* at 4711:15-4712:9. These casings were arranged all around Roberts' body. *Id.* at 4700:11-20. Forensic analysis matched the .38 super shell casings to shell casings recovered from the scene of a carjacking that occurred two weeks later in the same area as the Roberts murder. R.T., Jan. 12, 2006, at 5459:7-21. The shell casings also matched one of the weapons used to kill Richard Garrett (Racketeering Act Four). The .38 Super is a fairly rare caliber ammunition. R.T., Jan. 5, 2006, at 4978:3-4. Joseph Thompson, the owner of one of the few gun stores in the region that sold .38 Super ammunition, testified that on August 19, 1994, two black males were in the store and purchased .38 Super ammunition. *Id.* at 4978:17-4979:11. Thompson recalled that these two individuals had been in the store a week or two earlier. *Id.* at 4979:12-24. On that occasion, one of the two men advised that he had a Llama .38 Super Auto for which he needed an additional magazine. *Id.* at 4980:12-25. After the two men departed the store, Thompson copied down the license plate of the brownish-colored Chevrolet the two were driving. *Id.* at 4982:12-24. He forwarded the information to the Vallejo Police Department. *Id.* at 4983:2-5.

On September 1, 1994, officers were conducting surveillance on this car. R.T., Jan. 5, 2006, at 5022:2-12. While on duty, they observed a Buick driven by Jason Walker pull into the parking lot and park next to the Chevrolet. *Id.* at 5023:1-15; R.T. 5026:3-23. The officers then saw Jason Walker and another black male exit the Buick and enter an unknown apartment. *Id.* at 5023:11-5024:3. Approximately 45 minutes later, Walker came out of the apartment complex and opened the trunk of the Chevrolet. *Id.* at 5024:4-23. After a few minutes, Walker returned to the apartment. *Id.* at 5025:3-7.

Charles McClough testified that after he was released from prison in 1995, R.T., Jan. 12, 2006, at 5513:18-20, Walker and White told him that the two of them, along with Shango Greer and Marc Tarver, were involved in the Keith Roberts homicide. *Id.* at 5515:3-17; 5517:3-5518:11. According to McClough, White told him that several of them participated in the shooting. *Id.* at 5518:12-17. McClough testified that the subject of Roberts's murder came up again approximately a week later at Marc Tarver's residence, and White, Tarver, and Walker again talked about the killing. *Id.* at 5519:3-19. The subject later came up a third time, again at Tarver's residence, with the same participants, except that Shango Greer was also present. *Id.* at 5520:18-5521:9. During one of these conversations, it was revealed that while several different people in the group had shot Roberts, Walker had taken the

final and fatal shot. *Id.* at 5528:3-5529:6. Neither Greer nor Walker disputed Whites characterization of events. *Id.* at 5526:18-5527:22.

A second witness, Derrick Washington, also testified that Walker admitted his role in the Roberts homicide. According to Washington, Walker said he had shot Roberts on Louisiana Street because Roberts had attempted to rob Walker of some drugs. R.T., Jan. 18, 2006, at 5698:1-5699:3.

c. **Garrett Murder**

On August 28, 1994, at approximately 10:50 p.m., Richard Garrett was shot and killed in PDF territory on the sidewalk adjacent to the Beacon gas station on Sonoma Boulevard. R.T., Jan. 4, 2006 (p.m.), at 4767:7-4771:13. Forensic examination revealed that Garrett was shot both with a .25 caliber and a .38 Super auto. R.T., Jan. 12, 2006, at 5458:24-5459:5. Forensics determined that the same .38 super used to Garrett's was used to kill Keith Roberts earlier in the month. *Id.* at 5459:6-21. That weapon was also used in a carjacking that took place in the same area on August 17, 1994. Forensic examination also revealed that the .25 caliber weapon used in the Garrett homicide was used in the attempted homicide of Lawrence Rude. *Id.* at 5459:22-5460:13.

Derrick Washington witnessed the murder. R.T., Jan. 18, 2006, at 5688:4-6. Washington testified that on the night of the murder, his girlfriend at the time, Teresa Williams, drove Washington, Greer, Louis Walker, and Tarver to the Beacon Gas Station on Sonoma Boulevard. *Id.* at 5689:4-5691:19. They observed Garrett appear to be arguing with Nishetia Jones, who was Greer's girlfriend at the time. *Id.* at 5693:2-5. Greer, Walker, and Tarver got out of Williams's car and approached Garrett. *Id.* at 5691:20-25. Garrett and Greer got into a fight, and Garrett hit Greer in the head with a beer bottle. *Id.* at 5693:10-19. Washington knew that Louis Walker was in possession of a chrome .25 caliber semi-automatic pistol, and Washington saw him shoot Garrett twice with the pistol. *Id.* at 5694:8-5695:11. Washington also saw Jason Walker cross the street, walk over to Garrett, and shoot him once with a black .38 caliber automatic. *Id.* at 5695:12-5696:13. Washington had seen Walker in possession of that gun several times previously. *Id.* at 5696:15-19.

Jason McGill testified that he was across the street from the Beacon gas station when he heard a commotion across the street. R.T., Jan. 11, 2006, at 5226:3-20. He saw Greer and Garrett wrestling with each other. *Id.* at 5227:8. While they were wrestling, McGill saw Jason Walker approach Garrett,

say something, and then shoot him with a black semiautomatic pistol from a distance of five or six feet. *Id.* at 5227:17-5228:6. He only saw one shot, but heard two more after he turned to run away. *Id.* at 5228:12-22. McGill testified that the second two shots sounded different than the first shot, like they came from a smaller weapon. *Id.* at 5228:23-5229:3.

Sharolette Simpson testified that she accompanied Nishetia Jones to the Beacon station and was present when Garrett was killed. R.T., Jan. 5, 2006, at 4904:9-4905:25. Simpson saw Jones arguing with Garrett outside of the Beacon station when a black sedan arrived at the gas station. *Id.* at 4909:9-22. Greer approached Jones and Garrett from the direction of the car, *Id.* at 4911:8-16, and started arguing and fighting with Garrett. *Id.* at 4912:15-19. Simpson saw several friends of Greer's, including Tarver and Jason Walker, approach the scene from the direction of the car and begin to attack Garrett as well. *Id.* at 4913:8-4914:20. Simpson then saw Louis Walker shoot Garrett twice. *Id.* at 4915:15-4918:11.

Jason Hickerson testified that he spoke with PDF member Willis Nelson about Garrett while both he and Nelson were incarcerated at San Quentin State Prison. R.T., Dec. 7, 2005, at 60:15-61:3. Nelson told Hickerson that Garrett was shot in retaliation for Garrett having shot Nelson during a fight. *Id.* at 62:9-15. Nelson told Hickerson that he had "killers on the payroll." *Id.* at 63:1-7. Hickerson testified that, according to Nelson, Garrett, who was not a member of PDF, was selling drugs in the gang's territory and refused to stop when warned to, prompting threats of violence from PDF. *Id.* at 59:14-17. Hickerson relayed this threat to Garrett, who ignored it and continued to sell drugs in PDF territory. *Id.* at 60:2-10.

Two days after the Garrett killing, Dante Webster had a conversation with Jason Walker about what happened at the Beacon Station. Walker explained that Garrett was "out of pocket," meaning that he was "in violation" or "was doing something he wasn't supposed to be doing." R.T., Dec. 15, 2005, at 86:9-87:7. Walker also said that that's "how the West get down." *Id.*

d. **Russell Murder**

On January 29, 1998, at approximately 2:30 a.m., Devin Russell was shot with a shotgun at the intersection of Sonoma Boulevard and Kentucky Street, which is in PDF territory. R.T., Jan. 26, 2006 (a.m.), at 6366:23-25. Prior to being admitted to emergency surgery, Russell told the Vallejo Police

Department (VPD) that he had been shot with a sawed-off shotgun by someone he knew, but not by name. R.T., Jan. 19, 2006, at 5930:10-11.

Corporal Herndon of the Vallejo Police Department was the first officer to arrive at the scene. *Id.* at 5883:1-2. He observed that Russell had suffered several shotgun wounds and was having a hard time breathing; his eyes were starting to roll back in his head. *Id.* at 5883:15-25. Based upon these observations, Herndon told Russell, "Dude, you are going to die, tell me what happened." *Id.* at 5884:19-20. Russell indicated that a young Mexican male named Oscar was present during the shooting, and that a black man who was with Oscar was the shooter. *Id.* at 5885:9-13.

Uvonda Parks was an eyewitness to the homicide. Parks testified that she saw Charles White shoot Russell with a shotgun. R.T., Jan. 24, 2006 (p.m.), at 6186:10-11; 6206: 14-16. White is a black male who is a few years older than Oscar Gonzales. According to Parks, Gonzales and others were present during the homicide, and Gonzales gave White the shotgun. *Id.* at 6202:20-25. Parks testified that she approached White, Gonzales, and the others as they were confronting Russell about being short for drugs they had purportedly given him to sell. *Id.* at 6191:16-6192:4. Parks heard Russell repeatedly beg the three men to believe him that he did in fact sell all the drugs given to him and did not use the drugs or keep some of the drug proceeds for himself. *Id.* at 6200:6-12; 6201:15-16. Russell also pled with Parks to vouch for him and tell White, Gonzales, and the others that he had not stolen from them. *Id.* at 6199:15-6200:4. The crowd formed a circle around Russell, at which point both White and Gonzales attempted to hit Russell with their fists, but missed. *Id.* at 6201: 8-17.

Gonzales disappeared for a few moments and then reemerged a few minutes later. *Id.* at 6201:18-6202:5. Gonzales then walked over to White and they appeared to speak to each other. *Id.* at 6203:4-16. Soon afterward, White displayed a sawed-off shotgun, pointed it at Russell, and fired. *Id.* at 6204:3-10; 6206:4-16. At this point Parks turned to leave the scene and heard a second shot, but did not see who fired it. *Id.* at 6208:13-23. Parks then saw White, Gonzales, and their colleagues all approach Russell and kick him as he was on the ground. *Id.* at 6209:8-6210:2. After the killing, White caught up with Parks and followed her home. White told Parks that Russell was killed because he had been a "snitch," cooperating with the police in solving other crimes committed by the group. *Id.* at 6211:3-6212:1.

Derrick Shields testified that prior to Russell's murder, White told him of his plans to kill Russell because Russell had testified against PDF member Elliott Cole in the Jewel Hart homicide case. R.T., Feb. 2, 2006, at 7136:15-7137:14. Shields observed White and Gonzales together at the latter's home around 11:40 p.m. on the night Russell was killed. *Id.* at 7140: 8-20. The following day, Shields again saw White and Gonzales near Gonzales's house. *Id.* at 7141:22-7142:5. White and Gonzales bragged about having "got that fool" a reference to Russell the night before. *Id.* at 7142:6-19.

Others corroborated Shields's testimony that Russell was killed because he had testified against Cole. Mickalla Oliver, who was dating Russell at the time, broke off the relationship because she had learned that Russell would be targeted for testifying against Cole, which frightened her. R.T., Jan. 31, 2006 (p.m.), at 6775:18-6776:24. Charles McClough testified that Elliott Cole told him that "something needed to happen" to Russell to punish him for testifying against Cole in the Jewel Hart homicide, resulting in Cole going to prison. R.T., Jan. 12, 2006, at 5530:4-16. According to McClough, White and Arnando Villafan told him that White shot Russell with a 12-gauge shotgun. *Id.* at 5532:21-5534:7. McClough was told that White's initial plan was to shoot Russell from the roof overlooking an alley where others were leading Russell. *Id.* at 5534:8-24. When White tried to shoot Russell from the roof, however, the shotgun jammed. *Id.* at 5534:25-5535:5. White had to fix the jam and, after joining Russell and the rest of the group in the alley, shot him twice. *Id.* at 5535:6-24.

Sedrick Perkins testified that before Russell's murder, Shango Greer warned him not to associate with Russell because Russell was snitching. R.T., Jan. 26, 2006 (a.m.), at 6371:24-6372:10. Perkins saw White with a sawed-off shotgun a few months before Russell's murder. *Id.* at 6373:2-10. About half an hour after Russell was killed, Perkins saw White and Cole a few blocks from where Russell was killed. *Id.* at 6375:15-6376:3. White was carrying an army bag that looked like it had a shotgun inside and remarked that they "got that snitch." *Id.* at 6376:14-6377:13. Cole said "that's how we do it in the West." *Id.* at 6377:14-15. Cole made that statement to Perkins again a couple weeks later when they were talking about the Russell killing. *Id.* at 6378:9-10.

Emily Garcia, Gonzales's cousin, testified that the night Russell was killed, Gonzales, White, and two friends were at Gonzales's house shortly before the murder. R.T., Jan. 24, 2006 (p.m.), at 6166:1-6. Dorothy Jansen, Gonzales's aunt, testified that after the shooting she saw Gonzales, White,

and Villafan going up the stairs of Gonzales's house. *Id.* at 6159:6-25.

e. **Cayton Murder**

On the morning of April 7, 2000, the Redwood Credit Union in Novato, California, was robbed. R.T., Jan. 26, 2006 (p.m.), at 6503:12-6504:7. The perpetrators wore ski masks and gloves, *Id.* at 6508:13-19, and carried guns. *Id.* at 6506:23-25. After entering the bank, they shouted for everyone to get down, *Id.* at 6504:20-23, and demanded the keys to the teller drawers. *Id.* at 6506:15-20. The robbers took approximately $15,000 from the bank. *Id.* at 6509:12-17. As they made their escape, their car was followed by two witnesses. *Id.* at 6523:21-6527:21. When the robbers became aware that they were being followed, they leapt out of the car and fled on foot. *Id.* at 6528:22-6529:22. The police arrived after the robbers had fled the scene. *Id.* at 6531:5-15.

Investigation by the FBI determined that the vehicle belonged to Anthony Freeman, a friend of Shango Greer. R.T., Jan. 26, 2006 (p.m.), at 6557:3-18; 6561:18-20. In March 2000, Greer, Jason Walker, Charles White, and Larry Cayton visited Freeman and expressed interest in buying the car. *Id.* at 6557:19-6559:14. Greer, Walker, and White, along with Mark Tarver and two other unidentified men, returned a second time to view the car and discuss a purchase. *Id.* at 6559:15-6560:21. Approximately one or two weeks later, the car disappeared from Freeman's house. *Id.* at 6560:22-6561:17. Sometime later, after the bank robbery, Freeman told Greer that law enforcement had inquired about the car. *Id.* at 6562:3-10. Greer responded that Freeman should tell the FBI that the car was stolen, and instructed Freeman, "Don't worry about anything because you didn't do anything." *Id.* at 6562:13-17.

Mickalla Oliver, the girlfriend of Larry Cayton, told law enforcement that when she and Cayton were together, Cayton would point out banks and indicate which ones he would rob and which ones he would not. R.T., Jan. 31, 2006 (a.m.), at 6743:16-24. He would articulate the reasons to her why a particular bank would be a good or bad target. *Id.* at 6743:25-7644:3. She also testified that Cayton and Greer were together most of the time during the days before the bank robbery. *Id.* at 6746:18-6750:19.

Shortly after the April 7 robbery at the Redwood Credit Union in Novato, Oliver was traveling from Vallejo to Novato on Highway 37. *Id.* at 6754:4-22. Oliver saw Cayton driving on Highway 37 in the opposite direction, toward Vallejo, in Oliver's car that she had let him borrow the day before. *Id.* at

6754:23-6755:20. Later that day, Oliver asked Cayton where he was that morning and he told Oliver he was at home the entire morning. *Id.* at 6757:1-6758:9. Oliver angrily confronted Cayton in front of Greer and told him that she saw him driving her car on Highway 37 toward Vallejo earlier that morning. *Id.* at 6758:10-12. Cayton then asked Oliver to step outside so they could talk on the porch. *Id.* at 6758:13-21.

Cayton told Oliver that he did what he had to do because he was "tired of being broke." *Id.* at 6759:7-11. Oliver then asked him what he did with her car and Cayton told her that her car had not been involved in what he had done. *Id.* at 6759:15-19. Cayton then told Oliver not to tell Greer anything about the incident, and in fact went so far as to make up a story to explain to Greer why Cayton and Oliver had to speak in private on the porch. *Id.* at 6759:20-6760:7.

The next morning, Oliver returned to work in Novato. *Id.* at 6765:25-6766:3. Oliver testified that while she was at work she saw an article in the local newspaper about the bank robbery that had occurred the previous day in Novato. *Id.* at 6766:4-18. Oliver recognized a photograph of the car depicted in the article as belonging to Greer. Oliver recognized the car because during the time she lived at Lee Street she saw the car parked there on a number of occasions. *Id.* at 6768:3-5. Greer made comments in her presence indicating that the car was his. *Id.* at 6768:9-22.

Larry Cayton was killed in Oakland on the morning of April 8, 2000. R.T., Jan. 31, 2006 (p.m.), at 6864:7-19. Connie Phillips, who allowed Cayton to stay at her residence temporarily, testified that the afternoon prior to Cayton's death, she arrived home from work to find Cayton and Greer at her apartment watching a movie. *Id.* at 6859:10-23. At some point they left the apartment, though Cayton returned later that evening for about five minutes to retrieve some clothes. *Id.* at 6860:14-25. At about 4:00 a.m. the following morning, Phillips heard knocking at her front door. *Id.* at 6861:12-18. Phillips's boyfriend, Irwin Crews, went to see who was at the door. *Id.* at 6861:19-23. Crews testified that he opened the front door and found Greer, who told him that he had left an article of clothing at the apartment. *Id.* at 6883:11-6884:11. Greer went to the closet behind the front door and looked around briefly before leaving. *Id.* at 6884:12-6885:6.

Approximately twenty minutes later, Cayton came into the apartment through the back door. *Id.* at 6862:12-13. Cayton then came to the bedroom where Phillips and Crews were located and shut the

door. *Id.* at 6862:14-16. Phillips heard footsteps and muffled voices of at least two other men with Cayton. *Id.* at 6862:20-6863:1. Phillips was unable to tell who these two men were. *Id.* at 6863:15-20. Phillips testified that at one point Cayton said, in an agitated tone, "Don't even come at me like that." *Id.* at 6863:23-6864:3. Cayton and the men left the apartment shortly thereafter. *Id.* at 6864:5-6.

At approximately 5:30 a.m. on April 8, Clifford Rosa, a homeless person, was camped underneath a freeway overpass on 29th Street in Oakland. R.T., Mar. 1, 2006 (p.m.), at 8675:4-20. Rosa observed a light blue Ford Taurus carrying three people turn a corner, pull over, and turn its lights off. *Id.* at 8676:11-19. The occupant of the front passenger seat walked to the rear door, pulled out the passenger by the collar, and shot him. *Id.* at 8680:2-25. When the victim fell to the ground, the shooter stood over him and fired several more rounds into him. *Id.* at 8685:3-10. The driver then said, "We got to get out of here," and the passenger got back into the vehicle, which left the area. *Id.* at 8686:2-13. Rosa flagged a passing CHP officer and told him what had happened. *Id.* at 8686:20-8687:2. The victim was later identified as Larry Cayton. Rosa described the shooter and the driver as Caucasian or light-skinned. *Id.* at 8676:20-8678:21. Rosa admitted, however, that he was ingesting two dime bags of heroin a day during that time period. *Id.* at 8692:18-8693:3. He also had trouble seeing distances, and was not wearing glasses at the time he observed the killing. *Id.* at 8721:16-8722:17.

At about 4:00 p.m. on that day, Phillips was informed by the Oakland Police that Cayton had been shot and killed. R.T., Jan. 31, 2006 (p.m.), at 6864:7-19. Two days later, on Monday, Phillips and Crews stayed home from work. *Id.* at 6886:6-11; 6864:20-6865:11. That day, Greer and a companion paid a visit to Phillips's apartment to find out what Phillips and Crews knew about Cayton's death. *Id.* at 6886:12-6887:7. Two days later, on Wednesday, Phillips and Crews went back to work. *Id.* at 6867:23-6868:4; 6887:6-9. On that day, Phillips's home was broken into. A key was used to unlock the back door, but because there was a chain across the door, the intruder still had to force his way into the residence. *Id.* at 6887:17-6888:18. Because Cayton was the only one who had a key to the back door, the intruder must have used Cayton's key to gain entry. *Id.* at 6869:2-6870:6.

Though there was money out in the open in Phillips's residence, as well as valuable electronics, the only thing taken by the intruder was the video Cayton and Greer had been watching the afternoon before the murder, as well as a few rap CDs by local artists. *Id.* at 6871:12-6872:1. The only portion of

the residence the intruder disturbed was the closet Cayton used to store his clothes and belongings. *Id.* at 6889:10-15. Phillips and Crews could not tell if anything was missing from this closet, because they did not know what he kept there. *Id.* at 6890:15-16. They were, however, able to ascertain that no other portion of the residence had been disturbed, and that other than the aforementioned video and CDs, nothing else had been taken. *Id.* at 6890:7-11.

Derrick Shields, a close associate of Cayton and Greer, testified that he met Greer and Cayton in prison and they discussed having done bank robberies together. R.T., Feb. 2, 2006 (a.m.), at 7091:7-7092:17; 7096:17-7100:2. Shields and Cayton spent a good deal of time together in the late winter and early spring of 2000, after they both had been released from prison. *Id.* at 7100:17-7101:22. The afternoon after the Redwood Credit Union robbery, Shields encountered Cayton at a gas station, where Cayton inquired about purchasing a large quantity of marijuana from Shields, and showed Shields $1,500 in cash he proposed to use to buy the drugs. *Id.* at 7101:23-7103:24. Shields testified that this surprised him somewhat, since Cayton did not have a job and had not had much money since being released from prison. *Id.* at 7101:8-17; 7103:25-7104:4.

Shields learned of Cayton's death the next morning, from Elliot Cole. *Id.* at 7105:3-20. Later that day, Greer confided to Shields that he felt he had no choice but to kill Cayton. *Id.* at 7107:12-16. Shields also testified that before Cayton's death, Greer had complained that Cayton was starting to talk too much to other people about confidential information that was supposed to stay between Greer and Cayton. *Id.* at 7107:16-7108:18.

Shields cooperated with the government's investigation of this case. He was in custody on May 9, 2000, on unrelated charges when the FBI interviewed him about the murder of Larry Cayton. Ex. A, hereto (FBI-302).[7] He told the FBI agents what he knew at that time, which was consistent with his testimony at trial. *Id*. The FBI arranged for Shields to be released from custody for two weeks, for the purpose of wearing a wire on Greer, Walker, White, and others, after which Shields returned to custody and completed his sentence. R.T., Feb. 2, 2006 (p.m.), at 7158:2-7167:6; 7147:11-7148:3. During one

[7]Shields spoke two days earlier with the Oakland Police Department about the murder, first telling them "what he heard on the street," then telling them "the truth," *i.e.*, he knew who had killed Cayton, it was Greer, it was over a robbery occurring shortly after Cayton had been released from prison, and Cayton's discussion of same with "some little broads." Ex. A, hereto.

of the wired calls, Shields discussed the Cayton homicide with Greer and Greer indicated that Cayton was talking to various women about their illegal activities, which Greer considered unacceptable, consistent with what Shields told both the Oakland PD and the FBI prior to this call. Ex. B, hereto (Gov't Exhibit 510A); R.T., Feb. 2, 2006 (p.m.), at 7116:10-7119:4. During this tape-recorded conversation, Greer also told Shields, "I'd do the same thing again . . . if it all came down to it." *Id*.

Following the Cayton homicide, there was an extensive investigation by both the Oakland Police Department and the FBI. Pitch Dark Family members began their efforts to protect themselves from law enforcement action. When Mickalla Oliver confronted Charles White about Cayton's death, White asked Oliver for Cayton's cell phone, and then made her promise that she wouldn't snitch on them. R.T., Jan. 31, 2006 (a.m.), at 6777:12-6779:11. Oliver was scared for her life and left the area. *Id.* at 6780:10-20.

Anthony Freeman testified that Greer left California and went to Philadelphia in the summer of 2000 to live with his brother there. R.T., Jan. 26, 2006 (p.m.), at 6564:5-16. According to Freeman, Greer told him that it was "getting hot" in Vallejo as a result of the police and FBI investigation into the Cayton homicide, and Greer wanted to "let it cool down a little bit." *Id.* at 6564:17-25. After his return to California, Freeman had several contacts with Greer. Greer, White, and Marc Tarver came to see Freeman in July 2000. *Id.* at 6565:17-24. Greer told Freeman that Cayton was "gone," but declined to provide any other details because Freeman didn't "need to know about it." R.T., Jan. 30, 2006 (a.m.), at 6583:4-20.

II. LEGAL STANDARDS

A. Threshold for Evidentiary Hearing

When a 2255 petitioner posits facts which would demonstrate a violation of federal law or the Constitution, a hearing must be held "'[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *U.S. v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998). But "[m]erely conclusory statements in a § 2255 motion are not enough to require a hearing." *U.S. v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993) (citation omitted). "A hearing must be granted unless the movant's allegations, when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *U.S. v.*

Schaflander, 743 F.2d 714, 717 (9th Cir. 1984). The court can use common sense when determining whether to hold an evidentiary hearing. *Shah v. U.S.*, 878 F.2d 1156, 1159 (9th Cir. 1989).

B. Ineffective Assistance of Counsel

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Harrington v. Richter*, 131 S.Ct. 770, 790 (2011) ("Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial."). In *Strickland*, the Supreme Court established a two-pronged test for determining if counsel rendered ineffective assistance. Under this test, a defendant has the burden to establish: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced his defense. *Id.* at 687; *U.S. v. Quintero-Barraza*, 78 F.3d 1344, 1347 (9th Cir. 1995); *U.S. v. Taylor*, 802 F.2d 1108 (9th Cir. 1986).

In applying this standard, the Court need not follow any particular order. If an ineffectiveness claim is untenable on the prejudice prong, the Court need not even address the performance prong. *Strickland*, 466 U.S. at 697.

1. **Incompetence**

To establish incompetence, the defendant must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. *Id.* at 689-690; *Eggleston v. U.S.*, 798 F.2d 374, 376 (9th Cir. 1986); *U.S. v. Schaflander*, 743 F.2d 714, 717-718 (9th Cir. 1984). A defendant must prove serious derelictions on the part of counsel. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). The United States Constitution does not guarantee representation that is infallible. *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978). The defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 685. The Court must determine whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 718.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *Id.* at 689; *U.S. v. Cochrane*, 985 F.2d 1027, 1030 (9th Cir. 1993); *U.S. v. Hamilton*, 792

F.2d 837, 839 (9th Cir. 1986). Judicial scrutiny of counsel's performance must be highly deferential because it is "all too tempting for a convicted defendant to second-guess counsel's assistance after conviction or adverse sentence." *Strickland*, 466 U.S. at 689. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Id.* at 690.

Counsel need not recognize and assert every possible defense and argument. *Woratzeck v. Ricketts*, 820 F.2d 1450, 1453 (9th Cir. 1987), vacated on other grounds, 859 F.2d 1559 (9th Cir. 1988). Counsel does not commit ordinary error or any type of error when counsel does not raise claims that do "not have a reasonable probability of succeeding." *Miller v. Keeney*, 882 F.2d 1428, 1435 (9th Cir. 1989).

A standard of objective reasonableness recognizes tactical choices. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *Strickland*, 466 U.S. at 689-90 ("Even the best criminal attorneys would not defend a particular client in the same way."). Therefore, "the defendant 'must overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy.'" *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689). Where a defense attorney chooses one potential argument over another, the failure to present the alternative argument does not show ineffectiveness where the petitioner fails to identify evidence counsel should have presented that would support the alternative argument. *See Borg*, 24 F.3d at 27. A tactical decision by counsel that is not objectively unreasonable, but with which the defendant disagrees, does not constitute ineffective assistance of counsel. *Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984); *Hughes v. Borg*, 898 F.2d 695, 703 (9th Cir. 1990).

The Ninth Circuit has continuously warned it will "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994).

2. **Prejudice**

With respect to prejudice, it is not enough for a defendant to show that errors or omissions had some conceivable effect on the outcome of the proceeding, as virtually every act or omission of counsel would meet that test. *Strickland*, 466 U.S. at 693; *U.S. v. Birtle*, 792 F.2d 846, 849 (9th Cir. 1988). "He

must show there is some reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *U.S. v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996). This standard is "rigorous" and "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986). In assessing prejudice, the Court must also consider the applicable legal standard. *Strickland*, 466 U.S. at 695 (*e.g.*, when conviction challenged, would fact finder have had a reasonable doubt, absent counsel's errors).

3. **Petitioners Claims Are Largely Unreviewable, But Asserted as Ineffective Assistance of Counsel in an Attempt to Reargue Their Entire Case**

Non-constitutional claims are not reviewable in collateral proceedings. *See U.S. v. Timmreck*, 441 U.S. 780, 783-84 (1979). By contrast, claims of ineffective assistance of counsel are generally better raised in collateral proceedings than on direct appeal. *Massarro v. U.S.*, 123 S.Ct. 1690 (2003). Most of Petitioners claims are rehashed versions of arguments that their counsel made below, unsuccessfully, and that could have been, but were not raised on appeal. Petitioners recast these as ineffective assistance claims as to their trial counsel in some cases and as to their appellate counsel for failing to raise the issue in others, in an attempt to avoid default. The only claims made here that are the traditionally cognizable IAC claims are those that their trial counsel failed to call certain witnesses, and that their trial counsel failed to advise them of the maximum penalties they faced. As we demonstrate below, under *Strickland*, those claims are without merit. Quite literally every other claim raised by Petitioners is something that was addressed in the trial court and appropriately not included in Petitioners' direct appeal. These claims, even were review available here, are similarly without merit.

C. <u>Where Petitioners Failed to Raise Claims on Appeal, They Have Defaulted and Must Demonstrate Cause and Actual Prejudice to Have them Heard Here</u>

The law requires that a defendant bring all claims on direct appeal, or they are deemed "defaulted," barring him from raising them on collateral review. *Sunal v. Large*, 332 U.S. 174 (1947). A collateral attack is not a substitute for an appeal. "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal." *Id.* at 178; accord *U.S. v. Frady*, 456 U.S. 152, 168 (1982). "Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could

have been raised on direct appeal." *U.S. v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985). As a result, "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and 'actual prejudice' or that he is 'actually innocent.'" *Bousley v. U.S.*, 523 U.S. 614, 622 (1998).

Neither defendant claims he is actually innocent in this. Both allege in their arguments regarding sufficiency of the evidence that "Appellate counsel could have proved that Petitioner … was 'actually innocent' of being a part of an 'enterprise,'" Greer, at 89; Walker, at 86, but this argument is both passing and contained in a sufficiency of the evidence argument. "Actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623; *see also U.S. v. Transfiguracion*, 442 F.3d 1222, 1229 (9th Cir. 2006). To prove actual innocence, Petitioners each must show that he is in fact innocent, not that the government's case against him was legally insufficient. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Thus, to proceed here after defaulting at the Ninth Circuit, each Petitioner must show cause and actual prejudice.

To satisfy the cause requirement, the movant must demonstrate that "some objective factor external to the defense impeded counsel's efforts" to raise the issue. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Ordinarily, this will involve "a showing that the factual or legal basis for [the] claim was not reasonably available to counsel . . . or that 'some interference by officials' made compliance impracticable." *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991).

To show prejudice, the movant must show that an error worked to his actual and substantial disadvantage. *Frady*, 456 U.S. at 170.

As each claim is addressed below, the Government will address its default status.

D. <u>Alleged ineffective assistance of trial counsel.</u>

1. Failure to interview and call Marcus Taplin and Eric Webster on behalf of the defense. (Greer Motion, at 37-42; Walker Motion, at 35-40.)

We start with the fact that the defense here clearly engaged an investigator, and interviewed witnesses, putting over a dozen people on in the defense case. *See, generally*, Minutes from February 21, 2006 to March 9, 2006, R.T, Mar. 6, 2006, Mar. 7, 2006 (testimony of defense investigator Larry Fuller); R.T., Dec. 7, 2005 (a.m.), at 2-3 (referencing defense interviews with Hickerson). With such a

record, the failure to call specific witnesses Petitioners allege could have testified is a very weak claim of ineffective assistance indeed. *U.S. v. Schaflander*, 743 F.2d 714, 721 -722 (9th Cir. 1984) (where record demonstrates that defense counsel interviewed defense witnesses, generally, difficult to persuasively demonstrate that "further interviewing would have raised a reasonable probability of changing the outcome of the proceeding.").

a. **Marcus Taplin**

Petitioners claim that their counsel should have called Marcus Taplin to contradict Jason Hickerson's version of the events that occurred on the day that Shango Greer and Jason Walker tried to kill him. The attempted murder of Jason Hickerson, as the evidence was presented at trial, is more specifically outlined in section I.C.2.a, above and with citations, but we summarize it again and supplement it here.

Hickerson had run afoul of the Pitch Dark Family, stealing drugs and guns from a car belonging to Jason Walker. On July 15, 1994, Hickerson was a passenger in his girlfriend's car when EJ, a PDF member, approached and asked Hickerson why Hickerson took items belonging to a friend of EJ's. His girlfriend drove off, dropped Hickerson off on the street, and her car was then pursued by a car with Shango Greer, EJ and some other males unknown to her. That car eventually caught up to Hickerson, who identified the individuals in the car as defendants Greer, Walker, Jones, and Taplin. Hickerson ran and hid in a garage. When he left the garage, the car found him again, Hickerson testified that Greer, Walker, Jones, and Taplin jumped out of the car. Walker had a 38 caliber gun, Jones had a shotgun. Jones shot Hickerson, and pleaded guilty to attempted murder in state court.

Greer himself testified about the day Jones shot Hickerson, and admitted he had been with Jones, driving his own grey Honda civic, during the initial pursuit Hickerson described, and Greer admitted he went to Hickerson's girlfriend's[8] house, again with Jones, again in his own car, the grey Honda civic. He claimed he was following Hickerson because Hickerson had taken something from Greer's father, a point Greer's father later refuted. R.T. (Feb. 21, 2006), at 8008-8016. But after he went to Gooch's house, Greer claimed to have left with Ricardo White, leaving his own car behind. *Id.* at 8017. Gooch,

[8] Lakeisha Gooch.

however, testified that White got into his own car, alone, and left, while Greer and the others walked off together. R.T., Dec. 7, 2005, at 31:10-23. Thus, Greer's theory was that he was riding around in his own car with Eric Jones, who was convicted of Hickerson's attempted murder, but he left his car behind near Gooch's house and somebody else must have taken it and committed the attempted murder without him.

When investigators questioned Taplin in November 2002, he told them he did not know Hickerson, Walker, or Greer, and had never heard of a group called "Pitch Dark Family." Ex. C, hereto. Taplin also testified in the grand jury, and denied knowledge of any gangs in west Vallejo, and denied knowing Greer, Walker, White, or substantially anyone else associated with Pitch Dark Family. Ex. K, hereto.

Petitioners now claim it was ineffective assistance of counsel for their attorneys not to call Taplin to the stand to explain how he didn't know anyone associated with PDF or Hickerson, and hadn't been anywhere near a murder or attempted murder, ever, thereby impeaching Hickerson. Greer, at 38-39. Given Greer's own testimony, and how very thoroughly it was contradicted, including by his own father, impeaching Hickerson with apparently the only resident of west Vallejo who was unaware of any gang activity in the area hardly seems likely to bolster Greer's defense or defeat Hickerson's corroborated testimony.

Given the weakness of Greer's story and the corroborated strength of Hickerson's,[9] it would be extremely difficult for either Petitioner to show prejudice from the failure to call Taplin who would presumably say he did not know Greer or Walker, or any gang in west Vallejo, named PDF or anything else. The jury was hardly likely to come to a different conclusion in the face of this testimony, which was contradicted by substantially every other witness who testified that one had to know who was who on the streets to survive in west Vallejo, particularly as Marcus Taplin's presence during the attempted murder of Jason Hickerson formed a very limited portion of the testimony.[10] Trial counsel's choice not

[9] Greer admitted he was with Jones pursuing Hickerson that day and Jones pleaded guilty to Hickerson's attempted murder.

[10] R.T., Dec. 7, 2005, at 32:14-15, 35:9-19, 41:10-11, 46:17-21 (all direct testimony of Hickerson); R.T., Dec. 12, 2005, at 9:15-16, 13:7-17 (all cross-examination of Hickerson, including impeachment).

to call Taplin to the stand was well-within the realm of an objectively reasonable strategic decision. There is no ineffective assistance here.

b. **Eric Webster**

Petitioners claim it was error to fail to interview and call Eric Webster. Greer, at 39; Walker, at 37. They argue without citation that at trial Webster was identified as PDF's gun and drug supplier and, if he'd been called to the stand, he would have refuted that. The Government has not been able to find any such testimony. Indeed, it was the defense who portrayed Eric Webster as a gun and drug supplier for "the Folks," another West side gang in Vallejo that the defense portrayed as setting up all the PDF members who were on trial. Eric Webster was the defense's empty chair in this case; clearly a strategic choice.

In his opening statement, defense counsel brought up Eric Webster's name for the first time, stating that the evidence would show it was Eric Webster, not Shango Greer or Jason Walker, who shot Keith Roberts (aka York). R.T., Dec. 6, 2005, at 25-27. As the testimony developed at trial, the defense raised Eric Webster over and over again, tying him to another gang called "the Folks," and developing a theory that the Folks for some reason had it out for the nice little rap group "Pitch Dark Family," and set up this entire case against Greer, Walker, and their co-defendants. R.T., Jan. 24, 2006, at 6142-6143 (Townley cross by Greer's counsel that she might have identified E. Webster as involved in Roberts' murder, but does not recall); R.T., Mar. 1, 2006 (a.m.), at 8531-8538 (direct by Greer's counsel and redirect by government of Agent Peyton, who showed Townley a lineup regarding Roberts murder at which point Townley identified E. Webster as involved); *Id.* at 8543-8544 (direct by Walker's counsel of Agent Butler regarding same identification by Townley); R.T., Mar. 6, 2006, at 8989 (Walker's counsel examining defense investigator about showing Uvonda Parks' a photograph of Eric Webster); R.T., Jan. 26, 2006, at 6398-6400, 6403 (Perkins cross by Greer's counsel on topic of E. Webster being Dante Webster's brother and a gun and drug seller from Oakland); R.T., Feb. 15, 2006, at 7916-7918, 7921 (Cross of Det. Fowler by Greer's counsel about "Eric Webster, major dealer from Oakland" and what would happen if he attempted to sell in PDF territory); R.T., Feb. 21, 2006, at 7953 (Greer's counsel in direct exam of Greer raising identity of Eric Webster).

This groundwork, such as it was, formed part of the basis for the defense closing, which focused

on a defense theory that many of the witnesses were Folks members or associates and were all trying to set up the completely innocent rap group, PDF, and its members:

> Other than Folks or Folks-associated drug dealers working off their cases and grudges, did we hear anything about PDF from any drug dealers?
>
> …
>
> Folks was connected by blood and business dealings with a large scale drug dealer, Eric Webster.

R.T., Mar. 22, 2006 (Greer's closing), at 89:2-4, 23-24.

> Eric Webster shot Keith Roberts, as told by Connie Townley.
>
> …
>
> How it worked was this; It was a combination of the government – by "the government," I mean the FBI and the Vallejo Police Department – their desire to go after Shango Greer and PDF that put blinders on them. Okay?
>
> They did not see the whole case. Then Folks were able to provide the information that they needed in order to bring this prosecution, not because Folks was working with or for the FBI or Vallejo PD, but because those members of Folks profited by.
>
> …
>
> Ladies and gentlemen, it all leads back to Folks. Not because it was a setup. Life is not that easy. You've got well-intentioned FBI agents being suckered in by some very sharp people.
>
> What has resulted is this prosecution. This prosecution, ladies and gentlemen, is rife with doubt.

Id. at 90:9-10, 90:24-91:7; 91:13-18.

Walker's closing echoed this theme:

> Let's go back and take a look at Keith Roberts. Connie Townley testified, and I don't think there's any question that even though she tried to say she wasn't the eyewitness, it's clear that she was. It's Eric Webster's car and the passenger did the shooting.

R.T., Mar. 22, 2006, 142:24-143:3.

> They're all members of Folks [referring to Sedrick Perkins, Jason McGill, and Derrick Shields], E's Brother [Dante Webster] is the leader of Folks. It is more likely that Derrick Washington shot Roberts, shot at Romero-Sorto, and shot at the Richard Garrett case.

Id. at 144:18-21.

> [McGill] says he buys dope and guns from E, Eric Webster. He's a good

> friend with the Folks. Eric Webster is his supplier, and he sells dope in PDF territories apparently along with everyone else in town.

Id. at 164:10-13.

> You've heard a lot of talk about Derrick Washington. I have a few things to say about him. He's a member of Folks, right?
>
> He shot Rude, framed Shango. He buys his guns from E, Eric Webster. He got out of the right front passenger seat at the Beacon Station seconds before Garrett was shot.
>
> Did he get out of E's car at the Robert's shooting? Could have. Buys his guns from him.
>
> Remember Connie Townley? She finally admitted when E took her to the motel later, slams his gun down, and told her he liked her because she wouldn't snitch. Do you remember that?

Id. at 173:12-23; *see also* R.T., Mar. 23, 2006, at 7-11 (additional argument that E. Webster was shooter identified by Townley in relation to Roberts' murder); R.T., Mar. 22, 2006, at 129-131 (Walker's counsel raising Eric Webster in connection with the "Folks"); *id.* at 141 (Walker's counsel arguing E. Webster was identified by witness as Roberts' shooter). The defense theory that Folks, associated with Eric Webster, is well summarized by this line from Walker's closing:

> Ladies and gentlemen, we've got a Folks' trial attended by two members of PDF. That's what we have here.

R.T., Mar. 23, 2006, at 35:18-19.

The defense theory required that Eric Webster be a violent and large scale gun and drug dealer, associated with the Folks, and responsible for the murder of Keith Roberts, aka York. It is hardly likely that Webster would show up and admit on the stand under oath that he sold drugs and guns to gang members in Vallejo and murdered Keith Roberts. Greer himself denied harming a fly during his own testimony, one could reasonably expect Webster would either do the same, or refuse to testify. Thus, the defense here engaged in a classic defense strategy – point at the empty chair and say anything you want about it. There is hardly a clearer example of an objectively reasonable strategic choice by defense counsel in the defense playbook. There is no ineffective assistance here.

2. Petitioners' Argument Regarding Inadequate Expert Disclosure is a Transparent Attempt to Relitigate an Issue that Was Raised at the Ninth Circuit as Demonstrated by the Fact that their Counsel Actually Did What Petitioners Claim Counsel Failed to Do[11]

a. Petitioners Substantive Argument Was Raised in Their Appeal, and Cannot Now Be Revisited

In this issue, Petitioners make a claim that their trial counsel failed to object to inadequate expert disclosures by the Government and were therefore constitutionally ineffective, resulting in improper testimony from Detective Fowler that prejudiced them. Greer, at 125. We deal with the alleged constitutional issue below. The substantive issue raised by Petitioners here, however, that the subject matter of Det. Fowler's testimony was inappropriate, was also raised on appeal, and the Ninth Circuit ruled against Petitioners. Therefore there is no basis for raising this issue, again, here.

Specifically, Petitioners here allege that expert testimony on the existence of a RICO enterprise is inappropriate, and he was nothing more than a mouthpiece for hearsay on this point:

> Defense counsel allowed the government to prove the elements of a RICO offense through one witness whose testimony was not reliable. No other witness proved the elements of RICO for the government.

Greer, at 126.[12]

In their joint brief to the Ninth Circuit, Petitioners made the same argument in a section of their brief entitled: "The Court Erred In Admitting Fowler's Testimony on 'Street Intelligence' and the Codefendants' Admissions, Because this Lay Hearsay Evidence Required No Expert Interpretation." AOB, at 78. Under that section, Petitioners proceeded to argue that in other cases, there is percipient testimony about the structure and organization of the gang at issue, and provide their view of the percipient testimony in the instant case, calling it inadequate to demonstrate a RICO enterprise. AOB, at

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[11] Here we address the issues raised at: Greer, 118-126; Walker Motion, 105-113.

[12] The Government notes that Det. Fowler was not asked nor did he opine on whether the Pitch Dark Family was a RICO enterprise. He was asked about gangs in general, and how they operated, and he was asked whether Pitch Dark Family was a gang. He said it was. R.T., 7792:10-7793:14. Contrary to Petitioners' position, his testimony was not based solely on street intelligence; he cited multiple other bases for his opinion, including graffiti, tattoos, clothing, *Id.*, admissions by the co-defendants in this case that Pitch Dark Family was "an association of individuals engaged in gang-related activities," and that they were each members, R.T. 7794:10-21, as well as a letter written by Jason Keith Walker which states: "It's hella Crips down here. The 415 is still trying to recruit a nigga, but negative. 707-4-life. CPG, WSV, PDF till I die," which Det. Fowler translated to: "The 415 is trying to recruit him, and he doesn't want to join. He's got a gang already," R.T. 7797:4-7798:1, 7915:11-18.

79-80. In the instant petitions, Petitioners make the same argument, even citing the same case *U.S. v. Shyrock*, 342 F.3d 948 (9th Cir. 2003), and providing their argument of specific percipient witnesses testimony they claim failed to demonstrate a RICO enterprise. Greer, at 122-124; Walker, at 106-112.

In short, this issue was raised with the Court of Appeals, which affirmed the District Court. Thus, by necessary implication, the Court of Appeals considered and rejected this claim by Petitioners. *U.S. v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012) (quoting *U.S. v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("An argument is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument")). As this claim was determined against Petitioners in the Ninth Circuit, Petitioners may not revisit the issue in this Court via Section 2255. *Odom v. U.S.*, 455 F.2d 159, 160 (9th Cir. 1972) ("The law in this circuit is clear that when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion."); *see also U.S. v. Jingles*, 702 F.3d 494, 500 (9th Cir. 2012).

In *Jingles*, the defendant appealed from the denial of his Section 2255 motion. On direct appeal, he claimed there was a constructive amendment of the indictment, a claim the Ninth Circuit rejected. *Jingles*, 702 F.3d at 499. In his Section 2255 motion and in his appeal therefrom, he cast the same issue as a "fatal variance." *Id.* The Ninth Circuit noted that although he delineated his Section 2255 argument slightly differently than the issue he raised on his initial appeal, it was in substance the same issue and therefore the Section 2255 motion was properly denied. *Id.*at 499-500, 502. That is the case in regard to this issue regarding expert testimony.

b. **Petitioners' Trial Counsel *Did* Raise the Procedural Issue, Vigorously and in Writing, and Argued it In Front of Judge Damrell; Thus Their Claimed Basis for Ineffective Assistance is Fatally Flawed**

Petitioners' argument regarding Detective Fowler at the trial counsel level is summarized in the following passage from Petitioners' motions:

> Petitioner Greer argues that counsel's failure to object to Detective Fowlers' testimony pursuant to Rule 16(a)(1)(G), allowed the government to prove a RICO case through Detective Fowlers' testimony.

Greer, at 125; Walker, at 111. The majority of Petitioners' argument on this issue is focused on their position that it is improper to permit an expert to opine that a RICO enterprise existed, and that's what Det. Fowler did. That argument is not a Constitutional argument. *See U.S. v. Timmreck*, 441 U.S. 780,

783-84 (1979) (non-Constitutional violations are not cognizable on collateral review). It is an argument regarding non-constitutional error, and one they raised on appeal and lost. Thus, Petitioners cloak the argument in an "ineffectiveness" claim, by arguing that counsel was ineffective for failing to object to Detective Fowler's testimony pursuant to Rule 16(a)(1)(G).

There is a very big problem with that – trial counsel did object that the Government's disclosures under Rule 16(a)(1)(G) were inadequate. Indeed, defense counsel jointly objected, vigorously and in writing and at argument, to the Government's Rule 16(a)(1)(G) disclosures regarding Det. Fowler. *See, e.g.*, DN 497, at 2:15-21. The defense requested *and received* a *Daubert* hearing to challenge both the disclosure and Det. Fowler's qualifications. The defense's position was reiterated, clearly, in a subsequent motion to continue the *Daubert* hearing and "For Discovery of Gang Expert's Required Disclosure," which stated:

> The defense requests the Court order the government to produce immediately all items listed above and/or all other materials upon which Det. Fowler will rely in opining as to his opinions and order the government to comply with Rule 16(a)(1)(G).

DN 531, at 1, 8:3-5.

The issue of appropriate disclosures under Rule 16(a)(1)(G) was addressed almost exclusively at a hearing on November 14, 2005. R.T., Nov. 14, 2005. The Court ruled, after hearing and supplemental disclosure by the Government, that the Government's disclosure was adequate under the Rule. R.T., Nov. 15, 2005, at 1:17-20 ("I have received a letter addressed to defense counsel which I think fully satisfies the Court there's a Rule 16 compliance here."). Thus, the basic premise that trial counsel was ineffective for failing to object is demonstrated to be without basis by simple reference to the record in this case.

3. Because Petitioners' Counsel Challenged the Testimony of Uvonda Parks in the Grand Jury as Perjured, Petitioners' Argument that Counsel Was Ineffective for Failing to Make Such a Challenge is Baseless.[13]

Petitioners argue that their counsel failed to challenge Grand Jury testimony from witness Uvonda Parks that they allege was perjured. Petitioners have not only defaulted on this claim, it is wholly without merit as their trial counsel actually challenged the grand jury testimony of Uvonda Parks

[13] Here we address the issues raised at: Greer Motion, at 127-139; Walker Motion, at 113-125.

as perjured.

a. **Petitioners' Argument Must Be Disregarded Because it has Been Defaulted**

This issue could have been raised on appeal, but was not. Petitioners have therefore defaulted on this claim. *Sunal v. Large*, 332 U.S. 174 (1947).

b. **Even if Petitioners Argument Were Considered, It Would Fail Because Trial Counsel *Did* Challenge Alleged Perjury by Ms. Parks in Front of the Grand Jury**

Petitioners' counsel did in fact challenge the alleged perjured testimony of Uvonda Parks in front of the grand jury.

> The testimony of Uvonda Parks however was presented in an entirely misleading manner. The prosecution failed to inform the grand jury of (1) Park's significant conflicting prior statements concerning the Russell shooting, (2) evidence that Parks is completely unreliable and is known to have lied to law enforcement in the past, and (3) exculpatory facts known to the prosecution.

DN 196, filed Oct. 21, 2004, at 20:1-5. Trial counsel continued in that section to elaborate on the above in more detail, attaching Parks' testimony in unrelated a state preliminary hearing and a different state trial[14] as well as citing a California appellate court opinion that purported to contradict her trial testimony, claiming that Parks was a serial perjurer. *Id.* at 20-23. Trial counsel went further to argue that the prosecution elicited perjured testimony from Parks during her grand jury testimony, attaching the same, regarding whether she was the one who had called the police in regard to the murder she was testifying about. *Id.* at 23:12-18; DN 199, Ex. 10 (grand jury testimony of U. Parks). Trial counsel argued at length that Parks falsely identified a particular PDF gang member as present at the homicide because she didn't identify him for years and the prosecution must have known her identification was wrong and presented it anyway. *Id.* at 24-30. They also argued that the prosecution failed to advise the grand jury of "prior conflicting statements" by Parks about the murder of Devin Russell. *Id.* at 30-32.[15]

In short, Petitioners' claims that their trial counsel failed to challenge the allegedly perjured

[14] Exhibits 8 and 9 to the defense's motion, found in DN 199.

[15] The Government does not concede any validity to Petitioners' argument that any of the grand jury testimony they complain of was improper or perjured – this motion is not about that. It is about whether their counsel identified the issue and raised it; they did. The Government notes that the pretrial litigation on this and related issues allegedly tainting the grand jury process was extensive and, when all was said and done, Judge Damrell denied the defense motion. DN 445.

testimony of Uvonda Parks are proved utterly false by reference to their trial counsels' extensive briefing of just that issue. Moreover, they fall far short of demonstrating that Parks' testimony was actually perjured. "[W]hile [a witnesses'] statements are not entirely consistent, mere inconsistency is not necessarily equated with perjury and every contradiction may not be material." *U.S. v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992); *see also U.S. v. Sainz*, 772 F.2d 559, 563 (9th Cir. 1985) ("a literally true answer, even though unresponsive or 'shrewdly calculated to evade,' cannot form the predicate for a perjury conviction"); *U.S. v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002) (disputed testimony is for the trier of fact to resolve).

The testimony cited by Petitioners as perjured hardly meets the definition of perjury. In grand jury Parks described her relationship with the participants in the murder of Devin Russell, specifically Charles White, E, Oscar, and Nando, as essentially one of proximity, stating she knew "what they did" and that one of them liked her. Greer, 128-129; Walker, at 115, citing to DN 199, Ex. 10, at 17:15-23 (grand jury testimony, June 12, 2002). At trial she stated they did business together, selling drugs. This is not perjury. Ms. Parks did not testify in the grand jury that she did not do drug deals with the defendants. In fact, she went on in the grand jury to elaborate that the defendants felt they could trust her on the night of Devin Russell's murder "Because I've been in the life." DN 199, Ex. 10, at 18:11-14. At most, her trial testimony was confirmation of a natural progression of what she told the grand jury – the defendants trusted her because she was in the life (grand jury) and they knew she was "in the life" because she did drug deals with them (trial). It is not clear that this could even be characterized as an inconsistency, but that is, at most, what it is.

Petitioners allege perjury because in 2002 Parks testified that she had not been acquainted with Charles White, a defendant who went to trial after Petitioners, for a period of "years," while four years later at trial, she testified "I can't – knew of, couple of years. We don't know each other as a friend. I don't consider him a – knowing him." R.T., Jan. 24, 2006, at 6187:6-15. Thus, Parks told the grand jury that she had known Mr. White for a period of time constituting less than multiple years. At trial, she said she "knew of" Mr. White for a couple of years. These statements are not even inconsistent, much less perjurious.

They continue in their petitions to claim inconsistent testimony at trial and between the grand

jury testimony and trial demonstrates perjury at trial that their counsel should have objected to. Greer, at 131-132; Walker, at 117-119. They cite Parks' testimony at R.T. 6195 that "Smooth" did not go with them, and her later testimony that "Smooth" was there on page 6206. A fair read of the transcripts cited, however, show this is both a minor point (no party focused on it), and quite possibly nothing more than a misstated name on Parks' part. It certainly doesn't rise to the level of perjury, given that her testimony equates to "we ran into Smooth, continued on afterward, and later Smooth was in the same location," assuming she meant "Smooth" in the second cited passage. They complain that in grand jury she identified three people kicking the victim and at trial, she only mentioned two of them -- hardly perjury. And they complaint that at trial, four years after she attributes a statement (telling everyone to "get lost") to a different participant in Russell's murder than the one she named in grand jury. Not a material statement, not a surprise that her testimony is a little off, and not a surprise that trial counsel did not object to every such misstatement by a witness in this trial – the jury would have learned early that they, and their clients, simply wanted to obstruct and obfuscate. Not the impression competent counsel wishes to give the jury. They complain of this same passage that Parks "now put a gun" in the hand of a different defendant, but all she said was that *after* the murder, the shooter handed the gun to someone else as they were yelling for everyone to get lost. This dramatic recasting of the actual testimony does not support any relief for Petitioners by their motions.

Further demonstrating the baseless nature of Petitioners' argument here, during the trial itself, Petitioners counsel worked hard to impeach Parks on the stand, eliciting that she had told police she saw a fictitious person at the murder, R.T., Feb. 1, 2006, at 6915:18-23, that she later identified defendant Oscar Gonzales as the person she had made up, even though the person she was discussing didn't exist, R.T., Feb. 1, 2006, at 6917:10-15, pointing out inconsistencies in her identification of defendant Charles White, R.T., Feb. 1, 2006, at 6920-6921, inconsistencies in her description of the closeness of her relationship with Charles White, R.T., Feb. 1, 2006, at 6928-6930, inconsistencies in her prior statements about the night of the murder of Devin Russell, R.T., Feb. 1, 2006, at 6929-6930, and her testimony in the two prior state cases in which the defendants were not convicted, R.T., Feb. 1, 2006, at 6966-6971, and her alleged motive to testify to avoid being identified as an accomplice in the murder of Devin Russell as well as an accomplice in the prior state cases, R.T., Feb. 1, 2006, at 6966-6971.

In fact, substantially all of the cross examination of Parks, taking place over two mornings (one cut short due to her illness), focused on impeaching her credibility on numerous bases and shaking up her recitation of the events surrounding the murder of Devin Russell. R.T., Jan. 25, 2006, at 6244-6259; R.T., Feb. 1, 2006, at 6913-7009. Indeed, Petitioners cite one example of *their own counsel impeaching Parks* with inconsistent testimony as a claim that their counsel failed to object to perjurious testimony. Greer, at 134; Walker, at 120 (Greer's counsel, Mr. Kmeto challenging Parks' testimony about how she learned the identity of "Boo," also known as Charles McClough). This is, in fact, an example of exactly what Petitioners' trial counsel should have been doing, and in fact did. They did everything they could to question Parks' credibility, using her prior testimony to do so. There is no viable ineffective assistance of counsel claim here.

4. Petitioners' Claims of Ineffective Assistance by Failure to Properly Advise Regarding the Possible Maximum Penalties are Palpably Incredible and Deserves No Further Evidentiary Development or Hearing.[16]

In examining claims that trial counsel was incompetent, the Ninth Circuit looks to how plausible the claims of incompetence are, and the district court's experience with the lawyers. *Shah v. U.S.*, 878 F.2d 1156, 1160 (9th Cir. 1989).

Petitioners Greer and Walker, who were each represented separately below, claim here that their separate counsel advised them separately that they were each facing a maximum of 20 years in prison after trial, and in an identical fashion failed to review the sentencing guidelines with them or provide them any guidance about plea offers from the Government. The stunningly identical nature of the alleged failures by separate counsel as to separate defendants are themselves reason to question the veracity of the Petitioners' allegations in this regard. Specifically, both allege:

> Petitioner Walker [Greer] was indicted for an undeterminate drug amount pursuant to 21 U.S.C. § 841(b)(1)(C). His statutory maximum for this amount of drugs is a 20-year prison term ….

Walker, at 127; Greer, at 141. Neither petitioner was charged under that statute. DN 1, Indictment, *passim*.

> Simply stated, Petitioner Walker's [Greer's] attorney had a duty to investigate the sentencing guidelines cross-references for attempted murder and murder. Counsel unjustifiably failed to discover such

[16] This responds to arguments found at: Greer, 139-144; Walker, 125-130.

> information in this case.
>
> …
>
> In this case, Petitioner Walker [Greer] contends that if he had of known [sic] that he was facing a mandatory life sentence he would have accepted the governments offer of a 12-year prison term.

Walker, at 128; Greer, at 143. This argument, as to both Petitioners, fails because both Petitioners were represented by counsel with *documented* knowledge of the life sentences Petitioners faced, and at least Petitioner Greer was directly advised that he was facing a life sentence on all three counts with which he was charged.

Mr. Kmeto expressly stated his understanding of the potential implications of the charges his client faced well over a year before trial. Mr. Kmeto drafted a letter to the Government in mitigation, asking that the death penalty be taken off the table. In it he stated:

> It bears noting that if the government decides against seeking the death penalty for Mr. Greer, ***the offenses charged in Counts I and II of the Indictment, if proven, subject our client to a sentence of life imprisonment***. *See* 18 U.S.C. § 1963 (a) which provides that a violation of any section of 1962 shall be punished by not more than twenty years or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. In the instant case the racketeering acts alleged in Counts I and II are based, in part on allegation for which the maximum penalty includes life imprisonment.

Ex. D, hereto, (excerpt from Letter, Apr. 2, 2004, from P. Kmeto to J. Rafkin, S. Lapham) (emphasis added). Mr. Karowsky, in his representation of Walker and Greer's co-defendant Arnando Villafan, demonstrated a similar understanding, writing to government counsel that:

> I am writing to confirm your responsive letter to me of February 9, 2004 and our telephone conversation on that same date, wherein you confirmed that after reviewing our client's (Arnando Villafan) birth certificate, ***you will be seeking "only" life in prison without release, and not a de***ath ***verdict against him***.

Ex. E, hereto (Letter, Feb. 24, 2004, from J. Karowsky to J. Rafkin (emphasis added)). Petitioner Walker was never charged with a death-eligible crime, and so his counsel never engaged in the mitigation analysis for him that other defense counsel did. Mr. Karowsky's correspondence regarding Mr. Villafan, who pleaded guilty in December 2004, simply illustrates that Mr. Karowsky had knowledge of the penalties associated with the crimes charged. It would be surprising, indeed, if that knowledge did not translate to his later representation of Petitioner Walker.

Petitioner Greer was advised during his initial appearance and arraignment that:

> THE COURT: Just in summary, Mr. Greer, the indictment alleges several counts against you. In ***count one***, conducting the affairs of an enterprise through a pattern of racketeering activity, ***a maximum potential penalty of life***, a $250,000 fine, a term of supervised release of five years, and a $100 special assessment.
>
> ***Count two***, another conspiracy, different subsection of the statute concerning the pattern of racketeering activity, ***same maximum penalties***. ***Count four***, a violent crime in aid of racketeering activity. This one -- this particular offense, if convicted, ***could carry the death penalty or life in prison***, not more than $250,000 fine, a term of supervised release of five years and a $100 special assessment.

R.T., March 4, 2003, at 2:2-14 (emphasis added).

And both defendants were present in court when Mr. Kmeto discussed the penalties facing all the defendants who had pleaded:

> MR. KMETO: The Court has to be mindful of the reliability of these admissions. Let's really take a look at what these fellows did. They're facing life sentences. They're offered deals that are incredibly tantalizing -
>
> THE COURT: How do I know that?
>
> MR. KMETO: The reliability. I think Mr. Karowsky can speak to this firsthand.[17] These defendants were given, made offers which were very generous offers with the proviso that they admit that PDF was a gang and they admit it was engaged as a criminal enterprise.

R.T., Feb. 2, 2006, at 7206:1-10; *see also* DN 620, Minutes, Feb. 2, 2006 (reflecting defendants present). The record does not reflect that either Greer or Walker expressed any doubts or concerns upon hearing the news of their potential life sentences for the first time. One can fairly infer that their very competent attorneys had in fact previously advised them of the maximum penalty.

But additional evidence casts severe doubt on these allegations of incompetence in the plea negotiation process. First, Judge Damrell specifically worked with the Federal Defender to select counsel in this case. He noted at the first status conference in front of him:

> Let me say at the outset I have met with the – Mr. Quin Denvir, the Federal Defender, as to each member on the death penalty in these cases, and counsel have been appointed in those cases based on my conversations with him as to their experience and qualifications.

[17] As we set forth above, Mr. Karowsky originally represented Arnando Villafan. Mr. Kmeto's reference to Mr. Karowsky's personal experience with defendants facing life sentences and being desperate for a plea agreement for less than life is particularly illustrative of how patently absurd the claim is that Petitioners' counsel misinformed them that each faced a maximum of 20 years.

R.T., Mar. 10, 2003, at 4:4-9. That process resulted in the appointment of Mr. Kmeto, who represented Petitioner Greer throughout, and Jan Karowsky, who originally represented death-eligible defendant Arnando Villafan and who, after Villafan pleaded in December 2004, began representing Petitioner Walker. DN 301, Feb. 9, 2005 (order appointing Mr. Karowsky as Petitioner Walker's second attorney).

Second, a review of the docket and case file demonstrates that these attorneys thoroughly and highly competently and quite vigorously litigated this case. Third, Judge Damrell made explicit findings that each of Petitioners' counsel defended these individuals at a very high standard indeed:

> You were represented by very competent counsel. Lord knows what it would have cost to retain Mr. Karowsky and Mr. Peters. They're very good lawyers. You had the benefit of those lawyers. They represented you well; nevertheless, the jury found you guilty.

R.T., Oct. 16, 2006, at 4:19-23 (as to Mr. Walker).

> You, too, had a lawyer of considerable talent, Mr. Kmeto, who defended you vigorously. You had an excellent lawyer in your defense.

R.T., Oct. 16, 2006, at 11:25-12:4 (as to Mr. Greer). Even Greer agreed that his and his co-defendants were well represented, writing to the Court in February 2005 "We have 12 of the best lawyers in Northern California on this defense team…." DN 310, Feb. 23, 2005, letter to J. Damrell.

Fourth, as to Mr. Greer, the record demonstrates that he lies under oath:

> THE COURT: Obstruction of justice issue as to Defendant Greer. Again, this testimony of Mr. Greer is replete with obstruction. PDF was not a gang. He had nothing to do with the attempted murder of Mr. Hickerson, had nothing to do with the murder of Roberts and Cayton.
>
> He testified Defendant Jason Walker was not at the scene of the Garrett murder. The rock cocaine found after the Palace Billiards incident did not belong to him. All of that is obstructing justice, not true, and the jury basically so found.
>
> Obstruction of justice clearly applies to Mr. Greer under 3(c)1.1 [sic].

R.T., Sept. 15, 2006 (hearing on motion to correct PSR), at 10:12-24. Thus, his sworn statement in these proceedings that his counsel failed him in this rather spectacular fashion must inspire extreme skepticism.

The court on a Section 2255 petition such as this one need not abandon its practical experience because Petitioners make highly dubious claims about the advice their counsel gave them. "[C]ommon sense suggests that it would be highly unusual for defense counsel to give a client the advice [defendant]

asserts that he received. This is particularly true in light of the district court's own knowledge of defense counsel's competence and experience." *Shah v. U.S.*, 878 F.2d 1156, 1160 (9th Cir. 1989).

This court can and should examine Petitioners' claims about their purportedly ineffective trial counsel in light of the record demonstrating that these lawyers engaged in very thorough litigation of a very critical case, that each of them fully understood that the defendants in this case faced life sentences, in light of the clear record that they were hand-picked by the presiding judge for their experience and competence, and that loop was closed at the end of the litigation, when the same judge praised these lawyers for the work they did on behalf of these Petitioners. Adding to that mix is the evidence contradicting Petitioners' substantially identical sworn claims that they had no idea they faced life sentences, being advised by a judge of the potential life sentences, and being present in court when such sentences were discussed, among others. Petitioners claims in this regard do not warrant an evidentiary hearing. To the extent the court disagrees, the Government requests all prior counsel be subpoenaed to testify, to the extent possible,[18] specific discovery in advance from such counsel, to include:

- All records evidencing any analysis by such attorneys of the penalties Petitioners faced.
- All records evidencing any advice provided to these clients by their attorneys regarding penalties faced, plea offers made, advice given regarding those plea offers, and responses to the same by Petitioners.
- All records evidencing any advice provided to Petitioners by their attorneys regarding the application of the Sentencing Guidelines to their cases.
- All records evidencing discussions between counsel and the government regarding resolution by plea.

E. <u>Alleged ineffective assistance of appellate counsel.</u>

1. **Legal Standard**

Strickland applies to claims of ineffective assistance of appellate counsel. Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This requires the Court "not simply to 'give [the]

[18] Petitioner Greer was represented by Mr. Kmeto and Richard Mazer. Petitioner Walker was represented by Robert Peters, who has since passed away, and Jan Karowsky.

attorneys the benefit of the doubt' but to affirmatively entertain the range of possible 'reasons [defendant's] counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 131 S.Ct. 1388, 1407 (2011). Review is particularly deferential when reviewing a claim that appellate counsel failed to raise an additional issue on direct appeal. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

2. **Grand Jury Practice**

All of Petitioners' claims about failure to raise grand jury issues on appeal as ineffective assistance of appellate counsel fail on a fundamental level. Assuming for the sake of argument that each and every claim by Petitioners in this regard was wholly true, a premise we can and do defeat below, if there was any defect in the process of obtaining the indictment with the grand jury under the probable cause standard, that defect was cured by a guilty verdict on a beyond a reasonable doubt standard with the petit jury at trial.

An indictment valid on its face is not subject to challenge based on the reliability or competence of the evidence presented to the grand jury. *U.S. v. Calandra*, 414 U.S. 338, 344-345 (1974). "[T]he mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment. *See Costello v. U.S.*, 350 U.S. 359, 363, 76 S.Ct. 406, 408-409, 100 L.Ed. 397 (1956) (holding that a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient)." *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 261 (1988). "Grand juries can properly indict suspects on the basis of hearsay, evidence seized in violation of the Fourth Amendment, or evidence obtained in violation of the Fifth Amendment. Thus, relatively few constitutional challenges to indictments can be raised." *U.S. v. Zielezinski* 740 F.2d 727, 729 (9th Cir. 1984) (citations omitted[19]).

In *U.S. v. Navarro*, the defendant challenged the indictment on the grounds that the district court judge charging the grand jury had improperly advised the grand jury that the prosecutor had an obligation to disclose exculpatory evidence and that in the judge's experience the prosecutors would be

[19] Citations omitted for sake of readability. Citations were to: *Costello v. U.S.*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); *U.S. v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *U.S. v. Blue*, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966).

candid and honest and would act in good faith. *U.S. v. Navarro*, 608 F.3d 529, 536 (9th Cir. 2010). Because the prosecutor had not presented what the defendant claimed was exculpatory evidence (but what the Ninth Circuit characterized as a "public authority defense"), Navarro claimed the indictment was invalid and his conviction after trial had to be overturned. *Id.* at 537. After first noting that the district judge's charge that exculpatory evidence had to be presented to the grand jury was "flat wrong" and therefore erroneous, it held the error harmless because:

> Even if error in the grand jury proceedings (other than the structural errors denoted in *Vasquez* and *Ballard*[20]) was brought to the attention of the district court prior to trial, ***where the motion was denied and a guilty verdict was returned, the error is rendered harmless by the verdict***.

Id. at 540 (emphasis added). The *Navarro* court defined harmless error by reference to Federal Rule of Criminal Procedure 52(a), which states: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded," and made clear that "[t]his rule applies to errors in grand jury proceedings." *Id.* at 538. Thus, the law is that even if there is error in the grand jury process, a guilty verdict from a petit jury renders any error harmless:

> the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

U.S. v. Mechanik, 475 U.S. 66, 70 (1986).

Under this law, after a trial resulting in guilty verdicts, any reasonably experienced appellate attorney will avoid raising issues that are defined as harmless error in the Circuit to which the appeal must be taken. To demonstrate ineffective assistance, of course, Petitioners must show their counsels' actions were objectively unreasonable. Here, the applicable law dictates the opposite result; Petitioners' appellate counsels' decision not to address the issues addressed in this section (II.E.2), all of which are subject to the harmless error standard, is objectively reasonable. Appellate counsel upon reviewing the issue of whether errors in the grand jury proceedings occurred and were a viable issue on appeal would have realized including an argument so clearly subject to the harmless error rule would do nothing but

[20] Both dealing with discrimination in the composition of the grand jury. *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination); *Ballard v. U.S.*, 329 U.S. 187 (1946) (exclusion of women).

dilute viable claims and diminish Petitioners' credibility with the panel deciding their cases. All of the issues addressed in this section (II.E.2), were subject to this harmless error review. Under *Strickland*, therefore, Petitioners cannot show that their appellate counsels' performance was not sound strategy and their claims fail without further analysis necessary.

a. **Appellate Counsel Acted Objectively Reasonably in Not Raising the Only Instance of Actually Perjured Testimony Where that Perjury Was Not Sponsored by the Prosecutor and Was Disclosed to the Grand Jury Before They Returned an Indictment**[21]

This issue of Derrick Washington's perjury at the grand jury stage was extensively litigated below, but was not raised on appeal. In order to have it reviewed, therefore, Petitioners would have to show cause and actual prejudice. To avoid this, they claim this error as ineffective assistance of appellate counsel. Of course that standard is, "*Strickland* plus" given the widely-recognized valid strategic choices of appellate counsel in raising only the strongest issues on appeal. Petitioners must therefore demonstrate that appellate counsel made an objectively unreasonable choice in failing to raise an issue that was litigated below, before trial, determined against them, and after which a petit jury found the Petitioners guilty beyond a reasonable doubt. They cannot make such a showing, both because the verdict by the petit jury rendered any error in the grand jury harmless and because the fact that Derrick Washington's perjured himself during his appearance before the grand jury was presented to the grand jury *before* they returned a true bill.

In December 2000, Derrick Washington testified in front of a grand jury that Petitioner Greer shot an individual named Larry Rude. DN 370, Ex. B. The murder of Larry Rude was not a predicate act in this case, nor was it otherwise referenced in the indictment. Most of Mr. Washington's testimony in front of the grand jury focused on his general familiarity with Pitch Dark Family as a drug-dealing gang and its members, including Petitioners, and multiple specific incidents of violence he was witness to, including the murder of Larry Rude, the murder or attempted murder of an unidentified individual[22] who was arguing with one of Shango Greer's girlfriends, and a carjacking performed and, separately, the murder of Keith York by Petitioner Walker, both of which Walker told Mr. Washington about. His

[21] This responds to Petitioners arguments found at: Greer, 4-20; Walker, 2-18.

[22] The individual was unknown to Washington, but this fits the Richard Garrett murder.

knowledge was based on his personal relationship with members of that gang, including Petitioners. *Id.* Mr. Washington later admitted to investigators that he, in fact, had fired the shot at Larry Rude. The indictment was presented to the grand jury in January 2003, at which point the grand jury that heard Washington's testimony had long since been disbanded, and a new grand jury, 2001C, heard the indictment. DN 402, at 2. On December 18, 2002, just before the indictment was presented, the prosecutor brought in a number of transcripts from prior grand jury sessions for the jurors to review before indictment, including Derrick Washington's. DN 402, Ex. A. The same day, after they read his grand jury testimony, the prosecutor advised the grand jurors that Derrick Washington had perjured himself. DN 402, Ex. B, at 4:8-19.

Under the law, nothing more is required. As soon as the grand jurors "heard" the perjured testimony through reading it, the prosecutor advised the grand jurors that the witness had perjured himself and what the truth was. *U.S. v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *U.S. v. Johnson*, 618 F.2d 60, 63 (9th Cir. 1980). There is no doubt, the prosecutor advised the grand jury on December 18, 2002, just after they read his transcript from testimony from December 2000, that Derrick Washington perjured himself. The indictment was presented in January 2003, and so the issue of perjured testimony was vetted and understood before the grand jurors deliberated and returned a true bill. So for the basic fact of following the law in advising the grand jurors of perjured testimony known to the government in advance of indictment, the issue is over.

Petitioners, however, argue, again,[23] that the prosecutor's discussion with the grand jury about Washington's perjury (DN 402, Ex. B (sealed)), renders the indictment invalid for prosecutorial misconduct.[24]

Read in full, and in context, the prosecutor's discussion with the grand jury about Washington is a presentation of how she would explain the perjury to the petit jury (*i.e.*, he's not particularly bright, he was scared, Greer was a bad guy to Washington's knowledge, so no further harm in implicating him,

[23] Petitioners argued this before the trial court, unsuccessfully. DN 434.

[24] Petitioners make a passing argument that Washington's wife overheard FBI Agent French coaching and intimidating her husband. Walker, at 9; Greer, at 11. But Agent French never questioned Washington, R.T, Mar. 14, 2006, at 9714. Nor did Washington testify that he'd been coached to lie or intimidated by agents.

etc.), and a request for the grand jurors' perspective on this.[25] DN 402, Ex. B. Below is an excerpt of the tone of the conversation:

> [PROSECUTOR]: And my difficult question to all of you and I know it's very hard because you haven't gotten a chance to sit and look at him is given that what I've told you can you give me a sense of whether just in your gut you think you would throw out everything else that he told you about Pitch Dark Family about people carrying guns about what happened the night of the Garrett homicide or would he still have any credibility left with you.
>
> GRAND JUROR: I think it would probably my sense would be that if I got the same feeling that you've described by watching him testify, or his, his inability to really comprehend what's going on I don't think I would throw any of that other stuff out because there's just been way too much of that that we've all read about we've all seen we've all you know we've listened to. I think, I think that would I think this little incident wouldn't, wouldn't damage anything personally. That that would be me.
>
> [PROSECUTOR]: Okay. Even though he participated in a shooting? You know, and I, I don't want to sugarcoat this with you, because I –
>
> GRAND JUROR: No, no. I understand.
>
> [PROSECUTOR]: -- have to decide do I assess the case without him in it, period, and just figure I've got to write him off because this baggage is so heavy that it's going to taint everything he says, or is, because for the – and that why I, so I'm trying to, I, I really want to give you the worst possible, not sugarcoated, not try and get you to say what I want you to hear.

DN 402, Ex. B, at 6:15-7:18.

The ensuing discussion demonstrates that the grand jurors had a range of opinions on whether to believe Washington or not, and were clearly advised by the prosecutor that the murder at issue would not be a part of the indictment, not for the reason of perjury, but because she had insufficient evidence to link the murder to the racketeering enterprise. *Id., passim*. After this discussion, a little over a month later, with full knowledge of Washington's perjury, and having had the benefit of testimony from literally dozens of witnesses about the predicate acts and murders that *were* part of the indictment (as opposed to the murder Washington testified about, which was *not* part of the indictment), the grand jury returned the indictment that we are here arguing about over 10 years later.

And it has been argued in the intervening years. Petitioners engaged in motion practice below,

[25] The Government does not endorse this practice. Obviously, the least of its risks is the type of argument we are now addressing, which could easily have been avoided.

filing a supplemental brief in the process of the motion to dismiss the indictment for "grand jury abuse and prosecutorial misconduct," alleging that the prosecutor had improperly vouched for Washington and as a result the indictment had to be dismissed. DN 434, filed Sept. 8, 2005. Judge Damrell reviewed all the law presented by the parties, and all the transcripts submitted by the parties, and on this point he held:

> I think that admission, even though accompanied by what Mr. Lapham said, certain unsworn statements by the prosecutor, is not good. That would be at least not good, Mr. Lapham. I'm not here to approve [the presenting prosecutor's] conduct in this case, but I am here to impose what I think is a very -- I think Mr. Mazer would agree as would all the lawyers in this case, this is a very difficult and high standard I have by exercising my supervisorial powers to set aside an Indictment.
>
> The standard has been described in several places, but the Ninth Circuit, *Busher*[26] states: "A defendant challenging and Indictment carries a heavy burden. He must demonstrate that the prosecutor engaged in flagrant misconduct that deceived the Grand Jury or that significantly impaired its ability to exercise independent judgment."
>
> I don't think that standard has been met here. The prosecutor did inform the Grand Jury of Washington's perjury. In fact, the Rude shooting was not part of the Indictment and I would find that it is not material to the Indictment, that perjurious testimony because it related to the Rude shooting.
>
> Obviously, with respect to Washington and his credibility, the government is not obligated to impeach witnesses appearing before the Grand Jury. I just don't feel that the facts in this case meet the standard and warrant dismissal of the Indictment, despite the conduct of [the presenting prosecutor].

R.T., Sept. 19, 2005, at 23:10-24:6.

Judge Damrell's ruling was consistent with the law: "As we have said, under controlling precedent the threshold that must be surmounted before judicial intervention in the grand jury process can be justified has been set at a high level, for a variety of reasons having no necessary relationship to the standards that should guide a prosecutor presenting matters to a grand jury. It is not the function of the federal courts acting in their adjudicative capacity to develop and enforce a code of professional conduct for prosecutors." *U.S. v. Trass*, 644 F.2d 791, 797 (9th Cir. 1981). Even the cases cited by Petitioners do not dictate a different result. In *Bank of Novia Scotia*, the prosecutors:

> (1) fashioned and administered unauthorized "oaths" to IRS agents in

[26] *U.S. v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

> violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d).

Bank of Nova Scotia, 487 U.S. at 260. Noting that dozens of witnesses had testified over 20-months, the Supreme Court held that dismissal was not the appropriate remedy as "those violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury's decision to charge." *Id.* at 263. If the prosecutor engaged in misconduct, the Court held, the appropriate remedies included contempt of court, an order to show cause why discipline should not be imposed, and referral to the state bar or the U.S. Department of Justice for disciplinary proceedings. *Id*. Thus, this one example of what Petitoners characterize as prosecutorial misconduct, when compared to the much more significant issues found in *Bank of Nova Scotia*, cannot justify dismissal of the indictment.

Facing a perjury issue that was clearly vetted to the grand jury before an indictment was returned, appellate counsel had to know they would be subject to the harmless error review applicable where a petit jury has rendered a verdict beyond a reasonable doubt. And the prosecutorial misconduct issue would have been a similarly weak issue on appeal, given the more drastic facts of Bank of Nova Scotia and its holding that if misconduct occurs, it is better addressed through referral for discipline, and the caselaw that dictates that problems before the grand jury are harmless error following guilty verdicts from the petit jury. There was no ineffective assistance of counsel in declining to raise this issue on appeal.

b. **Appellate Counsel Acted Objectively Reasonably in Not Raising as "Perjured" Testimony that Is Only Arguably Inconsistent, Not Perjured, Particularly Where Those Issues Were Raised Below and Decided Against Petitioners**

The 1aw is clear there is no requirement to impeach the credibility of grand jury witnesses. *U.S. v. Havnes*, 216 F.3d 789, 798 (9th Cir. 2000). Thus, as to all of the claims of perjury in the grand jury, any appellate counsel reviewing the law would recognize that challenging purportedly perjured testimony in front of the grand jury, especially where the case had gone to the petit jury and defendants

found guilty beyond a reasonable doubt, was extremely unlikely to succeed. Thus, appellate counsel here made an objectively reasonable determination – not to dilute arguments with some chance of success by including these weak perjury-related arguments.

1) Grand Jury Testimony of Jason Hickerson[27]

Hickerson had testified at a state preliminary hearing in involving his attempted murder, and there were differences between his statements there and his statements to the grand jury in this case and his testimony at trial. Generally speaking, Hickerson's preliminary hearing testimony implicated Petitioner Greer in his attempted murder, but did not implicate Petitioner Walker. At the grand jury, and later at trial, Hickerson implicated both. Petitioners therefore contend that Hickerson perjured himself in the grand jury, the prosecution "must have known" that, and therefore presentation of his testimony was error that requires reversal. As we have previously established, a grand jury indictment, valid on its face, cannot be challenged based on the alleged incompetence of the evidence presented to the grand jury, so failure to raise this issue on appeal is hardly ineffective assistance of counsel. Rather, it demonstrates a valid, strategic choice to refrain from raising a weak issue on appeal. Petitioners claims fail on several other levels as well, however:

Petitioners' first argument is that because the preliminary hearing testimony from 1994 was different from the testimony Hickerson provided to the grand jury in 2001, the 2001 testimony was perjured, the government must have known it was perjured because it had to have had the preliminary hearing transcript, and nonetheless the government allowed the grand jury to proceed to indictment on perjured testimony. These assertions are without any legal or evidentiary basis, and are easily dismissed. First, the fact that the 1994 and 2001 testimony are different does not render the 2001 testimony perjured, or lead to an assumption that the prosecution "must have" known the 2001 testimony was perjured. Inconsistencies in testimony do not equal untruthfulness or establish that a prosecutor knowingly presented false testimony. *See Price v. Johnston*, 334 U.S. 266, 287 (1948) ("[I]t

[27] This responds to Petitioners' arguments found at: Greer, 21-32; Walker, 19-30. Petitioners make reference in a heading here to perjury by Dante Webster, and describe some of his testimony, but never actually assert that some other testimony contradicted it or otherwise pursue a claim of perjured testimony by Webster. Greer, at 28-29; Webster, at 26-27. The Government therefore does not address this fragmented argument.

may well be that the witness' subsequent [inconsistent] statements were true …"); *Allen v. Woodford*, 395 F.3d 979, 995 (9th Cir. 2005) ("[E]ven assuming" a witness' trial testimony was false, the conclusion "that the State knew or should have known that it was false" does not automatically follow."). Mere inconsistencies in the evidence do not constitute the knowing use of perjured testimony by the prosecution. *See U.S. v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002); *see also U.S. v. Croft*, 124 F.3d 1109, 1119 (9th Cir.1997) ("that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollection of events, does not establish that the testimony offered at trial was false"); *U.S. v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992) (internal inconsistencies and conflict with other evidence does not establish that a witness' statements were perjurious); *U.S. v. White*, 724 F.2d 714, 717 (8th Cir. 1984) ("[A] challenge to evidence through another witness or prior inconsistent statements is insufficient to establish prosecutorial use of false testimony." (citing with approval *U.S. v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981)).

Prosecutors will not be held accountable for discrepancies in testimony where there is no evidence from which to infer prosecutorial misconduct. *See U.S. v. Zuno–Arce*, 339 F.3d at 889–90. Instead, a factual basis for attributing knowledge to the government that the testimony was perjured must be established. *See Morales v. Woodford*, 388 F.3d 1159, 1179 (9th Cir. 2004) (rejecting a due process violation where petitioner "sets out no factual basis for attributing any misconduct, any knowing presentation of perjury, by the government").

As was demonstrated at trial, Hickerson lied in 1994, for very good reasons of personal safety, R.T., Dec. 7, 2005, at 47-48; R.T., Dec. 12, 2005, at 9:18-11:10, which renders him a perjurer in 1994, not 2001. To the extent his perjury is impeachment material, that is a matter for defense counsel to put in front of the *petit* jury, not something the prosecution is required to put in front of the *grand* jury. In fact, they did. Defense counsel raised the inconsistencies between Hickerson's early statements and later ones with him at trial, including all those now raised by both Petitioners' in their motions. R.T., Dec. 7, 2005, Dec. 8, 2005, *passim*. On redirect, Hickerson was asked about the inconsistencies between his preliminary hearing testimony and his later statements. He indicated that he didn't identify Petitioner Walker in the state proceedings because Walker was out of custody at the time of the preliminary hearing, and was in the courtroom staring Hickerson down. R.T., Dec. 12, 2005, at 9:18-

11:10. Hickerson testified that he glossed over the fact that he had stolen drugs and guns from Walker and that Walker was part of the group pursuing him on the day of his shooting because he feared retaliation from Walker if he implicated Walker in the shooting or crimes involving drugs and illegal weapons. R.T., Dec. 12, 2005, at 110-12.

Moreover, shortly before the indictment was actually presented to the grand jury, on January 15, 2003, FBI agents interviewed Hickerson on just this point, asking him about differences between his 1994 and 2001 statements. Hickerson explained that he had omitted facts from his 1994 testimony out of concerns for his personal safety, including Petitioner Walker's presence and threatening gestures to Hickerson in the course of Hickerson's preliminary hearing testimony. Ex. F, hereto. Thus having information that Hickerson's grand jury testimony was the accurate version of events, there was no misconduct in presenting the indictment to the grand jury.

In short, there was no legal or factual basis for appellate counsel to claim either that Hickerson's grand jury testimony was perjured or that it was known to the prosecutor to be perjured. There was no ineffective assistance in declining to raise such a poor appeal issue.

2) Grand Jury Testimony of Uvonda Parks.[28]

Petitioners raised this issue as to their trial counsel and we have discredited it in section II.D.3, above. Nothing further need be said, except that any competent appellate counsel examining this issue would realize that the evidence demonstrates that Petitioners' trial counsel *did* challenge Uvonda Parks testimony in front of the grand jury as perjured, though it fell far short of that definition, and that the petit jury verdict rendered the perjury, if any, harmless beyond a reasonable doubt. Thus, to raise such an issue on appeal would weaken Petitioners' valid claims, and diminish the overall credibility of the argument to the Ninth Circuit. Rather than demonstrating ineffective assistance of appellate counsel this simply demonstrates, again, that Petitioners had the benefit of highly competent counsel on appeal (as well as at and before trial).

[28] This responds to Petitioners' arguments found at: Greer, 127-139; Walker, 113-125

c. Appellate Counsel Acted Objectively Reasonably in Not Arguing on Appeal that there was a *Napue*-Type Violation Based on the Testimony of Derrick Washington and Jason Hickerson[29]

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citing, *inter alia, Mooney v. Holohan*, 294 U.S. 103 (1935)). "To prevail on a claim based on *Mooney–Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3)[ ] the false testimony was material." *U.S. v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir.2003). The burden of demonstrating falsity rests on petitioner. *See id*. (denying relief where petitioner's evidence of falsity was "unreliable" and "failed to demonstrate that the testimony [at issue] was false").

Petitioners' arguments in this regard fail on the first prong. They cannot demonstrate that their convictions were based on testimony that was actually false. First, they complain of perjury by Washington, whose perjury was discovered by the prosecution after it occurred and which was to the grand jury before the indictment was returned, as we set forth above. Thus, the grand jury was free to give Washington's testimony the weight it felt such testimony deserved, from accepting everything else he hadn't admitted lying about to disregarding it entirely. Nor is there any allegation that Washington repeated his lie in front of the petit jury; he did not.[30] R.t., Jan. 18, 2006, Jan. 19, 2006, *passim*. There is no *Napue* violation here, because the convictions simply were not based on the known, disclosed perjury of Derrick Washington.

Petitioners also claim that Hickerson's testimony was perjured, known to be perjured, and undisclosed. As we set forth above, that's simply not true.

Both Washington and Hickerson were the subject of pretrial litigation, and Judge Damrell ruled no violations had occurred. Both Washington and Hickerson testified at trial, were impeached with all the information set forth by Petitioners here, and the petit jury found Petitioners guilty beyond a reasonable doubt anyway. That fact alone defeats Petitioners' attempts to reopen this argument now. A

[29] This responds to Petitioners' arguments found at: Greer, 32-37; Walker, 30-35.

[30] And he was impeached with his perjury in front of the grand jury in front of the petit jury. R.T., Jan. 18, 2006, at 5715:1-5716:21; 5731:11-5732:6.

"reviewing court must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming the jury resolved all conflicts in a manner that supports the verdict." *Walters v. Maas*, 45 F.3d 1355, 1358 (9th Cir. 1995); *see also Schlup v. Delo*, 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) ("[T]he assessment of the credibility of witnesses is generally beyond the scope of [federal habeas corpus] review."). This rule results in the necessary assumption that the petit jury, knowing all of the bad and the good, resolved any concerns in favor of the verdict, and so must this court. There is no constitutional violation here, under *Napue* or under *Strickland* in failure to raise this issue, with no legal or factual foundation, in Petitioners' appeal.

d. **Arguing that Agent Peter French's Testimony About the Origin of Cocaine was Incompetent Would Have Been Rejected *Per Curiam* by the Ninth Circuit.**[31]

Petitioners claim that testimony from FBI Special Agent Peter French that cocaine generally comes from outside the United States, therefore supplying an interstate nexus under RICO, was improper variously because it was not information within his knowledge generally and he did not test the cocaine at issue to determine its origin. Greer, at 44; Walker, at 41. Thus, they argue, there was insufficient probable cause that the RICO enterprise affected interstate or foreign commerce. Failure to raise this issue on appeal, Petitioners claim, was ineffective assistance of appellate counsel. *Id*. Petitioners' claims fail on many levels.

Even if this testimony were somehow inadequate to support the issuance of an indictment, the fact that evidence in front of the grand jury that might be incompetent or inadequate is not a basis for dismissal. Instead, the remedy is: 'the regular operation of generally applicable rules of procedure and evidence at trial…" *U.S. v. Renzi*, 651 F.3d 1012, 1027 (9th Cir. 2011). At trial, the jury was instructed that they had to find an interstate nexus, and their verdict demonstrates that they did so. Petitioners thus had their remedy, trial in front of the petit jury. *See Mechanik*, 475 U.S. at 70 (petit jury verdict of guilty renders errors in the grand jury process harmless).

More, they cannot demonstrate that the information was inaccurate. The state, without any

[31] This responds to Petitioners' arguments at: Greer, 43-45; Walker, 41-42.

factual or evidentiary support, many very bizarre facts (cocaine is obtained from Merck in Los Angeles?). Greer, at 44; Walker, at 41. These bare and truly ridiculous allegations do not challenge the evidence presented at *trial* regarding an interstate commerce nexus, and cannot support proceeding to an evidentiary hearing on these petitions.

And Petitioners' citation of *U.S. v. Turner*, 396 U.S. 398 (1970), is similarly unhelpful to Petitioners' relitigation of their entire case. *Turner* held that a statutory presumption that cocaine was smuggled was invalid because: "coca leaves, from which cocaine is prepared, are legally imported for processing into cocaine to be used for medical purposes." *Id.* at 418. This issue was important in *Turner*, a drug case, because the statute at issue required proof that Turner had received, concealed, or facilitated the transportation or concealment of cocaine "while knowing that the [cocaine] had been unlawfully imported into the United States." *Id.* at 402. Thus, the question in Turner was not whether the cocaine had been imported, but whether it had been *illegally* imported. The legality of the importation of cocaine is not at issue in *this* case, only whether the cocaine affected interstate or foreign commerce. By being imported into the United States, as Agent French testified, it affected such commerce.

Second, they claim that Agent French lacked knowledge that the cocaine they sold on the streets of Vallejo came from outside of the United States. They cite no basis for this claim, they just claim it, saying he didn't claim to test or analyze the cocaine they are convicted of selling. They cite no authority for the proposition that to use cocaine importation as the basis for an indictment's allegation that the racketeering activity affected interstate or foreign commerce a witness must have acquired the cocaine the defendants are accused of selling and tested it to determine its origin. There is no such authority. His testimony was that "most" cocaine comes from outside the United States, evidence that is certainly sufficient for a probable cause finding.

Given the extensive case law that holds that error in front of the grand jury is rendered harmless by a verdict from a petit jury, Petitioners' appellate counsel wisely did not raise this issue on appeal.

3. Because the Indictment was Neither Varied Nor Amended by Introduction of Evidence about the Interstate Nexus Afforded by Guns, Petitioners' Appellate Counsel Provided Highly Effective Assistance in Declining to Raise that Issue[32]

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

U.S. v. Von Stol, 726 F.2d 584, 586 (9th Cir. 1984) (citations omitted). In *Von Stol*, the defendant was charged with transporting proceeds of fraud in interstate commerce, and alleged that the funds were taken from an individual named McCallum. The facts at trial demonstrated that the funds were actually taken from an individual named Hofer, and the jury was instructed that they could find Von Stol guilty if they found he took the money from "the owner." *Id.* at 585-586. The Court ruled "the divergence between the indictment and proof did not affect the sufficiency of the complaint or alter the crime charged. It did not constitute a constructive amendment." *Id.* at 587.

Here, Petitioners claim that the Government constructively amended[33] the indictment because at trial their proof of the interstate commerce element of the RICO charges was based on evidence that the guns used in various crimes were transported in interstate commerce. They claim that the indictment "stated that drug distribution gave the government jurisdiction over this case." Greer, at 47; Walker, at 44. Therefore, they argue, presentation of evidence about guns transported in interstate commerce was a fatal variance/amendment to the indictment.

Quick reference to the indictment shows the problem with this argument; the indictment does not say "drug distribution gave the government jurisdiction over this case" or anything to that effect. As to the jurisdictional interstate commerce allegation, for Count One, the indictment alleges:

> This enterprise was engaged in and its activities affected interstate and foreign commerce. ¶ 2.
>
> Beginning at a time unknown to the grand jury but no later than on or about January 1 1994 through on or about July 30, 2000 in the State and

[32] This responds to Petitioners arguments found at: Greer, 45-53; Walker, 42-50.

[33] Petitioners variously refer to this as a constructive amendment and a variance to the indictment. The Ninth Circuit makes plain there is very little difference between the two terms: "the historical difference between a constructive amendment and a variance has been that the former requires automatic reversal while the latter does not." *U.S. v. Jingles*, at 501.

> Eastern District of California and elsewhere the defendants SHANGO JAJA GREER CHARLES LEE WHITE, LOUIS WALKER, ELLIOT GUS COLE, ERIC JONES, and OSCAR GONZALES together with others known and unknown to the grand jury being persons employed by and associated with the Pitch Dark Family PDF described above which was an enterprise engaged in and the activities of which affected interstate and foreign commerce unlawfully and knowingly conducted and participated directly and indirectly in the conduct of the affairs of that enterprise through a pattern of racketeering activity that is through the commission of the following acts [then proceeding to outline various acts of murder, attempted murder, and drug dealing]. ¶6.

As to Count Two, Racketeering Conspiracy, the indictment alleges:

> Beginning at a time unknown to the grand jury but no later than on or about January 1 1994 through July 30 2000 both dates being approximate and inclusive within the State and Eastern District of California and elsewhere SHANGO JAJA GREER, JASON KEITH WALKER, CHARLES LEE WHITE, LOUIS WALKER, ERIC JONES, OSCAR GONZALES, ELLIOT GUS COLE, and MARC TARVER, defendants, together with other persons known and unknown, being persons employed by and associated with the Pitch Dark Family PDF an enterprise which engaged in and the activities of which affected interstate and foreign commerce knowingly and intentionally conspired to violate 18 U.S.C. § 1962(c) that is to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity as that term is defined by 18 U.S.C. § 1961(1) and (5). The pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise consisted of the acts set forth in paragraphs Eight through Sixteen of Count One of this Indictment [outlining various acts of murder, attempted murder, and drug dealing] which are incorporated as if fully set forth herein. ¶18.

The indictment alleged that Pitch Dark Family engaged in and conducted activities that affected interstate and foreign commerce. It does not specify the activities that affected interstate and foreign commerce. And it does not have to:

> Appellants argue that the indictment failed to allege facts supporting the required nexus to interstate commerce for counts one and two (the two RICO counts). They concede that the indictment stated that the Mexican Mafia was an enterprise, "which is engaged in, and whose activities affect, interstate and foreign commerce," but they claim that the indictment must also allege facts supporting this "conclusory pleading." 2002 WL 32302660 at *52.
>
> The indictment adequately pled the interstate nexus required by the RICO statute.

U.S. v. Fernandez, 388 F.3d 1199, 1218-1219 (9th Cir. 2004).

Under this precedent, Judge Damrell ruled on a motion to dismiss the indictment on this basis:

> With respect to the interstate commerce issue, I think *U.S. versus Fernandez* is dispositive of these issues, 388 F.3d 1199, Ninth Circuit case

> decided in 2004. The Court there expressly rejected the defendant's argument that the allegations required factual support, that allegation of interstate commerce activity.
>
> In the context of RICO prosecutions, the court concluded an Indictment need not set forth facts alleging how interstate commerce was affected or state any theory of interstate impact. …
>
> Clearly, in my view, there is an allegation nexus with interstate commerce and Fernandez. That is sufficient and Fernandez is controlling.
>
> The ability to prove nexus at trial is a matter for trial, not for dismissal of an Indictment consideration.

R.T., Sept. 19, 2005, at 28:13-29:4.

Thus, Petitioners' argument that the indictment was constructively amended because the indictment alleged drug dealing is patently frivolous. The indictment alleged an impact on interstate commerce, without more, and that is legally sufficient under Ninth Circuit precedent.

Petitioners' real claim here appears to be that because no gun charges were alleged, permitting evidence that the guns used in the various predicate acts traveled in interstate commerce in order to satisfy RICO's interstate or foreign commerce element was a fatal variance of the indictment. It is not a variance of the indictment at all, much less a fatal one. "A variance occurs not when the charging terms of the indictment are altered, but when the evidence adduced at trial proves facts materially different from those alleged in the indictment." *U.S. v. Day*, 862 F.2d 318 (9th Cir. 1988). As addressed above, the charging terms of the indictment alleged a link to interstate or foreign commerce, nothing more. Thus, proving that link by reference to guns traveling in interstate commerce does not constitute a variance. Even if it were, it would only be a fatal variance "unless the defendant could not have anticipated from the indictment what evidence would be presented at trial." *U.S. v. Antonakeas,* 255 F.3d 714, 722 (9th Cir. 2001) (quoting 3 Charles Alan Wright, Federal Practice and Procedure, Criminal § 516 (2d ed.1982)).

Under RICO, only a *di minimus* showing of impact on interstate commerce is required, *Fernandez*, 388 F.3d at 1218-1219, and showing guns traveling in interstate commerce is a very common method of proof of such elements. Even assuming Petitioners never dreamed the prosecution would introduce such evidence, once they were so informed, it was their obligation to request a continuance or waive a variance claim. *Day,* 862 F.2d at 3 ("The failure to request a continuance

constitutes a waiver of appeal on variance grounds."). Here, the prosecution stated clearly in its opening statement that it would be presenting evidence that the guns used in the various alleged murders had traveled in interstate commerce:

> Fourth and finally the government is required to prove that this enterprise had an effect on interstate commerce and that can be minimal. The evidence in this case is that cocaine, heroin -- those are drugs that are not manufactured in the State of California. They're manufactured in foreign countries. That has an effect on interstate commerce and that will be the evidence at trial.
>
> Weapons that were used will also – you'll hear evidence those are manufactured outside the State of California. That will be offered as further evidence of further activities of the enterprise that effect interstate commerce.

R.T., Dec. 5, 2005 (Opening Statements), at 64:11-22.

Thus, assuming this was a variance at all, assuming defendants could have no idea that the Government might try to tie the weapons used in the alleged predicate acts in to interstate commerce, they were on notice on December 5, 2005, that the Government intended to do just that. The witness Petitioners complain of, ATF agent Trista Frederick, did not testify until Tuesday, February 14, 2006, two and half months later. R.T., Feb. 14, 2006, at 7673. Under *Day,* Petitioners' arguments would have been yet again defeated for having been waived.

It is not surprising that any competent appellate counsel would consider and reject raising this issue on appeal. It is objectively very reasonable for any lawyer to bypass an issue with so little support in the law or the facts.

4. **Sufficiency of the Evidence**

Appellate review of claims of insufficient evidence is strict. The "standard is highly deferential because our criminal justice system gives primacy to the role of the jury in determining guilt beyond a reasonable doubt after being correctly instructed on the governing law." *U.S. v. Lukashov*, 694 F.3d 1107, 1118 (9th Cir. 2012). "The standard of review is not favorable to [defendant's] appellate claim. We do not retry the evidence afresh." *U.S. v. Rizk* 660 F.3d 1125, 1134 (9th Cir. 2011). "We 'may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial.' *Nevils*, 598 F.3d at 1164." *U.S. v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011).

If a Rule 29 motion was made at the close of evidence, the Ninth Circuit reviews the issue *de novo*. The defendant's failure to move for acquittal at the close of evidence limits appellate review to plain error or manifest injustice. *See U.S. v. Pelisamen*, 641 F.3d 399, 408-09 & n.6 (9th Cir. 2011). When reviewing for sufficiency of the evidence:

> all evidence must be viewed in the light most favorable to the prosecution, and, when "faced with a record of historical facts that supports conflicting inferences," a reviewing court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326, 99 S.Ct. 2781; *see also Nevils*, 598 F.3d at 1164. Second, looking at the evidence in this manner, we must determine whether the evidence is adequate to allow " any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *see also Nevils*, 598 F.3d at 1164. "At this second step, however, a reviewing court may not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, only whether any rational trier of fact could have made that finding." *Nevils*, 598 F.3d at 1164 (internal quotations and citations omitted).

U.S. v. Del Toro-Barboza, 673 F.3d 1136, 1143-1144 (9th Cir. 2012); *see also U.S. v. Budziak*, 697 F.3d 1105, 1108 (9th Cir. 2012).

While trial counsel made a Rule 29 motion at the close of evidence, the scope of that motion was very limited. For Petitioner Greer, Mr. Kmeto challenged the sufficiency of the evidence to support the nexus between the racketeering enterprise and the murder of Larry Cayton, affecting Count Four (referred to as Count Three) and the related predicate act in Counts One and Two, and on the same basis relating to the predicate act of the murder of Keith Roberts (aka York). R.T., Mar. 15, 2006, at 9787-9789. For Petitioner Walker, Mr. Peters joined in Mr. Kmeto's motion in regard to the murder of Keith Roberts as a predicate act, challenged the attempted murder of Jason Hickerson as a predicate act and the murder of Richard Garrett as a predicate act, on the basis that it was not part of any racketeering activity but a private dispute. R.T., Mar. 15, 2006, 9790-9791. Mr. Peters withdrew the Garrett argument the next day after, as he stated, reviewing the transcript and finding testimony that indicated that the Garrett homicide was enterprise related. March 16, 2006, R.T. 9816:14-19. In denying the motion, Judge Damrell noted: "This is not a Rule 29 motion as such, since there remains evidence that supports the conviction under Count One." He made similar observations as to the other counts, before

denying the motion.[34] March 16, 2006, R.T. 9817:18-9818:7.

Thus, we are left with a Rule 29 motion that the trial judge observed was "not a Rule 29 motion as such," and it is unclear with the more favorable *de novo* review would be available as opposed to plain error or manifest injustice. But assuming *de novo* review was available, an assumption appellate counsel could not make, any challenge to sufficiency of the evidence still faced a standard of review the Ninth Circuit characterizes as "highly deferential" and "not favorable" to defendants. It faced all inconsistencies, credibility determinations, and inferences assumed to be in favor of the guilty verdict.

It is difficult to understand how, under these standards, a decision by appellate counsel not to challenge the sufficiency of the evidence on appeal that could ever be characterized as objectively unreasonable under *Strickland*.

a. **Petitioners' Argument that There Was Insufficient Evidence to Prove Existence of a Criminal Enterprise is Nothing More than Their Attack on Various Witnesses' Credibility, and Therefore Insufficient Under Ninth Circuit Precedent[35]**

After claiming the government provided no evidence that the Pitch Dark Family was an enterprise under RICO, Petitioners proceed to present the testimony of individuals about PDF as an association in fact. But Petitioners' argument is essentially that the witnesses did not use the words of RICO in describing PDF's structure. Petitioners also, again, argue that many of these witnesses were non-credible. But the testimony of the witnesses addressed by Petitioners (Derrick Shields, Jason Hickerson, Dante Webster, Sedrick Perkins, Charles McClough, and Derrick Washington) was far more rounded than the presentation made by Petitioners here. Even were that not so, to the extent each of these witnesses' testimony was contradicted internally or by the testimony of other witnesses or the witness was impeached, for purposes of appeal, such problems with immaterial. The Ninth Circuit, under the applicable legal standards on sufficiency of the evidence, discussed above, would resolve all such issues in favor of a guilty verdict.

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[34] The parties and the court referred to Count Three, which was not at issue in this trial. Neither Petitioner Greer nor Petitioner Walker were charged in that count, which related to the murder of Devin Russell. All were referring to Count Four of the indictment, which related to the murder of Larry Cayton, as Count Three to avoid confusing the jury. Petitioner Greer was the sole defendant named in Count Four (referred to at trial as Count Three), and was acquitted of that charge.

[35] This responds to Petitioners' arguments at: Greer, 60-89; Walker, 57-86.

The structure and leadership of PDF was addressed in detail in Section I.C.1, above, with citations to the record. We provide here just a summary for purposes of this argument.

Jason Hickerson, Dante Webster, Sedrick Perkins, Anthony Freeman, Derrick Shields, Jason McGill, and Charles McClough[36] generally testified that they lived in the area at relevant times, knew PDF as a gang, most of them testified to a consistent territory controlled by PDF in which one either had to be a member of PDF or have its permission to sell drugs. All identified various members of PDF, all of them including Petitioners Walker and Greer in that group. Webster testified that PDF associated itself with the Crips gang, and testified to the shooting of a PDF gang member due to the confrontation of an out of area drug dealer working in PDF's territory (Freeman testified that Greer told him about this incident), stating that PDF called a meeting of local gangs to address the issue. Perkins identified Greer and Walker as two of PDF's leaders (the third being Charles White). McGill testified that Petitioner Walker was a leader of PDF, and Petitioner Greer was "muscle." McGill said he was present when PDF got together to discuss gang business.

McClough testified that Petitioner Walker told him (McClough) that he shot an individual two times (resulting in his death) because that individual testified against a fellow PDF member. R.T., Jan. 12, 2006, at 5534:6-5535:24. McClough testified that White (the last defendant to go to trial) told him about the murder of Keith Roberts (aka York) in the company of Walker on two occasions and in the company of Greer on one, and that "a number of people" had shot Roberts. *Id.* at 5518:1-17; 5519:8-12; 5519:8-5520:17; 5520:21-5521:8; 5526:10-25; 5522:2-4. Derrick Washington, also testified that Walker admitted his role in the Roberts homicide, saying he had shot Roberts on Louisiana Street because Roberts had attempted to rob Walker of some drugs. R.T., Jan. 18, 2006, at 5698:1-5699:3.

In a letter Jason Walker wrote, he essentially corroborated the nature and existence of PDF, telling a fellow PDF member that he was being recruited for a prison gang, but he was refusing to join because of his allegiance to his current gang, CPG/PDF. R.T. Feb. 15, 2006, at 7914:9-7615:18

[36] Petitioners' motions do not address the testimony of Anthony Freeman, Jason McGill, or Det. Steven Fowler in this sufficiency of the evidence argument. (This testimony is addressed in Section I.C.1, above.) Detective Fowler also testified that PDF was a known gang, and that, based on tattoos, graffiti, street intelligence, and the admissions of other PDF members, PDF was a drug-dealing gang in west Vallejo at all relevant times. R.T., Feb. 15, 2006, at 7765-7916.

(discussing GX1304B). Greer testified that Detective Fowler's analysis of the letter was accurate, until he got to the issue of what the "G" stood for in "CPG." R.T., Feb. 23, 2013, at 8332:14-8233:6. Greer testified that G was just G, it didn't stand for anything else, before conceding "it could be gangsta" when referring to "CPG" in a letter he wrote, Government Exhibit 1410.[37] *Id.*; R.T., Feb. 28, 2006, at 8847:14-8848:8.

Moreover, Petitioners' co-defendants pleaded guilty, admitting to membership in PDF and that PDF was "an association of individuals engaged in gang-related activities," a fact that was introduced a trial, but ignored by Petitioners here. Specifically:

> Q. Is another basis for your opinion that six different members of Pitch Dark Family made statements about Pitch Dark Family, specifically, Eric Jones, Oscar, Arnando Villafan, Elliott Cole, Mark Tarver, and Louis Walker, all separately admitted they were members of Pitch Dark Family, which was an association of individuals engaged in gang-related activities?
>
> A. Yes.

R.T., Feb. 15, 2006, at 7794:14-21 (Det. Fowler's testimony).

In short, while the witnesses attacked by Petitioners in their motions, generally gang members from west Vallejo, did not use words like "structure," "enterprise," or "essential nature," the testimony was more than sufficient, especially with all inferences and conflicts resolved in favor of the verdict, to determine that PDF was an enterprise under RICO. And the evidence not addressed by Petitioners similarly supports such a finding. Petitioners' appellate counsel was objectively quite reasonable in failing to waste valuable space in their already-oversized brief in this case on an issue so unlikely to succeed, based both on the comprehensive nature of the evidence and the very strict standard of review. Thus, Petitioners' argument fails under the first prong of *Strickland*. If it could pass that hurdle, Petitioners still have failed to demonstrate that the Ninth Circuit under the very strict standard of review on this issue would have found insufficient evidence, and reversed their convictions. *Strickland*, 466 U.S. at 694-695 (Petitioners must show that but for counsel's unprofessional errors, based on the applicable legal standard, outcome would have been different). Thus, this argument fails to demonstrate

[37] As the government noted in its closing, "It's like saying the … FBI stands for the Federal Bureau of I. It doesn't make any sense at all." R.T., March 21, 2006, at 14:21-25.

ineffective assistance of counsel under either prong of the *Strickland* test.

b. **Petitioners Challenges to Sufficiency of the Evidence as to Specific Murders are Based on a Crime of Which Neither Petitioner was Convicted, and So Their Arguments are Moot.**[38]

Petitioners here challenge the sufficiency of the evidence as to the convictions relating to the attempted murder or murders of Hickerson, Roberts (York), and Garrett, and Petitioner Greer challenges the sufficiency of the evidence as to the murder of Larry Cayton. As to all of these predicate acts, Petitioners claim that there is no evidence that these murders and attempted murder were committed "for the purpose of … maintaining or increasing [a] position in a RICO enterprise." Greer, at 90; Walker, at 90. But the element Petitioners claim the Government failed to prove is not an element of any crime of which Petitioners were convicted. It would have been surprising indeed if their appellate counsel had raised an argument based on a statute other than that of conviction in an appeal to the Ninth Circuit.

Petitioner Greer was convicted of Count One, violation of Title 18, United States Code section 1962(c) (conducting the affairs of an enterprise through a pattern of racketeering activity) and Petitioners Greer and Walker were convicted of Count Two, violation of Title 18, United States Code section 1962(d) (conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity). The relevant statute sets forth the elements of these offenses:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering

[38] This responds to Petitioners' arguments as to Hickerson, Roberts, and Garrett found here: Greer, 89-98, Walker, 86-95, and to Petitioner Greer's argument regarding Larry Cayton found at: Greer, 98-108.

> activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. The concept of "maintaining or increasing a position in a RICO enterprise" is not found in either subsection (c) or (d) of Section 1962. Nor is that concept found in the jury instructions for these charges:

> The defendant is charged in [Count _____ of] the indictment with having [conducted] [participated in the conduct of] the affairs of an enterprise through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, there was an on-going enterprise with some sort of formal or informal framework for carrying out its objectives consisting of a group of persons associated together for a common purpose of engaging in a course of conduct;
>
> Second, the defendant was employed by or associated with the enterprise;
>
> Third, the defendant [conducted] [participated, directly or indirectly, in the conduct of] the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt. To conduct or participate means that the defendant had to be involved in the operation or management of the enterprise; and
>
> Fourth, the enterprise engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between the United States and a foreign country.
>
> An enterprise need not be a formal entity such as a corporation and need not have a name, regular meetings, or established rules.

Ninth Circuit Criminal Jury Instruction No. 8.161 (18 U.S.C. § 1962(c)).

> [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] conspiracy to commit racketeering. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:
>
> 1. That the defendant knowingly conspired to conduct or participate in the

> conduct of the affairs of [insert name], an enterprise, through a pattern of racketeering activity as described in Count ___; and
>
> 2. That [insert name] [was][would be] an enterprise; and
>
> 3. That the activities of [insert name] would affect interstate commerce.
>
> If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].
>
> If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Seventh Circuit Criminal Jury Instruction 18 U.S.C. § 1962(d);[39] *see also U.S. v. Fernandez*, 388 F.3d 1199, 1228-30 (9th Cir. 2004).

The element Petitioners rely on here is, instead, an element of a VCAR charge, violent crime in aid of racketeering, under Title 18, United States Code section 1959(a):

> (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;

18 U.S.C. § 1959 (emphasis added); *see also U.S. v. Banks*, 514 F.3d 959, 965-966 (9th Cir. 2008).

Petitioner Walker was never charged with a crime under Section 1959. Petitioner Greer was charged with that crime in Count Four of the indictment, but he was *acquitted* of that charge by the petit jury. Thus, there is no conviction in this case under the statute that Petitioners claim the Government failed to prove an element of. Their argument here is moot, and their appellate attorneys certainly did not engage in ineffective assistance by refraining from raising such a foundationless issue.

The Government submits, in an abundance of caution, that the record of trial demonstrates that

[39] The Ninth Circuit has not promulgated jury instructions for RICO conspiracy, specifically.

the evidence was more than sufficient as to all of the predicate acts alleged, including the murders listed by defendants, and that it was an objectively reasonable decision for appellate counsel to refrain from raising a sufficiency argument on any point, including those raised by Petitioners here.

c. There Was Ample Evidence that the Predicate Acts Were Continuous and Related to Each Other and the Enterprise, So There Was No Ineffective Assistance in Failing to Raise this with the Ninth Circuit[40]

Petitioners claim that the predicate acts each was convicted of were not shown to be related to the PDF enterprise, and their appellate counsel were therefore ineffective for failing to raise this on appeal. We begin with an overview of the law on relatedness and continuity, then identify the relevant allegations of the indictment, and end with documentation of evidence entered regarding the purpose of each predicate act Petitioners complain of, which evidence, under the very strict standards governing review of sufficiency of the evidence, is more than adequate to have defeated any such argument on appeal of this case.

RICO charges require proof that predicate acts are related that there is continuity in the enterprise to which those acts relate. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). Relatedness addresses the relationship between the activities and the enterprise, and continuity the length or potential length of the enterprise, as the Supreme Court addressed:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. *See Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept—and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. See S.Rep. No. 91–617, at 158.

Id. at 241-242. The Ninth Circuit restated the continuity rule:

> To prevail under RICO, plaintiffs must establish that the predicate acts were continuous. This can be done either by pleading "closed-ended

[40] This responds to Petitioners' arguments found at: Greer, at 108-117; Walker, at 96-105

> continuity" or by pleading "open-ended continuity." Closed-ended continuity refers to a closed period of repeated conduct. It is established by showing that the predicate acts occurred over a substantial period of time. If closed-ended continuity cannot be established, plaintiffs may plead open-ended continuity. Open-ended continuity refers to past conduct that by its nature indicates a threat of future criminal conduct. It is established by showing either that the predicate acts specifically threaten repetition or that they were an ongoing entity's regular way of doing business.

Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1526 (9th Cir. 1995).

> To convict, the evidence must show that Bingham was engaged in a "pattern of racketeering activity," that is, at least two acts of racketeering activity, with the last act coming in the last 10 years. 18 U.S.C. § 1961(5). These acts must be related to each other and must "pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Racketeering acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id*. at 240, 109 S.Ct. 2893 (quotations omitted).

U.S. v. Bingham, 653 F.3d 983, 992 (9th Cir. 2011).[41] Notably, the predicate acts do not have to be related to each other, but to the enterprise and its goals. *See U.S. v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000) ("The predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise."); *U.S. v. Eufrasio*, 935 F.2d 553, 566 (3d Cir. 1991) ("[S]eparately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.").

The Indictment alleged a specific period during with the racketeering enterprise existed: "Beginning at a time unknown to the grand jury, but, no later than on or about January 1, 1994, through on or about July 30, 2000…." Indictment, ¶ 6.

The Indictment alleged the purposes of the racketeering enterprise:

> a. Enriching the members and associates of the enterprise through, among other things, murder, attempted murder, and distribution of narcotics.
>
> b. Preserving and protecting the power, territory and profits of the enterprise through the use of intimidation, violence, threats of

[41] In their Petitions, Petitioners argue about "horizontal" relationships among various predicate acts. This is based on Second Circuit precedent that the Ninth Circuit has not adopted. *See Bingham*, 653 F.3d at 992 n.5 ("We have not adopted this precise formulation….").

violence, assaults and murder.

c. Promoting and enhancing the enterprise and its members' and associates' activities.

d. Keeping victims in fear of the enterprise and in fear of its members and associates through violence and threats of violence.

Indictment, ¶ 3.

The Indictment alleged various predicate acts related to the enterprise, which included: Four murders in 1994, possession of cocaine base for sale in in 1997, a murder in 1998, sale of cocaine base in 1998, the murder of Larry Cayton in 2000, and an on-going conspiracy to sell narcotics from 1994 to 2000. Indictment, ¶¶ 8-16. All defendants were not named in all predicate acts.

Here, contrary to Petitioners' bare assertions,[42] the indictment alleged predicate acts as to these defendants spanning from 1994 through the year 2000. This is not a case based on the "threat of continuity," but on a "closed-ended" concept, a "closed period of repeated conduct." *See H.J., Inc.*, 492 U.S. at 242. ("A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time."); *Allwaste*, 65 F.3d at 1526 ("Closed-ended continuity refers to a closed period of repeated conduct. It is established by showing that the predicate acts occurred over a substantial period of time.").

Just one of the predicate acts, and one each Petitioner was found responsible for, is a drug conspiracy spanning six years, from 1994 to 2000, a substantial period of time; the others are murders occurring in 1994, 1998, and 2000, and specific narcotic violations in 1997 and 1998. To make their argument, Petitioners argue under the "open ended" theory of continuity and argue that the individual predicate acts showed no predisposition to continue in the future.[43] The Government disagrees, but the issue is moot. This is a case that falls squarely within the closed-ended continuity rule. Petitioners complain of the length of time between the murders they cite (ignoring the other predicate murders and drug sales), but even were we to look at the time span between the cited murders, the result is the same

[42] Each Petitioner claims that "The predicate acts charged in this case spanned a total of two months." Walker, at 102; Greer, at 115. The indictment itself belies this claim, as does the conviction, of each defendant, based on a drug conspiracy beginning in 1994 and continuing to at least 2000.

[43] *See H.J., Inc.*, 492 U.S. at 242 ("Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.").

because there is no requirement that the predicate acts occur with a specific time relationship to each other. *See U.S. v. Wong,* 40 F.3d 1347, 1374–1375 (2d Cir. 1994) (upholding pattern of activity finding under RICO with predicate acts occurring in February 1987, January 1990 and August 1990); *see also U.S. v. Cooper*, 91 F.Supp.2d 60, 76 n. 17 (D.D.C. 2000) ("[A]side from the statutory requirement that at least two predicate acts occur within a ten-year period, there is no limit on the amount of time that can lapse between two predicate incidents.").

Thus, Petitioners raise no viable issue in regard to the continuity requirement of RICO. Their arguments that the evidence is insufficient to support a finding of relatedness are similarly without legal or factual basis.

Count One, direct RICO participation under section 1962(c), is specific to Petitioner Greer, and the jury found him responsible for three predicate acts:[44]

> (1) the attempted murder of Jason Hickerson in July 1994
> (not challenged by Greer under Rule 29. R.T., Mar. 15, 2006, 9787-9789);
>
> (2) possession of cocaine base for sale in 1997
> (not challenged by Greer under Rule 29. *Id.*); and
>
> (3) the murder of Larry Cayton in April 2000
> (challenged by Greer under Rule 29. *Id.*).

Count Two, RICO conspiracy under Section 1962(d), was alleged and proven as to both defendants. Greer was found responsible for the following predicate acts:

> (1) the attempted murder of Jason Hickerson in July 1994
> (not challenged by Greer under Rule 29. R.T., Mar. 15, 2006, 9787-9789);
>
> (2) the murder of Keith Roberts (York) in August 1994
> (challenged by Greer under Rule 29. *Id.*);
>
> (3) possession of cocaine base for sale in 1997
> (not challenged by Greer under Rule 29. *Id.*);
>
> (4) the murder of Larry Cayton in April 2000
> (challenged by Greer under Rule 29. *Id.*); and
>
> (5) conspiracy to distribute illegal narcotics from 1994 to 2000
> (not challenged by Greer under Rule 29. *Id.*).

[44] The parentheticals in these lists identify which predicate acts were and were not the subject of a Rule 29 motion by trial counsel.

Walker was found responsible for the following predicate acts:

> (1) the attempted murder of Jason Hickerson in July 1994 (challenged by Walker under Rule 29. *Id.* at 9789-9790);
>
> (2) the murder of Keith Roberts (York) in August 1994 (challenged by Walker under Rule 29. *Id.* at 9787-9789);
>
> (3) the murder of Richard Garrett in August 1994 (initially challenged by Walker under Rule 29, but challenge withdrawn because "there was testimony" on the issue of whether the Garrett murder was enterprise-related. R.T., Mar. 16, 2006, at 9816:11-18);
>
> (4) conspiracy to distribute illegal narcotics from 1994 to 2000 (not challenged by Walker under Rule 29. R.T., Mar. 15, 2006, at 9789-9790).

Although Greer was not named in the predicate act relating to Richard Garrett, he nonetheless includes that murder in his argument here. Neither he nor Walker address the drug charges in their sufficiency of the evidence challenges here, consistent with their trial counsel's silence on the drug issues under Rule 29. So the drug predicates are unchallenged here, which means that on Count One for Greer and Count Two for Walker, the Ninth Circuit would need to determine there was sufficient evidence of relatedness on only *one* additional predicate count. *U.S. v. Fernandez*, 388 F.3d 1199, 1221 (9th Cir. 2004) ("[E]ven if there were insufficient evidence on the murder conspiracies, the jury found the requisite minimum of two predicate acts …"). As to Greer on Count Two, he has two unchallenged predicates of conviction, drug possession for sale and drug conspiracy, and so his argument as to the relatedness of the murder-based predicates would truly have been a baseless issue to raise with the Ninth Circuit.

Contrary to Petitioners' arguments, the evidence in the trial demonstrated to the jury in this case, beyond a reasonable doubt, that each of the predicate acts listed above was related to the enterprise. The purposes of the enterprise, as alleged, were murder, attempted murder, and narcotics trafficking, as well as "Preserving and protecting the power, territory and profits of the enterprise through the use of intimidation, violence, threats of violence, assaults and murder," and "Promoting and enhancing the enterprise and its members' and associates' activities." Indictment, ¶ 3. Thus, where predicate acts are related to the enterprise and its purposes, they are appropriately related under RICO. *H.J., Inc.*, 492 U.S. at 240 ("It is not the number of predicates but the relationship that they bear to each other or to some

external organizing principle that renders them 'ordered' or arranged."); *Corrado*, 227 F.3d at 554 (predicate acts may relate to each other or to the enterprise); *Eufrasio*, 935 F.2d at 566 (predicate acts are related "as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise."). As we demonstrate below, the predicate acts Petitioners complain of were all supported by evidence of connection to the enterprise purposes alleged: drug sales, preserving and protecting the power of the enterprise through violence and murder, and promoting and enhancing the enterprise, and its members activities.

Attempted murder of Jason Hickerson.

Hickerson testified at trial that he stole guns and drugs out of Jason Walker's car, and that when Shango Greer, Jason Walker, and Eric Jones were tracking him down on July 15, 1994, they were asking him where Walker's stuff was. R.T. (Dec. 7, 2005), at 100:7-101:12, 101:16-18, 101:19-102:5, 104:8-19. Thus, we have a direct connection to the narcotics trafficking that is one of the purposes of the enterprise, and a large part of the testimony at trial that PDF was a gang that sold drugs, and protected its members interests in this regard.

Petitioners continue to argue that Hickerson was impeached by his prior preliminary hearing testimony, and therefore the evidence was insufficient, but this argument ignores the standard that the Ninth Circuit resolves *all* conflicts in the evidence in favor of the verdict. *U.S. v. Reyes*, 660 F.3d at 461. Impeached or not, Hickerson's testimony, if believed by the jury, which we must assume it was under the sufficiency of the evidence standards, is sufficient basis to find that his attempted murder was connected to the enterprise and its goals.

The circumstances of Hickerson's attempted murder support this conclusion.[45] It was not Walker, on a personal grudge, coming after Hickerson, nor was it Greer (under his discredited story that Hickerson had stolen a stereo from Greer's father) chasing him down, not alone. The first person to make contact with Hickerson that day and, indeed, the PDF member to pull the trigger of a shotgun aimed at Hickerson, was Eric Jones. Greer, Walker, and Jones all pursued Hickerson that day, joined in

[45] *See* Section I.C.2.a, above, for detailed factual recitation and citations, including corroboration of Hickerson's testimony regarding why PDF was seeking Hickerson out by Gooch both in the car and when PDF visited her at her home.

their efforts by Ricardo White, who confronted Hickerson's girlfriend to find him, and actually searched her apartment in that effort.

There was more than adequate evidence that the Hickerson attempted murder related to the enterprise via both its purpose of narcotics trafficking and its varied members protecting the interests of that trafficking, and the power and interests of the enterprise and its members, whether they were individually directly harmed by Hickerson's actions or not. And, as we demonstrate below, the other murders related to drug trafficking, and protection of the PDF and its members activities, and multiple PDF members, most regularly Greer and Walker, participated in the various murders to varying degrees. *See H.J. Inc.,* 492 U.S. at 240 (racketeering acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."). This predicate act was found as to both Walker and Greer, and given their unchallenged drug trafficking related predicate acts, without going farther, sufficient evidence has been shown to sustain each of their convictions under all relevant counts.

Murder of Keith Roberts (York).

Petitioners again claim the murder of Keith Roberts, aka York, was unrelated to the enterprise (with mere denials that it related to drug trafficking). But Derrick Washington testified:

> Q. And what did Fade [Petitioner Walker] tell you about York's shooting?
>
> A. He said he had shot York.
>
> Q. Did he say where?
>
> A. Louisiana Street.
>
> Q. Did you say "Louisiana"?
>
> A. Yes.
>
> Q. Did he indicate what he shot him with, what type of weapon?
>
> A. He just said he had shot him. He didn't say.
>
> Q. Did he say why he had shot him?
>
> A. Because York was robbing him, taking his dope.
>
> Q. And did he say that York, in fact, tried to rob him of some of his dope?

A. Yes.

R.T., Jan. 18, 2006, at 5998:13-5999:1. Thus, we have direct testimony that Roberts' murder was the direct result of his interference with PDF drug trafficking. He stole the merchandise.

Nor was Roberts' murder isolated from other alleged racketeering acts. The same .38 super was used in the course of the murder of Richard Garrett. R.T., Jan. 5, 2006, at 4978:3-4. Nor was Walker acting alone, as Charles McClough testified that Walker and White told him they, along with Greer and PDF member Marc Tarver, had all been present for Roberts' murder. R.T., Jan. 12, 2006, at 5515:3-17; R.T. 5517:3-5518:11. So again, we have some of the same participants (Greer and Walker) along with additional PDF members participating in a murder based on theft of narcotics from Petitioner Walker. There is more than adequate evidence here for the jury, and the Ninth Circuit resolving all conflicts, inferences, and inconsistencies in favor of the verdict, to find that this predicate act was part of a pattern of racketeering activity under RICO. Neither Petitioner has any basis for alleging ineffective assistance of counsel in refraining from raising this very weak issue on appeal.

Murder of Richard Garrett.

Petitioners argue that Garrett's murder, under the Government's theory, was no more than a domestic dispute, therefore unrelated to the enterprise. Greer, at 112, Walker, at 99. Petitioners do not actually speak for the Government, which presented this theory of the reason for Garrett's murder in closing, having nothing to do with a domestic dispute:

> Jason Hickerson testified to some significant details about the Garrett killing. Jason Hickerson sold dope with Garrett in PDF territory. He said that Garrett was not from the West Side. He didn't have permission to sell on the West Side.
>
> He also testified about a conversation that he was party to between Willis Nelson and Leroy Vance, again two members who have been identified as being members of PDF.
>
> They told -- he overheard them say they had told Garrett to stop selling in PDF territory. They said if he didn't stop selling in PDF territory, they were going to have to pop him.
>
> I asked Hickerson what that meant, "pop him," which, as we all know, kill him.
>
> Hickerson said he warned Garrett to stop selling in PDF territory, and Garrett wouldn't listen. He still sold. Hickerson testified Garrett got into a fight over this with Willis Nelson and wound up shooting Nelson in the butt.

> Finally, Hickerson testified he was doing a stretch in prison, San Quentin, with Willis Nelson or at the same time Willis Nelson was there, and they talked about Richard Garrett. In conjunction with that conversation Hickerson -- Nelson told Hickerson, "I got killers on my payroll."
>
> So PDF had at least two reasons to be upset with Richard Garrett on the night he was killed. He shot one of their members in the butt, and he was selling in PDF territory without PDF permission.

R.T., Mar. 21, 2006, at 48:7-49:8; *see also* Hickerson testimony, R.T., Dec. 7, 2005, 60:15-61:3, 62:9-15, 63:1-7, 59:14-17, 60:2-10. So, again, we have a direct evidentiary link to the purposes of the enterprise, drug trafficking and the use of violence to achieve the ends of the enterprise.

But we also have similar methods and participants, in that the same gun was used to kill Garrett as was used in the murder of Keith Roberts earlier that same month. R.T., Jan. 12, 2006, at 5459:6-21. And like the other murders, the testimony at trial indicated that multiple members of PDF were present and participated. PDF member Marc Tarver was one of the group that confronted Garrett that night. R.T., Jan. 18, 2006, at 5691:20-25; R.T., Jan. 5, 2006, at 4913:8-4914:20. Greer was present and fought with Garrett before the shooting. R.T., Jan. 18, 2006, at 5693:10-19. PDF member and co-defendant Louis Walker shot Garrett with a 25 caliber semi-automatic pistol. *Id.* at 5694:8-5695:11. Petitioner Walker crossed the street, walked to Garrett, and shot him with a black 38 caliber semi-automatic weapon. *Id.* at 5695:12-5696:13.

Under these facts, the jury had sufficient evidence, as did the Ninth Circuit had it considered this issue, to find this predicate act related to the purposes of the enterprise. There was no ineffective assistance of counsel in failing to raise this issue as to either Petitioner, and most especially as to Petitioner Greer, who was not named in this predicate act under either count of conviction.

Murder of Larry Cayton.

The murder of Larry Cayton is mixed up with a bank robbery in April 2000. Notable is that the witnesses generally testified to the preparation for the robbery involving multiple PDF gang members and the cover-up of Cayton's resulting murder also involving multiple PDF gang members. In preparation for the robbery, Greer contacted his old friend Anthony Freeman to buy a car. Greer, Cayton, Petitioner Walker, and Charles White all came to see the car the first time. R.T., Jan. 26, 2006 (p.m.), at 6557:19-6559:14. The second time Cayton was not along, but Greer, Petitioner Walker,

Charles White, and PDF gang member Mark Tarver came to see the car, along with two other unidentified men. *Id.* at 6559:15-6560:21. Greer also followed up with Freeman, telling him Cayton was gone, but declining to provide details because Freeman didn't "need to know about it." *Id.* at 6583:4-20. This was an in person conversation; Greer brought White and PDF member Mark Tarver along, and left Freeman with the distinct impression that he was being threatened if he did not go along with their story that the car had been stolen. R.T., Jan. 26, 2006, at 6570:13-6574:15. Co-defendant Charles White asked Cayton's girlfriend when Cayton's funeral was, looking down at the floor instead of at her, which was unusual in her experience with him. R.T., Jan. 31, 2006, at 6778:1-6779:11. At the end of their conversation, White "told [her] to promise that [she] wouldn't snitch on them." *Id.* She felt threatened enough by this conversation to leave the state of California, leaving two of her children behind and quitting a job she loved. *Id.* at 6780:10-6781:18.

Hickerson testified that PDF member Ricardo White told him that PDF made money by committing robberies and burglaries in addition to selling drugs. Mickalla Oliver testified that she overheard Nando (Arnando Villafan) discussing a "lick," a bank robbery, that "LC" had engaged in and driven down the wrong path, exposing the participants to the police. Nando proceeded to say that "he" shouldn't have let LC get away with that, that LC should've been killed for his failure. R.T., Jan. 31, 2006, at 6738:6-6739:24. Shields testified that Greer told him Cayton had to go because he was speaking too freely about their business, a statement Greer repeated on tape that was introduced at trial. R.T., Feb. 2, 2006 (a.m.), at 7106:7-7109:2; R.T., Feb. 2, 2006 (p.m.), at 7119, *see also* Ex. _, hereto.

And so we have the similar participants, again, as we saw in the prior murders, whether directly pulling the trigger or just dealing with the aftermath. Greer and Petitioner Walker traveling as a pair, Tarver and White involved in the purchase of the car and with the intimidation of its seller and the victim's girlfriend after the murder. We have evidence that PDF, in addition to its other criminal activities, engaged in bank robberies. We have evidence that Cayton was speaking too freely for Greer's taste, putting PDF gang members and interests at risk, like Devin Russell, who was killed for snitching (*see, generally*, section I.C.2.d, above). And we have a PDF gang member talking about what someone should have done the first time "LC" made a mistake on a robbery. Lo and behold, LC makes another mistake, creating a threat to PDF's members and power, and this time he winds up dead. This predicate

act, like the others, is related to the enterprise and its goals, and the evidence was more than sufficient to so demonstrate.

In short, Petitioners' claims on sufficiency of the evidence are belied by the relevant standard of review of such claims, the relevant law, and all of the evidence presented at trial. There was no ineffective assistance in appellate counsels' decision not to raise these arguments on appeal; it was well within a spectrum of reasonable legal representation.

5. **There Was No Ineffective Assistance of Counsel in Failing to Challenge on Appeal the Disclosure of Expert Witness Steven Fowler, or the Substance of His Testimony; The First Issue Bore No Realistic Chance of Success and the Second Issue WAS Raised on Appeal.**[46]

Petitioners claim that their appellate counsel was ineffective in failing to challenge the use of Det. Fowler as an expert at trial, arguing that disclosure was inadequate under Rule 16(a)(1)(G), and that Det. Fowler's testimony was nothing more than regurgitated hearsay. The former is true; appellate counsel did not challenge the adequacy of disclosure under Rule 16(a)(1)(G) on appeal, although trial counsel challenged and litigated the adequacy of the disclosure, only to have the District Court rule the disclosure was adequate to meet the Government's obligations under the rule. *See* Section II.D.2.b, above. To raise that on appeal would have been foolish, given the standard of review and the facts of trial counsel's actual litigation of the issue below. "[T]o reverse a conviction for a discovery violation, we must find not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights." *U.S. v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997) (internal quotations and citation omitted). It is hardly objectively unreasonable that appellate counsel decided not to spend raise this rather frivolous issue on appeal.

To the extent that Petitioners argue that the substance of Det. Fowler's testimony was inappropriate and should have been challenged on appeal, a quick review of Petitioners' appeal briefing puts the lie to this argument. The alleged improprieties of Det. Fowler's testimony form the bulk of Petitioners' argument on appeal. Ex. J, hereto (Petitioners' appeal brief). The Ninth Circuit ruled against Petitioners on such arguments, and they cannot bite the apple again here.

[46] This responds to Petitioners arguments found at: Greer, 118-126; Walker, 105-113.

F. Alleged Constitutional Errors

1. Alleged *Brady* Violation[47]

Both movants allege a *Brady* violation related to a purported failure to disclose payments allegedly made to witness Derrick Shields. To do so, they cite trial testimony from Shields in which Greer's attorney attempts to impeach Shields with evidence that Shields was paid. They allege that this information was never provided to them during trial, and had they had the information they could have impeached Shields. But they cite and attach the FBI-302, Bates stamped 004069, which was provided in discovery on or about April 11, 2003, well over two years before trial. Petitioners' Motions, Ex. L. It is clear that the same document, and some additional information, is exactly what Mr. Kmeto was using in his attempt to impeach Shields, as he cites the authors of the FBI-302, Agents French and Butler, and the date of the FBI-302, December 12, 2001:

> Q. Now, in 2000 or 2001, did Shango Greer come up to you and say that the word's out on the street that you got $3,500 from the FBI?
>
> A. No.
>
> Q. That never happened?
>
> A. No.
>
> Q. Well, do you remember telling the FBI in an interview on December the 12th of 2001, by agents Butler and French, that Greer knew how much money that the FBI had provided to you?
>
> Did you tell them that?
>
> A. I don't remember saying that because I didn't get no money.
>
> Q. You don't remember saying that to the FBI, to Agent French, who is here, and Agent Butler on December the 12th of 2001?
>
> A. No. I don't remember saying that.
>
> Q. You never told them that?
>
> You never complained that, "Hey, Shango Greer knows how much money you guys paid me."
>
> You never complained like that to them?
>
> A. Never was paid any money.

[47] This addresses Petitioners' arguments found at: Greer, 53-60; Walker, 50-57.

R.T., Feb. 9, 2006, 7337:7-7338:3.[48] Mr. Kmeto's use of a dollar figure is very interesting in this context, as there is no dollar figure referenced in the 302. In a prior case against Petitioner Jason Walker, 2:00-CR-386, a felon in possession charge in which Shields was a witness and, in fact, based on the same time period in which he was working on the Government's investigation of PDF, the government provided to Walker a June 1, 2001, letter from the FBI outlining almost $3,500 in operational expenses paid to Shields for motel accommodations, food, transportation, clothing, and incidental expenses necessary to the work he was performing.[49] Ex. G, hereto. It appears that Walker shared this letter, produced on June 4, 2001, with his colleagues on the street, resulting in Greer approaching Shields sometime in December 2001 to confront him about getting paid and in Greer's attorney using information from the letter to impeach Shields in 2006.[50]

a. **Petitioners Have Defaulted on This Claim by Failing to Raise it On Appeal**

Petitioners impeached Shields at trial, but did not raise any *Brady* argument on appeal, resulting in default of that claim in these proceedings. To overcome this, Petitioners would need to show that "some objective factor external to the defense impeded counsel's efforts" to raise the issue. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). But there are no objective factors external to the defense that prevented them from raising this on appeal. The FBI 302 reflecting Shields' statement was provided *two years* before trial, and the related letter was disclosed or known to Petitioners in 2001. Counsel used the FBI 302 and information from the letter at trial. Thus, there was nothing external to the defense that impeded Petitioners' ability to raise the issue on appeal. As we demonstrate below, that is likely because it would have gone nowhere.

[48] Notably, the defense called Agents Butler and French in the defense case, but neither was asked about these supposed payments to Shields. DN 645, Minutes, Mar. 1, 2006; DN 653, Minutes, Mar. 6, 2006; DN 656, Minutes, Mar. 8, 2006.

[49] Shields was released into FBI custody in the middle of serving a state sentence on a parole violation. R.T., Feb. 2, 2006 (a.m.), at 7110:20-7111:16; R.T. Feb. 2, 2006 (p.m.), at 7156:20-7159:8. Whenever he was out on the street, he wore a wire. R.T., Feb. 2, 2006 (p.m.), at 7116:20-7118:13, 7159:9-12.

[50] While Shields testified he doesn't remember that conversation, the FBI agents certainly did not make it up.

b. **No Brady/Giglio Violation Occurred**

Material must be disclosed under *Brady* if it is both favorable to the defense and material, which is determined by evaluating whether there is a reasonable probability that the disclosure of the evidence would have changed the trial's result. *U.S. v. Ross*, 372 F.3d 1097, 1107-1108 (9th Cir. 2004). "[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense." *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (citation omitted).

Whether omitted evidence is material is evaluated in the light of the entire record, not just on the information's probative value, standing alone. *Id.*; *see also U.S. v. Agurs*, 427 U.S. 97, 112-13 (1976).

Information that could impeach government witnesses comes under the *Brady* doctrine. *U.S. v. Giglio*, 405 U.S. 150 (1972). But a witness may be "so thoroughly impeached" by other evidence that additional impeaching information may be "merely cumulative" and thus not material. *U.S. v. Polizzi*, 801 F.2d 1543, 1551 (9th Cir. 1986). Where a particular witness has given a statement consistent with his trial testimony before any benefit was provided or promised, the benefit is not material as it would be unlikely the jury would reach a different conclusion had it known of the evidence. *Libberton v. Ryan*, 583 F.3d 1147, 1163-1164 (9th Cir. 2009).

The questions here, then, are (1) was anything favorable regarding Shields withheld from the defense; and, if so, (2) was that favorable evidence material? The answers are (1) no, and (2) assuming for the sake of argument information was withheld, it certainly was not material in a case with over 80 witnesses and testimony that was corroborated both by prior consistent statements, other witnesses, and Shango Greer's own perjured statements about Derrick Shields.

As an initial matter, it is clear that to the extent any funds were paid to Shields, the defense had that information in hand. As established above, the FBI 302 upon which Petitioners base their argument that Shields was paid was disclosed in April 2003, long before trial, and Mr. Kmeto used it in his cross examination of Shields. Moreover, the underlying letter outlining the operational funds paid during Shields' participation in the investigation of PDF was disclosed to Walker in 2001 and evidence indicates that it was shared with Greer before December 2001, when he confronted Shields about it.

Information known to defendants need not be disclosed under *Brady*.[51] *Raley*, 470 F.3d at 804.

Moreover, the defense had ammunition with which to impeach Shields, and impeach they did. The jury had much to consider about Shields' bias, interests, and motive. The jury was instructed that Shields was a convicted felon and that bore on his credibility. DN 671, Jury Instructions, Number 18 ("You may consider this evidence along with other pertinent evidence in deciding whether or not to believe such a witness and how much weight to give to the testimony of such a witness." (listing Shields, among others)). Petitioner Greer's counsel cross-examined Shields on the issue of being paid. R.T., Feb. 9, 2006, 7337:7-7338:3. Defense counsel argued that Shields got a pass on his state charges because of his federal cooperation. R.T., Mar. 23, 2013, at 15-16. Petitioner Greer's counsel pointed out what a good liar Shields must be to have worn a wire on gang members for two weeks, never giving anyone any reason to doubt his street cred. R.T., Feb. 2, 2006, at 7162:4-7163:7, 7165:3-7167:9. Both lawyers argued in closing that the Folks street gang, of which Shields was a member, had it out for PDF and lied to police and the FBI to set up Greer and Walker. R.T., Mar. 22, 2006, at 32-34, 41, 43, 89, 91, 129, 144-147. Thus, the fact that the FBI paid the operational expenses incurred during the period in which Shields was released by CDCR to FBI custody is neither significant nor more than merely cumulative. This is particularly true as the Government could have easily rebutted a suggestion that this was a benefit to Shields by providing testimony about the necessity of the arrangement.[52]

Moreover, Shields' primary testimony related to the murder of Larry Cayton, and the evidence as to that murder was voluminous, and pointed directly at Shango Greer. We outlined the evidence in some detail and with citations in section I.C.2.e, above, but summarize and supplement here.

Evidence from sources other than Shields:

On April 7, 2000, shortly after Larry Cayton was released from a prison term in which he,

[51] Government counsel identified this letter in Walker's related case shortly before filing this brief. The Government is in the process of reviewing its correspondence and discovery files in the instant case, which are voluminous, to determine whether it was produced independently in this case. For the nonce, we assume for the sake of argument that the letter was not formally produced in the instant case.

[52] We say "could have" deliberately. Given the strength of the Government's case, the weak nature of this argument, the strong corroboration of Shields testimony by others as well as his prior consistent statement, and Petitioner Greer's self-damning testimony regarding Shields, it is likely the Government would have left the matter stand unchallenged.

Shango Greer, and Derrick Shields did time together (for unrelated charges), a credit union in Novato, California was robbed by masked men armed with guns, who got away with $15,000. Alert witnesses followed the car the robbers left in, and it was later identified as belonging to Anthony Freeman. In March 2000, shortly before the robbery, Greer, Cayton, Fade (Petitioner Walker), and Shady (Charles White) came to Freeman's house to visit and to look at a car he had for sale, the car that was ultimately used in the credit union robbery. Greer and Cayton returned to look at the car a second time, along with Mark Tarver, Charles White, and Petitioner Walker. Ultimately Greer told Freeman he wanted the car, but didn't know who would come and pick it up, so Freeman told Greer he would leave the keys in the glove box. It was later picked up when Freeman was not there. R.T., Jan. 26, 2006, at 6557:19-6561:17. When Freeman told Greer the police were asking about the car, Greer directed him to tell the FBI that the car was stolen.

Mickalla Oliver, Larry Cayton's girlfriend, testified that he spoke with her often about robbing banks, analyzing which ones were vulnerable. She testified that in the days before the robbery, Cayton and Greer spent a lot of time together. On the day of the robbery, she saw Cayton driving in her car, which she had loaned him, from Novato to Vallejo shortly after the crime occurred. When she confronted Cayton in front of Greer later that day, he pulled her outside and told her he did what he had to do because he was tired of being broke. When she asked him what he had done, he told her her car hadn't been involved. He then told her not to say anything to Greer about this, and made up a story about why the two had left the house to speak privately on the porch. When Oliver saw the newspaper article about the robbery the next day, she recognized the car that had been abandoned by the robbers as Greer's.

Cayton was killed the next morning. He had spent the afternoon watching a movie with Greer at his friend Connie Phillips' apartment (where Cayton had been staying), according to Ms. Philips' testimony. The two left the apartment together. At 4:00 a.m., Greer knocked on the apartment door, and Phillips' boyfriend, Irwin Crews, answered, as he testified at trial. Greer told Crews he'd left a piece of clothing there, and went to a closet used by Cayton and looked around briefly before leaving. Twenty minutes later, Cayton came back to the apartment, and shut the door to Crews and Phillips' bedroom. Phillips heard at least two other men speaking in muffled tones with Cayton, who at one point clearly

stated "Don't even come at me like that," in a tone of voice that Phillips described as "threatened." Shortly after, the men left, just over an hour later, in Oakland, California, Cayton was murdered.

Clifford Rosa, a homeless man who testified, was camped under a freeway overpass in Oakland, on April 8. At about 5:30 a.m. he saw a light blue Ford Taurus[53] with three people in it pull over. One of the occupants pulled another man out and shot him.[54] That dead man was Larry Cayton.

Two days after the murder, Phillips and Crews were home when Greer and another person showed up to find out what the two knew about Cayton's death. Four days after the murder, Phillips' home was broken into, with Cayton's key used to gain entry. Although valuables were in plain sight, the only things taken were the video Cayton and Greer had watched together and a few rap CDs. Nothing in the home was disturbed except for the closet Cayton used.

Following the Cayton homicide, there was an extensive investigation by both the Oakland Police Department and the FBI. Mickalla Oliver testified she confronted Charles White, a PDF gang member, about Cayton's death. White asked Oliver for Cayton's cell phone, and then made her promise that she wouldn't snitch on them. Anthony Freeman testified that Greer left California and went to Philadelphia in the summer of 2000 because, as Greer told him, it was "getting hot" in Vallejo as a result of the police and FBI investigation into the Cayton homicide. Greer wanted to "let it cool down a little bit." Greer, White, and Marc Tarver came to see Freeman in July 2000. They told Freeman that Cayton was "gone," but declined to provide any other details because Freeman didn't "need to know about it." Greer told Freeman that a "bum" had witnessed the shooting. R.T., Jan. 30, 2006, 6648:13-15. Freeman felt that the two visits were designed to see if he was sticking with his "stolen car" story, and to ensure he kept quiet. R.T., Jan. 26, 2006 (p.m.), at 6574. After one of the visits, he received a page with the California Penal Code section for "murder," which he understood as a threat.[55] *Id.* at 6572:1-14.

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[53] Greer was seen in this time period driving a light blue car similar to a Taurus or a Cressida. R.T., Jan. 31, 2006 (p.m.), at 6866:6-16 (Connie Phillips testifying); R.T., Jan. 31, 2006, at 6905:14-20 (Sheryl Coverson testifying).

[54] Rosa admitted that he was using significant amounts of heroin at the time and had trouble seeing distances; he was not wearing his glasses at the time he witnessed Larry Cayton's murder, and was 66 feet away. R.T., Mar. 1, 2006 (p.m.), at 8692:18-8693:3, 8721:16-8722:17; R.T., Feb. 13, 2006, at 7437:25-7438:10.

[55] It is hardly surprising Petitioners' counsel did not attempt to further impeach Shields or follow up with the case agents who authored the FBI 302, both of whom were called to the stand after Shields. The documentation regarding payment to Shields arose in the context of an FBI 302 that discusses

All of that testimony points directly to Shango Greer, including his own statements showing insider knowledge of the murder (*i.e.*, the "bum" who witnessed it). Greer and Cayton committed a robbery in a car purchased from Freeman, then spent the day together. Greer and Cayton each entered Phillips' apartment between 4 and 4:20 a.m. on the morning he was murdered. Cayton sounded like he was being threatened. When Freeman told Greer the FBI was asking about the car, Greer didn't deny taking it, he told Freeman to lie that the car had been stolen. Greer and his PDF associates visited Freeman and told him that Cayton was gone but that Freeman "didn't need to know about it," implying very clearly that they all did know all about it. Shields' testimony merely piled on this evidence.

Evidence from Shields:

Derrick Shields knew both Cayton and Greer, having met them in prison. Greer and Cayton discussed having done bank robberies together. The afternoon of the Redwood Credit Union robbery, Shields saw Cayton, who showed Shields $1,500 in cash and asked to buy a large amount of marijuana. This surprised Shields because Cayton did not have a job and had not had much money since being released from prison. Shields learned of Cayton's death the next morning, from PDF member Elliot Cole. Later that day, Greer confided to Shields that he felt he had no choice but to kill Cayton, because Cayton had been talking to a woman or women about their business. R.T., Feb. 2, 2006 (p.m.), at 7116:10-7119:4. Of course, Greer witnessed Cayton's girlfriend, Oliver, confront Cayton about returning from Novato in her car in the late morning, just after the credit union robbery.

To the extent there was any doubt that Shields was testifying without a bias from government funds, his story is corroborated by not one but three prior consistent statements he made to law enforcement. Ex. A, hereto. Where a witness' statements made before any deal are consistent with those made after, *Giglio* is inapposite. *See Libberton v. Ryan,* 583 F.3d 1147, 1163 (9th Cir. 2009) (finding no *Brady/Giglio* violation where other impeaching information was in the record and "the government could have pointed to a statement untainted by any secret deal, if such a deal existed, in order to corroborate [the government witness'] trial testimony.").

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attempts by Greer to intimidate Shields in relation to Shields' role as a witness in Walker's upcoming felon in possession trial. The defense hardly wanted to open the door to additional evidence relating to PDF's systematic murder and intimidation of witnesses.

Moreover, Shields's testimony was corroborated *again* by Greer's own statement on one of the recorded calls. Shields discussed the Cayton homicide with Greer and Greer indicated that Cayton was talking to various women about their (Greer and Cayton's) illegal activities, which Greer considered unacceptable. Gov't Exhibit 510A; R.T. 7116:10-7119:4. During this tape-recorded conversation, Greer also told Cayton, "I'd do the same thing again . . . if it all came down to it." *Id*

And, on a final note, Greer took the stand, and tried to discredit Shields' testimony, claiming Shields lied when he said that he and Greer were friends, and spent significant time together. R.T., Feb. 22, 2006, at 8098:6-24. He claimed the audiotape on which he made statements consistent with those Shields told investigators about when he was first interviewed meant the direct opposite, that Cayton was talking about ripping someone off for crack, not any robbery he'd committed with Greer, and that everything else was about his completely legitimate business activities and rap aspirations, and that when he said he'd do the same thing again, he meant he'd distance himself from Cayton's drug sales. *Id*. at 8099:21-8100:19, 8150:15-8167:2. He denied having founded a rap record label with Shields, and said anyone who said he did was a liar. R.T., Feb. 28, 2006, at 8416:2-8419:9. It turns out Greer was the liar. He was confronted with his own letter, describing how he and "Flav," Shields' street name, had founded Infamous 7, a rap record label. *Id.* at 8438:20-8443:4. Greer's demonstrated lie in attempting to distance himself from Shields only tended to bolster the case against Greer, as did his ludicrous claims that CPG stood for "City Park G," not "gangstas." In addition to the copious evidence relating to Greer's guilt that had nothing to do with Derrick Shields, his own damaging and perjured testimony demonstrates the lack of a *Brady* violation here. *See U.S. v. Ross*, 372 F.3d 1097, 1109 (9th Cir. 2004) ("The district court observed that, 'Ross's own testimony damaged his defense because his explanations of the meaning of the tape recorded conversation were incredible.'").

In short, to the extent that Petitioners claim a violation under *Brady/Giglio*, the evidence introduced at trial demonstrates both that any favorable information was in their possession and that information was far, far from material. There is no violation here.[56]

[56] Should the Court wish an evidentiary hearing on this point, the Government will seek discovery not just in the form of defense counsel, including Johnny Griffin, who represented Walker in the felon in possession case, but also of any documentation in the defense files relating to Derrick Shields.

2. There is No Evidence Supporting Petitioners' Claim that McClough's Testimony in the Government's Case was Perjured, Much Less That It Was Known to the Government to Be Perjured.[57]

Both movants allege a due process violation relating to the alleged knowing use by the government of false testimony by Charles McClough, who they also allege was pressured to testify in specific ways by an FBI agent. They each claim that failure to raise this on appeal was ineffective assistance of appellate counsel. Petitioners are wrong on all counts here.

a. Charles McClough's Pretrial Statements Establish PDF as a Street Gang, with Petitioners as Members and Engaged in Criminal Activity

Charles McClough was interviewed by the FBI in November 2000, and stated that his cousin by marriage, Charles White, was a gang member who was using violence to "compete" for respect on the street. Exhibit H, hereto. He referred to "Westside" gang members, which was "different gangs within the same circle," and included Waterfront, City Park Gang, Pitch Dark Family, and Downtown. He stated that the gangs were allied and operated fairly freely within the joint areas. He identified Petitioners Greer and Walker as members of PDF. He told how White had described the murder of Devin Russell, saying it was completed because Russell had testified against a PDF member. McClough said that the first shot at Russell failed, because the shotgun jammed, which was corroborated by evidence found at the scene.[58] He also told agents how he was told that Russell turned as the first working shot was fired, a statement later corroborated by the autopsy.[59] Petitioners Walker and Greer, White and another PDF gang member told him about how they killed "York," later identified as Keith Roberts, and the murder of Richard Garrett. *Id*.

Charles McClough testified in front of the grand jury the next day of November 2000, testifying that Westside gangs were loosely affiliated and included Westside, 5 Deuce, City Park Gangsters, "PDF, Pitch Dark Family," and "DT." In reference to these groups, he said "everyone was allies." DN 200, Ex. 23, at 4:2-24; *see also id.* 8:4 (though individuals had different gang affiliations, they hung out because they were "allies"). He testified "They [PDF] formulated an offer for a rap group, which

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[57] This responds to Petitioners' arguments found at: Greer, 145-155; Walker, 130-140.

[58] R.T., Jan. 19, 2006, at 5888-5890.

[59] R.T., Jan. 25, 2006, at 6343.

became Pitch Dark Family was the name of the rap group, which extended into a street gang." *Id.* at 4:25-5:6. He identified Petitioners Greer and Walker as members of PDF, as a gang, not a rap group. *Id*. at 6:2-20. He described what he was told by Charles White about the murders of Devin Russell, Keith Roberts (York), and Richard Garrett. *Id.* at 12 et seq.

McClough testified again in front of the grand jury in December 2002, substantially consistently with his prior statement and prior grand jury testimony. Ex. L, hereto (lodged under seal). In that proceeding he indicated early on that he did not want to testify any more due to fears about his safety, citing things he was hearing from others he was incarcerated with about threats to him and his family. *Id.* at 4:13-14. He took a break and spoke with FBI agents, after which he stated on the record that no one had threatened him to get him to come back in, and that he had discussed his concerns about his family's safety with the agents. *Id*. at 5:20-6:6. He then resumed testifying, again generally consistently with his prior statements about PDF and its members involvement in various murders. *Id.* at 6 *et seq*. Before he testified the second time, he met with FBI agents, who provided him with the FBI 302 documenting his November 2000 interview and the transcript of his prior grand jury testimony, and the interview focused on expanding upon his prior testimony and correcting things that were not accurately stated in the two prior records of his statements. Ex. I, hereto.

b. **McClough's Trial Testimony is Consistent With His Pretrial Statements and Grand Jury Testimony**

The government called McClough in its case in chief, and he testified on January 12, 17, and 18. McClough again identified PDF as a street gang, and Petitioners Greer and Walker as members, all consistent with his prior statements to FBI agents and the grand jury. At the very beginning of his testimony he stated:

Q. Were there some other gangs later on the West Side?

A. Yeah.

Q. Who?

A. DT.

Q. What does DT stand for?

A. Downtown.

Q. Who else?

A. City Park.

Q. Who else?

A. Pitch Dark Family.

Q. Pitch Dark Family sometimes goes by the initials PDF?

A. Yes.

Q. PD, City Park, Pitch Dark Family, were these gangs in competition with each other?

A. No.

Q. How would you classify them?

A. Allies.

Q. West Side gangs were basically allies with each other?

A. Yeah.

R.T., Jan. 12, 2006, 5486 at 4-22. When asked to name specific members of PDF, McClough stated he did not want to testify further. R.T., Jan. 12, 2006, at 5486-5487. At one point he refused to testify further, but came back to testify after a break, during with both the prosecution, with an FBI agent, and defense counsel, with an investigator, had an opportunity to speak with McClough. R.T., Jan. 12, 2006, at 5491:13-22. The record reflects that McClough felt threatened due to a conversation with another inmate, and that was the reason for his refusal to testify. R.T., Jan. 12, 2006, at 5498-5500. The Government specifically wished to address this with McClough upon the resumption of testimony and the defense objected; the Court agreed with the defense. *Id.* The prosecution also referenced relocation of McClough's family as a benefit to McClough to resume testimony, and the defense agreed they would not raise that as a bias issue in light of the prosecution's inability to clarify with McClough in front of the jury the source of McClough's reluctance to testify. When testimony resumed, McClough identified Greer and Walker as members of PDF. R.T., Jan. 12, 2006, at 5505. He also proceeded to testify about conversations he had with various members of PDF regarding the murders of Russell, Roberts (York), and Garrett.

A month later the defense called McClough in its case, and McClough recanted, claiming the FBI had threatened him by reference to what would happen to his children. R.T., Mar. 1, 2006 (a.m.), at

8551. He said PDF was "nothing but a rap group," that the FBI said they were going to implicate him in the murders, and that Charles White had said what McClough had testified to, but it was a lie, he knew White was lying, but no one asked McClough if White was lying. *Id.* at 8553. He claimed Agent Peter French "manipulated" him by offering his wife and children housing.[60] He said French told him not to say Roberts' (York's) shooting took place in an alley, because it didn't. *Id*. at 8556:17-8557:6. Notably, during cross examination on his original testimony, McClough testified that Roberts' shooting took place in an alley, despite his later recantation and claim that he was told by the FBI to lie on that point. R.T., Jan. 1, 2006, at 5659, 8-15. He also said the FBI started giving him "scenarios" about how the various murders happened during his first meeting with them (which he had to say, because his testimony from the first meeting through the Government's case in chief was consistent), and said it was Agent Peter French who did that. R.T., Mar. 1, 2006, at 8556:17-8557:6. But Agent French was not present at the first meeting with McClough, Ex. H, hereto, it was Agents Butler and Fong, neither of whom McClough could specifically identify as an agent who gave him "scenarios." R.T., Mar. 1, 2006, at 8569-8778.

McClough testified in the defense case that his statement to prosecutors and FBI agents, during the break in his original trial testimony, that a guy in prison told him he was a friend of a PDF member and he knew where McClough's family lived wasn't threatening to him and was unrelated to his decision to stop testifying. R.T., Mar. 1, 2006 (a.m.), at 8569-8778. He testified that he didn't really lie to the grand jury during his two prior sessions, he simply wasn't asked the right question, *i.e*., did Charles White lie to *him*. *Id.* at 8582-8583. He said PDF was a gang, but not a street gang as such, and his use of the phrase "street gang," in describing PDF must have just been a misunderstanding. *Id.* at 8588-8589. He said he just wasn't asked the right questions when he first testified at trial (apparently by either the prosecution OR the defense, even when the defense asked him on cross whether he'd been pressured by the FBI to testify), and if he had been, then it would've all been clear. R.T., Mar. 1, 2006, at 8595. McClough said that it was AUSA Kenneth Melikian who had told him to use the word "ally" when describing the Westside gangs. *Id.* at 8601-8602. He testified that he hadn't ever seen Mr.

[60] Note the Government's prior discussion that in light of McClough's expressed fear for his family during his break in testimony, the Government offered to relocate his family.

Melikian until a meeting in Susanville state prison in September 2005. R.T., Mar. 1, 2006 (p.m.), at 8617.[61] But in his November 2000 grand jury testimony McClough used the word "allies" more than once to describe the Westside gangs, including PDF. DN 200, Ex. 23, at 4:2-24; *see also id.* 8:4. McClough said he called defense investigator Larry Fuller to set the record straight after the *first day* of his testimony,[62] R.T., 8609:20-25, a remarkable statement given his testimony (on cross examination) on his *third* day of testimony:

> Q. Let me ask you this: Have you been threatened or pressured by the FBI in any way for your testimony?
>
> A. Nope.
>
> Q. Did they ever threaten to take your children away from you or anything like that?
>
> A. Nope.
>
> Q. Is that "no"?
>
> A. (Witness shakes head.)
>
> Q. I'm sorry?
>
> A. No.

R.T., Jan. 18, 2006, at 5654:23-5654:7.

We could go on with the extended cross-examination of McClough in regard to his recantation, but suffice it to say that whenever McClough was pinned down in a lie, he added a new, twisted element to an already tortured story. His testimony on recantation was so full of holes that the defense's redirect of McClough is two short pages of testimony. R.T., Mar. 1, 2006, at 8658-8659. Even the defense could do nothing with the train wreck that was McClough's recantation.

FBI Special Agent Dan Butler, one of two agents McClough suggested might have told him to

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[61] McClough was mistaken on this, he did not meet AUSA Ken Melikian until sometime after September 2005. It was AUSA Philip Ferrari who attended the September 2005 meeting. R.T., Mar 14, 2006, at 9629:12-9630:14.

[62] Notably, the defense never called their investigator to corroborate McClough's recantation testimony, on this point or any other. To the extent the Court wishes any kind of evidentiary hearing on this issue, and Government submits none is necessary, we will seek all documents relating to defense investigator Fuller's contacts with McClough, and any documents in the defense's possession relating to contacts with McClough, and expect we would put Mr. Fuller, Mr. Kmeto, and Mr. Karowsky on the stand.

lie, took the stand and denied that either he or Agent Fong threatened, intimidated, or coached McClough. R.T., Mar. 14, 2006, at 9677. He testified that, in fact, on December 2, 2005, when trial was commencing, he and another agent met with McClough at Folsom Prison and gave him copies of his prior statements to go over them and identify any corrections that needed to be made. *Id.* at 9678-9679. Agent Fong, the other agent McClough identified as his possible intimidator, took the stand and also testified that neither he nor Agent Butler intimidated, threatened, or coerced McClough. R.T., Mar. 9, 2006 (p.m.), at 9457:2-9458:11.

FBI Special Agent David Sesma testified that during McClough's break in trial testimony he was present when prosecutors and Agent French asked McClough questions and that McClough told them he'd received a threat from someone associated with PDF, who said he knew McClough was testifying, knew that one of the indicted co-conspirators in this case was out of custody, and they knew where his family lived. R.T., Mar. 14, 2006, at 9632. Agent Sesma testified that in response to McClough's concerns about his family's safety, the group generally discussed relocating McClough's family, and agents brought McClough's wife to the jail that day to discuss the issue with him. *Id.* at 9633:23-9634:23.

In short, on his direct exam in the Government's case in chief, McClough was asked questions in regard to PDF and Petitioners Greer and Walker and gave answers that were consistent with everything he previously told the Government. There is clear evidence dating from 2002 that McClough was concerned about his and his family's safety if he testified against PDF and its members. That concern was reinforced during trial in 2006, during the break in his testimony when McClough told agents that he had been threatened due to his status as a witness at trial.

The only basis on which Petitioners make a claim that McClough's testimony in the Government's case in chief was perjured and known to the Government to be perjured is McClough's recantation in the defense case. The jury could, and did, decide which side of McClough's story to believe, the one he told repeatedly before and at trial, or the inconsistent and illogical fantasy he told during the defense case. The jury convicted the Petitioners with full knowledge of what Petitioners claim was perjured testimony obtained by unspecified and unscrupulous FBI agents, an AUSA in the grand jury with all testimony transcribed (and none of it remotely threatening), and another AUSA who

told him to use the word "ally" years *after* McClough first used it himself. There was substantial evidence that McClough was threatened, but none that suggests it was the FBI (or anyone else in the Government) making the threats.[63] McClough's recantation, we can reasonably assume as the jury apparently did, was the product of threats by people associated with Petitioners, not by any undue government influence.

There is no error here, constitutional or otherwise. Nor is there ineffective assistance of counsel. Trial counsel raised this issue and vetted it thoroughly at trial. Any appellate counsel reviewing the transcript of McClough's recantation would be (and apparently was) wise to stay far, far away from this as an issue on appeal.

III. CONCLUSION

A Section 2255 motion is not an opportunity to reargue an entire case. *U.S. v. Schaflander*, 743 F.2d 714, 722 (9th Cir. 1984). Nonetheless, that is what Petitioners here attempted to do. But examination of the entire record, as resource-consuming as that is, demonstrates that Petitioners simply do not have a claim for relief. Their counsel, at trial and on appeal, demonstrated competence and sound strategic choices. *Id.* The Constitutional issues they allege were well-vetted at trial, or discredited by reference to the record, or both. There is no need for an evidentiary hearing on this record. The Government requests Petitioners motion be denied without further proceedings.

Dated: May 31, 2013

BENJAMIN B. WAGNER
United States Attorney

/s/ Jean M. Hobler
JEAN M. HOBLER
Assistant United States Attorney

[63] We note that multiple other witnesses testified to being intimidated by PDF members, including Oliver and Freeman. R.T., Jan. 31, 2006, at 6780:10-6781:18 (Oliver); R.T., Jan. 26, 2006, at 6570:13-6574:15 (Freeman).

Exhibit G

U.S. Department of Justice
United States Attorney
Eastern District of California

501 I Street, Suite 10-100
Sacramento, California 95814

916/554-2700
Fax 916/554-2900

June 4, 2001

Johnny L. Griffin, III
Attorney at Law
1010 F Street, Suite 200
Sacramento, CA 95814

Re: United States v. Jason Keith Walker
CR. S-00-386 LKK

Dear Mr. Griffin:

Enclosed please find additional discovery consisting of pages 000019-A, 000152 through 000226, and 5 audio CD's of consensually monitored conversations which occurred on July 5, 12 and 13, 2000. Additionally, when the matter proceeds to trial, the government will proceed only on two of the four firearms listed in the indictment: the Rohm 6 shot revolver and the Taurus 5 shot revolver. If you have any questions, do not hesitate to call me.

Very truly yours,

JOHN K. VINCENT
United States Attorney

By _____
JODI B. RAFKIN
Assistant U.S. Attorney

Encls.

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

450 Golden Gate Ave.
San Francisco, CA 94102
June 1, 2001

Honorable John K. Vincent
United States Attorney
Eastern District of California
501 I Street
Sacramento, California 95814

Attn: AUSA Jodi B. Rafkin

Re: Pitch Dark Family
"Blue 5"

Dear Sir:

It is the purpose of this letter to confirm a conversation between AUSA Jodi B. Rafkin of your office and Special Agent Daniel H. Butler of this bureau regarding the referenced investigation and individual.

The Board of Prison Terms (BPT) released CW between July 5, 2000, and July 15, 2000, in order to be operated as a cooperating witness. CW was tasked to meet with investigative targets under the supervision of the FBI. CW was lodged in a hotel and monitored by agents when he was not operational. CW received $1450 in payments for operating expenses, in five installments, during that period. These monies were used to acquire motel accommodations, food, transportation, clothing, and incidental expenses for the CW.

On February 2, 2001, and April 5, 2001, CW received two additional payments totaling $1700. Again, these payments were provided to CW as operating expenses. In particular, the CW was use these monies to acquire lodging, transportation, communication, meals, and entertainment in furtherance of the investigation.

On July 31, 2000, the FBI asked the BPT to consider CW's efforts to assist law enforcement. In response, the BPT reduced the CW's sentence for a parole violation by two months. On August 31, 2000, the FBI requested that the California Department of Corrections (CDC) move CW from the Sierra Conservation Center to the California Medical Facility. CW had

indicated that he desired this re-location in order to be closer to his/her family. CDC complied with the request and moved the CW to the California Medical Facility.

If you have any further questions, contact Special Agent Dan Butler, telephone (510) 251-4076.

Sincerely,

BRUCE J. GEBHARDT
Special Agent in Charge

By: Michael C. Riedel/DHB

MICHAEL C. RIEDEL
Supervisory Special Agent

000153

JOHN K. VINCENT
United States Attorney
JODI B. RAFKIN
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2708

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SHANGO JAJA GREER, aka G.O.; JASON KEITH WALKER, aka Fade; CHARLES LEE WHITE, aka Shady; LOUIS WALKER, aka Lou Dog; ERIC JONES, aka E.J. Rabbit; OSCAR GONZALES; ELLIOT GUS COLE, aka L.L.; ARNANDO VILLAFAN; and MARC TARVER, aka Bowleggs; Defendants.	CR. NO. CRS-03-042 FCD VIOLATIONS: 18 U.S.C. § 1962(c) - Conducting the Affairs of an Enterprise through a Pattern of Racketeering Activity; 18 U.S.C. 1962(d) - Conspiring to Conduct the Affairs of an Enterprise through a Pattern of Racketeering Activity; and 18 U.S.C. § 1959(a)(1) and 2 - Violent Crime in Aid of Racketeering Activity (2 Counts).

I N D I C T M E N T

COUNT ONE: [18 U.S.C. § 1962(c) - Conducting the Affairs of an Enterprise through a Pattern of Racketeering Activity]

The Grand Jury charges: T H A T

SHANGO JAJA GREER,
CHARLES LEE WHITE,
LOUIS WALKER,
OSCAR GONZALES,
ELLIOT GUS COLE, and
ERIC JONES,

The Enterprise

1. At various times relevant to this Indictment, SHANGO JAJA GREER, Jason Keith Walker, CHARLES LEE WHITE, LOUIS WALKER, ELLIOT GUS COLE, ERIC JONES, OSCAR GONZALES, Arnando Villafan, and Marc Tarver, and others known and unknown, were members and associates of the Pitch Dark Family (PDF), a criminal organization whose members and associates engaged in acts of violence, including murder, attempted murder, and narcotics distribution, and which operated principally in the west side of Vallejo, California.

2. The Pitch Dark Family (PDF), including its leadership, members and associates, constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4) (hereinafter "the enterprise"), that is, a group of individuals associated in fact. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. This enterprise was engaged in, and its activities affected, interstate and foreign commerce.

Purposes of the Enterprise

3. The purposes of the enterprise included the following:

a. Enriching the members and associates of the enterprise through, among other things, murder, attempted murder, and distribution of narcotics.

b. Preserving and protecting the power, territory and profits of the enterprise through the use of intimidation, violence, threats of violence, assaults and murder.

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c. Promoting and enhancing the enterprise and its members' and associates' activities.

d. Keeping victims in fear of the enterprise and in fear of its members and associates through violence and threats of violence, ~~and violence~~.

Roles of the Defendants

4. The defendants participated in the operation and management of the enterprise.

a. Defendants SHANGO JAJA GREER and Jason Keith Walker were the backbone of the enterprise. They participated in the management and operation of the enterprise and directed other members of the enterprise in carrying out unlawful and other activities in furtherance of the conduct of the enterprise's affairs.

b. Under the direction of the leaders of the enterprise, defendants CHARLES LEE WHITE, LOUIS WALKER, ELLIOT GUS COLE, ERIC JONES, OSCAR GONZALES, Arnando Villafan and Marc Tarver participated in unlawful and other activities in furtherance of the conduct of the enterprise's affairs.

Means and Methods of the Enterprise

5. Among the means and methods by which the defendants and their associates conducted and participated in the conduct of the affairs of the enterprise were the following:

a. Members of the enterprise and their associates committed, attempted and threatened to commit acts of violence, including murder, to protect and expand the enterprise's criminal operations.

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b. Members of the enterprise and their associates promoted a climate of fear through violence and threats of violence.

c. Members of the enterprise and their associates used and threatened to use physical violence against various individuals.

d. Members of the enterprise and their associates trafficked in illegal narcotics.

The Racketeering Violation

6. Beginning at a time unknown to the grand jury, but no later than on or about January 1, 1994, through on or about July 30, 2000, in the State and Eastern District of California and elsewhere, the defendants, SHANGO JAJA GREER, CHARLES LEE WHITE, LOUIS WALKER, ELLIOT GUS COLE, ERIC JONES and OSCAR GONZALES, together with others known and unknown to the grand jury, being persons employed by and associated with the Pitch Dark Family (PDF) described above, which was an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, unlawfully, and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, that is, through the commission of the following acts:

The Pattern of Racketeering Activity

7. The pattern of racketeering activity as defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisted of the following acts:

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8. Racketeering Act One -
Murder of Jewel Hart

On or about January 19, 1994, in the County of Solano, State and Eastern District of California, ELLIOT GUS COLE, defendant, and others known and unknown, intentionally murdered Jewel Hart, that is, unlawfully killed Jewel Hart, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

9. Racketeering Act Two -
Attempted Murder of Jason Hickerson

On or about July 15, 1994, in the County of Solano, State and Eastern District of California, SHANGO JAJA GREER, Jason Keith Walker, and ERIC JONES, defendants, and others known and unknown, unlawfully, willfully and knowingly attempted to murder Jason Hickerson, in violation of California Penal Code Sections 187, 664 and 31.

10. Racketeering Act Three -
Murder of Keith Roberts, aka York

On or about August 3, 1994, in the County of Solano, State and Eastern District of California, SHANGO JAJA GREER, Jason Keith Walker and CHARLES LEE WHITE, defendants, and others known and unknown, intentionally murdered Keith Roberts, aka York, that is, unlawfully killed Keith Roberts, aka York, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

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11. Racketeering Act Four -
Murder of Richard Garrett

On or about August 28, 1994, in the County of Solano, State and Eastern District of California, Jason Keith Walker, and LOUIS WALKER, defendants, and others known and unknown, intentionally murdered Richard Garrett, that is, unlawfully killed Richard Garrett, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

12. Racketeering Act Five -
Possession of Cocaine Base for Sale

On or about April 26, 1997, in the County of Solano, State and Eastern District of California and elsewhere, SHANGO JAJA GREER, defendant, knowingly and intentionally possessed with intent to distribute a substance containing cocaine base, contrary to the narcotics laws of the United States, to wit, Title 21, United States Code, Sections 812 and 841(a)(1) and 841(b)(1)(A), and Title 18 United States Code, Section 2.

13. Racketeering Act Six -
Murder of Devin Russell

On or about January 29, 1998, in the County of Solano, State and Eastern District of California, CHARLES LEE WHITE, ERIC JONES, ELLIOT GUS COLE, Arnando Villafan and OSCAR GONZALES, defendants, and others known and unknown, intentionally murdered Devin Russell, that is, unlawfully killed Devin Russell, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

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14. Racketeering Act Seven -
Possession of Cocaine Base for Sale

On or about November 29, 1998, in the County of Solano, State and Eastern District of California and elsewhere, LOUIS WALKER, defendant, knowingly and intentionally possessed with intent to distribute a substance containing cocaine base, contrary to the narcotics laws of the United States, to wit, Title 21, United States Code, Sections 812 and 841(a)(1) and 841(b)(1)(A), and Title, 18 United States Code, Section 2.

15. Racketeering Act Eight -
Murder of Larry Cayton

On or about April 8, 2000, in the County of Solano, State and Eastern District of California and the County of Alameda, State and Northern District of California, and elsewhere, SHANGO JAJA GREER, defendant, and others known and unknown, intentionally murdered Larry Cayton, that is, unlawfully killed Larry Cayton, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

16. Racketeering Act Nine -
Conspiracy to Distribute Illegal Narcotics

Beginning at a time unknown to the grand jury, but no later than on or about January 1, 1994, through on or about July 30, 2000, both dates being approximate and inclusive, in the County of Solano, State and Eastern District of California and elsewhere, SHANGO JAJA GREER, Jason Keith Walker, CHARLES LEE WHITE, LOUIS WALKER, ERIC JONES, OSCAR GONZALES and Marc Tarver, defendants, and others known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and

agreed together and with each other to distribute and possess with intent to distribute mixtures and substances containing detectable amounts of cocaine base, in violation of the narcotics laws of the United States, to wit, Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), in violation of Title 21, United States Code, Section 846.

All in violation of Title 18, United States Code, Section 1962(c).

COUNT TWO: [18 U.S.C. 1962(d) - Conspiring to Conduct the Affairs of an Enterprise through a Pattern of Racketeering Activity]

The Grand Jury further charges: T H A T

SHANGO JAJA GREER,
JASON KEITH WALKER,
CHARLES LEE WHITE,
LOUIS WALKER,
ERIC JONES,
OSCAR GONZALES,
ELLIOT GUS COLE, and
MARC TARVER,

The Racketeering Conspiracy

17. Paragraphs One through Five in Count One are hereby realleged and incorporated as if fully set forth herein.

18. Beginning at a time unknown to the grand jury, but no later than on or about January 1, 1994, through July 30, 2000, both dates being approximate and inclusive, within the State and Eastern District of California and elsewhere, SHANGO JAJA GREER, JASON KEITH WALKER, CHARLES LEE WHITE, LOUIS WALKER, ERIC JONES, OSCAR GONZALES, ELLIOT GUS COLE and MARC TARVER, defendants, together with other persons known and unknown, being persons employed by and associated with the Pitch Dark Family (PDF), an enterprise, which engaged in, and the activities of which

affected, interstate and foreign commerce, knowingly, and intentionally conspired to violate 18 U.S.C. § 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined by 18 U.S.C. § 1961(1) and (5). The pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise consisted of the acts set forth in paragraphs Eight through Sixteen of Count One of this Indictment, which are incorporated as if fully set forth herein.

It was a further part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise.

All in violation of Title 18, United States Code, Section 1962(d).

COUNT THREE: [18 U.S.C. 1959(a)(1) and 2 - Violent Crime in Aid of Racketeering Activity, and Aiding and Abetting]

The Grand Jury further charges: T H A T

CHARLES LEE WHITE,
ARNANDO VILLAFAN,
ELLIOT GUS COLE,
ERIC JONES, and
OSCAR GONZALES,

Murder of Devin Russell

19. At all times relevant to this Indictment, the Pitch Dark Family (PDF), as more fully described in Paragraphs One through Five of Count One of this Indictment, which are realleged and incorporated by reference as though set forth fully herein, constituted an enterprise as defined in Title 18, United States

Code, Section 1959(b)(2), namely the Pitch Dark Family, that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce.

20. At all times relevant to this Indictment, the above-described enterprise, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, acts involving murder, in violation of California Penal Code Sections 187, 189, 664, and 31, and narcotics trafficking in violation of Title 21, United States Code, Sections 841 and 846.

21. In or about January 29, 1998, in the County of Solano, State and Eastern District of California, for the purpose of gaining entrance to and maintaining and increasing their position in the Pitch Dark Family (PDF), an enterprise engaged in racketeering activity, CHARLES LEE WHITE, ERIC JONES, ELLIOT GUS COLE, ARNANDO VILLAFAN and OSCAR GONZALES, defendants, and others known and unknown, intentionally murdered Devin Russell, that is, unlawfully killed Devin Russell, a human being, with malice aforethought, in violation of California Penal Code Section 187, 189 and 31.

All in violation of Title 18, United States Code, Sections 1959(a)(1) and 2.

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COUNT FOUR: [18 U.S.C. 1959(a)(1) and 2 - Violent Crime in Aid of Racketeering Activity, and Aiding and Abetting]

The Grand Jury further charges: T H A T

SHANGO JAJA GREER,

Violent Crimes In Aid Of Racketeering Activity

Murder of Larry Cayton

22. At all times relevant to this Indictment, the Pitch Dark Family (PDF), as more fully described in Paragraphs One through Five of Count One of this Indictment, which are realleged and incorporated by reference as though set forth fully herein, constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), namely the Pitch Dark Family, that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce.

23. At all times relevant to this Indictment, the above-described enterprise, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, acts involving murder, in violation of California Penal Code Sections 187, 189, 664, and 31, and narcotics trafficking in violation of Title 21, United States Code, Sections 841 and 846.

24. In or about August 8, 2000, in the County of Solano, State and Eastern District of California, and the County of Alameda, State and Northern District of California, and elsewhere, for the purpose of maintaining and increasing his position in the Pitch Dark Family (PDF), an enterprise engaged in racketeering activity, SHANGO JAJA GREER, defendant, and others

known and unknown, intentionally murdered Larry Cayton, that is, unlawfully killed Larry Cayton, a human being, with malice aforethought, in violation of California Penal Code Sections 187, 189 and 31.

All in violation of Title 18, United States Code, Sections 1959(a)(1) and 2.

A TRUE BILL.

FOREPERSON

JOHN K. VINCENT
United States Attorney

JOSEPH SCHLESINGER, Cal. Bar # 87692
Acting Federal Defender
DAVID M. PORTER, Bar #127024
Assistant Federal Defender
801 "I" Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-5700

Attorneys for Defendant
SHANGO JAJA GREER

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, v. SHANGO JAJA GREER, Defendant.	No. 2:03-cr-00042 MCE-JFM **REQUEST FOR SUBSTITUTION OF COUNSEL; ORDER**

Defendant, SHANGO JAJA GREER, hereby moves this Court for an order substituting Benjamin Ramos, Attorney at Law, 7405 Greenback Lane, Suite 287 Citrus Heights, CA, 95610, telephone (916) 967-2927; as counsel for the Defendant in the above-entitled case. The Federal Defender's Office has determined that it is currently unable to continue its representation of Defendant. Mr. Ramos has agreed to represent the Defendant.

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Mr. Ramos is aware of any deadlines in this case. The undersigned is authorized to sign this substitution motion on his behalf.

Dated: January 4, 2013

Respectfully submitted,

JOSEPH SCHLESINGER
Acting Federal Defender

/s/ David M. Porter
DAVID M. PORTER
Assistant Federal Defender

Attorneys for Defendant
SHANGO JAJA GREER

Dated: January 4, 2013

/s/Benjamin Ramos
BENJAMIN RAMOS

O R D E R

Pursuant to this Motion for Substitution of Counsel and for the reasons stated therein, IT IS HEREBY ORDERED that Benjamin Ramos, Attorney at Law, shall be substituted in as appointed counsel for Defendant in place of the Office of the Federal Defender for the Eastern District of California.

Dated: January 10, 2013.

UNITED STATES MAGISTRATE JUDGE

gree0042.sub

Title 18, section 1961

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping,gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons).,[1] sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses),

section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United StatesCode, section 186 (dealing with restrictions on payments and loans to labor organizations)or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by theAttorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the UnitedStates, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States,any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any

department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. JASON KEITH WALKER AND SHANGO JAJA GREER, Movants.	No. 2:03-cr-0042 MCE EFB P ORDER

On June 15, 2018, the Court adopted the magistrate judge's findings and recommendations as to both movants. ECF Nos. 1225 & 1226. Pursuant to those adopting orders, both movants' motions to vacate, set aside, or correct their sentences pursuant to 28 U.S.C. § 2255 were denied. Id. The adopting orders omitted a decision on whether a certificate of appealability should issue as to either movant, however. On June 28, 2018, movant Walker filed a motion for clarification of that question. ECF No. 1227.[1]

A "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). The petitioner must show that reasonable jurists could debate whether the petition should have been resolved

[1] Although only movant Walker moved for clarification, the court will address the issue for both movants.

differently or that the issues presented are "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Having reviewed the magistrate judge's findings as to both movants *de novo* and adopted them as this Court's own, it now concludes that reasonable jurists would not find this Court's assessment of movants' claims debatable or wrong. See id. at 484.

It is therefore ORDERED that:

1. Movant Walker's Motion for Clarification (ECF No. 1227) is GRANTED;
2. The court declines to issue a certificate of appealability as to any of the claims raised in movant Walker and Greer's motions; and
3. Either movant may seek a certificate of appealability from the Ninth Circuit.

IT IS SO ORDERED.

Dated: July 2, 2018

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE