NO. _____

In The
Supreme Court of the United States

HALISI UHURU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. The Appellant was improperly convicted of participating in a RICO organization, 18 U.S.C. §1962(d), because he was incarcerated during the vast majority of time that the illegal acts of others in the organization were perpetrated; because he was unaware of any of said illegal acts committed by others in the organization and because various other members in the organization specifically told the other members not to inform the Appellant of the illegal acts that they had committed.

2. The Appellant was improperly convicted of obstruction of justice, 18 U.S.C. §1512(c)(1), because there was no official proceeding pending against him. The involvement of federal investigative resources does not create or indicate that a federal proceeding has been initiated.

II. LIST OF PARTIES AND RELATED CASES

Parties: United States of America

Related Cases:

United States v. Daniel Mathias, et als, United States District Court for the Western District of Virginia. Judgment entered December 12, 2016 and filed on December 30, 2016

United States of America v. Daniel L. Mathias, et als is a published opinion however the citation is not yet available. (No. 16-4838), United States Court of Appeals for the Fourth Circuit. Judgment entered on July 31, 2019.

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V. OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is a published opinion. *United States v. Mathis, et al.*, 932 F.3d 242 (4th Cir. 2019). App. 1a-41a. The original judgment was announced in the district court on December 13, 2016 and was filed in said court on December 21, 2016. App. 45a-76a. The Defendant objects to the findings and opinions of said courts and now petitions this court to correct said errors.

VI. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit decided this case on July 31, 2019. Jurisdiction to review this petition is conferred by 28 U.S.C. §1254. The petition is being filed within ninety (90) days of the date of the decision of the case on appeal made by the United States Court of Appeals for the Fourth Circuit.

VII. CONSTITUTIONAL PROVISIONS

No constitutional provisions are involved in this case.

VIII. STATEMENT OF THE CASE

The Appellant, Halisi Uhuru, was indicted in the Western District of Virginia on May 14, 2014, along with five other defendants. The Appellant was named only in Counts 1 and 36 of said indictment charging him with violations of a RICO conspiracy and with obstruction of justice. There were five other defendants named

in said indictment.[1] One other was charged with the same charges as the Appellant while the remaining four were charged with violations of RICO alleging predicate racketeering acts of a combination of state (Virginia) offenses (murder, kidnapping and robbery) and federal offenses (Hobbs Act robbery, obstruction of justice, and drug trafficking).

The first trial, which commenced in Charlottesville, Virginia, on May 4, 2015, ended in a mistrial. The second trial began on February 1, 2016, in Roanoke, Virginia, after the district court had transferred the case from the Charlottesville Division to the Roanoke Division.

The investigation of this case began on February 1, 2014, when a reserve police officer in Waynesboro, Virginia, was reported missing. After an intensive search his body was found several days later in a remote, wooded area of Goochland County, about 50 miles east of Charlottesville, from where he had been abducted. He had been shot once in the head. Police quickly apprehended the four individuals believed to have been responsible for Quick's abduction and murder.[2] They also discovered that those same four suspects, along with others, but not the Appellant, were likely responsible for a series of armed robberies, burglaries, and other crimes committed in the central Virginia area during the fall of 2013. At the time of the murder and most of the robberies, the Appellant was incarcerated serving a Virginia state sentence.

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[1] Said five other defendants being Daniel Mathias, Kweli Uhuru, Mersaides Shelton, Shantai Shelton and Anthony Stokes

[2] The Appellant was determined not to have been involved in either the murder or robberies.

The evidence collected, including documents, cell phone messages, video recordings and witness interviews, indicated that the suspects were associated with a gang called the 99 Goon Syndikate, also referred to as the Double Nine Goon Syndikate, or the abbreviation, DNGS. Police believed the DNGS was not a local street gang, but was part of the national Bloods gang. As a result, the case was prosecuted federally as a RICO conspiracy.

According to the government's witnesses, the DNGS was formed by three former members of the Bloods gang, Halisi Uhuru, Anthony Stokes, and Kweli Uhuru, all of whom met each other in prison. Kweli was the first to be released, in April 2013. He lived in Front Royal, Virginia, with his parents, and he spent much of his time in Louisa County with his younger brothers, Devante Bell and Shiquan Jackson. During that summer he persuaded Bell and Jackson to join his new gang, DNGS, borrowing from the language, symbols, rules and rituals that he had learned as a member of the Bloods gang. Kweli told them Halisi was the leader of the group, Stokes was second in authority, and Kweli was next in the hierarchy. Several months later their cousin, Anthony White joined the group, as did his girlfriend, Shantai Shelton, and her siblings, Mersadies Shelton and Daniel Mathis.

During the months of September and October, while the Appellant was in jail, and unknown to him, various members of this group and some of their friends committed a series of armed robberies of convenience stores, home invasions, burglaries, and other crimes in the central Virginia area. In a random encounter on the evening of January 31, 2014, Kweli, Mathis, Shantai and Mersadies carjacked

Kevin Quick as he was driving to his girlfriend's apartment in Charlottesville, took his bank card, forced him to give up the PIN, obtained money from a bank ATM, and then drove him to a remote area where they shot and killed him, leaving his body in the woods. Driving Quick's vehicle these four then went to the house of a friend in a rural area of Louisa County where they picked up White and then drove back to Charlottesville, stopping at another bank ATM along the way and then McDonald's. Except for Mathis these individuals spent the rest of the night at the apartment of Mersadies, Shantai and her other sister, Sidney Shelton.

Later on the morning of February 1, 2014 Shantai told White about the abduction and murder of Quick. When Mathis returned with the SUV, the group of four[3] plus Anthony White drove to a hotel in Manassas where they met with Anthony Stokes and the Appellant, Halisi Uhuru[4]. Before the meeting, Kweli warned the group not to tell either Halisi or Stokes anything about the abduction and murder of Kevin Quick.

The next day the group, without Halisi and Stokes, headed back to Charlottesville, stopping to drop off Kweli in Front Royal. After leaving Kweli the remaining individuals went back to the same friend's house in Louisa where they had picked up White the night before. There they used bleach and other cleaners to wipe down the SUV to remove fingerprints and other evidence of their presence. Mathis, Mersadies, and their friends then drove off in a quest to obtain marijuana from a source they had been told about. After entering the house where the

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[3] Daniel Mathias, Mersaides Shelton, Shantai Shelton and Kweli Uhuru

[4] Halisi Uhuru has only been released from prison on or about December 2, 2013.

marijuana supposedly was, Mathis attempted to rob the occupants, but things went badly and ended in a brawl in which one of the occupants was shot. This was the known as the "Super Bowl Robbery". Mathis and the others fled and drove off in the SUV, but after a short distance the vehicle broke down and was abandoned. After several phone calls a friend was persuaded to pick them up and take them back to the house in Louisa from whence they had come.

One of the group then telephoned Halisi to ask for help. Halisi still did not know about the murder. At Halisi's request Leslie Casterlow and Stokes drove to the home in Louisa to pick up Mathis, Shantai, Mersadies and White. These two then took the four back to Manassas. Again unknown to Stokes, Casterlow or Halisi, this group still had with them documents belonging to Kevin Quick as well as the gun that had been used to shoot Kevin Quick and in the attempted Super Bowl robbery. During the course of the day these items were destroyed or discarded. White and Shantai cut the gun into pieces and gave them to Casterlow. She then gave them to Stokes, who threw them out the window as their car travelled on the interstate around Northern Virginia. Also during this time period Halisi and Casterlow went to a local drug store where it was alleged that Halisi was given some of the documents belonging to Kevin Quick, which it was alleged that he destroyed by cutting them up and discarding them in a trash can. Later that day the police arrested Mathis, White, Shantai and Mersadies in their hotel room in Alexandria. The Appellant Halisi Uhuru, Stokes and Kweli Uhuru were arrested a short time later.

A superseding indictment alleged numerous times that the "enterprise," for purposes of the RICO and VICAR charges, was "the Bloods," and the members of the 99 Goon Syndikate were members of the "Bloods Street Gang." J.A. 86, 101, 104, 106, 109, 112, 115, 116, 118, 121, however, the district court instructed the jury that the government had charged the RICO "enterprise" not as "the Bloods," but as the "99 Goon Syndikate." Likewise, the government's presentation of evidence and argument conflated the "99 Goon Syndikate" gang with the "Bloods." Tattoos and documents showed that the 99 Goon Syndikate had taken rules, language, symbols, and oaths associated with the Bloods and adapted them to their own use, but the 99 Goon Syndikate, as a group or through individual members, was not in contact with any organization or part of a larger group, and did not claim to be part of the national Bloods. The government presented no evidence that the "99 Goon Syndikate" was a RICO enterprise, as opposed to simply a street gang, or that members of that group were members of the national "Bloods" gang. Said superseding indictment also charged the Appellant with obstruction of justice by destroying evidence belonging to the victim, Kevin Quick.

The two groups of defendants in this case had very different origins. One group was the Shelton sisters, Shantai and Mersadies and their half brother, Daniel Mathis. The three defendants, Halisi Uhuru, Anthony Stokes, and Kweli Uhuru, were unrelated to each other and had been imprisoned since they were teenagers. Halisi Uhuru was 16 when he was imprisoned in 2007 for armed robbery and related weapons offenses. He was on probation at this time and was supervised in

Danville. Kweli was released from prison in April 2013, and resided in Front Royal with his parents, although he spent time with his younger brothers in Spotsylvania County and later with Mathis and the Shelton sisters in Charlottesville.

These two groups met as the result of the relationship between Shantai Shelton and Anthony White. When Kweli was released from prison in April 2013 he began recruiting his younger brothers, Devante Bell and Shiquan Jackson, into what was described as something that would make people look at gangs in a different way. Over the summer they were initiated as members, and in August their friend, Anthony White, who was working at a landscaping company with Devante Bell, joined. When White began a relationship with Shantai after she returned to Charlottesville in September, her sister and brother were recruited into the gang, the 99 Goon Syndikate, although they did not officially become members until much later. Kweli met Shantai and her siblings through White.

The defendants associated with a group that called itself the "99 Goon Syndikate," sometimes referred to as the "Double Nine Goon Syndikate" or "DNGS." The government alleged the group had three important characteristics: (1) it was a "set" of the Bloods street gang, and thus "an individual unit" of the Bloods gang, identified or affiliated with a certain street, neighborhood, or geographic area; (2) as a "set," it shared a common identity as part of the Bloods gang through the use of "common tattoos, communication codes, language and graffiti markings," and display of the color red; and (3) its members supported themselves through criminal acts, such as robberies, burglaries, and drug trafficking. These are the

characteristics of a neighborhood-based street gang as recognized by the Department of Justice. 2015 National Gang Report, National Gang Intelligence Center, p. 11. By contrast a national-level gang operates in multiple jurisdictions and differs in structure, membership and conduct from either of the other recognized types of gangs, prison gangs and outlaw motorcycle gangs. *Id.* at 15-17.

The highest ranking member of the DNGS was purportedly Halisi Uhuru, followed in standing by Stokes, and Kweli Uhuru. Halisi's 2007 guilty plea included the admission that he was "a member of the NTG ("Nine Trey Gangstas") set of the Bloods" and that he had been a member of that gang for more than four years.

The defense portrayed the DNGS as a loosely associated group of individuals that had nothing to do with the Bloods - although they adopted to some extent the "common identity" associated with the Bloods gang, such as symbols, formalities (oaths, rules, etc.) and nomenclature - and that the crimes committed by individual members were spontaneous and unrelated to any "enterprise," and did not constitute a "pattern of racketeering activity." The members who testified denied having any contact or communication with anyone associated with the United Bloods Nation, the Bloods, or any other gang.

The government's evidence came from three main testimonial sources: (1) codefendants and others who participated in, or were indirectly involved in, the robberies and related offenses; (2) victims of the robberies and home invasions who were eyewitnesses; and (3) expert witnesses who testified about fingerprint, DNA, and other forensic evidence. This evidence was supported in varying degrees by

video recordings of some of the robberies, cell phone tower records, text messages recovered from cell phones associated with the defendants or Kevin Quick, and physical evidence, including clothing, tattoos, and documents.

Construed in the government's favor, circumstantial evidence tied the four capital defendants (Kweli, Mathis, Shantai and Mersadies) to the abduction and murder of Kevin Quick. Quick's phone sent a final text message to Yadira Weaver, the mother of his child, at 10:14 p.m., and the phone was turned off at 10:51. A cell tower analysis showed the phone "could have been" in the vicinity of Turtle Creek Apartments, Yadira Weaver's residence in Charlottesville, at the time it stopped. At 11:13 p.m. Quick's bank account PIN was entered into the cell phone associated with Mersadies. Video showed Quick's ATM card being used at a bank in Fork Union at 11:40 p.m. Witnesses saw Kweli, Mathis, Shantai, and Mersadies in Quick's SUV in Louisa several hours after the ATM was used in Fork Union. Video showed Kweli, Mathis, Shantai, Mersadies, and Anthony White at a McDonald's in Charlottesville at 4:54 a.m. Quick's body was later recovered in the woods in the general vicinity of where Kweli, Mathis, Shantai and Mersadies were ostensibly traveling that night in the SUV. Shantai possessed items belonging to Quick, including his ATM card and his vehicle registration. Mathis possessed a pistol believed to have been used to shoot Quick. Witnesses also saw Mathis and others destroy evidence by cleaning out the SUV, throwing away the contents, wiping it down with bleach, etc.

IX. SUMMARY OF THE ARGUMENT

Throughout all of events outlined above, state and local law enforcement agencies were diligently investigating not only the robberies and home invasions, but also the abduction of Kevin Quick. Federal investigative agencies became involved with state investigative agencies after the disappearance and subsequent murder investigation of Kevin Quick. Once these agencies learned the names of some of the capital defendants in this case, state arrest warrants were issued for them. When the Appellant, Halisi Uhuru, was arrested on or about February 6, 2014, he was charged with state and not federal offenses. It was not until March of 2014 that a federal indictment was filed against him. At the time of his alleged destruction of documents prior to his arrest on state charges there was no official federal proceedings pending as required by 18 U.S.C. §1512(c)(1). Instead the trial court held that pursuant to 18 U.S.C. §1512(g) the government was not required to prove that the Appellant actually knew that there was an official proceeding pending against him, but only that he could reasonably have foreseen such official proceeding. The trial court held that the use of federal investigative offices and officials constituted such official proceeding, whether or not the Appellant was aware of the fact that they were involved in the case. Appellant argued both at trial and before the Fourth Circuit that 18 U.S.C. §1512(g) did not negate the requirement that the government must prove the existence of an official proceeding as defined in 18 U.S.C. §1515(a)(1).

X. ARGUMENT

As stated in *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012)

> "[T]o satisfy §1962(d), the government must prove [1] that an enterprise affecting interstate commerce existed; [2] that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and [3] . . . that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts."

The focus of this appeal is on the third element. The government failed to not prove the Appellant Halisi Uhuru agreed to the commission of at least two of any of the charged racketeering acts: murder, kidnapping, robbery, obstruction of justice, Hobbs Act robbery, and drug conspiracy.

In the recent decision in *United States v. Barnett*, 2016 U.S. App. LEXIS 18394 (Oct. 12, 2016, 4th Cir.), the Court vacated the defendant's RICO conspiracy conviction because the evidence was insufficient to prove that she agreed that at least two predicate racketeering acts would be committed. Williams was intimately involved with a North Carolina "set" of the United Blood Nation ("UBN"), and was described as the set's "first lady," which meant she would serve as "the mouthpiece . . . for [a] high ranking male member if he's incarcerated." *Barnett*, 2016 U.S. App. LEXIS 18394 at *4-5. Williams did not dispute that the set was an enterprise, or that she participated in its management as "first lady." But she denied that she agreed enterprise members would commit at least two, particular acts of racketeering.

The government presented evidence of various robberies and drug crimes committed by UBN members, but conceded that none of the evidence directly

related to Williams. *Id.* at *5. The government argued, however, that because "Williams played a central role in the gang as the primary source and conduit of information and as an advisor integral to the success and coordination of gang activities, the jury could reasonably infer that she was aware that UBN members engaged in drug trafficking and committed robberies."

Rejecting the government's argument, the 4th Circuit held that in the absence of evidence sufficient to establish beyond a reasonable doubt that Williams agreed that the conspirators would commit two of the *particular* murders, robberies, drug trafficking offenses or other racketeering acts charged by the grand jury, she was not guilty. "The RICO conspiracy statute does not criminalize mere association with an enterprise," the court observed. *Id.* at *28 (quoting *Mouzone*, 687 F.3d at 218). Williams' firsthand knowledge that the enterprise was regularly involved in robberies, drug deals and other criminal activities was insufficient to sustain her conspiracy conviction in the absence of proof that she agreed to the commission of a particular robbery or drug offense. *Id.* at *28-29.

For similar reasons the Appellant in this case should be acquitted. While the Appellant may have distributed controlled substances for about two months between December 2013 and February 1, 2014, this activity was not related to the 99 Goon Syndikate. The trial evidence showed that he obtained some drugs for resale from sources in Maryland who were separate and apart from any of the other defendant in this case and that said drugs were then distributed in Northern Virginia. None of the proceeds were shared with any of the other defendants in this

case. This activity should not count as a predicate act of racketeering because it is not part of "a pattern of racketeering activity" within the confines of the RICO acts charged in this case.

The government failed to prove the Appellant agreed that any of the members of the charged conspiracy would commit any of the other racketeering acts alleged in the indictment. Not only did the Appellant not have any involvement in the robberies committed by the other defendants, or in the abduction and murder of Kevin Quick, he did not even know about those crimes until *after* they had occurred. He was more than 100 miles away in northern Virginia when those offenses took place. Other than knowing Kweli Uhuru, the Appellant did not even know who any of the other defendants were, let alone agree that they should commit predicate particular racketeering acts. Indeed Kweli even warned the others *not* to tell the Appellant about the abduction and murder of Quick.

The Appellant's purported destruction of incriminating evidence was not a conspiratorial act. The conspiracy to rob and murder Quick, like other predicate crimes, had already been completed before any of the others sought help from him to avoid arrest. *See United States v. Kang*, 715 F. Supp. 2d 657, 669 (D. S.C. 2010) (discussing Supreme Court precedent for proposition that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.").

The drug activities of the Appellant do not qualify as a predicate racketeering act because they were not related to the enterprise and the acts related to obstruction of justice occurred after the completion of the conspiracy.

Count 36 of the superseding indictment charged the Appellant with violating 18 U.S.C. §1512(c)(1), by corruptly altering or destroying ". . . a record, document, or other object, . . . with the intent to impair the object's integrity or availability for use in an official proceeding; . . . ." 18 U.S.C. §1512(c)(1). An official proceeding is "a proceeding before a judge or court of the United States. . .or a Federal grand jury." 18 U.S.C. §1515(a)(1)(a). The government failed to prove beyond a reasonable doubt that the Appellant acted in contemplation of a particular, foreseeable "official proceeding."

In *United States v. Aguilar*, 515 U.S. 593 (1995), which addressed 18 U.S.C. §1503, the Supreme Court required the government to prove a "nexus" between the offense charged and the conduct of a defendant. Later in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Supreme Court held that in prosecutions under §§1512(b)(2)(A) and (B), the government must prove the defendant contemplated a particular, foreseeable official proceeding when he obstructed justice. Courts have held that the same nexus must exist for a conviction under other subsections of §1512. *See United States v. Shavers*, 693 F.3d 363, 379 (3d Cir. 2012) *reversed on other grounds*, 133 S. Ct. 2877 (2013) (addressing §1515(a)(1)(A)).

Similarly, in *United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015) the court applied the same nexus requirement to Section 1512(c)(2), observing that

sister circuits have applied the "nexus" requirement to violations of §1512(c)(2); see also, *United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *United States v. Tyler*, 732 F.3d 241, 249-50 (3d Cir. 2013).

The Appellant was charged specifically under 18 U.S.C. §1512(c)(1). This charge required proof that he altered, destroyed, mutilated or concealed documents or other objects. The only evidence produced at trial was that the Appellant told Leslie Casterlow "to get rid" of Kevin Quick's credit card when she showed it to him. He never touched it nor did he destroy it. Casterlow, another defendant, destroyed it. She said stated at trial that while the Appellant and his girlfriend were picking up a prescription in a pharmacy, she cut up the credit card using some scissors in the drug store bathroom. Neither did the Appellant destroy any other evidence. It was this same Leslie Casterlow, without the knowledge of the Appellant, who threw clothing of the other defendants into a dumpster, burned documents and papers belonging to Kevin Quick. According to Casterlow, it was Anthony Stokes, not the Appellant, who threw the pieces of the gun out of the window of the car.

In February of 2014 no federal grand jury or any other "official proceeding" as defined 18 U.S.C. §1512(a)(1)(A) existed when any of the evidence involved in this case was destroyed. The Government contended that a "federal proceeding" had commenced because Jason Warren, an FBI specialist in tracking cell phone signals, had already been called in by local law enforcement to locate Kevin Quick's phone. But the assistance of a federal official does not convert a state investigation into a "federal proceeding" as defined under §1515(a)(1)(A).

When Kweli Uhuru and a number of the other defendants met up with the Appellant on the evening of February 1, the Appellant did not know about any of the robberies committed by members of Kweli Uhuru's group or of the abduction and murder of Kevin Quick. No evidence exists that anyone discussed any of the past conduct of Kweli's group with the Appellant. Indeed Kweli specifically warned the group not to tell the Appellant anything about the abduction and murder of Quick.

The state-based, rather than federal, character of the investigation was underscored at trial by the testimony of Scott Renalds, a detective with the Louisa County Sheriff's Office and the government's summary witness. Renalds testified about phone logs, Internet searches and text messages by the defendants who were involved in this case. Renalds testified that on February 3, the phone of Mersaides Shelton contained an Internet history search at 11:22 a.m. that contained the following: "Update. VSP [Virginia State Police] concerned about safety of missing Nelson County man." On the same date at 2:48 p.m., Renalds testified, a text from the phone held by Kweli Uhuru transmitted the following message to the phone associated with Mersaides Shelton: "Bones just told me the Roscoe's got the whip." (Bones was a nickname for the Appellant, "Roscoe" was a code word for the police.) At 3:11 p.m. the phone associated with Mersaides Shelton showed an Internet history search of a newspaper stating: "Police set press conference in disappearance of Nelson County man." "Police" referred to local law enforcement authorities.

At the time the Appellant allegedly destroyed evidence, there was no federal "official proceeding" in existence. When the defendants and others prosecuted in this case were arrested, they were arrested on state charges. An indictment was not issued until May 14, 2014, and grand jury proceedings were not commenced until April 2014. In the meantime two female defendants involved in the murder of Kevin Quick had already had their preliminary hearings in the Louisa County General District Court on March 18, 2014.

The trial court's post-trial ruling is inconsistent with the decisions from other circuits. The trial court essentially held that Congress in enacting 18 U.S.C. §1512(g) intended to omit a state-of-mind requirement with respect to the nexus between the defendant's obstruction and a particular federal proceeding. According to the trial court, the government need not prove that the Appellant foresaw any particular federal proceeding at the point in time when the alleged obstruction occurred, but only that there might be some supposed or possible future grand jury probe or trial.

The trial court attempted to distinguish the case at bar from *Shavers* and *Petruk* by noting that in those cases state proceedings had already begun prior to the institution of any federal proceedings. In *Shavers* and *Petruk* the defendants were clearly trying to influence testimony in their state cases. The trial court here held the government was not required to prove that Halisi or Stokes were aware that the law enforcement investigation underway in February 2014 was federal in nature. Likewise the trial court held that §1512(c)(1) did not include a *mens rea*

element. The net result of the court's statutory construction was elimination of the nexus requirement of §1512(c)(1). In upholding the conviction of Anthony Stokes' conviction on Count 36, the trial court emphasized that Stokes knew about Kevin Quick's abduction and murder through media reports and Jamar Rice's comments in Rice's vehicle, but there was no evidence existed that the Appellant had any of this information. Nevertheless all the information available to the Appellant, indeed to all of the defendants in this case, clearly indicated that state, not federal, law enforcement was in charge of this investigation.

In construing §1512(c)(1), the trial court heavily relied upon §§1512(f)(1) and 1512(g)(1). Under §1512(f)(1) "an official proceeding need not be pending or about to be instituted at the time of the offense [.] Under §1512(g)(1), "no state of mind need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States." 18 U.S.C. §1512(g)(1). The trial court cited *United States v. Stanley*, 533 F.App'x 325 (4th Cir. 2013) (unpublished) and *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009) to support its conclusion that §§1512(f)(1) and (g)(1) foreclosed the Appellant's position that the government must prove he contemplated a particular and foreseeable "official proceeding" rather than a state criminal justice investigation or prosecution. The opinion in *Stanley* is inapposite. There the Internet Crimes Against Children Task Force, a national criminal investigation unit overseen by the Department of Justice, was actively conducting online surveillance of the defendant at the time he attempted to destroy

incriminating evidence.[5] The defendant thus interfered with a criminal investigation led by federal agents and prosecutors. (The 4th Circuit had not yet ruled in the case of *United States v. Young*, discussed below.) Similarly in *Phillips*, 583 F.3d at 1261-2 the defendant obstructed the efforts of a drug task force led by the Drug Enforcement Administration in connection with a federal grand jury probe. ("At this point, a grand jury investigation was underway. By June 2007, law enforcement officers had testified before the grand jury, were working in conjunction with federal prosecutors, and had obtained wiretap orders and grand jury subpoenas from a federal judge . . .".). Unlike in *Stanley* and *Phillips*, no federal investigation or "official proceeding" existed in this case. The government presented no evidence that the Appellant contemplated a particular, foreseeable "official proceeding." When the Appellant allegedly destroyed evidence, the only investigation that was ongoing was led by the Virginia State Police, which, along with local law enforcement, had executed search warrants and begun arresting co-defendants on state charges.

The trial court misread §§1512(f)(1) and (g)(1) to eliminate any state-of-mind element concerning a nexus to a federal grand jury or trial. Neither provision excuses the government from proving that the Appellant contemplated a particular and foreseeable federal proceeding when they allegedly destroyed tangible evidence in a bid to obstruct justice. §1512(f)(1) and §1512(g)(1) serve distinct functions and address distinct fact patterns. §1512(f)(1) comes into play when the defendant destroys incriminating evidence before any official proceeding exists. Section

[5] https://www.icactaskforce.org/ (last visited April 5, 2017).

1512(f)(1) makes clear that a defendant can preemptively obstruct an "official proceeding" that has not yet commenced at the time of the obstruction. Thus §1512(f)(1) is relevant in cases such as this one where the government claims the defendant's obstructive acts relate to a forthcoming federal proceeding. Under *Arthur Andersen*, 544 U.S. at 708, however, the defendant nevertheless must contemplate and foresee a particular federal proceeding at the time of his allegedly obstructive efforts.

When the alleged obstruction occurs after the commencement of the "official proceeding," §1512(g)(1) rather than §1512(f)(1) becomes relevant. Congress in §1512(g)(1) provided that *if* the "official proceeding" in issue is underway at the time of the defendant's obstructive conduct, the government need not prove the defendant knew the proceeding he obstructed was a federal proceeding.

Section 1512(g)(1) does not apply in the case at bar. No "official proceeding" existed when the Appellant allegedly destroyed evidence in hopes of obstructing that proceeding. The trial court misapplied §1512(g)(1).

The Third Circuit explicitly has rejected the government's stock argument (which the trial court below embraced) that §1512(f)(1) and §1512(g)(1) combine to extinguish any state-of-mind requirement concerning a nexus between the defendant's obstruction and the particular "official proceeding" in issue. Prior to *Arthur Andersen*, 544 U.S. at 696, the court in *United States v. Tyler*, 281 F.3d 84, 93 (3d Cir. 2002) quoting *United States v. Bell*, 113 F.3d 1345, 1351 (3d Cir. 1997) accepted the government's longstanding position that under §1512 "the government

need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges [the defendant] intended to interfere with or prevent." Thus before *Arthur Andersen* the Third Circuit maintained that §§ 1512(f)(1) and (g)(2) relieved the prosecution of proving the defendant intended to obstruct a particular, foreseeable federal proceeding. "Congress plainly intended to omit a state-of-mind requirement with regard to the federal connection," the Third Circuit reiterated in 2002.[6] Following *Arthur Andersen*, however, the Third Circuit abrogated its position that §1512 lacks a scienter element with respect to the federal nexus.[7]

The Third Circuit's application of *Arthur Andersen* is correct. The trial court below, in contrast, misapplied *Arthur Andersen* when it adopted the government's increasingly discredited argument that §§1512(f)(1) and (g)(1) read together relieve the prosecution from having to prove the obstructive defendant contemplated a particular and foreseeable federal grand jury or court proceeding. Those two provisions – §§1512(f)(1) and (g)(1) – existed when the *Arthur Andersen* Court held that the prosecution must prove beyond a reasonable doubt that the defendant "contemplate[ed] a particular official proceeding" at the time he obstructed justice. *Arthur Andersen*, 544 U.S. at 696. Controlling precedent therefore required the

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[6] *Tyler*, 281 F.3d at 94. When the Third Circuit issued this decision in 2002, §1512(f) was codified as §1512(e) and §1512(g) was codified as §1512(f).

[7] "In Tyler's direct appeal, we relied on our holding in *Bell* for the view that §1512 'does not require that the defendant know or intend anything with respect to this federal character,' *Tyler II*, 281 F.3d at 92 (quoting *Bell*, 113 F.3d at 1348), an interpretation that is no longer correct under *Arthur Andersen*.". *United States v. Tyler*, 732 F.3d 241, 251 (3d Cir. 2013).

government to prove that the Appellant acted with this particular *mens rea* and specific intent.

Finally the in the case of *United States v. Young*, 916 F.3d 368 (4th Cir. 2019) the Fourth Circuit reversed a defendant's conviction on two counts of obstruction of justice under §1512(c)(2) where the defendant actually knew about certain FBI investigations into his relationships with certain individuals associated with terrorism and he intentionally attempted to deceive the FBI. After his conviction at trial the Fourth Circuit quoted *United States v. Friske*, 640 F.3d 1288, 1292 (11th Cir. 2011) in reversing the defendant's conviction for obstruction of justice:

> "Even though the defendant "was certainly acting suspiciously," "more is required to prove a violation of §1512(c)(2)." *Id.* at 1292. But because the only way for the jury to conclude that the defendant "knew of or foresaw the forfeiture proceeding" "would be through speculation," the evidence was insufficient to convict him. *Id.* at 1293. Similarly, although Young's actions were certainly designed to thwart an FBI inquiry, the only way the jury could have concluded he foresaw a particular grand jury investigation would be through speculation."

The Fourth Circuit then went on to state that "[t]he insufficiency of the evidence here is highlighted by cases in which courts have found that a grand jury proceeding into criminal activity was reasonably foreseeable because of a defendant's actual awareness of an ongoing or impending investigation into closely related activity and specific criminal actions in relation to such awareness."[8] "Although the Government established at trial that Young was constantly aware of the fact that the FBI *could* be investigating him, the Government failed to connect

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[8] 916 F.3d 368, 388 (4th Cir. 2019)

this general awareness—whether in combination with any of the issues discussed above or individually—with a *specific* and *reasonably foreseeable* official proceeding.

"Thus, 'based on our review of the record, we have uncovered no evidence to satisfy *Arthur Andersen*'s requirement that the Government prove a nexus between [the obstructive] conduct and a foreseeable particular federal proceeding to establish a conviction under' §1512(c). *Tyler*, 732 F.3d at 250–51."[9]

The Appellant in this case is significantly in contrast with the defendant in *Young*. Whereas in *Young* the defendant actually knew that he was being investigated by the FBI and that there may have been grand jury proceedings against some of his friends and acquaintances, in this case the Appellant did not know that any federal agency was involved in the investigation. He did not know of the murder. He did not know of the robberies. He did not know of the home invasions. He did not know of any of the actual criminal acts committed by any of the other defendants. The Appellant was shown a credit card belong to Kevin Quick. He knew that it did not belong to him or to Leslie Casterlow, the individual who showed it to him. He did not know about the murder. At best he knew that the credit card was stolen and that it was illegal to possess a stolen credit card. The government proved absolutely no nexus between the destruction of the credit card and any "official proceeding". For a jury to convict the Appellant of obstruction of justice under §1512(c)(1) would call for them to merely speculate about the Appellant's state of mind and his knowledge as the court in *Tyler* so stated.

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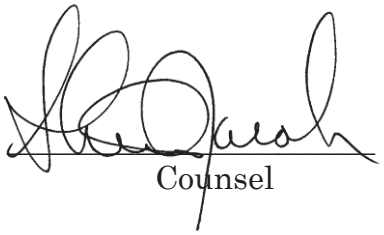
[9] 916 F.3d 368, 388 (4th Cir. 2019)

XI. CONCLUSION

The Defendant moves this Court to overturn the decision of the Fourth Circuit and the trial court regarding his conviction under §1962(d) (RICO) and his conviction for obstruction of justice under §1512(c)(1).

Respectfully submitted,
Halisi Uhuru

by 
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XII. APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4633

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL LAMONT MATHIS, a/k/a Gunna, a/k/a Mooch, a/k/a D-Man,

Defendant - Appellant.

No. 16-4635

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MERSADIES LACHELLE SHELTON, a/k/a Lady Gunns, a/k/a Maisha Love Uhuru,

Defendant - Appellant.

No. 16-4637

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANTAI MONIQUE SHELTON, a/k/a Tai, a/k/a Lady Blaze, a/k/a Boss Lady,

Defendant - Appellant.

No. 16-4641

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KWELI UHURU, a/k/a Travis Leon Bell, a/k/a K. Gunns, a/k/a Black Wolf, a/k/a Babi,

Defendant - Appellant.

No. 16-4837

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY DARNELL STOKES, a/k/a Face, a/k/a Black Face, a/k/a Kenyata Baraka,

Defendant - Appellant.

No. 16-4838

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HALISI UHURU, a/k/a Arthur Lee Gert Wright, a/k/a Gritty, a/k/a Bones, a/k/a Big Homey,

Defendant - Appellant.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. Glen E. Conrad, District Judge. (3:14-cr-00016-GEC-JCH-1; 3:14-cr-00016-GEC-JCH-2; 3:14-cr-00016-GEC-JCH-3; 3:14-cr-00016-GEC-JCH-4; 3:14-cr-00016-GEC-JCH-6; 3:14-cr-00016-GEC-JCH-7)

Argued: January 24, 2018 Decided: July 31, 2019

Before KEENAN and DIAZ, Circuit Judges, and DUNCAN, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Keenan wrote the opinion, in which Judge Diaz and Senior Judge Duncan joined.

ARGUED: Frederick T. Heblich, Jr., OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellant Daniel Lamont Mathis. Paul Graham Beers, GLENN, FELDMANN, DARBY & GOODLATTE, Roanoke, Virginia, for Appellant Anthony Darnell Stokes. Christopher R. Kavanaugh, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee. **ON BRIEF:** Larry W. Shelton, Federal Public Defender, Roanoke, Virginia, Geremy C. Kamens, Federal Public Defender, Alexandria, Virginia, Paul G. Gill, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Richmond, Virginia; Aaron Lee Cook, Harrisonburg, Virginia; David Anthony Eustis, Charlottesville, Virginia; Rhonda E. Quagliana, Charlottesville, Virginia; Michael T. Hemenway, Charlottesville, Virginia; Sherwin John Jacobs, Harrisonburg, Virginia, for Appellants. Rick A. Mountcastle, Acting United States Attorney, Roanoke, Virginia, Ronald M. Huber, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

BARBARA MILANO KEENAN, Circuit Judge:

This case involves the prosecution of several members of a violent street gang known as the Double Nine Goon Syndikate (DNGS). After a multi-week trial, a jury convicted Halisi Uhuru (Halisi), Anthony Stokes (Stokes), Kweli Uhuru (Kweli), Mersadies Shelton (Mersadies), Shantai Shelton (Shantai), and Daniel Mathis (Mathis) (collectively, the defendants) of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), based on their activities related to the gang.

Mathis, Shantai, Mersadies, and Kweli (collectively, the capital defendants) also were convicted, in relation to the murder of an off-duty police officer, of violent crimes in aid of racketeering activity in violation of 18 U.S.C. § 1959 (VICAR) by committing kidnapping and murder under Virginia law, as well as witness tampering by means of murder in violation of 18 U.S.C. § 1512(a). The capital defendants were sentenced to serve terms of life imprisonment. Halisi and Stokes additionally were convicted of obstruction of justice in violation of 18 U.S.C. § 1512(c)(1).[1]

On appeal, the defendants raise several challenges concerning their trial and sentences. Upon our review of these arguments, we vacate in part with respect to the capital defendants' convictions that are predicated on commission of kidnapping under Virginia

[1] The other crimes of conviction include Hobbs Act robberies in violation of 18 U.S.C. § 1951(a), VICAR offenses in violation of 18 U.S.C. § 1959, and various convictions for the use or carry of a firearm during and in relation to a violent crime in violation of 18 U.S.C. § 924(c).

law. Accordingly, we also remand the capital defendants' convictions for resentencing. We affirm the balance of the district court's judgments.

I.

The Bloods is a nationwide street gang.[2] Groups of Bloods are organized into "sets" or smaller, individual groups of Bloods. One of these sets, DNGS, was founded by Halisi, Stokes, and Kweli in 2013 during their incarceration for crimes unrelated to the present case.

DNGS operates through a hierarchical structure. Halisi served as "high OG" or "Double OG," DNGS's leader. Stokes was second in command as "low [OG]." Kweli also held a leadership role with the rank of "OG," "Big Homey," or a "Low 020." Another DNGS leader was responsible for operations conducted by incarcerated DNGS members. These four individuals composed DNGS's "Roundtable," or leadership council. Reporting to the council were members organized by rank, including sergeant, lieutenant, and major. New DNGS members held the title of "soldier."

Upon gaining membership into the gang, members were given notebooks to study that included the rules and the history of the Bloods gang and the DNGS set. Gang members communicated using certain codes and phrases in an effort to ensure that their communications remained incomprehensible to law enforcement authorities and others.

[2] We set forth the facts in the light most favorable to the government, the prevailing party at trial. *Evans v. United States*, 504 U.S. 255, 257 (1996).

Members outwardly reflected their association with the Bloods and DNGS by wearing red clothing items, including red bandanas, and by obtaining tattoos reflecting gang insignia.

DNGS financed itself through the proceeds of various illegal activities undertaken by members, including armed robberies, home invasions, and burglaries. Members were expected to "put in work" to advance their rank in the gang, that is, to commit crimes in order to show their commitment and loyalty. If a member refused to "put in work," that member likely would have been "violated," or beaten.

Both while imprisoned and after their release, Stokes, Kweli, and Halisi began recruiting new members to the newly formed DNGS set, including Shantai, Mersadies, and Mathis. As the gang's membership grew, DNGS members "put in work" committing a series of crimes from late 2013 into early 2014. This spree of illegal activities included a number of armed robberies of convenience stores, home invasions, burglaries, and other crimes committed in central Virginia.

On the night of January 31, 2014, the capital defendants attacked Kevin Quick (Quick), an off-duty reserve captain with the Waynesboro, Virginia, Police Department, as he was departing his vehicle. The four defendants compelled Quick back into his vehicle at gunpoint, drove him to a nearby ATM, and forced him to withdraw money from his account. After learning that Quick was a police officer, and realizing that Quick had "already seen their face[s]," the capital defendants decided that "it was too late . . . to let [Quick] go." They drove Quick to a remote area off the main roadway, removed Quick

from the car, and fired a single shot into Quick's head, killing him and leaving his body behind.[3]

The next day, the capital defendants met with Halisi and Stokes in Manassas, Virginia. The defendants rented two hotel rooms to host a "B-House," or a meeting of DNGS members. Throughout that day, the defendants and other DNGS members discussed potential drug trafficking plans and engaged with other drug dealers in transactions involving the distribution of quantities of drugs, including crack cocaine.

The capital defendants left the hotel the next morning and drove in Quick's vehicle to Front Royal, Virginia. Concerned that the vehicle could link them to the murder, the capital defendants bought bleach, rubber gloves, and a jug to hold gasoline for setting the vehicle on fire. Leaving Kweli behind, Mathis, Shantai, and Mersadies drove the vehicle to a friend's house where they cleaned the vehicle with bleach.

Later that day, Mathis and Mersadies committed a robbery. During the robbery, Mathis fired one shot from his pistol. Investigators later recovered a bullet and a cartridge from the scene of this robbery and matched these items through forensic testing to the weapon used in Quick's murder and a previous robbery.

Mathis and Mersadies quickly left the scene of the robbery in Quick's vehicle, which malfunctioned shortly thereafter. They pushed the disabled vehicle to a nearby driveway and doused the vehicle with additional bleach. After receiving a call from Mersadies asking for help, Halisi and Stokes decided that Stokes would drive to meet

[3] The record does not show which of the capital defendants fired the fatal shot.

Mersadies and Mathis, as well as Shantai, who had reunited with Mersadies and Mathis. Once Stokes reached the group, Mathis and Shantai told him that Quick's vehicle needed to be destroyed, but Stokes stated that they would "find a way to get rid of it the next day."

Stokes and Halisi later obtained a hotel room in which Mersadies, Mathis, and Shantai could "hide out."[4] As Quick's disappearance became publicized, Mersadies, Mathis, and Shantai discussed absconding to Montana to avoid being arrested. Mersadies informed Kweli of these discussions through frequent text messages.

While Kweli was attempting to have Quick's vehicle destroyed, law enforcement officers located the abandoned vehicle. Evidence technicians recovered the following evidence from the vehicle: Kweli's fingerprint on Quick's driver's license, which was found in Quick's wallet inside the vehicle; fingerprints belonging to Mathis, Shantai, and Mersadies on the vehicle or on items within the vehicle; Mersadies' DNA on a piece of chewing gum left in the vehicle's ashtray; and Mathis' DNA on rubber gloves left in the vehicle.

Once news media reported that Quick's vehicle had been recovered, the defendants planned their escape to Montana and destroyed other evidence related to their crimes. Halisi ordered Leslie Casterlow (Casterlow), who frequently acted as a drug courier for DNGS, to "get rid of" Quick's ATM card. Kweli ordered the other defendants to delete any incriminating text messages. Also, Shantai and one other DNGS member disassembled the gun used to kill Quick and placed the gun components in a pillowcase.

[4] At this time, the defendants were spread out over various locations in Northern Virginia.

A day after Quick's vehicle was recovered, Mathis, Shantai, and Mersadies were arrested at the hotel. After hearing news of the arrest, Halisi had his girlfriend destroy both his and Casterlow's phones. Casterlow, who still had possession of the murder weapon parts, hid those items behind a dumpster at their hotel.

During this time, Stokes was traveling to Washington, D.C. and Maryland to purchase narcotics with an associate, Jamar Rice (Rice), who later became a government witness. After receiving information from an unidentified caller that law enforcement had raided the hotel[5] to which Stokes was returning after his trip with Rice, Stokes told Rice that his "homies" had carjacked and killed a police officer, and had left his body in the woods.

Stokes returned to Virginia to pick up Halisi, Halisi's girlfriend, and Casterlow. Stokes told Casterlow to retrieve the murder weapon components from behind the dumpster and to drive the group to a nearby interstate highway. As Casterlow drove along the highway, Stokes threw the murder weapon parts over the wall bordering the road. Thereafter, Halisi, Stokes, and Casterlow were arrested at the hotel. Law enforcement officers later recovered the weapon parts with Casterlow's assistance.

The defendants were charged in a 36-count indictment with conspiring to participate in a racketeering enterprise that included the commission of assaults, robberies, burglaries, kidnapping, carjacking, murder, drug trafficking, and obstruction of justice. After the jury was sworn during the first trial, the district court was informed that Kweli had removed

[5] During this raid, law enforcement officers arrested Mathis, Mersadies, and Shantai.

from the courtroom a jury list containing identifying information about the jury panel members and their families. The district court thereafter granted the defendants' motion for a mistrial.

A second trial was held in the Roanoke Division of the Western District of Virginia following a request by some of the defendants to change venue. The district court also granted the government's request to empanel an anonymous jury. At the close of the second trial, a jury found the defendants guilty on all counts. The district court later sentenced the capital defendants each to serve a term of life imprisonment. Halisi and Stokes received sentences of 144 and 160 months' imprisonment, respectively. Several other sentences were imposed on the various defendants. This appeal followed.

II.

A.

The defendants first argue that the district court committed reversible error in deciding to empanel an anonymous jury. According to the defendants, there was no evidence supporting the district court's finding that the defendants had the capacity to harm or to intimidate the jurors.

We review a district court's decision to empanel an anonymous jury for abuse of discretion. *United States v. Dinkins*, 691 F.3d 358, 371 (4th Cir. 2012). In a capital case, a district court may empanel an anonymous jury only after determining "by a preponderance of the evidence that providing the [juror] list . . . may jeopardize the life or safety of any person." *Id.* at 372 (citing 18 U.S.C. § 3432). We choose to apply this strict

standard to both the capital defendants and the non-capital defendants, because the test is satisfied for both groups.

A district court must base its decision to empanel an anonymous jury on evidence in the record, rather than solely on the allegations in the indictment. *Id.* at 373. Use of an anonymous jury is appropriate "only in rare circumstances when two conditions are met: (1) there is strong reason to conclude that the jury needs protection from interference or harm, or that the integrity of the jury's function will be compromised absent anonymity; and (2) reasonable safeguards have been adopted to minimize the risk that the rights of the accused will be infringed." *Id.* at 372 (citations omitted).

To determine whether there are "strong reason[s]" for empaneling an anonymous jury, we consider five factors:

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

Id. at 373 (citing *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994)). These factors are not exhaustive but are meant to provide guidance in the district court's fact-specific inquiry. *Id.*

In the present case, during the first trial, the district court raised the question whether use of an anonymous jury would be appropriate. When the defendants stated their opposition, the court took no further action. However, as noted above, the court later received information that Kweli had removed the jury panel list containing the members'

personal information and had kept the list overnight in the jail. After the court informed the jury members that the jury list had been retained by a defendant overnight, some of the defendants moved for a mistrial, which the court granted.

In view of these events, the government filed a motion at the beginning of the second trial requesting an anonymous jury. The district court granted the government's motion.

Applying the standards outlined in *Dinkins* and reviewing the district court's reasoning, we conclude for several reasons that the district court did not abuse its discretion in having the case heard by an anonymous jury. First, the indictment alleged that the defendants were members of a violent street gang and were involved in a number of violent criminal offenses, including witness tampering by murder. The record contained sworn statements by various cooperating witnesses and DNGS members corroborating these allegations. This evidence strongly suggested that the defendants had associates who were not incarcerated and could intimidate or harm the jurors. *See Ross*, 33 F.3d at 1520.

Second, FBI special agent Scott Cullins expressed to the court concerns about juror safety given the gang's "history of not only retribution, but also preventative actions." Moreover, Deputy United States Marshal Mark Haley informed the court that at least two defendants, Kweli and Halisi, had continued their DNGS recruitment efforts from jail while awaiting trial. The circumstances leading to the mistrial thus more than justified the court's concern for juror safety. And third, if convicted, several of the defendants faced lengthy incarceration and substantial penalties that may have induced them to intimidate the jury in an attempt to influence the outcome of the trial. *See id.* at 1520–21.

We also observe that the district court adopted reasonable safeguards to minimize the risk that the defendants' constitutional rights would be infringed by the use of an anonymous jury. *Dinkins*, 691 F.3d at 378. The court provided the venire members with a neutral, non-prejudicial explanation of its decision that minimized the danger of prejudice to the defendants. *See United States v. Hager*, 721 F.3d 167, 188 (4th Cir. 2013). And the court's decision did not interfere with the defendants' ability to conduct a thorough voir dire examination. Counsel were given full access to all juror information, and the defendants were permitted to review redacted juror questionnaires. Accordingly, upon our consideration of all the facts and circumstances before the district court, we hold that the court's decision to empanel an anonymous jury was supported by a preponderance of the evidence and, thus, was not an abuse of discretion.

B.

Before the jury heard evidence in the case, the court considered pretrial motions seeking the admission of a number of inculpatory co-conspirator statements. The court ultimately overruled the defendants' objections and received the statements into evidence during the trial. The defendants argue that the district court erred in admitting three of these statements, because they were not made in furtherance of the charged RICO conspiracy, and their admission violated the defendants' rights under the Confrontation Clause as detailed in *Crawford v. Washington*, 541 U.S. 36 (2004). We disagree with the defendants' arguments.

1.

We review the district court's decision to admit co-conspirator statements for abuse of discretion. *United States v. Graham*, 711 F.3d 445, 453 (4th Cir. 2013). To introduce a co-conspirator's statements under Federal Rule of Evidence 801(d)(2)(E), the government was required to show by a preponderance of the evidence that (1) a conspiracy existed, (2) the conspiracy included both the declarants and the defendants against whom the statements were offered, and (3) the statements were made during the course of and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

The government proffered that it would establish that the statements were made during and in relation to the broader DNGS racketeering conspiracy, which included Quick's murder and the ensuing actions to avoid detection and arrest.[6] Shantai made the first challenged statement the morning after Quick's murder, giving Anthony White (White), another DNGS member, a detailed account of the kidnapping and murder. This statement included the fact that the capital defendants killed Quick, because "they found out he was a cop." Both White and Shantai were members of the conspiracy. Although White had not participated in Quick's murder, the statement provided information to White on the status of the DNGS criminal enterprise, of which he was a member. *See United States v. Mandell*, 752 F.3d 544, 552 (2d Cir. 2014) (noting that statements made between co-conspirators to "inform each other as to the progress or status of the conspiracy" are

[6] We find no merit in the defendants' argument that Quick's kidnapping and murder and the later cover-up of those crimes were not part of the DNGS racketeering conspiracy. As noted, the government's proffer alleged that Quick's murder was one of many racketeering acts done on behalf of the broader DNGS conspiracy. And our review of the record evidence, discussed more fully below in Section II.E., leads us to conclude that Quick's kidnapping and murder were part of the larger-scale DNGS conspiracy.

statements made in furtherance of that conspiracy). Accordingly, Shantai's statement to White was admissible as a statement of a co-conspirator made "in furtherance of the conspiracy."

Kweli made the second challenged statement while he and Halisi were arranging for someone to destroy Quick's vehicle. Kweli called Shiquan Jackson (Jackson), a DNGS member, to inform him of the situation. Kweli told Jackson that "[Kweli] just did something bad," and that he and the other capital defendants "just peter-rolled [i.e. killed] a cop" and had to "lay low." During this conversation, Kweli asked Jackson and Jackson's brother, Devante Jackson, also a DNGS member, to contact Halisi, find the vehicle, and quickly dispose of it. Again, all parties to this statement were members of the conspiracy, and Kweli's comments to Jackson were made in furtherance of the conspiracy. Not only was Kweli providing Jackson information regarding the status of the conspiracy, but he also sought to "induce a coconspirator's assistance" to destroy evidence for the purpose of evading detection and arrest. *Id.* Thus, because Kweli's statement to his fellow DNGS member was intended to "prolong the unlawful activities" of the DNGS enterprise, *United States v. Altomare*, 625 F.2d 5, 8 n.9 (4th Cir. 1980), this statement was admissible under Rule 801(d)(2)(E).

The third challenged statement involves comments Mathis made to his girlfriend, Dierra Lloyd (Lloyd), who was not a DNGS member. After Quick's murder, Mathis confessed to Lloyd that he and the other capital defendants "killed a cop." Mathis also

asked Lloyd if she "knew a place where [he] could get rid of [Quick's vehicle]."[7] Although this statement was not made to a member of the DNGS enterprise, we have recognized that "even casual relationships to the conspiracy" will satisfy the nexus requirement of Rule 801(d)(2)(E). *United States v. Smith*, 441 F.3d 254, 262 (4th Cir. 2006) (citation omitted). This statement also was made "in furtherance of the conspiracy" because Mathis sought Lloyd's assistance in disposing of Quick's vehicle. *See Mandell*, 752 F.3d at 552 (citation omitted). Therefore, Mathis' statement likewise was admissible under Rule 801(d)(2)(E).

2.

We turn to address the defendants' contention that the admission of the co-conspirator statements violated their rights under the Confrontation Clause. We review de novo this question of law. *United States v. Lighty*, 616 F.3d 321, 376 (4th Cir. 2010).

The Confrontation Clause protects a defendant's right to cross-examine a declarant making a "testimonial" statement. *Davis v. Washington*, 547 U.S. 813, 821 (2006). Although the Supreme Court has not articulated a precise definition of the term "testimonial," the Court has provided concrete examples of testimonial evidence. At a minimum, such evidence includes testimony given at a preliminary hearing, before a grand jury, and at a formal trial, as well as statements made during a police interrogation. *See Crawford*, 541 U.S. at 68. More recently, the Court has explained that a statement is testimonial in nature if the statement was made or procured with the "primary purpose" of

[7] It is not clear from the trial record whether Lloyd helped Mathis and the other members destroy the vehicle following Mathis' request.

creating an "out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)).

We conclude that the challenged co-conspirator statements were not testimonial in nature. The defendants made the challenged statements to co-conspirators and to Lloyd about criminal activities related to the DNGS criminal enterprise. Moreover, all the statements were made in furtherance of that criminal conspiracy and were not intended to be used as a substitute for trial testimony. Accordingly, the admission of the challenged statements did not violate the defendants' rights under the Confrontation Clause.[8] *See United States v. Jordan*, 509 F.3d 191, 194, 201 (4th Cir. 2007) (holding that statements made by declarant and alleged co-conspirator to the declarant's friend describing events related to the murder of a drug courier were non-testimonial and, thus, did not violate the Confrontation Clause).

C.

The defendants next contend that the indictment was defective because it charged that Quick was prevented from communicating "to a law enforcement officer," rather than "to a law enforcement officer . . . of the United States," as provided in the language of 18 U.S.C. § 1512(a)(1)(C). The district court did not reach the merits of this argument, determining that the defendants' motion to dismiss the witness tampering count and related

[8] Given that admission of the co-conspirator statements did not violate the Confrontation Clause, we reject the defendants' additional claim under *Bruton v. United States*, 391 U.S. 123 (1968). *United States v. Dargan*, 738 F.3d 643, 651 (4th Cir. 2013) ("Statements that do not implicate the Confrontation Clause, *a fortiori*, do not implicate *Bruton*.").

Section 924(c) count was untimely and that they failed to establish "good cause" to excuse their untimely filing.

The defendants concede that their motion to dismiss was untimely but argue that they had good cause for the untimely filing, because some of the defendants' attorneys were unaware of the alleged defect in the indictment. The defendants alternatively maintain that despite their untimely motion, this Court may review the merits of their argument for plain error, and conclude under that standard that the indictment was defective. We conclude that the defendants failed to show good cause and that, in any event, there was no defect in the indictment.

We review the district court's finding of lack of good cause for abuse of discretion. *United States v. Soto*, 794 F.3d 635, 655 (6th Cir. 2015); *cf. United States v. Cowley*, 814 F.3d 691, 698 (4th Cir. 2016) (reviewing for abuse of discretion the district court's finding that defendant did not establish good cause to rebut the presumption of untimeliness under the Innocence Protection Act). Under Federal Rule of Criminal Procedure 12, a challenge to a defect in an indictment "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits."[9] Fed. R. Crim. P. 12(b)(3)(B). If a party fails to meet this deadline, the motion is

[9] This version of Rule 12 took effect on December 1, 2014, a few weeks after the indictment was returned by the grand jury. The defendants do not argue that the prior version of Rule 12 applies. In any event, we determine that the current version of Rule 12 applies, because this case was pending at the time the Rule took effect and the Rule's application is "just and practicable." *See* S. Ct. Order Amending Fed. R. Crim. P. at ¶ 2 (Apr. 25, 2014) (providing that the new rules "shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending").

untimely. *Id.* 12(c)(3). A district court "may consider" an untimely motion only if the moving party "shows good cause" for its delayed action. *Id.*

We conclude that the district court did not abuse its discretion in finding that the motion was untimely, and that the defendants failed to show good cause for their delayed challenge. Mathis' counsel informed the court that he had "held onto" the perceived defect in the indictment "for quite [awhile]" because of his "hope that [he] would get into serious plea negotiations with the government, and that if [he] did get in serious plea negotiations with the government, that [he] could get some mileage out of it." Counsel further admitted that he "could have filed [the motion to dismiss] right before trial, [he] could have filed it before the jury was picked, [he] could have filed it any of those times, and [he] didn't."

A party's affirmative decision to delay filing a motion in an attempt to gain a strategic advantage at trial does not amount to good cause for purposes of Rule 12. *See United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003) (holding that defense tactic of "sandbagging" is not good cause for failure to file motion to dismiss (citation omitted)); *see also United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988) (noting that one purpose of Rule 12 is to "restrict[] the defense tactic of 'sandbagging'" (citation omitted)). Accordingly, we affirm the district court's denial of the defendants' untimely motion to dismiss the witness tampering charge and the related Section 924(c) counts of the indictment.[10]

[10] We are not persuaded by the defendants' argument that there was good cause for the untimely motion because some attorneys for the other defendants were unaware of the alleged defect. *See United States v. Ruhe*, 191 F.3d 376, 386–87 (4th Cir. 1999) (holding

More fundamentally, there was no defect, plain or otherwise, in the indictment. Generally, an indictment is sufficient if it "(1) indicate[s] the elements of the offense and fairly inform[s] the defendant of the exact charges and (2) enable[s] the defendant to plead double jeopardy in subsequent prosecutions for the same offense." *United States v. Williams*, 152 F.3d 294, 299 (4th Cir. 1998) (citation omitted). The fact that the language at issue in the indictment did not track the precise language of the statute did not constitute error under these circumstances. *Id.* The indictment detailed the factual basis for the witness tampering charge and cited to the correct statute, fairly apprising the defendants of the crime charged and its required elements. *Id.* Therefore, we reject the defendants' claim of error.

D.

The defendants next argue that the district court violated their Fifth Amendment rights by amending the indictment through the court's instructions to the jury. According to the defendants, although the indictment alleged that the Bloods gang was the criminal enterprise underlying the RICO charge, the court instead instructed the jury that DNGS was the alleged enterprise.

We do not address the merits of this argument because the defendants invited the claimed error. *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994) ("[A] court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." (quoting *Shields v. United States*, 273 U.S. 583, 586 (1927))).

that there was no good cause to raise an untimely suppression motion when the defendant could have with due diligence discovered the information necessary to raise the issue).

At the charging conference near the end of the trial, the defendants argued that the jury should be instructed that the alleged enterprise was only the Bloods, and did not include DNGS. The government noted that the indictment referred to the Bloods and DNGS interchangeably and ultimately offered, with the district court's approval, that the exact language contained in the indictment be used in the jury instructions. Nonetheless, the defendants declined this proposed course of action and requested that the instructions naming only DNGS be used. Thus, even if the court's instruction was improper, the defendants could have cured any such error but did not.[11] *See United States v. Lespier*, 725 F.3d 437, 445–46, 449–51 (4th Cir. 2013) (holding that the invited error doctrine applies when the defendant opposed provision of a particular instruction and then argued on appeal that it was error for instruction not to have been given).

E.

The defendants challenge the sufficiency of the evidence to convict them of the RICO conspiracy under 18 U.S.C. § 1962(d).[12] The capital defendants also argue that their federal witness tampering convictions under 18 U.S.C. § 1512(a)(1)(C) are not supported

[11] The defendants do not argue that an exception to the invited error doctrine is applicable in this case. *See United States v. Lespier*, 725 F.3d 437, 450–51 (4th Cir. 2013).

[12] The defendants also challenge the sufficiency of the evidence underlying their numerous VICAR convictions under 18 U.S.C. § 1959(a)(3), and violations of 18 U.S.C. § 924(c), based on the underlying VICAR offenses. VICAR imposes criminal liability on an individual who commits a crime of violence "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). As Section 1959(a) incorporates the same definition of "enterprise" as RICO, 18 U.S.C. § 1959(b), our analysis of the defendants' challenge to the RICO conspiracy convictions applies equally to the VICAR and related Section 924(c) convictions.

by the evidence. Additionally, Halisi and Stokes challenge the sufficiency of the evidence to support their convictions for obstruction of justice under 18 U.S.C. § 1512(c)(1).

We will sustain a jury's verdict when there is substantial evidence, construed in the light most favorable to the government, supporting the verdict. *United States v. Hackley*, 662 F.3d 671, 678 (4th Cir. 2011). We address the defendants' arguments in turn, setting forth additional facts as necessary to decide each argument.

1.

The defendants each were convicted of conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d). To obtain a conviction under this statute, the government was required to prove "that an enterprise affecting interstate commerce existed; that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and . . . that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (citations and internal quotation marks omitted).

a.

The defendants argue that: (1) DNGS was not an "enterprise," as the term is used in the RICO statute; and (2) their crimes were "unplanned, disorganized, and spontaneous" and, thus, did not constitute a pattern of racketeering activity. We find no merit in either argument.

The RICO statute defines the term "enterprise" as "any . . . group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A RICO enterprise

"is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function[ed] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The Supreme Court has explained that an "association-in-fact enterprise" must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

Here, the government presented sufficient evidence from which a reasonable jury could conclude that DNGS was an "enterprise," within the meaning of the RICO statute. DNGS members received tattoos and wore red clothing signifying their membership in the gang, congregated regularly at membership meetings, and had a set of governing rules that members were expected to follow. Members shared a common function and purpose, namely, to enrich members of the gang by "putting in work" through the commission of violent crimes and selling drugs. DNGS members also agreed to provide, and did provide, protection for one another. Although an "enterprise" "need not have a hierarchical structure or chain of command," *id.* at 948, the presence of such organizational features provides additional evidence of a functioning "enterprise." And here, the government's evidence established that DNGS had a clearly delineated leadership structure.

Although the RICO statute does not define the phrase "pattern of racketeering activity," *see* 18 U.S.C. § 1962, the statute specifies that proof of a "pattern of racketeering activity" requires evidence of "at least two acts of racketeering activity" committed within a ten-year period, 18 U.S.C. § 1961(5). The Supreme Court further has explained that to establish a pattern of racketeering activity, the racketeering predicate acts must be related

to each other (the "relatedness prong"), and must amount to, or pose a threat of, continued criminal activity (the "continuity prong"). *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("It is this factor of *continuity plus relationship* which combines to produce a pattern." (citation omitted)).

At issue here is the relatedness prong of the pattern analysis.[13] 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 (citation omitted). In making this determination, we employ the "commonsense, everyday understanding" of the statutory language. *Id.* at 241.

We conclude that the government sufficiently established a "pattern of racketeering activity." The government introduced evidence of twelve racketeering acts leading up to Quick's kidnapping and murder. Various combinations of DNGS members committed these crimes together. Those crimes shared the common purpose of enriching DNGS

[13] While the defendants have not, apart from a single conclusory statement, raised a continuity argument, we determine that the continuity prong is satisfied here. *H.J. Inc.*, 492 U.S. at 241–42 (holding that the continuity prong can be met by showing that related predicate offenses continued over a substantial period of time or posed a threat of continuing activity). Although the predicate acts established at trial were committed over the span of five months, the racketeering offenses were part of an ongoing criminal enterprise and were committed to enrich DNGS members and to facilitate future criminal acts. *See id.* at 242–43 (noting that "the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes"). DNGS also worked to protect its members from apprehension by law enforcement authorities. *See United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995) (holding that "in cases where the acts of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice, and were in pursuit of inherently unlawful goals . . . courts generally have concluded that the requisite threat of continuity was adequately established").

members, bolstering the gang's reputation for violence, or evading law enforcement authorities. In committing these crimes, the defendants employed firearms, threats of physical force, and actual physical force. The jury could conclude, based on this evidence, that the defendants had engaged in a "pattern of racketeering activity."

b.

Halisi and Stokes separately argue that the government failed to prove that either of them agreed to the commission of at least two of the charged racketeering acts. The government offered evidence of three categories of racketeering acts: drug trafficking, obstruction of justice, and robbery, in violation of state and federal law.[14] Although Halisi and Stokes do not dispute that they conspired to distribute narcotics, they argue that these activities were not related to DNGS and, thus, were not part of the RICO conspiracy. Halisi and Stokes also claim that their acts of obstruction did not constitute racketeering acts, because those acts occurred after the completion of the RICO conspiracy. We disagree with these arguments.

"[A] defendant can conspire to violate RICO and violate [Section] 1962(d) without himself committing or agreeing to commit the two or more acts of racketeering activity." *Mouzone*, 687 F.3d at 218 (internal brackets and quotation marks omitted) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997)). He need only "agree to pursue the same criminal objective" as that of the enterprise. *Salinas*, 522 U.S. at 63–64. This agreement is apparent from Halisi and Stokes' role within DNGS. Both men were the enterprise's founders and leaders. Both defendants had a central role in directing the enterprise, which required its

[14] Because we conclude that Halisi and Stokes participated in the racketeering acts of drug trafficking and obstruction of justice, we need not decide whether there was sufficient evidence to prove that they also participated in the other racketeering activities alleged in the indictment, including robbery.

members to commit crimes for the gang's welfare and support. These facts strongly support the jury's conclusion that Halisi and Stokes were actively involved in the RICO conspiracy conducted by DNGS, including the robberies committed by the capital defendants and others.

Abundant evidence showed that DNGS members distributed controlled substances and discussed arrangements for expanding their drug distribution networks at DNGS meetings. Other evidence showed that drug trafficking was done for the benefit of DNGS, and copies of DNGS-related documents introduced at trial reflected a detailed code used by DNGS members to disguise their intended language when discussing narcotics. DNGS members also sought to invest money obtained from robberies and theft into the gang's drug distribution network. Thus, the jury could conclude from the evidence that the distribution of controlled substances was a centerpiece of the DNGS criminal enterprise.

The government also produced substantial evidence that the acts of obstruction committed by Halisi and Stokes were done during and in furtherance of the conspiracy. Halisi and Stokes ordered the destruction of, or directly destroyed, evidence related to Quick's murder, including Quick's ATM card, the murder weapon, and the phones belonging to DNGS members. Halisi and Stokes took these actions not only to "cover up" the crimes that had been committed, but also to prolong the unlawful activities of the DNGS enterprise and to protect the DNGS members from being arrested. Accordingly, the jury could conclude from this evidence that the obstructive acts committed by Halisi and Stokes constituted acts of racketeering. *Altomare*, 625 F.2d at 8 n.9 (explaining that defendant's attempt to obstruct was "not merely an attempt to cover up a previously completed crime,

but was an effort to prolong the unlawful activities of the enterprise in which he and his co-conspirators were engaged").

2.

The capital defendants argue that the evidence was insufficient to prove that they engaged in witness tampering by murder to prevent Quick from reporting a carjacking offense. In particular, they assert that their witness tampering convictions cannot stand, because the government failed to prove the underlying crime of carjacking. We find no merit in this argument.

The federal witness tampering statute prohibits "kill[ing] another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States" of "information relating to the . . . *possible* commission of a Federal offense." 18 U.S.C. § 1512(a)(1)(C) (emphasis added). Section 1512 does not require that the government prove the completion of an underlying federal offense to establish witness tampering.[15] Instead, inclusion of the word "possible" in the statutory language reflects that a conviction under Section 1512 requires only that a witness was prevented from communicating to the authorities information about a *possible or actual* federal offense.

3.

[15] For the same reason, we reject the capital defendants' more specific argument that the government failed to adduce evidence establishing the federal nexus required by the carjacking statute. *See* 18 U.S.C. § 2119 (prohibiting the taking of "a motor vehicle that has been *transported, shipped, or received in interstate or foreign commerce*" (emphasis added)). For the purposes of the witness tampering conviction, the government was not required to proffer evidence proving the elements of the underlying crime of carjacking, including the federal nexus requirement.

Halisi and Stokes contend that the evidence was insufficient to support their convictions for obstruction of justice under 18 U.S.C. § 1512(c)(1), which, in relevant part, prohibits a person from "corruptly . . . alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, or attempt[ing] to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." We consider their separate arguments in turn.

Halisi argues that, because he only instructed other individuals to destroy evidence and did not directly destroy any evidence himself, he did not commit the crime of obstruction of justice.[16] We disagree.

Under the doctrines of vicarious liability and co-conspirator liability, a defendant is liable for the substantive offenses committed by a co-conspirator when the commission of the acts is reasonably foreseeable and is done in furtherance of the conspiracy. *United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010). The jury properly was instructed on both these theories of liability.[17] The evidence at trial established that Halisi ordered Casterlow to destroy Quick's ATM card, instructed his girlfriend to destroy his and Casterlow's phones, and gave Stokes the disassembled murder weapon in order for Stokes to discard the component parts. Thus, the jury reasonably could determine under a theory of either vicarious or co-conspirator liability that Halisi was responsible for destroying

[16] The indictment alleged that Halisi was involved "in directing the efforts of the enterprise in the destruction of documents and evidence associated with" Quick's murder.

[17] These theories of liability need not be charged in the indictment. *See Ashley*, 606 F.3d at 143.

evidence by commanding others to do so on his behalf. Accordingly, we affirm his conviction for obstruction of justice.

Stokes advances a separate challenge to his conviction for obstruction of justice. He argues that: (1) his conviction is invalid because a federal grand jury had not been convened to consider the crimes charged at the time that he purportedly obstructed justice; and (2) the government failed to prove that, at the time of his actions, he contemplated an official proceeding that was *federal* in nature. We reject both these arguments, which are foreclosed by the plain language of Section 1512.

Section 1512(f)(1) provides, in relevant part, that "[f]or the purposes of this section . . . an official proceeding need not be pending or about to be instituted at the time of the offense." And Section 1512(g)(1) provides that "[i]n a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States, a United States magistrate judge, . . . a Federal grand jury, or a Federal Government agency."

Despite this plain language, however, Stokes maintains that the Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), clarified that the government was required to prove that Stokes contemplated a particular and foreseeable federal grand jury or federal court proceeding. The Supreme Court held in *Arthur Andersen* that certain other provisions of the witness tampering statute, Section 1512(b)(2)(A) and (B), require that the government prove a "nexus" between the defendant's conduct and a foreseeable official proceeding. 544 U.S. at 698, 707–08. We will assume, without deciding, that Section 1512(c)(1) imposed the same burden on the government in the

present case, requiring the government to establish a "nexus" between Stokes' obstructive action and a foreseeable official proceeding. *See United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019) (holding that the "nexus" requirement applies to Section 1512(c)(2)). The evidence before us easily satisfied such a requirement.

Rice, who was with Stokes days after Quick's murder, testified that Stokes received a call that "the fed—the police had kicked in the door to [the DNGS members' hotel]." Stokes responded to Rice that the murder weapon was still in Casterlow's possession, and that Stokes was "concerned" the gun could be traced "back to the murder" and link him to the crime. The evidence further established that Stokes later took action to dispose of the murder weapon. The jury could conclude from this evidence that Stokes thought that his acts likely would affect a foreseeable official proceeding. *See Arthur Anderson*, 544 U.S. at 707.

Nor was the government required to establish that Stokes contemplated an official proceeding that was federal in nature in order to secure a conviction under Section 1512(c). As quoted above, the language of Section 1512(g)(1) plainly refutes such a contention. *See United States v. Phillips*, 583 F.3d 1261, 1264–65 (10th Cir. 2009) (holding that in a prosecution under Section 1512(c), "the government need not prove [that] the defendant knew that the official proceeding at issue was a federal proceeding such as a grand jury investigation"). Accordingly, we conclude that the evidence was sufficient to support Stokes' conviction for obstruction of justice under Section 1512(c)(1).

F.

The defendants next challenge a number of their convictions under 18 U.S.C. § 924(c) for use of a firearm during a crime of violence. They argue that the predicate offenses underlying their Section 924(c) convictions do not qualify as crimes of violence under the statute's "force clause," 18 U.S.C. § 924(c)(3)(A). With respect to the statute's "residual clause," *id.* § 924(c)(3)(B), the defendants argue that the clause is unconstitutionally vague in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*).

We review de novo the question whether an offense qualifies as a crime of violence. *See United States v. McNeal*, 818 F.3d 141, 151 (4th Cir. 2016). An offense under Section 924(c) arises when a defendant uses or carries a firearm during or in relation to a "crime of violence." 18 U.S.C. § 924(c)(1)(A). Subsection (c)(3) defines the term "crime of violence" as a felony offense that:

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

18 U.S.C. § 924(c)(3). We refer to Section 924(c)(3)(A) as the "force clause," and to Section 924(c)(3)(B) as the "residual clause" or the "924(c) residual clause." *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015).

The Supreme Court recently agreed with the defendants' argument that the 924(c) residual clause is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). The Court held that like similarly worded residual clauses struck down in *Johnson*

II, 135 S. Ct. at 2557, and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), the 924(c) residual clause improperly required the sentencing judge's "estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *Davis*, 139 S. Ct. at 2325-26, 2336.[18] Our analysis therefore is limited to considering whether the defendants' prior convictions qualify as crimes of violence under the force clause.

To determine whether an offense qualifies as a crime of violence under Section 924(c)(3)(A), we apply the categorical approach or the modified categorical approach, depending on the nature of the offense. *Id.* The categorical approach focuses "on the *elements* of the prior offense rather than the *conduct* underlying the conviction." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013) (citation omitted). Thus, we do not inquire "whether the defendant's conduct *could* support a conviction for a crime of violence" but instead inquire "whether the defendant was *in fact convicted* of a crime that qualifies as a crime of violence." *Id.*

In a "narrow range of cases," involving statutes that are comprised of "multiple, alternative versions of the crime," we apply the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 261–62 (2013) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). When confronted with such a "divisible" statute, we review certain underlying documents, including the indictment, "to determine what crime, with what

[18] The Supreme Court rejected the government's argument that unlike the residual clauses at issue in *Johnson II* and *Dimaya*, the 924(c) residual clause permits a case-specific approach allowing consideration of the defendant's actual conduct in the predicate crime, rather than the crime in the "ordinary" sense. *Davis*, 139 S. Ct. at 2327−33. The Court reasoned that the statutory language and historical context of the 924(c) residual clause did not permit a "case-specific reading." *Id.*

elements," formed the basis of a defendant's conviction. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citations omitted).

With this framework in mind, we turn to consider each predicate offense underlying the defendants' Section 924(c) convictions. These predicate offenses are: (1) VICAR in violation of 18 U.S.C. § 1959 by committing murder in violation of Virginia law, Virginia Code § 18.2-32; (2) witness tampering by means of murder in violation of 18 U.S.C. § 1512(a); (3) Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); and (4) VICAR by committing kidnapping in violation of Virginia law, Virginia Code § 18.2-47.

1.

We begin by addressing whether the capital defendants' Section 924(c) convictions, which involve (1) commission of VICAR by committing first-degree murder under Virginia law[19] and (2) federal witness tampering by means of murder under federal law, qualify as crimes of violence under the force clause. The capital defendants contend that Virginia's definition of first-degree murder,[20] prohibited under Virginia Code § 18.2-32, does not require the use or threatened use of force against another, because a defendant can violate the statute by using non-violent, indirect means, such as "poison[ing]" a victim.

[19] Neither party contests the applicability of the categorical approach to the VICAR-murder, agreeing that Virginia's murder statute is indivisible.

[20] Virginia Code § 18.2-32 specifies "[a]ll murder other than capital murder and murder in the first degree is murder of the second degree." Although the indictment did not specify whether the VICAR conviction was predicated on a first-degree or second-degree murder, the district court instructed the jury on first-degree murder. The parties do not dispute that the capital defendants' VICAR convictions stem from commission of first-degree murder under Virginia law.

Advancing the same rationale, the capital defendants also assert that federal witness tampering by murder, under 18 U.S.C. § 1512(a)(1)(C), is not categorically a crime of violence.

This line of reasoning, however, is foreclosed by the Supreme Court's decision in *United States v. Castleman*, in which the Court held that "physical force is simply force exerted by and through" human action and that, therefore, a person need not "directly" touch his victim to exert "physical force." 572 U.S. 157, 170−71 (2014) (citations and internal quotation marks omitted). Accordingly, so long as an offender's use of physical force, whether direct or indirect, could cause a violent result, the force used categorically is violent. *See id.* at 1415; *see also In re Irby*, 858 F.3d 231, 236, 238 (4th Cir. 2017) (holding that second-degree retaliatory murder is a crime of violence under Section 924(c)'s force clause and noting that the "distinction . . . between indirect and direct applications of force . . . no longer remains valid in light of *Castleman*'s explicit rejection of such a distinction") (citations and internal quotation marks omitted).

A conviction for first-degree murder under Virginia law requires the "willful, deliberate, and premeditated" killing of another. Va. Code § 18.2-32. Murder "requires the use of force capable of causing physical pain or injury to another person" irrespective whether that force is exerted directly or indirectly by a defendant. *See In re Irby*, 858 F.3d at 236, 238. Therefore, we conclude that the crime of first-degree murder under Virginia law qualifies categorically as a crime of violence under the force clause, and we affirm the capital defendants' Section 924(c) convictions that are based on the commission of this Virginia offense.

Likewise, because federal witness tampering by murder also requires the unlawful killing of another, which may be accomplished by force exerted either directly or indirectly, we find no merit in the capital defendants' challenge to their federal witness tampering convictions under 18 U.S.C. § 1512(a)(1)(C).[21] *See In re Irby*, 858 F.3d at 236. Accordingly, we affirm the Section 924(c) convictions predicated on the capital defendants' convictions for federal witness tampering by murder, in violation of Section 1512(a)(1)(C).

2.

We next consider the defendants' argument that their Section 924(c) convictions based on Hobbs Act robbery do not qualify as crimes of violence.[22] The defendants argue that because Hobbs Act robbery can be committed by placing a victim in fear of injury, the offense does not necessarily include as an element the "use, attempted use, or threatened

[21] Because this offense can be committed in various ways, the statute is divisible. *See Descamps*, 570 U.S. at 262. However, we need not apply the modified categorical approach here, because the parties agree and the record establishes that the capital defendants were convicted of witness tampering by means of murder under Section 1512(a)(1)(C). *See United States v. Carthorne*, 726 F.3d 503, 512 (4th Cir. 2013).

[22] The defendants convicted of Hobbs Act robbery and the related Section 924(c) charge are Shantai, Mersadies, and Mathis.

use of force," as required by the force clause. The defendants also contend that because Hobbs Act robbery may be accomplished by threatening another with injury to *intangible* property, such as shares of stock in a corporation, Hobbs Act robbery does not qualify as a crime of violence under the force clause. We disagree with both arguments.[23]

The Hobbs Act penalizes a person who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951. "Robbery" is defined, in relevant part, as the taking of personal property from another "by means of actual or threatened force, or violence, or *fear of injury*, immediate or future, to his person or property." *Id.* § 1951(b)(1) (emphasis added).

The question whether Hobbs Act robbery, when committed by means of causing fear of injury, qualifies as a crime of violence is guided by our decision in *McNeal*, 818 F.3d 141. In *McNeal*, we held that the crime of federal bank robbery, which may be committed by "force and violence, or by *intimidation*," 18 U.S.C. § 2113(a) (emphasis added), qualifies as a crime of violence under the force clause. 818 F.3d at 152–53. We explained that the use of intimidation, as proscribed by the bank robbery statute, necessarily "involves the threat to use [physical] force." *Id.* at 153. Although the bank robbery statute,

[23] The Hobbs Act is a divisible statute that prescribes two alternative methods of violating the Hobbs Act, namely, robbery and extortion. 18 U.S.C. § 1952(b)(1), (2). As before, however, we need not apply the modified categorical approach here, because the parties do not dispute and the record supports that the defendants were charged with and convicted of Hobbs Act robbery. *See Carthorne*, 726 F.3d at 512.

Section 2113, refers to use of "intimidation," rather than "fear of injury," we see no material difference between the two terms for purposes of determining whether a particular type of robbery qualifies as a crime of violence. Nor are we aware of any case in which a court has interpreted the phrase "fear of injury" as meaning anything other than intimidation.

We also observe that both Section 924(c) and Hobbs Act robbery reference the use of force or threatened use of force against "property" generally, without further defining the term "property." *Compare* 18 U.S.C. § 924(c)(3)(A) (defining a "crime of violence" as having "as an element the use, attempted use, or threatened use of physical force against . . . property of another"), *with* 18 U.S.C. § 1951 (defining "robbery" as a taking "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his . . . property"). And neither provision draws any distinction between tangible and intangible property. Thus, we do not discern any basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property for purposes of defining a crime of violence. Accordingly, we conclude that Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c).[24] *See United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Hill*, 890

[24] The defendants offer two additional arguments in support of their contention that Hobbs Act robbery is not a crime of violence. The defendants first assert that a threat of injury does not require the threat of violent force, such as when a perpetrator threatens another's property by throwing paint on someone's house. The defendants also assert that because Hobbs Act robbery is akin to common law robbery, Hobbs Act robbery does not contain the required force element. After reviewing these arguments, we conclude that neither has merit.

F.3d 51, 60 (2d Cir. 2018); *United States v. Rivera*, 847 F.3d 847, 849 (7th Cir. 2017); *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

3.

Finally, the capital defendants challenge their Section 924(c) convictions predicated on their VICAR convictions for kidnapping under Virginia law. They argue that because kidnapping under Virginia law can be committed by deception, the offense is not categorically a crime of violence under the force clause. *See* Va. Code § 18.2-47(A).[25] We agree.

Virginia's kidnapping statute generally prohibits an individual from seizing or taking another person "by force, intimidation, or deception" with the intent to deprive that person of his or her liberty. Va. Code § 18.2-47(A). Although the statute describes various ways that an individual may commit the act of kidnapping, namely, by force, intimidation, or deception, these alternatives represent various means of committing the crime, not alternative elements of the crime. *See Fuertes*, 805 F.3d at 498 ("[A]lthough § 1591(a) refers to alternative *means* of commission, it contains a single, indivisible set of *elements*, and the categorical approach applies."). Accordingly, we conclude that Virginia Code § 18.2-47(A) is indivisible, requiring application of the categorical approach. *See id.*

[25] The capital defendants also assert that kidnapping under Virginia law does not qualify as a crime of violence under the 924(c) residual clause, because that clause is unconstitutional in light of the Supreme Court's holding in *Johnson II*, 135 S. Ct. 2551. As we explained above, the Supreme Court recently has concluded that the 924(c) residual clause is unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. Accordingly, our determination explained below, that kidnapping under Virginia law does not qualify as a crime of violence offense under the force clause, is dispositive.

A review of the statute's language and the decisions by Virginia's appellate courts interpreting that language indicates that the offense may be committed in a non-violent manner through deceptive means.[26] Va. Code § 18.2-47; *Jerman v. Dir. of the Dep't of Corrs.*, 593 S.E.2d 255, 259 (Va. 2004) (affirming a kidnapping conviction when the evidence proved that one of the defendant's confederates convinced the victim to come with her under the ruse of selling illegal narcotics when the defendant's true intent was to harm the victim); *Kent v. Commonwealth*, 183 S.E. 177, 177–78 (Va. 1936) (affirming a conviction for kidnapping committed by fraud and coercion and without the use of force or restraint). Because Virginia defines kidnapping in a manner that allows for both violent and nonviolent means of committing the offense, the statute "sweep[s] more broadly" than the force clause's requirement that the offense be committed with the use, or attempted or threatened use, of physical force. *See Descamps*, 570 U.S. at 261; 18 U.S.C. § 924(c)(3)(A). Thus, we conclude that kidnapping under Virginia law does not qualify categorically as a crime of violence under the force clause. We therefore vacate the capital defendants' Section 924(c) convictions stemming from the commission of VICAR based on kidnapping under Virginia law.

G.

[26] To determine if a state conviction qualifies as a crime of violence, we look to the language of the statute as well as decisions by the state's courts. *See United States v. Doctor*, 842 F.3d 306, 312 (4th Cir. 2016).

Finally, the capital defendants argue that the fines imposed on each of them should be vacated as substantively unreasonable.[27] We disagree.

We review the substantive reasonableness of any part of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). After considering the factors outlined in Sentencing Guidelines Section 5E1.2(d) and concluding that a fine was warranted, the district court imposed on each defendant a $5,000 fine, a sum well below the advisory guidelines range.[28] *See* U.S.S.G. § 5E1.2. The defendants have not offered any evidence rebutting the presumption of reasonableness that we apply to the district court's below-Guidelines imposition of fines. *United States v. Perez-Jiminez*, 654 F.3d 1136, 1146–47 (10th Cir. 2011). Therefore, we hold that the court did not abuse its discretion in imposing those fines in this case.

III.

For these reasons, we affirm in part the district court's judgment, vacate the capital defendants' Section 924(c) convictions predicated on their VICAR convictions for kidnapping under Virginia law, and remand for resentencing of those capital defendants, namely, Mathis, Shantai, Mersadies, and Kweli.

[27] The defendants do not challenge the assessment of their fines as procedurally unreasonable.

[28] Kweli is the only capital defendant whose sentencing transcript was included in the record before this Court. Because the defendants have not raised an objection to the completeness of the record, our analysis of the substantive reasonableness of the fines assessed against each defendant stems from our review of Kweli's sentencing transcript only.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

FILED: July 31, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4633 (L)
(3:14-cr-00016-GEC-JCH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DANIEL LAMONT MATHIS, a/k/a Gunna, a/k/a Mooch, a/k/a D-Man

Defendant - Appellant

No. 16-4635
(3:14-cr-00016-GEC-JCH-3)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MERSADIES LACHELLE SHELTON, a/k/a Lady Gunns, a/k/a Maisha Love Uhuru

Defendant - Appellant

No. 16-4637
(3:14-cr-00016-GEC-JCH-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SHANTAI MONIQUE SHELTON, a/k/a Tai, a/k/a Lady Blaze, a/k/a Boss Lady

Defendant - Appellant

No. 16-4641
(3:14-cr-00016-GEC-JCH-4)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KWELI UHURU, a/k/a Travis Leon Bell, a/k/a K. Gunns, a/k/a Black Wolf, a/k/a Babi

Defendant - Appellant

No. 16-4837
(3:14-cr-00016-GEC-JCH-7)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ANTHONY DARNELL STOKES, a/k/a Face, a/k/a Black Face, a/k/a Kenyata Baraka

Defendant - Appellant

No. 16-4838
(3:14-cr-00016-GEC-JCH-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HALISI UHURU, a/k/a Arthur Lee Gert Wright, a/k/a Gritty, a/k/a Bones, a/k/a Big Homey

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

AO 245B (Rev. 11/16 - VAW Additions 11/15) Amended Judgment in a Criminal Case
Sheet 1

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED
(NOTE: Identify Changes with Asterisks (*))

DEC 21 2016

JULIA C. DUDLEY, CLERK
BY: DEPUTY CLERK

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA
V.
HALISI UHURU

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW314CR000016-006

Case Number:

USM Number: 18417-084

Date of Original Judgment: 12/15/2016
(Or Date of Last Amended Judgment)

Sherwin Jacobs, Esq.
Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☑ Modification of Restitution Order (18 U.S.C. § 3664) Page 6, Interest Requirement waived

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☑ was found guilty on count(s) One (1) and Thirty Six (36) after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d); 18 U.S.C. § 1963(a)	Conspiracy to Participate in a Racketeer Influenced and Corrupt Organization (RICO)	4/30/2014	One (1)
18 U.S.C. § 1512(c)(1)	Obstruction of Justice	4/30/2014	Thirty Six (36)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 12, 2016
Date of Imposition of Judgment

/s/ Conrad
Signature of Judge

Glen E. Conrad, Chief United States District Judge
Name and Title of Judge

DECEMBER 21, 2016
Date

AO 245B (Rev. 11/16 - VAW Additions 11/15) Amended Judgment in Criminal Case
Sheet 2 - Imprisonment

(NOTE: Identify Changes with Asterisks (*))

DEFENDANT: HALISI UHURU
CASE NUMBER: DVAW314CR000016-006

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred Forty Four (144) months as to each of Counts One (1) and Thirty Six (36), to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:
Placement in highest level drug rehabilitation treatment program for which the defendant qualifies.
Placement at FCI, Petersburg, Virginia.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 11/16 - VAW Additions 11/15) Amended Judgment in a Criminal Case
Sheet 3 — Supervised Release (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: HALISI UHURU
CASE NUMBER: DVAW314CR000016-006

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three (3) years as to each of Counts One (1) and Thirty Six (36), to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: HALISI UHURU
CASE NUMBER: DVAW314CR000016-006

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.*

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any special assessment, fine, and/or restitution that are imposed by this judgment.

2. Following release from imprisonment, the court will evaluate defendant's status and determine whether, after incarceration, drug rehabilitation is necessary and appropriate. If additional rehabilitation is deemed appropriate, the defendant shall participate in a program as designated by the court, upon consultation with the probation officer, until such time as the defendant has satisfied all the requirements of the program.

3. The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

4. The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms or illegal controlled substances.

AO 245B (Rev. 11/16 - VAW Additions 11/15) Amended Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: HALISI UHURU
CASE NUMBER: DVAW314CR000016-006

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$200.00	$	$500.00	$12,369.99

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

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
7-11	$100.00	$100.00	
J. S.	$700.00	$700.00	
M. S.	$6,500.00	$6,500.00	
Barracks Road Market	$428.00	$428.00	
Estate of Kevin Quick	$400.00	$400.00	
MacQueens Store	$2,500.00	$2,500.00	
Food Master Store	$1,453.00	$1,453.00	
Criminal Injuries Compensation Fund (L. B.)	$288.99	$288.99	

Unredacted version to be filed as sealed

document following entry of order

TOTALS	$12,369.99	$12,369.99

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☑ the interest requirement is waived for the ☑ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/16 - VAW Additions 11/15) Amended Judgment in a Criminal Case
Sheet 6 - Schedule of Payments (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: HALISI UHURU
Judgment - Page 7 of 7

CASE NUMBER: DVAW314CR000016-006

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☑ Lump sum payment of $200 immediately, balance payable
- ☐ not later than _____, or
- ☑ in accordance ☐ C, ☐ D, ☐ E, ☑ F or, ☐ G below); or

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

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ During the term of imprisonment, payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 25, or 50 % of the defendant's income, whichever is greater, to commence 60 days (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 100 during the term of supervised release, to commence 60 days (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, 210 Franklin Rd., Suite 540, Roanoke, Virginia 24011, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☑ Joint and Several as to all listed, in the amount of $12,369.99.
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Daniel Lamont Mathis 314CR16-01
Shantai Monique Shelton 314CR16-02
Maisha Love Uhuru 314CR16-03
fka Mersaides Shelton 314CR16-03
Kweli Uhuru 314CR16-04
AnthonyWhite314CR16-05
Halisi Uhuru 314CR16-06
.Anthony Stokes 314CR16-07
.Devante Bell 314CR16-09
.Shiquan Jackson 314CR34-01

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED

DEC 13 2016

JULIA C. DUDLEY, CLERK
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal Action No. 3:14CR00016
v.	)	
	)	**AMENDED MEMORANDUM OPINION**
DANIEL LAMONT MATHIS, et al.,	)	
	)	By: Hon. Glen E. Conrad
Defendants.	)	Chief United States District Judge

On October 22, 2014, Halisi Uhuru ("Halisi"), Anthony Darnell Stokes ("Stokes"), and four codefendants were charged in a multi-count superseding indictment. Halisi and Stokes were named in the first count of the superseding indictment, which charged the defendants with conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. § 1962(d). They were also charged with obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1), based on their involvement in the enterprise's efforts to conceal and destroy evidence associated with the robbery, abduction, and murder of Kevin Quick. All six defendants proceeded to trial in February of 2016, and were convicted of each offense with which they were charged. On November 28, 2016, the court conducted a hearing on the motions for judgment of acquittal filed by Halisi and Stokes, and the parties' written objections to the United States Probation Office's calculations under the United States Sentencing Guidelines. This memorandum opinion sets forth the court's rulings on those motions and objections.

I. Motions for Judgment of Acquittal

The defendants' motions for judgment of acquittal challenge the sufficiency of the evidence to support their convictions. When a motion for judgment of acquittal is based on a claim of insufficient evidence, the jury verdict "must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315

U.S. 60, 80 (1942). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Green, 599 F.3d 360, 367 (4th Cir. 2010) (citation and internal quotation marks omitted). In determining whether substantial evidence supports a verdict, the court considers both circumstantial and direct evidence, drawing all reasonable inferences from such evidence in the government's favor. United States v. Harvey, 532 F.3d 326, 333 (4th Cir. 2008). The court does not reweigh the evidence or reassess the jury's determination of witness credibility, United States v. Brooks, 524 F.3d 549, 563 (4th Cir. 2008), and can overturn a conviction on insufficiency grounds "only when the prosecution's failure is clear," United States v. Moye, 454 F.3d 390, 394 (4th Cir. 2006) (citation and internal quotation marks omitted). Thus, a defendant challenging the sufficiency of the evidence must overcome a "heavy burden." United States v. Engle, 676 F.3d 405, 419 (4th Cir. 2012).

A. Count 1

As set forth above, Count 1 of the superseding indictment charged the defendants with conspiracy to participate in a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). RICO makes it "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 . . . ." 18 U.S.C. § 1962(c). A "pattern of racketeering" consists of "at least two acts of racketeering activity" occurring within a ten-year period, 18 U.S.C. § 1961(5), which are "related" and "pose a threat of continued criminal activity." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989). These "[r]acketeering acts, often referred to as predicate acts, include any act or threat involving

murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance chargeable under state law and punishable by imprisonment for more than one year." United States v. Cornell, 780 F.3d 616, 623 (4th Cir. 2015) (citing 18 U.S.C. § 1961(1)(A)). The predicate acts also include "any act which is indictable under [certain] provisions of title 18," including "section 1512," 18 U.S.C. § 1961(1)(B), which makes it unlawful to "corruptly . . . alter[], destroy[], mutilate[], or conceal[] a record, document, or other object, or attempt[] to do so, with the intent to impair the object's integrity or availability for use in an official proceeding," 18 U.S.C. § 1512(c)(1).

Halisi and Stokes were convicted under RICO's conspiracy provision, which prohibits anyone from conspiring to violate the provisions of 18 U.S.C. § 1962(c). See 18 U.S.C § 1962(d). To satisfy § 1962(d), the government must prove the following elements: (1) "that an enterprise affecting interstate commerce existed"; (2) "'that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise"; and (3) "that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." United States v. Mouzone, 687 F.3d 207, 218 (4th Cir. 2012) (citation and internal quotation marks omitted). Unlike the general conspiracy statute applicable to federal offenses, 18 U.S.C. § 371, § 1962(d) does not require the commission of any overt or specific act in furtherance of the conspiracy. Salinas v. United States, 522 U.S. 52, 64 (1997). Instead, an agreement is sufficient. Id.; see also Mouzone, 687 F.3d at 218.

1. Halisi's Motion

In seeking judgment of acquittal on Count 1, Halisi argues, as he did during trial, that the evidence connecting him to the alleged enterprise in this case, the 99 Goon Syndikate, was insufficient. He points out that he was incarcerated during part of the charged time frame of the

conspiracy, that he did not personally recruit all of the other members of the 99 Goon Syndikate, that he did not order or direct any of the specific robberies committed by other members, and that he had no involvement in the actual kidnapping and murder of Kevin Quick. According to Halisi, the government's evidence showed that he was merely associated with the charged enterprise, not that he knowingly and willfully agreed to participate in its affairs.

Viewing the evidence in the light most favorable to the government, however, the court concludes that there is substantial evidence in the record to support the jury's verdict on Count 1. The evidence at trial, which included the testimony of gang members Anthony White, Devante Bell, and Shiquan Jackson, the gang's documents and "books of knowledge," and text messages sent by Halisi and his codefendants, demonstrated that Halisi was the highest-ranking member of the 99 Goon Syndikate, which was a criminal enterprise of commonly associated individuals who engaged in multiple acts of racketeering for the mutual benefit of the gang's members and the gang itself. As the highest-ranking member of the 99 Goon Syndikate, Halisi was responsible for passing down the gang's lingo and rules to other members of the enterprise. He also mentored and provided guidance to lower ranking members of the gang, such as Shantai Shelton, who was advised by Halisi that she would ultimately move up in rank if she continued to "put in work." Halisi's message to Shantai was consistent with other evidence introduced by the government, which indicated that members of the 99 Goon Syndikate were expected to "put in work," which meant, in essence, to commit robberies and other racketeering acts. By committing these criminal acts, as gang insider Anthony White testified, members of the enterprise hoped that they would earn both respect and rank, and ultimately move up in the organization.

While there is no evidence that Halisi ordered, directed, or was personally involved in any of the particular robberies that were committed by members of the 99 Goon Syndikate, the government's evidence established that Halisi benefitted from the acts of racketeering committed by other gang members. For instance, Halisi received a .38 caliber revolver from Anthony White that had been taken from the residence of Michael Shaffer, and then bragged to a witness that he had gotten it from one of his "homies" who had been "putting in work." See Dkt. No. 704 at 35. The government's evidence also established that Halisi was personally involved in at least two acts of racketeering, namely conspiracy to distribute narcotics and obstruction of justice.

Although Halisi is correct "that the RICO conspiracy statute does not 'criminalize mere association with an enterprise,'" Mouzone, 687 F.3d at 218 (citation omitted), the evidence in this case illustrates far more than his "mere association" with the 99 Goon Syndikate. When construed in the government's favor, the record clearly shows that Halisi was aware of the nature of the enterprise, that he was a leader of the enterprise who guided other members, that he received the proceeds of racketeering acts committed by lower-ranking members, and that he directly participated in at least two racketeering acts underlying the alleged conspiracy. In light of such evidence, it simply cannot be said that Halisi was a mere associate of the 99 Goon Syndikate. Accordingly, his motion for judgment of acquittal on Count 1 must be denied.

2. Stokes' Motions

Stokes has also moved for judgment of acquittal on Count 1. In addition to adopting the joint motion for judgment of acquittal filed by Daniel Mathis and Kweli Uhuru, as well as the motion for judgment of acquittal filed by Halisi, Stokes' current counsel has filed on his behalf a motion challenging the sufficiency of the evidence with respect to the third element set forth in

Mouzone.[1] Specifically, Stokes argues that the government failed to prove that he "knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." Mouzone, 687 F.3d at 218. For the following reasons, the court concludes that the evidence presented by the government, when viewed in its favor, was sufficient to allow a reasonable jury to find that Stokes personally committed at least two racketeering acts.[2] Accordingly, Stokes' motion for judgment of acquittal based on the third element will be denied.

First, as Stokes seemingly concedes in the memorandum filed in support of his motion, the government's evidence demonstrated that he committed multiple acts establishing his participation in a conspiracy to distribute narcotics. While Stokes argues that the narcotics conspiracy was unrelated to the 99 Goon Syndikate, there was ample evidence from which the jury could reasonably find to the contrary.[3] The government's evidence demonstrated that Stokes was the second-highest-ranking member of the 99 Goon Syndikate, and that the gang

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[1] For the reasons stated in the court's previous memorandum opinion denying the motion filed by Daniel Mathis and Kweli Uhuru, the court will deny Stokes' motion adopting the arguments made by his co-defendants. Likewise, in light of the evidence presented by the government, it cannot be said that Stokes was a "mere associate" of the 99 Goon Syndikate. Accordingly, the court will deny Stokes' motion adopting the arguments made by Halisi Uhuru. Finally, the court is unable to conclude that any of the additional arguments raised in Stokes' pro se motions warrant a judgment of acquittal. Thus, those motions will also be denied.

[2] In addition to arguing that he did not personally commit any qualifying racketeering acts, Stokes argues that the government's evidence was insufficient to establish that he agreed that other members of the conspiracy would commit certain of the predicate acts alleged in the superseding indictment, such as the various acts of robbery that were committed by his fellow gang members. Relying on the Fourth Circuit's recent decision in United States v. Barnett, No. 14-4866, 2016 U.S. App. LEXIS 18394 (4th Cir. Oct. 12, 2016), Stokes contends that the government failed to identify any "specific act of . . . robbery" to which he agreed, and that without such evidence, "no reasonable juror could find, based solely on [his] association with [the enterprise], that [he] agreed to predicate acts of . . . robbery." Barnett, 2016 U.S. App. LEXIS 18394, at *29. While the government has identified a number of facts that distinguish Stokes' involvement in the RICO conspiracy from that of the female defendant in Barnett, the court ultimately need not decide this issue. Because the government's evidence was sufficient to establish that Stokes personally committed at least two racketeering acts, the court need not address whether Stokes' conviction may also rest upon other acts that he did not personally commit.

[3] Likewise, the evidence in the record, including the testimony of Jamar Rice, belies Stokes' characterization of the quantity of narcotics for which he was responsible as a "decidedly modest amount." Dkt. No. 872 at 6.

created a code to disguise their language when discussing narcotics. Following the murder of Kevin Quick, four members of the Central Virginia line of the 99 Goon Syndikate traveled to Manassas to meet with Halisi and Stokes, the first and second in command. The evidence at trial, including Stokes' own text messages, established that the meeting was important and that attendance was considered mandatory. At that meeting, Stokes recruited Shantai Shelton to distribute narcotics for him in the "Louisa/Charlottesville area," and Shantai agreed to do so. See Dkt. No. 710 at 129. Moreover, as a result of his involvement in the distribution of narcotics, Stokes was able to provide financial support to other members of the 99 Goon Syndikate, including the four members responsible for Kevin Quick's murder, who Stokes assisted while they were evading law enforcement. For these reasons, the evidence presented by the government was sufficient to establish not only that Stokes was involved in a conspiracy to distribute narcotics, but that this racketeering activity was related to the operation of the enterprise.

Second, the government's evidence established that Stokes personally committed the predicate racketeering act of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1). While Stokes argues in a separate motion that he is not guilty of the charged obstruction offense, the court disagrees for the reasons set forth below.

In sum, the evidence presented by the government, when viewed in its favor, was sufficient to allow a reasonable jury to find that Stokes agreed to commit, and in fact committed, at least two acts of racketeering. Accordingly, Stokes' motion challenging the sufficiency of the evidence as to the third element of the RICO conspiracy offense must be denied.

II. Count 36

Count 36 of the superseding indictment charged Halisi and Stokes with obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1). Under this statute, any person who "corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1512(c)(1). For purposes of the statute, an "official proceeding" includes a proceeding before a federal judge, court, or grand jury, but not a state proceeding. See 18 U.S.C. § 1515(a)(1)(A). However, the qualifying proceeding "need not be pending or about to be instituted at the time of the offense, 18 U.S.C. § 1512(f)(1), and the government need not prove that the defendant was aware that the proceeding was federal in nature. See 18 U.S.C. § 1512(g)(1) ("In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States, [or] a Federal grand jury . . . .").

B. Halisi's Motions

Halisi filed a written motion for judgment of acquittal challenging the sufficiency of the evidence to support his conviction for obstruction of justice. The argument advanced in the written motion is essentially a credibility challenge. Halisi argues that "the only evidence against him regarding the obstruction charge came from Leslie Hope Casterlow," and that Casterlow's testimony was not worthy of belief since she "admitted to lying on numerous occasions to the police and other officials involved in this case." Dkt. No. 754 at 4.

As explained above, it was the jury's role to assess the credibility of witnesses and resolve any conflicts in the witnesses' testimony. See Brooks, 524 F.3d at 563. Because the court is not permitted to analyze the credibility of witnesses or re-weigh their testimony when

evaluating the sufficiency of the evidence, Halisi's credibility challenge is without merit. Moreover, while Leslie Casterlow's testimony established that Halisi was directly involved in the efforts to conceal and destroy evidence of the robbery, abduction, and murder of Kevin Quick, it was not the only evidence offered by the government. Instead, the testimony of gang members Shiquan Jackson and Devante Bell revealed that Halisi was involved in the efforts to dispose of Quick's vehicle, and their testimony was corroborated by a series of text messages between Halisi and other gang members. For these reasons, Halisi's written motion for judgment of acquittal on Count 36 must be denied.[4]

C. Stokes' Motion

Stokes filed a separate motion for judgment of acquittal challenging the sufficiency of the evidence to support his conviction under § 1512(c)(1). Stokes does not claim, nor could he, that the evidence was insufficient to establish his involvement in the destruction of evidence. Instead, relying on the Supreme Court's decisions in United States v. Aguilar, 515 U.S. 593 (1995) and Arthur Anderson LLP v. United States, 544 U.S. 696 (2005), Stokes argues that he is entitled to an acquittal because the government failed to establish a sufficient "nexus" between a proceeding and his obstructive conduct.

In Aguilar, the Supreme Court considered the intent element under 18 U.S.C. § 1503, which makes it unlawful to "'corruptly endeavor[] to influence, obstruct, or impede, the due administration of justice.'" Aguilar, 515 U.S. at 598. In an effort to "place metes and bounds on the very broad language" of the statute, the Supreme Court held that "[t]he actions of the accused must be with an intent to influence judicial or grand jury proceedings," and that "it is not enough

[4] During the hearing on November 28, 2016, Halisi also adopted Stokes' argument that he should be acquitted on the obstruction count because the government failed to establish that he had a reasonable likelihood of knowing that his actions would affect a federal proceeding. For the reasons set forth below, the court concludes that the argument advanced by Stokes is contrary to the plain language of the obstruction statute. Accordingly, Halisi's oral motion adopting that argument will be denied.

that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." Id. at 599. The Supreme Court noted that some courts had "phrased this showing as a 'nexus' requirement – that the act must have a relationship in time, causation, or logic with the judicial proceedings." Id. (internal citations omitted). "In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." Id. (internal citations omitted).

In Arthur Anderson, the Supreme Court extended the Aguilar nexus requirement to prosecutions under 18 U.S.C. § 1512(b), which "make[s] it a crime to 'knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'" Arthur Anderson, 544 U.S. at 698 (quoting 18 U.S.C. § 1512(b)(2)(A) and (B)). In that case, the Supreme Court relied on Aguilar to support its conclusion that although "a proceeding 'need not be pending or about to be instituted at the time of the offense,'" a proceeding must be at least foreseeable to the defendant. Id. (quoting 18 U.S.C. § 1512(e)(1). The Court emphasized that a defendant who "'lacks knowledge that his actions are likely to affect [a] judicial proceeding . . . lacks the requisite intent to obstruct.'" Id. (quoting Aguilar, 515 U.S. at 599).

Neither the Supreme Court nor the United States Court of Appeals for the Fourth Circuit has decided whether the nexus requirement articulated in Aguilar and Arthur Anderson extends to prosecutions under 18 U.S.C. § 1512(c)(1). However, at least one appellate court has determined that the same logic "applies with equal force to § 1512(c)(1) because that subsection, like § 1512(b)(1), speaks in terms of the relationship between obstructive acts and a

proceeding."[5] United States v. Matthews, 505 F.3d 698, 708 (7th Cir. 2007) (holding that "before a defendant may be convicted of obstruction under § 1512(c)(1), he must believe that his acts will be likely to affect a pending or foreseeable proceeding"); see also United States v. Mann, 685 F.3d 714, 723 (8th Cir. 2012) (assuming arguendo that the "Aguilar nexus requirement" applies to § 1512(c)(1)). In this case, the court finds it unnecessary to decide whether Aguilar and Arthur Anderson apply to § 1512(c)(1). Even assuming that the nexus requirement articulated in those decisions should be imputed to prosecutions under § 1512(c)(1), the evidence at trial established that an official proceeding was foreseeable to Stokes, and that his conduct was intended to affect such proceeding.

The evidence adduced at trial included the testimony of Jamar Rice, who was with Stokes a few days after the murder of Kevin Quick. While the two were traveling to a hotel in Northern Virginia where the other defendants were staying, Stokes received a phone call. Following the call, Stokes appeared nervous. When Rice asked Stokes "what was going on," Stokes initially indicated that Rice "didn't want to know." Dkt. No. 704 at 43. After a few moments, Stokes told Rice that "the fed -- the police had kicked in the door to the place" where they were headed, and that they could no longer go there. Id. On the way back to Manassas, Stokes told Rice that "some of his homies had been involved in some things," more specifically that they had "carjacked a man, they took his car, they ran through his pockets [and] found out he was a police officer, [and] they took him into the woods and they killed him." Id. at 44. Stokes further relayed that, following the murder, "they went to a neighborhood and tried to rob a man that was selling weed," but "[t]hey ended up shooting him [and the] clip fell out of the gun." Id. at 45. Rice testified that Stokes was "concerned" about the clip falling out of the gun, because it could

[5] Several appellate courts have applied the nexus requirement to § 1512(c)(2). See, e.g., United States v. Petruk, 781 F.3d 438, 444 (8th Cir. 2015) (collecting cases).

"trace[] the gun back to the murder" and "he was roughly tied into it." Id. at 46. Stokes explained that the firearm had been disassembled but was still in the possession of Leslie Casterlow. The government's evidence established that Stokes, Halisi, and Casterlow subsequently drove along I-495 in the middle of the night and disposed of the disassembled firearm by pitching it over a highway barricade. On the same day that they disposed of the weapon, the internet history on Stokes' phone contained links regarding the search for Kevin Quick, a warrant issued in connection with the search, and the discovery of Quick's vehicle. Additionally, the government's evidence established that the Federal Bureau of Investigation was involved in the investigation from the very beginning.

The evidence presented by the government, when viewed in its favor, established that Stokes knew that his codefendants had murdered an officer, that law enforcement had "kicked in the door" to their hotel room and arrested them, and that the murder weapon – the same weapon used in a subsequent shooting – was with Casterlow, and that Stokes believed that he was tied to it. Under these circumstances, a jury could easily infer that an official proceeding was foreseeable to Stokes, and that his subsequent involvement in the disposal of the firearm was intended to affect its availability in such proceeding. Accordingly, the government introduced ample evidence to satisfy any nexus requirement applicable to § 1512(c)(1) under Aguilar and Arthur Anderson.

Stokes also goes one step further and argues that the evidence failed to establish a sufficient nexus to a federal proceeding; in other words, that he should be acquitted on Count 36 because he had no reasonable likelihood of knowing that the investigation into Quick's murder related to a federal proceeding as opposed to a state proceeding. The court agrees with the government that Stokes' argument in this regard is "contradicted by the plain statutory language." United States v. Stanley, 533 F. App'x 325, 329 n.* (4th Cir. 2013). "In particular,

the statute specifies that a qualifying proceeding 'need not be pending or about to be instituted at the time of the offense,' 18 U.S.C. § 1512(f)(1), and that 'no state of mind need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States," id. at § 1512(g)." Id.; see also United States v. Phillips, 583 F.3d 1261, 1264-65 (10th Cir. 2009) ("Mr. Phillips contends that the evidence only demonstrates he was aware Officer Bice was a police officer, not that he was aware of an ongoing or future federal grand jury investigation. He argues that this is insufficient to establish the requisite mens rea under § 1512(c)(2). We disagree with Mr. Phillips's assessment of . . . the law . . . . First, § 1512(c)(2) does not require that the defendant knew of the existence of an ongoing official proceeding. Rather, a conviction under the statute is proper if it is foreseeable that the defendant's conduct will interfere with an official proceeding . . . . Second, § 1512(g)(1) makes clear that the government need not prove the defendant knew that the official proceeding at issue was a federal proceeding such as a grand jury investigation."); United States v. Felton, 500 F. App'x 65,66-67 (2d Cir. 2012) (holding that the defendant's requested jury instruction – "that the government must prove that the defendant foresaw the possibility that [a] lie would make its way to a federal proceeding" – was "an inaccurate statement of the law") (emphasis in original) (citing 18 U.S.C. § 1512(g)(1)).

Moreover, for the reasons discussed during the hearing, the two cases on which Stokes primarily relies to support his federal nexus argument are clearly distinguishable on their facts. See United States v. Petruk, 781 F.3d 444, 446 (8th Cir. 2015) (vacating a defendant's conviction for attempting to obstruct an official proceeding under 18 U.S.C. § 1512(c)(2) where the defendant's conduct in 2012 was "unequivocally directed at obstructing [existing] state proceedings and not the federal proceedings which he was eventually subjected to in 2013"); United States v. Tyler, 732 F.3d 241, 250 (3d Cir. 2013) (holding that the record supported a

petitioner's claim that he was actually innocent of a federal obstruction charge arising from the murder of a witness scheduled to testify against the petitioner's brother in state court, since "there was no evidence that Tyler's conduct was directed at preventing [the witness's] testimony at anything other than as a witness to a state drug offense at Tyler's brother's state trial," and a special agent conceded that no federal case involving the witness had been discussed at the time of her death and there was no plan to use her in a federal proceeding).

For all of these reasons, Stokes' challenges to the sufficiency of the evidence are without merit. Accordingly, the motion for judgment of acquittal on Count 36 will be denied.

II. Objections to Stokes' Presentence Report

A. Application of the Grouping Rules

Stokes objected to two portions of the presentence report ("PSR") that affected the calculation of the applicable Guidelines range of imprisonment. The first objection pertains to the application of the grouping provisions of the Sentencing Guidelines. The Probation Office grouped the RICO conspiracy count and the obstruction count pursuant to § 3D1.2(a), which provides that "counts involv[ing] the same victim and the same act or transaction" should be placed into a single group for sentencing purposes. See PSR ¶ 90 (citing U.S.S.G. § 3D1.2(a)). The Probation Office then used the guideline provisions applicable to the conspiracy count to determine the adjusted offense level for the grouped charges, since they produced the highest offense level. See U.S.S.G. § 3D1.3(a) ("In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to the Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.").

Pursuant to § 2E1.1 of the Sentencing Guidelines, the base offense level for a defendant convicted of a RICO offense is the greater of 19 or "the offense level applicable to the

underlying racketeering activity." U.S.S.G. § 2E1.1. The Application Notes to § 2E1.1 provide that "[w]here there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2)." U.S.S.G. § 2E1.1 app. n.1. In addition, the Application Notes direct the court to "apply Chapter Three, Parts A, B, C, and D" to determine whether an underlying offense produces an offense level greater than 19. Id.

In Stokes' case, the Probation Office identified three underlying racketeering offenses: robbery (designated in the PSR as Overt Act No. 1), narcotics distribution (designated as Overt Act No. 2), and obstruction of justice (designated as Overt Act No. 3). The Probation Office then calculated the adjusted offense level for each offense. Those calculations resulted in an adjusted offense level of 26 for Overt Act No. 1 (robbery), an adjusted offense level of 19 for Overt Act No. 2 (narcotics distribution), and an adjusted offense level of 30 for Overt Act No. 3 (obstruction of justice). The Probation Office then applied § 3D1.4 to determine the combined adjusted offense level for the underlying offenses. Overt Act No. 1 (robbery) and Overt Act No. 3 (obstruction of justice) were each assigned one unit, which yielded a two-level increase in offense level under § 3D1.4, and a combined adjusted offense level of 32.

In his first objection to the presentence report, Stokes contends that the Probation Office erred by failing to group the predicate racketeering offenses under § 3D1.2 in the same manner that it grouped the offenses of conviction. Stokes further argues that he should not receive a multiple-count adjustment under § 3D1.4, and that his combined adjusted offense level should instead be no higher than 30, which is the adjusted offense level applicable to Overt Act No. 3 (obstruction of justice). See U.S.S.G. § 3D1.4 app. n.1 ("Application of the rules in §§ 3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with § 3D1.3

[i.e., the highest offense level of the counts in the Group]."). For the following reasons, the court agrees.

Pursuant to § 3D1.2, "[a]ll counts involving substantially the same harm shall be grouped together into a single group." U.S.S.G. § 3D1.2. Section 3D1.2 then identifies four categories of counts involving the same harm within the meaning of the provision:

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2(a)-(d). Subsection (d) lists a variety of offenses that are specifically excluded from its operation, including robbery, which is covered by U.S.S.G. § 2B3.1. Subsection (d) makes clear, however, that the "[e]xclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection. U.S.S.G. § 3D1.2(d); see also United States v. White, 810 F.3d 212, 231 (4th Cir. 2016) ("Several courts have made clear that offenses excluded from grouping under Subsection (d) [of § 3D1.2] may nevertheless be grouped pursuant to Subsection (a) or (b).").

After carefully considering the presentence report and the parties' arguments, the court finds it appropriate to group the predicate offenses of robbery and obstruction of justice.[6] As

[6] Overt Act No. 2 (narcotics distribution) was not assigned any units under § 3D1.4 and, thus, ultimately had no effect on the defendant's combined adjusted offense level. Thus, the court need not decide whether it should also be grouped with the other overt acts identified by the Probation Office.

indicated above, subsection (b) of § 3D1.2 allows for grouping when counts involve the same victim and two or more acts connected by a common criminal objective. See United States v. Porter, 909 F.2d 789, 793 (4th Cir. 1990) (noting that subsection (b) of § 3D1.2 "allows for grouping where the offenses in question constitute part of the same transaction or part of the same continuing, common criminal endeavor"). Here, the obstructive acts undertaken by Stokes were part of an effort to aid his co-conspirators in avoiding detection for the robbery, abduction, and murder of Kevin Quick, and, thus, "involve[d]" a common victim and were part of a common criminal endeavor. The nexus between the robbery of Quick and the subsequent obstructive acts is illustrated in paragraph 56 of the PSR, which provides, in pertinent part, as follows:

> . . . Under the direction of the leader of the enterprise, Stokes was involved in the efforts to relocate those members involved in the robbery, abduction, and murder of Kevin Quick. He was further involved in the efforts of the enterprise to destroy documents and evidence associated with the murder of Quick . . . . As second in command, Stokes also directed others to destroy evidence (debit card, bloody clothes, cell phones, firearm, etc.) in furtherance of, and in an effort to conceal, criminal acts . . . .

PSR ¶ 56.

In response to Stokes' objection, the Probation Office highlighted the fact that multiple "robberies" were committed "to fund the racketeering organization," and, thus, that Quick was not the only robbery victim. See id. at ¶ 92. The problem with this argument is that paragraphs 92 through 97 of the PSR, which calculate the adjusted offense level for the predicate offense of robbery, do not cite to a particular robbery or robbery victim for which Stokes could be held responsible, and there is no evidence that Stokes was actually involved in any of the specific robberies committed by the 99 Goon Syndikate. Perhaps for this reason, the Probation Office

combined all of the various robberies into one group of robbery offenses, even though they were committed on separate occasions and involved different victims.[7] Because one of the grouped robbery offenses and the obstruction offense involved a common victim and a shared criminal objective, the court believes that the robbery and obstruction offenses are appropriately grouped under § 3D1.2(b). See United States v. Duncan, 311 F. Supp. 2d 757, 762 (N.D. Ind. 2004) (holding that separate counts of conviction for bank robbery and malicious burning of a vehicle qualified for grouping under § 3D1.2(b), since "the burning of the vehicle was part of the Defendant's plan to avoid detection for the bank robbery"). The mere fact that Kevin Quick was not the only victim of the robberies committed by the 99 Goon Syndikate is not dispositive under the circumstances of this particular case, nor is the fact that other members of society can be said to be the victims of obstructive conduct.

The court notes that its decision to group the predicate offenses of robbery and obstruction of justice is consistent with the Probation Office's decision to group the offenses of conviction. The decision is also consistent with the provisions of the Sentencing Guidelines applicable to obstruction of justice, which provide that such offense is ordinarily grouped with the underlying offense with respect to which the obstructive conduct occurred. See, e.g., U.S.S.G. § 3C1.1 app. n. 8. For all of these reasons, Stokes' objection to the application of the grouping rules is sustained, and he will be assigned a combined adjusted offense level of 30, which is the adjusted offense level applicable to the underlying obstruction offense.

[7] In this regard, Stokes' PSR differed from those prepared for co-conspirators who were actually involved in the commission of multiple robberies.

B. Career Offender Enhancement

Stokes also argues that the Probation Office improperly designated him as a career offender under § 4B1.1 of the Sentencing Guidelines.[8] Section 4B1.1 provides that a defendant is a career offender if: (1) the defendant was at least eighteen years old at the time of the commission of the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has been convicted of two prior crimes, each of which was a felony conviction for either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). Here, there is no dispute that Stokes was at least 18 years old when he committed the instant offenses. Instead, Stokes argues that he should not be sentenced as a career offender because neither his instant offenses of conviction nor his prior convictions qualify as "crime[s] of violence" or "controlled substance offense[s]" within the meaning of the career offender provision.

The terms "crime of violence" and "controlled substance offense" are defined in § 4B1.2 of the Sentencing Guidelines. The newly amended version of § 4B1.2 defines a "crime of violence" as

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a) (2016). A "controlled substance offense" is defined as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the

[8] As a result of being designated as a career offender, Stokes was assigned a base offense level of 32 and a criminal history category of VI.

. . . distribution . . . of a controlled substance . . . or the possession of a controlled substance . . . with intent to . . . distribute . . . ." U.S.S.G. § 4B1.2(b). The application notes to § 4B1.2 further provide that the terms "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 app. n.1.

During the hearing on the parties' objections, Stokes argued that the first issue – whether either of the instant offenses is a crime of violence or a controlled substance offense under § 4B1.2 – is dispositive, and that the court need not decide whether his prior convictions for attempted robbery are qualifying predicate offenses. With respect to this issue, the parties' dispute centers on whether the court must apply a categorical approach in deciding this issue, and focus solely on the statutory definitions of the offenses in question, or whether the court can expand the scope of its analysis to include the particular facts underlying the offenses of conviction. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (explaining that when courts apply a categorical approach, they "focus solely on . . . the elements of the crime of conviction" and "ignor[e] the particular facts of the case"); see also Descamps v. United States, 133 S. Ct. 2276, 2285 (2013) (describing the "central feature" of the categorical approach as "a focus on the elements, rather than the facts, of a crime").

While the government argues that the Application Notes to § 4B1.2 contain language suggesting that sentencing courts can consider the specific conduct at issue in determining whether an offense is a crime of violence or controlled substance offense,[9] Stokes correctly points out that the Fourth Circuit has "applied the categorical approach to instant offenses when

[9] During the hearing, the government specifically cited to Application Note 2 to § 4B1.2, which provides that "in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry." U.S.S.G. § 4B1.1 app. n.2.

determining whether the defendant should be sentenced as a 'career offender' under the Sentencing Guidelines . . . .'" United States v. Faulls, 821 F.3d 502, 515 n.5 (4th Cir. 2016) (citing United States v. Johnson, 953 F.2d 100, 114 (4th Cir. 1991); United States v. Martin, 215 F.3d 470, 474 (4th Cir. 2000)); see also United States v. Piccolo, 441 F.3d 1084, 1087 & n.6 (9th Cir. 2006) (holding that "the crime-of-violence determination under U.S.S.G. § 4B1.2, a legal question, is properly decided under [a] categorical analysis in cases of both prior and current offenses," and noting that "[t]he Fourth Circuit applies the categorical approach to an instant offense in determining whether that offense qualifies as a crime of violence under the Sentencing Guidelines"). Stokes also persuasively argues that neither of the instant offenses of conviction is categorically a crime of violence or a controlled substance offense for purposes of the career offender provision.

Ultimately, however, the court need not decide this issue. The court agrees with Stokes that the career offender designation overstates his criminal history, given the age of the prior convictions and the fact that they relate to offenses that were committed when Stokes was only 18 years old. Thus, even if Stokes technically qualifies as a career offender, the court is of the opinion that a downward departure is warranted. See U.S.S.G. § 4A1.3(b). Accordingly, the court will sustain Stokes' objection and sentence him as if he did not have the career offender designation. Specifically, the court will depart downward to a total offense level of 30 and a criminal history category of V.[10]

[10] The court notes that the Probation Office provided a list of disciplinary actions taken against Stokes while he was incarcerated for his prior offenses. While the court finds that a downward departure from the career offender levels is warranted notwithstanding Stokes' institutional record, the court nonetheless believes, contrary to Stokes' assertion, that a defendant's institutional record can be considered in determining where in the applicable Guidelines range the defendant should be sentenced.

II. Halisi's Presentence Report

A. Role Enhancement

The government filed one written objection to Halisi's presentence report. Specifically, the government objects to the absence of a role enhancement under § 3B1.1 of the Sentencing Guidelines. The government argues that Halisi should, at a minimum, receive a two-level increase under § 3B1.1(c).

Section 3B1.1(c) provides for a two-level adjustment "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" involving less than five participants. U.S.S.C. § 3B1.1(c). In determining whether a sentencing enhancement is appropriate under this provision, "titles such as 'kingpin' or 'boss' are not controlling. U.S.S.G. § 3B1.1 app. n.4. Instead, sentencing courts are directed to consider factors such as "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." Id.

Upon review of the record, the court agrees with the Probation Office that a role enhancement is not appropriate in Halisi's case. While Halisi was identified in the gang's writings as the highest ranking member of the 99 Goon Syndikate, there is no evidence that he was involved in planning or committing any of the particular robbery offenses committed by other members of the gang, or that he claimed a right to a larger share of the proceeds of those crimes. Because the majority of the factors set forth above weighs against the application of a role enhancement, the government's objection is overruled.

B. Adjustment for Obstruction of Justice

Halisi also filed objections to portions of his presentence report that affected the calculation of the applicable Guidelines range of imprisonment. Halisi first challenges the application of a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1. The enhancement was applied on the ground that Halisi committed perjury during trial by "den[ying] guilt under oath" and "den[ying] conduct that forms the basis of the offenses of conviction." PSR ¶ 87.

Pursuant to § 3C1.1, the obstruction-of-justice enhancement applies "[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice . . . , and (2) the obstructive conduct related to . . . the defendant's offense of conviction and any relevant conduct." U.S.S.G. § 3C1.1. The enhancement "is not intended to punish a defendant for the exercise of a constitutional right." U.S.S.G. § 3C1.1 app. n.2. Consequently, the sentencing court cannot apply the enhancement "simply because a defendant testifies on his own behalf and the jury disbelieves him." United States v. Bustos-Flores, 362 F.3d 1030, 1037 (8th Cir. 2004) (citation and internal quotation marks omitted). Instead, to impose the enhancement based on a defendant's testimony, "the sentencing court must find that the defendant '(1) gave false testimony; (2) concerning a material matter; (3) with willful intent to deceive . . . .'" United States v. Perez, 661 F.3d 189, 192 (4th Cir. 2011) (quoting United States v. Jones, 308 F.3d 425, 428 n.2 (4th Cir. 2011)).

Applying these principles, the court is of the opinion that an enhancement for obstruction of justice is not warranted in Halisi's case. While the jury ultimately discredited at least some of the testimony that Halisi gave at trial, the court believes that the application of an enhancement would unfairly punish Halisi for exercising his constitutional right to testify on his own behalf. Accordingly, Halisi's objection to the enhancement is sustained.

C. Application of the Grouping Rules

Halisi also adopted Stokes' objection to the Probation Office's application of the grouping provisions of the Sentencing Guidelines. For the reasons set forth above, the court will sustain that objection. Like Stokes, Halisi will be assigned a combined adjusted offense level of 30, which is the adjusted offense level applicable to the underlying obstruction offense.

D. Acceptance of Responsibility

Halisi's final objection to the calculation of the applicable Guidelines range pertains to the absence of a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. That section instructs the sentencing court to decrease the defendant's offense level by two if he "clearly demonstrates acceptance of responsibility for his offense," U.S.S.G. § 3E1.1(a), and to decrease it by one more level upon motion of the government if his offense level prior to the two-level reduction was 16 or higher, U.S.S.G.§ 3E1.1(b).

The commentary to § 3E1.1 provides a non-exclusive list of "appropriate considerations" in determining whether a defendant is entitled to a reduction for acceptance of responsibility. U.S.S.G. § 3E1.1 app. n.1. The first consideration is whether the defendant "truthfully admitt[ed] the conduct comprising the offense(s) of conviction . . . and any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." U.S.S.G. § 3E1.1 app. n.1(A). "As a general rule, acceptance of responsibility is inconsistent with a defendant's decision to exercise his right to a trial." United States v. Jones, 233 F. App'x 273, 279 (4th Cir. 2007). The Guidelines, however, provide for a limited exception:

> This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant

> goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

U.S.S.G. § 3E1.1 app. n.2 (emphasis added).

The court agrees with the Probation Office that this case is not one of the "rare situations" in which a defendant who proceeds to trial may still be entitled to a reduction for acceptance of responsibility. It is clear from the record that Halisi has not fully accepted responsibility for his actions, and that at least some of the reasons he went to trial are directly related to factual guilt. For these reasons, Halisi's objection to the absence of a reduction for acceptance of responsibility is overruled.

Conclusion

For the reasons stated, the defendants' motions for judgment of acquittal are denied, Stokes' objections to the Probation Office's calculation of the applicable Guidelines range are sustained, and Halisi's objections to the Probation Office's calculation of the applicable Guidelines range are sustained in part and overruled in part.

The Clerk is directed to send copies of this memorandum opinion and the accompanying order to all counsel of record.

DATED: This 12th day of December, 2016.

/s/ Conrad

Chief United States District Judge