

## **APPENDIX**

In the  
United States Court of Appeals  
For the Second Circuit

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August Term, 2019

(Argued: April 28, 2020    Decided: August 19, 2020  
Amended: September 1, 2020)

Docket Nos. 15-1453-cr(L), 18-328-cr(Con), 18-369-cr(Con), 18-421-cr(Con)

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UNITED STATES OF AMERICA,

*Appellee,*

-v.-

JONATHAN DELGADO, MATTHEW SMITH, ISMAEL LOPEZ, DOMENICO  
ANASTASIO,

*Defendants-Appellants.\**

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B e f o r e :

JACOBS, POOLER, and CARNEY, *Circuit Judges.*

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Defendant-Appellant Domenico Anastasio was charged with one count of racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (the “RICO Conspiracy Count”), and two counts of murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and (2) (the “VCAR Murder Counts”), based on his involvement with the

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\* The Clerk of Court is directed to amend the official caption to conform with the above.

10th Street Gang in Buffalo, New York, and his role in the 2006 murders of Darinell Young and Brandon MacDonald. Following a five-week trial, the jury found him guilty on all counts, including on two “special factors” that, as part of the RICO Conspiracy Count, charged Anastasio with intentionally causing the deaths of MacDonald and Young in violation of New York Penal Law §§ 125.25(1) and 20.00 (the “Murder Enhancements”). For these crimes, the United States District Court for the Western District of New York (Arcara, J.) sentenced Anastasio to life in prison. In his appeal, which we consolidated with those of his three co-defendants, Anastasio attacks the sufficiency of the evidence underlying his convictions; he also challenges several rulings made by the District Court before trial. On review, we agree with Anastasio that the evidence was insufficient to convict him of aiding and abetting the murders of MacDonald and Young. We conclude further, however, that the government adequately proved Anastasio’s knowing agreement to participate in a racketeering enterprise. Moreover, we discern no error in the District Court’s *Batson* ruling, and no abuse of discretion in its denial of Anastasio’s motion to sever his trial from that of his co-defendants. Accordingly, we **AFFIRM** Anastasio’s judgment of conviction as to the RICO Conspiracy Count; **REVERSE** the judgment as to the VCAR Murder Counts and the Murder Enhancements of the RICO Conspiracy Count and direct the District Court to enter a judgment of acquittal on the VCAR Murder Counts and the Murder Enhancements; and **REMAND** the cause for **RESENTENCING**.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.**

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PETER J. TOMAO, Esq., Garden City, NY, *for Defendant-Appellant* Domenico Anastasio.

MONICA J. RICHARDS, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, NY, *for Appellee* United States of America.

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CARNEY, *Circuit Judge*:

Defendants-Appellants Domenico Anastasio, Jonathan Delgado, Ismael Lopez, and Matthew Smith (together, “Defendants”) were convicted by a jury on conspiracy and racketeering charges relating to their involvement with the 10th Street Gang in

Buffalo, New York, and their participation in the murders of Brandon MacDonald and Darinell Young. For these crimes, the United States District Court for the Western District of New York (Arcara, J.) sentenced them each to life in prison. We now resolve Defendants' consolidated appeals in two opinions and an order, issued separately. We address Anastasio's challenges below.

Anastasio attacks his convictions and sentence on several grounds, only three of which we must reach to resolve this appeal. First, he challenges the sufficiency of the evidence supporting his three counts of conviction, one for racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (the "RICO Conspiracy Count"), and two for murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and (2) (the "VCAR Murder Counts"). In Anastasio's view, the government failed to prove that he knowingly agreed to participate in a racketeering scheme (as required by the RICO Conspiracy Count), or that he aided and abetted the murders of MacDonald and Young (as required by the VCAR Murder Counts and the New York law murder enhancements to the RICO Conspiracy Count). Anastasio also challenges two rulings made by the District Court before trial. He contends, in particular, that the government exercised its peremptory jury strikes on the basis of race, and that the District Court therefore erred by rejecting Anastasio's challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). In addition, Anastasio argues that the District Court abused its discretion when it denied his motion to sever his trials from that of his co-defendants, maintaining that the evidence against those individuals unfairly prejudiced the jury against him.

For the reasons that follow, we agree with Anastasio that the evidence adduced at trial fell short of establishing his guilt as an accomplice to murder. To satisfy the *actus reus* element of aiding and abetting under either federal or New York law, the government must prove that a defendant's conduct actually contributed to the success of the specific crime that the defendant is charged with aiding and abetting. Here, we

see no basis in the record for concluding that Anastasio in any way prompted, encouraged, or otherwise facilitated the commission of murder. Accordingly, we conclude that insufficient evidence supported the jury's guilty verdict on (a) the VCAR Murder Counts and (b) the two "special factors" of the RICO Conspiracy Count that charged Anastasio with intentionally causing the deaths of MacDonald and Young in violation of New York Penal Law §§ 125.25(1) and 20.00 (the "Murder Enhancements").

We reject, however, Anastasio's sufficiency challenge to the RICO Conspiracy Count itself, concluding that the government's evidence adequately established his knowing agreement to participate in a racketeering enterprise. Anastasio's remaining lines of attack, moreover, provide no basis for disturbing his conviction on that Count. As discussed in greater detail below, we discern no error in the District Court's rejection of Anastasio's *Batson* challenge and no abuse of discretion in its denial of his severance motion.<sup>1</sup>

We therefore AFFIRM Anastasio's judgment of conviction as to the RICO Conspiracy Count, REVERSE the judgment as to the two VCAR Murder Counts and the two Murder Enhancements of the RICO Conspiracy Count, and REMAND the cause for RESENTENCING.

## BACKGROUND

In 2009, local, state, and federal officers began a coordinated investigation in Buffalo, New York, into two rival street gangs operating there: the 10th Street Gang and

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<sup>1</sup> Anastasio raises two additional challenges on appeal. First, he contends that the District Court erred by denying his post-verdict motion for a new trial, asserting that the motion should have been granted because insufficient evidence supported his liability as an accomplice to the murders of Young and MacDonald. Second, he attacks the length of his sentence, claiming that it violates his Eighth Amendment rights. Both challenges are made moot, however, by our decision to reverse the VCAR Murder Counts and the Murder Enhancements of the RICO Conspiracy Count. Thus, we do not address them further.

the 7th Street Gang. These efforts led to a series of arrests and criminal prosecutions, most of which ended with guilty pleas. Anastasio and his three co-defendants, however, proceeded to trial. During its roughly five-week course, the jury heard testimony from more than 50 witnesses, including ten members of the 10th Street Gang who had earlier pleaded guilty and cooperated with the government (the “Cooperators”).<sup>2</sup>

## I. Factual Background

Viewed in the light most favorable to the government, the evidence adduced at trial tells the following story of Anastasio’s involvement in the 10th Street Gang and his role in the murders of MacDonald and Young. *See United States v. Dupree*, 870 F.3d 62, 67 (2d Cir. 2017) (“Because defendants appeal their convictions following a jury trial, our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor.”).<sup>3</sup>

### A. The 10th Street Gang

The 10th Street Gang (the “Gang”) was comprised of adolescents and young adults who lived in the vicinity of 10th Street in the West Side of Buffalo, New York. In the 2000s, its members ran a narcotics-trafficking operation, “work[ing] together” to sell

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<sup>2</sup> The ten Cooperators were: (1) Sam Thurmond, (2) Michael Corchado-Jamieson, (3) Derrick Yancey, (4) Christopher Pabon, (5) Jimmy Sessions, (6) Jimmarlin Sessions, (7) Jairo Hernandez, (8) Kyle Eagan, (9) Douglas Harville, and (10) Nicholas Luciano. The language quoted in this section of the Opinion is drawn primarily from the government and defense attorneys’ examination and cross-examination of these Cooperators, which elicited testimony that was largely consistent as to the fundamental description of the Gang’s operations and Anastasio’s role in it.

<sup>3</sup> Unless otherwise noted, our Opinion omits all alterations, citations, footnotes, and internal quotation marks in quoted text.

heroin, cocaine, crack cocaine, marijuana, and ecstasy from street corners, houses, and a park located within its territory. Smith App'x 2326.

At its peak, the Gang numbered about 100 members. Its structure, however, was fairly loose and decentralized. Although its members sometimes met to discuss matters, it did not have any designated leaders. Nor did it have "any formal or informal rules" for being a member. Smith App'x 2846. Rather than "giv[ing] out assignments" to its ranks, the Gang let individual members decide for themselves "what role" to play and "how much work [to] put" into its operations. Smith App'x 2324, 2361. The process for admitting new recruits was, likewise ad hoc: the Gang generally accepted into its fold interested individuals who became "familiar with . . . the people in the neighborhood" and who generally "vibe[d]" with other members. Smith App'x 2317.

The 10th Street Gang was not entirely unstructured, however. According to the testimony of several Cooperators, the Gang organized itself around a loose hierarchy of roles. The "shooters" and the "older guys" generally held the most respected positions, followed by the "suppliers" and "sellers" of drugs, the "fighters," and (at the bottom) the "look-outs." Smith App'x 2323, 2838, 4666. To move up the ladder, individuals had to earn the respect of their peers by "putting in work" for the Gang. Smith App'x 2360-61. In this context, "work" included (among other things) selling drugs, committing robberies, and fighting, stabbing, shooting, or killing rivals. Gang members often learned of their associates' work through word-of-mouth: when an individual "did something" that could "earn [him] respect" within the Gang, he would typically tell those "closest" to him, and from there, "the word would disseminate among the various members." Smith App'x 2361-62.

Members of the 10th Street Gang were also united by their shared commitment to defend the Gang's territory and drug business. As one Cooperator explained, the "10th Street . . . had [a] reputation" to maintain. Smith App'x 3810. Gang members

worried that, if they did not instill fear and respect in the community, outsiders would start selling narcotics in their neighborhoods and, as a result, siphon away the Gang's "drug profits." Smith App'x 4129. Accordingly, the Gang used violence and intimidation as its core strategy. Older gang members, for example, instructed younger ones to "shoot rivals if they came into the neighborhood." Smith App'x 2338-39. Although the Gang did not patrol its territory in a scheduled or structured way, individual members would take it upon themselves to stop and question anyone whom they did not recognize. If an outsider attempted to sell drugs inside claimed territory, the Gang would expel that person from the neighborhood—by force if necessary. And if a rival gang or drug dealer "d[id] something" to a 10th Street member, "[t]here [was] always retaliation." Smith App'x 3810.

One of the Gang's main rivals was the 7th Street Gang, a group that operated in nearby neighborhoods. The two gangs fought regularly. In the early 2000s, these skirmishes mostly took the form of brawls and fist fights. In around 2004, however, the conflict escalated and began to include shootings. As the violence intensified, the 10th Street Gang began acquiring more firearms—amassing, by one Cooperator's estimate, more than 70 guns. Members would carry these firearms for protection whenever they "sold drugs" or "hung around" together. Smith App'x 2331.

B. Anastasio's Association with the 10th Street Gang

At trial, several Cooperators identified Anastasio as a member of the 10th Street Gang. Anastasio apparently joined the Gang at some point in 2001 or 2002, after being introduced to its members through Sam Thurmond (a Cooperator) and two of Anastasio's cousins. He continued to associate with the Gang until at least 2010, when he attended a memorial rally for a deceased Gang member and can be seen in video footage "[t]hrowing up the M" hand sign for "M-O-B," another name used by the Gang. Smith App'x 2426.

Over those years, Anastasio's involvement with the Gang took a variety of different forms. According to testimony from the Cooperators, Anastasio acted as "a lookout" for "[a] lot" of the Gang's drug deals. Smith App'x 2852. On several occasions, he sold marijuana himself. Smith App'x 3646. In addition, Anastasio would bring firearms to the 10th Street park—the Gang's "home base"—to protect Gang members, sometimes "hid[ing] [these weapons] in the grass." Smith App'x 2847, 2853-54. Eventually, Anastasio began fighting rival gangs. In around 2004, for example, he joined a brawl between the 10th Street Gang and its 7th Street rival that included 80-100 total participants. Nothing in the record, however, suggests that Anastasio ever became a shooter for the Gang, although he did make his 12-gauge shotgun available to other members who, on at least one occasion, used that firearm to "sho[o]t up" a "known 7th Street house." Smith App'x 2457-61.

C. The Murders of Young and MacDonald

We now turn to the events leading to the murders of Young and MacDonald—the heart of the government's case.

At around midday on April 16, 2006, Anastasio was "hanging out" with ten to fifteen members of the 10th Street Gang outside of "Sam's store," waiting to go to a picnic scheduled for later that afternoon. Smith App'x 2888-92. Before they departed for the picnic, however, several armed 7th Street members drove by in an "orange Chevy Cobalt" and opened fire on the group, striking Delgado's younger brother, Robert Sanabria, in the stomach. Smith App'x 2892-95, 3015.

After an ambulance arrived to transport Sanabria to a hospital, members of the 10th Street Gang—including Anastasio—gathered at a nearby park. There, the group discussed revenge. According to a Cooperator's testimony, Delgado said that "he wanted to . . . shoot back at the 7th Street members for shooting his brother," adding

that anyone who “could get a gun” should “get it.” Smith App’x 2898, 2900. The group agreed that those who wanted to participate in the retaliation would meet at Thurmond’s apartment, where Thurmond lived with his brother, James Foxworth.

At some point during these discussions, one of the Gang members noticed a woman (Stephanie Maldonado) and her boyfriend at the time (Juan Hernandez) walking down a nearby street. Suspecting that Hernandez was from 7th Street, the Gang members who were at the park confronted the couple. Maldonado denied that her boyfriend was part of 7th Street, but after a heated conversation, some members of the 10th Street Gang, including Anastasio, knocked Hernandez to the ground and started kicking him. When Maldonado attempted to intervene, the assailants “hit” and “stomp[ed]” on her as well. Smith App’x 4471.

After this beating, which lasted about a “[m]inute and a half,” the 10th Street group dispersed, with some (including Anastasio) reconvening later at Thurmond’s apartment. Smith App’x 2465.22, 2903. There, Delgado restated the plan to “shoot at [7th Street Gang members] because they had shot his brother,” and he told those present (including Anastasio) that they needed to find guns. Smith App’x 2906. Several individuals then left to collect firearms and, when they returned, deposited those guns on Foxworth’s bed. Delgado, for example, brought a .44 caliber handgun that he owned, along with a .380 caliber firearm that he had acquired from another Gang member at the park; Corchado-Jamieson borrowed “a sawed-down .22 rifle” from his stepsister’s boyfriend, Smith App’x 2907; Thurmond took out his shotgun; and several members of the “Zolo Boys”—an “affiliate[]” of the 10th Street Gang—showed up at the apartment with two shotguns of their own, Smith App’x 2465.40, 2465.46.

Then, at some point that night, Smith informed Thurmond that he would “drive around the neighborhood” to locate members of the 7th Street Gang. Smith App’x 2465.39, 2465.48. Five to ten minutes later, Smith called Thurmond by phone, and said,

“[T]hey’re out there at Nick’s house on Pennsylvania. Go do what you all gotta do.” Smith App’x 2465.48. Thurmond then relayed this information to those present (including Anastasio), telling them that “if [they] wanted to do anything, that’s where [they] had to go.” Smith App’x 2465.49.

Anastasio, however, had twice tried and failed to acquire a firearm for his own use.<sup>4</sup> In his first attempt, Anastasio picked up the .44 caliber pistol that Delgado had brought to the apartment. The gun—which had only a single bullet in it—was in poor condition: its “pin kept coming out”; its “barrel was loose”; and its “handle . . . was kind of messed up.” Smith App’x 3073-74, 4485. Even so, Douglas Harville—a shooter for the Gang—demanded that Anastasio give him the weapon. Anastasio initially resisted, saying, “[N]o, I’m going.” Smith App’x 4484. He eventually gave in, however, and handed Harville the .44 caliber firearm. Later that night, Anastasio tried (without success) to repurchase a shotgun that he had recently sold to one of the Zolo Boys.

Those who had firearms then proceeded to drive in two vehicles to 155 Pennsylvania Street, where “Nick’s house” was located. Having no firearm, Anastasio remained in the apartment while the others drove to the scene of the crime.

When the shooters arrived at 155 Pennsylvania Street, they ran up and started firing at a group of individuals gathered on and near the front porch. Harville attempted to shoot the .44 caliber handgun that he had taken from Anastasio. “Nothing happened,” however, when he “pulled the trigger”: the gun apparently malfunctioned and left Harville unable to fire a single shot.<sup>5</sup> Smith App’x 4501. His associates, by

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<sup>4</sup> At one point during the night, Anastasio also picked up a .22 Ruger that lay on Foxworth’s bed. Another 10th Street Gang member ultimately ended up with this gun, however, and nothing in the record suggests that Anastasio attempted to claim the .22 Ruger as his own.

<sup>5</sup> After the shooting, Harville concluded upon inspecting the .44 caliber gun that it had not fired because of a problem with “the firing pin.” Smith App’x 4510.

contrast, discharged approximately 50 bullets, killing MacDonald and Young, who were innocent bystanders, and injuring four others.<sup>6</sup>

The shooters then fled the scene, eventually making their way back to Thurmond's apartment, where they "talk[ed] about . . . what happened" and coordinated their alibis. Smith App'x 2465.84, 2465.87-88. During their debriefing, Anastasio—who was waiting at the apartment when the shooters returned—expressed his frustration at being left behind, asking another Gang member: "[W]hy didn't you let me go? Why didn't you let me go?" Smith App'x 4811-12. Concerned that law enforcement might look for the shooters at the apartment, one of the 10th Street Gang's members (Corchado-Jamieson) offered to store the shooters' weapons temporarily at his house. Sometime later, everyone at the apartment went their separate ways.

## **II. Procedural History of the Prosecutions**

On February 2, 2012, Anastasio was charged in a Fourth Superseding Indictment ("the Indictment") with one count of racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (the "RICO Conspiracy Count"), and two counts of murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and (2) (the "VCAR Murder Counts").<sup>7</sup> As part of the RICO Conspiracy Count, the Indictment also set forth two "special factors" that charged Anastasio with intentionally causing the deaths of Young and MacDonald in violation of New York Penal Law §§ 125.25(1) and 20.00 ("the Murder Enhancements"). Smith App'x 5542-43. The VCAR Murder Counts each carried

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<sup>6</sup> Medical and ballistic testimony attributed the death of MacDonald to a bullet fired from Defendant Delgado's .380 firearm. The government could not conclusively identify the shooter who caused Young's death.

<sup>7</sup> When discussing the charges against Anastasio, we refer to the redacted, renumbered indictment that was provided to the jury.

a mandatory minimum sentence of life in prison, 18 U.S.C. § 1959(a)(1), and the Murder Enhancements raised the maximum penalty that Anastasio faced on the RICO Conspiracy Count to a life term of imprisonment, 18 U.S.C. § 1963(a).

Of the dozens of individuals charged in connection with the investigation of the Gang's operations, only Defendants proceeded to trial. As relevant to this appeal, Anastasio moved to sever his trials from the others, contending that his involvement with the Gang was minimal and that he would be unfairly prejudiced by the jury's consideration of evidence presented against his co-defendants. The District Court denied his motion, and the parties proceeded to jury selection. During that process, all four Defendants raised *Batson* challenges, claiming that the government had exercised its peremptory strikes on the basis of race when it moved to excuse two of the three individuals of Hispanic origin who were present in the venire. The District Court denied Defendants' *Batson* challenges, and shortly after, on August 1, 2014, the parties made their opening statements to the jury.

Following five weeks of trial, the jury found Anastasio guilty on all charges, including on the Murder Enhancements of the RICO Conspiracy Count. Anastasio then moved for a judgment of acquittal or, in the alternative, for a new trial under Rules 29 and 33 of the Federal Rules of Criminal Procedure. In both motions, Anastasio urged that the jury lacked sufficient evidence to find him guilty for aiding and abetting the murders of Young and MacDonald. In October 2017, the District Court denied these post-trial motions, relying primarily on Anastasio's decision to relinquish the .44 caliber handgun to Harville. See *United States v. Anastasio*, No. 09-CR-331-A, 2017 WL 4875422, at \*1, 5-7 (W.D.N.Y. Oct. 30, 2017). By "handing th[is] gun to Harville," the District Court reasoned, Anastasio "aided the murderous retaliation at 155 Pennsylvania Avenue for the earlier shooting of Robert Sanabria." *Id.* at \*6. Moreover, the District Court continued, Anastasio gave up "his own claim to the gun" knowing that Harville

and the others “would retaliate murderously” and “intend[ing] that they do so.” *Id.* The District Court therefore sustained the jury’s finding that Anastasio acted as an accomplice to murder.

In February 2018, the court sentenced Anastasio to concurrent life terms of imprisonment on each count of conviction—the mandatory minimum sentence for the VCAR Murder Counts and the statutory maximum sentence for the RICO Conspiracy Count. Anastasio then timely filed this appeal.

## DISCUSSION

Anastasio’s appeal focuses primarily on the sufficiency of the evidence underlying his convictions. He contends, in particular, that the government failed to prove (1) that he aided and abetted the murders of MacDonald and Young, or (2) that he agreed to participate in a racketeering scheme. We address these sufficiency challenges first, before considering Anastasio’s additional claims that the District Court erred by denying his *Batson* challenge and his motion to sever trials.

### I. Sufficiency of the Evidence

A defendant bears a “heavy burden” when he attacks a criminal conviction on the basis of insufficient evidence. *United States v. Tanner*, 942 F.3d 60, 64 (2d Cir. 2019). This is because in this procedural posture our “standard of review is exceedingly deferential.” *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018). In evaluating a sufficiency challenge, we are required to “view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government’s favor, and deferring to the jury’s assessment of witness credibility and its assessment of the weight of the evidence.” *United States v. Babilonia*, 854 F.3d 163, 174 (2d Cir. 2017). We must sustain a jury’s verdict, moreover, unless the “evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury

could find guilt beyond a reasonable doubt.” *United States v. Ng Lap Seng*, 934 F.3d 110, 130 (2d Cir. 2019). Thus, “[t]he ultimate question is not whether *we believe* the evidence adduced at trial established [the] defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*.” *United States v. Corbett*, 750 F.3d 245, 250 (2d Cir. 2014) (emphasis in original).

A. VCAR Murder Counts and Murder Enhancements

We begin by considering whether the evidence supports the government’s theory that Anastasio aided and abetted the murders of Young and MacDonald. To resolve this question, we must consider the scope of accomplice liability under both New York and federal law. This is because the Murder Enhancements of the RICO Conspiracy Count charged Anastasio as an aider and abettor under New York Penal Law § 20.00, whereas the VCAR Murder Counts charged Anastasio as an aider and abettor under both New York Penal Law § 20.00 and 18 U.S.C. § 2.<sup>8</sup> As we discuss below, moreover, these two aiding-and-abetting provisions are not coextensive. Accordingly, we assess Anastasio’s criminal liability under each statute separately, starting with 18 U.S.C. § 2.

1. *Aiding and Abetting under 18 U.S.C. § 2*

The general federal aiding-and-abetting statute provides in relevant part that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C.

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<sup>8</sup> The VCAR Murder Counts incorporated New York’s accomplice law because they charged Anastasio with murder in violation of New York Penal Law §§ 125.25(1) (“Murder in the second degree”) and 20.00 (“Criminal liability for conduct of another”). See *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999) (observing that the VCAR murder statute, 18 U.S.C. § 1959, requires “the government to prove that the defendant committed murder—however that crime is defined by the underlying state or federal law”).

§ 2(a).<sup>9</sup> As the Supreme Court recently explained in *Rosemond v. United States*, “[this] provision derives from (though simplifies) common-law standards for accomplice liability.” 572 U.S. 65, 70 (2014). Thus, “[a]s at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” *Id.* at 71.

Here, we conclude that the government’s evidence regarding Anastasio easily satisfies the “intent requirement” — *i.e.*, the *mens rea* element — of federal accomplice liability. *Id.* at 77. According to the Cooperators’ testimony at trial, Anastasio was present when the Gang planned its attack on 155 Pennsylvania Street. Knowing full well the murderous intentions of the assembled group, Anastasio nonetheless attempted to acquire a firearm of his own so that he could join the shooters. Based on this conduct, a rational jury could conclude beyond a reasonable doubt that Anastasio “wishe[d] to bring about” the murders of Young and McDonald — an entirely foreseeable consequence of the retaliatory shooting. *Id.* at 76; *see also United States v.*

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<sup>9</sup> The accompanying subsection, § 2(b), provides relatedly that “[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” 18 U.S.C. § 2(b). The government does not appear to pursue the § 2(b) theory of accomplice liability on appeal. *See* Gov’t Br. 80-81 (arguing that Anastasio “intentionally aided” the shooters). In any event, we find no evidence in the record to suggest that Anastasio was the “cause in fact” of the murders of MacDonald or Young. *See United States v. Concepcion*, 983 F.2d 369, 383-84 (2d Cir. 1992) (“§ 2(b) adopts the general princip[le] of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries.”).

*Nelson*, 277 F.3d 164, 197 (2d Cir. 2002) (holding that a jury may infer that “a person intends the ordinary consequences of his voluntary acts”). Indeed, Anastasio admitted as much when, after the shooters returned to the apartment and started talking about the shooting, Anastasio complained, “[W]hy didn’t you let me go? Why didn’t you let me go?” Smith App’x 4812. Thus, viewed in the light most favorable to the government, the trial evidence leaves us with no doubt that Anastasio possessed the *mens rea* necessary to be an accomplice to murder under § 2.

The more challenging question is whether Anastasio’s conduct satisfied the “affirmative-act requirement” — that is, the *actus reus* element — of federal accomplice liability. *Rosemond*, 572 U.S. at 74. In urging that it does, the government highlights that Anastasio was present when the Gang planned its retaliatory attack; that he participated in the assault of Maldonado and her boyfriend at the park; that at the apartment he twice attempted to take control of one of the Gang’s weapons for his own use; and that he handed the .44 caliber gun to Harville.

Anastasio responds that none of this conduct actually facilitated the commission of the two murders. He asserts, for example, that although he was present for the planning session, he did not offer any suggestions or make any contributions to forming the Gang’s plans. He further maintains that his decision to relinquish the .44 caliber gun to Harville did not advance the commission of the murders at all — stressing, in particular, Harville’s unchallenged testimony that the handgun malfunctioned during the shooting and that, as a result, Harville was unable to fire a single bullet. Thus, Anastasio submits, although he may have been an accomplice to *attempted* murder, he did not aid and abet the crimes that the Indictment charged him with: the murders of MacDonald and Young.

The affirmative act requirement for accomplice liability raises no more than a low hurdle for the government’s proof to clear, it is true. See *United States v. Garguilo*,

310 F.2d 249, 253 (2d Cir. 1962) (Friendly, J.) (“[E]vidence of an act of relatively slight moment may warrant a jury’s finding participation in a crime.”). “In proscribing aiding and abetting,” the Supreme Court has observed, “Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence.” *Rosemond*, 572 U.S. at 73. For their part, “courts have never thought relevant the importance of the aid rendered.” *Id.* at 75. Thus, a defendant’s acts need “not advance each element of the offense” to support federal accomplice liability; “all that matters is that they facilitated one component.” *Id.* at 74-75. Nor must a defendant provide more than a “minimal” amount of aid to qualify as an aider and abettor. *Id.* at 73. Indeed, as one venerable treatise put it, “‘the quantity of assistance [is] immaterial,’ so long as the accomplice did ‘something’ to aid the crime.” *Id.* (quoting R. Desty, *A Compendium of American Criminal Law* § 37a, p. 106 (1882)) (emphasis in original). This is because, as the Supreme Court has explained, “every little bit helps—and a contribution to some part of a crime aids the whole.” *Id.*

At the same time, however, the *actus reus* element of federal accomplice liability is not so capacious as to encompass any act taken in relation to some identified criminal activity. Rather, our case law imposes at least two limitations. First, we have repeatedly emphasized that, to convict a defendant of aiding and abetting a crime, the government must prove that the defendant’s “efforts contributed towards [the] success” of the crime, even if only at the margins. *See, e.g., United States v. Huevo*, 546 F.3d 174, 179 (2d Cir. 2008); *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999); *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990); *United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988); *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985). The government must prove that the defendant “furthered the criminal act.” *United States v. Nusraty*, 867 F.2d 759, 766 (2d Cir. 1989) (emphasis in original); *see also United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996) (“To be convicted of aiding and abetting, the defendant must

have taken some conscious action that furthered the commission of the underlying crime.”). Said another way: while the quantum of assistance provided by an accomplice may be trifling, it cannot be zero. Rather, to impose criminal liability under the federal aiding-and-abetting statute requires proof that a defendant performed *some* act that “directly facilitated or encouraged” the commission of a substantive crime. *United States v. Medina*, 32 F.3d 40, 45 (2d Cir. 1994).

Second, to support accomplice liability, the assistance rendered by a defendant must contribute to the success of “the specific underlying crime” for which the defendant is charged with aiding and abetting. *Pipola*, 83 F.3d at 562. This is because “aiding and abetting does not constitute a discrete criminal offense but only serves as a more particularized way of identifying persons involved.” *Smith*, 198 F.3d at 383. In other words, “when a person is charged with aiding and abetting the commission of a substantive offense, the ‘crime charged’ is . . . the substantive offense itself.” *United States v. Oates*, 560 F.2d 45, 55 (2d Cir. 1977); *see also Smith*, 198 F.3d at 383 (same). For this reason, a defendant who has been indicted for aiding and abetting a particular crime cannot be convicted based on evidence that he aided and abetted a second, separate crime, even if related to the first. *See United States v. Ledezma*, 26 F.3d 636, 641-42 (6th Cir. 1994) (reversing a defendant’s conviction for possession with the intent to distribute where the defendant was involved in shipping drugs, but did not aid or abet the particular shipment that the indictment charged him with possessing); *see also Wiley*, 846 F.2d at 155 (refusing to infer from his participation in one fraudulent scheme that the defendant aided and abetted another “distinct,” but related, fraudulent scheme). Instead, the government must prove that “the defendant consciously assisted the commission of the specific crime [charged in the indictment] in some active way.” *Medina*, 32 F.3d at 45.

Several of our decisions help illustrate the impact of these two limitations on the types of acts that can support federal accomplice liability. In *Garguilo*, for example, we considered whether a defendant's mere presence at the scene of a crime could render him liable for aiding and abetting that crime. 310 F.2d at 253. Generally, we said, the answer is no, because accomplice liability requires a defendant to "do[] something to forward the crime." *Id.* at 254. We recognized, however, that in some cases, a defendant's presence may advance the commission of the crime: an example would be "the attendance of a 250-pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of crime of someone useful as a lookout." *Id.* at 253. We therefore drew a distinction between those cases in which a defendant's presence "help[s]" or "positively encourage[s]" the commission of a crime and those cases in which a defendant's presence merely marks him as "a companion" to the actual perpetrator of the crime, observing that the former, but not the latter, can serve as a basis for accomplice liability under § 2. *Id.*

Later, in *Labat*, we addressed whether a defendant could be convicted as an accomplice for possession of cocaine based on his unsuccessful efforts to procure drugs for a co-conspirator. *See* 905 F.2d at 20-21, 22-23. The trial evidence showed that the defendant (Labat) told his co-conspirator (Moon) that he would try to obtain and personally deliver one kilogram of cocaine to Moon in New York. *See id.* at 20-21. While Labat worked to acquire and transport the drugs, however, Moon and one of his associates (Ray) obtained that same amount of cocaine from another source (Dentel) at a lower price. *Id.* at 21. Moon then sold those drugs to an undercover police officer, and on the basis of that sale, the government charged Labat with one count of possession with intent to distribute. *Id.* Upon reviewing the trial record, however, we found no evidence that Labat intended Moon to possess the specific kilogram of cocaine that formed the basis of Labat's possession charge—*i.e.*, the cocaine obtained from Dentel

and sold to the undercover officer. *See id.* at 23. “Nor,” we continued, “was there any evidence that Labat’s efforts made any contribution whatever to Moon’s obtaining the cocaine from Dentel.” *Id.* Thus, although Labat plainly intended for Moon to possess a kilogram of cocaine (and took steps to facilitate that criminal objective), we reversed Labat’s conviction for possession with intent to distribute, concluding that insufficient evidence supported the specific possession charge set forth in the indictment. *See id.*

For purposes of Anastasio’s appeal, however, our decision in *Medina* offers perhaps the most relevant illumination of the affirmative act requirement for federal accomplice liability. *See* 32 F.3d at 45-46 (Jacobs, J.). In that case, a jury convicted the defendant (Medina) of, among other crimes, aiding and abetting the use or carriage of firearms during an attempted robbery, in violation 18 U.S.C. §§ 924(c) and (2). *See id.* at 42. According to the government’s evidence, Medina devised a plan for three of his associates (Lopez, Villanueva, and Delgado) to rob Medina’s former employer. *Id.* at 42. In the days before the heist, Medina asked Lopez whether he had a gun. *Id.* at 43. When Lopez responded that Villanueva had a firearm (but Lopez apparently did not), Medina gave Lopez a revolver and instructed him on how to use it. *Id.* Lopez turned out to be a confidential informant, however, and he handed Medina’s revolver over to a government agent before the robbery was attempted. *Id.*

Reviewing this evidence, we reversed Medina’s § 924(c) conviction on sufficiency grounds, concluding that “Medina performed no act that specifically aided and abetted the use or carrying of a gun during the attempted robbery.” *Id.* at 42. His conviction could not rest on the revolver that Medina gave to Lopez, we explained, because that firearm “was not carried or used by anyone during the attempted robbery.” *Id.* at 45. Nor was it supported by the fact that “Villanueva and Delgado each carried a semi-automatic weapon to the attempted robbery,” since we saw “no evidence that Medina acted in any way to facilitate or encourage the use or carrying of those

weapons.” *Id.* We further observed that, while Medina was the mastermind behind the robbery, “his plans did not entail a gun that was actually used or carried during the attempted robbery.” *Id.* at 42. Thus, because nothing in the factual record suggested that Medina aided or abetted the use or carriage of a firearm by any of the robbers, we reversed his conviction under § 924(c). *See id.* at 45.<sup>10</sup>

Applying this case law to the record before us, we conclude that Anastasio’s conduct is not enough to satisfy the affirmative act requirement of federal accomplice liability. Although Anastasio was present while members of the 10th Street Gang discussed and formulated its scheme for revenge, nothing in the record suggests that Anastasio spoke during—much less contributed to—this planning process. Nor has the government offered evidence that Anastasio’s mere presence at Thurmond’s apartment

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<sup>10</sup> We also rejected the notion that Medina aided and abetted the commission of a § 924(c) offense merely because he “performed an act to facilitate or encourage the robbery.” *Medina*, 32 F.3d at 45. In doing so, we reasoned that the “specific crime” prohibited by § 924(c) is the use or carriage of a firearm during and in relation to a predicate crime (*e.g.*, a robbery), not the predicate crime itself. *Id.* Later, in *Rosemond*, the Supreme Court rejected this interpretation of § 924(c). *See* 572 U.S. at 75. Characterizing § 924(c) as a “double-barreled crime” that involves both “the use or carriage of a gun” and “the commission of a predicate (violent or drug trafficking) offense,” *id.* at 71, the *Rosemond* Court concluded that an individual could aid and abet a § 924(c) violation “by facilitating either [the predicate offense] . . . or the firearm use (or of course both),” *id.* at 74.

Thus, had *Rosemond* been handed down before we decided *Medina*, we likely would not have reversed Medina’s conviction in light of his contributions to the attempted robbery (*i.e.*, the predicate offense). *Rosemond* casts no doubt, however, on *Medina*’s requirement that an aider-and-abettor must actually contribute to the success of the underlying offense. Indeed, the majority opinion in *Rosemond* repeatedly acknowledges that federal accomplice liability requires a defendant to “d[o] something to aid the [substantive] crime.” *Id.* at 73 (emphasis in original); *see also, e.g., id.* at 74 (“[W]e approved a conviction for abetting mail fraud even though the defendant had played no part in mailing the fraudulent documents; it was enough to satisfy the law’s conduct requirement that he had in other ways aided the deception.”); *id.* at 74–75 (“It is inconsequential . . . that [a defendant’s] acts did not advance each element of the offense; all that matters is that they facilitated one component.”).

encouraged or otherwise influenced the Gang to commit the murders. Indeed, as far as we can tell from the record, Anastasio played no “role” in the execution of the retaliatory shooting “beyond that of a companion” to the shooters, and even that he did at a distance from the shooting. *Garguilo*, 310 F.2d at 253. He did not, for example, supply any of the firearms used during the shooting; provide any information on the location of the 7th Street Gang; serve as a look-out during the shooting; transport any of the shooters to or from 155 Pennsylvania Street; or, after the crime, help shield the shooters from police investigation.

The government points out that Anastasio *attempted* to acquire a firearm of his own, and that he later held the .44 caliber handgun and relinquished it to Harville. But the attempt to acquire a gun failed;<sup>11</sup> and as to the gun at issue, Anastasio did not bring it to the apartment. Rather, he found it in a common pile of guns that others had brought, and he unwillingly yielded it to a more senior member of the Gang. His conduct therefore had no more impact on the event than Medina’s delivery of a gun to a confidential informant, or Labat’s unsuccessful efforts to procure cocaine for Moon. *See Medina*, 32 F. 3d at 45-46; *Labat*, 905 F.2d at 23. In those cases and in this one, the defendant did nothing to “further[] the criminal act” or “contribute[] toward[] its success.” *Nusraty*, 867 F.2d at 766; *Zambrano*, 776 F.2d at 1097. The Young and MacDonald murders were—at least with respect to Anastasio—a “foregone conclusion.” *Medina*, 32 F.3d at 46. The gun was always going to be available, and a Gang member (likely Harville) was always going to bring it to the ambush.

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<sup>11</sup> The government did not charge Anastasio with attempted aiding and abetting, a putative crime that some of our sister circuits have suggested does not even exist under federal law. *See, e.g., United States v. Jayavarman*, 871 F.3d 1050, 1056 (9th Cir. 2017); *United States v. Samuels*, 308 F.3d 662, 669 (6th Cir. 2002); *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990).

2. *Aiding and Abetting under New York Penal Law § 20.00*

We need not tarry long on whether Anastasio aided and abetted the two murders under New York Penal Law § 20.00.<sup>12</sup> Although the principles of accomplice liability under New York law may differ somewhat from the corresponding federal law, they impose at least two overlapping requirements that, together, resolve Anastasio's appeal.

First, consonant with our interpretation of the federal aiding-and-abetting statute, New York courts have held that under § 20.00, a defendant's "mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with the perpetrator of a crime, is not enough for accessorial liability." *E.g., People v. Lopez*, 137 A.D.3d 1166, 1167 (2d Dep't 2016); *In re Tatiana N.*, 73 A.D.3d 186, 190-91 (1st Dep't 2010); *see also People v. Cabey*, 85 N.Y.2d 417, 422 (1995) ("[A] defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability."). Indeed, at least one Appellate Division has gone further and found no accomplice liability where a defendant was both present at the scene of the crime and uttered words of encouragement to the perpetrator—conduct that would likely qualify as aiding and abetting under federal law. *Compare People v. Fonerin*, 159 A.D.3d 717, 719 (2d Dep't 2018) (no accomplice liability where a defendant said, "Do that shit, man," right before his co-defendant set the victim on fire), *with Garguilo*, 310 F.2d at 253 ("[I]t is enough if the presence of the alleged aider and abettor has . . . positively encouraged the perpetrator . . .").

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<sup>12</sup> Section 20.00 provides:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

N.Y. Penal Law § 20.00.

Second, just as we have said that a defendant must actually contribute to the success of a crime to qualify as an aider and abettor under 18 U.S.C. § 2, the New York Court of Appeals has interpreted the state's accomplice statute as requiring evidence that "a defendant exhibited [some] calculated or direct behavior that purposefully affected or furthered the [substantive crime]." *People v. Bello*, 92 N.Y.2d 523, 526 (1998). This requirement, New York courts have explained, is "integral" to criminal liability under § 20.00. *E.g., id.*; *People v. Slade*, 133 A.D.3d 1203, 1204 (4th Dep't 2015). In line, then, with our case law on federal accomplice liability, a defendant is not an aider-and-abettor under New York law unless he "personally engaged in some voluntary act that was specifically connected to the [actual perpetrator's] misconduct," *People v. Byrne*, 77 N.Y.2d 460, 467 (1991), and in doing so, he "intentionally and directly assisted in achieving the ultimate goal of the [criminal] enterprise," *Bello*, 92 N.Y.2d at 526.

Here, as discussed in detail above, nothing in the record suggests that Anastasio's conduct "affected or furthered" the murders for which he is charged with aiding and abetting. *Id.* Rather, the government's evidence merely establishes that Anastasio associated with the perpetrators of those crimes in the hours leading up to and then following the shooting. Thus, for the same reasons that Anastasio did not aid or abet the two murders as a matter of federal law, we conclude that he did not act as an accomplice within the meaning of New York Penal Law § 20.00. Accordingly, we reverse the judgment of conviction that is based on the jury's verdict as to the VCAR Murder Counts and the Murder Enhancements of the RICO Conspiracy Count.

B. RICO Conspiracy Count

In contrast, we find no merit in Anastasio's sufficiency challenge to his conviction on the RICO Conspiracy Count. The conspiracy provision of RICO, 18 U.S.C. § 1962(d), "proscribes an agreement to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity." *United States v. Arrington*,

941 F.3d 24, 36 (2d Cir. 2019). As the Supreme Court has explained, RICO's definition of an "enterprise" is "broad": it generally encompasses any "group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle v. United States*, 556 U.S. 938, 944, 946 (2009). An enterprise, in turn, engages in "a pattern of racketeering activity" when its members commit at least two racketeering acts—such as murder, narcotics trafficking, or robbery—that both "[are] related to one another" and "have a nexus to the enterprise" (the so-called "predicate acts"). *United States v. Cain*, 671 F.3d 271, 284 (2d Cir. 2012); *see also* 18 U.S.C. § 1961(1) (defining "racketeering activity").

Importantly, the crime of RICO conspiracy "centers on the act of *agreement*." *United States v. Applins*, 637 F.3d 59, 81 (2d Cir. 2011) (emphasis in original). Thus, in contrast to RICO's substantive offenses, *see, e.g.*, 18 U.S.C. § 1962(c), "the Government need not establish the existence of an enterprise" to "prove a RICO conspiracy," *Arrington*, 941 F.3d at 36. Nor must it establish that a pattern of racketeering activity actually took place. *See United States v. Zemlyansky*, 908 F.3d 1, 11 (2d Cir. 2018) ("To prove the pattern element, the government must show that two or more predicate acts were, or were intended to be, committed as part of the conspiracy."). Rather, the government "need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme." *Arrington*, 941 F.3d at 36-37.

Here, a rational factfinder could conclude beyond a reasonable doubt that Anastasio agreed with other members of the 10th Street Gang to function as a unit for the common purpose of selling drugs. As the grand jury charged in the Indictment, and the government proved at trial, Gang members worked together to distribute drugs in their territory, organizing themselves into a loose hierarchy of roles and responsibilities. *See Applins*, 637 F.3d at 73 ("[A]n association-in-fact enterprise under RICO need not have a hierarchical structure, a chain of command, or other business-like attributes.").

In doing so, they viewed themselves as a single group united by a shared identity. To protect both the profits and “reputation” of the 10th Street Gang, Smith App’x 3810, members intended to—and did in fact—engage in a pattern of racketeering activity that included murder, robbery, and the distribution of drugs.

The jury was entitled to find, moreover, that Anastasio knowingly agreed to join and facilitate this racketeering scheme. The Cooperators identified Anastasio as an active member of the Gang: one who served as a lookout during drug deals, sold marijuana, and fought rival gangs. Although Anastasio’s actions at the apartment where the murders were planned did not render him an accomplice to the murders, his conduct there certainly provides a reasonable basis for inferring that Anastasio knew about, and agreed to, “the general criminal objective” of the 10th Street Gang. *Arrington*, 941 F.3d at 36-37. In light of this and other evidence showing Anastasio’s efforts to facilitate the Gang’s racketeering activity, we have no doubt that a reasonable jury could convict him of RICO conspiracy.

In arguing to the contrary, Anastasio faults the government for purportedly not proving that Anastasio himself engaged in—or intended to engage in—at least two acts of racketeering. As we have explained on multiple occasions, however, “[s]o long as [a] defendant knowingly agreed to facilitate the general criminal objective of a jointly undertaken racketeering scheme, the government need not prove that he or she knowingly agreed to facilitate any specific predicate act.” *Zemlyansky*, 908 F.3d at 11. Rather, we have said, “it suffices to show that [the defendant] intended that the broad goals of the racketeering scheme be realized, along with evidence that some (or any) members of the conspiracy intended that specific criminal acts be accomplished.” *Id.* Because we conclude that the government’s evidence against Anastasio satisfies this standard, we reject Anastasio’s sufficiency challenge to his conviction on the RICO Conspiracy Count.

## II. Pretrial Rulings

We also identify no reversible error in the District Court's decisions to deny Anastasio's *Batson* challenge and his motion to sever his trial from that of his co-defendants.

As to the former, all four Defendants claim that the government exercised its peremptory strikes on the basis of race when it moved to excuse two of the three Hispanic individuals who were present in the venire. As we explain, however, in a separate opinion resolving Delgado's appeal, the District Court did not clearly err in crediting the government's statement of its non-discriminatory reasons for striking those prospective jurors. *See United States v. Farhane*, 634 F.3d 127, 154 (2d Cir. 2011) ("Such a ruling represents a finding of fact, which we will not disturb in the absence of clear error."). We now adopt and incorporate that *Batson* analysis here, reaffirming that the record before us discloses no basis for disturbing the District Court's *Batson* determination.

As for severance, Anastasio urges that he was entitled to a separate trial because of his purportedly minimal role in the 10th Street Gang. In Anastasio's view, the vast bulk of the evidence presented at trial had nothing to do with him, but rather concerned his co-defendants' violent acts and drug deals. This evidence, he contends, had a prejudicial "spillover effect," leading the jury to convict Anastasio "based not on what he did but on what others around him did." Anastasio's Reply Br. 1.

A district court may sever trials if "the joinder of offenses or defendants . . . appears to prejudice a defendant." Fed. R. Crim. P. 14(a). The decision to sever, however, is "committed to the sound discretion of the trial judge," and we will not override an exercise of that discretion absent "clear abuse." *United States v. Chang An-Lo*, 851 F.2d 547, 556 (2d Cir. 1988). "It is not enough," we have said, for a defendant "to

demonstrate that separate trials would have increased the chances of the [defendant's] acquittal." *United States v. Spinelli*, 352 F.3d 48, 54-55 (2d Cir. 2003). Instead, the defendant must "show prejudice so severe as to amount to a denial of a constitutionally fair trial, or so severe that his conviction constituted a miscarriage of justice." *United States v. Blount*, 291 F.3d 201, 209 (2d Cir. 2002).

Anastasio has not carried this "heavy burden." *Chang An-Lo*, 851 F.2d at 556. As an initial matter, we conclude that much of the evidence presented at trial "would have been admissible at a separate trial of [Anastasio], since it was relevant to proving the nature and scope of the [RICO] conspiracy in which [all Defendants] were, to differing degrees, involved." *Spinelli*, 352 F.3d at 56. The testimony concerning the 10th Street Gang's structure and criminal activity, for example, helped to establish it as "a racketeering scheme" that "involved, or by agreement between any members of the conspiracy was intended to involve, two or more predicate acts of racketeering." *Zemlyansky*, 908 F.3d at 11. Likewise, the shooting at 155 Pennsylvania Street—the focal point of the five-week trial—was probative of Anastasio's agreement to join that racketeering scheme. Although the government's evidence concerning the retaliatory shooting failed to establish Anastasio's liability as an accomplice to murder, it certainly illustrated his knowledge of, agreement to, and participation in the Gang's criminal objectives.

To be sure, the record reflects that Anastasio played a less prominent role in the 10th Street Gang than did some of his co-defendants. As we have explained elsewhere, however, "differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *E.g., United States v. Carson*, 702 F.2d 351, 366-67 (2d Cir. 1983); *United States v. Scarpa*, 913 F.2d 993, 1015 (2d Cir. 1990). Indeed, not only are joint trials "constitutionally permissible" when they place "defendants who are . . . marginally involved alongside those heavily involved";

they are “often particularly appropriate in circumstances where the defendants are charged with participating in the same criminal conspiracy.” *Spinelli*, 352 F.3d at 55. That is what the District Court faced here.

We are reassured by the District Court’s express direction to the jury that it must consider the guilt of each Defendant “separately,” and its reminder that “[a] person may know or be friendly with a criminal without being a criminal himself.” Smith App’x 5394, 5420. These instructions sufficiently addressed the risk of spillover prejudice to Anastasio that joinder of Defendants’ trials might have produced. *See Chang An-Lo*, 851 F.2d at 556-57 (concluding that similar jury instructions mitigated the risk of spillover prejudice). Absent any particularized claim of prejudice, we are unable to discern any abuse of discretion—much less a “clear abuse”—in the District Court’s denial of Anastasio’s motion to sever. *Scarpa*, 913 F.2d at 1014.

### CONCLUSION

For the reasons set forth above, we **AFFIRM** Anastasio’s judgment of conviction as to the RICO Conspiracy Count; we **REVERSE** the judgment as to the two VCAR Murder Counts and the two Murder Enhancements, and direct the District Court to enter a judgment of acquittal on the VCAR Murder Counts and the Murder Enhancements; and we **REMAND** the cause for **RESENTENCING**.

A True Copy

Catherine O’Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

A handwritten signature in blue ink, reading "Catherine O'Hagan Wolfe", is written over a circular official seal of the United States Court of Appeals, Second Circuit. The seal features the text "UNITED STATES COURT OF APPEALS, SECOND CIRCUIT" around a central emblem.

**FILED** *IN THE DISTRICT COURT OF THE UNITED STATES*  
*for the Western District of New York*



SEP 05 2014

CLERK, US DISTRICT COURT, WDNY

THE UNITED STATES OF AMERICA

-vs-

MATTHEW SMITH a/k/a Matt Nasty  
(Counts 1-8),  
JONATHAN DELGADO a/k/a Jmag  
(Counts 1, 5, 6),  
ISMAEL LOPEZ a/k/a Ish  
(Counts 1, 3-6),  
DOMENICO ANASTASIO a/k/a Domo  
(Counts 1, 3, 4),

MAY 2011 GRAND JURY  
(Impaneled 5/06/11)

**INDICTMENT****09-CR-331-A****Violations:**

Title 21, United States Code,  
Sections 841(a)(1) and 846;  
Title 18, United States Code,  
Sections 1962(c), 1962(d), 1959(a)(1),  
924(c)(1) and 2.

(8 Counts)

**The Grand Jury Charges That:****GENERAL ALLEGATIONS**

1. At all relevant times, the defendants, MATTHEW SMITH a/k/a Matt Nasty ("SMITH"), JONATHAN DELGADO a/k/a Jmag ("DELGADO"), ISMAEL LOPEZ a/k/a Ish ("LOPEZ"), and DOMENICO ANASTASIO a/k/a Domo ("ANASTASIO"), and Matthew Deynes a/k/a Mateo ("Matthew Deynes"), David Deynes a/k/a Yum Yum ("David Deynes"), Nourooz Ali a/k/a Rooz a/k/a Black ("Ali"), Charles Watkins a/k/a Pingy ("Watkins"), Desmond Ford a/k/a Dez a/k/a

Blooper ("Ford"), Omar Hernandez a/k/a One Eye Omar a/k/a King Oso ("Omar Hernandez"), Tony Peebles a/k/a Tone ("Peebles"), Justin Augus a/k/a Big J a/k/a Augus ("Augus"), Saul Santana a/k/a Saulito ("Santana"), Melvin Medina a/k/a Mel ("Medina"), Miguel Moscoso a/k/a Choko ("Moscoso"), Hector Rodriguez a/k/a Javier Cordero a/k/a X-Blaze ("H. Rodriguez"), Cody Busch a/k/a Banks ("Busch"), Jimmy Sessions, Derrick Yancey a/k/a Funny ("Yancey"), Jonathan Serrano a/k/a Ani ("Serrano"), Michael Bobbitt, Brandon Bobbitt, Daniel Colon a/k/a Drunk Danny ("Colon"), Sam Thurmond a/k/a Set ("Thurmond"), Christopher Pabon a/k/a Chelo ("Pabon"), Michael Hernandez ("Michael Hernandez"), and others, were members and associates of an organization engaged in, among other things, murder, conspiracy to commit murder, attempted murder, conspiracy to traffic in narcotics, narcotics trafficking, robbery, and witness intimidation. That organization, known as the "10<sup>th</sup> Street gang," the "10<sup>th</sup> Street MOB," the "10<sup>th</sup> Street boys," or the "1015" gang (hereinafter "10<sup>th</sup> Street gang"), operated in the Western District of New York and elsewhere. The "10<sup>th</sup> Street gang," including its leadership, membership, and associates, constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4), that is a group of individuals

associated in fact. The enterprise was engaged in, and its activities affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

BACKGROUND OF THE 10<sup>th</sup> Street gang

2. The 10<sup>th</sup> Street gang was a criminal street gang, formed in the late 1980s, which maintained as its "territory" the area of the West Side of Buffalo, New York, roughly between Niagara Street to the West, Richmond Avenue to the East, Auburn Avenue to the North, and Carolina Street to the South. The 10<sup>th</sup> Street gang also maintained associates in other areas of the City of Buffalo and its suburbs.

3. 10<sup>th</sup> Street gang members generally identified one another through familial relationships, growing up together in the vicinity of 10<sup>th</sup> Street, the use of hand gestures, or gang "signs" wherein they typically displayed the letters "M" for "MOB" or "1" and "0" for 10<sup>th</sup> Street, and also by tattoos depicting the letters "M-O-B," "10<sup>th</sup> Street" or "1015." Members also referred to one another as "10<sup>th</sup> Street" or "1015" and

frequently wore plain white t-shirts to identify themselves as members and associates of the organization. Gang names and slogans were also used to identify members and territory controlled by the gang.

4. The 10<sup>th</sup> Street gang also used spray-painted "tagging" to demonstrate its control of its neighborhood to rival gang members and the local community. Gang "tagging" frequently appeared on street signs, walls, buildings, and pavement in areas controlled by the gang. Members also often used the numbers "10" and "15" in various forms of tagging to identify territory controlled by the gang. 10<sup>th</sup> Street gang members and associates further demonstrated their membership and association by posting references to "10<sup>th</sup> Street," or "1015," on social networking websites such as MYSPACE.

5. The 10<sup>th</sup> Street gang was continually engaged in the distribution of cocaine, cocaine base in the form of crack cocaine ("crack cocaine"), heroin, marijuana, and other controlled substances. Typically, senior 10<sup>th</sup> Street gang members obtained narcotic drugs and controlled the distribution of narcotic drugs by providing "street-level" distribution

amounts (typically a few grams of crack cocaine at a time) to numerous gang members and associates in the areas controlled by the gang. Senior 10<sup>th</sup> Street gang members also frequently set up drug "spots," and/or rented apartments for younger members of the gang to distribute narcotic drugs.

6. In order to enforce the authority of the gang, 10<sup>th</sup> Street gang members maintained a ready supply of firearms, including handguns, shotguns, and semi-automatic rifles. Weapons were to be sold to others, or otherwise discarded, after having been used to commit acts of violence on behalf of the organization.

7. 10<sup>th</sup> Street gang members further enforced the authority of the gang to commit its crimes by directing acts of violence and retaliation against non-compliant drug-traffickers and rival gang members, as well as non-compliant members. 10<sup>th</sup> Street gang members also threatened witnesses whom they suspected might testify or provide information to law enforcement about the crimes committed by the gang.

8. The 10<sup>th</sup> Street gang recruited younger members, including juveniles, to join the gang and directed them to commit acts of violence and drug trafficking crimes on behalf of the gang. New members frequently were recruited through friend or familial association with a current or former 10<sup>th</sup> Street gang member. Some members were permitted to claim gang membership or "represent" the gang after being permitted to "hang around" the gang for a period of time. During such time period, the "hang arounds" were required to prove themselves by displaying a willingness to fight, sell drugs, or shoot at rival gang members on behalf of the 10<sup>th</sup> Street gang. Other new members were "jumped in" to the gang. That initiation process ordinarily required that the new member be physically beaten by established members of the gang and demonstrate his resilience during the beating. The new members were then expected to put in "work" for the gang, which included the distribution of narcotics, shooting at rival gang members, "posting up" in the neighborhood (that is, acting as a "look-out" to alert members to the presence of law enforcement), and "tagging" in the neighborhood.

9. Female associates played a vital role in the operation of the 10<sup>th</sup> Street gang and its operations. Among other things,

female associates frequently conducted narcotics trafficking, stored narcotics and weapons, and maintained cellular telephones. Female associates also played an integral role in directing and maintaining communications within the organization, in particular communications with incarcerated gang members and other members of the organization, as well as in the collection of money from gang members for the incarcerated gang members.

PURPOSES OF THE ENTERPRISE

10. The purposes of the 10<sup>th</sup> Street gang, included, but were not limited to, the following:

a. Enriching members of the 10<sup>th</sup> Street gang through, among other things, the control of and participation in the distribution of narcotics in the territory controlled by 10<sup>th</sup> Street gang;

b. Maintaining the control and authority of the 10<sup>th</sup> Street gang over the neighborhoods it controls, often through threats and acts of violence;

c. Preserving, protecting, and expanding the power of the 10<sup>th</sup> Street gang through the use of intimidation, threats of violence, and actual violence, including assault and murder; and

d. Promoting and enhancing the authority of the 10<sup>th</sup> Street gang members and associates.

#### ROLES OF THE DEFENDANTS

11. The defendants participated in the operation and management of the enterprise.

a. The defendants, MATTHEW SMITH and JONATHAN DELGADO, and Matthew Deynes, David Deynes, Nourooz Ali, Charles Watkins, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Melvin Medina, and Sam Thurmond, were senior members and leaders of the enterprise who directed other members of the enterprise in carrying out unlawful and other activities in furtherance of the conduct of the enterprise's affairs.

b. Under the direction of the senior members of the enterprise, the defendants, ISMAEL LOPEZ and DOMENICO ANASTASIO, and Saul Santana, Miguel Moscoso, Hector Rodriguez, Cody Busch,

Jimmy Sessions, Derrick Yancey, Jonathan Serrano, Michael Bobbitt, Brandon Bobbitt, Daniel Colon, Christopher Pabon, And Michael Hernandez, participated in unlawful and other activities in furtherance of the conduct of the enterprise's affairs.

THE MEANS AND METHODS OF THE ENTERPRISE

12. The means and methods by which the defendants and their co-racketeers conducted and participated in the conduct of the affairs of the 10<sup>th</sup> Street gang, include:

a. Members of the 10<sup>th</sup> Street gang committed, attempted, and threatened to commit acts of violence to protect and expand the enterprise's criminal operation and to enforce the authority of the organization, such acts included assaults, murders, and intimidation and threats of violence directed against rival gang members, witnesses in criminal cases, and those who posed a threat to the enterprise;

b. Members of the 10<sup>th</sup> Street gang promoted a climate of fear through acts of violence and threats to commit acts of violence; and

c. Participants in the 10<sup>th</sup> Street gang engaged in trafficking controlled substances as a means to generate income.

COUNT 1

(RICO Conspiracy)

**The Grand Jury Charges That:**

1. Paragraphs 1 through 12 of the General Allegations are re-alleged and incorporated by reference as though fully set forth herein.

2. Beginning in or before 2000 and continuing to in or about 2011, the exact dates being unknown to the Grand Jury, in the Western District of New York and elsewhere, the defendants, MATTHEW SMITH, JONATHAN DELGADO, ISMAEL LOPEZ and DOMENICO ANASTASIO, and Matthew Deynes, David Deynes, Nourooz Ali, Charles Watkins, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Jimmy Sessions, Derrick Yancey, Jonathan Serrano, Michael Bobbitt, Brandon Bobbitt, Daniel Colon, Sam Thurmond, Christopher Pabon, Michael Hernandez, and others, being persons employed by, and associated with the 10<sup>th</sup> Street gang, which enterprise was engaged in, and the activities

of which affected, interstate and foreign commerce, unlawfully and knowingly combined, conspired, confederated, and agreed together and with others known and unknown to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisting of multiple acts involving murder, in violation of New York Penal Law Sections 125.25, 110, 105, and 20; robbery, in violation of New York Penal Law Sections 160, 110, and 20; and conspiracy to distribute, distribution of, and use of premises to distribute, controlled substances, including cocaine base, cocaine, heroin, ecstasy, and marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 856(a)(1), and 846; and acts indictable under Title 18, United States Code, Section 1512 (witness tampering). It was a further part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise.

A. MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO  
BE ACCOMPLISHED

The objects of the conspiracy were to be accomplished in substance as follows:

1. Members of the enterprise and their associates agreed to distribute and distributed quantities of cocaine, cocaine base, marijuana, heroin, and ecstasy.

2. Members of the enterprise and their associates agreed, planned and conspired to commit acts of violence and shootings, including acts involving murder, against rival gang members, associates of rival gang members, and other individuals and other persons involved in the distribution of controlled substances on the West Side of Buffalo, New York.

3. Members of the enterprise and their associates used, carried, and possessed firearms.

4. Members of the enterprise and their associates represented themselves to be, and identified themselves as, gang members of the 10th Street gang, in order to intimidate victims and rivals, and in order to enhance their street credibility and

control of the distribution of controlled substances on the West Side of Buffalo, New York.

5. Members of the enterprise and their associates promoted a climate of fear through violence and threats of violence.

**B. OVERT ACTS**

In furtherance of the conspiracy, and to accomplish the objects of the conspiracy, the defendants, MATTHEW SMITH, JONATHAN DELGADO, ISMAEL LOPEZ and DOMENICO ANASTASIO, and Matthew Deynes, David Deynes, Nourooz Ali, Charles Watkins, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Jimmy Sessions, Derrick Yancey, Jonathan Serrano, Michael Bobbitt, Brandon Bobbitt, Daniel Colon, Sam Thurmond, Christopher Pabon, Michael Hernandez, and others, known and unknown, committed various overt acts, on or about the following times and dates, within the Western District of New York and elsewhere, including, but not limited to, the following:

1. On or about May 17, 2005, defendant SMITH and Peebles, Jimmy Sessions and another 10<sup>th</sup> Street gang member possessed a .38 caliber revolver and 4 rounds of ammunition in a vehicle, in the neighborhood controlled by the 10<sup>th</sup> Street gang.

2. On or about September 2, 2005, defendant SMITH, another 10<sup>th</sup> Street gang member, and unindicted co-conspirators, possessed approximately 35.16 grams of cocaine base, four (4) bags of marijuana, one (1) bag heroin, a Glock 9 millimeter magazine with 10 rounds of ammunition, and \$1,256 U.S. currency at 300 Maryland Street, in the neighborhood controlled by the 10<sup>th</sup> Street gang.

3. On or about April 16, 2006, defendants DELGADO, LOPEZ, ANASTASIO and MATTHEW SMITH and Thurmond and others, known and unknown to the Grand Jury, met at a 10<sup>th</sup> Street gang member's apartment, located at the corner of Carolina Street and Niagara Street, in the territory controlled by the 10<sup>th</sup> Street gang. While they were at the apartment, the defendants discussed retaliating against rival 7<sup>th</sup> Street gang members for shooting defendant JONATHAN DELGADO'S younger brother earlier in the day.

4. On or about April 16, 2006, defendants DELGADO, LOPEZ and ANASTASIO and Thurmond and others, known and unknown to the Grand Jury, obtained firearms, to retaliate against rival 7<sup>th</sup> Street gang members.

5. On or about April 16, 2006, Pabon provided a .380 caliber handgun to defendant DELGADO to use to shoot rival 7<sup>th</sup> Street gang members and associates.

6. On or about April 16, 2006, defendant ANASTASIO provided a firearm to other 10<sup>th</sup> Street gang members to use to shoot rival 7<sup>th</sup> Street gang members and associates.

7. On or about April 16, 2006 defendant DELGADO, Thurmond, and others, known and unknown to the Grand Jury, spoke with members of a gang aligned with the 10<sup>th</sup> Street gang, known as the "Zolo Boys," wherein the "Zolo Boys" agreed to participate with the 10<sup>th</sup> Street gang in shooting rival 7<sup>th</sup> Street gang members and associates.

8. On or about April 16, 2006, defendant LOPEZ drove defendant DELGADO, Thurmond, and another 10<sup>th</sup> Street gang member,

to the vicinity of 7<sup>th</sup> Street where they exited LOPEZ's red Ford Explorer sport utility vehicle ("SUV") with loaded firearms.

9. On or about April 16, 2006, upon exiting defendant LOPEZ's SUV, defendant DELGADO was armed with a loaded .380 caliber handgun and Thurmond was armed with a loaded shotgun.

10. On or about April 17, 2006, defendant MATTHEW SMITH, and others, known and unknown to the Grand Jury, drove past a 7<sup>th</sup> Street gang hangout located at 155 Pennsylvania Street, Buffalo, New York, and, after driving past 155 Pennsylvania Street, defendant MATTHEW SMITH used his cellular phone and stated, "They are out there, do what you gotta do."

11. On or about April 17, 2006, defendant DELGADO, Thurmond, and others known to the Grand Jury, met up in an alleyway adjacent to 155 Pennsylvania Street, Buffalo, New York.

12. On or about April 17, 2006, defendant DELGADO, Thurmond, and others, ran from the alleyway adjacent to 155 Pennsylvania Street, towards 155 Pennsylvania Street, and fired numerous shots at individuals in the vicinity of 155

Pennsylvania Street. Victims Brandon MacDonald and Darinell Young were killed as a result of the shooting, and victims M.A., P.D., and A.W. sustained gunshot wounds.

13. On or about May 22, 2006, the exact date being unknown to the Grand Jury, Peebles and another senior 10<sup>th</sup> Street gang member advised defendant DELGADO, and other 10<sup>th</sup> Street gang members, that rival drug dealers were making a lot of money selling crack cocaine from a residence located at 235 Hudson Street, Buffalo, New York, on the corner of Fargo and Hudson, in the neighborhood controlled by the 10<sup>th</sup> Street gang.

14. On or about May 22, 2006, the exact date being unknown to the Grand Jury, after learning that rival drug dealers were making a lot of money selling crack cocaine from 235 Hudson, H. Rodriguez dressed in old and dirty clothes, pretended to be a crack cocaine user, and went to the residence located at 235 Hudson Street to purchase crack cocaine from the rival drug dealers. After purchasing crack cocaine from the rival drug dealers, H. Rodriguez returned to a 10<sup>th</sup> Street drug house located at 257 Whitney Place where he told Peebles and defendant

DELGADO, and others, that he did not see any guns in the possession of the rival drug dealers located inside the house.

15. On or about May 22, 2006, the exact date being unknown to the Grand Jury, after H. Rodriguez reported that the rival drug dealers inside 235 Hudson Street did not have any firearms, defendant DELGADO, who was armed with a handgun, and two other armed 10<sup>th</sup> Street gang members went to the location and shot at rival drug dealers using an AK-47 and a shotgun in order to force the rival drug dealers out of the neighborhood controlled by the 10<sup>th</sup> Street gang.

16. On or about June 12, 2007, defendant SMITH possessed 40 bags containing a quantity of heroin and 1.43 grams of hydrocodone in the neighborhood controlled by the 10<sup>th</sup> Street gang, and defendant SMITH stated to law enforcement that he was a member of "1015".

17. Sometime before on or about June 15, 2007, Ali advised defendant DELGADO, Peebles, H. Rodriguez, Thurmond, Ford, and other 10<sup>th</sup> Street gang members, that rival gang members were

making money selling drugs in the vicinity of Maryland and Trenton, Buffalo, New York.

18. On or about September 13, 2008, defendant LOPEZ, Augus and Yancey, and other 10<sup>th</sup> Street gang members, were present in the vicinity of 925 Niagara Street, Buffalo, New York, when LOPEZ and another 10<sup>th</sup> Street gang associate were shot by rival gang members.

19. On or about June 19, 2010, defendant SMITH and an un-indicted co-conspirator punched and kicked victim T.G. while yelling "10<sup>th</sup> Street," in the vicinity of Prospect Avenue and Massachusetts Street, in the neighborhood controlled by the 10<sup>th</sup> Street gang.

20. On or about July 15, 2010, defendant SMITH sold a quantity of heroin to an individual known to the Grand Jury.

21. On or about July 22, 2010, defendant SMITH sold a quantity of heroin to an individual known to the Grand Jury.

NOTICE OF SPECIAL FACTORS REGARDING COUNT 1

1. Beginning in or before 2000 and continuing until in or about 2011, the exact dates being unknown, in the Western District of New York and elsewhere, the defendants, SMITH and DELGADO, and Matthew Deynes, David Deynes, Ali, Watkins, Ford, Omar Hernandez, Peebles, Augus, Santana, Medina, Moscoso, H. Rodriguez, Busch, Jimmy Sessions, Serrano, Michael Bobbitt, Brandon Bobbitt, Colon, Yancey, Thurmond, and Michael Hernandez, did knowingly, intentionally, willfully, and unlawfully, combine, conspire, and agree together and with others, known and unknown, to commit the following offenses, that is, to possess with intent to distribute, and distribute, 280 grams or more of a mixture and substance containing cocaine base, and 5 kilograms or more of a mixture and substance containing cocaine, Schedule II controlled substances, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A).

2. On or about April 17, 2006, in the Western District of New York, defendants, DELGADO, SMITH, LOPEZ and ANASTASIO, and Thurmond and Pabon, together with others, with intent to cause the death of another person, did intentionally and unlawfully

cause the death of Darinell Young, in violation of New York Penal Law Sections 125.25(1) and 20.

3. On or about April 17, 2006, in the Western District of New York, defendants, DELGADO, SMITH, LOPEZ and ANASTASIO, and Thurmond and Pabon, together with others, with intent to cause the death of another person, did intentionally and unlawfully cause the death of Brandon MacDonald, in violation of New York Penal Law Sections 125.25(1) and 20.

All in violation of Title 18, United States Code, Section 1962(d).

COUNT 2

(RICO)

The Grand Jury Further Charges That:

1. Paragraphs 1 through 12 of the General Allegations are re-alleged and incorporated by reference as though fully set forth herein.

THE RACKETEERING OFFENSE

2. Beginning on a date unknown and continuing to in or about 2011, the exact dates being unknown to the Grand Jury, within the Western District of New York, and elsewhere, the defendant, MATTHEW SMITH, and Nourooz Ali, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Derrick Yancey, Brandon Bobbitt, Daniel Colon, and others, known and unknown, being persons employed by and associated with the 10<sup>th</sup> Street gang criminal enterprise, which was an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, unlawfully and knowingly did conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise, through a pattern of racketeering activity, that is, through the commission of the acts set forth below.

THE PATTERN OF RACKETEERING ACTIVITY

3. The pattern of racketeering activity, as defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisted of the following acts:

RACKETEERING ACT ONEConspiracy to Distribute Controlled Substances

4. Beginning in or before 2000 and continuing to in or about 2011, the exact dates being unknown, within the Western District of New York, and elsewhere, the defendant, MATTHEW SMITH, and Nourooz Ali, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Derrick Yancey, and Brandon Bobbitt, did knowingly, willfully, and unlawfully, combine, conspire and agree, together and with others, known and unknown, to commit the following offenses:

a. To possess with intent to distribute, and to distribute, 280 grams or more of a mixture and substance containing cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A);

b. To possess with intent to distribute, and to distribute, 5 kilograms or more of a mixture and substance containing cocaine, a Schedule II controlled substance, in

violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A); and

c. To possess with intent to distribute, and to distribute, a quantity of a mixture and substance containing marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D).

RACKETEERING ACT TWO

Possession with Intent to Distribute Cocaine Base

5. On or about September 2, 2005, in the Western District of New York, the defendant, MATTHEW SMITH, together with others, did knowingly, intentionally, and unlawfully possess with the intent to distribute a quantity of a mixture and substance containing cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and Title 18, United States Code, Section 2.

RACKETEERING ACT THREEMurder and Conspiracy to Commit Murder

6. The defendant named below committed the following acts, any one of which alone constitutes the commission of Racketeering Act Five:

a. On or about April 17, 2006, in the Western District of New York, the defendant, MATTHEW SMITH, and others, with intent to cause the death of another person, did intentionally and unlawfully cause the death of victims Brandon MacDonald and Darinell Young, in violation of New York Penal Law Sections 125.25(1) and 20.

b. On or about April 17, 2006, in the Western District of New York, the defendant, MATTHEW SMITH, and others, did intentionally and unlawfully attempt to cause the death of victims A.W., P.D., and M.A., in violation of New York Penal Law Sections 125.25(1), 110 and 20.

c. Beginning on or before April 17, 2006, in the Western District of New York, the defendant, MATTHEW SMITH, together with others, with intent that conduct constituting a violation

of Murder in the Second Degree, New York Penal Law, Section 125.25(1), be performed, by intentionally causing the death of another person, namely, rival gang members and associates, did agree to engage in and cause the performance of such murders.

In furtherance of said conspiracy and in order to affect its purpose and object, the defendant, MATTHEW SMITH, and others, known and unknown:

i. On or about April 16, 2006, defendant MATTHEW SMITH, and others, known and unknown to the Grand Jury, discussed retaliating against rival 7<sup>th</sup> Street gang members for shooting defendant DELGADO'S younger brother earlier in the day;

ii. On or about April 16, 2006, co-conspirator 10<sup>th</sup> Street gang members, known and unknown to the Grand Jury, obtained firearms to retaliate against rival 7<sup>th</sup> Street gang members;

iii. On or about April 17, 2006, co-conspirator 10<sup>th</sup> Street gang members, known and unknown to the Grand Jury, met in

an alleyway adjacent to 155 Pennsylvania Street, Buffalo, New York;

iv. On or about April 17, 2006, defendant MATTHEW SMITH, and others known to the Grand Jury, drove past a 7<sup>th</sup> Street gang hangout located at 155 Pennsylvania Street, Buffalo, New York, and, after driving past 155 Pennsylvania Street, defendant MATTHEW SMITH used a cellular phone and stated, "They are out there, do what you gotta do"; and

v. On or about April 17, 2006, co-conspirator 10<sup>th</sup> Street gang members, known and unknown to the Grand Jury, ran from the alleyway, towards 155 Pennsylvania Street, and fired numerous shots at individuals in the vicinity of 155 Pennsylvania Street. Victims Brandon MacDonald and Darinell Young were shot and killed, and victims M.A., P.D., and A.W. sustained gunshot wounds.

All in violation of New York Penal Law Section 105.15.

RACKETEERING ACT FOURPossession with Intent to Distribute Heroin

7. On or about June 12, 2007, in the Western District of New York, the defendant, MATTHEW SMITH, did knowingly, intentionally, and unlawfully possess with the intent to distribute a quantity of a mixture and substance containing heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

RACKETEERING ACT FIVEDistribution of Heroin

8. On or about July 15, 2010, in the Western District of New York, the defendant, MATTHEW SMITH, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture and substance containing heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

RACKETEERING ACT SIXDistribution of Heroin

9. On or about July 22, 2010, in the Western District of New York, the defendant, MATTHEW SMITH, did knowingly,

intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture and substance containing heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

All in violation of Title 18, United States Code, Section 1962(c).

COUNT 3

(Murder in Aid of Racketeering)

The Grand Jury Further Charges That:

1. At all times relevant to this Indictment, the 10<sup>th</sup> Street gang enterprise, as more fully described in Paragraphs 1 through 12 of the General Allegations, which are realleged and incorporated by reference as though set forth fully herein, constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

2. At all times relevant to this Indictment, the above-described enterprise, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, acts involving murder and robbery, in violation of New York Penal Law, and narcotics distribution, and conspiracy to do so, in violation of Title 21 United States Code, Sections 841(a)(1) and 846, and acts indictable under Title 18, United States Code, Section 1512.

3. On or about April 17, 2006, in the Western District of New York, the defendants, MATTHEW SMITH, DOMENICO ANASTASIO, and ISMAEL LOPEZ, together and with others, for the purpose of maintaining and increasing position within the 10<sup>th</sup> Street gang, an enterprise engaged in racketeering activity, did unlawfully murder Brandon MacDonald, in violation of New York State Penal Law Sections 125.25(1) and 20.

All in violation of Title 18, United States Code, Sections 1959(a)(1) and 2.

COUNT 4

(Murder in Aid of Racketeering)

The Grand Jury Further Charges That:

1. Paragraphs 1 and 2 of Count 3 are realleged and incorporated by reference as though set forth fully herein.

2. On or about April 17, 2006, in the Western District of New York, the defendants, MATTHEW SMITH, DOMENICO ANASTASIO, and ISMAEL LOPEZ, together and with others, for the purpose of maintaining and increasing position within the 10<sup>th</sup> Street gang, an enterprise engaged in racketeering activity, did unlawfully murder Darinell Young, in violation of New York State Penal Law Sections 125.25(1) and 20.

All in violation of Title 18, United States Code, Sections 1959(a)(1) and 2.

COUNT 5

(Narcotics Conspiracy)

The Grand Jury Further Charges That:

Beginning in or before 2000, and continuing to in or about 2011, the exact dates being unknown to the Grand Jury, in the Western District of New York, and elsewhere, the defendants,

MATTHEW SMITH, JONATHAN DELGADO and ISMAEL LOPEZ, and Matthew Deynes, David Deynes, Nourooz Ali, Charles Watkins, Desmond Ford, Omar Hernandez, Tony Peebles, Justin Augus, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Jimmy Sessions, Derrick Yancey, Jonathan Serrano, Michael Bobbitt, Brandon Bobbitt, Michael Hernandez, Benjamin Medina, Sam Thurmond, Chazity Fluellen, and Darnell McIntosh, did knowingly, willfully, and unlawfully combine, conspire, and agree together and with others, known and unknown, to commit the following offenses, that is, to possess with intent to distribute, and distribute, 280 grams or more of a mixture and substance containing cocaine base, a Schedule II controlled substance, 5 kilograms or more of a mixture and substance containing cocaine, a Schedule II controlled substance, and a quantity of a mixture and substance containing marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 841(b)(1)(D).

All in violation of Title 21, United States Code, Section 846.

COUNT 6

(Possession of Firearms in Furtherance of a Drug Crime)

The Grand Jury Further Charges That:

Beginning in or before 2000, and continuing to in or about 2011, the exact dates being unknown to the Grand Jury, in the Western District of New York, and elsewhere, the defendants, MATTHEW SMITH, JONATHAN DELGADO and ISMAEL LOPEZ, and Matthew Deynes, David Deynes, Nourooz Ali, Charles Watkins, Desmond Ford, Omar Hernandez, Tony Peebles, Justin August, Saul Santana, Melvin Medina, Miguel Moscoso, Hector Rodriguez, Cody Busch, Jimmy Sessions, Derrick Yancey, Jonathan Serrano, Michael Bobbitt, Brandon Bobbitt, Michael Hernandez, Benjamin Medina, and Sam Thurmond, in furtherance of a drug trafficking crime for which they may be prosecuted in a court of the United States, that is, a violation of Title 21, United States Code, Section 846, as set forth in Count 5 of this Indictment, the allegations of which are incorporated herein by reference, did knowingly and unlawfully possess firearms.

All in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 7

(Possession of Heroin with Intent to Distribute)

The Grand Jury Further Charges That:

On or about July 15, 2010, in the Western District of New York, the defendant, MATTHEW SMITH, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture and substance containing heroin, a Schedule I controlled substance.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT 8

(Possession of Heroin with Intent to Distribute)

The Grand Jury Further Charges That:

On or about July 22, 2010, in the Western District of New York, the defendant, MATTHEW SMITH, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture and substance containing heroin, a Schedule I controlled substance.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

**DATED:** Buffalo, New York, February 2, 2012.

WILLIAM J. HOCHUL, JR.  
United States Attorney

**BY:**

S/JOSEPH M. TRIPI  
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A TRUE BILL:

S/FOREPERSON

1 A. Yes.

2 Q. Did members go up in that area?

3 A. Yes.

4 Q. The territory that the gang got, was it protected?

5 A. Yes.

6 Q. What areas were protected and describe how.

7 A. Every area that we either sold drugs out of or hung  
8 around was protected because all of us would carry firearms.

9 Q. Did the gang have a lot of firearms?

10 A. Yes.

11 Q. How many firearms would you estimate that you've observed  
12 as a member of the 10th Street Gang?

13 A. Over 50.

14 Q. How many different members of the gang have you observed  
15 possessing a firearm on their person or in their house?

16 A. Almost everybody.

17 MR. GRANGER: I'll object to almost everybody.

18 MR. VERRILLO: Objection.

19 MR. GREEN: Objection.

20 THE COURT: Overruled.

21 BY MR. TRIPI:

22 Q. Who had the most guns?

23 A. The older 10th Street people.

24 Q. How would the younger guys get guns?

25 A. Either call up Jairo or someone who had a connection with

- 1 Q. .25 what?
- 2 A. Caliber.
- 3 Q. Handgun?
- 4 A. Yes.
- 5 Q. Where would you see him with that gun?
- 6 A. Around the neighborhood or in his house.
- 7 Q. When you say around the neighborhood, where?
- 8 A. Around the park.
- 9 Q. Did you ever see him stash it in the park?
- 10 A. No.
- 11 Q. How would you see it in the park?
- 12 A. He would come and say I got my gun on me.
- 13 Q. That's the .25 caliber?
- 14 A. Yes.
- 15 Q. How did you know it was his dad's?
- 16 A. He told me.
- 17 Q. Have you ever seen Smith with a firearm?
- 18 A. No.
- 19 Q. Have you seen Lopez with a firearm?
- 20 A. Yes.
- 21 Q. Where did you see him with a firearm?
- 22 A. At my house on Niagara and Carolina.
- 23 Q. What firearm did he have?
- 24 A. A .38.
- 25 Q. When was that?

1 MR. TRIPI: Stop the video.

2 BY MR. TRIPI:

3 Q. What is Defendant Anastasio doing there?

4 A. Throwing up the M.

5 Q. For M-O-B?

6 A. Yes.

7 MR. TRIPI: Continue video, please.

8 (The video was played.)

9 MR. TRIPI: Stop the video.

10 BY MR. TRIPI:

11 Q. Is that the Kyle you were referencing earlier?

12 A. Yes.

13 Q. In the middle in the white shirt?

14 A. Yes.

15 MR. TRIPI: Continue the video.

16 (The video was played.)

17 MR. TRIPI: Stop the video.

18 BY MR. TRIPI:

19 Q. In the black shirt, who's that?

20 A. Nico.

21 MR. TRIPI: Continue video.

22 (The video was played.)

23 MR. TRIPI: Please stop the video.

24 BY MR. TRIPI:

25 Q. This individual who is walking right here, I'm going to

1 Q. Who was the one who said that he is?

2 A. Smith.

3 Q. How did Smith say that?

4 A. Yo, there goes some 7th Street people right there.

5 Q. Did he say it loudly or softly?

6 A. Loudly.

7 Q. So, you and other people in your group heard?

8 A. Yes.

9 Q. How long were you -- were you guys punching and kicking  
10 the guy?

11 A. Minute and a half.

12 Q. How did it stop?

13 A. We just stopped.

14 Q. What was his condition when you stopped?

15 A. Maybe a little cuts and bruises, but nothing too serious.

16 Q. What happened next?

17 A. We -- we all basically left the block because the cops  
18 was called.

19 Q. How do you know the cops were called?

20 A. Because the people who were inside the Beecher's Boys  
21 Club told us.

22 Q. So, like, adults came out?

23 A. Yeah.

24 THE COURT: Mr. Thurmond, where did this happen?

25 THE WITNESS: 10th Street park.

1 A. Yes.

2 Q. What types of controlled substances have you observed him  
3 sell?

4 A. Crack or weed.

5 Q. Have you ever observed Defendant Lopez selling drugs in  
6 10th Street park?

7 A. Yes.

8 Q. What controlled substance, if any, did you observe him  
9 sell?

10 A. Weed.

11 Q. Have you ever observed Defendant Anastasio selling any  
12 controlled substances in the park?

13 A. Not really.

14 Q. Did you ever observe him acting as a lookout?

15 A. Yes.

16 Q. How often did you observe him acting as a lookout?

17 A. A lot of times.

18 Q. Out of the four defendants who are here, have you ever  
19 observed any of them bring a gun to the park?

20 A. Yes.

21 Q. Who have you observed bring a gun to the park?

22 A. Jonathan.

23 Q. What type of gun -- is that Defendant Delgado?

24 A. Yes.

25 Q. What type of gun did you observe him bring to the park?

1 A. Bring .22s, .44s, that's about it. Maybe a couple  
2 others; not sure.

3 Q. Did you ever bring a gun to the park?

4 A. Yes, I did.

5 Q. What kind of gun did you bring to the park?

6 A. I'd bring .22s, .45s.

7 Q. When you would have your gun, would you let other members  
8 know that you had it?

9 A. I'd let them know if they asked or sometimes if they knew  
10 that I already had it.

11 Q. What would be your purpose for bringing a gun to the  
12 park?

13 A. For protection.

14 Q. From who?

15 A. From 7th Street Gang members or other gang members.

16 Q. So that you wouldn't be defenseless selling drugs?

17 MR. LEMBKE: Objection. Leading.

18 THE COURT: Sustained.

19 BY MR. TRIPI:

20 Q. Did you feel vulnerable in the park?

21 A. Yes.

22 Q. Why?

23 A. There was a couple times when people came through running  
24 around in cars or shot at us.

25 Q. Do you ever observe Defendant Anastasio bring a gun to

1 the park?

2 A. Yes.

3 Q. What type of gun did you observe him bring to the park?

4 A. .25, shotgun.

5 Q. Where would he hide it, if you know, the gun?

6 A. Either he'd have it on him or if it was too big, he'd

7 hide it in the grass.

8 Q. You indicated you saw him with a .25?

9 A. Yes.

10 Q. Was that a handgun or rifle?

11 MR. LEMBKE: Objection. Leading.

12 THE COURT: Sustained.

13 BY MR. TRIPI:

14 Q. What type of .25?

15 A. It was a handgun.

16 Q. What, if anything, did he say about that .25?

17 A. He said it was his.

18 Q. Had you seen it in his possession anywhere other than in

19 the park?

20 A. In the house.

21 Q. What house?

22 A. They used to have a abandoned house we used to chill at

23 on 10th Street.

24 Q. Who used to chill at this abandoned house on 10th Street?

25 A. Me, Jae Mag, Matt, Ish, Dom -- Domenic, Little Mikey,

1 Ant, Big Jay.

2 Q. What type of activity would occur at this abandoned house  
3 on 10th Street?

4 A. We'd chill in there and smoke weed or if it was too cold  
5 outside, we'd sell crack out of the house.

6 Q. What time period were you utilizing the abandoned house  
7 on 10th Street?

8 A. We were in there all day, possibly every day.

9 Q. What years, do you recall?

10 A. Possibly 2003, 2004.

11 Q. Did you observe Defendant Lopez bring a firearm to the  
12 park?

13 A. Yes.

14 Q. What type of firearm did you observe Defendant Lopez  
15 bring to the park?

16 A. .38 special revolver, a handgun.

17 Q. How many times did you see him with that handgun?

18 A. Probably once.

19 Q. Describe the circumstances of when you saw it.

20 A. It was somewhere where a rival gang member that was  
21 riding through the neighborhood and kept riding through and  
22 we called him for it and he brought it over so we could hold  
23 it, just in case we needed to use it.

24 Q. Who called him?

25 A. Big Jay.

1 Q. And were you at the park at the time when Big Jay called  
2 him?

3 A. Yes.

4 Q. Do you recall what year this was?

5 A. Not sure.

6 Q. Was it before or after the murders on Pennsylvania?

7 A. Before.

8 Q. Did it seem like a long time before or --

9 A. Yes.

10 MR. VERRILLO: Objection.

11 THE COURT: Rephrase your question, please.

12 BY MR. TRIPI:

13 Q. How long before -- using the murders on Pennsylvania as a  
14 reference point -- how long before that would you estimate  
15 Ish gave Big Jay the .38 in the park?

16 A. About two years before.

17 Q. Now, you also indicated that Defendant Anastasio would  
18 bring a shotgun to the park?

19 A. Yes.

20 Q. What type of shotgun did you observe him bring to the  
21 park?

22 A. A 20-gauge shotgun.

23 Q. And how many times would you estimate that you've  
24 observed Defendant Anastasio bring a 20 gauge to the park?

25 A. A few times.

1 Q. Where would he put that?

2 A. Bring it -- he'd put it in either in a house or in the  
3 park somewhere, hidden.

4 Q. What types of places would guns get hidden in the park?

5 A. Like, behind fences or behind a couch or something.

6 Q. What do you mean by a couch?

7 A. Like if we were in a house, it would be behind the couch  
8 or something.

9 Q. I'm just talking about the park right now.

10 A. Okay.

11 Q. Where would he hide the gun in the park when you observed  
12 it?

13 A. There used to be holes in the fence we used to go  
14 through. He'd put them probably in the grass, hidden, or in  
15 a dumpster.

16 Q. You also observed him with that 20 gauge in a house you  
17 said?

18 A. Yes.

19 Q. What house?

20 A. On 10th Street, abandoned house.

21 Q. Is that the same abandoned house you referred to a moment  
22 ago?

23 A. Yes.

24 Q. How many times would you estimate you saw him with the 20  
25 gauge at that abandoned house?

1 Q. Okay. Describe what happened while you and Kiki were  
2 standing on the corner.

3 A. We were all standing around talking, waiting to go to the  
4 picnic and the 7th Street Gang members had rolled up.

5 Q. You said they rolled up?

6 A. Yes.

7 Q. From where?

8 A. They were coming up Maryland from Niagara.

9 Q. Okay.

10 MR. TRIPI: Can we switch back to the computer for a  
11 moment? Keeping up 2521.

12 BY MR. TRIPI:

13 Q. Using the screen for a moment, can you use your finger to  
14 trace the route of travel for the vehicle you observed?

15 A. (Witness complies.)

16 MR. TRIPI: And Your Honor, may the record reflect  
17 on the screen, using 2521.

18 BY MR. TRIPI:

19 Q. Can you draw an arrow in the direction?

20 A. (Witness complies.)

21 Q. Okay. What type of vehicle did you observe driving in  
22 that direction?

23 A. I believe it was a orange Chevy Cobalt.

24 Q. And did that vehicle continue straight or did it turn?

25 A. It turned.

1 Q. Where did it turn?

2 A. It turned up West.

3 Q. Can you trace, with your finger, the direction that it  
4 turned?

5 A. (Witness complies.)

6 MR. TRIPI: May the record reflect the witness  
7 continued the pink line across the bottom of the screen and  
8 then moving upward on the right-hand portion of the screen of  
9 Government Exhibit 2521.

10 BY MR. TRIPI:

11 Q. Now, you ended the line at about the corner of West and  
12 Maryland; is that correct?

13 A. Right.

14 Q. What happened at that point?

15 A. They started shooting at us.

16 Q. Did you recognize anybody?

17 A. Yes.

18 Q. Who did you recognize in the car?

19 A. Pito, Pote, Ace.

20 Q. How many people did you see shooting?

21 A. Only one.

22 Q. Who was shooting?

23 A. Pote.

24 Q. Where was he in the car?

25 A. He was in the passenger seat.

1 Q. Front passenger seat?

2 A. Yes, front passenger seat.

3 Q. How was he shooting in relation to the driver?

4 A. The driver was leaned back, his hands on the wheel, Pote  
5 was propped up and was shooting across him.

6 Q. So, Pote in the passenger seat was shooting across the  
7 face of the driver?

8 A. Yes.

9 Q. Did the car keep moving or did it come to a stop?

10 A. It kept moving.

11 Q. Did it slow down?

12 A. It stopped on Maryland and West at the stop sign. When  
13 it turned the corner, he wasn't going at a fast pace. He was  
14 going maybe 10, 15 miles per hour at a -- at a steady pace  
15 and he started shooting.

16 Q. How many shots do you recall?

17 A. I only recall one.

18 Q. Okay. I'm going to hand you back up the hard copy of  
19 Government Exhibit 2521. If you could draw the route of  
20 travel on the hard copy just as you did on the computer  
21 screen of Government Exhibit 2521, okay?

22 A. (Witness complies). Okay.

23 MR. TRIPI: If we could briefly switch back to the  
24 ELMO, please?

25

1 BY MR. TRIPI:

2 Q. What happened after the shot?

3 A. When the shot fired off, a lot of people scattered. I  
4 was frozen where I was standing.

5 Q. How old were you at the time?

6 A. I think I was only 14 or 15.

7 Q. What happened next?

8 A. After the shot was fired off, almost everybody was -- had  
9 ran away, but when I started to run away, Kiki had started  
10 screaming.

11 Q. What did you do?

12 A. I stopped run -- I stopped running and he was holding his  
13 stomach and I told him to sit down. He sat down on the steps  
14 and then after that, James had came up and told him to lay  
15 down. When he laid down, he -- he said he was shot and we  
16 knew he was shot because he was screaming.

17 Q. What happened next?

18 A. After that, they had already -- the store owner had came  
19 out and said he was calling the police. He called the  
20 police. I believe someone else called the police on their  
21 cell phone. When the police arrived, they lifted up -- they  
22 ended up sliding off my jacket and just throwing it to the  
23 side. They lifted up his white t-shirt and there was just a  
24 little drop of blood, but the police officer knew he was  
25 shot. He called for an ambulance and everybody had gathered

1 A. After that, because everybody was so infuriated, we -- we  
2 were mad at -- because he was talking to us with an attitude,  
3 also. So, when everybody went to go grab him, we went to  
4 jump him.

5 Q. Who went to go jump him?

6 A. It was me, Matt, Cebrin, Funny, G-Wil, Jae Mag, Domenic,  
7 James, couple other guys.

8 Q. So, Defendant Smith, Defendant Delgado and Defendant  
9 Anastasio were in the group?

10 MR. LEMBKE: Objection. Asked and answered.

11 MR. TRIPI: Just clarifying the nicknames, Your  
12 Honor.

13 MR. LEMBKE: Objection. He answered the question.

14 THE COURT: Overruled.

15 THE WITNESS: Yes.

16 BY MR. TRIPI:

17 Q. Describe what happened next.

18 A. When we ran up -- when we ran up to him, Matt punched him  
19 in his face. He fell to the ground. Everybody jumped --  
20 just started jumping on him, kicking him.

21 MR. LEMBKE: Objection to everybody.

22 THE COURT: Who was doing it, sir?

23 THE WITNESS: It was me, Matt, Cebrin, G-Wil, Funny;  
24 couldn't really see because everybody was crowded around.

25

1 BY MR. TRIPI:

2 Q. Based on your perception, did it feel like everyone was  
3 involved?

4 MR. LEMBKE: Objection.

5 THE COURT: Rephrase your question.

6 BY MR. TRIPI:

7 Q. Based on your perception, did it seem like a majority of  
8 the group were involved?

9 MR. LEMBKE: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: Yes.

12 BY MR. TRIPI:

13 Q. What happened next?

14 A. When he was on the ground, his girlfriend had gotten in  
15 the way. She ended up jumping on top of him and I ended up  
16 kicking her in the face. After that, everybody kind of felt  
17 bad that I kicked her, but we just walked away because he  
18 wasn't moving.

19 Q. What happened next?

20 A. After that, then we walked to Sam and James's house.

21 Q. Where did you go?

22 A. I went to Sam and James's house.

23 Q. Who went there with you?

24 A. I believe it was me, Sam, James, Jonathan, Domenic,  
25 Funny, Chelo, Frank, probably a couple other people.

1 going to retaliate.

2 MR. LEMBKE: Objection.

3 THE COURT: Overruled.

4 BY MR. TRIPI:

5 Q. Describe those conversations.

6 A. We didn't have any guns at the time and we had to find  
7 guns.

8 Q. Who brought up the conversation about finding guns?

9 A. I believe it was Jonathan.

10 Q. What did he say?

11 A. That we were going to go through on 7th Street Gang  
12 members and shoot at them because they had shot his brother.

13 Q. After that, did people start attempting to acquire guns?

14 A. Yes.

15 Q. Describe what happened in that regard for the jury.

16 A. I had acquired a gun from my -- from my brother later  
17 that day.

18 Q. With respect to that -- excuse me. With respect to that  
19 firearm, did that cause you to leave the apartment to go get  
20 it?

21 A. Yes, it did.

22 Q. Okay. Before you left, what, if anything, do you recall  
23 Defendant Anastasio saying about guns?

24 A. That he was trying to get a -- trying to get a gun to go  
25 with us.

1 A. Yes.

2 Q. At that point in time, do you notice where he is shot?

3 A. Yes.

4 Q. Is that in the stomach?

5 A. Yes.

6 Q. He is bleeding, correct?

7 A. Yes.

8 Q. Bleeding badly, correct?

9 A. No.

10 Q. At some point in time -- well, when you say he was shot  
11 in the stomach, could you point to, on your stomach, where  
12 you observed Kiki shot and could you show that to the jury,  
13 please?

14 A. He was shot here (indicating).

15 Q. And so, you're pointing to -- and correct me if I'm  
16 wrong -- is if we take your bellybutton as kind of like the  
17 center, you are to the -- just above and to the left of the  
18 bellybutton; is that correct?

19 A. Yes.

20 Q. Thank you. Did you see an exit wound?

21 A. No.

22 Q. It's apparent Kiki is in pain, right?

23 A. Yes.

24 Q. And shortly thereafter, police arrive on the scene,  
25 correct?

1 A. Yes.

2 Q. What locations -- we've talked about 235 Hudson and  
3 257 Whitney and the 10th Street Park -- have you observed  
4 Defendant Smith sell either marijuana, heroin or crack in any  
5 other locations?

6 A. I can't say I have.

7 Q. Have you ever observed Defendant Smith with a firearm?

8 A. I can't say I have.

9 Q. Okay. When you guys were arrested in the car, there was  
10 a firearm?

11 A. That's the only time.

12 Q. Okay. Did you observe him do a shooting?

13 A. No, but I heard.

14 MR. GRANGER: Objection to what he heard.

15 THE COURT: Sustained. Jury will disregard the last  
16 question and answer.

17 BY MR. TRIPI:

18 Q. Now, between age 14 and 23, your age 14 and 23, did you  
19 ever observe Defendant Anastasio sell any marijuana or  
20 controlled substances?

21 A. Marijuana.

22 Q. How many -- where did you see him sell marijuana?

23 A. Me, personally, I went to his house like, once or twice.

24 Q. Where was his house?

25 A. On West, in between Maryland and Virginia.

1 Q. Were you purchasing for your own use?

2 A. Yes.

3 Q. Because you sold crack, right?

4 A. Yes.

5 Q. Who was present when you went to defendant Anastasio's  
6 house to purchase marijuana?

7 A. Most likely by myself.

8 Q. Do you specifically recall?

9 A. No.

10 Q. What quantity did you purchase from him on those two or  
11 three occasions that you went to his house?

12 MR. LEMBKE: Once or twice. Objection.

13 THE COURT: Sustained.

14 MR. TRIPI: I apologize.

15 BY MR. TRIPI:

16 Q. It was once or twice?

17 A. Yes.

18 Q. What quantities were they?

19 A. \$5 bags.

20 Q. Did you ever observe any firearms as it relates to  
21 Defendant Anastasio?

22 A. Can't say I have.

23 MR. TRIPI: Can we please publish Government  
24 Exhibit 615D, please, 615D?

25 MR. LEMBKE: Is that D as in dog or B as in boy?

1 Q. Describe why.

2 A. Because I have been in that neighborhood forever. I was  
3 raised there. I still love that neighborhood, to be honest  
4 with you. So, to be doing this and then, like, I know those  
5 dudes. I know -- I know all of them. I been with them a  
6 long time. So, for me to be sitting here, doing this,  
7 it's -- it's hard.

8 Q. What if -- what if someone from another gang or another  
9 group did something to a 10th Street member; was there  
10 anything that was expected to happen in response?

11 A. There's always retaliation.

12 Q. Can you explain how that was understood throughout the  
13 gang?

14 A. It's like 10th Street got -- it's like we had the  
15 reputation. We was -- like, we were the West Side. So, if  
16 something happens to one person, everybody feels that. It  
17 doesn't matter how minute the person is, he might not be a  
18 person that sells drugs, he might not be a shooter, he might  
19 just be from that area, from that hood.

20 If somebody from somebody else -- if somebody from  
21 somewhere else does something to him, it's like -- it's like  
22 he did it to everybody. You just -- we couldn't let that  
23 happen, basically.

24 Q. Would letting things like that go diminish the amount of  
25 respect 10th Street had?

1 A. Inches.

2 Q. And -- okay. Did you see anyone else in the Cobalt?

3 A. Not that I could remember.

4 Q. So, now, the ambulance arrived, they take Kiki away.

5 Everyone is mad. Describe what happened next.

6 A. The tension started building up. A lot of people started  
7 arriving to the park. Eventually, there was a lot of people  
8 at the park.

9 Q. Who started arriving to the park?

10 A. People, a lot of people, Kano, Angel, I think S-E-T.  
11 Matthew was there. Mike Jiggs, that's all I could really  
12 remember the names. I remember seeing faces.

13 Q. Okay. How many more people were there at the park than  
14 what you named?

15 A. Quite a few.

16 Q. What happened next?

17 A. At that time, everybody is up there and then, eventually,  
18 an individual walked down the street with a girl and boys --  
19 boys ended up jumping the dude right in front of the park,  
20 right on Maryland.

21 Q. Who ended up jumping the guy?

22 A. Mike Jiggs, Matthew Smith, there was quite a few. I  
23 think Russ might have been there, Nico.

24 Q. How many guys were involved in -- using your word --  
25 jumping this guy?

1 A. Whoever had weed at the time. It would be Ish, it was  
2 just...

3 Q. How many -- let me ask you this: How many times have you  
4 observed or you've been with Domo purchasing weed from Ish?

5 A. Maybe like five times.

6 Q. Where did those purchases take place?

7 A. On 10th Street.

8 Q. Have you ever observed anyone in the gang stashing guns  
9 in the park?

10 A. Yes.

11 Q. Who have you observed do that?

12 A. Domo.

13 Q. What types of guns have you observed Domo stash in the  
14 park?

15 A. .22 Ruger.

16 Q. Is that a handgun or a long gun?

17 A. That is a long gun, like a rifle.

18 Q. Where did you observe Domo -- describe the circumstances  
19 of him stashing the .22 Ruger in the park?

20 A. It was like, behind the Boys and Girls Club, over the  
21 fence.

22 MR. TRIPI: Can we please put up Government  
23 Exhibit 7U, please? Okay.

24 BY MR. TRIPI:

25 Q. What do you mean by near the fence? Describe it for the

1 jury.

2 MR. LEMBKE: Near the fence or over the fence?

3 THE WITNESS: Over the fence.

4 MR. TRIPI: Describe what you mean.

5 MR. LEMBKE: Over the fence.

6 THE WITNESS: It's in the back of the club. If you  
7 go into the park, there's a common wall. In the back, there  
8 would be a -- a fence and it was like, a little space back  
9 there, grass. There was a back door to get into the club and  
10 that's where it would be.

11 Q. What club are you talking about?

12 A. The Boys and Girls Club on 10th Street.

13 Q. Keep your voice up, please.

14 A. The Boys and Girls Club on 10th Street.

15 Q. How many times have you observed that?

16 A. Two or three times.

17 Q. Looking at 7U, can you point out -- if you touch the  
18 monitor, you'll get a mark. Can you point out the area where  
19 you're describing the firearm would be placed?

20 A. (Indicating).

21 Q. So, is that the back side of the Boys and Girls Club?

22 A. Yes.

23 Q. And there's a fence there?

24 A. Yes.

25 Q. Have you been over to Domo's house?

1 there is sufficient evidence for a reasonable juror to  
2 conclude that Defendant Lopez participated in a narcotic  
3 conspiracy and that he possessed a firearm in furtherance of a  
4 drug trafficking crime.

5 Defendant Jonathan Delgado is charged with Counts 1 and  
6 Counts 5 and 6 of the indictment. After hearing all the  
7 evidence over the course of the trial and drawing all  
8 reasonable inferences in favor the government, the Court finds  
9 that a reasonable juror could conclude that Defendant Delgado  
10 participated in a RICO conspiracy and a narcotic conspiracy  
11 and that he possessed a firearm in furtherance of the drug  
12 trafficking crime.

13 Defendant Domenico Anastasio is charged in Count 1 and  
14 Count 3 and 4 of the indictment. Drawing all reasonable  
15 inferences in favor of the government, the Court finds that a  
16 reasonable jury could conclude, after hearing the evidence  
17 offered, the Defendant Anastasio was a participant in the RICO  
18 conspiracy.

19 The Court also finds that, upon the allegations, the  
20 defendant Anastasio provided a gun to individuals which was  
21 used in the shooting on April 17, 2006. A reasonable juror  
22 could conclude that the defendant is guilty of a violent crime  
23 in aid of racketeering murders with respect to the death of  
24 Brandon McDonald and Darinell Young.

25 The Court rejects the defendant's statute of limitations

1 with at least one of the -- with one co-conspirator that at  
2 least two of the racketeering acts would be committed by a  
3 member of the conspiracy in the conduct of the affairs of the  
4 enterprise.

5 The government is not required to prove that the defendant  
6 personally committed two racketeering acts or that he agreed  
7 to personally commit two racketeering acts. Moreover, it is  
8 sufficient that the government proves beyond a reasonable  
9 doubt that the defendant agreed to participate in the  
10 enterprise with the knowledge and intent that at least one  
11 member of the RICO conspiracy, which could be, but not need be  
12 the defendant himself, would commit at least two acts of  
13 racketeering in the conduct of the affairs of the enterprise.

14 Moreover, the indictment need not specify the predicate  
15 racketeering acts the defendant agreed would be committed by  
16 some members of the conspiracy in conducting the affairs of  
17 the enterprise, when it is alleged, as in Count 1 of the  
18 indictment, that it was agreed that multiple acts, indictable  
19 or chargeable under the applicable laws would be committed.

20 The jury is not limited to considering only specific  
21 racketeering acts alleged in Count 1 of this indictment, the  
22 RICO substantive count; rather you may also consider evidence  
23 presented of other racketeering acts committed or agreed to be  
24 committed by co-conspirators in furtherance of the  
25 enterprise's affairs, including racketeering acts in which a

1 defendant may not be named in the indictment, to determine  
2 whether the defendant agreed that at least one member of the  
3 conspiracy would commit two or more racketeering acts.

4 Moreover, in order to convict the defendant of a RICO  
5 conspiracy offense, the jury verdict must be unanimous as to  
6 which type or types of predicate racketeering activity the  
7 defendant agreed to would have been committed. For example,  
8 at least two acts of murder, attempted murder, conspiracy to  
9 commit murder, robbery, witness tampering or drug trafficking  
10 or any combination thereof.

11 Furthermore, to establish the requisite conspiratorial  
12 agreement, the government is not required to prove that each  
13 co-conspirator explicitly agreed with every other co-  
14 conspirator to commit the substantive RICO offense, knew of  
15 all of his fellow conspirators or was aware of all of the  
16 details of the conspiracy. Rather, they must establish --  
17 rather to establish sufficient knowledge, it is only required  
18 that the defendant knew the general nature and the common  
19 purpose of the conspiracy and that the conspiracy extended  
20 beyond his individual role.

21 Moreover, the elements of RICO conspiracy, such as the co-  
22 conspiratorial agreement, the defendant's knowledge of it, the  
23 defendant's participation in the conspiracy may be inferred  
24 from the circumstantial evidence. For example, when the  
25 evidence established the defendant and at least one other

1 conspirator committed several racketeering acts in furtherance  
2 of the charged enterprise affairs, the jury may infer the  
3 existence of the requisite agreement to commit a RICO offense.

4       However, it is for the jury to determine whether, based  
5 upon the entirety of the evidence, the government has proven  
6 the defendant entered into the required conspiratorial  
7 agreement. Furthermore, it is not necessary that the  
8 government prove that a particular defendant was a member of  
9 the conspiracy from the beginning. Different persons may  
10 become members of the conspiracy at different times.

11       If you find there is a conspiracy, you may consider the  
12 acts and statements of any other members of the conspiracy  
13 during and in furtherance of the conspiracy as evidence  
14 against the defendant whom you have found to be a member of  
15 it. When persons enter into a conspiracy, they become agents  
16 of each other. So, if the act or statement of one conspirator  
17 during the existence and in furtherance of the conspiracy is  
18 considered the act and statement of all of the other  
19 conspirators and the evidence against all of them.

20       Moreover, the defendant may be convicted as a conspirator,  
21 even though he plays a minor role in the conspiracy, provided  
22 that you find beyond a reasonable doubt the conspiracy existed  
23 and the defendant knowingly participated in the conspiracy  
24 with intent to accomplish the objectives or to assist other  
25 conspirators in accomplishing its objectives.

1 In the event of a guilty verdict returned against the  
2 defendants on Count 1, you would then be required to make the  
3 following determination by the standard beyond a reasonable  
4 doubt: (A) Whether the defendants Matthew Smith and Jonathan  
5 Delgado conspired to possess with intent to distribute and  
6 distribute cocaine base and cocaine; (B) Whether Matthew Smith  
7 intentionally and unlawfully caused the death of Darinell  
8 Young in violation of New York Penal Law, Section 125.25(1)  
9 and 20; (C) That the defendant, Matthew Smith, intentionally  
10 and unlawfully caused the death of Brandon McDonald in  
11 violation of New York Penal Code 125.25(1) and 20; (D) Whether  
12 the defendant, Jonathan Delgado, intentionally and unlawfully  
13 caused the death of Darinell Young in violation of New York  
14 Penal Law, Section 125.25(1) and 20; (E) That the defendant,  
15 Jonathan Delgado, intentionally and unlawfully caused the  
16 death of Brandon McDonald in violation of New York Penal Law,  
17 Section 125.25(1) and 20; (F) Whether the defendant, Ismael  
18 Lopez, intentionally and unlawfully caused the death of  
19 Darinell Young in violation of New York Penal Code, Section  
20 125.25(1) and 20; (G) Whether the defendant, Ismael Lopez,  
21 intentionally and unlawfully caused the death of Brandon  
22 McDonald in violation of New York Penal Law, Section 125.25(1)  
23 and 20; (H) Whether the defendant, Domenico Anastasio,  
24 intentionally and unlawfully caused the death of Darinell  
25 Young in violation of New York Penal Law 125.25(1) and 20; and

1 (I) Whether the defendant, Domenico Anastasio, intentionally  
2 and unlawfully caused the death of Brandon McDonald in  
3 violation of New York Penal Law, Section 125.25(1) and Section  
4 20.

5 The verdict form, which will be given to you, will contain  
6 the findings which you'll be asked to make and I'll go over  
7 that with you when I'm finished with these instructions.

8 Count 3 and 4. We're done with Count 2, we're done with  
9 Count 1.

10 Counts 3 -- by the way, the indictment form will go  
11 chronological with the indictment, so the verdict form will go  
12 Count 1, 2, 3, 4, 5, 6 in the chronological order which is set  
13 forth in the indictment. I thought it would be easier to go  
14 to Count 2 first because it's more complicated than the other  
15 counts.

16 Counts 3 and 4 of the indictment charge certain of the  
17 defendants with committing violent crimes in aid of  
18 racketeering. Each of these counts refers to the existence of  
19 a racketeering enterprise as follows -- and I'm reading the  
20 indictment:

21 At all times relevant to this indictment, the 10th Street  
22 Gang enterprise is more fully described in paragraphs 1  
23 through 12 of the general allegations -- which I've already  
24 read -- which is realleged and reincorporated hereby  
25 referenced and thoroughly set forth herein constitute an

1 to be very careful as you follow it. How do you find the  
2 Defendant, Ismael Lopez, on racketeering conspiracy charged in  
3 Count 1? Guilty, not guilty? If you find the defendant is  
4 guilty of Count 1, proceed to the next special factor. You've  
5 got special factors again, same title, but it's a little  
6 different here.

7 And starting at part A, if you find him not guilty, you  
8 skip part A and B and proceed to the next defendant. Okay?  
9 You just go right -- just follow this very carefully, Okay?  
10 Special factors: Do you find the Defendant Lopez  
11 intentionally and unlawfully caused the death of Darinell  
12 Young in violation of New York Penal Law, Section 125? Then,  
13 you deal with the amounts of drugs as far as these two are.  
14 And it goes, yes, no.

15 Part B is the same thing, related to Brandon McDonald --  
16 the death of Brandon McDonald. Yes, no. The same applies to  
17 Defendant Anastasio, okay?

18 So, the difference in the two defendants, first two you  
19 name -- if you find them guilty. If you find them not guilty,  
20 just go -- just skip over to the next one. If you find them  
21 guilty, then you deal with the amount of drugs, both cocaine,  
22 crack cocaine, okay? With the Defendants Anastasio and Lopez,  
23 it's just -- deals with the with two murders. Okay?

24 Then you go to Count 2. Now, Count 2, that's is the one  
25 with all the racketeering acts. Okay? The second count

1 THE CLERK: Part B. Do you find that Defendant Lopez  
2 intentionally and unlawfully caused the death of Brandon  
3 McDonald in violation of New York Penal Law Sections 125.25(1)  
4 and 20?

5 THE FOREPERSON: Yes.

6 THE CLERK: How do you find as to Defendant Domenico  
7 Anastasio on the racketeering conspiracy charges in Count 1?

8 THE FOREPERSON: Guilty.

9 THE CLERK: Special factors findings for Count 1.  
10 Part A. Do you find that Defendant Anastasio intentionally  
11 and unlawfully caused the death of Darinell Young in violation  
12 of New York Penal Law Sections 125.25(1) and 20?

13 THE FOREPERSON: Yes.

14 THE CLERK: Part B. Do you find that Defendant  
15 Anastasio intentionally and unlawfully caused the death of  
16 Brandon McDonald in violation of New York Penal Law Sections  
17 125.25(1) and 20?

18 THE FOREPERSON: Yes.

19 THE CLERK: Count 2 -- and I will just read the first  
20 paragraph on page 9, Count 2. The second count of the  
21 indictment charges Defendant Matthew Smith with participating  
22 in the affairs of a racketeering enterprise through a pattern  
23 of racketeering activity in violation of Title 18, United  
24 States Code, Section 1962(C). Now, I'm on page 10. How do  
25 you find as to the Defendant Matthew Smith on the racketeering

1 associates, did agree to engage in and cause the performance  
2 of such murders?

3 THE FOREPERSON: Yes.

4 THE CLERK: Racketeering act 4. Part D. Do you find  
5 that Defendant Smith possessed heroin with intent to  
6 distribute it on June 12th, 2007?

7 THE FOREPERSON: Yes.

8 THE CLERK: Racketeering act 5. Part E. Do you find  
9 that Defendant Smith distributed heroin on July 15th, 2010?

10 THE FOREPERSON: Yes.

11 THE CLERK: Racketeering act 6. Part F. Do you find  
12 that Defendant Smith distributed heroin on July 22nd, 2010?

13 THE FOREPERSON: Yes.

14 THE CLERK: Count 3. The third count of the  
15 indictment charges each of the defendants, Matthew Smith,  
16 Domenico Anastasio and Ismael Lopez with murder in aid of  
17 racketeering of Brandon McDonald on April 17th, 2006 in  
18 violation of Title 18, United States Code Sections, 1959(a)(1)  
19 and (2), how do you find as to the defendant, Matthew Smith,  
20 on the charge that he, together with others, murdered Brandon  
21 McDonald in aid of racketeering as alleged in Count 3?

22 THE FOREPERSON: Guilty.

23 THE CLERK: How do you find as to the defendant,  
24 Domenico Anastasio, on the charge that he, together with  
25 others, murdered Brandon McDonald in aid of racketeering as

1 alleged in Count 3?

2 THE FOREPERSON: Guilty.

3 THE CLERK: How do you find as to the defendant,  
4 Ismael Lopez, on the charge that he, together with others,  
5 murdered Brandon McDonald in aid of racketeering as alleged in  
6 Count 3?

7 THE FOREPERSON: Guilty.

8 THE CLERK: Count 4. The fourth count of the  
9 indictment charges each of defendants Matthew Smith, Domenico  
10 Anastasio and Ismael Lopez with murder in aid of racketeering  
11 of Darinell Young on April 17th, 2006 in violation of Title  
12 18, United States Code, Sections 1959(a)(1) and (2), how do  
13 you find as to the defendant, Matthew Smith, on the charge  
14 that he, together with others, murdered Darinell Young in aid  
15 of racketeering as alleged in Count 4?

16 THE FOREPERSON: Guilty.

17 THE CLERK: How do you find as to the defendant,  
18 Domenico Anastasio, on the charge that he, together with  
19 others, murdered Darinell Young in aid of racketeering as  
20 alleged in Count 4?

21 THE FOREPERSON: Guilty.

22 THE CLERK: How do you find as to the defendant,  
23 Ismael Lopez, on the charge that he, together with others,  
24 murdered Darinell Young in aid of racketeering as alleged in  
25 Count 4?

1 there, 20?

2 MR. TRIPI: Total, throughout all the iterations of  
3 all the indictments, I believe it was 44.

4 THE COURT: Forty-four. It's been going on for eight  
5 or nine years.

6 MR. TRIPI: Yes.

7 THE COURT: Not even talking about the facts that  
8 occurred many years ago. Well, we can talk about this, I  
9 guess, for a long time, but pursuant to the Sentencing Reform  
10 Act of 1984, it's the judgment of the Court that the defendant  
11 is hereby committed to the custody of the Bureau of Prisons,  
12 to be imprisonment for a period of life imprisonment on each  
13 of Counts 1, 3 and 4, all to be served concurrently. Cost of  
14 incarceration fee is waived.

15 Because supervised release is not authorized for the  
16 life sentence, no release conditions are imposed, but I will  
17 address that shortly.

18 Pursuant to 18 U.S.C. 3664(n), if the defendant is  
19 obligated to provide restitution and he receives resources  
20 from any source including inheritance, settlement, insurance,  
21 lawsuit or other judgment during the period of incarceration,  
22 he shall be required to apply the value of such resources to  
23 any outstanding restitution.

24 Pursuant to 18 U.S.C. 3663(a), it is ordered that he  
25 make restitution to the victims in the total amount of \$6,919.

## UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA

v.

Domenico Anastasio

## JUDGMENT IN A CRIMINAL CASE

Case Number: 1:09CR00331-036

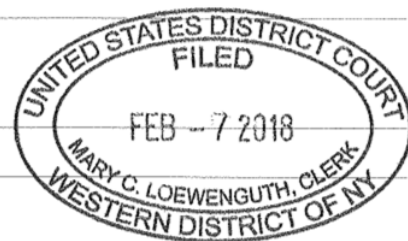
USM Number: 21459-055

Matthew R. Lembke

Defendant's Attorney

## THE DEFENDANT:

- ☐ pleaded guilty to counts \_\_\_\_\_
- ☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.
- ☒ was found guilty on counts 1, 3 and 4 of the Redacted Indictment  
after a plea of not guilty.



The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1962(d) and 18 U.S.C. § 1963(a)	Conspiracy to Commit RICO	2011	1
18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 2	Murder in Aid of Racketeering	04/17/06	3 and 4

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.

February 1, 2018

Date of Imposition of Judgment

Signature of Judge

Honorable Richard J. Arcara, Senior U.S. District Judge

Name and Title of Judge

Feb. 6, 2018

Date

DEFENDANT: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
Life on Counts 1, 3 and 4, to run concurrent

*Pursuant to 18:3664(n), if the defendant is obligated to provide restitution, and he receives resources from any source, including inheritance, settlement (insurance, lawsuit), or other judgment during a period of incarceration, he shall be required to apply the value of such resources to any outstanding restitution.*

*The cost of incarceration fee is waived.*

- ☒ The court makes the following recommendations to the Bureau of Prisons:  
The defendant be housed at FCI Allenwood located in Allenwood, Pennsylvania
- ☒ 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 2 p.m. 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 \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

**SUPERVISED RELEASE**

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

Five (5) years as to Count 1

**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 make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ 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)*
7. ☐ 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: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

### 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

Upon a finding of a violation of probation or supervised release, I understand that this court may (1) revoke supervision, (2) extend the terms of supervision, and/or (3) modify the conditions of probation or supervised release. 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](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

U.S. Probation Officer's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

The defendant shall submit to substance abuse testing, to include urinalysis and other testing. Details of such testing to be approved by the U.S. Probation Office. If substance abuse is indicated by testing, the defendant is to complete a drug/alcohol evaluation and enter into any treatment as deemed necessary by the U.S. Probation Office and/or the Court. The defendant is not to leave treatment until discharge is agreed to by the U.S. Probation Office and/or the Court. While in treatment and after discharge from treatment, the defendant is to abstain from the use of alcohol. The defendant is required to contribute to the cost of services rendered (co-payment in the amount to be determined by the U.S. Probation Office based on the ability to pay or availability of third party payment).

DEFENDANT: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 300	\$ 0	\$ 0	\$ 6,919

- ☐ 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.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
NYS Office of Victim Services Alford E. Smith Building 80 South Swan Street 2 <sup>nd</sup> Floor Albany, NY 12210 ATTN: B. Speanburg, Legal Department Re: Victim Compensation for Family of Brandon MacDonald Claim # 512722	\$5,014	\$5,014	
Kelly Berry	\$1,005	\$1,005	
Bonnie Coon	\$900	\$900	
<b>TOTALS</b>	\$ 6,919	\$ 6,919	

- ☐ 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.

DEFENDANT: Domenico Anastasio  
CASE NUMBER: 1:09CR00331-036

### SCHEDULE OF PAYMENTS

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

- A ☐ Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due  
☐ not later than \_\_\_\_\_, or  
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F 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 ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of \$100 on each count for a total of \$300, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

Pursuant to 18 U.S.C. §3663A, it is ordered that the defendant make restitution to the victims in the total amount of **\$6,919 (Kelly Berry in the amount of \$1,005; Bonnie Coon in the amount of \$900; and \$5,014 to the Crime Victim's Board)**. The restitution is due immediately. Interest on the restitution is waived. Restitution will be joint and several with Ismael Lopez (1:09CR00331-35), Jonathan Delgado (1:09CR00331-34), Matthew Smith (1:09CR00331-23), Sam Thurmond (1:09CR00331-33), Douglas Harville (1:09CR00331-21), Christopher Pabon (1:09CR00331-37), Michael Corchado-Jamieson (1:11CR00280), Domingo Ramirez (1:14CR00141-001), and any other defendant(s), convicted in this case or any related case, who share the same victim(s) and losses. While incarcerated, if the defendant is non-UNICOR or UNICOR grade 5, the defendant shall pay installments of \$25 per quarter. If assigned grades 1 through 4 in UNICOR, the defendant shall pay installments of 50% of the inmate's monthly pay. After considering the factors set forth in 18 U.S.C. §3664(f)(2), while on supervision, the defendant shall make monthly payments at the rate of 10% of monthly gross income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

- ☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

**Ismael Lopez (1:09CR00331-35), Jonathan Delgado (1:09CR00331-34), Matthew Smith (1:09CR00331-23), Sam Thurmond (1:09CR00331-33), Douglas Harville (1:09CR00331-21), Christopher Pabon (1:09CR00331-37), Michael Corchado-Jamieson (1:11CR00280), Domingo Ramirez (1:14CR00141-001)**

- ☐ 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.