No. _____

SUPREME COURT OF THE UNITED STATES

Ismael Lopez,

Petitioner,

vs.

United States of America, et al,

Respondents.

On the Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether mandatory sentences, as a whole or in part, are constitutional and should be replaced with factor-based analysis under §3553, in conjunction with the totality of the circumstances, proportionality test, and the evolving standards of decency in modern society, especially when a defendant is a young adult or convicted under accomplice liability?

Whether the evidence presented at trial was legally sufficient to establish the essential elements of the charges and not in violation of the Fifth Amendment. Specifically, was the *mens rea* element of the aiding and abetting charge relative to the VICAR counts proven beyond a reasonable doubt and was there sufficient nexus between Mr. Lopez's weapon possession and any alleged drug trafficking to prove the charge?

LIST OF PARTIES AND RELATED CASES STATEMENT

Ismael Lopez is the Petitioner in this case and was represented in the court below by Maurice J. Verrillo, Esq. who was appointed in accordance with the Criminal Justice Act.

The United States of America is a Respondent and was represented by the United States Attorney's Office.

Jonathan Delgado is a Respondent in this matter and is represented by Scott M. Green, Esq.

Domenico Anastacio is a Respondent in this matter and is represented by Daniel J. Henry, Jr., Esq.

Matthew Smith is a Respondent in this matter and is currently without representation.

All cases directly related to this matter are as follows:

- United States v. Lopez, No. 09-CR-00331-35, U.S. District Court for the Western District of New York. Judgment entered on February 22, 2018.
- United States v. Delgado, No. 09-CR-0331-34, U.S. District Court for the Western District of New York. Judgment entered on April 24, 2015.
- United States v. Smith, No. 09-CR-0331-23, U.S. District Court for the Western District of New York. Judgment entered on November 2, 2017.
- United States v. Anastasio, No. 09-CR-0331-36, U.S. District Court for the Western District of New York. Judgment entered on February 7, 2018.
- United States v. Lopez, No.18-369, U.S. Court of Appeals for the

Second Circuit. Judgment entered on August 18, 2020.

- United States v. Smith, No.18-328, U.S. Court of Appeals for the Second Circuit. Judgment entered on August 18, 2020.

- United States v. Delgado, No. 15-1453, U.S. Court of Appeals for the Second Circuit. Judgment entered on August 18, 2020.

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PETITION FOR WRIT OF CERTIORARI

Ismael Lopez, an inmate currently incarcerated at United States. Penitentiary Hazelton in Bruceton Mills, West Virginia, by and through Maurice J. Verrillo, Attorney for the Petitioner, respectfully petitions this court for a writ of certiorari to review to the judgment of the Second Circuit Court of Appeals

OPINIONS BELOW

The decision by the Second Circuit Court of Appeals denying Mr. Lopez's direct appeal is reported as United States v. Lopez, 18-369 (2d Cir. 2020). The Second Circuit also denied Mr. Lopez's petition for a rehearing on November 25, 2020. The order and decision are both attached in the Appendix at pages App. A and App. D. Additionally, the Appendix further includes the Western District of New York's post trial decision and order (App. C), and relevant excerpt of the sentencing transcript (App. B).

JURISDICTION

Both of Mr. Lopez's direct appeal of his conviction and subsequent petition for rehearing were denied on August 18, 2020 and November 25, 2020, respectively. Mr. Lopez invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within 150 days of the Second Circuit's judgment, in accordance with the Court's March 19, 2020 order modifying the court rules and extending the deadlines, in light of the ongoing COVID-19 pandemic.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

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

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Sentencing issues, in conjunction with the Eighth Amendment, are no stranger to this Court. This Court has long held that the chronological age of a minor is a significant mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982). Further, the "mental and emotional development of a youthful defendant [must] be considered." Id. As such, mandatory life sentences for minors are patently unconstitutional. Graham v. Florida, 560 U.S. 48 (2010). Further, 18 U.S.C. §3553 states that courts are to impose sentences that are sufficient and not greater than necessary for the crime committed. In recent years, the United States Sentencing Commission has recognizes the importance of the age of the offender beyond the age of majority. First, the Commissions has recognized that several studies have shown that adolescent offenders rarely become chronic offenders. U.S.S.C. Report of the Tribal Issues Advisory Group 30 (2016). Further, "[t]here is a growing recognition that people may not gain full reasoning skills and abilities until they reach the age of 25 on average." U.S.S.C., Youthful Offenders in the Federal

System, Fiscal Year 2010 to 2015 (2017). Finally, "[t]he concept of proportionality is central to the Eighth Amendment." Graham, 560 U.S. at 59.

This case presents several questions. First, whether Mr. Lopez shared in the principal's criminal intent to warrant conviction as an aider and abetter under 18 U.S.C. § 2 and whether the evidence presented was legally sufficient to prove intent. Second, whether the alleged nexus between Mr. Lopez's firearm possession and alleged drug trafficking was sufficiently particularized and proven by the government to justify his conviction under § 924(c)(1). Finally whether, a mandatory sentence of life without parole is constitutional under the Eighth Amendment where Mr. Lopez was not present or actively involved with the principal crime and when the offense was only a few months after his 18th birthday.

It has been long since held that the essential elements of a criminal charge must be proven beyond a reasonable doubt, when viewed in the light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307, 309 (1979). Dating back even further, this Court had determined that there must be substantial evidence to support a verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). Lower courts have further expanded on this principle, stating that an "aider and abetter must share in the principal's essential criminal intent." United States v. Elusma, 849 F.2d 76, 78 (2d Cir. 1988). An offender must "share in the intent to commit the offense as well as play and active role in its commission." United States v. Lombardi, 138 F.3d 559, 561 (5th Cir. 1998).

In regards to § 924(c)(1), the government must prove "active employment of

the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey v. United States, 516 U.S. 137, 143 (1995); see also United States v. Wheeler, 886 F.3d 415, 426 (4th Cir. 2018). Several lower circuits, including the Second Circuit Court of Appeals, have also held that a sufficient nexus must be established between gun possession and alleged drug trafficking. The government cannot convict under § 924(c)(1) on the generalization that "anytime drug dealers use guns to protect themselves and their drugs." United States v. Snow, 462 F.3d 55, 62 (2d Cir. 2006). "Instead, the government must establish the existence of a specific nexus between the charged firearm and the charged drug selling operation. Id. Further, the D.C. Circuit requires not only a nexus, but possession of drugs on the date in question to establish said nexus. United States v. Jefferson, 974 F.2d 201, 204 (D.C. Cir. 1992).

A. Summary of Events from April 16, 2006 to April 17, 2006

Mr. Lopez was alleged to have been a member of the 10th Street gang in Buffalo, NY, which was an apparent rival to the 7th Street gang, also based in Buffalo. As of April 17, 2006, Mr. Lopez was only 18 years and several months old. In the years following the April 17, 2006 incident, Mr. Lopez went on to complete technical school and held steady employment with the Department of Motor Vehicle and was a contributing member of society.

Earlier in the day on April 16, 2006, Kiki Sanabria ("Kiki"), brother of co-defendant Jonathan Delgado, had been shot, allegedly by a member of the 7th Street gang. Shortly after the shooting, a gathering took place at a park on 10th

Street, of which Mr. Lopez was a party to. The gathering was relatively uneventful and there was no discussion of retaliation taking place at that time.

On the night of April 16, 2006, and into the early morning of April 17, 2006, several individuals then gathered at co-defendant Sam Thurmond's apartment on Carolina and Niagara Street in Buffalo. During this gathering, several co-defendants, turned cooperators, testified that there were discussions of retaliation against the 7th Street gang. However, there was conflicting testimony as to whether Mr. Lopez was even inside the apartment when these discussions took place. There was no testimony alleging that Mr. Lopez was a participant in these discussions at all. Mr. Lopez had arrived at the apartment several hours after most of the other individuals arrived. Further, testimony indicated that any discussions of retaliation occurred in a hallway in the apartment and Mr. Lopez was not in the vicinity at the time.

In the early morning hours of April 17, 2006, some witnesses testified that Mr. Lopez transported several individuals in his red Ford Explorer to an associate's, Jimmy Sessions, home, several blocks away from where the eventual shooting occurred. During the drive, testimony indicated that there was no discussion of any kind with Mr. Lopez or the other occupants in the vehicle. After dropping off the others at Sessions's home, Mr. Lopez left and was ultimately no where near the site of the shooting on Pennsylvania Street. Several eye witnesses from the scene testified at trial and there was no mention of a red Ford Explorer being present at any point during the night.

On September 5, 2014, after a several weeks long trial, Mr. Lopez and his three remaining co-defendants were found guilty on all counts. After subsequent post-trial motions were filed, argued before the court, and ultimately denied, the District Court rendered a sentence of mandatory life imprisonment without the possibility of parole.

B. Alleged History of Firearm Possession

Testimony at trial established that Mr. Lopez had been known to sell drugs at the 10th Street Park and out of his 10th Street home. At trial, only one co-defendant, Sam Thurmond, testified to ever seeing Mr. Lopez in possession of a fire arm. Even then, Thurmond testified to seeing Mr. Lopez armed "probably once." Further, Thurmond insisted that this single instance was at a time when rival gang members were in the neighborhood and the firearm was for personal protection rather than furthering drug activity. Further, the government had alleged that Mr. Lopez was armed the night of the April 17, 2006 homicide. However, there was contradictory testimony to this allegation as well. Regardless, the evidence established at trial suggests, at most, two incidents where Mr. Lopez was armed over a span of several years, neither of which had any correlation to drug trafficking.

At the indictment phase of the proceedings, Count 63 alleged the 924(c) violation. However, the count was vague and lacked an particularity. There was no connection made between any alleged firearm possession and drug activity. Rather, it alleged that over the course of 11 years, Mr. Lopez and others possessed firearms

in furtherance of an undisclosed drug trafficking crime.

C. Direct Appeal

Following his sentencing, Mr. Lopez filed a timely appeal to the Second Circuit Court of Appeals. On his direct appeal, he renewed his argument that the government did not provide legally sufficient evidence to warrant a conviction under 18 U.S.C. § 2 and 18 U.S.C. § 924(c)(1). Further, he also argued that the District Court erred during sentencing when it failed to consider any mitigating factors, in accordance with 18 U.S.C. § 3553, and imposed a "mandatory" sentence of life imprisonment without parole.

During the course of the appeal, the District of Connecticut had decided a criminal case with similar sentencing issues as those presented in this matter. See Cruz v. United States, 2018 U.S. Dist. LEXIS 52924 (D. Conn. 2018). The Cruz court considered relevant scientific data as it relates to the mentality of youthful offenders in conjunction with the Eighth Amendment. Further, Mr. Lopez argued, under the umbrella of proportionality, that the co-defendant who actually pulled the trigger and took a life had been sentenced to a lesser sentence than Mr. Lopez who wasn't even present at the time of the shooting.

The Second Circuit upheld the District Court's verdict and sentencing. The Court held that Mr. Lopez did not meet the significant burden of challenging the sufficiency of the evidence. Further, the court held that it must uphold the sentence based on the bright line established by this Court and did not give any additional considerations.

Mr. Lopez subsequently filed a petition for a panel or en banc rehearing with the Second Circuit which was summarily denied on November 25, 2020. Following the Second Circuit's judgment, the court also rendered a decision on the Cruz matter in which it overturned the sentencing decision made by the District Court of Connecticut.

REASONS FOR GRANTING THE WRIT

A. This Court must reconsider the utility of mandatory life sentences within the confines of the Eighth Amendment, in light of recent scientific data and in conjunction with 18 U.S.C. § 3553.

It is no secret that the jurisprudence surrounding life imprisonment and similar punishments has evolved greatly over the course of several decades. With the constant scientific research and data collection as it relates to one's mental maturity, it begs the question of whether mandatory life sentences or sentencing under 18 U.S.C. § 2, no matter one's age or level of involvement, are constitutional at all. There is no question that mandatory sentences give courts little to no opportunity to exercise its reasonable discretion when sentencing a defendant. Further, it opens the door for relatively small time crimes to be met with the equivalent of a death sentence. For when there is no choice but to sentence a person to life in prison without parole, one might as well be sentenced to death. See Solem v. Helm, 463 U.S. 277 (1983).

1. Constitutionality of Mandatory Sentences.

18 U.S.C. § 3553 states that "the court shall impose a sentence sufficient, but not greater than necessary." Factors for a court's consideration include the

circumstances of the offense, the personal history of the defendant, other sentences available, policy statements, and the need to avoid sentence disparities, among others. Further, 18 U.S.C. § 3661 states that "[n]o limitation shall be placed on the information" a sentencing court may consider "concerning the [defendant's] background, character, and conduct," See Pepper v. United States, 552 U.S. 1089 (2011). These statutes, by its very nature, is contradictory to the very concept of mandatory sentences.

"The concept of proportionality is central to the Eighth Amendment." Graham v. Florida, 560 U.S. 48, 59 (2010). The Eighth Amendment forbids "extreme sentences that are grossly disproportionate to the crime committed." Ewing v. California, 538 U.S. 11, 24 (2003). As such, the Eight Amendment requires that courts be able to exercise its discretion in sentencing. Mandatory sentences are entirely counterintuitive.

This case is certainly not the first instance of mandatory sentences being questioned and reevaluated under the Eighth Amendment. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012). These cases are prime examples of the need to consider mitigating factors when sentencing defendants along with the "evolving standards of decency that mark the process of a maturing society." Graham, 560 U.S. at 58. The same principle applies to this matter.

This Court has long recognized that "sentencing judges 'exercise a wide

discretion' in the types of evidence they may consider when imposing sentence and that '[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" Pepper, 552 U.S. at 1089 (quoting Williams v. New York, 337 U. S. 241, 246–247 (1949)). The Pepper court further recognized the importance of considering the likelihood of rehabilitation and rehabilitative efforts. Id. Further, "[t]he State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture, that is irrevocable. It deprives the convict of the most basic civil liberty without giving hope of restoration." Graham, 560 U.S. at 70.

Relevant factors in sentencing younger offenders included the characteristics of the defendant, the nature and conduct associated with the particular offense, and the level of maturity and age of the defendant. Miller, 597 U.S. at 469. While Miller specifically dealt with 14 year old defendants, recent scientific findings indicate that such factors should also be considered in cases involving young adults. For example, the United States Sentencing Commission recognized the importance of the age of an offender. "There is a growing recognition that people may not gain full reasoning skills and abilities until they reach the age of 25 on average." USSC, Youthful Offenders in the Federal System, Fiscal Years 210 to 2015 (2917). While it might be argued that Miller established a bright line of 18 years old in regards to sentencing, decades of Supreme Court jurisprudence shows bright lines being established, challenged, and ultimately adjusted. This very case presents another

opportunity for such an adjustment. See Cruz v. United States, 2018 U.S. Dist. LEXIS 52924 *; 2018 WL 1541898 (D. Conn. 2018).

The District Court of Connecticut dealt with similar issues when considering the appropriate approach to mandatory life sentences and young adult defendants. Id. While the district court held in favor of the defendant, the Second Circuit did reverse the decision on appeal. It is likely that Cruz will be presented before this Court shortly. Regardless, the district court also considered scientific evidence as it relates to the mental development of young adults and the directional trend in sentencing. Id. at 56. Cruz involved a defendant who was 18 year and 20 weeks old at the time the murders were committed. Id. at 47. The district court also stated that these facts have yet to be presented to this Court, until now with Mr. Lopez.

When considering the several factors of 18 U.S.C. § 3553, Mr. Lopez's circumstances are a prime example of why mandatory life sentences must be reconsidered in favor of a factor based analysis.

Regarding his personal background, at the time of the April 17, 2006 incident, Mr. Lopez was not far past his 18th birthday. He had allegedly been a participant in the 10th Street gang since the approximate age of 14. This implies that he was likely targeted by adult members of the gang as a child and groomed, for lack of a better term, into adulthood. Following the April 2006 incident, Mr. Lopez went on to graduate high school, attend and complete his associates degree at ITT Tech, and retain employment in his local DMV office and for Copier Fax services. For all intents and purposes, Mr. Lopez, as he grew into actual adulthood,

took various steps to be a valuable and contributing member of society.

Regarding the circumstances of the offense, while the principal offense is severe, Mr. Lopez's alleged involvement is minimal at best. The record indicates that any discussions of retaliation occurred outside of Mr. Lopez's presence. Further there was no discussion in the vehicle that Mr. Lopez was driving prior to the shooting. Further, he was nowhere near the area when the shootings took place. This was the extent of his participation.

There is no question that other sentences would be available to Mr. Lopez is not for the issue of mandatory sentencing. Had the court been permitted to exercise its reasonable discretion, it is likely that a more appropriate sentence would have been imposed with the possibility of rehabilitation. Due to his age at the time of the offense and the steps he took personally in the years following, it is safe to say that Mr. Lopez would be a suitable candidate for rehabilitation. However, as it stand right now, he will never be afforded that opportunity.

As to sentence disparities, there is a glaring disparity present in this case. While Mr. Lopez was convicted under 18 U.S.C. § 2, to be discussed further below, the principal who pulled the trigger will likely serve less time as he is currently awaiting re-sentencing. It defies logic that a principal should serve a sentence with a foreseeable end date while an alleged accomplice never sees the light of day.

Finally, as it relates to any policy statements, the scientific findings of the United States Sentencing Commission should be seriously considered. An individual does not become a fully matured, well-reasoned adult the day one

reaches one's 18th birthday. Such findings are further proof of the need for a factors based analysis during sentencing in opposition to mandatory sentencing. Mr. Lopez was barely 18 at the time of the April 2006 incident. As his personal history indicates, he spent the several years following that incident bettering his person and honing marketable skills as he grew into adulthood. This took years after his 18th birthday to achieve.

It is worth noting the several areas of law, policy, and society where ages have been raised above 18 years of age. One must be at least 21 years old to purchase and consume alcohol. As of 2019, the age to purchase tobacco was increased to 21 years of age. One must be at least 21 years old to obtain a license for most firearms. 25 states have allowed individuals to remain in foster care until the age of 21 rather than 18. In New York State, child support must be maintained until a subject child reaches 21 years of age. To obtain federal financial aid, one is considered a dependent until the age of 23. Finally, the Affordable Care Act allows individuals to remain on their parents' health insurance until they reach 26 years of age. The point is simply this: society has long since recognized that reaching adulthood is far more complex than reaching one's 18th birthday. There are various areas of society that one cannot partake in until well past the age of 18. As such, mandatory life sentences without parole for 18 year old defendants do not stand to reason from a policy standpoint.

To further highlight the trend in favor of discretionary sentencing, in the last several months, the D.C. city council proposed and passed an amendment which

would allow for sentencing reconsideration for offenders under the age of 25 years old at the time of the offense. Essentially, if a violent crime is committed by a young adult, this act allows for an ultimate change in sentencing at a later time. It was signed and enacted by the District of Columbia's mayor in January of this year. A similar bill had been proposed to Congress in 2019 and the DC City act is being presented to Congress as well. See S. 2146/H.R. 3795. This is just another example of governments and the powers that be are recognizing that one's age alone does not determine adulthood.

Several of the §3553 factors are wildly applicable to Mr. Lopez's case. Further, society no longer draws a line at 18, as was the case in Roper, between childhood and adulthood. See Roper, 543 U.S. at 574. However, where the law currently stands, the hands of the courts are metaphorically tied due to mandatory sentencing. This is all the more reason why this court should and must reconsider the purpose, if any, of mandatory sentences as society continues to evolve.

2. Proportionality Issues and 18 U.S.C. § 2.

This case also raises the question of constitutionality of 18 U.S.C. § 2, in which an alleged accomplice is sentenced in the same or harsher manner than the principal, regardless of actual level of involvement. This questions goes directly to the issue of proportionality considered in Graham and Ewing. This, once again, prevents courts of exercising reasonable discretion in its sentencing procedures.

Mr. Lopez's alleged involvement in the April 2006 incident, to its fullest extent, amounted to driving others to the home of an associate, not the location of the shootings. His

direct involvement does not extend any further. Yet, under § 2, Mr. Lopez is sitting in a federal prison for the rest of his life without any change of getting out. This flies in the face of proportionality. As an additional blow, the principal to the crime, Jonathan Delgado, is awaiting re-sentencing and will likely serve a lesser sentence than Mr. Lopez because Delgado just happened to be 17 at the time. This defies logic and does nothing to further any actual justice. Additionally, it further highlights that age and maturity/adulthood are not one in the same. If anything, no accomplice should serve more time for a crime than the principal's sentence. It serve no rational purpose.

This case provides this Court with the opportunity to further consider and evaluate the effect that 18 U.S.C. § 2 as it relates to the necessity of proportionality in sentencing. The two are wholly incompatible and there lies the needs of this Court's intervention for the benefit of the criminal justice system as a whole.

B. Mr. Lopez's Fifth Amendment right to due process was violated when he was convicted without legally sufficient evidence. As such, this Court must evaluate the constitutional implications of his conviction.

At the center of due process, is the legal requirement of proof beyond a reasonable doubt before one can be convicted of a criminal charge. In the present case, Mr. Lopez had been charged with a violent crime in aid of racketeering ("VICAR"). The government was tasked with proving each of the following:

1. There was a RICO enterprise;
2. That the defendant engaged in racketeering activity;
3. Each defendant had a position within the enterprise; and

4. This defendant committed a crime of violence to maintain or increase his position within the enterprise.

United States v. Burden, 600 F.3d 204 (2d Cir. 2010). The violent crime in the present matter is the homicide that occurred in the early hours of April 17, 2006. Due to the nature of the murder charge, it was a specific intent crime. The intent of Mr. Lopez must have been undoubtedly proven to justify a conviction as an aider and abetter under 18 U.S.C. § 2. The burden to do so is a heavy one.

The Second Circuit has established that when the crime at hand is a specific intent crime, the government must prove the intent of the individual defendant, not just the principal. United States v. Pipola, 83 F.3d 556 (2d Cir. 1999). A defendant must had the specific intent of furthering the principal's underlying crime. United States v. Frampton, 382 F.3d 213, 223 (2d Cir. 2004). Other circuits have agreed saying a defendant must "willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wished to bring about." United States v. Fischer, 686 F.2d 1082 (5th Cir. 1982).

While not having any binding effect on this court, New York jurisprudence regarding the intent required for a murder conviction offers additional guidance. A charge under accomplice liability in New York requires proof that the alleged accomplice has an intent to kill the victims at issue. People v. Cummings, 131 A.D.2d 865 (2d Dept. 1987). Once cannot be convicted when there is 'No agreement to kill, no purpose to kill and no express intent to kill." Id. at 867 (internal quotations omitted). Further, It is well settled in New York that the mere presence

as a driver or passenger of a vehicle where a shooting occurs or will occur does not satisfy the state requirements of knowledge and intent to kill. People v. Bennett, 160 A.D.2d 949 (2d Dept. 1990); People v. Comfort, 113 A.D.2d 420 (4th Dept. 1985); People v. Torres, 153 A.D.2d 911 (2d Dept. 1989).

As previously noted in the factual summary, assuming the evidence most favorable to the government, Mr. Lopez was not present during discussions of planning of retaliation against the 7th Street group, there was no discussion of their intentions while driving from Niagara and Carolina to Pennsylvania Street, and he was not present at Pennsylvania when the shootings occurred. The mere driving of a motor vehicle with occupants, even if this were true, does not establish the requirements of accessorial liability, prove knowledge or intent to commit the substantive offense beyond a reasonable doubt.

Eyewitness testimony of 7th Street affiliates would have seen the bright red Ford Explorer of Mr. Lopez's, but did not testify to seeing the vehicle, Mr. Lopez, or any defendant's in a vehicle.. The only persons claiming Mr. Lopez's involvement are cooperators who have a self-interest in accusing Mr. Lopez to their personal benefit via a plea agreement with the government. The photos of the scene clearly show the frontage of the house at 155 Pennsylvania was in close proximity to the one way street and was well lit.

The government designated the Murder 2nd degree statute as the basis for its entitlement to raise the VICAR charges. The government has failed to satisfy the knowledge and intent requirements that exist under New York or federal law.

The government has also failed to establish that Mr. Lopez committed the alleged acts to further his position in the "10th Street Gang." The record at trial established at best that Mr. Lopez was a small time seller of marijuana. There was no history of involvement with violent crimes or shootings and minimal references in testimony about the alleged activities of the 10th Street group. Such contacts were consistent with a person who resided in the neighborhood and who had contacts with his neighbors.

At trial, the government failed to prove all elements of the VICAR charge beyond a reasonable doubt. As a result, Mr. Lopez's was denied his constitutionally protected right to due process and now sits in federal prison for the rest of his life. Thus, Mr. Lopez asks this Court to grant him a writ of certiorari to review the due process matter and determine what truly qualifies as an aider and abetter.

C. This Court must clarify the definition of a "nexus" between a firearm possession and alleged drug trafficking activity, as well as the level of particularity required at the indictment phase of criminal proceedings.

When the government seeks a conviction under 18 U.S.C. § 924(c), the connection between the weapon and the alleged drug activity must be particularized at the indictment stage. United States v. Russell, 369 U.S. 749 (1962). This Court held in Russell that an insufficient indictment would deprive a defendant of basic constitutional protections. Id. Further, the Second Circuit has established that the government must "establish the existence of a specific nexus between the charged firearm and the charged drug selling operations." United States v. Snow, 462 F.3d 55, 62 (2d Cir. 2006) citing United States v. Finley, 245 F.3d 99, 203 (2d Cir. 2001).

The Fourth Circuit has also elaborated and stated that the government has the burden of showing actual and active employment of the firearm in relation to the drug trafficking activity. United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018). Further, the D.C. Circuit held that any evaluation of § 924(c)(1) requires proof of a nexus between "a particular drug offender and the firearm" and "that the guns facilitate[d] the predicate offense in some way." United States v. Jefferson, 974 F.2d. 201, 205 (D.C. Cir. 1992) (quoting United States v. Harris, 959 F.2d 246, 261 (D.C. Cir. 1992) (internal quotations omitted).

In the present matter, there was little to no evidence presented that would connect any firearm possession with alleged drug activity. Both alleged incidents involved Mr. Lopez arming himself in order to protect himself from any aggression facilitated by the 7th Street gang. Neither incident pose any connection to alleged drug activity. The mere fact that Mr. Lopez had a reputation of selling drugs alone cannot be enough to establish a required nexus between that activity and possible firearm possession. One choosing to arm oneself for self preservation and protection can be a separate matter from drug trafficking entirely.

The lack of any established nexus between firearm possession and drug activity is glaring in this matter. It is a prime example of why this court should render a clearer definition of what a suitable "nexus" actually is, as it related to 18 U.S.C. § 924(c). Mr. Lopez was found guilty under this statute based on a vague assertion that a firearm possessed for self protection automatically amounts to furthering a drug operation with little connection between the two. It is certain

that he is not the first victim of such a charge and is likely to not be last. As such, it is imperative that this Court offer its guidance on the level of correlation needed between a weapons possession and alleged drug activity

CONCLUSION

This matter presents to the Court several issues of great constitutional importance. Firstly, the matter of legal sufficiency is imperative to one's right to due process and thus the matter at hand needs the Court's reevaluation to protect those rights. Second, the nexus required between a firearm possession and drug activity is not clearly defined. While several circuits have considered the matter under 18 U.S.C. § 924(c), the application still varies. The Court's direction is necessary to ensure due process and consistency among the several circuits. Finally, mandatory sentences are inherently unconstitutional under the Eighth Amendment. They are contradictory to the proportionality requirement set by this Court and prevent district courts from exercising their reasonable discretion. This Court must weight the option of a factor based analysis in sentencing any and all matter in the interest of both justice and the protection of a defendant's constitution rights under the Fifth and Eighth Amendments. These questions potentially affect more than just Mr. Lopez. These invoke considerations of law as well as policy and can garner significant and needed change among the justice system. As such, Mr. Lopez is respectfully requesting that this Court grant him a writ of certiorari and be heard on these matters.

DATED this 23rd day of April, 2021.

Respectfully submitted,

Maurice J. Verrillo /s/
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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 18th day of August, two thousand twenty.

Present: DENNIS JACOBS,
ROSEMARY S. POOLER,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 18-328, 18-369

MATTHEW SMITH,
ISMAEL LOPEZ,

Defendants-Appellants.[1]

Appearing for Appellant-Smith: Jane S. Meyers, Brooklyn, N.Y.

Appearing for Appellant-Lopez Maurice J. Verrillo, Rochester, N.Y.

[1] The Clerk of Court is directed to amend the caption as above.

Appearing for Appellee: Monica J. Richards, Assistant United States Attorney, *for* James P. Kennedy, United States Attorney for the Western District of New York, Buffalo, N.Y.

Appeal from the United States District Court for the Western District of New York (Arcara, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Defendants-Appellants Matthew Smith and Ismael Lopez appeal from final judgments entered November 2, 2017 and February 5, 2018, respectively, in the United States District Court for the Western District of New York (Arcara, *J.*), sentencing them principally to life imprisonment. We decide by separate opinions the appeals of Smith and Lopez's codefendants, Jonathan Delgado and Domenico Anastasio. Following a jury trial, Smith and Lopez were each convicted of one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") with special sentencing factors charging the aiding and abetting of two murders ("murder enhancements"), in violation of 18 U.S.C § 1962(d); two counts of murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2 ("VCAR-murder counts"); one count of conspiracy to possess with intent to distribute narcotics ("narcotics-conspiracy count"), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846; and one count of possession of firearms in furtherance of a drug-trafficking crime ("firearms-possession count"), in violation of 18 U.S.C. §§ 924(c)(1) and 2. Smith was also convicted of one count of participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c); and two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C).We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, both defendants attack their convictions on sufficiency-of-the-evidence grounds and advance age-based challenges to their mandatory life sentences. Additionally, Lopez argues that the district court erred in denying his supplemental motion for a post-trial hearing, and Smith argues that he received ineffective assistance of counsel. We address these arguments in turn.[2]

[2] On appeal, all four defendants argued that during jury selection the government exercised its preemptory strikes on the basis of race when it struck a woman of Hispanic origin from the venire. As we explain in an opinion resolving Delgado's appeal, the district court did not clearly err in crediting the government's statement of its nondiscriminatory reasons for striking the prospective juror. *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.

I. Sufficiency of the Evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004) (internal quotation marks and citation omitted), as the standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Ultimately, "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001). "In evaluating a sufficiency challenge, we must 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. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (internal quotation marks and citation omitted).

A. Smith

Smith challenges the sufficiency of the evidence for the murder enhancements and the VCAR-murder counts. In pertinent part, the VCAR murder statute, 18 U.S.C. § 1959(a), requires not only that Smith possessed the mens rea for murder, but also that he acted with the general purpose of maintaining or increasing his status within the gang. *See United States v. Persico*, 645 F.3d 85, 105 (2d Cir. 2011). Smith argues that, under this record, it was irrational for the jury to conclude that he possessed the intent to kill and that he did so to further his status in the gang.

We disagree. Regarding Smith's intent to kill, the government introduced testimony at trial that Smith (1) told other gang members that he would drive around the neighborhood to locate members of the rival 7th Street Gang; (2) did in fact drive around the neighborhood and reported back that he located 7th Street Gang members, stating "they're out there" and "do what you all gotta do," Smith App'x at 2465.48; (3) at some point returned to the apartment where the murders were planned and where the murder weapons were piled on top of a bed; (4) after Smith called in his observation, he told a fellow gang member that was with him, the "boys were going to retaliate" for the earlier shooting, Smith App'x at 2770; and (5) after gunshots were heard, Smith told a fellow gang member that the victims "got what they deserved," Smith App'x at 2782. Based on this evidence, a jury could reasonably conclude beyond a reasonable doubt that Smith possessed the mental state for the murders—an entirely foreseeable consequence of his reports to a group bent on lethal retaliation. *See United States v. 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").

It was also reasonable for the jury to conclude that Smith acted with the general purpose of maintaining or increasing his position in the gang when he volunteered to look for rivals at a time when his fellow members talked openly about retaliation. There was evidence demonstrating that Smith understood that the gang valued taking action when retaliatory efforts were underway: in one instance, when two other gang members were arguing over which one would shoot at rival gang members, Smith grabbed the gun and darted off on a bicycle to shoot at the rival members himself. That Smith later participated in beating a suspected associate of the 7th Street Gang near a gathering of 10th Street Gang members further supports the jury's finding that Smith acted with a desire to increase his position in the gang. Viewing this evidence in the

light most favorable to the government, along with other evidence presented at trial showing as a general matter that the organization placed value on members committing violent acts on behalf of the gang, we decline to disturb Smith's convictions on the VCAR-murder counts.

B. Lopez

Lopez similarly attacks the sufficiency of the evidence of his mental state for the murder enhancements and the VCAR-murder counts. Lopez argues that "[t]he mere driving of a motor vehicle with occupants, even if this were true, does not establish the requirements of accessorial liability, prove knowledge or intent to commit the substantive offense beyond a reasonable doubt." Appellant's Br. at 34. We do not agree.

The trial testimony established that Lopez was more than just a mere driver of a motor vehicle with occupants. There was testimony that Lopez (1) joined other gang members at the apartment where they stockpiled firearms and planned the murders; (2) drove a lookout to a place near the scene of the murders; and (3) later drove four armed gang members to the scene where one of the shooters "took [his] shotgun and put it on the back seat of the floor." Smith App'x at 2926. The jury did not unreasonably conclude from this that Lopez knew that the plan was to kill rival gang members, and Lopez intentionally aided his codefendants by transporting them to the location when they were fully armed and ready, willing, and able to shoot and kill.

Furthermore, viewing the evidence in the light most favorable to the government, the jury did not irrationally conclude that Lopez acted with the general awareness to increase his status in the gang. Contrary to Lopez's assertion that the "[t]he record at trial established at best that [Lopez] was a small time seller of marijuana," Appellant's Br. at 36, there was testimony showing that Lopez had already advanced through the ranks as a drug seller and as someone known to possess a .38 revolver, which he would bring with him to 10th Street Park and show other members. There was also testimony that newer members were expected to "put in work," meaning they had to perform certain criminal—and often violent— acts to increase their status. Smith App'x at 2360.

Lopez also argues that there was insufficient evidence to convict him of the narcotics-conspiracy count, but this challenge also fails. Trial testimony established Lopez's guilt as a drug supplier who sold marijuana from his house. For example, there was testimony that one drug supplier sold Lopez more than 100 pounds of marijuana and that another gang member bought more than 60 pounds of marijuana from Lopez. This testimony is enough to defeat the sufficiency argument as to this count.

Finally, Lopez's attack on the sufficiency of the evidence underlying his conviction for the firearms-possession count is also meritless. Trial testimony established that Lopez brought a firearm to the 10th Street Park to provide protection for the gang while selling drugs there. Such evidence is sufficient for a jury reasonably to have found Lopez guilty on the firearms-possession count.

II. Sentencing

Defendants' age-based challenges to their mandatory life sentences are foreclosed by our recent decision in *United States v. Sierra*. 933 F.3d 95, 97 (2d Cir. 2019) ("Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, the defendants' age-based Eighth Amendment challenges to their sentences must fail." (citation omitted)). We are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Smith and Lopez were both over eighteen years old at the time of the VCAR-count murders, which carry a mandatory-minimum sentence of life imprisonment. Accordingly, we affirm their sentences.

III. Motion for Post-Verdict Hearing

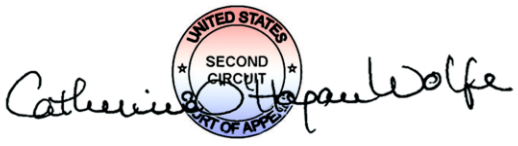
Additionally, we conclude that the district court acted well within the bounds of its discretion in denying Lopez's motion for a post-verdict hearing. After his trial, Lopez submitted letters from some of the testifying witnesses purporting to recant portions of their prior testimony that incriminated Lopez. The district court is accorded great deference in its decision to grant a hearing in such circumstances, especially when, as here, it presided over the trial in which the recanting witnesses testified. *See United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir. 1987) ("When a motion for a new trial is predicated entirely on an affidavit from a trial witness who recants her testimony, a trial judge can ordinarily deny it without a hearing.").

IV. Ineffective Assistance of Counsel

Finally, Smith also argues that his counsel was constitutionally ineffective for not filing a sentencing statement. Our Circuit has "a baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Khedr*, 343 F.3d 96, 99 (2d Cir. 2003) (internal quotation marks and citation omitted). Though we have exercised our discretion to address these claims when their resolution is beyond a doubt, *id.*, we decline to do so here given the absence of a fully developed record on this issue. *See Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998) (explaining that, "except in highly unusual circumstances," a lawyer charged with ineffectiveness should be given "an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs"). Accordingly, we dismiss Lopez's ineffective assistance of counsel claims without prejudice.

We have considered the remainder of Lopez and Smith's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:09-CR-00331-35
	)	(RJA)(HBS)
Plaintiff,	)	
	)	
vs.	)	January 30th, 2018
	)	
ISMAEL LOPEZ,	)	
	)	
Defendant.	)	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE RICHARD J. ARCARA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JAMES P. KENNEDY, JR.
UNITED STATES ATTORNEY
BY: JOSEPH M. TRIPI, ESQ.
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138 Delaware Avenue
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For Defendant: LAW OFFICES OF MAURICE VERRILLO
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3300 Monroe Avenue, Suite 301
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Probation Officer: ALEXANDRA PISKORZ

Court Reporter: MEGAN E. PELKA, RPR
Robert H. Jackson Courthouse
2 Niagara Square
Buffalo, NY 14202

that is appropriate here.

THE COURT: Well, the Court is well aware of the severity of the sentence that is required here. To impose upon the defendant a life sentence is the second most severe penalty in the federal criminal justice system.

However, the Second Circuit has held that a life sentence does not violate the Eighth Amendment prohibition against cruel and unusual punishment required by the statute in *United States v. Yousef*, 327 F.3d 56 at page 137 (2d Cir. 2003).

Moreover, it's also apparent that the Court finds that the statutory mandatory minimum sentence of life without release is not "grossly disproportionate" for the two violent murders and the four attempted murders, even though the defendant's participation was as an accessory, and not as a principal. See *Harmelin v. Michigan* at 501 U.S. 957, 1991.

Okay. Mr. Lopez, this is your opportunity, sir, to say anything you'd like to say. You can stand up if that makes you more comfortable.

THE DEFENDANT: First and foremost, I would like to say to the victims' family that I'm sorry for their loss. I understand that you don't know me and might not want to hear what I have to say, but I want you to know that I did not participate in the murder of your loved ones. It hurt me to the core to see all of you in pain during the trial.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

DECISION AND ORDER

v. 09-CR-331-A

ISMAEL LOPEZ,

Defendant.

Defendant Ismael Lopez was convicted, after a jury trial, of one count of racketeering conspiracy in violation of 18 U.S.C. § 1962(d) ("RICO conspiracy"), two counts of murder in aid of racketeering in violation of 18 U.S.C. § 1959(a) ("VICAR murder"), one count of narcotics conspiracy in violation of 21 U.S.C. § 846, and one count of possessing firearms in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c). The convictions were for conspiracy to participate in organized criminal activities of a violent street gang in Buffalo, New York, for an accessorial role in the April 17, 2006 VICAR murders of Brandon MacDonald and Darinell Young, for gang-related drug-trafficking, and for weapons possession in furtherance of gang-related drug-trafficking. Each of the VICAR murder convictions carry a sentence of mandatory life imprisonment. 18 U.S.C. § 1959(a)(1).

Defendant Lopez moves pursuant to Fed. R. Crim. P. 29 for a judgment of acquittal notwithstanding the jury's verdicts based primarily upon arguments that, due to errors in the conduct of the trial, there was insufficient admissible evidence for a rational jury to find him guilty as an accessory to the VICAR murders. The Defendant also challenges the sufficiency of the evidence in support of the other counts of

conviction in conclusory fashion.

Defendant Lopez moves in the alternative for a new trial pursuant to Fed. R. Crim. P. 33 based upon arguments that errors in the conduct of the trial irredeemably prejudiced him. The Defendant repeats his contention that he did not intentionally aid the principals who committed the VICAR murders while intending that the principals commit acts of murder. He repeats the conclusory claims that there was insufficient proof of his guilt of each of the other counts of conviction, and that he is innocent.

For the reasons stated below, the Court finds the jury's guilty verdicts were supported by legally-sufficient evidence, and were not a miscarriage of justice. Defendant Lopez's motions pursuant to Rule 29 for a judgment of acquittal and pursuant to Rule 33 for a new trial are therefore denied.

BACKGROUND

During a trial that lasted approximately five and half weeks, evidence showed that Defendant Lopez was an associate and member of the 10th Street Gang, a violent street gang that operated on the Lower West Side of Buffalo. Members and associates of the Gang engaged in criminal activities that supported the Gang, including violence, threats of violence, and drug-trafficking. Members and associates were involved in Gang-related distribution of heroin, cocaine, crack cocaine, marijuana, and ecstasy.

Primarily to protect territory that the 10th Street Gang claimed exclusively as its own for drug dealing, and to assert and maintain its relative standing in a loose hierarchy of local street gangs, members and associates of the Gang were involved

in murders, attempted murders, and assaults. Members and associates of the Gang routinely possessed firearms during their criminal activities, and evidence showed that firearms were freely shared among Gang members.

More than forty co-defendants and defendants alleged to be members or associates of the Gang have entered guilty pleas to related charges. Defendant Lopez and three co-defendants, each of whom were also found guilty of all charges against them, were the only persons who sought a trial.

The territory of the 10th Street Gang was a neighborhood rife with poverty and violence. The evidence at trial showed that, like most street gangs, the Gang was, in the minds of its members and associates, only partly about crime. The Gang was for some associates and members more about social acceptance, support, excitement, and structures that were lacking elsewhere. The Gang held neighborhood parties. It offered a hierarchy of leadership and a clear path to gain approval and respect. One could "put in work" by fighting, committing crimes, or by making sacrifices for Gang members or for the Gang, to earn trust and to build a sense of belonging and higher status.

The 10th Street Gang was a rival of other street gangs, and it had a long-standing violent rivalry with the 7th Street Gang, another neighborhood criminal gang which operated nearby on the Lower West Side of Buffalo. At times, deadly violence erupted between the 10th Street Gang and the 7th Street Gang. The murder victims in this case, Brandon MacDonald and Darinell Young, were murdered in the early-morning hours on April 17, 2006, because they were mistaken for

associates of the 7th Street Gang by members and associates of the 10th Street Gang who were retaliating for an earlier mistaken-identity shooting by a 7th Street Gang member.

It happened on April 16, 2006, as a group that included 10th Street Gang members was walking to a cookout in the vicinity of West Avenue and Maryland Street. At approximately 2:48 p.m., while among the group, Robert Sanabria, the younger brother of Defendant Lopez's co-defendant and fellow 10th Street Gang member Jonathan Delgado, was shot in the stomach and seriously injured during a drive-by shooting.

After Robert Sanabria was loaded into an ambulance, associates and members of the 10th Street Gang, including some who had been at the shooting, gathered at a park on 10th Street. They were afraid Sanabria might die. They were upset and angry about the shooting.

Robert Sanabria later identified 7th Street Gang member Luis Medina as the person who shot him to the Buffalo Police Department. Others who were present during the drive-by shooting had immediately recognized Medina.

The shooting of Sanabria by Medina was a case of mistaken identity: Medina meant to shoot a 10th Street Gang member who had recently been involved in an altercation with 7th Street Gang members outside a party. Sanabria had borrowed a New York Yankees jacket from that 10th Street member. Medina believed he was shooting the owner of the jacket in retaliation for the earlier incident when he shot Sanabria.

The shooting of Robert Sanabria was the first time in the long-running violence between the 7th Street Gang and the 10th Street Gang that 7th Street Gang members had traveled across Niagara Street into 10th Street Gang territory to shoot a 10th Street Gang associate or member. As a result, the shooting took on added significance as a challenge and an insult to the 10th Street Gang.

Some of members and associates of the 10th Street Gang gathered in the park on 10th Street Park in the immediate aftermath of the shooting began to plan retaliation against the 7th Street Gang. Some began seeking firearms to use to retaliate.

Later that evening, members and associates of the 10th Street Gang who planned to retaliate for the shooting of Robert Sanibria arranged to congregated at Sam Thurmond's apartment in a building at the corner of Niagara Street and Carolina Street. And plans to attack suspected associates of the 7th Street Gang who were seen in the vicinity of 155 Pennsylvania Street began to take shape.

To participate in the planned retaliation, Defendant Lopez first drove Derrick Yancey, one of his best friends, a short distance from Sam Thurmond's apartment to a spot on Niagara Street to act as a lookout in anticipation of the attack. After dropping Yancey, the Defendant then made a U-turn and returned to the apartment where the principal murders were waiting. Yancey called the Defendant on the telephone and said, essentially, "tell the boys it's quiet as hell out here, ya'll boys be safe."

Defendant Lopez, having returned to Sam Thurmond's apartment, then drove

the four of the five eventual shooters to the vicinity of the murders in his vehicle. Sam Thurmond had a shotgun; Douglas Harville had a .44 caliber handgun; Michael Corchado-Jamieson had a cut down .22 caliber rifle; and co-defendant Jonathan Delgado had a .380 caliber handgun. Three of these shooters, Thurmond, Harville, and Corchado Jamieson, testified during the trial. The fourth, Delgado, was convicted with the Defendant.

As Defendant Lopez drove the armed shooters down Pennsylvania Street past the eventual victims, he said, "Don't shoot from the car." Shortly thereafter, as Yancey walked away from his lookout post, he heard shots fired "like it was the Fourth of July."

The 10th Street Gang members and associates who rode to the area of 155 Pennsylvania Street had met in an nearby alley. They burst from the alley shooting at people on and near the porch of 155 Pennsylvania Street. They shot and killed Brandon MacDonald and Darinell Young. At least five guns were fired during the attack. Brandon MacDonald was killed by a .380 caliber round that was recovered from his chest. Darinell Young died after being shot multiple times. Durell Maddox, Miguel Albaran, Aaron Williams, and Payge Diaz were also shot, but they survived.

Sam Thurmond later told Yancey that Defendant Lopez "dropped them off," that night. The Defendant later admitted to Jairo Hernandez, "I dropped them off," that night.

I.

Rule 29 Judgments of Acquittal are Not Warranted

In general, Rule 29(c) of the Federal Rules of Criminal Procedure authorizes a court to decide a case on its own and to acquit a defendant on legal grounds despite a jury verdict of guilty. But a motion for acquittal pursuant to Rule 29(c) may be granted only if, after viewing all of the evidence in the light most favorable to the United States, no rational juror could find the essential elements of the charged crime were proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998). In viewing the evidence in the light most favorable to the United States, the United States must be credited with every reasonable inference that could have been drawn in its favor. *Jackson*, 443 U.S. at 319; *United States v. Facen*, 812 F.3d 280, 286 (2d Cir. 2016). A Rule 29(c) motion can only be granted if the evidence that the defendant committed the crime alleged is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). Accordingly, a defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Si Lu Tian*, 339 F.3d 143, 150 (2d Cir. 2003).

Moreover, the ultimate questions raised by a challenge to the legal sufficiency of evidence are not whether a court believes that the evidence adduced at trial establishes a defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could reasonably reach that conclusion. *United States v. Valle*, 807 F.3d

508, 515 (2d Cir. 2015). The Second Circuit has emphasized repeatedly that "courts must be careful to avoid usurping the role of the jury." *Facen*, 812 F.3d at 286 (quoting *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003)). "Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *Id.*

Defendant Lopez repeatedly argues that evidence of his role as an accomplice to the two VICAR murders was insufficient as a matter of law to sustain the convictions because accomplice testimony against him did not satisfy a requirement of New York State law that such testimony be supported by corroborating evidence. The Defendant points out that New York Criminal Procedure Law § 60.22(1) provides that:

> A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

Id. The Defendant stresses that evidence that he acted with murderous intent when he drove some of the principal murderers to dropped them off near the scene of the murders shortly before the murders were committed was not sufficiently corroborated by non-accomplice testimony or independent evidence, and that judgments of acquittal must therefore be entered on the two VICAR murder counts against him.

Defendant Lopez's argument misapprehends the law. The New York corroboration requirement in CPL § 60.22(1) is "an evidentiary rule . . . not incorporated into a VICAR prosecution." *United States v. Diaz*, 176 F.3d 52, 87 (2d

Cir. 1999); *see*, *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1987) (§ 1952 RICO case); *United States v. Cutolo*, 861 F.Supp. 1142, 1146–47 (E.D.N.Y. 1994) (motion to dismiss § 1959 VICAR murder counts for failure to corroborate accomplice testimony as would be required in a New York state court denied). While an absence of non-accomplice corroboration may go to the relative weight of evidence of the Defendant's role in the murders, it is not required to support the verdicts that were otherwise supported by legally-sufficient evidence. *See e.g.*, *United States v. Riggi*, 541 F.3d 94, 110 (2d Cir. 2008).

Defendant Lopez also argues that there was otherwise insufficient evidence to establish beyond a reasonable doubt that he was guilty of the racketeering murders in violation of 18 U.S.C. § 1959(a) charged in Counts 3 and 4 of the Indictment for the April 17, 2006 murders of Brandon MacDonald and Darinell Young. The five elements of those offenses are:

> . . . (1) that the organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that that defendant committed or aided and abetted the murder, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

United States v. Persico, 645 F.3d 85, 105 (2d Cir. 2011) (citations omitted). Racketeering murder in violation of 18 U.S.C. § 1959(a) can be predicated on state-law murder in aid of racketeering. *United States v. Diaz*, 176 F.3d 52, 79 (2d Cir. 1999).

New York law provides, in relevant part, that "a person is guilty of murder in the

second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person . . . .” N.Y. Penal Law § 125.25(1). New York law further provides that a person is criminally liable as an accessory or accomplice to an offense committed by another person 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. When it comes to criminal culpability under New York law, whether a person was an actual perpetrator of the crime or guilty only as an accessory is irrelevant. *See e.g.*, *People v. Rivera*, 85 N.Y. 2d 766 (1995). There is no distinction between guilt as a principal or as an accessory, as long as the accessory has the same intent as the principal. *Id.*

The Court finds the evidence in this case legally sufficient to prove Defendant Lopez’s guilt of accessory to murder in violation of N.Y. Penal Law §§ 20.00 and 125.25(1) beyond a reasonable doubt. In anticipation of the 10th Street Gang's retaliatory attack on the 7th Street Gang, the Defendant drove Derrick Yancey, one of his best friends, from Sam Thurmond’s apartment at the corner of Carolina Street and Niagara Street, where the eventual attackers were preparing, to a spot on Niagara Street to act as a lookout in anticipation of the attack. After dropping Yancey, the Defendant then made a U-turn and returned to the apartment where the principal murders were waiting. Yancey called the Defendant on the telephone and said, essentially, “tell the boys it's quiet as hell out here, ya'll boys be safe.”

After Defendant Lopez left the apartment at Carolina and Niagara, with four

armed shooters in his vehicle, he drove down Pennsylvania Street past the eventual victims and said "Don't shoot from the car." Shortly thereafter, as Yancey walked away from his lookout post, he heard shots fired "like it was the Fourth of July."

Sam Thurmond later told Yancey that Defendant Lopez "dropped them off," that night. The Defendant later admitted to Jairo Hernandez, "I dropped them off," that night.

The Court finds the evidence at trial of Defendant Lopez's knowing actions and words was legally sufficient to establish beyond a reasonable doubt that the Defendant intentionally aided the principal murderers, and that he acted with the same intent to trigger the natural and probable consequences of the shooting attack as the principals when he did so. When the Defendant told the principals who he was driving to the attack not to shoot from inside his vehicle as they all rode past the intended shooting victims on Pennsylvania Street, he confirmed the evidence tending to show that he shared the principals' intent. *See People v. Whatley*, 69 N.Y.2d 784, 785 (N.Y.1987). That evidence was legally-sufficient to establish beyond a reasonable doubt that the Defendant was an accessory to the murders.

Defendant Lopez also seeks to argue that the evidence at trial was legally insufficient to establish that he participated in the murders to maintain or to increase his position in the 10th Street Gang as required by the VICAR murder statute. The Court disagrees. Testimony during the trial established that 10th Street Gang members commonly understood that they needed to "put in work" to maintain or

increase their status in the Gang. Proof of the Defendant's conduct demonstrated that he understood that his relative status with and in the Gang was dependent on his efforts to sell narcotics, to commit acts of violence, and to aid and abet racketeering and other criminal acts of other members of the Gang.

The evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that the drive-by mistaken-identity shooting of Sanibria was a compelling event for 10th Street Gang members, that retaliation against the 7th Street Gang was widely viewed as essential to the Gang among Gang members, and that Defendant Lopez concluded he would be an active participant in the retaliation. The Court finds that a rational jury could find beyond a reasonable doubt, based upon the evidence at trial, that the Defendant understood that it was expected that Gang members would help with the murderous retaliation against the 7th Street Gang, and that he participated in the retaliation with intent to murder in furtherance of his status in the Gang. *See United States v. Burden*, 600 F.3d 204, 220 (2d Cir. 2010).

Defendant Lopez would also contest the legal sufficiency of the evidence of his participation in the narcotics-trafficking conspiracy, and of his possession of firearms in furtherance of a drug-trafficking crime. Based upon the testimony of witnesses about the Defendant's participation in marijuana sales, and testimony of the Defendant's personal possession of firearms, the Court finds no basis to enter a judgment of acquittal on these charges, either.

II.

A New Trial
is Unwarranted

Rule 33 of the Federal Rules of Criminal Procedure provides that a court may grant a defendant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a); *United States v. James*, 712 F.3d 79, 107 (2d Cir. 2013). A defendant's Rule 33 burden to show that a new trial is warranted is a heavy burden. *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009). A court may exercise its authority under Rule 33 only "sparingly and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992) (quotations omitted). "To grant [a] motion [for a new trial], [t]here must be a real concern that an innocent person may have been convicted." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013) (quotations omitted)).

On the one hand, Rule 33 "confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). A trial court is permitted to weigh the evidence and credibility of witnesses. *Id.* at 1413.

On the other hand, "motions for a new trial are disfavored in this Circuit; the standard for granting such a motion is strict . . . ." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995) (ellipsis added). While a court has "broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29," *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001), the "court must strike a

balance between weighing the evidence and credibility of witnesses and not wholly usurp[ing] the role of the jury." *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000) (quotation omitted). "It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment" under Rule 33. *Sanchez*, 969 F.2d at 1414. A court's rejection of trial testimony does not automatically permit a new trial; the court "must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *Ferguson*, 246 F.3d at 134. "The ultimate test is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005) (quotation omitted).

Defendant Lopez argues that the Court seriously prejudiced his case by erroneously ruling that documents about his employment history and educational record were inadmissible. The Defendant is generally correct when he points out that a defendant is authorized by Federal Rule of Evidence 404(a)(2)(A) to introduce evidence of a pertinent character trait to attempt to raise doubt whether he committed offenses. *Id.* That evidence usually consists of a witness' testimony of a personal opinion, or of reputation for the pertinent trait within a relevant community, consistent with the dictates of Federal Rule of Evidence 405 governing the methods of proving character traits, however. *See e.g., United States v. Riley*, 638 Fed.Appx. 56, 64 (2d Cir. 2016). The Defendant argues that exclusion of the employment and educational records that he offered into evidence erroneously prevented him from introducing evidence of his law-abiding character, even though he elicited no testimony in the

form of an opinion or reputation for being a law-abiding person.

Defendant Lopez overlooks that he was permitted by the Court to elicit some testimony from his two alibi witnesses, and from some of the witnesses called by the United States, about his employment and his education. That testimony was relevant background evidence that was clearly admissible within the Court's discretion. *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988)[1]. On the other hand, the documents about the Defendant's employment history and educational record, specifically tendered by the Defendant to show a character trait of law-abidingness, were specific-instance evidence that was inadmissible as evidence of his character. *See United States v. Doyle*, 130 F.3d 523, 542 (2d Cir. 1997). Moreover, because the documents were cumulative of the background testimony of the Defendant's witnesses, because the Defendant did not elicit opinion or reputation evidence of the character trait, and given the risks of juror confusion if the documents had been admitted, it was not an error, let alone a materially prejudicial error, to rule that the documents were inadmissible. Fed. R. Evid. 403.

Defendant Lopez also argues that he should be granted a new trial, in part, due to a spectator outburst in the presence of the jury during the closing argument of the United States. The Court was later informed the spectator was a close relative of one of the two victims of the VICAR murders. In what was an angry and emotionally-

[1] Defendant Lopez's belated suggestion that the United States opened the door to admission of the documentary evidence of his employment history and educational record when it elicited testimony from cooperating witnesses about their own backgrounds is unpersuasive. The Defendant's counsel was permitted to ask witnesses called by the United States questions about the Defendant's background, and counsel did so with some of the witnesses.

distraught voice, the spectator interrupted the prosecutor's closing, shouted that the defendants were murderers, and otherwise seemed to vilify the defendants in a garbled rant that trailed off as she was removed from the courtroom by a security officer at the Court's direction. Aside from calling the defendants murderers, the Court could not tell what the spectator was shouting.

It would have been a miscarriage of justice if the Defendant Lopez had been subject to trial in an atmosphere disturbed by a victim-relative's inflamed passions. Due process, including specifically the presumption of innocence, would have been violated if the fact-finding process was prejudicially undermined by such an outburst. *See Estelle v. Williams*, 429 U.S. 501, 503-06 (1976). But the Court concludes the spectator's outburst ultimately resulted in no significant prejudice to any of the defendants. The victim-relative's shouting was quelled at the direction of the Court, and the Court delivered a curative instruction to the jury. The Court's notes reflect that it instructed the jury essentially as follows:

> As I have admonished you repeatedly throughout the trial, your verdict in this case must be based solely on the evidence presented in this Courtroom in accordance with my instructions. Before our recess, there was an outburst from the public gallery in the Courtroom. As you now well know, you must completely disregard any aspect of that outburst and put it out of your minds because it is not evidence. The parties have no opportunity to respond to that outburst. I am instructing you to disregard it. It would be a violation of your oath as jurors to allow yourselves to be influenced in any manner by that outburst.

The curative instruction also echoed repeated warnings during the trial that the jurors not begin deliberations until given final instructions on the law. And the Court later

emphasized to the jurors in its final instructions that the verdict had to be based solely upon evidence admitted during the trial, and not be influenced by sympathy. The Court believes that the jurors followed the Court's instructions, and that the jury was not influenced by the victim-relative's outburst. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (*citing Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). Accordingly, after due consideration, the Court finds the victim-relative's outburst did not deny the Defendant a fair trial, *see United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009), and did not materially prejudice the rights of the defendants.

Defendant Lopez argues that the jury must have been influenced by the victim-relative's outburst (and by other errors in the Court's conduct of the trial) because the jury returned the verdicts after only about three and a half hours of deliberations, and that was not enough time to consider the evidence introduced during the approximately five-and-a-half-week long trial. Based partly upon the Court's own observations while presiding over the trial, the Court disagrees. Although the trial was fairly long, the jury heard a lengthy series of closing arguments and rebuttal arguments, it had a copy of the Court's instructions on the law, and it had a lengthy verdict form to help it organize its deliberations.

Moreover, the proof of the murders of Darinell Young and Brandon MacDonald, of the attempted murders of others who were shot at the same time on April 17, 2006, of drug-trafficking, and of specific instances of other criminal activity, was generally strong. There was substantial overlap of the proof underlying different counts. Proof of the VICAR murders of Darinell Young and Brandon MacDonald was

also the subject of Special Factors findings underlying the RICO conspiracy count, for example.

The jury's task was not so difficult or complex that the Court will find misconduct from the relative speed of deliberations. *See e.g.*, *United States v. Barajas*, 2011 WL 5999024, at *2 (D.Kan. Nov. 30, 2011) (citing cases). Given the evidence against the defendants, the roughly three-and-a-half-hour duration of deliberations is as probative of the efficiency of the deliberations as it is of the Defendant's speculation that the jury was influenced by the isolated outburst during the prosecutor's closing and by errors in the conduct of the trial he contends were made.

The Court instructed the jury routinely throughout the trial of Defendant Lopez and his three co-defendants that it should not deliberate until the close of the evidence, and until it was given final instructions on the law. The jury was instructed to consider each defendant individually, and to consider each of the charged offenses separately. "[A]bsent evidence to the contrary, [the Court] presume[s] that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the [C]ourt." *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997) (quotation and citation omitted). "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (*citing Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). The Defendant offers no evidence supporting his speculation that the jury may have improperly reached its verdicts and unanimous findings. The Court observed no evidence of juror misconduct. Speculation about reasons for the

duration of the jury's deliberations, or about the content of the deliberations, does not warrant a new trial.

Defendant Lopez next renews an objection to denial of his request for a jury instruction on multiple conspiracies. However, because the Defendant has not even tried to show that the trial evidence was susceptible to inferences that there were separate networks operating independently of one another, and that he was substantially prejudiced by the Court's decision to deny the request for a multiple conspiracies charge. *See United States v. Maldonado–Rivera*, 922 F.2d 934, 962 (2d Cir. 1990).

The burden to show a basis in the evidence for a requested jury charge is on Defendant Lopez. *United States v. Bok*, 156 F.3d 157, 163 (2d Cir. 1998). The Defendant only suggests, in conclusory fashion, that the multiple-object RICO conspiracy and the multiple object drug-trafficking conspiracy with which he was charged were somehow by their nature justification for a multiple-conspiracies instruction. His suggestion is far from sufficient to carry his burden, and is without merit. *United States v. Maldonado–Rivera*, 922 F.2d at 962.

Similarly, Defendant Lopez also renews a request for a state-law instruction on the defense of extreme emotional disturbance on behalf of a co-defendant who was not charged with the VICAR murders[2]. The Defendant has not even attempted to

[2] The jury found co-defendant Delgado guilty of the deaths of Darinell Young and Brandon MacDonald in violation of New York Penal Law §§ 125.25(1) and 20 as a sentencing factor for the RICO conspiracy count. Dkt. No. 1774, p. 6. Delgado sought the extreme emotional disturbance instruction. Defendant Lopez does not explain how he was prejudiced by the Court's ruling that the instruction was not appropriate as to co-defendant Delgado.

establish that there was at least some foundation in the evidence that the Defendant himself was suffering extreme emotional disturbance manifesting itself in a profound loss of his self-control at the time of the murders. *See People v. McKenzie*, 19 N.Y.3d 463, 466 (2012). This argument on behalf of the Defendant is therefore also without merit.

Defendant Lopez's final arguments in support of a new trial are that he is entitled to a hearing and various relief based upon newly-discovered evidence consisting of statements of two persons that the Defendant contends are materially exculpatory under *Brady* and *Agurs*[3]. The letters and an affidavit are not sufficient to warrant a new trial, or even to grant any other relief, however.

In general, a Rule 33 motion for a new trial based upon newly-discovered evidence can be granted "only in the most extraordinary circumstances." *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992). The standard for considering such a motion is:

> (1) the evidence be newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidenc

United States v. Owen, 500 F.3d 83, 88 (2d Cir. 2007) (citations omitted). Defendant Lopez has submitted letters from an accomplice trial witness, Derrick Yancey, and has submitted a letter and affidavit from Cebrinn Hill, who was also a participant in the murders of Brandon MacDonald and Darinell Young. Suffice it to say, the

[3] *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

proffered statements, which amount to no more than unsupported opinions on the ultimate issues of guilt, are not exculpatory, or even impeaching.

Moreover, having observed Derrick Yancey's testimony at trial, the Court finds no basis for a hearing concerning Yancey's potential testimony in Defendant Lopez's submissions, s*ee United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir. 1987), and no basis for any of the relief the Defendant seeks. Cebrinn Hill's proffered testimony, which need not be summarized here, is far too vague to be materially exculpatory, let alone likely to result in an acquittal on retrial of the any of charges against the Defendant. For all of the above reasons, the Defendant has not met his heavy burden to show that it is a "manifest injustice" to let the jury's guilty verdicts stand.

CONCLUSION

For the foregoing reasons, the motions of Defendant Ismael Lopez for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), or for a new trial pursuant to Fed. R. Crim. P. 33, are denied. Dkt. Nos. 1590, 2092.

Sentence will be imposed January 30, 2017, at 12:00 p.m.

The schedule for the submission of sentencing papers is as follows: Statements with Respect to Sentencing Factors, objections and motions due by January 11, 2018; responses to objections and motions due by January 18, 2018; any character letters and any sentencing memorandum in support of the defendant due by January 18, 2018; any motions to adjourn sentencing due by January 22, 2018; final Presentence Investigation Report due by January 25, 2018; United States' response to legal arguments in defendant's sentencing memorandum due by January

25, 2018.

SO ORDERED.

Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: December 22, 2017

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of November, two thousand twenty.

United States of America,

Appellee,

v.

Jonathan Delgado, Matthew Smith, Ismael Lopez,

Defendants - Appellants.

ORDER

Docket Nos: 15-1453,
18-328,
18-369

Appellant, Ismael Lopez filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk