No.

in the

Supreme Court

of the

United States

Term,

AUSTIN WOODS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

In 1946, this Court enunciated the *Pinkerton* theory of liability, which permits a defendant to be held liable for a substantive offense committed by a co-conspirator if the offense was committed as part of the conspiracy. Where a defendant is convicted of conspiracy, and charged with an 18 U.S.C. § 924(c) offense relating to a substantive crime of violence committed by another, can the Government prove the "crime of violence" as to a defendant using only *Pinkerton* liability?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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The Petitioner, Austin Woods, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on September 17, 2021.

OPINION BELOW

The Sixth Circuit's opinion in this matter is published at 14 F.4d 544, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on September 17, 2021. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

Austin Woods and his brother Antoine grew up in Detroit, Michigan. At a young age, Austin and Antoine began rapping. This led to the formation of HNIC, a rap label/group. Antoine (also known as "Pesh") became successful, and was well known in the Detroit rap scene. Antoine and Austin were interviewed on radio and on video about their music, and enjoyed significant downloads of their tracks. Austin's rap name was HNIC Ken. Other rappers sought to have them either write lyrics for them, or appear on their own recordings to increase sales.

While in high school, Antoine had a disagreement with a fellow student, James Williams (Baby James). This rivalry continued after high school. Baby James also considered himself a rapper, and would rap lyrics about Antoine and HNIC, and post messages on social media that where derogatory to Antoine and HNIC. Baby James had his own group or crew, known as SRU. The rivalry between Baby James and Antoine was known in the rap world as a "beef."

On October 24, 2015, Antoine, Austin, and a couple of their friends were at the Fairlane Mall in Detroit, Michigan. There, they were confronted by Baby James, his cousin Eric Green, and Carlton Green, James' brother. A fight broke out, and Antoine, Austin and their friends fled. Eric Green and the others caught up with Appellant Austin Woods, and beat him. The Government alleged that because of this incident, Antoine determined to kill Baby James, and that Petitioner Austin, along with other members of HNIC, agreed to help.

On December 20, 2015, a shooting occurred at 557 Alger Street, the home of Baby James' grandmother. Eric Green was there. According to Green, he heard shots, and saw bullets come through the house. Brenda Williams, the grandmother, testified that she saw through her peephole someone trying to fix his gun, so she got her gun to confront the person. However, when she opened the door, they were gone. Evidence presented at trial placed Antoine's cell phone near the home at the time of the shooting. The Government's theory was that Antoine shot into the home on that evening, believing that Baby James was present. Donovann Rhymes, a witness for the Government who claimed to be a member of HNIC, testified that prior to the shooting, he surveilled the Alger Street location with Antoine, but was not present on the night of the shooting.

Petitioner Austin Woods was charged on September 6, 2017 with: one count of conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5); one count of conspiracy to commit assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(6); one count of discharging a weapon during a crime of violence (the conspiracy counts were listed as the underlying charge), in violation of 18 U.S.C. § 924(c); one count of discharging a weapon during a crime of violence (underlying charge was an assault of Yolanda Green for which Petitioner Woods was not charged), in violation of 18 U.S.C. § 924(c); one count of discharging a weapon during a crime of violence (underlying charge was the Alger Street shooting for which Petitioner Woods was not charged),

in violation of 18 U.S.C. § 924(c); and one count of discharging a weapon during a crime of violence (assault on Brenda Williams in March, 2016 for which Petitioner Austin Woods was not charged)), in violation of 18 U.S.C. § 924(c).

Petitioner Woods and his brother both plead not guilty, and proceeded to trial. The jury eventually returned a verdict as to Petitioner Woods on two counts: the conspiracy to commit murder count listed as Count 1 of the indictment, and one count of 18 U.S.C. § 924(c) relating to the Alger Street shooting (Count 11). The jury had been instructed, as to Count 11 of the indictment, that they could find Woods guilty of the discharge of the firearm through a *Pinkerton* theory of liability; that is, if they found Woods was a member of the conspiracy alleged in Count 1, and during the conspiracy, another co-defendant committed the firearms offense, and that it was reasonable foreseeable that the firearms offense would be committed, then he could be criminally liable.

After trial, the defense moved to dismiss the § 924(c) charge, arguing that, given this Court's pronouncement in *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), Petitioner Woods' conspiracy conviction could not support a finding that a crime of violence was committed. The district court, in denying this claim, held that because Count 11 was premised on a violation of Mich. Comp. Laws § 750.83, it was a crime of violence. (Appendix 2, p.9) The court did not address the *Pinkerton* aspect of liability in its analysis. Having upheld this conviction,

Petitioner Woods was sentenced to 48 months on the conspiracy count, with a consecutive 120 months for his 18 U.S.C. § 924(c) conviction.

Petitioner Woods appealed his conviction to the Sixth Circuit Court of Appeals, raising four claims:

1. Woods' conviction for conspiracy to commit murder in aid of racketeering is not a crime of violence, so as to support a conviction under 18 U.S.C. § 924(c).
2. The Government failed to prove that Woods took an affirmative act in support of the discharge of a firearm, so as to support a conviction for 18 U.S.C. § 924(c) under an aiding and abetting theory.
3. Woods did not knowingly and intentionally join a conspiracy to commit murder, so as to support a conviction under 18 U.S.C. § 1959(a)(5).
4. The reference to an uncharged shooting of a three month old was sufficiently egregious so as to warrant a mistrial.

The Sixth Circuit denied this appeal in its entirety on September 17, 2021. As pertains to the first claim, the court held:

> Finding the Woods brothers guilty through a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the § 924(c) elements clause. [ ] Because both VICAR attempted murder and VICAR assault with a

dangerous weapon are crimes of violence, not conspiracy crimes, the Woods brothers' argument fails.

(Appendix 1, p.8)

REASON FOR GRANTING THE WRIT

1. A conspiracy theory of liability cannot be used to support an 18 U.S.C. § 924(c) charge, as conspiracy is an inchoate offense which does not contain, as an element, the use of force

18 U.S.C. § 924(c) requires that in order for a defendant to be convicted of discharging a firearm, that firearm must be discharged during a "crime of violence." Petitioner Austin Woods was not present, nor did he actively participate in the shooting which took place on December, 6 2105 at Alger Street address. Further, the only offense for which Petitioner Woods was convicted (other than the 18 U.S.C. § 924(c) charge at issue) was one count of VICAR conspiracy. Because VICAR conspiracy is not a crime of violence, and because Woods' only tie to a discharge of a firearm is through *Pinkerton*/conspiracy liability, his conviction pursuant to 18 U.S.C. § 924(c) cannot stand. The Sixth Circuit's holding, that a conspiracy conviction and *Pinkerton* liability can satisfy the crime of violence element of 18 U.S.C. § 924(c), is contrary to this Court's precedents. Certiorari should issue to reverse the Sixth Circuit's holding.

A. A conspiracy charge cannot be an underlying crime of violence for purpose of 18 U.S.C. § 924(c)

18 U.S.C. § 924(c) contains two distinct conduct elements: the commission of a crime of violence, and the use of a firearm as part of that crime of violence. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280, 119 S. Ct. 1239, 1243, 143 L. Ed. 2d 388 (1999). This Court has, for the last decade or so, provided continuing guidance

on the meaning of the term "crime of violence." Most recently, the Court determined that to be a crime of violence, the crime must have, "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *United States v. Davis*, 139 S. Ct. 2319, 2324, 204 L. Ed. 2d 757 (2019)(finding unconstitutional the "residual clause" of 18 U.S.C. § 924(c)(3)(B)). To determine whether an offense has such an element, this Court has required use of the categorical approach, in which the elements of the offense are reviewed to determine whether they "necessarily involve[] the defendant's 'use, attempted use, or threatened use of physical force against the person of another.' [ ] If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard." *Borden v. United States*, 141 S. Ct. 1817, 1822, 210 L. Ed. 2d 63 (2021).

Petitioner Woods' "underlying offense" was for conspiracy; specifically, conspiracy to commit murder in aid of racketeering. "To prove a § 1959(a) conspiracy, the government must establish, inter alia, that the defendant (1) agreed with others to commit a violent crime—either murder or kidnapping, see § 1959(a)(5) . . . . . —and (2) entered into that agreement 'for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.'" *United States v. Basciano*, 599 F.3d 184, 198–99 (2d Cir. 2010).

Because the § 1959(a) conspiracy does not have, as an element of the offense, the use of force against the person of another, it cannot be a proper predicate for

purposes of 18 U.S.C. § 924(c). One circuit has held that 18 U.S.C. § 1959(a)(5) is not a proper predicate to support an 18 U.S.C. § 924(c) conviction.1 In *United States v. Lewis*, 818 F. App'x 232 (4th Cir. 2020), the Government conceded that conspiracy to commit attempted murder in aid of racketeering activity could not support an 18 U.S.C. § 924(c) conviction. The Fourth Circuit agreed, holding "[b]ecause Lewis's § 924 conviction was predicated on his Count 1 and Count 2 racketeering conspiracy convictions, and because those conspiracy charges do not require such proof of force, see 18 U.S.C. §§ 1959(a)(5); (6), the racketeering conspiracy convictions do not qualify as predicate crimes of violence." *Id.*; accord *United States v. Rodriguez*, No. 94 CR. 313 (CSH), 2020 WL 1878112 (S.D.N.Y. 2020)(§ 924(c) counts tied to a conspiracy count brought pursuant to 18 U.S.C. § 1959(a) were no longer valid, even where the § 924(c) count also listed substantive counts). Accordingly, a conspiracy conviction cannot satisfy the "crime of violence" element of 18 U.S.C. § 924(c).

B. *Pinkerton* liability cannot be used to make an inchoate offense a crime of violence

The Sixth Circuit determined that, even though Petitioner Woods' only other offense of conviction was conspiracy, because the 18 U.S.C. § 924(c) count referenced

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1 Similarly, at least three circuits have held that RICO conspiracies are not crimes of violence. See *United States v. Simmons*, 11 F.4th 239 (4th Cir. 2021), *United States v. Jones*, 935 F.3d 266, 271 (5th Cir. 2019) *United States v. Green*, 981 F.3d 945, 951–52 (11th Cir. 2020).

the attempted murder and assault contained in other counts of the indictment, these could be proper predicates for Petitioner Woods' 18 U.S.C. § 924(c) conviction. (Appendix 1, p.8) The Sixth Circuit relied on *Pinkerton* liability for this proposition.

The judicially-created *Pinkerton* doctrine allows the Government to argue to a jury that "it may find a defendant guilty of a substantive offense that he did not personally commit if it was committed by a coconspirator in furtherance of the conspiracy, and if commission of that offense was a reasonably foreseeable consequence of the conspiratorial agreement." *United States v. McCoy*, 995 F.3d 32, 63 (2d Cir. 2021). As put by the Ninth Circuit: "*Pinkerton* liability depends on the existence of a cognizable conspiracy; without a valid conspiracy count, the *Pinkerton* theory cannot be a basis for the other convictions." *United States v. Yates*, 16 F.4th 256, 270 (9th Cir. 2021). Although under a *Pinkerton* theory of liability the actus reus is supplied by another, "[t]he *mens rea* necessary to transform the act into a criminal offense is evidenced by the defendant's participation in the conspiracy. *United States v. Thirion*, 813 F.2d 146, 153 (8th Cir. 1987).

The Government did not charge Petitioner Woods with the substantive assault/attempted murder offense which they claim was the crime of violence for purposes of the 18 U.S.C. § 924(c) count. Nonetheless, the Government argued they could still rely on the assault through *Pinkerton* liability.2 The Sixth Circuit agreed,

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2 It is worth noting that at least one circuit has opined that in light of this Court's

finding "[w]hile it is unusual for the government to rely on *Pinkerton* liability as the basis for a § 924(c) charge without charging the defendant with the underlying predicate crime of violence, as is the case here with Austin, the law permits the government to make this questionable strategic choice. Charging the underlying predicate offense is not required for liability under § 924(c); it is enough if the defendant may be prosecuted in a court of the United States for the predicate offense." (Appendix 1, p.9)

Woods submits that *Pinkerton* liability cannot suffice to prove the crime of violence element. Because it relies solely on participation in a conspiracy, an inchoate offense, it cannot by definition contain an element of the use of force. The only *mens rea* Woods was found guilty of was participating in an agreement. To allow criminal liability under these circumstances would be far from Congressional intent in promulgating 18 U.S.C. § 924(c), which was designed to create a discrete offense and separate punishment for crimes of violence where a weapon is also possessed. See *Abbott v. United States*, 562 U.S. 8, 12, 131 S. Ct. 18, 22, 178 L. Ed. 2d 348 (2010).

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pronouncement in *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), the application of *Pinkerton* liability to 18 U.S.C. § 924(c) may no longer be valid. *United States v. Walton*, No. 18-50262, 2021 WL 3615426, at *2 (9th Cir. 2021).

Further, the jury was never instructed that they needed to find Petitioner Woods guilty beyond a reasonable doubt of the assault; either under a direct or *Pinkerton* theory of liability. The jury was only told that the assault was the predicate: the jury was never instructed that Petitioner Woods needed to criminally participate in the assault. Other than the § 924(c) count, the jury only convicted Woods of conspiracy. To hold Woods liable for the assault, without a jury finding beyond a reasonable doubt, would violate the Sixth Amendment jury trial right. See *United States v. Haymond*, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019).

The Sixth Circuit's decision also belies what actually occurred at trial. During closing arguments, the Government informed the jury: "Austin Woods was a member of the murder conspiracy charged in Count 1, conspiracy to murder James Williams. During that conspiracy, his brother, Antoine and Donovann Rhymes, and others, committed the four shootings, the four VICARs, and the corresponding gun crimes. And then third, those firearm crimes, as I just said, helped further the goal of the conspiracy, the goal being to shoot and kill James Williams. . . . . What matters is that the uses of the firearms were reasonably foreseeable to him and within the scope of what he agreed to, and he agreed to target and murder Baby James." Thus, the Government solely relied on the conspiracy conviction itself in their arguments to the jury, not *Pinkerton* liability.

To hold Petitioner Woods liable for a violation of 18 U.S.C. § 924(c) based solely on *Pinkerton* liability removes the element of "crime of violence" from the offense. This Court should grant certiorari, and hold that where a defendant is convicted of conspiracy, and the Government relies solely on *Pinkerton* liability, a conviction under 18 U.S.C. § 924(c) cannot be supported.

CONCLUSION

Woods requests this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the 18 U.S.C. § 924(c) conviction.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER September 17, 2021
2. DISTRICT COURT DECISION March 2, 2020

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0220p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTOINE WOODS (20-1214); AUSTIN WOODS (20-1215),
Defendants-Appellants.

Nos. 20-1214/1215

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:17-cr-20022—Nancy G. Edmunds, District Judge.

Argued: June 9, 2021

Decided and Filed: September 17, 2021

Before: COOK, GIBBONS, and DONALD, Circuit Judges.*

COUNSEL

ARGUED: Jeffrey B. Lazarus, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant in 20-1214. Kevin M. Schad, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-1215. William M. Sloan, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Jeffrey B. Lazarus, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant in 20-1214. Kevin M. Schad, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-1215. William M. Sloan, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

*The Honorable Deborah L. Cook participated in this decision before she took inactive senior status on August 27, 2021.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Antoine and Austin Woods (collectively "the Woods brothers") appeal their convictions and sentences. The Woods brothers participated in multiple drive-by shootings in an attempt to murder a member of a rival gang. Antoine Woods was indicted for several offenses in violation of the Violent Crimes in Aid of Racketeering Act ("VICAR"): conspiracy to commit murder in aid of racketeering; attempted murder in aid of racketeering; assault with a dangerous weapon in aid of racketeering; using, carrying, and discharging a firearm during and in relation to a crime of violence; and obstruction of justice. Austin Woods was indicted for conspiracy to commit murder in aid of racketeering and using, carrying, and discharging a firearm during and in relation to a crime of violence. After a joint trial, the jury rendered a guilty verdict for both brothers on the conspiracy charge and one of the firearm charges. The jury also rendered a guilty verdict for Antoine on the charges of attempted murder, assault with a dangerous weapon, an additional firearm charge, and obstruction of justice. The Woods brothers appealed, and this court consolidated their cases for briefing and submission. We vacate Antoine Woods's conviction in Count 9 for attempted murder in aid of racketeering and remand to the district court to amend its judgment as to Counts 1, 3, 16, and 17. We affirm Antoine and Austin Woods's convictions on all other counts.

I.

Antoine and Austin Woods were members of a Detroit-based group known as HNIC. The Woods brothers claim that HNIC was a rap group that made music videos to post on social media. The government argues, however, that HNIC was a street gang "engaged in drug dealing, intimidation, and violence." CA6 R. 51, Appellee Br., 3. Co-defendant and fellow HNIC member Donovann Rhymes testified during trial that HNIC was a gang involved in criminal activities including "[d]rug sales, attempt[ed] murders, murders, [and] scams." DE 220, Trial Tr., Page ID 2399. According to Rhymes, HNIC sold illegal drugs including heroin, marijuana, prescription opioids, and codeine drink. Rhymes also stated that HNIC members promoted and protected the gang's reputation by engaging in retributive violence against anyone who

disrespected HNIC. The Woods brothers were two of HNIC's leaders and gave other members orders "[t]o assault, kill, [and] rob people." *Id.* at Page ID 2396, 2401.

On October 24, 2015, the Woods brothers and other HNIC members got into a fight with James Williams, Carlton Green, and Eric Green at the Fairlane Mall in Detroit. Williams was a member of a rival gang, and he and Antoine Woods had a longstanding feud. The two groups began fighting with knives and poles at the mall, and eventually the HNIC members—including the Woods brothers—ran away. Williams and his associates ran after them, tackled Austin, and beat him until the mall security guards broke up the fight. After the altercation, Williams created multiple memes and posted them to social media making fun of HNIC, and specifically the Woods brothers, for running away during the fight.

Williams's social media posts upset HNIC, including the Woods brothers, and they decided to respond. Rhymes testified that shortly after the Fairlane Mall fight he heard James Eldridge, another HNIC leader, tell Antoine that he needed to "do something about [Williams's social media posts.]" DE 220, Trial Tr., Page ID 2456–57. Rhymes explained that he understood Eldridge to mean that Antoine should shoot Williams or otherwise retaliate against him. Two days later, Eldridge texted the Woods brothers and told them they needed to respond to Williams's social media taunts. DE 203, Trial Tr., Page ID 1796 (ATF Special Agent Matthew Rummel describing Eldridge's text as "[i]t says, man, y'all better fuck this N word up, and then an emojicon of a person crying."). Austin responded, "I ain't posting nothing. I'm on a mission for real," and Antoine said "No mo internet games bro, just know dat." *Id.* at Page ID 1798, 1800. Rhymes testified that he subsequently went with the Woods brothers to surveil a residence associated with Williams "to kill him." DE 220, Trial Tr., Page ID 2457–59. On November 30, 2015, Austin texted Antoine a link to a YouTube video that showed the address of Williams's grandmother's house and told Antoine that he thought Williams was hiding there.

On December 6, 2015, there was a shooting at the King of Diamonds strip club where Williams was having a party. Rhymes testified that HNIC was responsible for the shooting and that he went to the strip club with Antoine and two other HNIC members to kill Williams. The four HNIC members waited in cars outside of King of Diamonds until they saw Williams exit the club. Rhymes testified that upon seeing Williams, Antoine said "there you go" and pointed his

gun at the back of Williams's head. DE 220, Trial Tr., Page ID at 2506. Antoine and Rhymes both fired their guns at Williams, and Williams and his associates returned fire. Rhymes, Antoine, and the other HNIC members fled the scene after exchanging multiple shots with Williams's group.

On December 20, 2015, there was another shooting, this time at Williams's grandmother's house. Eric Green, Williams's cousin, was in the house during the shooting and testified that he believed five to eight shots were fired into his grandmother's house. Green did not see who fired the shots. Antoine later told Rhymes that he "tore [Williams's] grandma's house up," which Rhymes understood to be an admission that Antoine was the shooter. DE 222, Trial Tr., Page ID 2705.

On September 6, 2017, a federal grand jury indicted the Woods brothers on multiple charges related to the December 6, 2015 shooting, the December 20, 2015 shooting, and two other drive-by shootings directed at Williams. On August 08, 2018, the grand jury returned a second superseding indictment. Relevant to this appeal, both Antoine and Austin were charged with conspiracy to commit murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5) (Count 1); using, carrying, and discharging a firearm on or about December 6, 2015, during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c) and 2 (Count 5); and using, carrying, and discharging a firearm on or about December 20, 2015, during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c) and 2 (Count 11).[1] Additionally, Antoine was charged with attempted murder in aid of racketeering on or about December 6, 2015, in violation of 18 U.S.C. §§ 1959(a)(5) and 2 (Count 3); assault with a dangerous weapon in aid of racketeering on or about December 6, 2015, in violation of 18 U.S.C. §§ 1959(a)(3) and 2 (Count 4); attempted murder in aid of racketeering on or about December 20, 2015, in violation of 18 U.S.C. §§ 1959(a)(5) and 2 (Count 9); and assault with a dangerous weapon in aid of

[1]Antoine and Austin were also charged with § 924(c) violations related to the two additional shootings, but both were acquitted of those charges.

racketeering on or about December 20, 2015, in violation of 18 U.S.C.§§ 1959(a)(3) and 2 (Count 10).[2]

The Woods brothers were tried jointly. The government's first witness was ATF Special Agent Matthew Rummel. When asked to describe the nature of the initial investigation into HNIC, Rummel testified that "[v]arious members were either witnesses or party to some violent crimes, including a drive-by shooting of a residence in which a three-month old was killed." DE 323, Trial Tr., Page ID 4644. Shortly thereafter, defense counsel moved for a mistrial, arguing that mentioning the killing of a small child was extremely prejudicial. The district court denied the motion and later gave the jury a limiting instruction to disregard Rummel's comment about the drive-by shooting.

At the close of the government's proof, the Woods brothers jointly moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 and the district court denied the motion. At the close of all evidence, the district court instructed the jury that it could find the Woods brothers guilty of the § 924(c) charges under a theory of *Pinkerton* liability. Relevant to this appeal, a jury convicted Antoine of Counts 1, 3, 4, 5, 9, 10, and 11; Austin was convicted of Counts 1 and 11. The Woods brothers filed post-trial motions for judgment of acquittal and for a new trial, which the district court denied. The district court sentenced Antoine to a total of 384 months of imprisonment and Austin to a total of 168 months of imprisonment. The Woods brothers appealed, and their cases were consolidated for briefing and submission.

The Woods brothers raise three common issues on appeal, and each makes several individual arguments. Both defendants challenge whether their § 924(c) charges were based on proper predicate crimes of violence given that the jury was instructed on—and may have come to a guilty verdict based on—a *Pinkerton* theory of liability. They also argue that there was insufficient evidence to support their convictions of conspiracy to commit murder in aid of racketeering and that the district court abused its discretion by denying their motion for a mistrial after Rummel improperly connected HNIC to the shooting of a young child. Individually, Austin

[2]Antoine was also charged with attempted murder in aid of racketeering and assault with a dangerous weapon in aid of racketeering related to the other shootings of which he was acquitted. Additionally, he was indicted and found guilty on two counts of obstruction of justice, which he does not challenge on appeal.

argues that his § 924(c) charge was based on insufficient evidence and that there was insufficient evidence that he knowingly joined the conspiracy to commit murder. Antoine separately argues that his convictions on Counts 9 and 10 violate the Double Jeopardy Clause.

II.

A. 924(c) Charges

1. Standard of Review

We review de novo issues of law, including whether an offense is a crime of violence under § 924(c)(3). *Manners v. United States*, 947 F.3d 377, 379 (6th Cir. 2020).

We review a challenge to the sufficiency of the evidence in a criminal case de novo. *United States v. Garcia*, 758 F.3d 714, 718 (6th Cir. 2014). When the defendant challenges the sufficiency of the evidence to support a jury verdict, we review the evidence in the light most favorable to the government. *United States v. Bailey*, 973 F.3d 548, 564 (6th Cir. 2020). We will affirm a defendant's conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hendricks*, 950 F.3d 348, 352 (6th Cir. 2020) (quoting *United States v. Vichitvongsa*, 819 F.3d 260, 270 (6th Cir. 2016)). "[C]ircumstantial evidence alone can defeat a sufficiency challenge." *United States v. Volkman*, 797 F.3d 377, 390 (6th Cir. 2015). "We can neither independently weigh the evidence, nor make our own assessment of the credibility of the witnesses who testified at trial." *Garcia*, 758 F.3d at 718.

2. Merits

a. Predicate Crimes

18 U.S.C. § 924(c) penalizes using, carrying, or possessing a firearm "during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." If the firearm is discharged, as in this case, the minimum term of imprisonment is 10 years. *Id.* § 924(c)(1)(A)(iii). Until recently, there were two ways an offense could qualify as a predicate crime of violence for purposes of § 924(c). Under the elements clause, a crime of violence is defined as an "offense that is a felony and . . .

has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 924(c)(3)(A). Under the residual clause, a crime of violence was defined as any felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(B). However, the Supreme Court struck down the residual clause as unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Before *Davis*, conspiracies to commit violent crimes were proper predicate offenses under the residual clause. *See United States v. Ledbetter*, 929 F.3d 338, 361 (6th Cir. 2019). After *Davis*, a predicate offense qualifies as a crime of violence only if use of force is an element of the offense, and this excludes conspiracy charges. *Manners*, 947 F.3d at 379.

The Woods brothers argue that the attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) ("VICAR attempted murder") charges and the assault with a dangerous weapon in aid of racketeering under 18 U.S.C. § 1959(a)(3) ("VICAR assault with a dangerous weapon") charges underlying their § 924(c) charges are not proper predicate offenses because the jury instructions allowed them to be convicted of the 924(c) charges under a theory of *Pinkerton* liability. *Pinkerton* liability is a type of vicarious liability that allows members of a conspiracy to be held liable for reasonably foreseeable substantive offenses committed by co-conspirators in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946); *see also United States v. Hamm*, 952 F.3d 728, 744 (6th Cir. 2020) ("The doctrine holds that a member of a conspiracy is liable for substantive offense[s] committed by his co-conspirators, even if he did not participate in them, as long as: (1) the offenses are done in furtherance of the conspiracy, (2) they fall within the scope of the unlawful project, and (3) they are reasonably foreseeable consequence[s] of the unlawful agreement." (alterations in original) (internal quotation marks omitted)).

The Woods brothers assert that because *Pinkerton* liability depends on the existence of a conspiracy and conspiracy charges are no longer proper predicate crimes of violence after *Davis*, their VICAR attempted murder and VICAR assault with a dangerous weapon charges are also not proper predicate offenses. The Woods brothers' argument conflates the predicate crimes of violence underlying their § 924(c) conviction (which are not conspiracy charges) and the basis of

liability for the 924(c) charges, which may have been *Pinkerton* liability. The Supreme Court's only inquiry in *Davis* was whether the § 924(c) residual clause was unconstitutionally vague, not whether *Pinkerton* liability is a proper basis for a 924(c) conviction. *See Davis*, 139 S. Ct. at 2327. Finding the Woods brothers guilty through a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the § 924(c) elements clause. *United States v. Meyers*, 102 F.3d 227, 238 (6th Cir. 1996) (affirming a § 924(c) conviction based on *Pinkerton* liability). Because both VICAR attempted murder and VICAR assault with a dangerous weapon are crimes of violence, not conspiracy crimes, the Woods brothers' argument fails.

In *Davis*, the conspiracy charge itself was not at issue. Rather, the Court clearly stated that it was the fact that the conspiracy charge rested solely on § 924(c)'s residual clause, and not the elements clause that precluded liability. *Davis*, 139 S. Ct. at 2325. Substantive charges like VICAR murder, on the other hand, rely on the elements clause, not the unconstitutionally vague residual clause. This is true whatever legal theory of liability the jury relies on to find the defendant guilty of § 924(c).

This is not a situation, as the Woods brothers claim, where their § 924(c) convictions are predicated on a conspiracy charge. The indictment clearly stated that VICAR attempted murder and VICAR assault with a dangerous weapon are the predicate offenses for the Woods brothers' § 924(c) charges. The jury instructions explained that the jury could find the Woods brothers guilty of the § 924(c) charge in Count 5 based on "the crime of attempted murder in aid of racketeering as charged in Count [3], or assault with a dangerous weapon as charged in Count 4" and could find them guilty of Count 11 based on "the crime of attempted murder in aid or racketeering as charged in Count 9, or assault with a dangerous weapon as charged in Count [10]." DE 348, Trial Tr., Page ID 5465; *see also* DE 247-1, Jury Instructions, Page ID 3873–74. Both the indictment and jury instructions ensured that the jury knew the predicate offenses were VICAR attempted murder and VICAR assault with a deadly weapon, not the conspiracy charge brought in Count 1. *See United States v. Nixon*, 825 F. App'x 360, 364 (6th Cir. 2020) ("By describing and naming the correct predicate offense, the indictment and jury instruction left no confusion for the jury that the predicate offense was a crime of violence."); *see also Reyes v.*

United States, 998 F.3d 753, 758–59 (7th Cir. 2021). The Woods brothers' § 924(c) charges were properly based on crimes of violence under the § 924(c) elements clause.

The jury's potential reliance on *Pinkerton* liability to convict of the 924(c) offenses does not change this outcome. Other circuits have come to a similar conclusion, finding that a defendant can be convicted of a § 924(c) charge based on a theory of *Pinkerton* liability. *See United States v. Henry*, 984 F.3d 1343, 1356–57 (9th Cir. 2021) (upholding a § 924(c) conviction based on *Pinkerton* liability after *Davis*); *United States v. Howell*, No. 18-3216, 2021 WL 3163879, at *4 (3d Cir. July 27, 2021) ("[G]uilt may . . . be found for the § 924(c) offense under *Pinkerton* based on a coconspirator who also completed the armed Hobbs Act robbery."); *United States v. Hernandez-Roman*, 981 F.3d 138, 145 (1st Cir. 2020) ("We have held that where, as here, *Pinkerton* liability is in play, 'the defendant does not need to have carried the gun himself to be liable under section 924(c).'") (quoting *United States v. Flecha-Maldonado*, 373 F.3d 170, 179 (1st Cir. 2004))); *United States v. Johnson*, 827 F. App'x 283, 286 (4th Cir. 2020) ("This argument confuses the offense of Hobbs Act conspiracy with the co-conspirator theory of liability for Hobbs Act robbery. . . . [W]e have long-held that a co-conspirator's § 924(c)(1) violation may be imputed to other members of the conspiracy . . . under the *Pinkerton* conspiracy doctrine." (second omission in original) (internal quotation omitted)).[3]

We note that Austin Woods, who was convicted of the 924(c) offense charged in Count 11, was not charged with either of the predicate acts for that offense, which were charged in Counts 9 and 10. While it is unusual for the government to rely on *Pinkerton* liability as the basis for a § 924(c) charge without charging the defendant with the underlying predicate crime of violence, as is the case here with Austin, the law permits the government to make this questionable strategic choice. Charging the underlying predicate offense is not required for liability under § 924(c); it is enough if the defendant may be prosecuted in a court of the United States for the predicate offense. 18 U.S.C. § 924(c); *see also United States v. Smith*, 182 F.3d 452, 457 (6th Cir. 1999) ("[Section 924(c)] requires only that the defendant have committed a

[3]Additionally, contrary to defendants' argument otherwise, the Supreme Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014), did not heighten the mens rea requirement under *Pinkerton*. *United States v. Edmond*, 815 F.3d 1032, 1047 (6th Cir. 2016), *vacated on other grounds by United States v. Harper*, 137 S. Ct. 1577 (Mem) (2017) ("*Rosemond* did not alter the *Pinkerton* framework, as at least one circuit has already concluded.").

violent crime *for which he may be prosecuted* in federal court. It does not even require that the crime be charged . . . [and] it does not require that he be convicted."). In sum, our precedent requires us to affirm the Woods brothers' § 924(c) convictions, even if they were found liable for the 924(c) offenses by a theory of *Pinkerton* liability.

b. Sufficiency of the Evidence Challenge

Alternatively, Austin argues that there is insufficient evidence to convict him on Count 11's § 924(c) charge related to the December 20 drive-by shooting of Williams's grandmother's house under an aiding and abetting theory of liability. He first argues that it is impossible that the jury found him guilty of Count 11 under a *Pinkerton* theory of liability because he was not present for the shooting and because the jury only convicted him of one of the four § 924(c) charges brought in the indictment. According to Austin, "[i]f the jury had found guilt[] as to count eleven, under a *Pinkerton* theory of liability, they would have necessarily have found guilt as to the other three counts." CA6 R. 25 (Austin), Appellant Br., 19. Thus, he reasons the jury must have found him guilty of Count 11 based on an aider and abettor theory. He goes on to argue that there was insufficient evidence to convict on the aider and abettor theory.

Austin's argument that the jury must have eschewed a *Pinkerton* theory of liability is unpersuasive. The jury instructions stated that to find Austin guilty of any of the § 924(c) charges under a *Pinkerton* theory the jury must find that the *specific firearm crime* under consideration was committed to help advance the conspiracy and was reasonably foreseeable to Austin. Each § 924(c) charge was based on a specific underlying firearm crime. The jury could have reasonably found that there was sufficient evidence to conclude that the shooting on December 20, 2015 was reasonably foreseeable to Austin, but that the other shootings charged in the indictment were not reasonably foreseeable to him. The jury instructions allowed the jury to find Austin guilty of one of the § 924(c) charges under a *Pinkerton* theory of liability but not the others, and the jury's verdict is entirely consistent with finding Austin guilty of Count 11 under a *Pinkerton* theory of liability.

There was sufficient evidence for a reasonable juror to find Austin guilty beyond a reasonable doubt of Count 11 based on a *Pinkerton* theory of liability. To find Austin guilty

under a *Pinkerton* theory of liability, the jury must have found beyond a reasonable doubt that: (1) Austin "was a member of the conspiracy charged in Count 1 of the indictment," (2) the December 20, 2015 shooting happened when he was still a member of the conspiracy, (3) the December 20, 2015 shooting "was committed to help advance the conspiracy," and (4) the December 20, 2015 shooting "was within the reasonably foreseeable scope of the [conspiracy]." DE 348, Trial Tr., Page ID 5470.

There was sufficient evidence for the jury to find elements of the Count 11 predicate crime. *See supra* Part II.B. Austin does not challenge that he was a member of HNIC on December 20, 2015. There is extensive witness testimony to support the conclusion that the December 20 shooting was intended to advance HNIC after Williams publicly taunted the Woods brothers and HNIC. Finally, there is sufficient evidence to conclude that the December 20, 2015 shooting was reasonably foreseeable to Austin. On November 30, 2015, Austin sent Antoine a link to a YouTube video that revealed Williams's grandmother's address. Austin said, "that's where he [is] hiding, I guarantee." DE 203, Trial Tr., Page ID 1813. Combined with the testimony that Austin agreed that Williams needed to be killed for his social media posts taunting HNIC after the Fairlane Mall fight, a rational juror could find that it was reasonably foreseeable to Austin that an HNIC member would try to kill Williams at his grandmother's house where Austin claimed he was "hiding." Accordingly, because there was sufficient evidence to independently convict him under a *Pinkerton* theory of liability, we need not address whether there was also sufficient evidence to convict him on an aiding and abetting theory of liability.

B. Sufficiency of the Evidence for Conspiracy to Commit Murder in Aid of Racketeering (Count 1, VICAR murder)

1. Standard of Review

We review a challenge to the sufficiency of the evidence in a criminal case de novo. *Garcia*, 758 F.3d at 718. When the defendant challenges the sufficiency of the evidence to support a jury verdict, we review the evidence in the light most favorable to the government and will affirm a defendant's conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Hendricks*, 950 F.3d at 352 (quoting *Vichitvongsa*, 819 F.3d at 270).

If the defendant failed to preserve his sufficiency of the evidence challenge at trial, however, we will review the evidence under the more lenient "manifest miscarriage of justice" standard. *United States v. Ray*, 803 F.3d 244, 262 (6th Cir. 2015). A defendant can only succeed under this standard if the record is "devoid of evidence pointing to guilt." *United States v. Childs*, 539 F.3d 552, 558 (6th Cir. 2008).

2. Merits

The Woods brothers both challenge the sufficiency of the evidence as to Count 1, conspiracy to commit murder in aid of racketeering ("VICAR murder"). To establish a VICAR violation, the government must show:

> (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 the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

United States v. Odum, 878 F.3d 508, 516 (6th Cir. 2017), *vacated on other grounds sub nom. Frazier v. United States*, 139 S. Ct. 319 (2018) (quoting *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992)). Both Antoine and Austin argue that HNIC was not a RICO enterprise and that they did not attempt to murder Williams to further their positions in HNIC. Additionally, Austin claims that there was insufficient evidence to find that he knowingly joined the conspiracy to murder Williams.

The parties dispute whether the Woods brothers waived this sufficiency of the evidence challenge as to Count 1. The government argues that the Woods brothers failed to specifically raise a motion for acquittal or new trial on Count 1 at the close of evidence, so the panel should review the Woods brothers' claim for "manifest miscarriage of justice." CA6 R. 51, Appellee Br., 29–30. The Woods brothers claim that "the record reflects that the defense never intended to waive or abandon this matter, to trigger the invited error doctrine and manifest injustice standard." CA6 R. 38 (Austin), Reply Br., 7–8. The Woods brothers claim the proper standard of review is de novo and the court should determine whether any rational juror could have found the elements of Count 1 beyond a reasonable doubt. Because the Woods brothers' sufficiency of

the evidence challenge fails even under de novo review, we assume for purposes of this appeal that the Woods brothers did not waive this challenge.

a. Racketeering Enterprise

Under § 1959, an enterprise is defined as a "partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2). The enterprise must also be engaged in "racketeering activity," which includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* at §§ 1959(b)(1), 1961(1). The Woods brothers dispute that HNIC was engaged in racketeering activity.

There was sufficient evidence for a rational juror to conclude beyond a reasonable doubt that HNIC was engaged in racketeering activity including murder, threats of murder, and dealing in controlled substances. The Woods brothers argue that HNIC was only a rap group, and that "[t]here was a distinct lack of evidence regarding illegal activities by HNIC." CA6 R. 39 (Antoine), Appellant Br., 27; CA6 R. 25 (Austin), Appellant Br., 24. This argument is soundly refuted by large portions of the record. Multiple witnesses testified that HNIC was involved in dealing controlled substances including marijuana, heroin, and codeine. Rhymes also testified about murders, attempted murders, and assaults he committed as a member of HNIC, sometimes at the Woods brothers' direction. DE 220, Trial Tr., Page ID 2398–2401 (describing how leaders of HNIC including the Woods would order members to "assault, kill, [and] rob people"). The Woods brothers appear to argue that the court should disregard Rhymes's testimony because he was a cooperating co-defendant, but we may not reweigh the evidence or assess Rhymes's credibility on appeal. *Ledbetter*, 929 F.3d at 353. There is sufficient evidence for a reasonable juror to conclude that HNIC was engaged in racketeering activity and, thus, was a criminal enterprise.

b. Maintain or increase position in HNIC

Second, the Woods brothers claim that there was insufficient evidence to find that they joined the conspiracy to murder Williams with the purpose of maintaining or increasing their position within HNIC. "The violent-crimes-in-aid-of-racketeering statute does not extend to every 'violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang.'" *Ledbetter*, 929 F.3d at 358 (quoting *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014)). Put another way, a defendant is not guilty of a VICAR crime when he acts "alone and with no apparent connection to the gang." *Id.* Rather, "VICAR's purpose element is met if the jury could find that an *animating purpose* of the defendant's action was to maintain or increase his position in the racketeering enterprise." *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (emphasis added) (internal quotation marks omitted). For example, a defendant may be liable if the violent crime "was sanctioned by the gang and . . . the defendant participated because he knew it was expected of him as a member" or the crime "fit the mold of the gang's typical missions against rival[s]." *Ledbetter*, 929 F.3d at 358–59.

The Woods brothers claim that because they were already leaders of HNIC, they could not increase their position with HNIC and that "[t]he government failed to present evidence that any action by [the Woods brothers] or any action agreed-upon, relating to [Williams], was for the 'animating purpose' of maintaining [their] position within HNIC." CA6 R. 39 (Antoine), Appellant Br., 26; *see also* CA6 R. 25 (Austin), Appellant Br., 22–23. Again, the Woods brothers' argument discounts Rhymes's testimony. Rhymes testified that it was important to HNIC to protect the gang's reputation and that HNIC members would engage in retribution in response to any perceived disrespect. Rhymes said that Eldridge, the third leader of HNIC, told Antoine that he needed to do something about Williams's social media posts mocking HNIC and the Woods brothers after the Fairlane Mall fight. A rational juror could conclude based on Rhymes's testimony that the conspiracy to murder Williams was sanctioned by HNIC or that the Woods brothers participated in it because they knew it was expected of them as HNIC members. *See Ledbetter*, 929 F.3d at 358–59. Accordingly, there was sufficient evidence to conclude that

the Woods brothers acted with the animating purpose of maintaining or increasing their position in HNIC.

c. Knowingly joined conspiracy to kill Williams

Lastly, Austin argues that the government failed to prove he agreed to join the conspiracy to murder Williams. According to Austin, "the Government failed to present evidence that [he] knew of this agreement [to murder Williams,] or specifically decided to join in." CA6 R. 25 (Austin), Appellant Br., 25. Austin's argument is unconvincing. The government presented evidence that Austin was a knowing and willing participant in the conspiracy to murder Williams. For example, Austin texted other HNIC members a link to a YouTube video revealing Williams's grandmother's address and told them that he thought that was where Williams was hiding. He also agreed with Eldridge when Eldridge said Williams needed to pay for the social media posts mocking HNIC and the Woods. Finally, Rhymes testified that he waited outside an apartment building associated with Williams with Antoine and Austin and that Austin told Rhymes to kill Williams if he saw him. This evidence is sufficient for a rational juror to conclude that Austin knowingly participated in the conspiracy to murder Williams.

In sum, the Woods brothers' arguments that there was insufficient evidence to sustain their conspiracy to commit murder charges are unpersuasive. The government provided ample evidence that both the Woods brothers were members of HNIC and knowingly participated in the conspiracy to murder Williams in order to advance the goals of HNIC.

C. Motion for Mistrial

Next, the Woods brothers challenge the district court's denial of their motion for a mistrial. We review a district court's denial of defendants' motion for mistrial for abuse of discretion. *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019).

The Woods brothers moved for mistrial after Rummel stated that the investigation into HNIC was started after a drive-by shooting in which a three-month old baby was killed. In determining whether an improper reference warrants a mistrial, we consider five factors: "(1) whether the remark was unsolicited, (2) whether the . . . line of questioning was reasonable,

(3) whether the limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence" presented against the defendant. *Zuern v. Tate*, 336 F.3d 478, 485 (6th Cir. 2003). "The primary concern [in this inquiry] is fairness to the defendant." *United States v. Forrest*, 17 F.3d 916, 919 (6th Cir. 1994).

On May 21, 2019, the government called Rummel as its first witness in the trial. After discussing Rummel's background and qualifications as an ATF special agent, the prosecution asked about Rummel's knowledge of HNIC:

> Q. And at that point, when you first heard of HNIC for the first time in 2012, 2013, was there an ongoing investigation of HNIC under way?
>
> A. Yes.
>
> Q. And what was the nature of that investigation?
>
> A. Various members were either witnesses or party to some violent crimes, including a drive-by shooting of a residence in which a three-month old was killed.

DE 323, Trial Tr., Page ID 4643–44. Almost immediately after this statement, defense counsel requested a sidebar conference and moved for a mistrial arguing that the reference to the infant's death was highly prejudicial. The district court agreed that the comment was "extremely prejudicial," but postponed ruling on the motion for a mistrial. *Id.* at Page ID 4646–47. Before allowing the questioning to continue, the district court told the prosecution and Rummel not to mention the death of the three-month old or detailed information about prior investigations again.

The next day, the district court heard oral arguments from the parties about the motion for a mistrial and allowed defense counsel to question Rummel. Rummel explained that although HNIC members were interviewed about the drive-by shooting that killed the infant, no HNIC members were charged with the murder of the three-month old. When asked by defense counsel whether "it [came] up during discussions with the government attorneys in preparation for your testimony that you would be making reference to the shooting of the three-month-old," Rummel answered "[n]o." DE 228, Trial Tr., Page ID 3330–31. After hearing arguments from both sides, the district court denied the motion for a mistrial. The district court found that the government did not act in bad faith and that Rummel's statement, while unfortunate and

incomplete, did not rise to the level of false testimony. The district court agreed, however, to give the jury a limiting instruction on Rummel's testimony if the parties requested one.

On May 29, 2019, the district court read the jury the following limited instruction regarding Rummel's testimony:

> Earlier in this trial on May 21, 2019 you heard testimony from Special Agent Matthew Rummel that law enforcement investigated whether various members of HNIC were either witnesses or parties to a [drive-by] shooting of a residence that resulted in the death of a three-month-old baby, child, in 2012 or 2013.
>
> The government and the defendants have agreed or stipulated to the following fact: Upon further investigation, law enforcement ultimately determined that neither HNIC nor defendant Antoine Woods nor defendant Austin Woods were involved in the [drive-by] shooting. Accordingly, you are instructed to completely disregard Agent Rummel's testimony about that 2012 or 2013 [drive-by] shooting. Do not discuss it or consider it in your deliberations. You cannot consider it in any way against either of the defendants. Do not let it influence your verdict in any way. Thank you.

DE 217, Trial Tr., Page ID 1892–93.

The district court did not abuse its discretion by denying the Woods brothers' motion for a mistrial. The evidence shows that Rummel's statement about the three-month old's killing was unintentional and was not elicited in bad faith by the government.[4] Furthermore, the district court gave the jury a limiting instruction to disregard Rummel's statement as soon as the parties notified the government that they had agreed on the instruction's language. The limiting instruction clearly directed the jury to "completely disregard" Rummel's statement about the drive-by shooting and "not let it influence [the] verdict in any way." DE 217, Trial Tr., Page ID 1893. The limiting instruction also explained that the drive-by shooting was not relevant to this case because "neither HNIC nor defendant Antoine Woods nor defendant Austin Woods were involved the drive-by shooting." *Id.* at Page ID 1893. Finally, the short statement made by

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[4]The Woods speculate that Rummel's testimony must have been a "designed statement" because it arose "within the first few questions" of his testimony and "unlike a situation where the prosecution was examining a lay witness, [Rummel] was the case agent, a witness the AUSA would have spent significant time preparing for his testimony." CA6 R. 39 (Antoine), Appellant Br., 29; CA6 R. 25 (Austin), Appellant Br., 27–28. This argument is directly contradicted, however, by Rummel's testimony under oath that he had not discussed the shooting with the prosecution during his preparation for trial.

Rummel was only a small part of the fourteen-day trial against the Woods brothers. In sum, based on the surrounding facts and circumstances, Rummel's statement was not so prejudicial that it was unfair for the Woods brothers to continue the trial. The district court did not abuse its discretion.

D. Double Jeopardy Counts 9 and 10

Next, Antoine argues that his convictions on Counts 9 and 10 violate the Double Jeopardy Clause. CA6 R. 39 (Antoine), Appellant Br., 31–36. Because Antoine did not raise this claim before the district court, it is reviewed for plain error. *United States v. Mayberry*, 540 F.3d 506, 512 (6th Cir. 2008). Under plain error review, the defendant "must show that there is '1) error, 2) that is plain, and 3) that affects substantial rights,' and if so, he must persuade us that '4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.'" *United States v. Yancy*, 725 F.3d 596, 601 (6th Cir. 2013) (quoting *United States v. Murdock*, 398 F.3d 491, 496 (6th Cir. 2005)).

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person will be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend V. The government concedes that Antoine's conviction for VICAR attempted murder under Count 9 and VICAR assault with a dangerous weapon under Count 10 violate the Double Jeopardy Clause because "it does not appear that Congress intended for a defendant to be convicted and punished for multiple VICAR offenses based on the same shooting at the same victim at the same moment." CA6 R. 51, Appellee Br., 64. The government asks that we remand Antoine's case to the district court with instructions to amend Antoine's judgment by vacating Count 9 without prejudice and removing the $100 special assessment. Because the parties are correct that Antoine's conviction of Counts 9 and 10 violate the Double Jeopardy Clause, we grant Antoine's claim and order the district court to follow the government's recommendation to amend Antoine's judgment.

E. Sentencing Error for Counts 1, 3, 16, and 17

Finally, the government requests we order the district court to amend Antoine's judgment because his sentences on Counts 1, 3, 16, and 17 exceed the statutory maximum for those counts.

The government explains:

> The district court imposed a concurrent sentence of 144 months on all of Antoine's convictions other than the § 924(c) counts. (R.326: Tr., 4747; R.294: Judgment, 4246). This was appropriate for Counts 4 and 10 under 18 U.S.C. § 1959(a)(3), which has a statutory maximum of 240 months. But the statutory maximums for the other convictions are below the imposed 144-month sentence: Counts 1 and 3 have a 120-month maximum under 18 U.S.C. § 1959(a)(5); Count 16 has a 60-month maximum under 18 U.S.C. § 371; and Count 17 has a 120-month maximum under 18 U.S.C. 1503(b)(3). The judgment should therefore be corrected so that the concurrent sentences on those counts do not exceed their respective statutory maximums. As with the vacatur of Count 9, though, none of these changes affects the guideline calculation or overall sentence, so a resentencing is unnecessary.

CA6 R. 51, Appellee Br., 68. Antoine does not address this issue in either his opening brief or his reply brief. Because the government correctly explains the district court's computation errors, we instruct the district court to amend Antoine's judgment according to the government's recommendation upon remand.

III.

We affirm Antoine Woods's convictions except for that on Count 9 and remand with instructions to amend his judgment to vacate the Count 9 conviction without prejudice and to correct his sentence on Counts 1, 3, 16, and 17 to comply with the statutory maximums. We affirm the rest of Antoine Woods's convictions, and we affirm Austin Woods's convictions.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTOINE WOODS (D-2), and
AUSTIN WOODS (D-3),

Defendants.

_____/

Case No. 17-20022

Honorable Nancy G. Edmunds

OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR JUDGMENTS OF ACQUITTAL AND/OR A NEW TRIAL [232, 233, 236, 242, 281]

This matter comes before the Court on Defendants Antoine Woods' and Austin Woods' motions for a judgment of acquittal and/or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33. (Dkts. 232, 233.) Defendant Antoine Woods filed an amended motion and a supplemental brief, (dkts. 236, 281), and Defendant Austin Woods filed two additional briefs supplementing his motion, (dkts. 242, 249). The government opposes these motions. (Dkts. 247, 283.) The Court finds that the decision process would not be significantly aided by oral argument. Therefore, pursuant to Eastern District of Michigan Local Rule 7.1(f)(2), Defendants' motions will be decided on the briefs and without oral argument. For the reasons stated below, the Court DENIES Defendants' motions.

I. Background

In August of 2018, Defendants Antoine Woods and Austin Woods were charged in a second superseding indictment with various racketeering and firearms offenses. (Dkt. 126.) Defendant Antoine Woods was also charged with two obstruction of justice

offenses. The racketeering and firearms charges stem from a murder conspiracy and four separate shootings in late 2015 and early 2016 allegedly committed by members of the Detroit street gang, "Head Niggas in Charge" or "HNIC," aimed at a rival and members of his family. The obstruction of justice charges were a result of Antoine Woods' efforts to influence and/or prevent the testimony of a fellow HNIC member.

On June 21, 2019, following a lengthy jury trial that began on May 14, 2019, the jury found Defendant Antoine Woods guilty of 9 of the 15 counts in which he was charged and Defendant Austin Woods guilty of 2 of the 5 counts in which he was charged. (Dkts. 212, 214.) More specifically, both Defendants Antoine and Austin Woods were found guilty of conspiring to commit murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5). Defendant Antoine Woods was found guilty of all the counts related to two of the four charged shootings: a December 6, 2015 shooting at the King of Diamonds strip club and a December 20, 2015 shooting at the residence at 557 Alger Street. These counts include attempted murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5) and Mich. Comp. Laws § 750.83; assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. § 1959(a)(3) and Mich. Comp. Laws § 750.82; and using, carrying, and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Defendant Austin Woods was found guilty of the § 924(c) charge related to the December 20, 2015 shooting. Finally, Defendant Antoine Woods was found guilty of both obstruction of justice charges, including conspiracy to commit obstruction of justice in violation of 18 U.S.C. §§ 371, 1503 and obstruction of justice in violation of 18 U.S.C. § 1503.

The chart below lists the jury's verdicts:

Count	Charge	Defendant(s)	Verdict
One	Conspiracy to Commit Murder in Aid of Racketeering	Antoine Woods, Austin Woods	Guilty
Three	Attempted Murder in Aid of Racketeering (Dec. 6, 2015 shooting)	Antoine Woods	Guilty
Four	Assault with a Dangerous Weapon in Aid of Racketeering (Dec. 6, 2015 shooting)	Antoine Woods	Guilty
Five	Use and Carry and Discharge of a Firearm During and in Relation to a Crime of Violence (Dec. 6, 2015 shooting)	Antoine Woods	Guilty
		Austin Woods	Not Guilty
Six	Attempted Murder in Aid of Racketeering (Dec. 7, 2015 shooting)	Antoine Woods	Not Guilty
Seven	Assault with a Dangerous Weapon in Aid of Racketeering (Dec. 7, 2015 shooting)	Antoine Woods	Not Guilty
Eight	Use and Carry and Discharge of a Firearm During and in Relation to a Crime of Violence (Dec. 7, 2015 shooting)	Antoine Woods, Austin Woods	Not Guilty
Nine	Attempted Murder in Aid of Racketeering (Dec. 20, 2015 shooting)	Antoine Woods	Guilty
Ten	Assault with a Dangerous Weapon in Aid of Racketeering (Dec. 20, 2015 shooting)	Antoine Woods	Guilty
Eleven	Use and Carry and Discharge of a Firearm in Relation to a Crime of Violence (Dec. 20, 2015 shooting)	Antoine Woods, Austin Woods	Guilty
Twelve	Attempted Murder in Aid of Racketeering (Mar. 9, 2016 shooting)	Antoine Woods	Not Guilty
Thirteen	Assault with a Dangerous Weapon in Aid of Racketeering (Mar. 9, 2016 shooting)	Antoine Woods	Not Guilty
Fourteen	Use and Carry and Discharge of a Firearm During and in Relation to a Crime of Violence (Mar. 9, 2016 shooting)	Antoine Woods, Austin Woods	Not Guilty
Sixteen	Conspiracy to Commit Obstruction of Justice	Antoine Woods	Guilty
Seventeen	Obstruction of Justice	Antoine Woods	Guilty

II. Analysis

At the end of the government's case-in-chief, Defendant Antoine Woods moved for acquittal on the three counts related to the December 20, 2015 shooting (Counts 9, 10, 11), and Defendant Austin Woods moved for acquittal on the four § 924(c) counts he was charged with (Counts 5, 8, 11, 14). The Court denied the motions. (*See* dkt. 227, PgID 3314, 3318.)

Defendant Antoine Woods now seeks acquittal or a new trial on the counts related to both the December 6, 2015 and December 20, 2015 shootings (Counts 3, 4, 5, 9, 10, 11), arguing the evidence at trial was not sufficient to sustain these convictions and that the convictions go against the weight of the evidence. He also seeks acquittal on the two obstruction of justice counts (Counts 16, 17).[1] Defendant Austin Woods seeks acquittal or a new trial on the § 924(c) charge he was convicted of (Count 11). He argues that this conviction should be set aside because it was based upon a *Pinkerton* theory of liability or, alternatively, that that the evidence was insufficient to sustain this conviction. Defendants also take issue with certain rulings made by the Court during trial and argue that they warrant a new trial.

The Court begins its analysis with the applicable standards of review, and then addresses Defendants' individual arguments.

A. Standard of Review

[1] Since the conclusion of the trial in this case, Defendant Antoine Woods has been appointed new counsel twice—the first upon his motion and the second upon his counsel's motion to withdraw. (*See* dkts. 259, 272.) Through a supplemental brief filed by his newest counsel approximately seven months after the jury returned its verdict, Antoine Woods seeks acquittal on the obstruction of justice counts for the first time and makes a number of new arguments. (*See* dkt. 281.) Defendant Austin Woods has filed a notice of joinder to this brief to the extent the issues raised apply to him. (Dkt. 286.)

1. Rule 29 Motions for Acquittal

Federal Rule of Criminal Procedure 29 allows the Court to "set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c). "In deciding whether the evidence is sufficient to withstand a motion for an acquittal, and support a conviction, the court views all evidence in the light most favorable to the prosecution and determines whether there is any evidence from which a reasonable jury could find guilt beyond a reasonable doubt." *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999). The court does not independently weigh the evidence or assess the credibility of trial witnesses. *Id.* It must, however, "consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States v. Fusero*, 106 F. Supp. 2d 921, 927 (E.D. Mich. 2000) (internal quotation marks and citation omitted).

2. Rule 33 Motions for a New Trial

Federal Rule of Criminal Procedure 33 permits the Court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "The rule does not define interest of justice and the courts have had little success in trying to generalize its meaning." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010) (internal quotation marks and citation omitted). It is, however, "widely agreed that Rule 33's interest of justice standard allows the grant of a new trial where substantial legal error has occurred." *Id.* This includes "reversible error or violation of the defendant's substantial rights." *Id.* at 374. And when "deciding Rule 33 motions based on the manifest weight of the evidence, . . . a district judge may sit as a thirteenth juror and consider the evidence to ensure that there is no miscarriage of justice." *Id.* at 373 n.9

(internal quotation marks and citation omitted). "Generally, such motions are granted only in the extraordinary circumstance where the evidence preponderates heavily against the verdict." *United States v. Montgomery*, 358 F. App'x 622, 628 (6th Cir. 2009) (internal quotation marks and citations omitted).

The decision to grant a Rule 33 motion for a new trial lies within the Court's sound discretion. *United States v. Davis*, 15 F.3d 526, 531 (6th Cir. 1994). "The defendant bears the burden of proving that a new trial should be granted." *Id.*

B. Sufficient Evidence for Guilty Verdicts as to Defendant Antoine Woods on Counts 3, 4, 5, 9, 10, 11

For each shooting, Defendant Antoine Woods was convicted of two violent crimes in aid of racketeering ("VICAR") offenses—attempted murder in aid of racketeering and assault with a dangerous weapon in aid of racketeering, as well as using, carrying, and discharging a firearm during and in relation to a crime of violence in violation of § 924(c). He challenges the sufficiency of the evidence supporting all six of these convictions. He does not dispute that the shootings took place, but rather argues that there was insufficient evidence that he was the offender and that the government did not prove certain elements of the crimes.[2]

1. Sufficient Evidence on Common VICAR Elements

For each VICAR offense, the government was required to prove that 1) an enterprise existed, 2) the enterprise was engaged in racketeering activity, 3) the enterprise was engaged in, or its activities affected, interstate commerce, 4) the

[2] To the extent Defendant Antoine Woods relies on the Supreme Court case of *United States v. Davis*, 139 S. Ct. 2319 (2019), to attack his § 924(c) convictions, this issue will be discussed below along with Defendant Austin Woods' arguments to the same effect.

defendant had a position in the enterprise, and 5) the defendant's general purpose in committing the violent crime was to maintain or increase his position in the enterprise. *See United States v. Odum*, 878 F.3d 508, 517 (6th Cir. 2017), *vacated on other grounds sub nom. Frazier v. United States*, 139 S. Ct. 319 (2018) (internal citations omitted). Defendant Antoine Woods takes issue with the sufficiency of the evidence supporting the third and fifth of these elements. The Court finds there was sufficient evidence supporting all of the common VICAR elements.

To establish the existence of an enterprise, the government was required to prove "a purpose, relationships among those associated with the racketeering enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009). Here, the government introduced evidence in the form of social media posts by Antoine Woods and other HNIC members reflecting the members associating with one another, identifying themselves as HNIC members, identifying HNIC as a gang, bragging about their activities, and protecting their territory. The government also introduced evidence of HNIC tattoos on Defendant Antoine Woods' body and other members' bodies. (Gov. Exhs. 2.1-2.4.) And, finally, co-conspirator and fellow HNIC member Donovann Rhymes testified about HNIC's existence, criminal activities, and its purposes, including protecting the gang's reputation. (Dkt. 220, PgID 2404-11.) This evidence was sufficient to establish that HNIC was an enterprise. This same evidence also established Antoine Woods' position within that enterprise.

There was also sufficient evidence establishing that the enterprise was engaged in racketeering activity, specifically drug trafficking. Rhymes testified as to HNIC's drug

trafficking activities, and social media posts and digital media further supported his testimony. The government also introduced evidence of drug trafficking from four homes at which HNIC members were present. (*See* Dkt. 223, PgID 2899-2913; dkt. 230, PgID 3380-84.) And while Defendant Antoine Woods argues that the government failed to show that the HNIC enterprise engaged in activities that affected interstate commerce, drug trafficking is an economic activity that satisfies the interstate commerce prong. *See Taylor v. United States*, 136 S. Ct. 2074, 2080-81 (2016) (illegal sale of controlled substances is an economic activity that affects interstate commerce); *see also Odum*, 878 F.3d at 517 ("if an enterprise engages in economic activity, then even a *de minimis* connection to interstate commerce is sufficient to meet the interstate prong of VICAR").

With regard to the final common VICAR element, Defendant Antoine Woods argues that Rhymes committed the violent crimes at issue for financial reasons and due to a personal vendetta he had against the target. This argument assumes that the jury found that Woods aided and abetted Rhymes in the commission of these crimes. However, the government charged Woods as the principal and aiding and abetting was only an alternative theory. Nonetheless, there was sufficient evidence to establish that Defendant's general purpose in committing (or aiding and abetting) the VICAR offenses was to maintain or increase his position in the enterprise.

The government presented evidence that Defendants were humiliated after a member of a rival gang chased them through the Fairlane Town Center. This incident was captured on video and posted on social media. Antoine Woods was then directed via text message from a fellow HNIC member to "fuck [him] up." (Gov. Exh. 41.25.)

After the shootings, Antoine Woods bragged about them on social media and in rap songs with references to HNIC. This evidence was sufficient for the jury to conclude that the Defendant Antoine Woods committed the violent crimes at issue to maintain or increase his position in the enterprise. *See United States v. Gills*, 702 F. App'x 367, 376-77 (6th Cir. 2017) (sufficient evidence supporting purpose element of VICAR count where gang "expected its members to retaliate violently when someone disrespected or threatened a fellow member" and defendant bragged about shooting afterward). In sum, the evidence was sufficient to support all the common VICAR elements.

2. Sufficient Evidence on December 6, 2015 Shooting

A summary of only some of the relevant evidence presented at trial demonstrates that there was sufficient evidence from which the jury could have concluded that Defendant Antoine Woods participated in the shooting that took place on December 6, 2015 at the Kind of Diamonds strip club.

First, there was evidence placing Antoine Woods at the scene. More specifically, a member of the FBI's Cellular Analysis Survey Team testified that two cell phone numbers associated with Antoine Woods utilized cell tower cites around the King of Diamonds shortly before and after the shooting. (Dkt. 219, PgID 2333-36; *see also* Gov. Exhs. 62.1, 62.3.) Moreover, three days after the shooting, a HNIC associate named "Rara" sent a text message to Rhymes referencing a shooting. A cell phone associated with "Rara" was also near the King of Diamonds on the night of the shooting.

An individual named Eric Green testified that he saw two individuals shooting toward the King of Diamonds on the night of the shooting and that he returned fire. (Dkt. 217, PgID 2029-30.) This was further corroborated by the surveillance video,

which showed two figures emerge from a vehicle, run toward the club just before the shooting, and then flee. There were also bullet casings recovered from the scene and testimony supporting an inference that bullets from three different calibers were fired that night.

An individual named Michael Yousif provided testimony that he was robbed of a .40 caliber handgun with a unique red laser attachment approximately a week prior to the shooting. (Dkt. 203, PgID 1706-26.) There was also cell phone evidence reflecting that Antoine Woods had possession of an identical looking gun that same day. Moreover, a valet driver at the King of Diamonds testified that he saw a "red beam" coming from south of the club (the same area from which the bullet casings were recovered) prior to the shooting. And one of Antoine Woods' rap songs specifically referenced this red beam.

Finally, HNIC member and co-conspirator Rhymes testified at length as to how both he and Antoine Woods committed the shooting at the King of Diamonds shooting. And while Antoine Woods argues that his testimony was incredible, there was sufficient corroborating evidence from which to conclude that Woods committed attempted murder and assault with a firearm the night of the December 6, 2015 shooting or, alternatively, that he aided and abetted the commission of these crimes.

3. Sufficient Evidence on December 20, 2015 Shooting

Similar to the December 6, 2015 shooting, a review of only some of the relevant evidence presented at trial demonstrates that the evidence was sufficient to establish that Defendant Antoine Woods participated in the December 20, 2015 shooting at 557 Alger Street.

First, there was the cell tower evidence placing Antoine Woods at the scene of the shooting. More specifically, a phone associated with Woods traveled from the Oak Park area toward the crime scene prior to the shooting, connected to a tower just west of the crime scene shortly before the shooting, and travelled back to Oak Park after the shooting. Moreover, Antoine Woods received text messages in the weeks preceding the shooting from Austin Woods, providing 557 Alger Street as the address of their rival's grandmother's home. (Gov. Exh. 41.44.)

In addition, the jury heard testimony regarding the casings recovered from the scene of the shooting and how they matched the casings retrieved from other shooting scenes. And, finally, Antoine Woods made comments on his Instragram account and in his rap videos, which could be construed as admissions of his involvement in the shooting, such as "boy don't make me wake grandma up again." And while Rhymes did not testify that he was present during this shooting, he did testify that he and Woods had previously gone to 557 Alger Street to verify that it was their target's grandmother's home and that Woods had told him that he had shot at the house. In sum, there was sufficient evidence establishing Antoine Woods committed attempted murder and assault with a firearm the night of the December 20, 2015 shooting or, alternatively, that he aided and abetted the commission of these crimes.

4. Sufficient Evidence a Firearm Was Discharged

Defendant Antoine Woods argues the evidence was insufficient to establish that a firearm was discharged during the commission of the VICAR offenses, which serve as the predicate crimes for his convictions under § 924(c) (Counts 5 and 11). "Although § 924(c) requires proof that the gun is real, the government's proof need not reach a level

of scientific certainty." *United States v. Willis*, 232 F. App'x 527, 537 (6th Cir. 2007) (noting that "descriptive lay opinion testimony" is sufficient to support a conviction under § 924(c)) (internal quotation marks and citations omitted). Here, an eyewitness, who was present during both shootings, testified that he saw the discharge of firearms during the December 6, 2015 shooting and heard gunshots and saw bullets piecing the walls during the December 20, 2015 shooting. For the December 6, 2015 shooting, there was also photographic evidence of the bullet holes in a car that was parked at the club's entrance, video evidence of the flashes from the area where the shooters were located, and bullet fragments and discharged casings retrieved from the scene. For the December 20, 2015 shooting, discharged casings were also retrieved from the scene. A firearms expert witness testified regarding how the recovered casings from both shootings were fired from the same firearms that had fired casings recovered from other shooting scenes. This evidence was sufficient to establish that a firearm had been discharged during both shootings for purposes of Defendants' § 924(c) convictions.

C. Sufficient Evidence for Guilty Verdict as to Defendant Austin Woods on Count 11 based upon a *Pinkerton* Theory of Liability[3]

Defendant Austin Woods seeks acquittal on his conviction for using, carrying, and discharging a firearm during and in relation to a crime of violence in violation of § 924(c) (Count 11). He argues that the jury may have improperly predicated this conviction on his conspiracy to commit murder conviction (Count 1) due to the

[3] To the extent these issues relate to Antoine Woods, the Court's analysis applies to him as well. The Court notes, however, that Austin Woods' liability was based solely on *Pinkerton*, while Antoine Woods was charged as a principal and aiding and abetting and *Pinkerton* were alternate theories.

government's reliance on a *Pinkerton* theory of liability, and that conspiracy is no longer a valid crime of violence pursuant to the Supreme Court case of *United States v. Davis*, 139 S. Ct. 2319 (2019). The government argues that Defendant's arguments have no merit, noting that they are based in large part on a conflation of 1) the crimes of violence which serve as the predicate offenses for Count 11 and 2) the murder conspiracy to which Austin Woods was a member of and which gave rise to his *Pinkerton* liability for Count 11.

Prior to trial, Defendants moved to dismiss the four § 924(c) counts charged in the indictment (Counts 5, 8, 11, and 14), arguing that the "residual clause" definition of a "crime of violence" was unconstitutionally vague in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which invalidated a similarly worded clause in another statute. The Court noted, however, that under § 924(c), there are two definitions for a "crime of violence"— § 924(c)(3)(A) contains the "elements clause" definition and § 924(c)(3)(B) contains the "residual clause" definition. *See United States v. Woods*, 336 F. Supp. 3d 817, 822 (E.D. Mich. 2018). While there was a question as to the constitutionality of the residual clause, the elements clause remained undisputedly intact. In this case, as set forth in the second superseding indictment, the predicate crimes of violence for Count 11 are attempted murder in aid of racketeering (Count 9) and assault with a dangerous weapon in aid of racketeering (Count 10).[4] (Dkt. 126, PgID 574.) The Court found that both of these predicate offenses constitute crimes of violence under the elements

[4] Similarly, the predicate crimes for Defendant Antoine Woods' § 924(c) conviction set forth in Count 5 are attempted murder in aid of racketeering (Count 3) and assault with a dangerous weapon in aid of racketeering (Count 4). (Dkt. 126, PgID 569-70.)

clause, and thus denied Defendants' motion to dismiss. *See Woods*, 336 F. Supp. 3d at 824-25. The Supreme Court's ruling in *Davis*, 139 S. Ct. at 2336, explicitly finding § 924(c)(3)(B) unconstitutionally vague, does not alter this analysis in any way. Moreover, the Sixth Circuit has recently affirmed this Court's finding that assault with a dangerous weapon in aid of racketeering is a crime of violence under the elements clause. *See Manners v. United States*, 947 F.3d 377, 382 (6th Cir. 2020). And while Defendants cite to the case of *United States v. Jones*, 935 F.3d 266, 274 (5th Cir. 2019), there, the § 924(c) offense was predicated upon two offenses, one of which was no longer a valid crime of violence post-*Davis*, and it was unclear which predicate the jury had relied upon. Here, both of the predicate VICAR offenses constitute crimes of violence under the elements clause.

Under *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), a conspirator may be convicted of a substantive offense that other conspirators commit during and in furtherance of a conspiracy. This includes a § 924(c) offense. *See United States v. Myers*, 102 F.3d 227, 238 (6th Cir. 1996). And while Austin Woods was not charged with the predicate offenses (only Antoine Woods was), this is of no consequence. *See United States v. Smith*, 182 F.3d 452, 457 (6th Cir. 1999) (Section 924(c) "requires only that the defendant have committed a violent crime *for which he may be prosecuted* in federal court. It does not even require that the crime be charged; *a fortiori*, it does not require that he be convicted."); *see also Johnson v. United States*, 779 F.3d 125, 129 (2d Cir. 2015) ("Every circuit court to have considered the issue has concluded that § 924(c) does not require the defendant to be convicted (or even charged with) the predicate crime, so long as there is legally sufficient proof that the predicate crime was,

in fact, committed."). What matters is that the jury was properly instructed on the government's burden to establish Austin Woods' liability under *Pinkerton* and that the evidence was sufficient to meet that burden.

To prove a defendant guilty of a substantive offense under *Pinkerton*, the government must prove 1) that the defendant was a member of the conspiracy; 2) that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the substantive offense in question; 3) that this substantive offense was committed to help advance the conspiracy; and 4) that this substantive offense was within the reasonably foreseeable scope of the unlawful project. *See Pinkerton*, 328 U.S. at 645-48; *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir. 1970).

Here, the jury was properly instructed on the *Pinkerton* theory of liability. More specifically, the jury was instructed that to find Austin Woods liable on a *Pinkerton* theory, the government needed to prove, in relevant part, that "one or more of the other members [of the conspiracy] committed the specific firearm crime under consideration," which was the § 924(c) conviction in Count 11. (Dkt. 247-1, PgID 3880.) In turn, the instructions included all of the elements needed to prove Antoine Woods' use and carry of a firearm "during and in relation to one or both of the crimes of violence charged in the indictment that are under consideration . . . [t]hat is, for Count Eleven, the crimes of violence charged in Counts Nine and/or Ten." (*Id.* at PgID 3874.)

Moreover, the evidence was sufficient to establish all of these elements. As discussed above, there was sufficient evidence from which the jury could have concluded that a member of the conspiracy, namely Antoine Woods, committed the

substantive offense in question. And the volume and frequency of the communications between the members of the conspiracy support an inference that Antoine Woods committed the offense while he and Austin Woods were members of that conspiracy.

There was also sufficient evidence from which the jury could have concluded that Antoine Woods' commission of the substantive offense was committed to help advance the murder conspiracy and that it was within the conspiracy's reasonably foreseeable scope. Only a few weeks prior to the shooting, Austin Woods sent Antoine Woods and Rhymes a link to a video that provided 557 Alger as the address for their rival along with a message to Antoine stating "Go check that YouTube video for his grandmother address / That's where he hiding I guarantee" and a message to Rhymes stating, "Write down that address that's where he gone be / Grandma house." (Gov. Exhs. 40.16, 41.43.) Thus, the evidence was sufficient to support Defendant Austin Woods' conviction based upon a *Pinkerton* theory of liability.

Finally, the Court addresses Defendant's argument that the evidence in this case combined with the *Pinkerton* instruction amounted to a constructive amendment of the charge in the indictment. A constructive amendment occurs "when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *See United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007) (internal quotation marks and citation omitted). However, Defendant does not identify any trial evidence proving facts that differed from those alleged in the indictment. Moreover, the Sixth Circuit has held that a *Pinkerton* instruction for a

substantive offense does not result in a constructive amendment.[5] *See id.* at 527-28; *see also United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010) (holding "a district court does not constructively amend an indictment by giving a *Pinkerton* instruction when *Pinkerton* liability has not been charged" in the indictment). In sum, Defendants' arguments regarding their § 924(c) convictions have no merit.

D. Verdict Form was Proper

Defendant Antoine Woods argues that because the Court did not use a special verdict form, it is unclear whether the jury's guilty verdicts were unanimous as to each element of his convictions.[6] Defendant first notes that the jury was instructed that it could find him guilty of the attempted murder and assault with a dangerous weapon (VICAR) offenses as a principal or as an aider and abettor and that it could find him guilty of violating § 924(c) as a principal, aider and abettor, or under a *Pinkerton* theory of liability. However, these alternate theories do not necessitate a special verdict form. *See United States v. Perry*, 401 F. App'x 56, 62 (6th Cir. 2010) ("Since the criminal liability for principals and aiders and abettors is identical, there is no requirement that a jury unanimously find each was either a principal or an aider and abettor.") (citations omitted). Defendant also argues that a special jury verdict form was needed to clarify which predicate offense the jury based his § 924(c) convictions upon. However, as noted above, the jury was instructed that the § 924(c) charges were predicated on the

[5] In that case, the Sixth Circuit also held that a district court may properly provide a *Pinkerton* instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy. *Budd*, 496 F.3d at 528. Here, not only were Defendants charged with the offense of conspiracy, but also the jury returned guilty verdicts as to this charge. In fact, Defendants do not challenge the sufficiency of the evidence supporting their conspiracy convictions.

[6] Defendants did not raise an objection to the jury verdict form during trial.

VICAR offenses, not the conspiracy charge in Count 1. *Cf. United States v. Vasquez*, 672 F. App'x 56, 61 (2d Cir. 2016) (affirming a § 924(c) conviction using a general verdict form despite multiple predicates because the record made it clear that the conviction was supported by a valid drug trafficking predicate). Moreover, each § 924(c) conviction was based upon two VICAR offenses that stemmed from the same shooting, and the jury found Antoine Woods guilty of both of these underlying offenses for each conviction. Thus, the lack of a special verdict form in this case does not raise any unanimity concerns.

E. Sufficient Evidence for Guilty Verdicts as to Defendant Antoine Woods on Counts 16, 17

Defendant Antoine Woods seeks a judgment of acquittal on his conspiracy to commit obstruction of justice and obstruction of justice convictions (Counts 16, 17), but fails to make any argument regarding any deficiencies in the trial evidence. Regardless, the Court finds there was sufficient evidence to support these convictions.

To sustain a conviction for obstruction of justice, the government was required to prove "1) that there was a pending judicial proceeding, 2) that the defendant knew this proceeding was pending, and 3) that the defendant then corruptly endeavored to influence, obstruct, or impede the due administration of justice." *United States v. Monus*, 128 F.3d 376, 387 (6th Cir. 1997).

Here, the testimony of Case Agent Rummel and co-conspirator Rhymes established that there was a pending judicial proceeding, namely this case, during March and April of 2018 (the time of the charged obstruction conduct) and that Defendant Antoine Woods knew this proceeding was pending. (Dkt. 221, PgID 2572; dkt. 223, PgID 2936.) Moreover, there was several pieces of evidence from which the

jury could conclude that Antoine Woods endeavored to influence, obstruct, or impede the appearance and testimony of Rhymes. For example, Rhymes testified that Antoine Woods told him to plead the Fifth when they were both being held in the courthouse lock-up prior to a status conference. (Dkt. 221, PgID 2572-74.) He also testified that later, while being held at the same detention facility as Woods, another inmate, co-defendant Theodore Chandler, delivered an affidavit and a cover note to his cell. (*Id.* at PgID 2580-81.) The note stated in relevant part, "sign this and we will just act like shit never happened," and the affidavit stated that the signer "ha[s] no knowledge nor never witnessed, participated, or conspired with Antoine Woods, Austin Woods, or [another co-conspirator]" to commit "any state or federal crimes" and that "[a]ny statements made prior to this date would be false and made under duress." (Gov. Exhs. 100.1-3.) Antoine Woods stipulated that the handwriting on the cover note was his. (Dkt. 221, PgID 2586.) Woods also sent emails to coordinate the delivery of the affidavit and note, stating in part, "I need him to sign this affidavit for this case for me and [Austin]." (Gov. Exh. 104.22.) This evidence was sufficient to support Defendant Antoine Woods' obstruction of justice conviction.

For the conspiracy to commit obstruction of justice count, the jury was instructed that the government was required to prove that 1) "the defendant and at least one other person conspired, or agreed, to commit the crime of obstruction of justice;" 2) "that the defendant knowingly and voluntarily joined the conspiracy;" and 3) "that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy." (*See* dkt. 247-1, PgID 3884.) The evidence discussed above similarly supports this conviction. Moreover, Rhymes testified that

Chandler later entered his cell and threatened him, telling him to sign the affidavit. (Dkt. 221, PgID 2592-93.) Thus, there was sufficient evidence from which the jury could conclude that Defendant Antoine Woods engaged in a conspiracy to obstruct justice.

F. Defendant Antoine Woods' Social Media Posts were Properly Admitted

Defendant Antoine Woods argues that the government did not properly authenticate his social media accounts as belonging to him. The government responds by arguing that the government produced ample evidence linking Defendant to the social media accounts, "painstakingly reviewing key identifiers found in the social media accounts themselves and highlighting corroborating identifiers elsewhere." (Dkt. 283, PgID 4106.)

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "Authentication is a relatively low hurdle, and may be proved through a variety of methods, including circumstantial evidence." *United States v. Quintana*, 763 F. App'x 422, 426 (6th Cir. 2019) (internal quotation marks and citations omitted). A court's decision to admit particular evidence as properly authenticated does not preclude the defendant "from challenging its genuineness before the jury." *United States v. Jones*, 107 F.3d 1147, 1150 n.1 (6th Cir. 1997).

Here, for Defendant Antoine Woods' Instagram account (pesh_tarentino), the government introduced evidence that the account used the email address "HNICPesh@gmail.com," that the same email address and account name appeared in the user accounts on Antoine Woods' phone, and that Antoine Woods used the moniker

"Pesh." (Dkt. 200, PgID 1335-36, 1357-61.) The government also noted Antoine Woods in the profile picture and a picture posted on his birthday stating "HNIC Pesh 4642 happy birthday." For his twitter account, the government presented evidence that the account used the email address "freshpesh88@gmail.com," which matches Antoine Woods' 1988 birth year and his "Pesh" moniker, and had numerous pictures of Defendant. (Dkt. 231, PgID 3515-17, 3531.) This evidence was sufficient to support the authentication of Defendant's social media accounts. *Compare United States v. Quintana*, 763 F. App'x 422, 427 (6th Cir. 2019) (rejecting an authenticity challenge to the district court's admission of records from the defendant's Facebook page where there was "an account in defendant's name, an email address with his name and moniker, a location linked to defendant, dates that correspond to witness testimony, and a picture of defendant") *with United States v. Vayner*, 769 F.3d 125, 132-33 (2d Cir. 2014) (holding the district court's admission of what the government alleged was the defendant's profile page from a Russian social networking site was error due to a lack of proper authentication where there no evidence in the record to link the page to the defendant "[o]ther than the page itself"). Thus, there was no error in the admission of Defendant's social media posts.

G. Rhymes' Testimony Does Not Mandate a New Trial

Both Defendants raise issues relating to the testimony of their co-conspirator, Donovann Rhymes. Defendant Antoine Woods argues his due process rights were violated, because Rhymes provided false testimony. To establish a denial of due process based on the use of false testimony, however, a defendant must show "(1) the statement was actually false; (2) the statement was material, and (3) the prosecution

knew it was false." *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998) (internal quotation marks and citation omitted). "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Id.*

Here, Defendant has not provided any evidence that Rhymes' testimony was actually false. Defendant points to Rhymes' statement during cross-examination that he "possibly" told law enforcement that he, and not Woods, had committed the December 20, 2015 shooting. (*See* dkt. 221, PgID 2625.) Indeed, Rhymes himself admitted during direct examination that he was not always truthful in his prior meetings with the government. (*Id.* at 2571.) However, any inconsistencies between Rhymes' testimony and his prior statements are not sufficient on their own to establish he committed perjury or the prosecution knew of the alleged perjury. *See Coe*, 161 F.3d at 343. Moreover, Defense counsel had the opportunity to bring the inconsistent testimony to the attention of the jury during both cross-examination and closing argument. *See United States v. Ward*, 190 F.3d 483, 491 (6th Cir. 1999). Thus, there was no due process violation.

Defendant Austin Woods asserts that the Court's denial of Defendants' motion to strike Rhymes' direct testimony after he invoked his Fifth Amendment right against self-incrimination during cross-examination mandates a new trial. (Dkt. 209.) While a witness's invocation of the Fifth Amendment may have implications on a defendant's Sixth Amendment right to confrontation, the refusal of a witness to submit to cross-examination on "collateral maters" or to provide "cumulative testimony regarding credibility" does not require that any testimony be stricken. *See United States v. Stephens*, 492 F.2d 1367, 1375 (6th Cir. 1974); *see also United States v. Garrett*, 542 F.2d 23, 26 (6th Cir. 1976) (emphasizing the distinction "between general credibility and

answers which might possibly establish untruthfulness with respect to the specific events of the crime charged").

Here, while Rhymes initially invoked his Fifth Amendment privilege during three lines of questioning, he ultimately did answer the questions posed to him on two of those issues. And after considering the parties' briefs and hearing oral argument, the Court found that the third line of questioning—regarding an armed robbery for which charges were later dismissed—did not warrant any testimony be stricken because this was an issue that was "collateral at best and cumulative with respect to credibility." (Dkt. 225, PgID 3171; dkt. 211.) Thus, the Court properly denied Defendants' motion to strike Rhymes' direct testimony.

H. Disclosure of Bullet Fragment

Defendant Antoine Woods argues that the government violated Federal Rule of Criminal Procedure 16(a)(1) by its delayed disclosure of a bullet fragment that was introduced into evidence as Government Exhibit 71.14. The government responds by noting that the police report reflecting the recovery of a bullet fragment from the scene of the December 6, 2015 shooting was first produced seventeen months before trial and was also provided to Defendants' discovery coordinator approximately one year before trial. And while the government acknowledges that it did not conduct an expert analysis of the bullet fragment until much closer to trial, Defendants were provided the bullet fragment and other casings when they requested their own firearm examiner have an opportunity to review this evidence. Moreover, any delay did not prejudice Defendant, who did not object to the fragment's introduction into evidence and did not challenge the government's expert's conclusions about the fragment. (*See* dkt. 225, PgID 3182-84.)

Thus, Defendant's argument regarding the timeliness of the disclosure of the bullet fragment has no merit.

I. No Constructive Amendment Occurred

Defendant Antoine Woods argues that the indictment was constructively amended for two reasons. First, he notes that Count 4 of the indictment, charging him with assault with a dangerous weapon in aid of racketeering, listed three victims, while the jury instructions only included two of those victims. Moreover, the indictment charged the HNIC enterprise with engaging in activities that affected "interstate and foreign commerce," but the jury was instructed that the government must prove the enterprise's affect only on "interstate commerce."

However, "[i]t is settled law that an offense may be charged conjunctively in an indictment where a statute denounces the offense disjunctively. Upon the trial the government may prove and the trial judge may instruct in the disjunctive form used in the statute." *United States v. Murph*, 707 F.2d 895, 896-97 (6th Cir. 1983) (citation omitted). Here, for the VICAR offenses, the government was required to prove that the enterprise was engaged in activities that affected "interstate *or* foreign commerce." *See* § 1959(b)(2). Thus, the government's reliance only on "interstate commerce" was permissible. Similarly, the fact that the government did not present evidence on one of the victims named in the indictment does not impact the validity of the conviction as to the other two victims. In sum, there was no constructive amendment.

J. Ballistics Evidence

Defendant Antoine Woods argues that the government failed to disclose exculpatory ballistics evidence in violation of its *Brady* obligations. Defendant appears

to base this argument on speculation, noting that ballistics evidence was presented to the jury for all the shootings except the December 7, 2015 shooting that took place at a hair salon. Defendant argues that the evidence would have shown that the same firearm was used in both the December 7, 2015 and December 20, 2015 shootings. However, the government responds by noting that while one of the casings recovered from the December 7, 2015 shooting was submitted for entry into the National Ballistic Information Network, the system did not identify any potential matches that would warrant further comparison analysis. Thus, the government did not fail to disclose exculpatory ballistics evidence, because no such evidence exists.

K. Prejudicial Statement Does Not Warrant a New Trial

Defendant Austin Woods asserts that a prejudicial statement made by a government witness in the presence of the jury warrants a new trial in this case. The government argues that the jury instructions given by the Court sufficiently protected against any juror bias resulting from the statement.

In response to questions about the beginning of the investigation into HNIC as a part of the government's case-in-chief, Case Agent Rummel stated that he had been investigating various HNIC members as "either witnesses or party to some violent crimes, including a drive-by shooting of a residence in which a three-month old was killed." (Dkt. 200, PgID 1326-27.) Counsel for all parties approached the bench and the defense requested a mistrial, arguing the statement was prejudicial. The Court agreed the statement was prejudicial but held it did not warrant a mistrial. (*Id.* at PgID 1327-28.) The Court also instructed the witness not to volunteer detailed information about prior or contemporaneous investigations "if the underlying allegations involve serious

crimes such as the murder of a three-month old." (*Id.* at PgID 1329.) Defense counsel moved for a mistrial on the same basis again the next morning. (*See* dkt. 228, PgID 3337.) The Court denied the motion but indicated that it would give the jury cautionary instructions if the parties so agreed. The parties ultimately agreed upon the following language:

> Earlier in this trial on May 21, 2019 you heard testimony from Special Agent Matthew Rummel that law enforcement investigated whether various members of HNIC were either witnesses or parties to a drive-by shooting of a residence that resulted in the death of a three-month-old baby, child, in 2012 or 2013. The government and defendants have agreed or stipulated to the following fact: Upon further investigation, law enforcement ultimately determined that neither HNIC nor defendant Antoine Woods nor defendant Austin Woods were involved in the drive-by shooting. Accordingly, you are instructed to completely disregard Agent Rummel's testimony about that 2012 or 2013 drive-by shooting. Do not discuss it or consider it in your deliberations. You cannot consider it in any way against either of the defendants. Do not let it influence your verdict in any way.

(Dkt. 217, PgID 1892-93.) Despite these instructions being read by the Court to the jury on May 29, 2019, Defendant Austin Woods now argues that they did not cure the prejudicial nature of the witness's statement.

As a general matter, "[b]ackground information that explains how law enforcement came to be involved with a particular defendant" is admissible. *See United States v. Caver*, 470 F.3d 220, 239 (6th Cir. 2006). Here, in response to a line of questioning regarding how he came to be involved with Defendants, the case agent made the prejudicial statement at issue. In cases where the Sixth Circuit has considered whether particular prejudicial testimony warrants a new trial, it has considered a number of factors, including whether curative instructions were given, "whether the prejudicial statement was an isolated incident or comprised a significant part of the testimony," and "whether the government acted in bad faith or deliberately

injected the comment." *See United States v. Munda*, No. 92-5588, 1993 U.S. App. LEXIS 11130, at *5 (6th Cir. May 7, 1993) (citing cases); *see also United States v. Reesor*, 10 F. App'x 297, 304 (6th Cir. 2001) ("In order for a mistrial to be warranted, the admitted evidence on which it is based must render the trial unfair.").

Here, the prejudicial testimony was only one statement and there is no evidence that the government acted in bad faith or deliberately injected the testimony. (*See* dkt. 228, PgID 3336.) Moreover, the jury was not only instructed to disregard the statement, but was also explicitly informed that the investigation revealed that both Defendants were not involved in the drive-by shooting. Thus, the instructions were sufficient to cure any prejudice resulting from the jury hearing the statement made by the witness, and the Court properly denied the motion for a mistrial. *See United States v. Martinez*, 430 F.3d 317, 336-37 (6th Cir. 2005) (finding no abuse of discretion in the denial of a motion for mistrial due to a remark regarding the defendant's prior arrests because it was unsolicited, the government's line of questioning was reasonable, the jury was instructed to disregard the testimony, and the statement was only a small part of the evidence); *Munda*, 1993 U.S. App. LEXIS 11130, at *3-5 (finding no abuse of discretion in the denial of a mistrial due to testimony regarding the defendant previously serving time in prison because "it was only one statement, never mentioned again by either party, unsolicited, and cured by fully instructing the jury"). In sum, the isolated statement made by the government witness did not render the trial unfair.

L. Video Evidence was Properly Admitted

Defendant Austin Woods argues that the Court's admission of certain video evidence constituted error. In the video at issue, Austin Woods, in a YouTube interview,

introduces himself as "HNIC Ken," states that he represents HNIC, and describes how he directed "goons" to "humble" a particular individual who had shown too much disrespect. (*See* dkt. 184-1, PgID 1114-17.) Prior to trial, Defendants filed a motion in limine, seeking to preclude the government's introduction of certain rap videos, song lyrics, and other social media evidence, including this video. (Dkt. 184.) Defendants argued that this evidence should be excluded because it is artistic expression entitled to First Amendment protection, and its probative value is outweighed by the risk of unfair prejudice. (*Id.*) The government argued that the evidence was admissible because it is relevant to the existence of the HNIC enterprise, the purpose of the enterprise, and Defendant's role in that enterprise. (Dkt. 197.) After considering the parties' briefs and hearing oral argument, the Court denied Defendants' motion but ordered the government to alert the Court prior to the admission of any song lyrics or video clips. (Dkt. 199.) After reviewing the video clips in camera, the Court held that they were admissible. (Dkt. 231, PgID 3527.) Austin Woods offers no reason for the Court to reconsider its previous ruling. In fact, Defendant himself offered clips from the same video at trial. (*See* dkt. 224, PgID 3059-61.) The admission of the video evidence did not constitute error.

M. Mandatory Sentencing Provisions are Not Unconstitutional

Defendant Austin Woods asserts that the mandatory sentencing provisions of § 924(c) are unconstitutional as cruel and unusual under the Eighth Amendment. Because Austin Woods had not yet been sentenced, however, this issue is not ripe for review. Moreover, the Sixth Circuit has previously rejected an Eighth Amendment claim to the consecutive-sentence requirement in § 924(c). *See United States v. Watkins*,

509 F.3d 277, 282-83 (6th Cir. 2007) (noting "the Supreme Court has held that life sentences for even nonviolent offenses are constitutional"); *see also United States v. Ellis*, 483 F. App'x 940, 942 (6th Cir. 2012) (rejecting an Eighth Amendment claim to the mandatory minimum sentence provisions in 21 U.S.C. § 841). In sum, the sentencing requirements in § 924(c) are not unconstitutional.

III. Conclusion

For the foregoing reasons, Defendants Antoine Woods' and Austin Woods' Rule 29 and Rule 33 motions are DENIED.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: March 2, 2020

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 2, 2020, by electronic and/or ordinary mail.

s/Lisa Bartlett
Case Manager