APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, AKA Devil, AKA P-Grump, AKA PG, AKA Pueblo Group, Defendant-Appellant.	No. 19-50355 D.C. No. 2:10-cr-00923-SJO-31 Central District of California, Los Angeles ORDER

Before: WATFORD and BUMATAY, Circuit Judges, and FREUDENTHAL,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Watford and Bumatay vote to deny the petition for rehearing en banc, and Judge Freudenthal so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed September 8, 2021, is DENIED.

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, AKA Devil, AKA P-Grump, AKA PG, AKA Pueblo Group, Defendant-Appellant.	No. 19-50355 D.C. No. 2:10-cr-00923-SJO-31 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted July 9, 2021
Pasadena, California

Before: WATFORD and BUMATAY, Circuit Judges, and FREUDENTHAL,** District Judge.
Concurrence by Judge WATFORD

Following an earlier reversal and remand in *United States v. Young*, 720 F. App'x 846 (9th Cir. 2017), Rondale Young was tried a second time on charges

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

arising from a 2009 shooting at a carwash in nearby 38th Street gang territory. The jury returned convictions for conspiracy to violate the Racketeer Influenced and Corrupt Practices Act (RICO), conspiratorial and substantive murder under the Violent Crime in Aid of Racketeering (VICAR) statute, and use of a firearm in furtherance of a crime of violence. The Court vacates Young's firearm conviction, vacates the related consecutive ten-year sentence, and affirms in all other respects.

1. Young argues his prior state acquittal for murder bars or is a defense against federal prosecution for VICAR murder. He also argues re-prosecution is barred because the government delayed prosecution. The district court did not err in denying dismissal. The federal trial was not for a violation of the same statute adjudicated in state court even though the indictment for VICAR murder borrowed California law defining murder. Thus, the exception to the separate sovereign doctrine recognized in *Houston v. Moore*, 18 U.S. 1 (1820) and confirmed in *Gamble v. United States*, 139 S. Ct. 1960, 1977–78 (2019), does not apply.

Young's second theory that his state acquittal is a valid defense was not preserved below, thus this issue is reviewed for plain error. *United States v. McElmurry*, 776 F.3d 1061, 1063 (9th Cir. 2015). The district court did not plainly err in allowing the VICAR murder charge to go to the jury. On this charge, to avoid prejudice, the court "should instruct on the state definition" to include "the requisite state of mind or the law respecting self-defense." *United States v. Adkins*,

883 F.3d 1207, 1211 (9th Cir. 2018) (citation omitted). A prior acquittal is not part of California's *definition* of murder; thus his state acquittal is not a valid defense to VICAR murder.

As to delay in prosecution, Young's Sixth Amendment speedy trial claim is waived by his failure to raise it in the earlier appeal. *United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003) ("[Defendant] cannot now use the serendipitous fact of reversal . . . to refashion his defaulted claims. . . ."). Dismissal for delay under Federal Rule of Criminal Procedure 48(b) "is limited to post-arrest situations." *United States v. Benitez*, 34 F.3d 1489, 1495 (9th Cir. 1994) ("[A]n arrest or prosecution by state authorities does not trigger Rule 48(b)"). The ten-month period between Young's federal arrest and trial does not constitute unnecessary delay.

2. Young argues the law of the case requires suppression of his second-day custodial statements and recorded calls based on the mid-stream *Miranda* warning given his first day in custody during a deliberate two-step interrogation ruled improper in his earlier appeal. *Young*, 720 F. App'x at 848–49. Young also argues for suppression of his recorded calls, and for suppression of allegedly coerced statements made after officers detained and referred to his mother. The law of the case does not require suppression of Young's second-day statements because this Court's earlier decision addressed only the circumstances of the first

day with no implication that the Court reached Young's later statements. *See United States v. Garcia-Beltran*, 443 F.3d 1126, 1129 (9th Cir. 2006) (the law of the case extends to issues "decided explicitly or by necessary implication").

Further, there is no clear error in the district court's factual findings denying Young's suppression motion. *United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017) ("[F]actual findings [are reviewed] for clear error . . . ."). These findings support the district court's conclusion that the circumstances of that second day were curative of the prior day's *Miranda* violation. *See Bobby v. Dixon*, 565 U.S. 23, 32 (2011) (the break in time and change in circumstances created "a new and distinct experience" to conclude the *Miranda* warning was not undermined (citation omitted)). No additional curative steps were required for a reasonable person in Young's position to understand that he had a real choice about whether to speak again at his request to the detectives. *See Missouri v. Seibert*, 542 U.S. 600, 611–12 (2004).

The district court's findings that Young's testimony was not credible support the order denying suppression of the recorded calls. Special deference is given to a district court's determinations of witness credibility. *United States v. Hovsepian*, 422 F.3d 883, 885 (9th Cir. 2005). Finally, the detective's actions and comments about Young's mother were not coercive but were logically related to video

surveillance and eyewitness identifications indicating the vehicle used in the carwash shooting belonged to Young's mother.

3. Young argues the jury instructions erroneously described VICAR's purpose (motive) and its malice elements. As to purpose, Young argues *Burrage v. United States*, 571 U.S. 204 (2014) requires a "but-for" causal relationship between the racketeering enterprise and the murder. This argument was rejected in *United States v. Rodriguez*, 971 F.3d 1005, 1010–11 (9th Cir. 2020) and thus we reject it here. The district court correctly gave a "substantial purpose" rather than a "but-for cause" instruction for the VICAR purpose element. Young also argues the disjunctive form of the purpose instruction was erroneous. However, a disjunctive formulation was specifically recognized in *United States v. Banks*, 514 F.3d 959 (9th Cir. 2008) to "ensure that the statute is given its full scope, without allowing it to be used to turn every criminal act by a gang member into a federal crime." *Id*. at 970.

The Court also rejects Young's arguments that the malice instructions were defective for conspiratorial and substantive murder under VICAR. The instruction for conspiratorial murder required the government to prove Young agreed and intended that one or more of his co-conspirators would "intentionally and unlawfully kill" the victim, not just "intentionally kill." The substantive VICAR murder instruction provided that a person acts with *express malice* if he unlawfully

intended to kill. Read together, the phrase "intentionally and unlawfully kill" incorporates an express malice requirement. The jury could not convict on only implied malice. On aiding and abetting VICAR murder, the instruction required the jury find Young "intentionally help[ed] someone else commit a crime" by "act[ing] with the intent to facilitate murder in the aid of racketeering" by "actively participat[ing] in a criminal venture *with advance knowledge* of the crime and having acquired that knowledge *when Defendant still had a realistic opportunity to withdraw from the crime*." (emphasis added). This instruction does not permit a conviction by finding the shooting was merely a natural and probable consequence of Young picking up the co-conspirators. Finally, the instruction for *Pinkerton* liability is correct in that the jury was required to find Young agreed with the shooter that one or both of them would kill with express malice, and the shooting of the victim was a natural and probable consequence of that agreement.

4. Young's conviction for use and carry of a firearm in furtherance of a crime of violence relies on the VICAR second degree murder charge as the crime of violence. *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019) held that a finding of extreme recklessness, depraved heart, or implied malice will suffice as the requisite mental state for second degree murder under federal and California law. *Id*. at 1040; Cal. Penal Code § 188. The plurality in *Borden v. United States*, 593 U.S. __, 141 S. Ct. 1817 (2021) concluded the phrase "violent felony" under

18 U.S.C. § 924(e) of the Armed Career Criminal Act (ACCA) does not include offenses criminalizing reckless conduct. *Id*. at 1825. The definitions of "crime of violence" in § 924(c)(3) and "violent felony" in § 924(e)(2)(B) are identical in relevant part. Because second degree murder under federal and California law criminalizes reckless conduct, VICAR second degree murder is not categorically a crime of violence. Because Young's conviction under 18 U.S.C. § 924(c) is vacated, the Court declines to address whether *Pinkerton* liability applies.

5. The Court rejects Young's argument that the law permits a fine without imprisonment for VICAR murder. *See United States v. Rollness*, 561 F.3d 996, 998 (9th Cir. 2009) (per curiam) (recognizing that "§ 1959(a)(1) imposes a minimum sentence of life imprisonment for VICAR murder"). The holding in *Rollness* is unaffected by *Encino Motors, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

VACATE 18 U.S.C. § 924(c) CONVICTION AND SENTENCE; AFFIRM IN ALL OTHER RESPECTS.

WATFORD, Circuit Judge, concurring:

I agree with my colleagues that a conviction for VICAR murder carries a mandatory minimum sentence of life imprisonment without the possibility of parole. *United States v. Rollness*, 561 F.3d 996, 997–98 (9th Cir. 2009) (per curiam); *accord United States v. Under Seal*, 819 F.3d 715, 720 (4th Cir. 2016); *United States v. Carson*, 455 F.3d 336, 385 n.44 (D.C. Cir. 2006) (per curiam); *United States v. James*, 239 F.3d 120, 126–27 (2d Cir. 2000). But this case illustrates why mandatory minimum sentences of any sort—especially a sentence of life without parole—are both unjust and unwise.

The district judge who sentenced Rondale Young to life without parole did not believe that sentence to be warranted. He agreed with the jury's verdict, which was predicated on a finding that Young played an integral role in the murder of an innocent person. To retaliate against a rival gang, Young drove two of his fellow gang members into the rival gang's territory to kill one of that gang's members. Young's co-conspirators got out of the car, shot and killed someone they mistakenly believed to be a member of the rival gang, and then ran back to the car where Young was waiting to drive them off. Young no doubt deserved a lengthy sentence for engaging in that conduct, and the judge who presided over his trial and heard the evidence against him was no doubt prepared to impose such a

sentence. But the judge also stated that, if afforded the discretion to do so, he would not have sentenced Young to spend the rest of his life in prison.

Young's character and background did not suggest that he deserved the law's most severe sanction short of death. He was 26 years old at the time of the offense, a devoted father, and employed as a delivery driver for Arrowhead. He had only a minor criminal record. In addition, there was no evidence suggesting that Young had planned or orchestrated the murder, so his role in the offense rendered him at least somewhat less culpable than the other two participants. Yet the judge had already sentenced one of those defendants—the one who prosecutors believed had actually shot the victim—to 40 years in prison. (That defendant, Anthony Gabourel, had been tried separately from Young and acquitted of the VICAR murder charge, so he avoided the mandatory life sentence that Young faced.) The judge was understandably reluctant to impose on Young a longer sentence than the one his more culpable co-defendant had received.

What the Supreme Court has said in the capital sentencing context applies, in my view, with no less force in non-capital cases. Arriving at a "just and appropriate sentence" in any case—capital or otherwise—"requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); *see also* 18 U.S.C. § 3553(a)(1) (requiring the court to

consider, among other factors, the "nature and circumstances of the offense and the history and characteristics of the defendant"). Mandatory minimum sentencing laws frequently preclude the imposition of a just and appropriate sentence because they "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson*, 428 U.S. at 304. Young deserved to be treated "with that degree of respect due the uniqueness of the individual," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion), even if he was facing a sentence of life without parole rather than death.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONDALE YOUNG, AKA Devil, AKA P-Grump, Defendant-Appellant.	No. 15-50158 D.C. No. 2:10-cr-00923-SJO-31 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted July 10, 2017
Pasadena, California

Before: PREGERSON,** REINHARDT, and WARDLAW, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Prior to his death, Judge Pregerson fully participated in this case and formally concurred in this disposition after deliberations were complete.

On August 2, 2009, alleged Pueblo Bishops Bloods gang member Jesse McWayne was killed during a drive-by shooting in the Pueblo Del Rio Housing Projects in South Los Angeles. When a responding officer arrived at the scene, he heard someone in the crowd say, "It was 38." Just forty minutes later, at a carwash in nearby 38th Street gang territory, two men exited a black Chrysler and shot and killed Francisco Cornelio. Detectives suspected that Rondale Young was involved in the shooting because video surveillance and eyewitness identifications indicated that the vehicle used in the carwash shooting belonged to Helen Young, Rondale's mother, and he was charged and convicted.

Rondale Young now appeals his jury trial convictions for conspiracy to violate the Racketeer Influenced and Corrupt Practices Act (RICO), conspiratorial and substantive murder under the Violent Crimes in Aid of Racketeering (VICAR) statute, and use of a firearm in furtherance of a crime of violence. Because several inculpatory statements were admitted into evidence in violation of *Miranda* and the Confrontation Clause, and the district court erroneously instructed the jury on the elements of RICO, we vacate the convictions and remand.

1. Young argues that the district court erred in admitting hearsay statements made by alleged Pueblo Bishops gang member Shane Tresevant, in violation of the Confrontation Clause. During trial, Detective Calzadillas testified

that Tresevant told a detective that he saw Young and Anthony Gabourel get into Young's mother's vehicle shortly after Jesse McWayne was shot. Detective Calzadillas also testified that Tresevant told a detective that Gabourel returned to the Pueblo Del Rio Housing Projects about an hour later and said they "got one." When the prosecutor asked Detective Calzadillas what he understood "got one" to mean based on his training and experience with gangs, Detective Calzadillas replied, "That they had shot somebody in retaliation."

Neither Gabourel nor Tresevant testified at trial. The statements were admitted over defense counsel's hearsay and Confrontation Clause objections. The government concedes that the district court erred in admitting the statements, but argues that the error was harmless. We disagree.

The government bears the burden of showing that a Confrontation Clause error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). In evaluating this issue, we consider "the importance of the witness'[s] testimony to the prosecution's case, whether the testimony was cumulative, . . . and, of course, the overall strength of the prosecution's case[.]" *See United States v. Esparza*, 791 F.3d 1067, 1074 (9th Cir. 2015) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). "Even when the government's case is 'strong,' a Confrontation Clause violation is not harmless

where the erroneously admitted evidence could have 'significantly altered the evidentiary picture.'" *Id.* (quoting *United States v. Bustamante,* 687 F.3d 1190, 1195 (9th Cir. 2012)).

Here, there was limited evidence of Young's involvement in the shooting. Besides the Tresevant hearsay statements, the other evidence that allegedly placed Young at the scene of the crime included (1) Young's mother's statement to police that her son had her car on the morning of the murder; (2) Young's inculpatory statements to police, which, as discussed below, were obtained in violation of *Miranda*; and (3) video surveillance that showed Young's mother's car (though not Young) at the crime scene. Eyewitnesses at the crime scene did not visually identify Young, and Gabourel admitted that he and three others (including Tresevant) were in the car on the day of the murder, but he did not implicate Young.

The evidence of Young's gang involvement was also minimal. The motive for the shooting, an essential element under VICAR, was predominantly established by Detective Calzadillas's testimony that the "got one" remark indicated a retaliatory, gang-related motive. The only other evidence directly linking Young to gang-affiliated conduct were his boasts to a jail informant, which

at best ambiguously tie Young to the gang and could instead indicate that Young had disavowed "putting in work" for the gang by the time of the offense.

Eliminating Tresevant's hearsay statements undermines the likelihood that the jury would have found that Young was present in the car when the murder occurred or that Young had a gang-related motive for participating. However, we need not decide whether the Confrontation Clause violation was harmless on its own because we conclude that the Confrontation Clause and *Miranda* violations were collectively prejudicial.

2. Young argues that detectives engaged in a deliberate two-step interrogation process when they questioned him on September 22, 2009, in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Missouri v. Seibert*, 542 U.S. 600 (2004).

A "deliberate two-step interrogation" occurs when an officer deliberately waits until the suspect has confessed, then gives *Miranda* warnings and has the suspect repeat his confession. *Id.* at 1158–60. Under *Seibert*, if officers deliberately employ the two-step technique, any post-warning statement must be suppressed unless sufficient curative measures are taken to ensure that the midstream *Miranda* warnings are genuinely understood. *Reyes v. Lewis*, 833 F.3d 1001, 1029 (9th Cir. 2015). Curative measures may include "a substantial break in

time and circumstances between the pre-warning statement and the *Miranda* warning," or "an additional warning that explains the likely inadmissibility of the pre-warning custodial statement." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

The record shows that detectives deliberately engaged in a two-step interrogation. Detectives interrogated Young at the police station for at least twenty minutes without providing any *Miranda* warnings. Only *after* Young confessed that he drove the vehicle linked to the shooting (his mother's car) did the detectives finally give him *Miranda* warnings. Although the pre-warning part of the interview was not recorded, Young's post-warning statements appear to be largely repetitive of his pre-warning statements. For example, in response to a question about who was in the car with him, Young said, "I already told you that . . . ." This suggests that the detectives were asking substantive questions about the investigation before the recording device was turned on and before they gave the *Miranda* warnings.

Moreover, the detectives did not take any curative measures. They gave Young only a short break between the pre- and post-warning interrogations. There is no evidence that the detectives told Young that his prior statements would likely be inadmissible. The post-warning interrogation occurred in the same location as

the pre-warning interrogation, and the same detectives carried out both interrogations.

We reject the government's contention that the detectives delayed giving the *Miranda* warnings so that they could build rapport with Young and get "biographical" information. The police arrested Young during his truck route and transported him to the police station to be questioned about the murder. By that time, Detective Calzadillas knew that (1) the car at the scene matched Young's mother's car; (2) Young's mother said that only she and her son drove the car and that he was driving it on the morning of the shooting; and (3) at least one witness (Tresevant) had identified Young as being involved. The detectives had no excuse to delay giving the *Miranda* warnings when they interviewed Young, one of the few suspects they had at that point in the investigation. *Cf. Reyes*, 833 F.3d at 1031.

3. Young argues that the district court misinstructed the jury on the elements of RICO, 18 U.S.C. § 1962(d), and VICAR, 18 U.S.C. § 1959(a)(1), (5). Here, Young objected to the RICO jury instruction but did not specify the grounds for his objection, and Young did not object to the VICAR instruction. We therefore review his claim for plain error. *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943).

Young argues that the RICO instruction did not accurately state the culpability required for a criminal conviction under RICO. We agree. The district court instructed the jury that the government must prove that Young "conspired and agreed" that he "or a co-conspirator, would conduct or participate, either directly or indirectly, the conduct of the affairs of the enterprise through a pattern of racketeering activity." The district court's instructions obscure the elements of the crime because they do not explain what the defendant, not a co-conspirator, needed to agree to do in order to be found criminally culpable as a conspirator. A defendant is guilty of conspiracy to violate RICO only if the evidence shows that the defendant knowingly and personally "agreed to facilitate a scheme which includes the operation or management of a RICO enterprise." *See United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) (internal quotation marks omitted). Because the jury instructions are contrary to *Fernandez*, they are plainly erroneous.

We disagree, however, with Young's argument that the district court erred in instructing the jury on the motive element under VICAR. The VICAR offense requires a murder to have been committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity . . . ." 18 U.S.C. § 1959. Implementing our decision in *United States v.*

Banks, 514 F.3d 959, 969 (2008), the district court instructed the jury that the government must prove that enhancing Young's status in the enterprise was a "substantial purpose" for the murders. Young argues that *Burrage v. United States*, 134 S. Ct. 881 (2014), a case decided after Young's trial, overrules *Banks* and should have required the government to prove that Young's motive to enhance his status was a "but for" cause of the murders. Without deciding the scope of *Burrage* or its applicability to the motive element in VICAR, we conclude that the district court's instruction was not plainly erroneous because *Burrage*'s interpretation of the causation element in the Controlled Substances Act is not obviously applicable in the VICAR context.

4. Collectively, the Confrontation Clause, *Miranda* violations, and the erroneous jury instructions were not harmless. Without the Tresevant hearsay statement and Young's statement that he was driving his mother's car near the carwash at the time of the shooting, the government's case was weak. Young's mother's statement that her son had the car on the morning of the murder does not preclude the possibility that Young lent the car to another person and does not definitively place Young at the scene of the crime. Additionally, Anthony Gabourel admitted to being in the murder vehicle and named his companions (including Tresevant), none of whom was Young.

Nor is the error in the RICO jury instruction harmless because, at trial, Young heavily contested the government's assertion that Young had personally agreed to facilitate a racketeering scheme. Young's counsel pointed to a complete absence of evidence that Young had any connection with the Pueblo Bishop Bloods's actual gang activity, and recordings captured Young saying that he had "learned a lesson" and had "stopped hanging out" with the gang. Because we cannot "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," *Neder v. United States*, 527 U.S. 1, 17 (1999), the erroneous RICO instruction was not harmless.

Absent the erroneously admitted evidence, the jury would have had no evidence that contravened Gabourel's account. Because we cannot be certain "beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, we vacate Young's convictions and remand for a new trial.

VACATED AND REMANDED.