No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID PEREZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX A – OPINION OF THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1448

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID PEREZ,

Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16 CR 462-6 — **Rebecca R. Pallmeyer**, *Chief Judge*.

ARGUED OCTOBER 27, 2020 — DECIDED DECEMBER 23, 2021

Before SYKES, *Chief Judge*, and KANNE and ST. EVE, *Circuit Judges*.

SYKES, *Chief Judge*. David Perez was a member of the Latin Kings street gang in Maywood, Illinois, and served in several leadership positions in which he ordered or personally carried out acts of violence, including the attempted murder of a former gang member. He pleaded guilty to conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d),

and possessing a firearm as a felon, *id.* § 922(g)(1). The district judge sentenced him to concurrent terms of 336 months and 120 months in prison, respectively—below the advisory range under the Sentencing Guidelines.

Perez challenges his sentence on two grounds. He first argues that the judge incorrectly held that the attempted-murder predicate for the RICO violation increased the maximum penalty on that count to life in prison under 18 U.S.C. § 1963(a). He also contends that the judge committed a procedural error by failing to consider his argument under 18 U.S.C. § 3553(a)(6) about the need to avoid unwarranted sentencing disparities with similarly situated defendants.

We affirm. The judge correctly determined that the RICO violation was "based on" an act of racketeering that is punishable by life imprisonment under state law—discharging a firearm in an attempted murder—a predicate act that raised the applicable maximum penalty from 20 years to life under § 1963(a). *See United States v. Brown*, 973 F.3d 667, 709 (7th Cir. 2020). The argument about unwarranted sentencing disparities is both waived and meritless. It is waived because at sentencing the judge twice asked Perez's counsel whether he was satisfied with the court's explanation of the sentence, and both times counsel failed to mention any § 3553(a)(6) concerns. Waiver aside, a sentence within or below a properly calculated Guidelines range necessarily complies with § 3553(a)(6). *United States v. Sanchez*, 989 F.3d 523, 540–41 (7th Cir. 2021).

I. Background

From 2004 to 2008, and again from 2012 to 2015, David Perez was a member of the Latin Kings street gang operating in the Village of Maywood just west of Chicago. The Maywood branch of the gang was divided into two "circles," each with its own set of leaders—the older members or "Junior" circle and the younger members or "Shorty" circle. At various points during his membership, Perez held several leadership positions, including the "Inca" of the Shorty circle—essentially its president. *See, e.g.*, *United States v. Porraz*, 943 F.3d 1099, 1101 (7th Cir. 2019). As Inca, Perez recruited new members, enforced dues obligations, directed the use of armed patrols, ordered violent beatings to punish gang members, and instructed members to commit acts of violence.

On May 10, 2014, the Junior circle ordered the murder of Victim 1, a runaway former gang member. Perez saw Victim 1 at a restaurant in Melrose Park on Mother's Day, May 11. He alerted other gang members, who came to the scene and shot Victim 1 multiple times in the stomach and chest. The victim survived but suffered permanent colon damage and requires a colostomy bag for the rest of his life.

In 2016 a federal grand jury returned an indictment charging Perez and 14 other gang members with racketeering and other offenses related to their participation in the Maywood Latin Kings. Perez was charged in nine counts, including racketeering conspiracy, conspiracy to commit murder in aid of the racketeering enterprise, attempted murder in aid of the enterprise, assault with a dangerous weapon in aid of the enterprise, and four counts of unlawful possession of a firearm by a felon. He pleaded guilty to

racketeering conspiracy, *see* § 1962(d) (Count 1), and unlawful possession of a firearm by a felon, *see* § 922(g)(1) (Count 16).

Perez did not admit in his plea declaration to facts surrounding the attempted murder of Victim 1, but he later stipulated that he participated in the murder—indeed, he ordered and agreed with other gang members to carry out the act. He further stipulated, and the district judge found, that the facts of the attempted murder were proven beyond a reasonable doubt.

Punishments for RICO violations are typically capped at 20 years in prison, but the maximum increases to life imprisonment when a "violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." § 1963(a). Because RICO defines "racketeering activity" as "any act … chargeable under State law," 18 U.S.C. § 1961(1), the applicable statutory maximum often turns on state law.

The parties disagreed about whether the attempted murder of Victim 1 increased Perez's statutory maximum on Count 1 to life in prison under § 1963(a). Perez argued that the maximum remained 20 years because under Illinois law attempted murder carries a maximum life sentence only if the defendant "personally discharged a firearm that proximately caused great bodily harm." 720 ILL. COMP. STAT. 5/8-4(c)(1)(D). It's undisputed that Perez did not personally fire the shots at Victim 1, so he argued that the maximum sentence could not be enhanced under § 1963(a).

The judge disagreed, reasoning that Perez faced a statutory maximum of life on Count 1 because sentences for

RICO conspiracies do not hinge on acts committed by a specific defendant; rather, they reflect the operation of the criminal enterprise as a whole. That is, the attempted murder of Victim 1 was a predicate racketeering act attributable to all members of the conspiracy.

In his sentencing memorandum and again at the sentencing hearing, Perez asked the court to consider the sentences of coconspirators Jose Pena and Ulises De La Cruz when determining his sentence. Pena was sentenced to 96 months on Count 1, and De La Cruz was sentenced to 210 months for the same count.

After considering the factors set forth in § 3553(a), the judge sentenced Perez to concurrent terms of 336 months and 120 months on Counts 1 and 16, respectively—below the Guidelines range of 360 months to life. The judge characterized Perez's participation in the conspiracy as "shocking and horrifying," finding that he had engaged in "hideous, stupid, [and] meaningless violence." The judge considered the permanent injuries to Victim 1, the culture of fear created by the Latin Kings, and the need for general deterrence. Balancing these considerations, the judge concluded that "the guideline range is about right in this case," but she imposed a sentence below that range in recognition of Perez's "genuine and heartfelt" acceptance of responsibility.

The judge twice asked Perez's counsel if there were any issues she had overlooked or should address. Counsel requested his client's placement in a particular Bureau of Prisons facility but did not mention sentencing disparities—either generally or with respect to coconspirators Pena and De La Cruz in particular.

II. Discussion

Perez challenges the judge's ruling regarding the statutory maximum penalty for the RICO conviction and her failure to address his argument about unwarranted sentencing disparities. We review claims of legal and procedural error de novo. *United States v. Durham*, 766 F.3d 672, 685 (7th Cir. 2014).

A. Life Sentence Eligibility

As we've noted, the statutory maximum sentence for a RICO offense is ordinarily 20 years, but the maximum increases to life "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." § 1963(a). Perez reprises the argument he made below that the enhanced maximum does not apply here because attempted murder is punishable by life in prison under Illinois law only when the defendant "personally discharged a firearm that proximately caused great bodily harm." 730 ILL. COMP. STAT. 5/5-8-1(a)(1)(d)(iii); § 5/8-4(c)(1)(D). It's undisputed that Perez ordered the killing of Victim 1 but did not personally fire the gun. So, Perez reasons, the statutory maximum for his RICO conspiracy conviction remained capped at 20 years because his violation was not "based on" a predicate act for which the maximum penalty under state law includes life imprisonment.

This argument misunderstands the language and operation of § 1963(a). The proper inquiry is whether the RICO "violation"—here, conspiracy—was *based on* a predicate crime punishable by life imprisonment. The judge therefore correctly framed the question and likewise correctly answered it. The RICO violation was based in part on the

predicate racketeering act of attempted murder—that is, a coconspirator's attempt to kill Victim 1 by shooting him, causing great bodily harm. Under Illinois law, that version of attempted murder is punishable by life imprisonment.

We addressed a similar argument in *United States v. Brown*, 973 F.3d 667 (7th Cir. 2020). There, the defendants were members of a street gang and were convicted of RICO conspiracy predicated on racketeering acts that included multiple first-degree murders. Illinois law authorizes a sentence of life imprisonment for first-degree murder when certain aggravating factors are present. 730 ILL. COMP. STAT. 5/5-4.5-20(a), 5/5-8-1; 720 ILL. COMP. STAT. 5/9-1(a) & (b). Like Perez, the defendants maintained that their maximum sentences should have been capped at 20 years notwithstanding these predicates. Their reasoning was slightly different: they argued that because the RICO statute criminalizes the agreement to commit an act, not the act itself, the relevant state analogue was conspiracy, which under Illinois law is not punishable by life imprisonment. *Brown*, 973 F.3d at 709.

We rejected the argument, explaining that "section 1963 requires that the 'violation'—in this case, the conspiracy—be 'based on a racketeering activity for which the maximum penalty includes life imprisonment.'" *Id.* What mattered, we said, was that "[t]he defendants' conspiracies were all *based on* murders for which the maximum penalty includes life imprisonment." *Id.*

The same conclusion follows here. Perez's RICO violation—conspiracy—was "based on" predicate acts of racketeering that included a coconspirator's attempted murder of Victim 1 by discharging a firearm and causing great bodily

harm, which is a crime punishable by life in prison under Illinois law. The judge properly applied the enhanced maximum penalty under § 1963(a).

B. Sentencing Disparities

Perez also argues that the judge procedurally erred by failing to consider his argument under § 3553(a)(6) about the need to avoid unwarranted disparities between similarly situated defendants. He pointed to codefendants Pena and De La Cruz, who were sentenced to 96 months and 210 months, respectively, for their involvement in the conspiracy. He argued that both codefendants were responsible for more criminal conduct and were ranked higher than Perez within the Latin Kings. The judge passed over this argument, though she imposed a below-Guidelines sentence of 336 months on the conspiracy count in recognition of Perez's expression of remorse. (The 120-month term on the firearm count is concurrent.)

As an initial matter, this argument is waived. After announcing the sentence, the judge twice asked Perez's counsel if there were other issues she had overlooked. First, she asked: "Are there other issues you feel I haven't addressed or any other recommendations you think I should make?" Counsel raised a point about his client's prison assignment but did not mention sentencing disparities. After a bit more discussion, the judge inquired again: "Are there other issues?" Perez's counsel *still* did not mention any sentencing disparities. The judge thus gave counsel not one but two meaningful opportunities to identify any overlooked arguments. The failure to make use of those opportunities is a waiver. *United States v. Garcia-Segura*, 717 F.3d 566, 569 (7th Cir. 2013).

Even if not waived, the argument is meritless. We have held that the Sentencing Guidelines "are themselves an anti-disparity formula." *United States v. Blagojevich*, 854 F.3d 918, 921 (7th Cir. 2017). Because the judge "correctly calculated and carefully reviewed the Guidelines range, [she] necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *Gall v. United States*, 552 U.S. 38, 54 (2007). Thus, a sentence below or within a properly calculated Guidelines range, as this one is, "*necessarily* complies with § 3553(a)(6)." *Sanchez*, 989 F.3d at 541 (emphasis added) (internal quotation marks omitted).

AFFIRMED

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID PEREZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX B – ORDER OF THE SEVENTH CIRCUIT REGARDING REHEARING

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 16, 2022

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-1448

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID PEREZ,
Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 CR 462-6

Rebecca R. Pallmeyer,
Chief Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID PEREZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX C – ORDER OF THE NORTHERN DISTRICT OF ILLINOIS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 16 CR 462-6**
	)	
	)	**Judge Rebecca R. Pallmeyer**
DAVID PEREZ, a/k/a "Monster,"	)	

MEMORANDUM ORDER

On July 21, 2016, the grand jury returned a nineteen-count indictment against Defendant David Perez and fourteen other members of the Maywood Latin Kings street gang. (Indictment [4].) The indictment charges the Defendants with conspiring to violate the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et. seq.*, through their involvement with the Latin Kings. (*Id*. at 1–14.) The indictment also charges the Defendants with numerous violent crimes and firearms offenses in connection with the racketeering conspiracy. (*Id*.) Perez is personally charged with RICO conspiracy (Count One), attempted murder and assault with a dangerous weapon (Counts Two, Three, Four, and Six), and possessing a firearm as a previously-convicted felon (Counts Sixteen through Nineteen).

As one of the predicate acts necessary to establish a pattern of racketeering activity under the RICO Act, the Government alleged that Perez and four others attempted to murder an individual, referred to as "Victim 1," in violation of Illinois law. (*Id*.) The Government claims that two of Perez's co-defendants shot Victim 1 on May 11, 2014, in Melrose Park, Illinois—causing Victim 1 great bodily harm and permanent disfigurement. (*Id*.) The Government alleges that Perez, as the leader or "Inca" of his circle of Latin Kings, ordered those co-defendants to shoot Victim 1 and also helped to locate Victim 1 on the day of the shooting. (Government's Brief Regarding Statutory Maximum on Count One [371] ("Gov't's Br."), 3.) It is undisputed that Perez did not personally discharge a firearm in the course of the attempted murder.

On March 24, 2017, Perez pleaded guilty to Count One's charge of RICO conspiracy. (Plea Agreement [259].) Perez also pleaded guilty to one count of being a felon-in-possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*Id.*) In his plea, Perez admitted to conspiring to conduct and participate in the affairs of a criminal enterprise (the Latin Kings gang) "through a pattern of racketeering activity, which included threats, intimidation, and violence, [and] which included assaults with dangerous weapons against others[.]" (Plea Agreement 2.) Perez has not, however, admitted to any involvement with the alleged attempted murder of Victim 1 as described in the Special Findings section of Count One, and separately charged against Perez and others in Counts Two and Three.

In Perez's plea agreement, the parties recognized an ongoing disagreement concerning the maximum sentence permitted for his violation of 18 U.S.C. § 1962(d). The parties have now filed briefs so that this legal issue can be resolved prior to sentencing. The Government believes that Perez is eligible for life imprisonment under Section 1963(a) because the RICO conspiracy involved an attempted murder: "a racketeering activity for which the maximum penalty includes life imprisonment" under Illinois law. (Gov't's Br. 5.) The Defendant argues that the maximum sentence is capped at 20 years because Perez would not be subject to a life sentence for attempted murder based on these facts, if he were charged with that crime in Illinois. (Defendant's Response to Gov't's Br. [391] ("Def.'s Resp."), 2.) Because Perez has not admitted to any facts surrounding the attempted murder of Victim 1, the Government acknowledges that it must still prove those underlying facts beyond a reasonable doubt at a future proceeding, should it ask for a sentence of more than 20 years for Perez. (Gov't's Br. 4–5) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).)

The sole issue addressed in this opinion is whether a defendant in a RICO conspiracy must be personally eligible to receive a life sentence under state law for a given offense in order to be eligible for a life sentence for a RICO Act violation that relies on that state offense as an

underlying act of racketeering. For the reasons described below, the court finds that the applicable statutory maximum sentence for Defendant David Perez is life imprisonment.

DISCUSSION

RICO violations typically carry a 20-year statutory maximum prison sentence. 18 U.S.C. § 1963(a). The statutory maximum is increased to life, however, "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." *Id*. The Act defines "racketeering activity" as including "any act or threat involving murder . . . which is chargeable under State law." 18 U.S.C. § 1961(1). In Illinois, attempted first-degree murder is not a life-eligible offense without the presence of aggravating factors. Instead, the offense is classified as a Class X felony, which prescribes a range of 6–30 years imprisonment. 720 ILCS 5/8-4(c)(1).

Illinois law does, however, authorize sentences "up to a term of natural life" in cases of attempted first-degree murder "during which the person *personally discharged* a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person[.]" 720 ILCS 5/8-4(c)(1)(D) (emphasis added). The Government contends that this provision makes Perez eligible for life imprisonment because the charged RICO conspiracy involved such an attempted murder—that is, one in which a person discharged a firearm and caused the requisite harm. Perez objects on two grounds. As a threshold matter, Perez argues that the Government's allegations against Perez do not amount to "racketeering activity" within the meaning of Section 1961(1) because the additional factors required to trigger increased punishment for attempted murder in Illinois are merely a "firearm sentencing enhancement" and not a separate "offense." (Def.'s Resp. at 4–5.) Perez's central objection to his eligibility for a life sentence, however, concerns the "personally discharged" language in the Illinois statute. (*Id*. at 2.) Perez does not dispute that the alleged attack on Victim 1 caused Victim 1 great bodily harm and permanent disfigurement. Rather, Perez emphasizes that he did not personally pull the trigger on Victim 1. Thus, he contends, the "personally discharged"

restriction in the Illinois attempted murder statute that authorizes a life sentence limits the sentence that may be imposed under the RICO Act and prevents the Government from "superimposing vicarious liability theories" in an attempt to bypass Illinois law. (*Id*. at 2.)

1. State "Sentencing Enhancements" Qualify as "Racketeering Activity" under the RICO Act

Perez's first argument is that, regardless of which individuals may be held accountable for the alleged attempted murder of Victim 1, the Government may not rely on a mere "sentencing enhancement" to trigger a life sentence under RICO because the enhancement is not "racketeering activity" within the definition of 18 U.S.C. § 1961(1). (Def.'s Resp. 6.) Perez cites no authority in the few sentences he devotes to this argument, and his position does not appear to be supported by the law. (*See id*.) On this threshold matter of whether the facts of the alleged attempted murder constitute "racketeering activity," the text of the RICO Act provides a clear answer. The definitions section states that "racketeering activity" includes "*any* act or threat involving murder . . . chargeable under State law." 18 U.S.C. § 1961(1) (emphasis added). An attempted murder with a firearm that specifically results in "great bodily harm, permanent disability, permanent disfigurement, or death" to the victim counts as "any act . . . involving murder . . . chargeable under State law" and is a predicate racketeering activity for the purposes of the RICO Act.

Even if the phrase "any act" could be interpreted some other way, the case law reveals that the RICO Act is concerned with behaviors, not technical categorizations. As summarized by the Seventh Circuit in a RICO case involving bribery that was possibly—but not clearly—prohibited by Illinois law: "[T]he RICO statute incorporates state offenses according to their generic designation. . . . 'The test for determining whether the charged acts fit into the generic category of the predicate offense is whether the indictment charges a type of activity generally known or characterized in the proscribed category.'" *United States v. Garner*, 837 F.2d 1404, 1419 (7th Cir. 1987) (quoting *United States v. Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977)).

For this reason, the court is not persuaded by Perez's suggestion that there is a difference in "chargeability" between the base offense of attempted murder and the firearm sentencing enhancement in 720 ILCS 5/8-4(c)(1)(D). Perez is indeed correct that Section 5/8-4(c)(1)(D) is most accurately described as a "sentencing enhancement" and not a unique "offense," *see People v. Harris*, 410 Ill. Dec. 591, 600, 70 N.E.3d 718, 727 (1st Dist. 2016), but the categorization is not relevant to this dispute. In fact, treating the two types of provisions differently would appear to run afoul of the Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because Illinois's firearm sentencing enhancement increases the statutory maximum above the maximum for "baseline" attempted murder, *Apprendi* actually *requires* prosecutors to charge a defendant with a "sentencing enhancement" just as they would have to for a basic offense. *Id.* at 490. Either within the context of the RICO Act, or as a standalone offense in the state of Illinois, the varieties of attempted murder that render a defendant subject to a life sentence are "chargeable under State law."

Taken to its logical conclusion, Perez's view would call into question every sentence of more than 20 years imposed for a RICO violation that was based on a violation of Illinois law. There are no "baseline" crimes for which an individual may be sentenced to life in prison in Illinois absent aggravating factors or "sentencing enhancements." Even first-degree murder, in its basic form, only warrants a 20 to 60 year prison sentence in Illinois. 730 ILCS 5/5-4.5-20(a). As with attempted murder, first-degree murder only becomes a life-eligible offense with the presence of aggravating factors. *See* 720 ILCS 5/9-1(b); 730 ILCS 5/5-8-1. In its Reply Brief, the Government logically concluded that all of the "federal racketeering cases in this circuit that involve enhanced sentences under § 1963(a) based on murder or attempted murder in violation of Illinois law *necessarily* involve aggravated forms of these predicate offenses." (Government's Reply Brief [415] ("Gov't's Reply), 4) (citing *United States v. Benabe*, 654 F.3d 753 (7th Cir. 2011)) (emphasis added).

This court is not aware of any instance in which another court in this circuit has split the facts underlying a predicate racketeering activity into separate offense and enhancement components. *See, e.g., United States v. Warneke*, 310 F.3d 542, 549–50 (7th Cir. 2002) (affirming the defendants' life sentences for a RICO conspiracy based on predicate acts for which the Illinois aggravated murder statute authorized a life sentence); *Benabe*, 654 F.3d at 757–59 (same); *United States v. Morales*, 655 F.3d 608, 615–19 (7th Cir. 2011) (same). This court therefore declines to adopt Perez's novel interpretation of Section 1961(1). Regardless of whether Perez chooses to call it an "offense" or a "separate sentencing enhancement," the alleged attempted murder is "racketeering activity" under the RICO Act.

2. RICO Conspiracy is a Federal Offense and Perez May be Sentenced to Life Imprisonment Based on Actions Committed by his Co-Conspirators

Perez's core objection to his eligibility for a life sentence rests on Illinois law. Perez argues that his maximum sentence under the RICO Act is capped at 20 years imprisonment because he could not, under any circumstances, receive a life sentence for this specific act of attempted murder if he were prosecuted in the state of Illinois. (Def.'s Resp. 2.) Perez's position, in the court's view, runs contrary to a plain reading of the language of 18 U.S.C. 1963(a) and reflects a misunderstanding of the nature of conspiracy liability. Perez did not plead guilty to a state offense, or even a substantive RICO offense. He pleaded guilty to a conspiracy. Section 1963(a) states only that the "violation"—i.e. the racketeering conspiracy—must be "based on a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a). As a racketeering conspiracy necessarily involves more than one person, the statute by its terms anticipates the imposition of vicarious liability between co-conspirators. *See Benabe*, 654 F.3d at 776. Perez himself acknowledged as much in his guilty plea by admitting that his violation rested, at least in part, on a pattern of activity to be carried out by other members of the conspiracy:

> Mr. Perez admits that he knowingly conspired to conduct and participate in the conduct of the affairs of the Latin Kings through a pattern of racketeering activity,

> which included threats, intimidation, and violence, which included assaults with dangerous weapons against others, and other acts of violence such as [physically beating other gang members to enforce gang rules]. Mr. Perez agreed that some members of the conspiracy would commit at least two acts of racketeering activity.

(Plea Agreement 2–3.)

The case law confirms that the punishment for one individual within a RICO conspiracy may be informed by the actions of others within that conspiracy. A RICO conspiracy charge under Section 1962(d) "does not require proof that the defendant committed two predicate acts of racketeering, that he agreed to commit two predicate acts, or, for that matter, that any such acts were ultimately committed by anyone." *United States v. Tello*, 687 F.3d 785, 792 (7th Cir. 2012) (citing *Salinas v. United States*, 522 U.S. 52, 63, 65–66 (1997)). All that is required to prove primary liability for a particular defendant is evidence of an agreement that *any member* of the conspiracy would commit at least two acts of racketeering. *Benabe*, 654 F.3d at 776; *United States v. Amaya*, 828 F.3d 518, 531 (7th Cir. 2016). Once the existence and scope of the conspiracy is established, "the maximum penalties [ ] each [defendant] face[s] depend[s] on whether the involvement of each in the conspiracy included responsibility for . . . crimes serious enough to authorize a life sentence." *Benabe*, 654 F.3d at 777. Co-defendants in a RICO conspiracy may be held responsible for all of the predicate acts charged "as a direct participant, as an aider-and-abetter, or under *Pinkerton*." *Id*. at 777–78 (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)).

Perez cites numerous Illinois state court decisions holding that the Illinois attempted murder statute does not authorize a life sentence for accomplices or conspirators who did not "personally discharge" a firearm at the victim. (Def.'s Resp. 6–8) (collecting cases). This point, however, is not in dispute. The Government concedes that Perez could not receive an enhanced sentence based on these facts if the case were brought by state prosecutors. (Gov't's Br. 6.) Although the statute's "personally discharge" language does indeed "limit[ ] the applicability of accountability principles" in Illinois courts, *People v. Flynn*, 367 Ill. Dec. 854,

863–64, 985 N.E.2d 8, 17–18 (1st Dist. 2012), Perez is not in an Illinois court. Sentences under the RICO Act, especially sentences for racketeering *conspiracies*, do not hinge on acts committed by a specific defendant; they reflect the operation of the criminal enterprise as a whole.

As noted, the Federal Courts of Appeals have been unanimous in holding that references to state offenses under the RICO Act "are definitional only." *United States v. Frumento*, 563 F.2d 1083, 1087 (3d. Cir. 1977) ("The gravamen of section 1962 is a violation of federal law and 'reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage.'") (quoting *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971)); *see also United States v. Licavoli*, 725 F.2d 1040, 1046 (6th Cir. 1984) ("The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law.") (collecting cases). This applies to both the definition of the relevant conduct as well as the scope of an accomplice's or conspirator's liability. *See Benabe*, 654 F.3d at 776 (citing *Salinas*, 522 U.S. at 65–66). Various courts have, for example, recognized, as separate predicate acts, both the conspiracy to commit an offense and the completed offense, even where state law precluded a defendant from being charged with both offenses. *See United States v. Muskovsky*, 863 F.2d 1319, 1330–31 (7th Cir. 1988); *Licavoli*, 725 F.2d at 1046–47. Other federal appellate courts have held that a state court acquittal or the expiry of a state statute of limitations are irrelevant on the question of whether given conduct was "chargeable under State law" within the meaning of 18 U.S.C. § 1961(1). *See, e.g., Frumento*, 563 F.2d at 1087 n. 8A ("Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute") (emphasis in original). In short, RICO is a federal offense, and the specifics of Illinois conspiracy and attempt law do not control the appropriate sentence. *Muskovsky*, 863 F.2d at 1330; *Licavoli*, 725 F.2d at 1046 ("[C]ontrary to defendants' contention, it is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned

for more than one year for both conspiracy to murder and murder."). The law does not require individual defendants to be personally eligible for a life sentence for a predicate act in order for them to receive a life sentence as a member of a racketeering conspiracy. *See, e.g., Salinas*, 522 U.S. at 64 ("If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. . . . A person, moreover, may be liable for conspiracy even though he was *incapable* of committing the substantive offense.") (emphasis added).

Perez is not the first defendant to advance the argument that Illinois law insulates racketeering conspirators from enhanced sentences in federal proceedings. In *United States v. Chester*, No. 13 CR 774, 2017 WL 3394746, *1 (N.D. Ill. Aug. 8, 2017) (Tharp, J.), another judge in this District rejected a similar argument by defendants in a RICO conspiracy case who claimed that their maximum sentence could not be increased to life based on murders they were not alleged to have committed. *Id*. at *34. Defendants Chester and Ford were not charged with personally participating in two murders, but Judge Tharp found that "their eligibility for life sentences d[id] not turn on whether they did so." *Id*. Judge Tharp relied on the Seventh Circuit's decision in *United States v. Benabe*, 654 F.3d 753 (7th Cir. 2011), in concluding that Chester and Ford were eligible for life sentences because "under conspiracy law, '***responsibility for***' murder does not mean ***commission*** of murder." *Chester*, 2017 WL 3394746, at *38 (emphasis in original). Judge Tharp continued:

> All that matters is whether the RICO "violation"—in other words, the conspiracy—was based upon racketeering acts that included the Bluitt murder. Under conspiracy law, it would not matter which conspirator committed the murder.
>
> . . .
>
> Once the jury answered that question affirmatively, Chester and Ford were subject to the enhanced penalty of a potential life sentence, because it was established beyond a reasonable doubt that a member of the conspiracy committed the murder of Bluitt and did so in a cold, calculating, and premediated manner, such that under Illinois law, the offense would be punishable by life imprisonment. See 720 ILCS 5/9(b)(11).

> . . .
>
> Therefore, the conspiracy—the RICO violation—was "based upon racketeering activity" (the murder of Bluitt in a cold, calculating, and premeditated way) for which "the maximum penalty includes life imprisonment." 18 U.S.C. 1963(a). The question for purposes of § 1963(a) is whether ***the conspiracy*** involved a life-eligible crime; it is not whether Ford or Chester killed Bluitt (or Neeley, or Daniels).

Id. at *37 (emphasis in original). *Chester* is not binding authority, and is currently being appealed to the Seventh Circuit, but this court agrees with Judge Tharp's reasoning and restatement of the applicable law.

Perez attempts to distinguish his situation from the ones addressed in *Chester* and *Benabe*, and asserts that any reliance on those cases is misplaced because they involved actual murders, not attempted murders. (Def.'s Resp. 12.) An overview of the Illinois murder statutes defeats this proposed distinction. Illinois's statutes regarding first-degree murder and attempted murder share an identical sentencing structure: neither offense is eligible for a life sentence in its basic form, but both become life-eligible with the presence of specific aggravating factors. *See* 720 ILCS 5/8-4(c)(1) (outlining the aggravating factors for attempted murder); 730 ILCS 5/5-8-1 (outlining the aggravating factors for first-degree murder). Judge Tharp acknowledged as much in *Chester* by instructing the jury that they must find not only that a member of the conspiracy committed first-degree murder, but also determine whether the conspirator did so "in a cold, calculating, and premediated manner[.]" *Chester*, 2017 WL 3394746, *37 (citing 720 ILCS 5/9-1(b)(11)).[1] Particularly relevant to this case, the sentencing enhancement section of Illinois's first-degree murder statute copies *verbatim* the attempted murder enhancement Perez contends is inapplicable to him: a person who "personally discharge[s] a firearm that proximately caused great bodily harm, permanent disability,

[1] After Illinois abolished the death penalty, state courts repurposed the Illinois statute governing a defendant's eligibility for the death penalty for acts of first-degree murder—720 ILCS 5/9-1—into a second source of aggravating factors allowing for life imprisonment. *See Chester*, 2017 WL 3394746, *49 (citing *People v. Delaney*, 2015 Ill. App. 130573-U, ¶ 34 (2d Dist. 2015)).

permanent disfigurement, or death to another person" shall receive an additional "25 years or up to a term of natural life." *Compare* 720 ILCS 5/8-4(c)(1)(D) *with* 730 ILCS 5/5-8-1(a)(1)(d)(iii). In other words, even for a completed murder, Illinois law imposes an enhanced sentence only on one who pulled the trigger. Yet Perez appears to concede that he would be eligible for a life sentence, had Victim 1 died in the attack. Perez's efforts to distinguish *Chester* and *Benabe* are not sustainable.

Perez nevertheless urges that first-degree murder is different "because, unlike attempted murder, Illinois law expressly permits life sentences to be imposed in murder cases based on theories of vicarious liability." (Defendant's Sur-Reply Brief [422] (Def.'s Sur-Reply), 3.) Perez cites the two generic Illinois statutes establishing "accountability for conduct of another", 720 ILCS 5/5-1, 5/5-2, to support this view, but he again ignores the clear parallels to the "insulation" he claims is present in cases of attempted murder. For one, neither 720 ILCS 5/5-1 or 5/5-2 specifically address murder, attempted murder, or any other offense. Second, numerous provisions within the aggravated first-degree murder statute include the same sort of insulating language that Perez claims to be unique to attempted murder—including the identical "personally discharged" firearm enhancement mentioned previously. *See* 730 ILCS 5/5-8-1(a)(1)(d)(iii). Perez cites *People v. Rodriguez*, 229 Ill. 2d 285, 295, 891 N.E.2d 854, 860 (2008), as one of several Illinois cases confirming that only the defendant who "personally discharged" a firearm during an attempted murder is eligible for a life sentence, but *Rodriguez* itself used that language in the context of the first-degree murder statute, not the attempted murder statute. *Id*. If anything, *Rodriguez* bolsters the Government's position that that there is no compelling reason to treat federal racketeering cases involving Illinois murder and attempted murder differently when it comes to vicarious liability—which the Seventh Circuit has consistently said applies in RICO cases to hold defendants accountable for murders committed by their co-conspirators.

Finally, Perez cites to a passage from the final pre-trial transcript in *Chester* in an attempt to limit Judge Tharp's reasoning to murders alone. (Def.'s Sur-Reply 9–-10.) Judge Tharp said:

> [Section 1961(1)] says based on murder, and that's what the indictment actually charges, that murders were committed. And it charges that murders were committed in the special findings.
>
> So I—you know, the theoretical conceptual question of whether one could simply charge a RICO conspiracy as an agreement to participate in the affairs of an enterprise through a pattern of racketeering activity that consisted of murder and qualify for an enhanced life sentence based on an agreement to murder, I think there's substantial reason to question that, but I don't think in this case I have to resolve that abstract question. I think based on the indictment and the special findings in particular here, what is sought to be the enhancing factor here is the commission of the murders alleged in the indictment.
>
> So from my view, based on the indictment in this case, there is the possibility that Mr. Vaughn is subject to an enhanced penalty of life imprisonment if the government can prove beyond a reasonable doubt as found by a jury that the allegations in the indictment on which it predicates the eligibility for the enhanced sentence, the murders that are alleged in the special findings, were committed, one or more of them. But I think the government does have to prove that much.

(Transcript of Proceedings [1199] in *United States v. Chester*, No. 13 CR 774 (Chester Tr.), 69:4–70:2). Perez argues that "that passage makes clear that Judge Tharp's ruling turned on the existence of the multiple murders alleged in the Chester superseding indictment, not on vicarious liability for any attempted murder." (Def.'s Sur-Reply 9.) In the quoted passage, however, Judge Tharp was not addressing a distinction between attempted murder and actual murder, but instead focused on the difference between *conspiracy* to commit murder and murder. Judge Tharp was discussing whether the law would permit federal prosecutors to transform a non-life eligible "*conspiracy* to commit murder" in Illinois (a Class 1 Felony capped at 15 years) into a life-eligible "racketeering conspiracy involving the *commission of murder*" by bringing the case under the RICO Act. Judge Tharp sensibly questioned the wisdom of allowing the latter approach, but noted that was not the question he was required to answer in *Chester*. Nowhere in the quoted passage did Judge Tharp reject the idea that Illinois law treats attempted

murder and first-degree murder in nearly-identical ways, or that federal law controls vicarious liability under the RICO Act. In fact, in the next paragraph (one that Perez does not mention), Judge Tharp rejected the very argument now advanced by Perez: [2]

> I understand Mr. Herman's further argument that okay, Judge, if you find that his sentence can be enhanced, his sentence can be enhanced only on the basis of what he is alleged to have done himself personally, and that's the attempted murder that he's charged with. That argument I don't believe holds up, and *Benabe* I believe resolves that argument and precludes that argument.
>
> . . .
>
> Judge Hamilton writing for the panel [in *Benabe*] says clearly and unequivocally that *Pinkerton* applies in the context of determining whether someone is eligible for a sentencing enhancement along with aiding and abetting or personal involvement. . . . *Benabe* [states unequivocally] that *Pinkerton* does apply in that context and that if one is subject to liability on the basis of foreseeable acts of a co-conspirator that that makes you eligible for a sentencing enhancement.

(Chester Tr. 70:3–9, 71:14–25.) Making it absolutely clear where he stood on the matter, Judge Tharp concluded:

> So in my view, the maximum penalty does not depend on proof that the defendant personally participated in any of the life-qualifying conduct. The eligible life-qualifying conduct is not limited to what a particular defendant is charged with having personally participated in. Mr. Vaughn has admitted he was a member of the Hobos RICO conspiracy. He is therefore liable for the foreseeable acts of co-conspirators in furtherance of that conspiracy. For the maximum penalty of life to apply, the government must present sufficient evidence to prove beyond a reasonable doubt that one or more of the life-qualifying murders alleged in the indictment occurred and was or were committed by a member or members of the conspiracy, that the murder or murders was or were foreseeable to Mr. Vaughn and that the murder was or were in furtherance of the conspiracy. The government need not prove that Mr. Vaughn himself committed any particular act.

(Chester Tr. 74:23-75:14.) There can be no confusion as to the scope of Judge Tharp's reasoning in *Chester*, or to the Seventh Circuit's holding in *Benabe*.

Perez pleaded guilty to conspiring to conduct the affairs of the Latin Kings organization through a pattern of racketeering activity. The predicate racketeering acts were committed by

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[2] Not only are the arguments the same, but the attorney advancing them is the same. Perez's lawyer, Joshua Herman, also represented defendant Derrick Vaughn in *Chester* and is the same individual Judge Tharp was responding to in the Transcript.

Perez and others in furtherance of the overall conspiracy. One of those acts, the alleged attempted murder, would indisputably warrant a life sentence for one or more of Perez's co-conspirators. Under the plain language of Section 1963(a), Perez's violation of the RICO Act—the racketeering conspiracy—was "based on a racketeering activity for which the maximum penalty includes life imprisonment." Although Perez has stressed that it would be impossible for him to receive a life sentence for attempted murder in the state of Illinois, the issue in this case is not whether the predicate racketeering activity has a maximum penalty of life imprisonment *with respect to Perez*. If the Government can prove beyond a reasonable doubt that the attempt on Victim 1's life occurred and that Perez is responsible—either for ordering and assisting his subordinate Latin Kings to commit the act as alleged by the Government, or under *Pinkerton*—Perez will be subject to a statutory maximum sentence of life in prison.

CONCLUSION

For the reasons stated, the court finds that the Government has alleged facts that, if proved beyond a reasonable doubt at a future proceeding, would subject Defendant David Perez to a maximum sentence of life imprisonment pursuant to 18 U.S.C. 1963(a).

ENTER:

Dated: February 13, 2018

REBECCA R. PALLMEYER
United States District Judge