No. _____

In the Supreme Court of the United States

ANDRE JENKINS, aka Little Bear,

Petitioner,

v.

UNITED STATES OF AMERICA,
DAVID PIRK,
TIMOTHY ENIX, aka BLAZE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case where the proof against petitioner was wholly circumstantial and the eyewitnesses that were necessary to assign his conduct to those circumstances and who provided purported admissions of him, lied so much both inside and outside of the courtroom, when does the cumulative effect render such proof incredible as a matter of law and therefore legally insufficient to sustain convictions?

2. Do the interests of justice warrant a new trial where challenged statements that implicated petitioner made and advanced by a co-defendant near the end of a months-long trial, which, in conjunction with that co-defendant's own testimony, splintered the joint defense effort to the undue prejudice of petitioner?

DISCLOSURE OF PARTIES

(Pursuant to Rule 14.1 [b][i])

The parties to this proceeding are the petitioner (and defendant), Andre Jenkins, aka Little Bear, who was the appellant in the court of appeals and respondent (and plaintiff), the United States of America. Mr. Jenkins challenges his conviction after jury trial in the Western District of New York with co-defendants Timothy Enix, aka Blaze, and David Pirk, who are not petitioners herein.

PRIOR PROCEEDINGS

(Pursuant to Rule 14.1 [b][ii])

Mr. Jenkins was convicted in the Western District of New York under case 15-cr-00142 and judgment was entered on March 7, 2019, Doc. 1589. The Court of Appeals for the Second Circuit denied petitioner's direct appeal by opinion filed on August 5, 2022 under docket number 19-610.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

The petitioner Andre Jenkins, currently serving several life sentences pursuant to the instant convictions, respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit. Therein the court affirmed petitioner's judgment of conviction in the Western District of New York.

OPINIONS AND ORDERS BELOW

The Opinion of the court of appeals, which affirmed petitioner's judgment of conviction, is reported at *United States v. Jenkins*, 2022 WL 3138879 (2d Cir. 2022), and is reproduced in **Appendix A**. The Decision and Order of the Western District of New York (Wolford, USDJ), dated December 19, 2018, denying petitioner's motions pursuant to Rules 29 and 33, is reported at *United States v. Pirk*, 2018 WL 6629679 (WDNY 2018), and is reproduced in **Appendix B**.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 5, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 29(a)

> Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction… .

Federal Rule of Criminal Procedure 33(a)

> Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. …

STATEMENT OF THE CASE

1. Procedural History

On March 16, 2016, a Second Superseding Indictment [SSI] was filed in the District Court for the Western District of New York under case number 15-CR-142. Within its 46 counts, Andre Jenkins, aka Little Bear, was charged in: Count 1, RICO conspiracy, and within that count he is alleged to have committed overt acts 32-33, 41-42, 44-57, 59-61, 63, 66-67 and 87; Count 2, possession of firearms in furtherance of crime of violence; Count 19, murder in aid of racketeering regarding

the death of Paul Maue; Count 20, murder in aid of racketeering regarding the death of Daniel "DJ" Szymanski; Count 21, possession and discharge of firearm in furtherance of crime of violence regarding the death of Paul Maue; Count 22, possession and discharge of firearm in furtherance of crime of violence regarding the death of Daniel "DJ" Szymanski; Count 23, felon in possession of a firearm; Count 45, using and maintaining premises for drug dealing; and, Count 46, possession of firearms in furtherance of drug trafficking crime. (A 213 [local Dkt. No. 33]).

Extensive pre-trial motion practice occurred with almost all indicted defendants filing a variety of pre-trial motions. For purposes of trial the SSI was redacted and consolidated to those counts which related specifically to Mr. Jenkins and co-defendants Pirk and Enix. This Redacted Indictment (RI), essentially renumbered the above reference counts as follows: SSI Counts 1 and 2, remained the same; SSI Counts 19 and 20, became RI Counts 3 and 4; SSI Counts 21 and 22, became RI Counts 5 and 6; SSI Count 23, became RI Count 7; SSI Counts 45 and 46, became RI Counts 8 and 9. (local Dkt. No. 1256).

On May 3, 2018, at the close of the Government's proof, Mr. Jenkins orally moved for a judgement of acquittal pursuant to Rule 29(a), which was denied by the District Court.

On May 18, 2018, the jury rendered verdicts convicting defendants of all counts. (A 18809). Mr. Jenkins filed a motion for Rule 29(c), judgement of acquittal, and Rule 33(a), motion for a new trial. (A 18802). The Government responded. (A 19000), and petitioner replied. (A 19028). The Government filed a sur-reply in

opposition to all post-judgment motions. (A 19082). District Court denied the motion except as to RI Count 2 by Decision and Order, dated December 19, 2018. (A 19290). By Decision and Order dated January 4, 2019, District Court denied the post-verdict motions regarding RI Count 2. (A 19337).

On February 28, 2019, Mr. Jenkins was sentenced as follows: RI Counts 1, 3, and 4: life imprisonment as to each count, to run concurrently; RI Counts 2 and 9: 60 months imprisonment on each count to run consecutive to each other and all other counts; RI Counts 5 and 6: life imprisonment on each count, to run consecutive to each other and all other counts; RI Count 7: 120 months imprisonment, to run concurrently to RI Counts 1, 3, 4, and 8; RI Count 8: 240 months imprisonment, to run concurrently to RI Counts 1, 3, 4, and 7. This results in an aggregate term of life imprisonment, plus two (2) consecutive terms of life imprisonment, plus 120 months (10 years) imprisonment to be served consecutively. The sentence with respect to RI Counts 1, 3, 4, 7, and 8, was ordered to run concurrently to the undischarged state sentence imposed in Niagara County Court on October 21, 2015, under Docket No. 2014-387. (local Dkt. 1614).[1]

A timely Notice of Appeal was filed on March 11, 2019 (A 19424 [local Dkt. 1599]). The court of appeals affirmed the convictions by opinion filed August 5,

[1] Petitioner was tried and convicted in state court on murder charges arising from the same facts and circumstances as those charged in the instant matter. He is serving life sentences for those convictions at the Attica Correctional Facility where he necessarily is also serving those sentences in the instant matter that were ordered to run concurrent to his state sentences.

2022. The jurisdiction of the court of appeals derived from 28 U.S.C. § 1291; the district court had jurisdiction pursuant to 18 U.S.C. § 3231.

2. Factual Overview of the Case

Focusing on Mr. Jenkins's convictions of Counts 3, 4, 5, and 6 of the Redacted Indictment, the trial evidence, in sum and substance, was meant to establish that in the late summer of 2014, the National President of the Kingsmen Motorcycle Club [KMC], co-defendant David Pirk, with some assistance from the KMC Tennessee/Florida Regional President, co-defendant Timothy "Blaze" Enix, devised a plan to address violence being perpetrated by former KMC members who joined a violent, rival, one-percent motorcycle club, on current KMC members. As a KMC member, the plan entailed Mr. Jenkins undertaking a "mission" to determine the cause of this violence.

On September 6, 2014, at some time between 2:50:36 am and 2:53:06 am, KMC members Paul "Paulie" Maue and Dennis "DJ" Szymanski were fatally shot as they sat in the front seats of a Chevy Cruz in the back parking lot of the KMC North Tonawanda chapter clubhouse. These murders are the bases of RI Counts 3, 4, 5, and 6; and, they jump-started the investigation resulting in all remaining charges.

A. Petitioner's Rule 33(a) motion for a new trial.

Mr. Jenkins moved, pre-trial, for *Bruton*-severance from various co-defendants based on statements that implicated him in some fashion. (A 2154 [local

Dkt. 792]). One of those statements was made by co-defendant Enix, who thanked the agents arresting him on the instant indictment for "getting the guy" that committed the murders of Maue and Szymanksi. (A 2158). This statement was made on March 3, 2016, after Mr. Jenkins had been convicted of the state-court murder charges. The District Court denied severance, finding that the Enix statement did not facially incriminate petitioner. (A 2595 [local Dkt. 998]).

At trial, an FBI agent testified as to a joint interview he conducted with Pirk and Enix and testimony was elicited regarding their reactions to Mr. Jenkins having been arrested in Georgia in relation to the murders of Maue and Szymanski. (A 15167). Mr. Jenkins's state-court convictions for these murders were not introduced or otherwise referenced, in accordance with District Court's prior ruling.

Subsequent to this testimony, admission of the "getting the guy" statement was again debated, outside the presence of the jury, as the Government announced its intention of calling the agent to whom that statement was made. Ultimately, the Government decided to not elicit that statement. (A 15023-24). However, counsel for Enix first raised the issue that exclusion of this statement adversely affected their ability to present a portion of their defense. (A 15023). The next day, counsel for Enix, again outside the presence of the jury, argued that eliciting the statement was within their Sixth Amendment right to present a defense and of exonerating Enix and being grateful to the FBI for finding the right person who committed the murders. (A 15643-44).

The Government then called Agent Samuels to whom Enix made the challenged statement at the time of his own arrest. Just prior to her direct examination, District Court announced that the statement could be elicited by either the Government or on cross-examination by counsel for Enix with an instruction to the jury that the statement would only come in as to Enix. (A 15686). Counsel for Mr. Jenkins orally renewed his motion for severance, which was denied. (A 15688). The Government then elicited from Agent Samuels that Enix "thanked the FBI for getting the guy that killed Paulie and DJ." (A 15692).

Later, in his own defense, Enix testified as to why he thanked the FBI. After referencing his statement of December, 2014, where he offered an alternative theory in response to Petitioner getting arrested for the murders, Enix testified that he thanked the FBI for getting the guy that killed Maue and Szymanski for the following reason:

> At the first interview, all I knew was theories. I couldn't get a straight answer about anything. I mean, I was -- trust me, I was searching and trying to find. So I didn't know at that time. By the time of March 22nd, when I was arrested and I had this conversation with the agent, Special Agent Samuels, a lot of things had come up and a lot more information was available and I had learned a lot more information. So, yes, my opinion had changed.

(A 17614).

Enix's advancing the statement, even in the face of the Government's temporary decision to not elicit the statement, in conjunction with his own subsequent trial testimony, formed the basis of Mr. Jenkins's Rule 33(a) motion.

B. Petitioner's Rule 29(a) motion for acquittal.

At the close of the Government's proof, counsel for Petitioner made an oral motion pursuant to Rule 29(a). (A 16677-79). In sum and substance, counsel challenged the contradictory testimony regarding the VICAR murder counts and the possession and discharge of a firearm counts related thereto, focusing by way of example, on the testimony of Faulkner and Albright relating to the presence of blood on Petitioner's pants after the murders. These contradictions were merely a drop in the bucket in terms of contradictions and outright lies that were established during Mr. Jenkins's trial. Indeed, his convictions relied upon lies.

i. Testimony about the blood

At trial, Rene Faulkner claimed that when Mr. Jenkins returned to Betty's the second time the morning of the shootings, he came inside normally and, stopping where other people could not see him, yelled to her to get her stuff and "let's go." As she walked towards him, she saw blood on his pants. However, in a prior proceeding, she testified that at that time, Mr. Jenkins "busts through the door with blood all over his jeans." (A 9465; 9573).

Roger Albright testified that at about 4:30 am, Mr. Jenkins and Faulkner showed up at the clubhouse and Albright let them in. Mr. Jenkins was wearing a pair of blue jeans and a sweatshirt. It was raining and they "were both kind of wet. Other than that, nothing." (A 8159). Albright clarified that when the two had returned, he did not see any blood on Mr. Jenkins pants at all. Not when he was walking around and not on the clothes he claims he was given. (A 8255-56).

ii. Testimony about the gun

The weapon that killed Maue and Szymanski was determined to be a black Glock 19, 9mm caliber. (A 3745-49 [Govt. Exhibit 30.12]). It was recovered along the side of the south-bound lanes of Route 219. (A).

Jimmy Fritts testified that he gave Mr. Jenkins a Glock 19, 9mm to take with him when he traveled from Tennessee to New York in early September, 2014. (A 15349). However, Albright testified that he saw Mr. Jenkins with a "gun-metal gray and black" pistol when Mr. Jenkins actually dropped the gun in the bar at the clubhouse and Albright picked it up. **(**A 8150**).** Albright testified that the gun was a .45 caliber; Albright even "picked it up and jokingly … wiped it off like [he] didn't want [his] fingerprints on that, jokingly did that. And set it on the bar and [Mr. Jenkins] picked it up." (A 8257-58).

Faulkner testified she saw Mr. Jenkins with a firearm that looked like a "basic handgun that a police officer would use" in the back of Mr. Jenkins's pants as they were getting on his motorcycle. (A 6393-94).

Leslie Maziarz, who "knows something about firearms," said that while her own gun was a 9mm, Mr. Jenkins's "looked similar to mine, but his, probably bigger. … A bigger - - … mine was 9, his was probably a 44, I don't know." (A 8789-90).

Mr. Jenkins was arrested in Georgia for possession of a firearm, a .380 caliber Bersa handgun. (A 16240).

iii. Contradicting admissions

Albright said that Mr. Jenkins told him he committed the murders because either Maue or DJ informed the Nickel City Nomads that Mr. Jenkins was not really out of the KMC. (A 8165-67).

Monica Brown testified that Mr. Jenkins said he committed the murders because, "Because they kept putting Pirk down and they wouldn't stop talking bad about him." (A 5694).

Michael Long testified that, just after the Tennessee KMC members were told not to kill Mr. Jenkins for the murders, Mr. Jenkins told him he committed the murders because, "They were bad guys. They were switching over to another club. They were pulling people from the Kingsmen to go over to the Nickel City Nomads, and that is the way it had to be handled." (A 15854).

Jimmy Fritts testified that, before the Tennessee KMC members were told not to kill Mr. Jenkins for the murders, Mr. Jenkins told them that DJ and Maue were the ones leaking to the Nickel City Outlaws and that DJ and Maue warned them about Mr. Jenkins, and that DJ and Maue decided to take him to the Outlaws where they were going to ask him about it. (A 15402-03). Fritts also said that Mr. Jenkins said the murders were "self-defense." (A 15502).

iv. Accumulating lies

Various witnesses testified as to lies regarding material aspects of the case that they provided against Mr. Jenkins and/or as to reasons for bias that would undermine their credibility. Various witnesses also lied on the witness stand.

Faulkner testified that when she and Mr. Jenkins first rode away from Betty's that "it wasn't pouring, no. It didn't start pouring until later on in the ride, but it was raining." However, Faulkner had previously testified in a prior proceeding that as she was trying to call Pirk, it was pouring rain when and they were probably going 90 miles an hour. Further, she had previously testified at another proceeding that as they pulled away from Betty's it was pouring rain. (A 9575-79). On cross-examination, Faulkner testified that it had stopped raining by the time they arrived in Olean. Again, at a prior proceeding, she testified that it had still been raining when they reached Olean. (A 9597-98).

On cross-examination, Faulkner repeatedly answered that she did not recall receiving multiple thousands of dollars from the government during the pendency of this investigation. (A 9615-16). When confronted with an inconsistency between her testimony on direct and on cross-examination, Faulkner commented, "It was lightly said than permanently said." (A 9638).

Albright was testifying under a plea agreement with the government and was awaiting sentencing on a separate conviction in PA for receiving stolen property. Even so, the FBI paid him $5,000.00 to relocate and also made a few cell phone payments for him. (A 8123-25). He conceded that he is concerned over breaching his cooperation agreement with the Government over his recent arrest in Pennsylvania. (A 8326-27).

Albright revealed on cross-examination that "Special Ed" Dekay, one of the former KMC members who left club and who is among the group that Mr. Jenkins'

defense accused of having been responsible for the murders of Maue and DJ, threatened Albright in January or February of 2018 (the instant trial began jury selection in January, 2018, and testimony began in February) when the two of them were housed at the same jail. (A 8206). He further conceded that it was fair to state that Dekay was threatening Albright in relation to his testimony at this trial; and that his testimony helps him with the threat that he thinks he has from Dekay, who is a member of the Outlaws Motorcycle Club. (A 8332; 8334-36).

Albright did not tell the detectives that Mr. Jenkins confessed to him that he committed the murders; did not mention that Albright and Faulkner burned clothes on behalf of Mr. Jenkins; and, did not mention kerosene being used to burn any clothes. He did tell detectives that he had heard that Maue and DJ were to join the Nickel City Nomads and if they backed out, they may have been taken out for knowing too much, and he may have mentioned Special Ed and Filly to the detectives. (A 8226-27). Then, after the supposed shooting incident in May of 2015, Albright met with FBI agents and told them information different than what he told N. Ton. Detectives in September of 2014. (A 8264-66).

Albright testified that he had made various statements to case agents reflecting the fickle nature of his potential testimony: It would be easy to make AUSA Tripi look stupid. He knew that Rene Faulkner and Paul Gilmore had testified in the grand jury and he stated that Faulkner was a whore and he would make statements to discredit Faulkner and Paul Gilmore, as witnesses and destroy the government's case. He didn't care if were to be arrested for lying to the grand jury or not or for not

cooperating with the government; and that he would tell the grand jury that he had lied about the information that he gave to Agent Mango concerning Mr. Mr. Jenkins and he would say that he was drunk when he talked to Mr. Mr. Jenkins and didn't remember what he talked with him about. (A 8304-06).

Albright conceded he may have sent a text to a case agent that said: "Sad thing is you don't care. I'm just a POS biker that switched. What of - - [sic] - - I say I lied was told to say what I did would fuck your case and I may see jail, but will be federal. I don't care. Sad if I have to resort to that, but I'll talk to my lawyer and see what the best option is for me. Sleep on that…" (A 8318).

Albright admitted that he sent texts to agents saying, "Let me know if you can do anything. If not, I might call the news. That would be a good way to get something done." "Let's see how it goes." "night". (A 8320). Albright also demanded $3,000 to $5,000 to buy a car. (A 8322).

Albright testified that his attitude towards law enforcement was hostile and belligerent and that he felt he was being manipulated but he knew that his cooperation with the government could be revoked if he didn't fully cooperate. He testified that he knew the agreement was protecting him from being charged in any manner either in relation to the shootings of DJ and Maue or with RICO-related offenses. (A 8306-08).

Fritts testified at the subject trial while under related indictment charging RICO conspiracy and other counts. That indictment alleged conduct

regarding firearms and making false statements; as well as accessory after the fact to the murders of DJ and Maue.

After testifying on cross-examination that when the KMC first wanted to open a chapter in Tennessee, the club members "weren't going to take over, but we were going to be in Tennessee and wear a full Tennessee rocker," Fritts was asked directly whether it was the intention, at that time, for the KMC to take over the whole state. His answer was yes. Fritts then admitted that he had lied earlier to counsel for Mr. Jenkins. (A 15074-73).

Fritts testified that Pirk, Drifter and himself went to Wal-Mart after dinner. Fritts' girlfriend, Monica Brown, went too, although Fritts lied to the FBI and said she had not gone in order to protect her. (A 15362).

Fritts lied in the grand jury about loaning his motorcycle to Mr. Jenkins. (A 15383). Fritts also lied to the grand jury about where he met Mr. Jenkins for the first time. (A 15564-66).

Fritts admitted he lied to agents about not telling them whether or not he allowed to or agreed with allowing Mr. Jenkins to take cocaine with him to New York. (A 15576). Fritts also revealed the motive for his lying, besides trying to help himself: he believes Mr. Jenkins stole cocaine from him. (A 15576-77).

In November of 2016, Monica Brown lied to a federal grand jury and testified at this trial under promise that if she was truthful, the government would not prosecute her. In December of 2017 (just weeks before the subject trial) she claimed to provide to the government information she had not been truthful about

regarding Fritts, KMC, Mr. Jenkins and Pirk. (A 5618-20). She didn't testify about Pirk and Drifter coming up just before going to New York. She claimed she did not know how Mr. Jenkins traveled from Florida to Tennessee. (A 5701-04). In the grand jury, she was repeatedly asked if she saw Mr. Jenkins drop off the motorcycle and she answered no. She was asked if she even saw Mr. Jenkins at all after he returned from New York and her response was no. She even got "sassy" by suggesting in one of her answers in the grand jury that Mr. Jenkins "supposedly" dropped the motorcycle back in Tennessee. (A 5761-65).

Brown testified about conversations between Fritts and Mr. Jenkins regarding the deaths of DJ and Maue that she did not tell the grand jury. And at trial, for the first time, she testified that Fritts and Mr. Jenkins were talking club business between themselves in front of her. She also testified that Mr. Jenkins, who had never previously discussed club business with her, suddenly admitted murder to her. She further testified that Fritts, who always made sure that others in the clubhouse did not talk club business in front of Brown, tells her that Mr. Jenkins went on a murder spree. (A 5757-59).

Brown garnered a source of knowledge about her testimony by admitting that she followed the investigation on the internet, becoming aware that things were being found, like the gun, and she maintained a fair level of knowledge about the case. (A 5755-56).

In October of 2017 (approximately 3 months before jury selection in the subject trial), Michael Long was indicted on RICO conspiracy charges for

participating in the KMC; possession of a firearm in furtherance of a crime of violence; and, accessory after the fact regarding the murders of DJ and Maue that Pirk and Mr. Jenkins are charged with. He was also charged with making false statements to the FBI on November 21 and 30 of 2016; and with obstruction of justice for testifying falsely to a federal grand jury on November 30, 2016. (A 5781-83).

Essentially, Long admitted he was charged with lying about his relationship with Pirk; the amount of communication with Pirk in 2014 and 2015; the amount and type of communication with Mr. Jenkins in 2014; the amount of communication and the time of communications with Pirk, Enix and Mr. Jenkins while Mr. Jenkins was borrowing a motorcycle from Jimmy Fritts; whether Long or anyone else called Pirk when Mr. Jenkins returned the motorcycle to Fritts at the KMC clubhouse in Tennessee; communication with Pirk when Fritts was in the Western District of New York pursuant to a grand jury subpoena in July of 2015; and whether guns were possessed and sold inside the Tennessee KMC clubhouse. Long pled guilty to RICO conspiracy and admitted involvement in drugs; being an accessory after the fact for murders; and admitted obstructing justice in the grand jury for all of the above lying. He admitted he had a cooperation agreement with the government and is supposed to tell the truth to limit his prison time and to avoid re-instatement of charges dismissed for his plea and a sentence of life in prison. (A 15784-86).

Long testified that he lied in a federal grand jury to protect himself and his family. (A 15969-70). When confronted with the fact that he told the federal grand jury that he had a bachelor's degree in computer science after he admitted at trial

that he only had an associate degree, Long said, "It must have came [sic] out. My mind was mixed up." He was asked, "Because of all sorts of other lies you told on things involving you, that was an extraneous lie that you just told?" Long answered, "I believe so." (A 15970-71).

Long lied to agents and to the grand jury about sale of alcohol in the clubhouses; he lied to agents about drug dealing at the clubhouses in relation to himself and others, in relation to sales in the clubhouses in Tennessee and Florida; he lied to the grand jury about drug dealing in those clubhouses, his own drug use and his own drug dealing; he admitted that there is a special category that he puts himself in as opposed to other individuals who deal drugs. (A 15988; 15989-90; 15991).

Long lied to agents about whether the KMC club was sanctioned by the Outlaws, and he lied about having initially met with the Outlaws. (A 16006-07). He lied twice to agents and once to the grand jury about what occurred at the South Buffalo clubhouse. (A 16007). He lied to the grand jury about the meeting he said he had with Pirk and Mr. Jenkins in Tennessee. (A 16009). He admitted lying to a federal grand jury about the alleged confrontation with Mr. Jenkins in the KMC Tennessee chapter clubhouse when he returned to New York. (A 16176-77). And, he admitted that he lied to the grand jury when he blamed Enix for yelling and causing problems in the confrontation at the KMC South Buffalo chapter clubhouse. (A 6064).

Long admitted that his incentive in testifying was to get out of custody as soon as possible and get back to his family but he knew that the United States

Attorney's Office determines what substantial assistance is under the terms of his proffer agreement. (A 15976-77). He admitted that the lies he told were "just off the top of his head". When asked, "So, you're pretty good at lying then?" Long responded, "I wouldn't say I'm pretty good at it, but I did what I thought I had to do at the time." (A 15987-88).

The following exchange occurred on cross-examination of Long after he testified to things that he had never previously disclosed:

> Q. And you met with Mr. Fritts many times after the shootings, correct?
>
> A. Yes, sir.
>
> Q. You talked about the law enforcement investigation, correct?
>
> A. Yes, sir.
>
> Q. And you talked about what stories you were going to tell if you were asked about, correct?
>
> A. Yes, sir.
>
> Q. You talked about what lies you were going to tell to the federal agents, correct?
>
> A. Not in detail no, sir.
>
> Q. But generally what lies you were going to tell?
>
> A. Possibly how to respond.
>
> Q. And you talked about how you were going to lie to the Federal Grand Jury?
>
> A. We didn't talk about how we were going to lie.
>
> Q. But generally about how you were going to lie to the Federal Grand Jury?

A. Yes, sir.

Q. And so you worked through all of the issues in relation to what stories you were going to tell with him, correct?

A. Yes, sir.

Q. And you read through -- at some point you read through the indictment, correct?

A. Yes, sir.

Q. So you were familiar with it, right?

A. Yes, sir.

Q. So when you decided that you wanted to cooperate with law enforcement, you knew what stories you had to tell, correct?

A. Yes, sir.

(A 16010-12) (emphasis added).

Long clarified that the indictment he and Fritts had read was the subject indictment which charged Pirk, Enix and Mr. Jenkins [A 213]. Long conceded that "reading through the indictment was part of the fabric of the story that [Long] and Mr. Fritts came up with over time." (A 16177-78).

REASONS FOR GRANTING THE WRIT

POINT I.

DENIAL OF MR. JENKINS' RULE 29(A) MOTION WAS IMPROPER BECAUSE THE CUMULATIVE EFFECT OF THE LIES AND CONTRADICTORY TESTIMONY RENDERED THE EVIDENCE INSUFFICIENT TO SUSTAIN HIS CONVICTIONS.

The court of appeals dispensed with this argument in one paragraph, summarily opining that while "several instances" of contradictory testimony was identified by Mr. Jenkins, the credibility of witnesses was well within the province of the jury. The court of appeals not only mischaracterized the volume of lies presented in Mr. Jenkins's brief and which appeared in the record; more importantly, the court didn't pass on Mr. Jenkins's main argument, namely, that the accumulation of lies, as set forth above and in addition to those NOT identified but clearly evident during the testimony of other witnesses, was so voluminous as to render the testimony against Mr. Jenkins legally incredible and therefore legally insufficient to sustain his convictions.

The standard of review here requires that the challenged evidence be viewed "in a light that is most favorable to the government, and with all reasonable inferences resolved in favor of the government," *United States v. Persico,* 645 F.3d 85, 104 (2d Cir.2011) (quoting *United States v. Eppolito,* 543 F.3d 25, 45 (2d Cir.2008)). Where testimony is "incredible as a matter of law," credibility can be the basis for a motion for judgment of acquittal. *See United States v. Sanchez Solis,* 882 F.2d 693, 696 (2d Cir.1989).

To be sure, witness credibility is a matter for the jury to be given deference when evaluating the sufficiency of the evidence. *United States v. Roman,*

870 F.2d 65, 71 (2d Cir.1989). "[T]he proper place for a challenge to a witness's credibility is 'in cross-examination and in subsequent argument to the jury' " not in post trial motions. *Id.* (quoting *United States v. Friedman,* 854 F.2d 535, 558 (2d Cir.1988)). However, credibility may be reviewed if the testimony is "incredible as a matter of law." *Solis,* 882 F.2d at 696; *see also United States v. Bermea,* 30 F.3d 1539, 1552 (5th Cir.1994) (finding uncorroborated accomplice's testimony sufficient to sustain guilty verdict unless it was incredible or insubstantial on its face).

The contradictions here aren't mere products of chance or human nature. They grew from the seeds of lies, watered and fed by bias, fear and mendacious character, and were harvested by the liars who testified in this trial.

Mr. Jenkins' guilt is dependent, yes, in large part on the testimony of liars. This testimony connected the dots and filled in the major gaps in the wholly circumstantial case against him. The contradictions noted, though speaking to the most salient facts of Mr. Jenkins' guilt, are a drop in the bucket compared to the examples and evidence of the lying that occurred in this trial. That former co-defendants and other cooperators testified under plea agreements or proffer agreements is one thing; and almost every single KMC witness and non-members associated with them did. The more telling aspect is that most of those agreements involved instances of lying to investigators, to grand juries, to trial juries and to the jury in this trial.

The testimony of each of these witnesses, singularly and, most importantly taken in total, was incredible as a matter of law because they lied so

frequently, blatantly and boldly. Their lies are breathtaking in scope, especially so in light of the total lack of forensic and eyewitness evidence linking Mr. Jenkins to the murders. The government doesn't address the cumulative effect of the parade of lies initiated at its request, ostensibly because without these bold-faced liars it would have had no case at all. Indisputably, there was no forensic evidence linking Mr. Jenkins to the murders of Maue and DJ. No fingerprints, no DNA, no hair samples, no blood evidence. There was no eyewitness to the shootings that led to their deaths. Nor was there was video evidence of the shootings.

Here, witness after witness after witness was confronted with example after example of their mendacity. While a judgment of acquittal is extreme, and therefore rarely granted, something must done to raise the evidentiary bar so precipitously dropped by the presentation of these witnesses. Otherwise, the words of Filip Caruso, on cross-examination while testifying for the government and posited by Mr. Jenkins's defense as having been responsible for the murders of Maue and Szymanski, will be left to so adeptly characterize the efforts of himself and the other government witnesses:

Q. So you're pretty good at telling lies?

A. Sometimes you got to lie.

[A 11663] [Emphasis added].

In courtrooms across this country, witnesses testify in their own self-interest to satisfy plea bargains; witnesses testify after having lied to law enforcement or in prior proceedings; and, occasionally, witnesses are shown to be liars

such that their lack of credibility is duly acted on by the fact-finder. In order to prevent such a showing in the future, this Court should grant this petition and take up this issue if only to better delineate what "incredible as a matter of law" means so that it may be more effectively utilized. Otherwise, presenting lying witnesses will be encouraged.

POINT II.

THE INTERESTS OF JUSTICE REQUIRE A NEW TRIAL BECAUSE INTRODUCTION OF CO-DEFENDANT ENIX'S STATEMENTS AND HIS OWN TESTIMONY IN CONFORMITY THEREWITH EFFECTED A MANIFEST INJUSTICE BY UNDERMINING THE JOINT DEFENSE UNDERTAKEN BY MR. JENKINS, ENIX AND PIRK TO THAT POINT.

The court of appeals, like the district court below, misapprehended and therefore did not properly address petitioner's argument. The issue posed by petitioner was that the joint-defense effort was eviscerated by Enix's embrace of the admission of his statement thanking the FBI for getting the right guy (it could not have been missed that he was referring to Mr. Jenkins) and his own subsequent testimony. The joint defense effort and the effect of the admission of the Enix statement on that effort was disregarded by the court. This scenario falls squarely within the ambit of Rule 33(a).

Mr. Jenkins, Pirk and Enix had been unified in defending against the charges in the indictment. Cross-examination duties were shared by the three defense teams, as were legal arguments. While there were times that issues specific to a certain defendant were only addressed by that defendant's defense team, those

were few and far between. Virtually every motion was joined by the three as were the vast majority of arguments. Only when the issue of this statement arose did it become obvious that one may be pitted against the others. Confirmation of this was had once Enix testified. The Confrontation Clause doesn't alleviate this situation.

The court of appeals relied too heavily on the *Bruton* issues of the challenged statement by co-defendant Enix and did not assign the proper significance to the fact that the statement, in combination with Enix's later testimony, splintered the months' long joint defense effort which could not have escaped the attentiveness of this jury to the undue prejudice of Mr. Jenkins.

This jury was attentive. Jurors paid close attention to detail, even noticing when Enix was holding hands with a court-room observer while they were outside of the courthouse yet visible to a couple of jurors on a break. [Confidential Appendix 1-8].

And the evidence of Mr. Jenkins's guilt was not overwhelming (a finding that has now become mantra) unless one overlooks the lack of forensic and eyewitness evidence and the ridiculous amount of lying that government witnesses engaged in.

Multi-defendant criminal trials occur all over this country at the state and federal levels. Where such defendants join forces at trial, jurists should be able to recognize the significance of this not just on the substantive defense on the merits of this case, but in terms of the image of a unified approach that is being presented to the jury. When one member of a team turns on another member of that team, it

sends the jury the message that this person must be distancing themselves from the other because that other person must be guilty.

This Court should grant the petition to lead the way to a more fair and just way to consider these trial defense issues and to recognize the real dangers that are posed to fair trials when prejudice is done by one of the defense team members.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the judgment of the Court of Appeals of the Second Circuit in this case.

Dated: Buffalo, New York
November 1, 2022.

Respectfully submitted,

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APPENDIX A

2022 WL 3138879
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Andre JENKINS, aka Little Bear, David Pirk, Timothy Enix, aka Blaze, Defendants-Appellants.*

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-cr (L), 19-637-cr (Con), 19-2778-cr (Con)

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August 5, 2022

Appeal from a judgment of the United States District Court for the Western District of New York (Elizabeth A. Wolford, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART** and **VACATED** and **REMANDED IN PART**.

Attorneys and Law Firms

For Appellee: Katherine A. Gregory, Assistant United States Attorney, for Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY.

For Defendant-Appellant Jenkins: Michael S. Deal, Legal Aid Bureau of Buffalo, Inc., Buffalo, NY.

For Defendant-Appellant Pirk: William T. Easton (Cheryl M. Buth, Meyers Buth Law Group, Orchard Park, NY, on the brief), Easton Thompson Kasperek Shiffrin LLP, Rochester, NY.

For Defendant-Appellant Enix: James W. Grable, Jr. (Terrence M. Connors, Rebecca F. Izzo, on the brief), Connors LLP, Buffalo, NY.

Present: Amalya L. Kearse, Dennis Jacobs, William J. Nardini, Circuit Judges.

SUMMARY ORDER

***1** Defendants-Appellants Andre Jenkins, David Pirk, and Timothy Enix appeal from their convictions (and, in Enix's case, his sentence) for narcotics and firearms offenses, as well as for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, and murder in aid of racketeering in connection with their membership in the Kingsmen Motorcycle Club ("KMC"). Specifically, the jury found that (1) Jenkins, Pirk, and Enix committed RICO conspiracy in violation of 18 U.S.C. § 1962(d) (Count 1); (2) Jenkins, Pirk, and Enix possessed a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count 2); Jenkins and Pirk committed the murder of Paul Maue in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) (Count 3); Jenkins and Pirk committed the murder of Daniel "DJ" Szymanski in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) (Count 4); Jenkins and Pirk possessed and discharged a firearm in furtherance of a crime of violence (specifically the Maue murder charged in Count 3) in violation of 18 U.S.C. § 924(c) and (j) (Count 5); Jenkins and Pirk possessed and discharged a firearm in furtherance of a crime of violence (specifically the Szymanski murder charged in Count 4) in violation of 18 U.S.C. § 924(c) and (j) (Count 6); Jenkins possessed a firearm as a felon in violation of 18 U.S.C. § 922(g) (Count 7); Jenkins, Pirk, and Enix used and maintained the KMC's South Buffalo clubhouse for the purpose of drug distribution and use in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2 (Count 8); and Jenkins, Pirk, and Enix possessed firearms in furtherance of a drug trafficking crime (specifically Count 8) in violation of 18 U.S.C. §§ 924(c) and 2 (Count 9). In our concurrently filed opinion, we reject Pirk and Enix's challenge to the district court's interested-witness instruction to the jury. In this summary order, we conclude that none of Defendants-Appellants' remaining challenges warrants reversal, with one exception described below. We assume the parties' familiarity with the record.

I. Evidentiary sufficiency challenges

Jenkins, Pirk, and Enix challenge the sufficiency of the evidence underlying their convictions. We review such challenges *de novo*. *United States v. Ho*, 984 F.3d 191, 199 (2d Cir. 2020). In evaluating the sufficiency of the evidence, we draw all permissible inferences in favor of the government, resolve all issues of credibility in favor of the jury's verdict, and "ask 'whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Willis*, 14 F.4th 170, 181 (2d Cir. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Pirk first challenges the sufficiency of the evidence underlying his convictions on Counts 1, 3, 4, 5, and 6. Specifically, Pirk notes that his liability for an intentional murder under New York Penal Law § 125.25(1) was an element of each of these charges.[1] The government's theory at trial was that Jenkins shot Maue and Szymanski at Pirk's direction and with his assistance such that Jenkins was liable for their murders as a principal and Pirk was liable as an aider and abettor. Pirk argues that the government introduced insufficient evidence of his accessorial liability for the Maue and Szymanski murders at trial, and thus the government failed to prove an element of Counts 1, 3, 4, 5, and 6. Accessorial liability under New York law requires that the defendant possess the same mental culpability required of the principal and "personally engage[ ] in some voluntary act that was specifically connected to the actual perpetrator's misconduct and in doing so, he intentionally and directly assisted in achieving the ultimate goal of the criminal enterprise." *United States v. Delgado*, 972 F.3d 63, 79 (2d Cir. 2020) (internal quotation marks, citations, and alterations omitted). Similarly, under federal law, a defendant is liable "if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* at 73 (internal quotation marks omitted).

***2** Pirk argues that the evidence was insufficient to establish (1) his intent to kill Maue and Szymanski and (2) his performance of an affirmative act in furtherance of the murders under either standard. We disagree.[2] As to Pirk's mental culpability, multiple witnesses testified that Jenkins told them that Pirk ordered the murders. As to Pirk's facilitation of the murders, evidence showed that Pirk, the president of the motorcycle club to which Jenkins belonged, ordered Jenkins to commit the murders. In addition, testimony of a club member present at the scene of the murders and corresponding cell phone records established that Pirk called Maue just before the murders, prompting Maue and Szymanski to leave the clubhouse just as Jenkins arrived in the parking lot where the murders occurred. A reasonable inference to draw from this evidence is that Pirk called Maue in order to facilitate the murders by drawing Maue and Szymanski from the relative safety of the clubhouse out into the parking lot where they were more vulnerable, so that Jenkins could kill them more easily. The evidence was therefore sufficient to establish both Pirk's intent and his affirmative facilitation of the murders and thus his accessorial liability under New York and federal law.

Pirk raises one additional challenge to the sufficiency of the evidence underlying his convictions on Counts 5 and 6 for aiding and abetting Jenkins's violations of 18 U.S.C. § 924(j). Pirk argues that there was insufficient evidence that he knew that Jenkins would use a gun in commission of the murders that served as the predicates to Counts 5 and 6, and thus insufficient evidence that Pirk "actively participated in the underlying ... violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission" as required by *Rosemond v. United States*, 572 U.S. 65, 67 (2014). There was, however, sufficient circumstantial evidence that Pirk was aware that Jenkins would use or carry a gun during the commission of the murders. *See United States v. Zhong*, 26 F.4th 536, 559 (2d Cir. 2022) ("[T]he sufficiency-of-the-evidence test may be satisfied by circumstantial evidence alone." (internal quotation marks omitted)). Testimony by KMC member Jimmy Ray Fritts established that, shortly before the murders, Jenkins stayed with Fritts in Tennessee and purchased from Fritts the gun he would eventually use in the murders. Pirk joined Fritts and Jenkins in Tennessee, and the men, along with other KMC members, discussed Pirk's plans to employ Jenkins to determine which New York KMC members were leaking information to rival clubs, a plan that involved "eliminating" a suspected leaker named Filip Caruso and finding out who else was responsible. Joint App'x at 15376. Pirk and Jenkins left Tennessee together to travel to New York, and the murders occurred one week later. A reasonable jury could infer that, during their travels to New York together to "eliminate" Caruso, Pirk learned that Jenkins was armed with a gun, and that Pirk therefore knew that Jenkins was armed with a gun when Pirk ordered him to kill Maue and Szymanski. Accordingly, the evidence that Pirk knew Jenkins would carry or use a gun in connection with the murders was sufficient under *Rosemond*.

Next, Enix challenges the sufficiency of the evidence underlying his convictions on Counts 1, 8, and 9.[3] Turning first to Count 1, "[t]he conspiracy provision of the [RICO statute], 18 U.S.C. § 1962(d), proscribes an agreement to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity." *United States v. Arrington*, 941 F.3d 24, 36 (2d Cir. 2019) (internal quotation marks and alteration omitted). The government

"need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme." *Id.* at 36–37. Although Enix argues that he had no involvement in or awareness of some of the criminal conduct charged as racketeering acts, the racketeering conspiracy involved far broader purposes and "there is no rule requiring the government to prove that a conspirator knew of all criminal acts by insiders in furtherance of the conspiracy." *United States v. Zichettello*, 208 F.3d 72, 100 (2d Cir. 2000). In addition to the conduct Enix claims he had no involvement in, the Superseding Indictment charged that the purposes of the racketeering enterprise included "[p]reserving and protecting the [KMC's] power, territory, and reputation ... through intimidation, violence, threats of violence, assaults, murder, and attempted murder." Gov't App'x at 9. Ample evidence established Enix's involvement in the plan to shoot members of a rival motorcycle gang if necessary to secure return of KMC property in Florida and avoid damage to the KMC's reputation. Count 1 also charged that the purposes of the KMC included "[g]enerating and maximizing [KMC's] profits, reputation, and membership ... from a variety of illegal activity including but not limited to drug trafficking, firearms sales, sale of untaxed cigarettes, sale of alcohol, gambling, robbery, and prostitution." *Id.* Multiple witnesses reported that KMC clubhouses illegally sold alcohol and tax-free cigarettes, and that Enix, the National Secretary and Treasurer of the KMC, concealed these and other income streams from the KMC's outside accountant. A rational factfinder could therefore conclude beyond a reasonable doubt that Enix agreed with other KMC members that the KMC would function as a unit for the common purposes charged in the indictment.

***3** Enix also challenges the sufficiency of the evidence supporting his conviction on Count 8 for maintaining the KMC's South Buffalo clubhouse as a drug-involved premises in violation of 21 U.S.C. § 856(a)(1). Section 856(a)(1) proscribes the knowing use or maintenance of any place "for the purpose of manufacturing, distributing, or using any controlled substance." Enix accepts that the "statute does not state that drug use must be the 'primary purpose' of maintaining a premises," but argues that the evidence was insufficient because "[h]ere, it was not *a* purpose." Enix Br. at 67. On the contrary, multiple witnesses testified to ubiquitous drug use and sales at the KMC clubhouses, including the South Buffalo clubhouse, and one former KMC member testified that the availability of drugs in the KMC clubhouses increased certain of the club's revenue streams and was central to driving enrollment of new members. Enix also argues that there is insufficient evidence of his *mens rea.* But Enix occupied a high-level position in the national KMC organization and was responsible for paying taxes and other bills for the South Buffalo clubhouse, which he occasionally visited. A rational jury could infer from the evidence of ubiquitous drug use at KMC clubhouses (including the South Buffalo clubhouse), Enix's attendance at the South Buffalo clubhouse, and his leadership position in which he was responsible for the clubhouses' financial reporting and legal structure, that Enix knew about the drug use and distribution in the clubhouse and intended for it to continue in order to boost the KMC's membership and profits. This evidence was also sufficient to hold Enix liable under a *Pinkerton* theory based on his participation in the RICO conspiracy charged in Count 1.[4] *See United States v. Gershman*, 31 F.4th 80, 99 (2d Cir. 2022) ("A *Pinkerton* charge informs the 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." (internal quotation marks omitted)).

Enix also challenges the sufficiency of the evidence supporting his conviction on Count 9 for a violation of 18 U.S.C. § 924(c) predicated on Count 8. "In order to sustain a conviction under ...§ 924, the Government must demonstrate some nexus between the firearm and the drug selling operation," and show that "a reasonable jury could, on the evidence presented at trial, find beyond a reasonable doubt that possession of the firearm facilitated the drug trafficking crime." *United States v. Thompson*, 528 F.3d 110, 119 (2d Cir. 2008) (internal quotation marks omitted). At trial, the government elicited testimony that a shotgun was stored behind the bar at the South Buffalo clubhouse and was accessible to all KMC members there. Other testimony established that more firearms were stored upstairs and that a portion of the roof of the clubhouse from which KMC members could fire guns was "used ... for security." Joint App'x at 7035. Just as "[p]ossession of a firearm to defend a drug stash clearly furthers the crime of possession with intent to distribute the contents of that stash," *United States v. Lewter*, 402 F.3d 319, 322 (2d Cir. 2005), possession of a firearm for the purpose of securing a premises that is maintained for the purpose of drug use and distribution furthers that crime. This evidence was sufficient to hold Enix liable under a *Pinkerton* theory of liability based on his participation in the RICO conspiracy charged in Count 1. Given the clubhouse's utility as a safe haven for drug use

and distribution by KMC members, a practice that drove up profits and membership, and the testimony that there were guns stored in every clubhouse to protect the premises from outside interference, a reasonable jury could conclude that the possession of guns in furtherance of the maintenance of the South Buffalo clubhouse as a drug-involved premises was foreseeable to Enix as a member of the RICO conspiracy.[5]

***4** Finally, Jenkins argues that insufficient evidence supports his convictions on Counts 3 through 6. Jenkins argues that insufficient evidence supports his convictions on these counts because his convictions rest "in large part on the testimony of liars." Jenkins Br. at 38. Although Jenkins identifies several instances at trial during which either an internal inconsistency in a witness's testimony was exposed or the witness admitted to lying in another context, it is "well established that it is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." *United States v. Flores*, 945 F.3d 687, 710–11 (2d Cir. 2019) (internal quotation marks, alteration, and emphasis omitted).

II. Challenges to the admission of evidence

Enix and Jenkins next raise several challenges to the admission of certain evidence at trial. Enix challenges the admission of testimony by former KMC members David Masse and Timothy Haley as lay opinions under Federal Rule of Evidence 701. We review the admission of lay opinion testimony for abuse of discretion. *United States v. Persico*, 645 F.3d 85, 99 (2d Cir. 2011). Under Federal Rule of Evidence 701, a lay witness may provide opinion testimony so long as the testimony is "rationally based on the witness's perception," "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge." "The rational-basis requirement is the familiar requirement of first-hand knowledge or observation." *United States v. Dawkins*, 999 F.3d 767, 793 (2d Cir. 2021) (internal quotation marks omitted). This requirement works in tandem with the helpfulness requirement, which "is designed to provide assurance against the admission of opinions which would merely tell the jury what result to reach." *Id.* (internal quotation marks and alteration omitted).

Enix objects to the district court's admission of Masse's opinion testimony on two subjects: (1) the object of the agreement formed between the KMC members gathered at a Florida clubhouse, namely that they would use violence if necessary to secure the return of their property from a rival motorcycle group; and (2) that one hundred percent of the KMC membership was generally aware that members used and distributed drugs inside KMC clubhouses. First, the district court did not abuse its discretion by admitting Masse's opinion as to the violent means by which the KMC members agreed to retrieve their property from the rival gang. Masse's opinion was rationally based on his participation in the conversation during which the plan was hatched, and helped the jury understand, from an insider's perspective, the lengths to which the group was willing to go to retrieve their property. Second, Enix waived any challenge to the district court's admission of Masse's testimony that one hundred percent of the KMC was generally aware of drug use and distribution within the clubhouses. "A claim is waived ... when a defendant makes an intentional decision not to assert a right or, put another way, acts intentionally in pursuing, or not pursuing, a particular course of action." *United States v. Williams*, 930 F.3d 44, 64–65 (2d Cir. 2019) (internal quotation marks and alteration omitted). That is the case here. After the district court granted Enix's motion to strike the testimony and give a curative instruction but ruled that the government would be allowed to recall Masse to the stand, defense counsel made the tactical decision to allow the testimony to stand and explore the issue through cross examination rather than draw attention to the issue.

***5** Enix also challenges the admission of testimony by former KMC member Timothy Haley that (1) KMC was a "criminal organization" and "a collection of gangsters and tough guys," Joint App'x at 13891–92; and (2) many KMC members used drugs in clubhouses "that these defendants control," Joint App'x at 13893–94. As to the first portion of challenged testimony, even assuming that its admission was an abuse of discretion, it was harmless. "[E]ven manifestly erroneous evidentiary rulings are insufficient to warrant reversal if they do not affect substantial rights," a determination which "depends on the likelihood that the error affected the outcome of the case." *United States v. Miller*, 626 F.3d 682, 690 (2d Cir. 2010) (internal quotation marks omitted). There can be no serious claim that the challenged testimony had any likelihood of affecting the outcome of the case in light of the overwhelming evidence of guilt. As to the second portion of challenged testimony, Enix successfully objected, and the district court instructed the jury to disregard the testimony. "It is an 'almost invariable assumption of the law that jurors follow their instructions,' " and Enix

provides no persuasive reason to suspect that the jurors here did otherwise. *United States v. Rasheed*, 981 F.3d 187, 196 (2d Cir. 2020) (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)).

Jenkins challenges the denial of his motion for a mistrial based on the admission of testimony by Lieutenant Darryl Truty, a detective assigned to investigate the Maue and Szymanski murders, as a lay opinion under Rule 701 and the denial of his motion for a new trial under Federal Rule of Criminal Procedure 33 based on the admission of testimony regarding a post-arrest statement made by Enix to law enforcement. We review both challenged decisions for abuse of discretion. *Rasheed*, 981 F.3d at 195 (reviewing denial of mistrial for abuse of discretion); *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (reviewing denial of Rule 33 motion for abuse of discretion).

Truty prepared a composite video combining surveillance footage from two locations visited by Jenkins on the night of the Maue and Szymanski murders and testified that the blackand-white video showed Jenkins returning after the murders with stains on his jeans that were consistent with blood. Jenkins argues that Truty's testimony did not meet the requirements of Rule 701 and thus it was error to admit it. Even if the admission of Truty's testimony was erroneous, any error was harmless. *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005) (evaluating admission of opinion testimony under Rule 701 for harmless error); *see also United States v. Apuzzo*, 555 F.2d 306, 308 (2d Cir. 1977) (evaluating failure to grant a mistrial for harmless error). The evidence of Jenkins's guilt with respect to the murders was overwhelming, and Truty's testimony about the stains was cumulative of eyewitness testimony by Rene Faulkner that Jenkins returned from the South Buffalo clubhouse with blood on his jeans. We therefore affirm the district court's denial of Jenkins's motion for a mistrial based on the admission of Truty's testimony.

With respect to the second challenge, Jenkins argues that the admission of a post-arrest statement by Enix thanking law enforcement for "getting the guy" who murdered Maue and Szymanski via the testimony of a federal agent and Enix himself constituted a manifest injustice, and thus that the district court erred by denying Jenkins's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Rule 33 allows a court to order a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). A court evaluating a Rule 33 motion must "examine the entire case, take into account all facts and circumstances, and make an objective evaluation, keeping in mind that the ultimate test for such a motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Landesman*, 17 F.4th 298, 330 (2d Cir. 2021) (internal quotation marks omitted). Jenkins argued below that he was prejudiced by this testimony because an inculpatory statement by a co-defendant would be given special weight by the jury and because, had he known that the statement would be introduced, he would have pursued severance or an alternative trial strategy. The district court correctly rejected these arguments. First, as the district court noted, the evidence of Jenkins's guilt was overwhelming. Further, the district court instructed the jury to consider the statement only with respect to Enix's state of mind and not for the truth of who killed Maue and Szymanski, and Jenkins provides no persuasive reason to believe that the jury failed to follow this direction. *See Rasheed*, 981 F.3d at 196. Finally, the district court correctly rejected Jenkins's argument that he was unfairly surprised by the admission of the statement and thus lost the opportunity to pursue an individual defense strategy because the admissibility of Enix's statement was litigated well before trial. Accordingly, the district court did not abuse its discretion in denying Jenkins's Rule 33 motion.

III. Pirk's right to be present during the May 1, 2018, in-chambers conference

***6** Pirk argues that his Fifth and Sixth Amendment rights to be present at all stages of his trial were violated when the district court held a conference in chambers with a court security officer ("CSO") and counsel for Enix and the government regarding a comment made by a juror to the CSO. "A defendant in a criminal case has the right to be present at 'every trial stage.' " *United States v. Collins*, 665 F.3d 454, 459 (2d Cir. 2012) (quoting Fed. R. Crim. P. 43(a)(2)). Although the "constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, [the Supreme Court has] recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (internal citation omitted). "The Due Process Clause applies in lieu of the Sixth Amendment in situations where the defendant is not specifically confronting witnesses or evidence against him." *United States v. Jones*, 381 F.3d 114, 121 (2d Cir. 2004). Instead, "a defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Gagnon*, 470 U.S. at 526 (internal quotation marks omitted). The presence of a defendant "is a condition of due process to the extent that

a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* (internal quotation marks omitted).

As an initial matter, the in-chambers conference involved only the questioning of a CSO concerning a remark a juror made to the CSO and therefore did not implicate Pirk's ability (or lack thereof) to confront witnesses or evidence against him, that is, his Sixth Amendment confrontation right. Nor did Pirk's absence from the conference relate, in a reasonably substantial way, to the fulness of Pirk's ability to defend the charges against him, that is, to his Fifth Amendment due process right. Pirk relies on cases involving a trial judge's *ex parte* communication with one or more jurors. *Ex parte* communications between judge and juror are particularly fraught because they "may unintentionally 'drift' into a supplemental instruction, for which the defendant has a well-established right to be present." *Collins*, 665 F.3d at 460 (internal citations omitted). "Furthermore, unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views." *Id.* (internal quotation marks and alteration omitted). Here, however, there was no *ex parte* communication between the district court and any jurors, and so the concerns motivating the outcomes in these cases—avoiding *ex parte* supplemental instructions to the jury and preventing the jury from forming an impression of the judge's personal views—are not present. The district court therefore did not err in holding the May 1, 2018, in-chambers conference.

IV. The denial of Pirk's transfer motion

Pirk next argues that the district court erred by denying his motion for an intra-district transfer of the location of his trial from Buffalo to Rochester. We disagree. Federal Rule of Criminal Procedure 18 provides that "[t]he court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." The Advisory Committee notes to the 1966 amendment to Rule 18 also contemplate prejudice to the defendant as grounds for an intra-district transfer. Fed. R. Crim. P. 18 advisory committee's notes to 1966 amendment.

We find no abuse of discretion in the district court's careful weighing of the relevant factors and resulting denial of Pirk's transfer motion. *Cf. United States v. Maldonado-Rivera*, 922 F.2d 934, 966–67 (2d Cir. 1990) (reviewing a motion to transfer brought pursuant to Federal Rule of Criminal Procedure 21(a) based on adverse publicity for abuse of discretion). The district court acknowledged that "in the Buffalo area, pretrial press coverage of this case has been significant during various periods of time" but reasonably concluded that the sizable population in the Buffalo division, the years that had elapsed between the bulk of the potentially prejudicial press coverage and the trial, and careful *voir dire* would dilute any prejudicial effect. Joint App'x at 2606–09. Nor do we accept Pirk's argument that the district court underweighted the likely effect of holding such a substantial trial in Buffalo on her own docket.[6] The district court therefore did not abuse its discretion in denying Pirk's transfer motion.

V. Multiplicity challenges

***7** Pirk argues that his convictions for Counts 5 and 6, § 924(j) convictions based on the murders in aid of racketeering of Maue and Szymanski, respectively, are multiplicitous and must therefore be vacated. "An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." *United States v. Kerley*, 544 F.3d 172, 178 (2d Cir. 2008) (internal quotation marks omitted). We have held that the "appropriate unit of prosecution under § 924(c)(1) is the predicate offense (i.e., the 'crime of violence') rather than the number of firearms." *United States v. Mejia*, 545 F.3d 179, 204–05 (2d Cir. 2008). Here, Counts 5 and 6 are predicated on separate offenses—namely, the murders of two victims, charged as separate offenses in Counts 3 and 4. Although Pirk emphasizes that the murders happened "within seconds" of each other, Pirk Br. at 66, such temporal proximity does not collapse the two murders into a single crime. *See Mejia*, 545 F.3d at 205–06 (rejecting multiplicity challenge to three separate § 924(c) charges based on two shooting incidents that injured three individuals).

VI. Enix's procedural reasonableness challenge

Next, Enix argues that the district court erred by considering the Maue and Szymanski homicides as part of the nature and circumstances of Enix's offense under 18 U.S.C. § 3553(a). The district court agreed with Enix that the murders were not "relevant conduct" under U.S.S.G. § 1B1.3 for purposes of calculating Enix's advisory Guidelines range. During its consideration of the § 3553(a) factors at Enix's sentencing, however, the district court noted that Enix led a "violent motorcycle gang" and that it was "not surprising ... that, ultimately, at the end of the day, two individuals end up being killed execution style in the back of the North Tonawanda clubhouse." Joint App'x at 19803–04. Enix contends that, once the district court determined that the homicides were not

"relevant conduct" within the meaning of U.S.S.G. § 1B1.3, the district court was not allowed to consider the homicides in its analysis of the § 3553(a) factors. We disagree.

Although the concept of "relevant conduct" constrains a district court's ability to consider certain conduct in calculating a defendant's Guidelines range, a "district court may make its own evaluation of the characteristics of the defendant, and the need of the sentence to punish, deter, and protect the public." *United States v. Wernick*, 691 F.3d 108, 119 (2d Cir. 2012). A finding that certain acts "are not technically 'relevant conduct' to the specific offense charged ... does not imply that those acts are not highly relevant (in a non-technical sense) to the district court's evaluation." *Id.* The district court therefore did not err by considering the homicides during Enix's sentencing.

VII. Pirk and Jenkins's *Davis* challenge to Count 2

Finally, we vacate Pirk's and Jenkins's convictions on Count 2 for violations of 18 U.S.C. § 924(c) predicated on Count 1's RICO conspiracy. The government consents to vacatur of these convictions in light of our recent decision in *United States v. Capers*, 20 F.4th 105 (2d Cir. 2021), in which we held that RICO conspiracy is not categorically a crime of violence and thus cannot serve as a predicate for a conviction under § 924(c), *id.* at 120.

* * *

For the reasons stated above, and in the concurrently filed opinion, the judgment of the district court is **AFFIRMED IN PART** and **VACATED IN PART**, and the case is **REMANDED** to the district court for further proceedings consistent with this order.

All Citations

Not Reported in Fed. Rptr., 2022 WL 3138879

Footnotes

* The Clerk of Court is directed to amend the caption as set forth above.

1 Pirk was charged as an aider and abettor to the murders under a mix of state and federal law. Specifically, the murder enhancement to Count 1's RICO conspiracy charged Pirk as an aider and abettor under New York Penal Law § 20.00; the murder in aid of racketeering offenses charged in Counts 3 and 4 charged Pirk as an aider and abettor under both New York Penal Law § 20.00 and 18 U.S.C. § 2; and the firearms offenses charged in Counts 5 and 6 charged Pirk as an aider and abettor under 18 U.S.C. § 2.

2 "Although the principles of accomplice liability under New York law may differ somewhat from the corresponding federal law," *Delgado*, 972 F.3d at 78, those differences are immaterial here and the evidence was sufficient to hold Pirk liable for the murders as an aider and abettor under either New York or federal law.

3 Pirk joins in Enix's arguments with respect to Counts 8 and 9.

4 For the same reasons, we reject Pirk's challenge to his conviction on Count 8.

5 For the same reasons, we reject Pirk's challenge to his conviction on Count 9.

6 Similarly, the district court appropriately took account of the preferences of the other defendants and their counsel, all of whom (except Pirk and Jenkins) expressed a strong preference for trying the case in Buffalo. Pirk argues that doing so was error because these defendants had pleaded guilty before the district court issued its written Decision and Order. But the district court's January 15, 2018, written Decision and Order simply memorialized the district court's reasoning for its May 9, 2017, oral denial of Pirk's motion. At the time that the district court orally denied Pirk's motion, these other defendants had not yet pleaded guilty, and so it was reasonable at that time for the district court to consider their preferences.

APPENDIX B

2018 WL 6629679
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

UNITED STATES of America,

v.

David PIRK, Andre **Jenkins** a/k/a Little Bear, and Timothy Enix a/k/a Blaze, Defendants.

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Signed 12/19/2018

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DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

I. INTRODUCTION

***1** Defendants David Pirk ("Pirk"), Andre **Jenkins** ("**Jenkins**"), and Timothy Enix ("Enix") (collectively "Defendants") were convicted after a four-month jury trial on May 18, 2018, of various crimes as charged in the Second Superseding Indictment pertaining to the operation of the Kingsman Motorcycle Club ("KMC"). Sentencing is scheduled for February 28, 2019.

This Decision and Order resolves Defendants' post-verdict motions filed pursuant to Federal Rules of Criminal Procedure 29(c) and 33 (Dkt. 1322; Dkt. 1325; Dkt. 1326), except for Defendants' challenges based upon *Sessions v. Dimaya*, —— U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018).[1] Upon due consideration of the parties' submissions and the evidence set forth during trial, and for the reasons set forth below, the Court denies Defendants' post-verdict motions, except the Court continues to reserve decision on the post-verdict motions seeking to set aside each Defendant's conviction on Count 2 based upon *Dimaya*.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants were charged, along with 13 other defendants,[2] by a 46-count Second Superseding Indictment returned on March 16, 2016. (Dkt. 33 (hereinafter "the Indictment" or "SSI")). The Indictment portrayed a violent motorcycle club engaged in drug trafficking and firearms offenses, obsessed with maintaining its perceived power and preventing members from "jumping patch" to rival biker clubs through the use of threats, intimidation, and violence, ultimately escalating to the execution-style murders of two allegedly disloyal members (Paul Maue ("Maue") and Daniel "DJ" Szymanski ("Szymanski")) on September 6, 2014, at the KMC North Tonawanda Chapter clubhouse. (*Id.* at ¶ 59). The KMC operated clubhouses in New York, Tennessee, Pennsylvania, and Florida. The evidence produced at trial[3] demonstrated that the organization functioned through a strict hierarchal structure governed by written bylaws with dues paid through each KMC chapter to the national organization in Florida. Pirk served at the top of the organization as National President, and Enix operated as his righthand man as the Florida/Tennessee Regional President. **Jenkins** served as a Nomad, an enforcer who acted on behalf of the National President and who killed Maue and Szymanski.

***2** The Indictment charged Pirk in eight separate counts,[4] as follows:

(1) Count 1—RICO[5] Conspiracy in violation of 18 U.S.C. § 1962(d);

(2) Count 2—Possession of Firearms in Furtherance of Crime of Violence (the RICO Conspiracy charged in Count 1), in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2;

(3) Count 3 (Count 19 in SSI)—Murder in Aid of Racketeering in violation of VICAR,[6] 18 U.S.C. §§ 1959(a)(1) and 2;

(4) Count 4 (Count 20 in SSI)—Murder in Aid of Racketeering in violation of VICAR, 18 U.S.C. §§ 1959(a)(1) and 2;

(5) Count 5 (Count 21 in SSI)—Possession and Discharge of Firearm in Furtherance of Crime of Violence (the VICAR murder charged in Count 3), in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j), and 2;

(6) Count 6 (Count 22 in SSI)—Possession and Discharge of Firearm in Furtherance of Crime of Violence (the VICAR murder charged in Count 4), in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j), and 2;

(7) Count 8 (Count 45 in SSI)—Using and Maintaining the KMC South Buffalo Chapter's Clubhouse for Drug Dealing, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2; and

(8) Count 9 (Count 46 in SSI)—Possession of Firearms in Furtherance of Drug Trafficking Crime (the Drug Premises violation charged in Count 8), in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2.

Jenkins was charged in the same eight counts as Pirk, and he was also charged in a ninth count—Count 7 (Count 23 of the SSI)—with being a Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). In addition, the Indictment alleged Special Sentencing Factors for Pirk and **Jenkins** on Count 1, pertaining to the deaths of Maue and Szymanski.

The Indictment charged Enix with a total of four counts: Count 1 (the RICO conspiracy in violation of 18 U.S.C. § 1962(d)); Count 2 (possession of firearms in furtherance of RICO conspiracy in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2); Count 8 (Using and Maintaining the KMC South Buffalo Chapter's clubhouse for drug dealing, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2); and Count 9 (possession of firearms in furtherance of drug trafficking, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2).

The trial spanned a total of four months. Jury selection commenced on January 16, 2018, and consumed multiple days of written and oral questioning, in both a group and individual setting, driven in large part by the pretrial publicity that had surrounded the case, including **Jenkins**' murder conviction in New York State court and the Court's decision to exclude that evidence. Jury selection concluded on February 7, 2018, when twelve jurors and six alternates were selected. Opening statements began on February 20, 2018, with the Government commencing its presentation of proof on February 22, 2018. The Government's case continued for 10 weeks through May 3, 2018, when the Government rested. The Government called over 60 witnesses, including many high-ranking KMC members who cooperated with the Government and provided inside information as to the operation of the club. The Government entered over 800 exhibits into evidence including videos and other photographic evidence, phone records, Facebook messages, DNA evidence, ballistic evidence, and KMC meeting minutes.

***3** Defendants put on a case that lasted one week. Pirk presented proof on May 7 through 9, including his own testimony, and Enix presented proof on May 9 through 11, including his own testimony. **Jenkins** elected not to present any proof.

Thus, the proof alone consumed 11 full weeks. Counsel presented closing arguments on May 14 and 15, and the Court charged the jury on May 15 and 16, with the jury commencing its deliberations on May 16, 2018.

On May 18, 2018, the jury returned guilty verdicts with respect to each Defendant on each of the counts charged. (Dkt. 1258; Dkt. 1259).

On June 25, 2018, pursuant to the schedule set by the Court, Defendants filed post-verdict motions pursuant to Federal Rules of Criminal Procedure 29(c) and 33. (Dkt. 1322 (Enix); Dkt. 1325 (Pirk); Dkt. 1326 (**Jenkins**)). On August 1 and 3, 2018, the Government filed responses in opposition of each of Defendants' motions. (Dkt. 1367 (Enix Opp.); Dkt. 1370 (Pirk Opp.); Dkt. 1371 (**Jenkins** Opp.)). On August 10, 2018, Defendants each filed reply papers in further support of their motions. (Dkt. 1379 (**Jenkins** Reply); Dkt. 1381

(Pirk Reply); Dkt. 1382 (Enix Reply)). On August 17, 2018, the Government filed a consolidated sur-reply to Defendants' reply papers. (Dkt. 1388). Oral argument was held before the undersigned on August 21, 2018, at which time the Court reserved decision. (Dkt. 1391).[7]

III. LEGAL STANDARDS

A. Rule 29 Standard

Rule 29(c)(1) of the Federal Rules of Criminal Procedure provides that "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict...." The standard on a motion for a judgment of acquittal is stringent, and a defendant claiming that he was convicted based on insufficient evidence "bears a very heavy burden." *United States v. Blackwood*, 366 F. App'x 207, 209 (2d Cir. 2010) (quoting *United States v. Desena*, 287 F.3d 170, 177 (2d Cir. 2002)). "In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). Accordingly, "[a]ll permissible inferences must be drawn in the government's favor." *Id.*

"If *any* rational trier of fact could have found the essential elements of the crime, the conviction must stand." *United States v. Puzzo*, 928 F.2d 1356, 1361 (2d Cir. 1991) (quotation and citation omitted). "The test is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt." *Id.* (quotation and citation omitted). The evidence must be viewed "in its totality, not in isolation," *United States v. Huezo*, 546 F.3d 174, 178 (2d Cir. 2008) (quotation and citation omitted), "as each fact may gain color from others," *Guadagna*, 183 F.3d at 130. The Court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Id.* (quotation and citation omitted).

***4** A district court must be careful not to usurp the role of the jury. "Rule 29(c) does not provide the trial court with an opportunity to 'substitute its own determination of ... the weight of the evidence and the reasonable inferences to be drawn for that of the jury.' " *Id.* at 129 (alteration in original) (quoting *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984)). "[A] jury's verdict will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *United States v. Nersesian*, 824 F.2d 1294, 1324 (2d Cir. 1987). The government is not required "to preclude every reasonable hypothesis which is consistent with innocence." *United States v. Chang An-Lo*, 851 F.2d 547, 554 (2d Cir. 1988) (citing *United States v. Fiore*, 821 F.2d 127, 128 (2d Cir. 1987)). Further, "the jury's verdict may be based entirely on circumstantial evidence." *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995).

B. Rule 33 Standard

Rule 33 of the Federal Rules of Criminal Procedure allows a court to vacate a judgment and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). In evaluating the sufficiency of the evidence for purposes of Rule 33, the Court "must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Id.* "The defendant bears the burden of proving that he is entitled to a new trial under Rule 33...." *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009).

"Because motions for a new trial are disfavored in this Circuit the standard for granting such a motion is strict; that is, newly discovered evidence must be of a sort that could, if believed, change the verdict." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995). Indeed, to justify the granting of a Rule 33 motion, "a district court must find that there is a real concern that an innocent person may have been convicted." *McCourty*, 562 F.3d at 475 (quotation and citation omitted). For these reasons, a court will grant a new trial only "in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993).

IV. ENIX'S SUFFICIENCY-BASED CHALLENGES TO COUNT 2

In addition to challenging his conviction on Count 2 based on *Dimaya*, Enix argues that the conviction must be set aside pursuant to Rule 29(c) because "the evidence is insufficient to sustain his conviction as to that Count because he never agreed that a member of the racketeering conspiracy would attempt, solicit, or conspire to engage in murder in violation of Florida law." (Dkt. 1322-1 at 22). He additionally argues that the proof was insufficient to convict him under an aiding or abetting or *Pinkerton* theory of liability. (*Id.* at 24).

The Court instructed the jury that in order to convict Enix of the § 924(c) charge in Count 2, it would need to unanimously

conclude that the Government proved each of the following elements beyond a reasonable doubt: (1) Enix committed a crime of violence for which he might be prosecuted in a court of the United States; and (2) he knowingly possessed a firearm in furtherance of the crime of violence. The Court also instructed the jury that Enix was charged as both a principal and an aider and abettor with respect to Count 2, and that if the crime charged in Count 2 was committed by another person, but Enix took an affirmative act in furtherance of the underlying crime with the intent to facilitate the offense's commission,[8] then he could be found guilty of the crime as an aider and abettor.

***5** The Court also gave an instruction pursuant to *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), that if the jury concluded Enix was a member of the RICO conspiracy charged in Count 1, then they may find him guilty of the § 924(c) charge in Count 2, if they concluded that the Government proved beyond a reasonable doubt: (1) that the crime charged in Count 2 was committed; (2) that the person(s) committing the crime charged in Count 2 was a member of the conspiracy; (3) that the crime charged in Count 2 was committed pursuant to a common plan and understanding existing among the conspirators; (4) that Enix was a member of the conspiracy at the time the crime in Count 2 was committed; and (5) that Enix could have reasonably foreseen that the substantive crime charged in Count 2 might be committed by his co-conspirators.

Defendant's sufficiency argument focuses on the special interrogatories answered by the jury as part of the verdict form to address the uncertainty concerning the implications of the *Dimaya* decision. By way of background, when the Court charged the jury on May 15 and 16, 2018, the Supreme Court one month earlier had declared that 18 U.S.C. § 16(b) as incorporated into the Immigration and Nationality Act's definition of "aggravated felony" at 8 U.S.C. § 1101(a)(43)(F) was impermissibly vague in violation of due process. *Dimaya*, 138 S.Ct. at 1215. As acknowledged by Justice Roberts in his dissenting opinion, "§ 16 serves as the universal definition of 'crime of violence' for all of Title 18," including the definition applicable to § 924(c), and therefore, the Court's holding in *Dimaya* "calls into question convictions" under § 924(c). 138 S.Ct. at 1241. Weeks after *Dimaya* was issued, the Second Circuit issued an amended decision in *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018), removing its discussion about whether Hobbs Act robbery constituted a crime of violence under § 924(c)(3)(B) and expressing no view as to whether that clause was void for vagueness, *id.* at 53 n.2, and the Tenth Circuit Court of Appeals (the only circuit court at the time the jury was charged in this case to have addressed the issue post-*Dimaya*) concluded that *Dimaya's* reasoning extended to § 924(c)(3)(B) and rendered it unconstitutionally vague, *United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018).[9]

Due to these developments and in an effort to provide the parties, this Court, and any appellate court insight into the jury's reasoning with respect to its findings on Count 2, the Court instructed the jury to make specific findings as part of its consideration of Count 2, as to the racketeering activity (if any) that each Defendant agreed would be committed by a member of the conspiracy. Not all charged predicate acts were part of the questions posed to the jury; only those that could potentially qualify as crimes of violence if charged as substantive offenses—namely murder (under New York and Florida law), robbery (under New York and Florida law, and the Hobbs Act), and kidnapping (under Florida law).

The jury returned a guilty verdict on Count 2 with respect to Enix, and when answering the special interrogatories, it identified Enix as having agreed with at least one other co-conspirator that murder, in violation of Florida Statutes Annotated §§ 782.04(1)(a)(1), 782.04(1)(a)(2)(d)-(f), and 777.04(1)-(3), would be committed by a member of the conspiracy in the conduct of the affairs of the enterprise. The jury answered "no" with respect to Enix concerning the other identified predicate acts that potentially constituted crimes of violence (i.e., murder under New York law, robbery under New York and Florida law and the Hobbs Act, and kidnapping under Florida law).

***6** Enix now argues that the evidence was not sufficient to sustain a conclusion that he agreed that a member of the RICO conspiracy would commit murder under Florida law.[10] (Dkt. 1322-1 at 22-24). The Court disagrees.

Drawing all inferences in favor of the Government, the Court concludes that the evidence was sufficient to convict Enix on Count 2. Evidence was admitted that in or about January 2014, Filip Caruso ("Caruso") and David Masse travelled to Florida and met with Enix, Pirk, and other KMC members to plan an effort to retrieve KMC property from the Pagans (a rival motorcycle club) "by any means necessary." Although that initial effort did not come to fruition, a subsequent meeting with the Pagans occurred in 2014. Testimony was introduced from multiple witnesses that Enix was armed during that subsequent meeting with the Pagans, the purpose of which was to retrieve KMC property. The jury, drawing

reasonable inferences from the evidence, could fairly and logically conclude that Enix was guilty beyond a reasonable doubt of planning to kill the Pagans if he and the other KMC members were unable to voluntarily retrieve the KMC property. Although Enix contends that he was armed only for purposes of "self-defense" (Dkt. 1382 at 28), that not only misses the point of the § 924(c) offense charged in Count 2, but Enix's version of events was not credited by the jury. The evidence produced at trial supported a conclusion that Enix, Pirk, **Jenkins**, and other KMC members planned and plotted their meeting with the Pagans in 2014, and then travelled to that meeting prepared to engage in warfare with the Pagans if they were unable to retrieve their property. While violence did not become necessary, and Pirk and Enix were able to negotiate the return of the KMC property, the evidence supported the jury's conclusion that the KMC members (including Enix) were prepared to use their firearms if necessary. Drawing all inferences in favor of the Government, the jury could have reasonably concluded that Enix solicited people and helped come up with a plan, and took steps toward achieving the plan, to ultimately murder members of the Pagans if the KMC members were unable to retrieve their property. The evidence suggested that Enix helped recruit the right people who were willing to use their firearms if necessary in the meeting with the Pagans, and he went to that meeting with those individuals, armed with firearms and a plan of attack. Thus, based on the proof at trial, the jury could have reasonably concluded that Enix possessed a firearm in a manner that facilitated the RICO conspiracy in Count 1. As a result, Enix's Rule 29(c) motion on this ground must be denied.

V. DEFENDANTS' SUFFICIENCY-BASED CHALLENGES TO COUNTS 8 AND 9

***7** Enix argues that the proof was insufficient at trial to sustain his convictions on Counts 8 and 9. (Dkt. 1322-1 at 25-36). Pirk joins in Enix's motion to vacate his conviction on Count 8 (Dkt. 1325-1 at 18-19), and moves to vacate his conviction on Count 9 (*id.* at 14-16). **Jenkins** also moves to vacate his convictions on Counts 8 and 9. (Dkt. 1326 at 5).

A. The Rule 29(c) Motions Directed to Count 8

The evidence was sufficient to convict Defendants on Count 8, which charged them with using or maintaining the South Buffalo Chapter clubhouse as a premises for drug manufacturing, distribution, or use, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2. The Court instructed the jury that in order to convict a Defendant for a violation of Count 8, they needed to find that the Government proved beyond a reasonable doubt that the Defendant under consideration permanently or temporarily used or maintained the South Buffalo Chapter clubhouse for the purpose of manufacturing, distributing, or using cocaine or marijuana, and he acted knowingly. The Court finds that the jury, drawing reasonable inferences from the evidence, could fairly and logically conclude that the Government met its burden of proof with respect to each Defendant.

One of Enix's arguments is that there was no evidence that the purpose of the clubhouse was for drug use or distribution. (Dkt. 1322-1 at 27). The Court instructed the jury that while the Government was not required to prove that drug activity was the only purpose of using or maintaining the clubhouse, it needed to prove that drug activity was a significant or important reason for maintaining the clubhouse. Viewing the evidence in the light most favorable to the Government, the Court concludes that the evidence supported the conclusion that an important reason for maintaining the South Buffalo clubhouse was to use and distribute illegal drugs. Numerous witnesses testified about pervasive drug use and distribution that occurred within the South Buffalo Chapter clubhouse and at all KMC clubhouses. Witnesses also testified that the South Buffalo Chapter clubhouse (like all clubhouses) was stocked with firearms, which are "tools of the trade" of drug dealers and therefore evidence of drug dealing. *See United States v. Vegas*, 27 F.3d 773, 778 (2d Cir. 1994) ("[T]his Court has repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade." (quotation and citation omitted)). In fact, a photograph was introduced into evidence depicting Enix in the South Buffalo Chapter clubhouse posing with a firearm. Evidence was introduced that the South Buffalo Chapter clubhouse was maintained like a fortress, and there was also testimony that Pirk and Enix ordered the clubhouses cleared of any contraband before law enforcement raided them, evidencing knowledge of illegal activity occurring within the clubhouses. Additionally, evidence was introduced that Enix paid the bills allowing for the continuing operation of the South Buffalo Chapter clubhouse, and evidence was introduced at trial about drug use by all Defendants, including Enix.

Based on that testimony and evidence, the jury could reasonably conclude that the South Buffalo Chapter clubhouse was used or maintained for drug activity—indeed, it was pervasive and a significant or important reason for the clubhouse's operations. There was also evidence sufficient

for the jury to find each Defendant used or maintained the clubhouse as a drug premises, including Enix by virtue of his direct activities in keeping the clubhouse open and the circumstantial evidence of his knowledge as to the drug activities in the South Buffalo Chapter clubhouse. At a minimum, the jury, drawing reasonable inferences from the evidence, could fairly and logically conclude that each Defendant was guilty beyond a reasonable doubt as an aider and abettor on Count 8. In addition, there was also evidence sufficient for the jury to find each Defendant guilty on Count 8 under a *Pinkerton* theory of liability. *See United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir. 1996) ("Under the *Pinkerton* theory of liability, a conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes."); *see also United States v. Parkes*, 497 F.3d 220, 232 (2d Cir. 2007) ("An offense by a co-conspirator is deemed to be reasonably foreseeable if it is 'a necessary or natural consequence of the unlawful agreement.' " (quoting *Pinkerton v. United States*, 328 U.S. at 648, 66 S.Ct. 1180)).

B. The Rule 29(c) Motions Directed to Count 9

***8** Enix argues that there was insufficient evidence to convict him on Count 9, asserting that the evidence failed to show that he possessed firearms with intent to further the drug trafficking offense in Count 8. (Dkt. 1322-1 at 32-36). Pirk reiterates this argument, as does **Jenkins**. (Dkt. 1325-1 at 14-16; Dkt. 1326 at 5).

Viewing the evidence in the light most favorable to the Government, the Court must reject Defendants' arguments. As recounted above, the photographic and testimonial evidence established that the South Buffalo Chapter clubhouse, like all other KMC clubhouses, contained several firearms, and that KMC members were engaged in drug use and distribution inside that clubhouse. As to Pirk and Enix, the evidence established that they were part of the KMC leadership and controlled the club through the established chain of command. By way of example, evidence was introduced that Enix acted as Pirk's spokesperson and orchestrated club activities through Facebook communications, including support of the activities at the South Buffalo Chapter clubhouse and support of KMC members who were drug dealers. Evidence was introduced that the possession of firearms permeated the operation of the club—they were a fundamental tool possessed by KMC members while engaging in the activities necessitated by club membership.

In the very least, there was sufficient evidence that Defendants were liable for the § 924(c) offense in Count 9 as aiders and abettors, or under a *Pinkerton* theory of liability. With respect to aiding and abetting, the evidence was sufficient for a reasonable jury to conclude that each Defendant had advance knowledge that an accomplice would be possessing a firearm in furtherance of maintaining or using the South Buffalo Chapter clubhouse for drug use or distribution. Again, there was a photograph of Enix introduced at trial depicting him holding a firearm (along with other KMC members doing the same) in the South Buffalo Chapter clubhouse. Moreover, like the other clubhouses, firearms were stored at the South Buffalo Chapter clubhouse for protection, and the evidence demonstrated that KMC members were regularly armed.

"[A] defendant may be guilty of a § 924(c) violation under a *Pinkerton* theory if: (1) the defendant conspired to commit a crime involving violence or drug trafficking; (2) the § 924(c) offense was committed in furtherance of the conspiracy; and (3) the offense was a reasonably foreseeable consequence of an act furthering the unlawful agreement." *Rosario v. United States*, 164 F.3d 729, 734 (2d Cir. 1998). The evidence supports the conclusion that one of the objectives of the KMC was to provide drugs at all clubhouses, including the South Buffalo Chapter clubhouse. Indeed, a reasonable jury could conclude that the KMC maximized its profits through this drug dealing by attracting members into the clubhouses. Witnesses testified that the South Buffalo Chapter clubhouse was heavily armed in order to protect its contents, including its drugs. "Recognizing that in the drug culture, firearms are the tools of the trade, any reasonable juror would conclude that the § 924(c) violations were a reasonably foreseeable concomitant to the drug sales." *Id.* at 735 (quotation and citation omitted). Drawing all reasonable inferences in favor of the Government, as the Court must on a Rule 29(c) motion, the evidence sufficiently supported the jury's findings with respect to Count 9.

VI. ENIX'S UNANIMITY-BASED CHALLENGE TO COUNT 1

***9** Enix argues that the conviction on Count 1 must be set aside pursuant to Rule 29(c) because the jury found that Enix joined an agreement that is different than the agreements that Pirk and **Jenkins** joined. (Dkt. 1322-1 at 36-47). Enix bases his argument on the jury's conclusions in the Count 2 special

verdict interrogatories that Enix did not agree to any violation of the New York Penal Law or the Hobbs Act, whereas the jury found that Pirk and **Jenkins** agreed to the New York Penal Law violations and that Pirk additionally agreed to the Hobbs Act violation. (Dkt. 1258 at 3-8). The Court rejects Enix's arguments.

First, a conspirator need not have full knowledge of all aspects of the conspiracy:

> [T]here is no rule requiring the government to prove that a conspirator knew of all criminal acts by insiders in furtherance of the conspiracy.
>
> No theory requires co-conspirators to have such knowledge. *To be convicted as a conspirator, one must be shown to have possessed knowledge of only the general contours of the conspiracy* .... While we have held that too little knowledge may undermine a conspiracy conviction, there is no requirement that a defendant must have been omniscient.

United States v. Zichettello, 208 F.3d 72, 100 (emphasis added). Second, nowhere on the verdict sheet does it state that the listed racketeering acts are the *only* ones to which a guilty defendant agreed as part of the conspiracy; not every charged racketeering act was listed. (*See* Dkt. 1258). Third, the jury is presumed to have followed the Court's instruction regarding the need for unanimity with respect to the type or types of racketeering activity a defendant agreed would be committed as part of the conspiracy. *See United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) ("[T]he law recognizes a strong presumption that juries follow limiting instructions."). Nothing in the special verdict sheet undermines that presumption; for example, the jury could have unanimously agreed that Defendants agreed to commit a type or types of racketeering acts that were not listed on the special verdict sheet for Count 2. Similarly, the jury did conclude that all three Defendants agreed to the predicate racketeering activity involving murder under Florida law.

A theory of the case pursued at trial by Defendants was that they were not part of the same alleged conspiracy—and that there was a difference between the Florida KMC activities and those "up north" with the KMC in New York. Plainly, the jury's verdict reflected a rejection of this defense theory, and it would not be appropriate for the Court to set aside the jury's findings based upon the evidence presented in this case.

VII. PIRK'S ENTERPRISE-BASED CHALLENGE TO COUNT 1

Pirk argues that the Government failed to present sufficient evidence of an enterprise and that, pursuant to Rule 29(c), the Court should vacate his conviction on Count 1 (and related counts, such as Count 2). (Dkt. 1325-1 at 16-17). Pirk raised a similar argument in his pretrial motion to dismiss, and the Court rejected it. *See United States v. Pirk*, 267 F.Supp.3d 406, 417-22 (W.D.N.Y. 2017). The Court finds no reason to depart from its earlier ruling.

First, proof of enterprise is not necessary to convict a defendant of RICO conspiracy. In *United States v. Applins*, 637 F.3d 59 (2d Cir. 2011), the Second Circuit concluded that the establishment of an enterprise is not a necessary element of RICO conspiracy. With respect to the "enterprise" requirement, the Second Circuit explained: "A RICO enterprise 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.' RICO reaches 'a group of persons associated together for a common purpose of engaging in a course of conduct.' " *Id.* at 73 (quoting *United States v. Turkette*, 452 U.S. 576, 580, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). The Second Circuit further explained: "[T]he existence of an association-in-fact is oftentimes more readily proven by 'what it does, rather than by abstract analysis of its structure.' For this reason, [the Second Circuit has] stated that 'proof of various racketeering acts may be relied on to establish the existence of the charged enterprise.' " *Id.* (quoting *United States v. Coonan*, 938 F.2d 1553, 1559, 1560 (2d Cir. 1991)). Nevertheless, it concluded, based on *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), that existence of an enterprise is not an element of RICO conspiracy:

> ***10** RICO conspiracy requires proof "that a defendant agreed with others (a) to conduct the affairs of an enterprise (b) through a pattern of racketeering" and that "the conduct prong requires only that conspirators reached a meeting of the minds as to the operating of the affairs of the enterprise through a pattern of racketeering conduct."

Id. at 77 (quoting *United States v. Basciano*, 599 F.3d 184, 199 (2d Cir. 2010)). In other words, "[u]nder *Applins*, it is clear that the government is not required to prove the establishment of an enterprise in order to convict Defendants of RICO conspiracy." *United States v. Larson*, No. 07-CR-304S, 2011 WL 6029985, at *5 (W.D.N.Y. Dec. 5, 2011).

Second, even if proof of an enterprise was required, the Government presented ample evidence of an enterprise in this case. In *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009), the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 946, 129 S.Ct. 2237. In so holding, the Supreme Court rejected the petitioner's argument that a RICO enterprise "must have at least some additional structural attributes, such as a structural 'hierarchy,' 'role differentiation,' a 'unique *modus operandi*,' a 'chain of command,' 'professionalism and sophistication of organization,' 'diversity and complexity of crimes,' 'membership dues, rules and regulations,' 'uncharged or additional crimes aside from predicate acts,' an 'internal discipline mechanism,' 'regular meetings regarding enterprise affairs,' an 'enterprise "name," ' and 'induction or initiation ceremonies and rituals.' " *Id.* at 948, 129 S.Ct. 2237.

Here, the evidence more than satisfied the enterprise element. Even the aspects of an enterprise that did not have to be established—such as chain of command, membership dues, and rules and regulations—were present here. Thus, while not a required element of the charged RICO conspiracy pursuant to *Applins*, the evidence sufficiently established an enterprise in this case.

VIII. DEFENDANTS' MULTIPLICY CHALLENGE TO § 924(c) COUNTS

Enix argues that the § 924(c) convictions on Counts 2 and 9 cannot both stand because they involve the same predicate conduct charged in Count 1. (Dkt. 1322-1 at 41-43). Relying on the unpublished summary order issued by the Second Circuit in *United States v. Whyte*, 630 F. App'x 104 (2d Cir. 2015), as well as the decisions in *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001), and *United States v. Wallace*, 447 F.3d 184 (2d Cir. 2006), Enix contends that it is impermissible for two § 924(c) counts to be based on "the same intertwined and overlapping conduct." (Dkt. 1322-1 at 41-43).[11]

***11** Pirk joins in Enix's argument with respect to Counts 2 and 9 (Dkt. 1325-1 at 18-19), and he also separately argues that Counts 2, 5 and 6 are multiplicitous, relying on the same caselaw cited by Enix as well as *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008), (*id.* at 11-14). **Jenkins** has joined in the post-verdict motions of his co-defendants. (Dkt. 1326 at 8).

The Government, relying on *United States v. Arline*, 835 F.3d 277 (2d Cir. 2016), and also citing to some of the same caselaw as Defendants, contends that different units of prosecution and different conduct serve as the basis for each of the § 924(c) counts and, as a result, Defendants' multiplicity arguments must be rejected. (Dkt. 1367 at 46-48).[12]

The Court finds it challenging to reconcile some of the Second Circuit's caselaw on this issue. The Second Circuit itself has recognized the "wildly divergent interpretations" among the circuits and "that reasoned application of § 924(c)(1) can be extremely difficult." *Finley*, 245 F.3d at 206; *see United States v. Rentz*, 777 F.3d 1105, 1115 (10th Cir. 2015) (en banc) (Gorsuch, J.) ("We don't mean to suggest we think we've somehow cracked § 924(c)'s code. Even now plenty of hard questions remain."). In part, the challenges arise from the interplay among different principles that apply when analyzing separate § 924(c) charges for multiplicity, as well as the "widely-shared view that the statute's text is ambiguous." *Finley*, 245 F.3d at 207. To unravel the multiplicity issues raised by Defendants, the Court starts with a discussion of some basic principles, then moves to a review of each of the counts at issue, the relevant caselaw, and ultimately a conclusion regarding Defendants' multiplicity challenges.

A. Relevant Legal Principles

"An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). In other words, "[a]n indictment is multiplicitous if it charges the same crime in two counts." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004). Punishment for a multiplicitous indictment "violates the Double Jeopardy clause of the Fifth Amendment, subjecting a person to punishment for the same crime more than once." *Chacko*, 169 F.3d at 145.

"It is not determinative whether the same conduct underlies the counts; rather, it is critical whether the 'offense'—in the legal sense, as defined by Congress—complained of in one count is the same as that charged in another." *Id.* at 146. When the same statutory violation is charged multiple times, as is the case with the § 924(c) charges in Counts 2, 5, 6, and 9, "the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d

Cir. 2004) (quoting *Bell v. United States*, 349 U.S. 81, 83-84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)).

***12** The appropriate unit of prosecution under § 924(c) is the underlying predicate offense rather than the number of firearms. *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993). "Only where the defendant commits multiple ... violent crimes, and the government can link the firearms to those crimes, may the government prosecute for multiple violations of § 924(c)(1)." *Id.* On the other hand, "[w]here the government links multiple firearms to a single crime, only one § 924(c)(1) violation occurs." *Id.*

While double jeopardy principles primarily serve as the basis for a multiplicity challenge to separate § 924(c) counts, principles of statutory interpretation and construction must also be considered. *See United States v. Medina*, 642 F. App'x 59, 61 (2d Cir. 2016) (recognizing that *Lindsay*'s unit of prosecution inquiry was undertaken without any reference to the Double Jeopardy Clause and suggesting that there is a separate, statutory question at play). Moreover, due to the ambiguity of § 924(c)(1), the rule of lenity must guide the statutory interpretation so that any doubt is "resolved against turning a single transaction into multiple offenses." *Finley*, 245 F.3d at 207 (quoting *Bell*, 349 U.S. 81, 75 S.Ct. at 672-73).

With those basic legal principles in mind, the Court now turns to a discussion of each of the counts at issue.

B. The § 924(c) Counts

Both Counts 2 and 9 charged violations of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2, and both covered the same time frame—on or before 2006 through the date of the return of the Indictment. (Dkt. 1255 at 14, 19-20). However, the underlying predicate offenses serving as the basis for Counts 2 and 9 differ. Count 2 charged a firearm offense in furtherance of an alleged crime of violence—the racketeering conspiracy charged in Count 1—and the jury was specifically instructed that in order to convict on Count 2, they needed to conclude that one or more of the objects of the conspiracy was committing a crime of violence.[13] In contrast, Count 9 charged a firearm offense in furtherance of the substantive drug trafficking crime charged in Count 8 relating to using or maintaining the South Buffalo Chapter clubhouse for the purpose of distributing or using cocaine or marijuana.

Count 1 alleged racketeering activity that included using or maintaining the South Buffalo Chapter clubhouse for drug trafficking purposes, but it also alleged other drug trafficking crimes as part of the racketeering activity, including violations of 21 U.S.C. § 856(a)(1) with respect to other clubhouses, possession with intent to distribute and distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1), and conspiracy to do the same in violation of 21 U.S.C. § 846. Count 1 also alleged non-drug-related racketeering activity including murder and robbery in violation of New York and Florida law, Hobbs Act robbery, kidnapping in violation of Florida law, obstruction of justice, witness tampering, and trafficking of contraband cigarettes. Moreover, while a conviction on Count 8—and therefore Count 9—including as an aider and abettor or under a *Pinkerton* theory of liability —required proof that the offense of using or maintaining the South Buffalo Chapter clubhouse for drug trafficking purposes was actually committed, a conviction on Count 1 did not require proof that any of the racketeering acts were actually accomplished.

***13** Both Counts 5 and 6 charged violations of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j), and 2. Counts 5 and 6 related to the VICAR murders in aid of racketeering charged in Counts 3 and 4, respectively, with Counts 3 and 5 charged for Maue's murder and Counts 4 and 6 charged for Szymanski's murder. The VICAR statutory violations charged in Counts 3 and 4 (i.e., 18 U.S.C. § 1959(a)(1)) were not separately alleged as racketeering activity in Count 1, although murder in violation of New York law was alleged as part of Count 1's racketeering activity.

C. Second Circuit Case Law

In *Lindsay*, the defendant was convicted of a § 924(c) count related to a narcotics conspiracy, which conspiracy charge was a lesser-included offense of the Continuing Criminal Enterprise violation that also served as a separate predicate for another § 924(c) count. 985 F.2d at 669. While not vacating the § 924(c) conviction based on the lesser-included offense, the Second Circuit remanded for resentencing so that the two § 924(c) convictions could be combined. *Id.* at 671. Among other principles, *Lindsay* teaches that separate § 924(c) counts cannot stand based on two underlying predicate offenses where one of the predicates is a lesser-included offense of the other. *See id.* at 674. In other words, *Lindsay* focused on the underlying predicate offense as the appropriate unit of prosecution, concluding that when that predicate offense is the same in law and fact (including as a lesser-included

offense of the other), the § 924(c) convictions cannot be separated.

Employing those principles, the Second Circuit in *Whyte*, 630 F. App'x 104, a case relied upon extensively by Enix (Dkt. 1322-1 at 42), concluded that separate § 924(c) convictions could not stand where one was based on racketeering and racketeering conspiracy counts, and the other was based on a narcotics conspiracy that served as part of the alleged racketeering activity. The Second Circuit concluded that the two § 924(c) counts were multiplicitous because "the predicates for [the defendant's] firearms convictions are a lesser-included offense (the marijuana distribution conspiracy) and greater offenses (the RICO offense and the RICO conspiracy)." *Id.* at 109.

The *Whyte* court did not cite any authority for or provide any analysis or explanation regarding its conclusion that the marijuana distribution conspiracy was a lesser-included offense of the RICO conspiracy count, and that conclusion conflicts with the Second Circuit's prior caselaw holding otherwise. *See United States v. Thomas*, 757 F.2d 1359, 1370-71 (2d Cir. 1985) (finding that § 846 narcotics conspiracy was not lesser-included offense of § 1962(d) conspiracy even though it was also alleged as part of racketeering activity); *see also Basciano*, 599 F.3d at 199 ("To be sure, the violence proscribed by § 1959 may sometimes be part of a pattern of racketeering proscribed by § 1962. Nevertheless, because distinct factual elements must be proved to establish § 1959(a)(5) and § 1962(d) conspiracies, a defendant may be prosecuted under both statutes without violating the Double Jeopardy Clause."). Moreover, *Whyte*, an unpublished summary order, has never been cited by the Second Circuit or any other court.

Less than a year after the *Whyte* decision was issued, the Second Circuit in *Arline*, 835 F.3d 277, concluded that separate § 924(c) convictions should be allowed to stand where one was predicated on a narcotics conspiracy dating from 2004 through 2011, and the second § 924(c) count was predicated on a racketeering enterprise and conspiracy, but "on occasions other than those described" in the first § 924(c) count. *Id.* at 279, 283. The defendant challenged his conviction on both § 924(c) counts, arguing that they punished simultaneous conduct because the predicates had a temporal overlap of about 5 years and because the racketeering conspiracy alleged a pattern of racketeering activity that included "dealing in a controlled substance." *Id.* at 282. The Second Circuit rejected the defendant's arguments, reasoning that the evidence that the defendant possessed multiple firearms on separate occasions gave the jury ample basis to convict on two separate § 924(c) counts. *Id.* at 283. The court explained as follows:

> ***14** [A]lthough [the] incidents [of the defendant's gun possession] may have occurred within the same five-year period—or even in the same month or year—the evidence at trial, and the Government's presentation of that evidence and argument to the jury, demonstrated that the guns were neither linked "to a single crime," nor based on the "continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct."

Id. at 282 (quoting *Lindsay*, 985 F.2d at 674, then *Wallace*, 447 F.3d at 188).

Notwithstanding the above caselaw, the Second Circuit has struck down separate § 924(c) convictions even where the underlying predicate offenses are not the same. In *Finley*, 245 F.3d 199, the court concluded that § 924(c) does not support multiple firearm convictions where a defendant possesses a single firearm during a single drug transaction that results in separate drug possession and distribution offenses: "The statute does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct." *Id.* at 207. In other words, the separate predicate offenses did not charge the same offense, but nonetheless under the rule of lenity and statutory construction principles, the court concluded that the separate § 924(c) convictions could not stand.

Similarly, in *Wallace*, 447 F.3d 184, one § 924(c) count charged that the defendants used a firearm in furtherance of the conspiracy to distribute cocaine base charged in Count One "and, in doing so, murdered Torres in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j)(1), and 2"; the other § 924(c) count charged that the defendant used a firearm during a crime of violence (the drive-by shooting charged in Count Twelve in violation of 18 U.S.C. § 36(b)(2)(A) (prohibiting the firing of a weapon in furtherance of a major drug offense)) "and in doing so, murdered Torres, again in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j)(1), and 2." *Id.* at 186. The Court addressed the following question: "whether the two § 924(c)(1) counts ... were based on a single 'unit of prosecution.' " *Id.* at 187-88. The Court explained:

> In determining the appropriate unit of prosecution under a criminal statute, we look to Congress, asking whether

> it clearly manifested an intention to punish a defendant twice for continuous possession of a firearm in furtherance of co-terminous predicate offenses involving essentially the same conduct. Where ambiguity or doubt exists about Congressional intent regarding the unit of prosecution, we apply the rule of lenity, which dictates that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses."

Id. at 188 (quoting *Finley*, 245 F.3d at 207).

The *Wallace* court explained that one § 924(c) count (Count Thirteen) was predicated on the government proving that the defendant knowingly used a firearm during and in relation to a drug trafficking offense, and in the course of using it, caused the murder of Torres; the other § 924(c) count (Count Fourteen) was predicated on the government proving that the defendant fired a weapon, in furtherance of a major drug offense, into a group of two or more people with the intent to injure, and in the course of doing so, caused the murder of Torres. *Id.* at 189-90. "The relevant conduct underlying the offenses predicating Counts Thirteen and Fourteen consists of the same shooting." *Id.* at 189. Thus, the underlying predicates were distinct crimes charged under different statutes, but the court concluded that the firearm was possessed or used in furtherance of simultaneous predicate offenses consisting of virtually the same conduct.

***15** However, in *Mejia*, 545 F.3d 179, the Second Circuit allowed the separate § 924(c) convictions to stand. In *Mejia*, the defendant fired at a crowd in a parking lot from inside a van, hitting two individuals. *Id.* at 183. He and his co-defendants then drove to another parking lot, where the defendant handed the gun to another occupant of the van, who shot a third victim in the second parking lot. *Id.* at 184. The defendant was charged with three separate VICAR counts of assault to maintain his position in a racketeering enterprise based on the three separate victims, in violation of 18 U.S.C. § 1959(a)(3), and with three separate § 924(c)(1)(A)(iii) counts based on each of the § 1959(a)(3) charges. *Id.* The Second Circuit rejected the notion that the shootings were a single incident, finding that while they were "clustered in time and space, that clustering does not somehow merge them into one predicate crime." *Id.* at 205-06. The court recognized *Finely* and *Wallace* as the exception to the general rule set forth in *Lindsay* that the appropriate unit of prosecution for a § 924(c) count is the predicate offense (i.e., the underlying crime of violence or the drug trafficking crime), and concluded that none of the unique concerns at play in *Finley* and *Wallace* were present so as to justify departing from the general rule. *Id.* at 205-06; *see also United States v. Salameh*, 261 F.3d 271, 279 (2d Cir. 2001) (rejecting multiplicity challenge to two § 924(c) convictions—one based on conspiracy to bomb World Trade Center by, *inter alia*, transporting bomb to the site, and the other based on assaulting Secret Service Agents by using the bomb to damage the World Trade Center).

D. The Court's Conclusions

Several legal principles can be distilled from the above discussion, leading to the Court's conclusion that Defendants' multiplicity challenges to their § 924(c) convictions must be denied because each is linked to a distinct crime.

First, the possession of a single firearm with simultaneous predicate offenses consisting of virtually the same conduct cannot serve as the basis for separate § 924(c) convictions, even where the underlying conduct is charged separately under different statutory provisions. This principle is most relevant to the multiplicity challenge to Counts 5 and 6, based upon **Jenkins**' use of one firearm to murder both Maue and Szymanski on September 6, 2014, at the North Tonawanda Chapter clubhouse. The Court concludes that this case is more similar to the scenario presented in *Mejia*, as opposed to *Finley* (involving "virtually the same conduct with the same criminal motivation") or *Wallace* (involving the same murder). Like *Mejia*, the unit of prosecution for Counts 5 and 6 is the VICAR statute (in *Mejia*, the unit of prosecution was 18 U.S.C. § 1959(a)(3); here the unit of prosecution is 18 U.S.C. §§ 1959(a)(1) and 2). Also like *Mejia*, there are multiple shooting victims (in *Mejia*, three victims were assaulted with firearms; here, two victims were murdered). *See Mejia*, 545 F.3d at 183-84. By comparison, in *Finley* and *Wallace*, while different statutes served as the basis for the underlying predicates of the § 924(c) charges, the conduct was virtually the same. *See Finley*, 245 F.3d at 207; *Wallace*, 447 F.3d at 189. In other words, the conduct drives the result, and here, there were two separate murders constituting two separate crimes. Even though only one firearm was involved and even though the murders occurred during a single criminal episode lasting a brief period of time, *Mejia* precludes Defendants' multiplicity arguments as to Counts 5 and 6: the "clustering" in time and space of the shootings "does not somehow merge them into one predicate crime." 545 F.3d at 205-06. The principles set forth by *Finley* and *Wallace* do not stand for the proposition that a defendant may escape the consecutive punishments imposed by § 924(c) because he utilizes a single firearm to murder two individuals at or about the same time. The murders were separate offenses

constituting distinct crimes, and thus, they each may serve as the basis for a separate § 924(c) conviction.

Second, separate § 924(c) convictions cannot be based on units of prosecution that are the same crimes for double jeopardy purposes, including as lesser-included offenses. This principle relates most directly to Defendants' multiplicity challenge to the § 924(c) conviction on Count 2 (based upon the underlying racketeering conspiracy). As noted above, the racketeering activity alleged as part of Count 1's conspiracy also served, in part, as the basis for separate substantive counts charged in Counts 3, 4, and 8, that supported three additional § 924(c) charges in Counts 5, 6, and 9, respectively. While *Whyte* suggests that the substantive counts here may be lesser-included offenses of the racketeering conspiracy and thus would raise double jeopardy issues, 630 F. App'x at 109, this Court respectfully disagrees. *Whyte* is a non-precedential summary order and "is therefore not binding on this Court." *United States v. Wider*, 184 F.Supp.3d 10, 16 (E.D.N.Y. 2016); *see also* 2d Cir. L. R. 32.1.1 ("Rulings by summary order do not have precedential effect."). Pursuant to binding Second Circuit precedent, Counts 3, 4, and 8 are not lesser-included offenses of the racketeering conspiracy charged in Count 1. *See Basciano*, 599 F.3d at 196-97; *Thomas*, 757 F.2d at 1371. The substantive counts charged in Counts 3, 4, and 8 are not the same in law as the conspiracy charged in Count 1—Counts 3, 4, and 8 each require proof of an element not contained in Count 1, and Count 1 requires proof of an element not contained in Counts 3, 4, and 8. *See United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Thus, double jeopardy principles do not, in the Court's view, preclude imposition of separate § 924(c) convictions based upon these four separate counts.

***16** Nonetheless, there is a third general principle that the Court must consider. *Arline* suggests that the Court must examine whether the conduct at issue with each § 924(c) conviction is distinct, separate and apart from any double jeopardy analysis. 835 F.3d at 282-83. Here, the Court concludes that the evidence that served as the basis for each § 924(c) count was not the same. The murder of Paul Maue served as the basis for the Count 5 conviction, and the murder of DJ Szymanski served as the basis for the Count 6 conviction. For Count 2, the jury was instructed that it was based upon the allegation that Count 1 was a crime of violence, and accordingly to convict on Count 2, the jury needed to conclude that an object of the conspiracy was a crime of violence. Because of the special interrogatories that were answered for Count 2, it is evident that the jury concluded with respect to Count 2 that each Defendant actually agreed to the commission of at least one crime of violence having nothing to do with the murders of Maue and Szymanski (for all three Defendants, murder under Florida law, and additionally Hobbs Act robbery for Pirk). (See Dkt. 1258).[14] The murder allegations under Florida law were related to the dispute with the Pagans in 2014, and the Hobbs Act robbery was related to the incident involving the shutdown of the Springville Chapter on or about June 7, 2013. Thus, all three Defendants were convicted of a firearm offense in violation of § 924(c) as charged in Count 2 for conduct separate and distinct from the murders of Paul Maue and DJ Szymanski.

Moreover, while the drug trafficking offense that served as the basis for the charge in Count 8 also was alleged as part of the racketeering activity in Count 1, the § 924(c) count charged in Count 9 was linked to a drug trafficking unit of prosecution (Count 8), whereas the § 924(c) count charged in Count 2 was linked to an alleged crime of violence (Count 1). Again, the jury was specifically instructed that in order to convict on Count 2, it needed to conclude that objective(s) of the RICO conspiracy included crime(s) of violence, whereas no such instruction was provided for Count 9. Additionally, the Government specifically argued during its closing argument (both initially and then even more directly during rebuttal) that the charges in Count 2 concerning the possession of firearms were related to the fact that KMC members needed to possess firearms to allow the club to function in the way it did and stand up to rivals—whether it be the incident with the Pagans in Florida in 2014, the incident with the Outlaws in Tennessee in May 2014, or the incident with the defecting Springville Chapter in June 2013—whereas the possession of firearms inside the South Buffalo Chapter clubhouse and fortifying that clubhouse where drug possession and dealing was occurring related to the charges in Count 9.

In sum, the Government produced evidence of Defendants' firearm possession on multiple occasions and at different times and places; there was evidence that firearms were possessed inside many of the KMC clubhouses, in Tennessee during the meeting with the Outlaws, in Florida during the meeting with the Pagans, in New York during the Springville Chapter shutdown, during the murders of Paul Maue and DJ Szymanski, and at various other times and places. Firearms were tools of the trade for KMC members, including **Jenkins**, Pirk and Enix. The evidence produced at trial demonstrated that Defendants and other KMC members possessed firearms

in Florida, Tennessee, and New York sufficient to conclude that the firearms were "neither linked 'to a single crime,' nor based on the 'continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct.' " *Arline*, 835 F.3d at 282 (quoting *Lindsay*, 985 F.2d at 674, then *Wallace*, 447 F.3d at 188). While the time period in Count 9 overlapped with Count 2, and while the murders at issues in Counts 5 and 6 occurred during the time of the conspiracy, there was sufficient evidence of separate conduct to allow the four separate § 924(c) convictions to stand.[15]

***17** Accordingly, for the foregoing reasons, Defendants' motions in support of setting aside the convictions under 18 U.S.C. § 924(c) based on multiplicity grounds, are denied.

IX. PIRK'S CHALLENGE UNDER RULE 29(c) TO COUNTS 1 THROUGH 6 BASED ON INSUFFICIENT ACCESSORIAL LIABILITY

Pirk argues that the Court should vacate his convictions on Counts 1 through 6—all of which, in his view, were dependent in whole or in part on his role in the killings of Maue and Szymanski—because there was no proof beyond a reasonable doubt that he aided, abetted, counseled, commanded, induced, or procured **Jenkins** to murder them. (Dkt. 1325-1 at 5-10).

Viewing the evidence in the light most favorable to the Government, which the Court must do, the Court rejects Pirk's argument. There was ample evidence adduced at trial to support the jury's finding that Pirk aided or abetted the murders of Maue and Szymanski, including, but not limited to, the following: (1) testimony from co-conspirators Roger Albright and Joseph Michael Long that **Jenkins** told each of them that Pirk told **Jenkins** to "take care of it" in reference to killing Maue and Szymanski; (2) testimony from Thomas Koszuta (another co-conspirator) that, after the murders, Pirk stated that **Jenkins** killed Maue and Szymanski and did what he had to do; (3) testimony from Robert Osborne and Emmett Green that Pirk instructed KMC members to delete video from the clubhouses that would put **Jenkins** at the clubhouse shortly after the murder; (4) testimony that Pirk instructed the Tennessee KMC members not to retaliate against **Jenkins** for killing Maue and Szymanski; (5) evidence demonstrating that Pirk and **Jenkins** travelled to New York together and surreptitiously met prior to the murders; (6) **Jenkins'** instructions to Rene Faulkner as he was leaving right before the murders to call Pirk using his "burner phone" if anything happened; and (7) Pirk's telephone call to Maue right before he was murdered. When considered with the significant evidence of a coverup encouraged by Pirk after the murders, there was more than enough evidence for the jury to find that Pirk aided and abetted the murders.

X. PIRK'S *ROSEMOND*-BASED CHALLENGE TO COUNTS 5 AND 6

Pirk argues that his convictions on Counts 5 and 6—the § 924(j) counts related to the VICAR murder counts set forth in Counts 3 and 4—must be set aside under Rule 29(c) because he had no advance knowledge that **Jenkins** would carry a firearm when he killed Maue and Szymanski. (Dkt. 1325-1 at 10-11). In support of this argument, Pirk cites *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). In that case, the Supreme Court held that, to aid and abet a § 924(c) offense, the defendant must have advance knowledge that one of his confederates will carry a gun, such that he still realistically could have opted out of the crime. *Id.* at 78, 134 S.Ct. 1240.

Viewing the evidence in the light most favorable to the Government, the Court rejects Pirk's argument. The jury was instructed in accordance with *Rosemond*, and it returned a verdict of guilt as to Pirk on Counts 5 and 6. Based upon the evidence presented at trial, a reasonable jury could conclude that Pirk knew that **Jenkins** would be carrying a firearm and would use a firearm during the murders of Maue and Szymanski.

XI. JENKINS' MOTION TO VACATE HIS CONVICTIONS ON COUNTS 3 AND 4

***18** **Jenkins** argues that the Court should vacate his convictions on Counts 3 and 4, the VICAR counts involving the murders of Maue and Szymanski, "because they were not in furtherance of the RICO conspiracy alleged to have involved the [KMC]." (Dkt. 1326 at 4). In his view, the fact that other members of the KMC wanted to retaliate against him for committing the murders means that the murders could not have been for the purpose of maintaining or increasing his position in the KMC enterprise, which was engaged in racketeering activity. (*See id.* at 4-5).

Considering the evidence in the light most favorable to the Government, the Court rejects **Jenkins'** argument. **Jenkins'** motion challenges the Government's proof that the murders were to maintain or increase his position within the KMC. (*See id.*). Based on the evidence presented at trial, a reasonable jury could conclude that the evidence

demonstrated that Pirk ordered **Jenkins** to carry out the murders in order to retaliate against what was believed to be Maue's and Szymanski's betrayal of the KMC, and that **Jenkins** carried out that order and, as some witnesses testified, "did what he had to do." From those circumstances, the jury could reasonably conclude that **Jenkins** carried out the murder at the request of the KMC's National President in order to maintain his position within the KMC enterprise —in other words, he was following orders, and carrying out those orders was expected of him by virtue of his membership in the KMC. In fact, **Jenkins** was witnessed leaving the scene of the murders yelling "LKDK" (meaning "Live a Kingsman, Die a Kingsman")—representing direct evidence that the murders were linked to **Jenkins**' role within the KMC. Thus, the motive element of the VICAR counts was satisfied in this case. *United States v. Thai*, 29 F.3d 785, 817 (2d Cir. 1994) ("The motive requirement is thus satisfied if 'the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.' " (quoting *United States v. Conception*, 983 F.2d 369, 381 (2d Cir. 1992))); *see also United States v. Krasniqi*, 555 F. App'x 14, 18 (2d Cir. 2014) (finding motive element satisfied where defendants killed a fellow member of an enterprise who the defendants believed had betrayed the enterprise, such that killing was done to maintain defendants' leadership in the enterprise and to punish for disloyalty).

XII. DEFENDANTS' RULE 33 ARGUMENTS

A. Enix's Rule 33 Arguments

Enix argues that a new trial is necessary for two reasons: (1) the jury did not unanimously agree that he joined the same racketeering conspiracy as his co-defendants; and (2) the interest of justice weighs in favor of a new trial on all counts against him because he is not guilty. (Dkt. 1322-1 at 44-46). Those arguments echo those raised in support of Enix's Rule 29 motion, discussed previously. For the same reasons the Court rejects Enix's Rule 29 motion, he has failed to show the "extraordinary circumstances" necessary to warrant a new trial under Rule 33.

B. Pirk's Rule 33 Arguments

Pirk argues that he is entitled to a new trial because of two purported flaws in Caruso's testimony: (1) Caruso gave inconsistent testimony about Pirk's alleged request to have Caruso kill Maue; and (2) Caruso's testimony was patently unbelievable in light of his criminal history, perjury, and admitted willingness to lie to advance his own interests. (Dkt. 1325-1 at 19-20).

However credible Caruso may or may not be, his testimony is not an "extraordinary circumstance" warranting a new trial. Caruso was one of dozens of Government witnesses, and even setting aside his testimony, there was more than sufficient proof of Pirk's guilt on the charges of which he was convicted. Accordingly, no new trial is warranted on this basis.

C. Jenkins' Rule 33 Arguments

***19** **Jenkins** argues that he is entitled to a new trial for two reasons: (1) Enix elicited testimony from FBI Special Agent Samuels ("Agent Samuels") and also presented his own testimony, that he thanked the FBI agents for "getting the guy" that committed the murders, and Enix was permitted to testify that his opinion as to who committed the murders had changed by the time he was arrested; and (2) the Government presented evidence of cell-site location information from **Jenkins**' cellphone that was obtained without a warrant, in violation of *Carpenter v. United States*, —— U.S. ——, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). (Dkt. 1326 at 6-8). The Court considers each argument in turn.

1. Enix's Testimony

Enix was permitted to testify during his direct examination, over the objections of **Jenkins**' counsel, that when he was arrested on March 22, 2016, and was being transported to the federal courthouse by Agent Samuels, he thanked her "for getting the guy that killed Paulie and DJ." The Court gave a limiting instruction to the jury during the testimony that it was introduced for purposes of showing Enix's state of mind, and it was not admitted to show who allegedly committed the murders.

In addition, the Government elicited testimony from Agent Samuels that Enix thanked the FBI for "getting the guy" who committed the murders. The Court instructed the jury that the evidence could only be considered with respect to Enix, and that it was not being admitted to prove that anyone committed the murders.

According to **Jenkins**, the prejudice resulting from the testimony of Agent Samuels and Enix is two-fold: the jury is bound to believe the testimony of a co-defendant casting

blame on another, and, had **Jenkins** known the testimony would have been elicited, he would have moved for severance or pursued an alternative defense strategy. (Dkt. 1326 at 7). In his view, this warrants a new trial. The Court disagrees.

First, the evidence of **Jenkins**' guilt was overwhelming. No objective view of the evidence in this case could lead to the conclusion that Enix's statement to Agent Samuels somehow influenced the jury's verdict with respect to **Jenkins**' guilt.

Second, nothing about Enix thanking the FBI for "getting the guy" or changing his mind about who committed the murders implicated **Jenkins** in particular. To the extent that **Jenkins** now argues that the testimony raised a *Bruton* issue, the Court disagrees, as it did previously when denying **Jenkins**' motion for severance. *See United States v. Pirk*, 284 F.Supp.3d 398, 410-412 (W.D.N.Y. 2018). As the Court explained previously in that decision, in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court limited the scope of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), concluding that the *Bruton* doctrine applies to a co-defendant confession that is "incriminating on its face." *Id.* at 208, 107 S.Ct. 1702 ("There is an important distinction between this case [*Richardson*] and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the co-defendant's confession 'expressly implicat[ed]' the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove 'powerfully incriminating.' By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." (alteration in original)); *accord United States v. Lung Fong Chen*, 393 F.3d 139, 148 (2d Cir. 2004) ("In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Court limited the reach of *Bruton* by holding that when a confession is redacted so that it does not facially incriminate the defendant, its admission with a proper limiting instruction does not violate the Confrontation Clause."). Neither the statements concerning Enix thanking the FBI for "getting the guy" nor Enix's testimony about changing his mind about the identity of the perpetrator expressly incriminated **Jenkins**.

***20** Third, the statements made by Enix came in only for the jury's consideration of Enix, and the jury was specifically instructed that the statements should not be considered in connection with the jury's evaluation of **Jenkins**' guilt. Indeed, as part of the Court's final instructions, it charged the jury that guilt is individual and that the verdict of guilty or not guilty must be determined separately with respect to each Defendant and based solely upon the evidence—or lack of evidence—presented against the Defendant under consideration and without regard to the guilt or non-guilt of anyone else.

Finally, the suggestion that somehow **Jenkins** would have moved for severance or pursued an alternative defense strategy if he had been armed with knowledge concerning the statement's admission represents revisionist history of the pretrial proceedings in this case. **Jenkins** cited to the statement in support of his severance motion (Dkt. 792 at 5), and the Court denied that motion without any concession on the part of the Government that the statement would not be introduced (*see* Dkt. 998). Rather, the relevant severance-related pretrial concession on the part of the Government was its agreement not to seek to introduce **Jenkins**' state-court murder conviction as part of its case-in-chief in the event that the Court deemed the introduction of that conviction a sufficient basis to grant severance. (Dkt. 803 at 11). During trial the Government indicated that it might not elicit testimony from Agent Samuels concerning the statement, but ultimately the Government did elicit the testimony because of the Court's decision that Enix could elicit the testimony subject to an appropriate limiting instruction. Thus, the suggestion that the introduction of this testimony somehow represented a sea change in the course of the trial is simply not supportable. In addition, the simple presence of antagonistic defenses[16] does not, as a matter of law, mandate severance. *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) ("Mutually antagonistic defenses are not prejudicial *per se.* Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.").

Accordingly, this testimony does not constitute an extraordinary circumstance warranting a new trial.

2. *Carpenter*-Based Arguments

At trial, the Government introduced cell tower location mapping covering a seven-day period of September 1 through 7, 2014, for **Jenkins**' identified cell phone. (*See* Gov't Trial Ex. 3584.2). In *Carpenter*, the Supreme Court held that the acquisition of cell-site location information is a search for Fourth Amendment purposes, and, as a result, "the

Government must generally obtain a warrant supported by probable cause before acquiring such records." 138 S.Ct. at 2221. The Supreme Court issued its decision on June 22, 2018, over a month after the jury returned its verdict against **Jenkins**.

***21** In this case, the Government represents that it relied on the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 *et seq.*, in order to obtain the cell site location information to which **Jenkins** now objects. (Dkt. 1371 at 21). The SCA "required the Government to show 'reasonable grounds' for believing that the records were 'relevant and material to an ongoing investigation.' " *Carpenter*, 138 S.Ct. at 2221 (quoting 18 U.S.C. § 2703(d)). "That showing falls well short of the probable cause required for a warrant. The Court usually requires 'some quantum of individualized suspicion' before a search or seizure may take place." *Id.* (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 560-61, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). Accordingly, the procedure on which the Government relied is now invalid.

The Government argues that it acted in good faith when it relied on the subsequently invalidated warrantless procedure for obtaining cell site location information. (Dkt. 1371 at 21). The Second Circuit has confirmed that the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 919-21, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), applies to government reliance on the now invalid warrantless procedure under the SCA. *United States v. Chambers*, No. 16-163-cr, —— F. App'x ——, 2018 WL 4523607 (2d Cir. Sept. 21, 2018). In fact, the Second Circuit has recognized the applicability of the good faith exception even when cell-site records were obtained pursuant to a subpoena as opposed to an SCA order. *See United States v. Zodhiates*, 901 F.3d 137, 143-44 (2d Cir. 2018).

Moreover, unlike the defendants in *Carpenter*, *Chambers*, and *Zodhiates*, **Jenkins** never moved to suppress the cell phone evidence in this case. *See United States v. Yousef*, 327 F.3d 56, 144 (2d Cir. 2003) (failure to raise argument concerning suppression pre-trial constituted waiver under Fed. R. Crim. P. 12(b)(3) where no good cause shown). **Jenkins** has failed to demonstrate good cause for his failure to raise the suppression issue pretrial. While *Carpenter* was not decided until after the trial, the raising of the issue pretrial by the defendant in that case (as well as in the *Chambers* and *Zodhiates* cases) demonstrates that the issue could have been raised pretrial. *See, e.g., United States v. McCullough*, No. 12-539-CR, 523 F. App'x 82, 83 (2d Cir. Apr. 23, 2013) (failure to move to suppress cell-site records in advance of trial constitutes waiver); *see also United States v. Thomas*, 897 F.3d 807, 815 (7th Cir. July 26, 2018) (failure to raise motion to suppress cell-site location information pre-trial not supported by good cause; uncertainty concerning legal issue prior to *Carpenter* did not constitute good cause).

Finally, the evidence of **Jenkins**' travels between September 1, 2014, and September 7, 2014, as depicted by Government Exhibit 3584.2, was separately corroborated by other evidence introduced in the case, including eyewitness testimony from numerous witnesses. Therefore, the admission of the evidence (even if in error) was harmless beyond a reasonable doubt.

XIII. CONCLUSION

For the foregoing reasons, the Court denies Defendants' post-verdict motions (Dkt. 1322; Dkt. 1325; Dkt. 1326), except for Defendants' challenges based upon *Sessions v. Dimaya*, —— U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), to their convictions on Count 2 under 18 U.S.C. §§ 924(c)(1)(A)(i) and 2, and on that issue the Court continues to reserve decision and will issue a separate Decision and Order.

SO ORDERED.

All Citations

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Footnotes

1 Defendants seek to set aside their convictions on Count 2 for violations of 18 U.S.C. § 924(c)(1)(A)(i) and 2, based upon the Supreme Court's decision in *Dimaya*. (Dkt. 1322-1 at 6; Dkt. 1325-1 at 16). The Court accepted additional briefing and conducted further oral argument with respect to the *Dimaya* issues, and it intends to issue a separate Decision and Order addressing that aspect of the post-verdict motions.

2 All other defendants entered into pleas prior to trial, including the additional four defendants who were charged by separate indictment in Case No. 1:17-CR-00189-EAW. As a result, a total of 20 defendants have been convicted for their crimes related to the KMC.

3 The entire trial transcript has not yet been prepared, and therefore the Court is primarily relying on its notes in connection with its recitation of the evidence in this Decision and Order. Of course, if the certified transcripts differ from the Court's recitation of the evidence, the transcripts control.

4 Although there were 46 separate counts set forth in the SSI (Dkt. 33), Defendants were charged in only nine of those counts. Therefore, the counts were renumbered for purposes of trial. (Dkt. 1256; Dkt. 1257). For purposes of this Decision and Order, the Court will use the renumbered counts as used at trial, but during its initial recitation of each count, the Court will, where applicable, also refer to the SSI's numbering.

5 "RICO" refers to the Racketeer Influenced and Corrupt Organizations Act, codified at 18 U.S.C. §§ 1961-1968.

6 "VICAR" refers to the Violent Crimes in Aid of Racketeering statute, codified at 18 U.S.C. § 1959.

7 As noted previously, the Court accepted further briefing and argument concerning the *Dimaya* issues. Specifically, a status conference was held before the undersigned on September 25, 2018 (Dkt. 1408), and the Court agreed to accept further briefing and hear additional oral argument due to subsequent caselaw developments related to the *Dimaya* issues. The Government and Enix filed simultaneous supplemental briefs on November 7, 2018 (Dkt. 1462 (Enix); Dkt. 1463 (Gov't)), and oral argument was held before the undersigned on November 14, 2018 (Dkt. 1465), at which time the Court reserved decision. As noted above, the Court will separately address Defendants' post-verdict motions seeking to set aside their convictions on Count 2 based on *Dimaya*.

8 Consistent with *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014), the Court instructed the jury that the Government must prove that Enix had advance knowledge that an accomplice would be possessing, using, or carrying a firearm during the commission of the crime of violence because it was not enough to have intent with respect to the RICO conspiracy; rather, Enix must have the requisite intent concerning the entirety of the crime, including the firearm possession.

9 More recently, on September 10, 2018, the Second Circuit decided *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018), holding that § 924(c)(3)(B) is not unconstitutionally vague. The implications of *Barrett* and the *Dimaya*-related issues raised by Defendants will be addressed in a separate Decision and Order.

10 In its separate Decision and Order on the *Dimaya* issues, the Court will address whether, even if Enix did not specifically agree to the commission of a predicate crime of violence, he may nonetheless be convicted of Count 2. In other words, "the agreement proscribed by section 1962(d) is [a] conspiracy to participate in a charged enterprise's affairs, not [a] conspiracy to commit predicate acts." *United States v. Yannotti*, 541 F.3d 112, 121 (2d Cir. 2008) (alterations in original). Thus, if the charged RICO conspiracy qualifies as a crime of violence, then any member of the conspiracy may arguably be found guilty of violating § 924(c) by possessing firearms in furtherance of that conspiracy, even if the defendant did not specifically agree to the commission of violent predicate acts. As a result, even if the evidence was not sufficient to support the jury's finding as to Enix's agreement concerning the violation of the Florida murder statutes, that does not mean that his conviction on Count 2 must be set aside. However, since the Court concludes that the evidence was sufficient to find that Enix agreed that a member of the conspiracy would violate the Florida murder statutes, it does not need to address this alternative point for purposes of this Decision and Order.

11 In a footnote, Enix makes the point that where "a defendant would suffer a 25-year mandatory minimum sentence derived from *Pinkerton* liability arising out of the conduct of others," the circumstances favoring relief are particularly compelling. (Dkt. 1322-1 at 43 n.14). Not only does this argument misconstrue Enix's level of culpability, but the Court views the argument to be one of policy. No party has cited the Court to any caselaw supporting the notion that the multiplicity analysis for § 924(c) convictions is different when a defendant is convicted as an aider and abettor or under a *Pinkerton* theory of liability. The Court must evaluate Enix's multiplicity challenge based upon the law—not based on any policy

arguments as to the appropriateness or inappropriateness of a 25-year mandatory minimum consecutive sentence under the circumstances of this case.

Pirk also bases his argument, in part, on the nature of the charges against him in Counts 5 and 6, wherein his alleged conduct was not as one who physically committed the two murders, but rather as one who aided and abetted **Jenkins** in committing the murders. (Dkt. 1381 at 6). However, again, there is no caselaw cited by any party, and the Court is not aware of any caselaw, suggesting that the multiplicity analysis is different where one is charged as an accessory as opposed to a principal. In other words, the multiplicity analysis is dependent on the underlying unit of prosecution, not the theory of liability for the § 924(c) count.

12 The Government also contends that Pirk's multiplicity argument directed to Counts 2, 5, and 6 is barred based upon the Court's prior denial of Pirk's pretrial motion to dismiss. (Dkt. 1370 at 4-5). *See Pirk*, 267 F.Supp.3d at 427-28. The Court disagrees. "Where there has been no prior conviction or acquittal, the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed." *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006). In other words, the Court does not agree that its prior denial of the pretrial motion to dismiss precludes the same multiplicity argument being raised post-trial. Just because more than one § 924(c) charge could proceed to trial does not mean that each conviction must be sustained.

13 Although not part of the elements charged for the RICO conspiracy, this was included as part of the Court's instructions on Count 2 to address the *Dimaya* issues. Specifically, the jury was charged that in their consideration of Count 2, if they concluded that a Defendant was guilty of Count 1 as charged, they must also determine whether the Government had proven that one or more of the objects of the racketeering conspiracy charged in Count 1 was committing a crime of violence. As discussed previously, the jury was asked to make specific findings as to certain racketeering activity that each Defendant agreed would be committed as part of the racketeering conspiracy.

14 The presence of the special interrogatories, while helpful to deciding the issue, is not critical to the determination, because the Second Circuit has held that "the existence of a 'second or subsequent' § 924(c) conviction is a sentencing factor that need not be determined by a jury." *Arline*, 835 F.3d at 280.

15 The Court notes that there was no request by Defendants to "give a specific jury instruction or to pose an interrogatory as to the firearms at issue" in each of the § 924(c) counts. *See United States v. Barnes*, 560 F. App'x 36, 43 (2d Cir. 2014).

16 Contrary to **Jenkins**' argument, the Court rejects the notion that Enix's testimony somehow constituted evidence of a mutually antagonistic defense to **Jenkins**. The acceptance of the veracity of Enix's testimony—that his opinion concerning the identity of the individual who committed the murders had changed over time—did not necessarily preclude acceptance of **Jenkins**' defense that he did not commit the murders. *See United States v. Yousef*, 327 F.3d 56, 151 (2d Cir. 2003) ("Defenses are mutually antagonistic when accepting one defense requires that the jury must of necessity convict a second defendant." (quotation and citation omitted)).