No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL MENCHER
Petitioner,

v.

UNITED STATES
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether Florida's First-Degree Premeditated Murder Statute is categorically a crime of violence for purposes of 18 U.S.C.§ 924(C)?

-

CORPORATE DISCLOSURE STATEMENT

There are no corporations or publicly traded companies with a stake in the outcome of this matter.

LIST OF PROCEEDINGS

1. United States v. Cosimano et al. – United States District Court for the Middle District of Florida – 8:18-cr-00234-MSS-MAP – Judgment Entered 12/02/2019
2. United States v. Michael Mencher – 11th Circuit Court of Appeals – 19-14841 – affirmed 08/24/2022.

LIST OF PARTIES

Petitioner Michael Mencher

Respondent United States

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below where the Eleventh Circuit Court of Appeals upheld the lower court's judgment and sentence. The Eleventh Circuit determined that Florida's First-Degree Premeditated Statute was categorically a crime of violence for purposes of 18 U.S.C.§ 924(C).

OPINION BELOW

The Amended Judgment of the Middle District of Florida appears at Appendix A to the petition. The Opinion from the Eleventh Circuit affirming the Middle District of Florida appears at Appendix B to the petition and is unpublished. No petition for rehearing was filed. These opinions are unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit entered judgment was August 24, 2022. Appendix A. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the definition of "crime of violence" for purposes of § 18 U.S.C.§ 924(C) in a categorical analysis.

STATEMENT OF THE CASE

Michael Mencher is currently incarcerated in the Bureau of Prisons serving the life sentence imposed by the trial court. Mr. Mencher was named in a 5-codefendant Second Superseding Indictment that charged Count 1: Conspiracy to

Commit Murder in Aid of Racketeering Activity, Count 2: Murder in Aid of Racketeering Activity, Count 3: Use of a Firearm During and in Relation to a Crime of Violence, Count 4: Use of a Firearm During and in Relation to a Crime of Violence Causing Death and Count 9: Narcotics Conspiracy Appx. C. The "Racketeering Activity" alleged in the Indictment was that the 69'ers Motorcycle Club was an Enterprise that engaged in the following:

a. Members of the Enterprise and their associates committed, attempted, and threatened to commit acts of violence, including murder, to protect and expand the Enterprise's criminal operations;

b. Members of the Enterprise and their associates promoted a climate of fear through violence and threats of violence;

c. Members of the Enterprise and their associates used and threatened to use physical violence against various individuals; and

d. Members of the Enterprise and their associates trafficked in controlled substances, including heroin, cocaine, methamphetamine, and marijuana.

The specific act of murder referenced by statute in Count Three of the Second Superseding Indictment, was murder in violation of Fla. Stat. §782.04(1)(a)1, Florida's statute codifying First Degree Premeditated Murder.

A nine-day jury trial was held by the Court. The Government dismissed counts 4 and 9, and was adjudicated guilty on counts one, two, and three. Michael Mencher was sentenced as to Count I: 120 months imprisonment; as to Count II: Life imprisonment concurrent with Count I; and as to Count III: 60 months

consecutive to all other counts; Michael Mencher was further sentenced to a five-year term of supervised release, three years on Count I and concurrent five years on Counts II and III; based on financial circumstances all fines were waived. (Doc. 514.)

ARGUMENT IN FAVOR OF GRANTING CERTIORARI

Mr. Mencher adopted a motion to Dismiss Count Three of the Second Superseding Indictment, which charged him with using a firearm during and in relation to committing a crime of violence, namely Florida's offense of first-degree premeditated murder. The motion argued that Florida's premeditated murder statute doesn't qualify as a crime of violence under 18 U.S.C. §924(C), and therefore Count Three must be dismissed.

That statute defines a "crime of violence" as felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

The first part of this statute is referred to as the "use of force" clause and the second is referred to as the "residual" clause. *In re Fleur*, 824 F.3d 1337, 1339 (11th Cir. 2016). This Court has held that the residual clause is unconstitutional. *See United States v. Davis*, 139 S.Ct. 2319 (2019). Leaving only the elements clause, courts must employ a "categorical" approach to determine whether or not an offense

qualifies. *Johnson v. United States*, 576 U.S. 591 (2015). This requires looking "to whether the statutory elements of the predicate offense necessarily require, at a minimum, the threatened or attempted use of force." *Id.* The court, therefore, must consider the least culpable conduct punished under the statute and determine if that requires the proof of the use, attempted use, or threatened use of physical force against the person of another. *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010). The categorical approach thereby "requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge under the statute." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014).

This Court has determined that the element of "'physical force' means violent force – that is, force capable of causing physical pain or injury to another person" and that the violent force must be of "a substantial degree." *Curtis Johnson*, 559 U.S. at 140 (analyzing the term "violent felony" in the force clause of § 924(e)(2)(B)); see also *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (analyzing the term "crime of violence" in the force and residual clauses of § 16). Moreover, the use of force must be intentional. *Leocal*, 543 U.S. at 8-9 (analyzing the term "crime of violence" in the force and residual clauses of § 16).

Florida defines premeditated first-degree murder as "The unlawful killing of a human being . . . [w]hen perpetrated from a premeditated design to effect the death of the person killed." Fl. Stat. §782.04. This statute is broad and allows for the offense to be committed without the use of physical force. Courts have

sustained convictions for attempted first degree premeditated murder where the defendant surreptitiously poisoned the victim, but the victim did not die. *See Trepal v. State*, 621 So.2d 1361, 1362-63 (Fla. 1993) (defendant hid the poison in bottles of Coca-Cola and secreted the bottles in the victim's house); *Nelson v. State*, 450 So.2d 1223, 1224-25 (Fla. 4th Dist. Ct. App. 1984) (defendant hid poison in pills and furnished pills to victims).

The Fifth Circuit has concluded that offenses that can be violated by poisoning another do not involve the use, attempted use, or threatened use of physical force. *See United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir. 2015) (Florida manslaughter); That court reasoned that because poisoning is an act that can be committed without the use of violent force, an offense that can be violated by poisoning does not satisfy the definition of "physical force" required by those provisions. *Id.* at 284.

Due to the broad conduct covered by Florida's premeditated murder statute, it doesn't take much imagination to conceive of a situation where one can kill someone through premeditation without the use of force as defined by This Court. As such from a categorical approach, Florida's offense of premeditated first-degree murder must fail as a qualifying offense under 18 U.S.C. §924(C). This is a matter of great importance as demonstrated above, some circuits agree that a killing that can be committed without the use of force does not qualify. While it may be uncomfortable to conclude that intentional premeditated murder is not a crime of

violence, the proper application of *Johnson* ands its progeny require such a conclusion in order to prod Congress to amend the statutes. This Court should take the step necessary to fix the problems with 18 U.S.C. § 924(c)(3).

CONCLUSION

Accordingly, Mr. Mencher requests that this Court grant his petition for certiorari review.

Respectfully submitted,

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 19-14841

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER BRIAN COSIMANO,
a.k.a. Durty,
MICHAEL DOMINICK MENCHER,
a.k.a. Pumpkin,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:18-cr-00234-MSS-SPF-1

Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.

PER CURIAM:

This is an appeal from two defendants following a brutal murder. Evidence at trial showed that Defendants-Appellants Christopher Cosimano and Michael Mencher conspired to kill a member of a rival motorcycle club and did so. After Cosimano, Mencher, and several of their associates followed the victim, Paul Anderson, for several miles on the highway, Cosimano brazenly shot him to death at a traffic light in broad daylight. Mencher was present at the murder scene and later told a confidential informant that he would have shot the victim if Cosimano had been unable to. The evidence also supported the jury's finding that the murder served to increase the Defendants' status in their motorcycle club, which was an enterprise engaged in interstate racketeering. Further, the evidence supported a separate conviction for the Defendants' use of a firearm during a violent crime. While the Defendants argue that murder is not categorically a crime of violence, our precedent holds the contrary. The Defendants raise several additional arguments on appeal, but none justify reversal. We thus affirm their convictions.

I. BACKGROUND

The Defendants were associated with the 69'ers Motorcycle Club, a national organization with active chapters in several states. Cosimano was president of the Hillsborough County Chapter (nicknamed the Killsborough Chapter), Sean Leonard was vice president, Erick Robinson was sergeant at arms, and Allan Guinto was treasurer. Mencher and Cody James Wesling were "prospects," or prospective members.

In May 2018, a grand jury charged Cosimano, Mencher, Robinson, Guinto, and Wesling in a nine-count indictment. A superseding indictment followed two months later. Relevant to this appeal, Count 1 charged conspiracy to commit murder in aid of racketeering activity, 18 U.S.C. § 1959(a)(5), Count 2 charged murder in aid of racketeering activity (VICAR murder), 18 U.S.C. §§ 1959(a)(1) and 2, and Count 3 charged the Defendants with knowingly using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2.

A month later, a federal agent interrogated Cosimano. Leading up to the interrogation, Cosimano had been held on state murder charges and had spent months in solitary confinement. The agent told Cosimano at the outset that he had some paperwork to go over. He then read Cosimano his *Miranda*[1] rights.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Cosimano confirmed that he understood his rights and signed the waiver form, agreeing to talk with the agent. The agent told Cosimano that he could not make "any promises" but that Cosimano had "an opportunity to help [himself,] [t]o put [himself] in the best possible position." "I'm going to give you a lot of credit and . . . a little [ ] grace," he told Cosimano.

For the next five hours, Cosimano spoke—often emotionally—about his experience with motorcycle clubs and drug dealing. He also discussed a fight in a Miami bar between the 69'ers and a rival gang, the Outlaws. At one point during the conversation, Cosimano asked the agent if it would "favor" him to "put all the information out." The agent replied "I don't know," and then added that honesty would "help [Cosimano] out." Cosimano later moved to suppress these statements. His waiver, he argued, was not voluntary, knowing, and intelligent because the agent had improperly downplayed the *Miranda* warnings. The district court denied the motion, finding that "the defendant was well-aware of what he was signing." Some portions of Cosimano's statements—those relating to the Outlaws and the Miami incident—later came in at trial.

Before trial, Mencher and Cosimano joined in a motion to dismiss filed by Wesling. The Defendants argued that the district court should dismiss the Count 3 charge for use of a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c). The predicate "crime of violence" for Count 3 was the VICAR murder charged in Count 2, which in turn was based on a violation of Florida's first-degree murder statute. The Defendants argued that the

predicate murder offense was not categorically a crime of violence because it did not necessarily involve the use of physical force. Florida first-degree murder, they posited, could be carried out non-violently by poisoning or leaving a person for dead. The court denied the motions.

As the case proceeded to trial, Cosimano and Mencher were the only remaining defendants. They moved to sever their trials, arguing that they planned to raise mutually antagonistic defenses. Specifically, both Defendants planned to point the finger at the other. "Spillover" effect also concerned the Defendants; they worried that the government would be able to introduce evidence in a joint trial that would be inadmissible if the trials were severed. But after the Defendants reached an agreement with the government about redacting certain statements to limit spillover effect, the court denied the motions to sever as moot. The court would later give a limiting instruction reminding the jury to consider each count and each defendant separately.

At trial, the government called Guinto and Wesling, who had taken plea agreements, as well as Leonard and a regional 69'ers boss, Art Siurano, who had agreed to cooperate with the government. The government also called a slew of other witnesses including another eye witness to the shooting. The following evidence was presented.

The 69'ers motorcycle club is a "one-percent" club, meaning its members are the "elite[s] of the outlaw biker world" and the one percent of society that "live by their own rules." The club has a

written constitution and an organizational hierarchy. Club members pay annual dues of $50 to the New York Chapter. And according to Siurano, northeast-based chapters of the 69'ers have coordinated with Florida-based chapters to distribute drugs.

Leading up to Anderson's murder, the Florida-based 69'ers were at odds with a rival motorcycle club, the Outlaws. To tell it briefly, the Outlaws considered Florida their territory. When some Outlaws, including Leonard, defected and joined Florida chapters of the 69'ers, the Outlaws were not pleased. Tensions soon boiled over. One night, when a St. Petersburg, Florida bar hosted a "Bike Night," Leonard and Guinto showed up to represent the 69'ers. The Outlaws were there too—and in greater numbers. Several of the Outlaws, including Pasco County President Paul Anderson, confronted Leonard and Guinto and demanded that they hand over their club vests—called "cuts" in the biker world—or die in them. When Leonard and Guinto refused to comply, the Outlaws attacked them, beat them badly, and stole their cuts.

About a week later, federal law enforcement arrested Leonard on a firearms charge in New York. He entered an agreement with the government and became a federal informant.

Meanwhile, animosity between the 69'ers and the Outlaws mounted. Cosimano wanted revenge against the Outlaws for the Bike Night incident. A national 69'ers boss also wanted retribution and said the "score would not be settled until two [Outlaws] go to the hospital and we have two of their cuts." As Siurano put it, the 69'ers and the Outlaws "were going to war."

One day in late July 2017, Cosimano called Guinto and said he was outside a St. Petersburg bar that the Outlaws frequented. Eventually, a prominent Outlaw came out of the bar and left on his motorcycle. It was James Costa, President of the St. Petersburg Outlaws. Minutes later Costa was shot on the highway. Guinto testified that Cosimano admitted to being the shooter later that night. According to Guinto, Cosimano gave him and Wesling clothes and a gun with instructions to get rid of them. Guinto testified that his assistance increased his stature in the club, and that the 69'ers expected the shooting to bolster their reputation.

Hostility between the clubs showed no sign of dissipating. Following the Bike Night incident, Cosimano had galvanized the Killsborough 69'ers to engage in "shows of force" to antagonize the Outlaws. In response, a contingent of Outlaws called the One Ton Crew, led by Anderson, had threatened to take more cuts from Killsborough Chapter members. Then, while Cosimano and a fellow 69'er were in Miami, they got in a bar fight with some Outlaws. In the melee, Cosimano allegedly hit one Outlaw with a plate and used a piece of broken plate to stab another.

This was the state of affairs on December 21, 2017, the day Anderson was murdered. Around midday, Guinto, Robinson, and Wesling were out having lunch when Cosimano called. He said he knew where an Outlaw was and told the group to meet him at the 69'ers' clubhouse. When they arrived, Cosimano and Mencher were "getting their bikes ready . . . [,] gearing up for a ride." Wesling would later tell Leonard that, at this point, Cosimano said he

was going to murder Anderson. At trial, however, Wesling testified that Cosimano said he knew where Anderson was and wanted to "beat the shit out of him."

The group left to go after Anderson. Guinto and Robinson took one car, Wesling drove another, and Cosimano and Mencher took their motorcycles. Normally, Cosimano and Mencher wore their 69'er cuts when they rode. This time, they rode without their cuts, dressed in black, and covered their faces with bandanas. They also flipped their license plates, making them unidentifiable, and Cosimano removed the 69'ers stickers from his motorcycle.

At some point, the group caught up with Anderson, who was driving a pickup truck. They followed him for about a half hour. After Anderson passed through a toll booth off the Suncoast Parkway, he came to a stop at a red light. Guinto and Robinson had fallen behind, but Wesling was still on Anderson's tail. According to Wesling, Cosimano and Mencher then passed him on their motorcycles and pulled up close to Anderson's truck—Cosimano on the passenger side, Mencher 10 to 15 feet behind him. Cosimano dismounted his bike and knocked on Anderson's truck window. He then fired multiple gunshots into the truck, killing Anderson.

Besides Wesling, another driver on the road witnessed the shooting. Although he could not identify the Defendants, he testified about the motorcycles he saw. He said the motorcycle in front—the one that pulled up next to Anderson's truck—had saddlebags and a windshield. That description matched Cosimano's

motorcycle. And the motorcycle behind that one, the witness testified, had graphics of "SS lightning bolts." That description matched Mencher's motorcycle.

The 69'ers left the scene after the shooting. According to Guinto, they stopped when they got to a secluded area. Cosimano gave Robinson a handgun, helmets, and a sweater to dispose of. And Cosimano and Mencher changed into extra clothes they had brought with them. Wesling testified that he met Cosimano at a gas station a few hours later, and the two discussed the shooting. Cosimano told Wesling he had shot Anderson to protect Leonard.

As for Mencher, he had phone conversations with Leonard after the killing, not realizing that Leonard was a confidential informant and that law enforcement was recording the call. By this time, news stories had shown pictures of both Defendants' motorcycles, so the two discussed how they would hide or disguise the bikes. Cosimano, who was with Mencher, chimed in, telling Leonard that one of the motorcycles had already been "changed . . . up," while the other needed to be hidden. Later, when Mencher was by himself, he spoke again with Leonard, venting that Cosimano's plan to attack Anderson had been ill-conceived. "I don't mind doing things," Mencher said, "but not in broad daylight." Mencher also said that he would have shot Anderson from behind if Anderson had tried to get away. "I would've just opened up into the back of him, you know what I mean?"

At the close of the government's case in chief, the Defendants moved for judgment of acquittal. They argued in part that

there was insufficient evidence to establish an enterprise engaged in racketeering activity and that affected interstate commerce. They also argued that first-degree murder could not serve as the predicate crime of violence for the § 924(c) count. The court denied the motions. The jury began deliberating on the eighth day of trial.

An issue arose during deliberations. One of the jurors, Juror 3, did his own research on the law during a weekend break. When deliberations resumed, he discussed his research with the other jurors. The foreperson notified the court, after which the court interviewed each of the jurors individually. Juror 3 admitted what he had done. As for the other jurors, the court's inquiry established that some had trouble understanding Juror 3, whose first language was not English, and that most paid little attention to his explanation of the law. The jurors assured the court that they could decide the case based on the evidence and the law the court had given them. Having investigated, the district court decided to remove Juror 3 and replace him with an alternate juror. Cosimano agreed with this course of action, but Mencher moved for a mistrial. The district court denied Mencher's motion, replaced Juror 3, and had the jury "begin its deliberations anew."

The jury convicted Mencher and Cosimano on Counts 1–4 and acquitted them on other counts, some of which charged Cosimano for his alleged role in the Costa shooting and another of which charged Mencher with drug trafficking. The government dismissed Count 4 at sentencing, so the district court sentenced

Mencher and Cosimano only on Counts 1–3. The court sentenced both Defendants to 10 years on Count 1 to run concurrently with a life sentence on Count 2. On Count 3, Cosimano received a 10-year sentence, and Mencher a 5-year sentence, to run consecutively to the Count 1 and 2 sentences. Both Defendants appealed.

II. DISCUSSION

Our discussion divides into three parts. First, we address the Defendants' argument that the district court should have granted judgment of acquittal on Counts 1 and 2 for conspiracy to commit VICAR murder and VICAR murder. Second, we address the Defendants' argument that their Count 3 conviction for committing a crime of violence with a firearm should be vacated because the predicate murder charge is not categorically a crime of violence. Third, we address the Defendants' remaining arguments. This third section divides into three subsections: (1) the Defendants' argument that the district court abused its discretion in denying their motion to sever the trial, (2) Cosimano's argument that his post-*Miranda* statements should have been suppressed; and (3) Mencher's argument that the district court abused its discretion in denying his motion for a new trial based on juror misconduct.

A. Sufficient Evidence Supported the Verdict on Counts 1 and 2

We review the sufficiency of the evidence de novo, drawing all reasonable inferences in the government's favor. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir. 2005). We must affirm

the convictions unless there is no reasonable construction of the evidence on which the jury could have found the Defendants guilty beyond a reasonable doubt. *Id.* at 1334.

On Counts 1 and 2, the government had to prove that Cosimano and Mencher conspired to murder Anderson, that they aided and abetted each other in murdering him, and that the Defendants committed those crimes for the purpose of "maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). An enterprise includes "any . . . group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* § 1959(b)(2). "[R]acketeering activity" is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . , which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1).

Mencher and Cosimano make three main arguments. First, they challenge the sufficiency of the evidence showing that they conspired to murder Anderson or aided and abetted his murder. Second, they argue that the 69'ers' Killsborough Chapter was not a racketeering enterprise engaged in interstate commerce. Third, they argue that the murder would not have served to maintain or increase their position with the 69'ers.

The Defendants' first argument relies heavily on testimony from Wesling, who was present at the scene of the murder.

Wesling testified that on the morning of the murder Cosimano had said that he wanted to "beat the shit out of Anderson." That testimony, the Defendants say, establishes that the plan was to beat up Anderson rather than kill him. They argue that the evidence, at most, showed that the murder was a "spur of the moment" decision. There was no evidence of any advance planning, they say. Yet the following facts allow an inference to the contrary:

- As the Defendants left the clubhouse to follow Anderson, they brought extra clothes with them, indicating a plan to hide their identity.
- They flipped their license plates to hide them and did not wear their 69'er cuts as they normally would on a motorcycle ride.
- The Defendants tracked Anderson for miles, and, according to witnesses, Cosimano shot Anderson through the window of his truck.
- After the killing, Mencher's remarks on a recorded call with a confidential informant supported an inference that he knew the plan was to kill Cosimano. Mencher even bragged that he would have killed Anderson if Cosimano was unable to.

Based on this evidence, a reasonable jury could conclude that the Defendants conspired to kill Anderson, and that they aided

and abetted each other in his murder.

The Defendants also contest the jury's finding that their local chapter of the 69'ers was an enterprise. Instead, they say, it was no more than a disorganized group of guys partying in a clubhouse. And even if it could be considered an enterprise, they argue, it was not a racketeering enterprise that affected interstate commerce. While some of the 69'ers sold drugs, the Defendants argue that drug dealing was separate from membership in the 69'ers.

We disagree. The definition of "enterprise" is broad. *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983). An enterprise may be a "loose or informal," even "amoeba-like" association. *Id.* That standard is easily met here. The 69'ers are a national motorcycle club that holds meetings, has a constitution, and requires members to pay dues. Members wear vests with a wolf on the center patch, and the club has used "shows of force" to assert their dominance over other motorcycle clubs. The Killsborough Chapter was part of that organization and held meetings on the first and third Thursdays of every month. Even if the group was not highly formalized, a jury could conclude that it was an association in fact and thus an enterprise under the statute. *See* 18 U.S.C. § 1959(b)(2).

And there was evidence that the 69'ers operated as a racketeering enterprise that affected interstate commerce. For example, Siurano testified that he sent drugs from New Jersey to Florida-based 69'ers, including Robinson, who then distributed the drugs. Drug trafficking is a type of racketeering. *Id.* § 1961(1). And it is enough to satisfy the government's burden that the enterprise—

not necessarily each individual—engaged in racketeering and conduct that affected interstate commerce. *See United States v. Norton*, 867 F.2d 1354, 1359 (11th Cir. 1989). The evidence thus supported the jury's finding on these elements.

The Defendants' final argument on sufficiency of the evidence is that the murder would not have served the purpose of maintaining or increasing their position in the 69'ers. Again, we disagree. The 69'ers' national leadership wanted to settle a score with the Outlaws, and there was evidence that Anderson's murder was meant to settle that score. A reasonable jury thus could have inferred that the murder served to increase or maintain the Defendants' status in the 69'ers organization.

B. Florida First-Degree Murder Is a Crime of Violence

Count 3 of the indictment charged the Defendants with violating 18 U.S.C. § 924(c)(1)(A), which makes it a crime to use, carry, or possess a firearm during a crime of violence. The predicate crime of violence charged was VICAR murder, 18 U.S.C. § 1959(a)(1), "as charged in Count Two" of the indictment. Count 2, in turn, charged VICAR murder based on a violation of Florida's first-degree murder statute, Fla. Stat. § 782.04(1)(a)1. The Defendants challenge their Count 3 convictions, arguing that the predicate murder offense was not a crime of violence.

"[W]e review de novo whether a prior conviction is a crime of violence under § 924(c)." *Steiner v. United States*, 940 F.3d 1282, 1288 (11th Cir. 2019) (per curiam). This analysis generally requires

a "categorical approach," in which we look only to the elements of the statute of conviction, not to the defendant's real-world conduct. *Mathis v. United States*, 579 U.S. 500, 504 (2016). When applying the categorical approach to § 924(c), we must ask whether the offense at issue "always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). We alter our approach, however, when the statute of conviction is "divisible," meaning the statute lists multiple, alternative elements, effectively creating multiple crimes. *Mathis*, 579 U.S. at 505. When dealing with a divisible statute, we employ a "modified categorical approach" in which we consider "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 505–06 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). We "then compare that crime, as the categorical approach commands, with the relevant generic offense." *Id.* at 506.

We recently held that the VICAR statute is divisible. *Alvarado Linares v. United States*, No. 19-14994, --- F.4th ----, 2022 WL 3367950, at *4 (11th Cir. Aug. 16, 2022). The statute prohibits a number of offenses committed in aid of racketeering, including murder, maiming, assault, and threats "to commit a crime of violence against any individual in violation of the laws of any State or the United States." *Id.* (citing 18 U.S.C. § 1959(a)). "Because the statute lists multiple acts that each qualify as a crime, we apply the

modified categorical approach to determinate whether a VICAR offense is a 'crime of violence' under Section 924(c)(3)." *Id.*

A point of confusion in this case, however, has been which murder offense we look to for purposes of the modified categorical approach. Do we look through the VICAR statute to its state predicate offense and analyze whether Florida first-degree murder is a crime of violence? Or do we analyze whether a generic federal definition of murder is categorically a crime of violence?

Our recent decision in *Alvarado Linares* resolves this dilemma. We must look to how the government charged the VICAR offense, and when, as here, it incorporated the state law elements into the jury charge for the VICAR offense, then we must look to the state predicate offense, in this case Florida first-degree murder. *See id.* That statute prohibits "[t]he unlawful killing of a human being . . . [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being." Fla. Stat. § 782.04(1)(a)1.

Under our precedents, Florida first-degree murder is a crime of violence. In the Armed Career Criminal Act (ACCA)[2] context, we've held that Florida attempted first-degree murder and Florida second-degree murder are crimes of violence. *See Hylor v. United States*, 896 F.3d 1219, 1223 (11th Cir. 2018); *United States v. Jones*, 906 F.3d 1325, 1329 (11th Cir. 2018). And in the § 924(c) context,

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[2] ACCA's elements clause is materially similar to that of § 924(c). *Hylor v. United States*, 896 F.3d 1219, 1225 (11th Cir. 2018) (Jill Pryor, J., concurring).

we've held the same as to Georgia malice murder and federal second-degree murder. *See Alvarado Linares*, 2022 WL 3367950, at *5 (Georgia malice murder, prohibiting the killing of another person with malice aforethought, "necessarily entails the use of physical force against the person of another.")[3]; *Thompson v. United States*, 924 F.3d 1153, 1158 (11th Cir. 2019) (Federal second-degree murder, prohibiting the killing of another person with malice aforethought, necessarily involves force "capable of causing physical pain or injury" thus satisfying § 924(c).). Naturally, then, the same is true of Florida first-degree murder in the context of § 924(c).

Resisting this conclusion, the Defendants argue that it is possible to commit Florida first-degree murder without physical force. They posit a few examples, like this one: "[A] defendant takes a boat far offshore with a victim who jumps off the boat to go swimming and the defendant later decides to drive the boat away and leave the victim stranded in the ocean to die." In this example, the Defendants say, the elements of Florida first-degree murder would be satisfied even though the offense did not involve physical force.

We've heard arguments like this before, and we've rejected them. Take our decision in *United States v. Sanchez*, 940 F.3d 526,

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[3] We added that, to the extent it was relevant, generic federal murder also meets the definition of a crime of violence because it entails "the unlawful killing of a human being with malice aforethought." *Alvarado Linares v. United States*, No. 19-14994, --- F.4th ----, 2022 WL 3367950, at *6 (11th Cir. Aug. 16, 2022).

536 (11th Cir. 2019). There, the defendants argued that New York second-degree murder is not a violent felony for purposes of the ACCA because it can be committed nonviolently by, for example, starving a person to death. *Id.* at 535. Unpersuaded, we reasoned that "the intentional causation of bodily injury or death, even by indirect means such as withholding medical treatment or food, necessarily involves the use of physical force." *Id.* "[I]t is impossible," we held, "to cause bodily injury without force" and thus "impossible to cause death without force." *Id.* at 536. The Defendants' drowning example fails for the same reason. Subjecting a victim to death by drowning would involve the use of force, even if indirectly.

The bottom line: to commit Florida first-degree murder, a defendant must unlawfully kill another human with a premeditated design. Fla. Stat. § 782.04(1)(a)1. To do that, a defendant necessarily must use physical force. *See Sanchez*, 940 F.3d at 536. We thus hold that the offense is categorically a crime of violence and a proper predicate for the Defendants' § 924(c) convictions.

C. None of the Defendants' Other Arguments Justify Reversal

1. Motions to Sever the Trial

The next argument raised by the Defendants is that the district court abused its discretion in allowing a joint trial. They argue first that they presented mutually antagonistic defenses. Mencher's attorney, for example, argued at trial that Cosimano "set [Mencher] up to take the fall for the killing." Second, the

Defendants argue that the joint trial allowed the government to admit damaging evidence that would otherwise have been inadmissible. Specifically, Mencher zeroes in on evidence of the Costa shooting. If Mencher had been tried separately, he says, the jury never would have heard about that incident because it took place before he joined the 69'ers and he played no role in that shooting. Cosimano, for his part, argues that evidence of Mencher's drug dealing, based on Mencher's own statements, was admissible only under the statement-of-a-party-opponent hearsay exception. That evidence would have been inadmissible had Cosimano been tried separately.

The government responds that mutually antagonistic defenses are not necessarily prejudicial. As to spillover evidence, the government says any prejudice was ameliorated by the district court's limiting instruction that the jury should consider the evidence as to each defendant and each count separately.

We review the denial of a motion to sever for abuse of discretion. *United States v. Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002). Generally, a joint trial is preferred when defendants are indicted together. *Zafiro v. United States*, 506 U.S. 534, 537 (1993). District courts should grant a severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. "Mutually antagonistic defenses," however, "are not prejudicial *per se*." *Id.* at 538. In fact, "the best solution in such situations," generally, "is not severance,

but for the trial judge to issue proper limiting instructions." *United States v. Blankenship*, 382 F.3d 1110, 1125 n.27 (11th Cir. 2004). We've offered the caveat that a limiting instruction may be insufficient in a scenario where "the sheer number of defendants and charges with different standards of proof and culpability, along with the massive volume of evidence, makes it nearly impossible for a jury to juggle everything properly and assess the guilt or innocence of each defendant independently." *Id.* at 1124.

Here, it is true that the joint trial had some spillover effect. Evidence of the Costa shooting may not have been otherwise admissible against Mencher, and evidence of Mencher's drug dealing may not have been otherwise admissible against Cosimano. But the evidence was not so voluminous that it would have been "nearly impossible" for the jury to sort through and to determine guilt as to each defendant on each charge. *See id.* As a result, the district judge's decision to give a limiting instruction rather than sever the trial was not an abuse of discretion. *See Zafiro*, 506 U.S. at 539. We thus affirm.

*2. Motion to Suppress Cosimano's Post-*Miranda *Statement*

Cosimano's final argument is that the district court erred in denying his motion to suppress statements he made during a custodial interrogation. He argues that the agent improperly downplayed the *Miranda* warnings,[4] rendering them meaningless—

[4] Cosimano also argues that his rights were violated under *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that once a defendant has

particularly given Cosimano's fragile emotional state at the time.

In reviewing the denial of a motion to suppress, we review the district court's factual findings for clear error and its application of the law de novo. *United States v. Watkins*, 760 F.3d 1271, 1282 (11th Cir. 2014). A defendant may waive his right to remain silent, but the waiver must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Police are not to give *Miranda* warnings in a manner that is coercive or misleading. *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991). A *Miranda* waiver is effective "if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension." *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (internal quotation marks omitted).

Cosimano relies heavily on our decision in *Beale*, where we found *Miranda* warnings to be misleading because an investigator told a defendant that waiving his rights "would not hurt him." *Beale*, 921 F.2d at 1435. That promise, we held, contradicted the warning that the defendant's statements could be used against him in court. *Id.*; *see also Hart v. Att'y Gen. of State of Fla.*, 323 F.3d 884, 894–95 (11th Cir. 2003) (finding *Miranda* warnings misleading

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"expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him"). Since Cosimano did not request to have counsel present while he was questioned, *Edwards* does not help him. We thus analyze his claim under *Miranda*.

where a defendant was promised that honesty would not hurt him).

This case, however, is distinguishable from *Beale* and *Hart*. True, the agent told Cosimano that honesty could "help" him and put him "in the best possible position." But the agent made no promises. To the contrary, the agent told Cosimano: "I'm not making you any promises, okay? I literally, I cannot do it." And although Cosimano may have been in an emotionally vulnerable state during the interview, the district court found that he "was well-aware of what he was signing." Because the record does not establish that this finding was clearly erroneous, we affirm.

3. Motion for New Trial Because of Juror Misconduct

Mencher's final argument is that the district court should have declared a mistrial based on juror misconduct.

We review for abuse of discretion a district court's denial of a motion for mistrial based on the jury's exposure to extrinsic information. *United States v. Dortch*, 696 F.3d 1104, 1110 (11th Cir. 2012). A mistrial is required only if the extrinsic evidence posed a reasonable possibility of prejudice to the defendant. *Id.* The government has the burden to show that any exposure to extrinsic evidence was harmless. *Id.* Factors relevant to this determination include: "(1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the

juror issues; and (4) the strength of the government's case." *United States v. Ronda*, 455 F.3d 1273, 1300 (11th Cir. 2006).

To be sure, it was improper for Juror 3 to research the law himself and share his findings with his fellow jurors. But, importantly, each of the jurors assured the court that he or she would follow the law and the court's instructions. Based on the court's interview with the jurors, any exposure to extrinsic evidence was harmless. It did not appear that the jurors took to heart what they heard from Juror 3—much less that it would have prevented them from fulfilling their oaths. Therefore, the district court's decision to replace the wayward juror rather than declare a mistrial was not an abuse of discretion.

III. CONCLUSION

In summary, sufficient evidence supports the jury's verdict, and none of the trial errors alleged by the Defendants warrants reversal. We thus affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 24, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14841-GG
Case Style: USA v. Christopher Cosimano
District Court Docket No: 8:18-cr-00234-MSS-SPF-1

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Michael Dominick Mencher
8:18-cr-234-T-35SPF

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL DOMINICK MENCHER

Case Number: 8:18-cr-234-T-35SPF

USM Number: 70544-018

Anne F. Borghetti, CJA

AMENDED[1] JUDGMENT IN A CRIMINAL CASE

The Defendant was found guilty to Counts One, Two, and Three of the Second Superseding Indictment. The Defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Murder in Aid of Racketeering Activity	December 21, 2017	One
18 U.S.C. § 1959(a)(1)	Murder in Aid of Racketeering Activity	December 21, 2017	Two
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm During a Crime of Violence	December 21, 2017	Three

The Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The Defendant has been found not guilty on Count Nine of the Second Superseding Indictment. The original Indictment, the Superseding Indictment and Count Four (4) of the Second Superseding Indictment are dismissed on motion of the United States.

IT IS ORDERED that the Defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the Defendant shall

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[1]Amended to add that the original Indictment, Superseding Indictment and Count 4 of the Second Superseding Indictment are dismissed on motion of the United States. The offense charge for Count 3 was also amended to reflect the correct statute number, modifying it from 924 (c)(1)(a)(i) to 924 (c)(1)(A)(i).

notify the court and United States Attorney of any material change in the Defendant's economic circumstances.

Date of Imposition of Judgment:
November 20, 2019

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

December 24, 2019

Michael Dominick Mencher
8:18-cr-234-T-35SPF

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120 MONTHS as to Count One; LIFE term as to Count Two, to run concurrently; and 60 MONTHS as to Count Three, to run consecutive to all other counts.**

The Court makes the following recommendations to the Bureau of Prisons:

- Confinement at Butner FCI, due to medical reasons.

Defendant is remanded to the custody of the United States Marshal to await designation by the Bureau of Prisons to begin the service of his federal sentence. The U.S. Marshal may act accordingly if protocol requires a different procedure regarding the defendant's custody.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant will be on supervised release for a term of **Five (5) years, which consists of 3 years as to Count One; and Five (5) years as to Counts Two and Three, to run concurrently.**

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. Defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

The Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The Defendant shall also comply with the additional conditions on the attached page.

Michael Dominick Mencher
8:18-cr-234-T-35SPF

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, Defendant shall comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by Probation Officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. Defendant shall report to the Probation Office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the Probation Officer instructs you to report to a different Probation Office or within a different time frame. After initially reporting to the Probation Office, the Defendant will receive instructions from the court or the Probation Officer about how and when the Defendant must report to the Probation Officer, and the Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the Probation Officer.
4. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall live at a place approved by the Probation Officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the Probation Officer excuses you from doing so. If you do not have full-time employment Defendant shall try to find full-time employment, unless the Probation Officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer at least 10 days in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall not knowingly communicate or interact with that person without first getting the permission of the Probation Officer.
9. If you are arrested or questioned by a law enforcement officer, Defendant shall notify the Probation Officer within **72 hours.**
10. Defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. Defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the Probation Officer determines that you pose a risk to another person (including an organization), the Probation Officer may require you to notify the person about the risk and Defendant shall comply with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.
13. Defendant shall follow the instructions of the Probation Officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. Probation Officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:_____ Date:_____

Michael Dominick Mencher
8:18-cr-234-T-35SPF

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The Defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

2. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the Defendant to submit to random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
$300.00	N/A	WAIVED	N/A	N/A

SCHEDULE OF PAYMENTS

Having assessed the Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- Special Assessment shall be paid in full and is due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the Probation Officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:18-cr-234-T-35MAP

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy,"
ERICK RICHARD ROBINSON,
a/k/a "Big E," and
CODY JAMES WESLING,
a/k/a "Little Savage"

18 U.S.C. § 1959(a)(1)
18 U.S.C. § 1959(a)(3)
18 U.S.C. § 1959(a)(5)
18 U.S.C. § 924(c)(1)(A)(iii)
18 U.S.C. § 924(j)(1)
18 U.S.C. § 3
21 U.S.C. § 846

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

(Conspiracy to Commit Murder in Aid of Racketeering Activity)

A. The Enterprise

1. At various times relevant to this Second Superseding Indictment, the defendants, CHRISTOPHER BRIAN COSIMANO, a/k/a "Durty," MICHAEL DOMINICK MENCHER, a/k/a "Pumpkin," ALLAN BURT GUINTO, a/k/a "Big Beefy," ERICK RICHARD ROBINSON, a/k/a "Big E," CODY JAMES WESLING, a/k/a "Little Savage," and others known

and unknown, were members and associates of the 69'ers Motorcycle Club, a criminal organization whose members and associates engaged in narcotics distribution and acts of violence including acts involving murder and which operated principally in the Middle District of Florida and elsewhere.

2. The 69'ers Motorcycle Club, including its leadership, membership, and associates, constituted an enterprise as defined in 18 U.S.C. § 1959(b)(2), hereinafter, "the Enterprise," that is, a group of individuals associated in fact that engaged in, and the activities of which affected, interstate and foreign commerce. The Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the Enterprise.

B. Purposes of the Enterprise

3. The purposes of the Enterprise included the following:

a. Enriching the members and associates of the Enterprise through, among other things, murder and distribution of narcotics.

b. Preserving and protecting the power, territory and profits of the Enterprise through the use of intimidation, violence, threats of violence, assaults and murder.

c. Promoting and enhancing the Enterprise and its members' and associates' activities.

d. Keeping victims in fear of the Enterprise and in fear of its members and associates through threats of violence and violence.

C. Means and Methods of the Enterprise

4. Among the means and methods by which the defendants and their associates conducted and participated in the conduct of the affairs of the Enterprise were the following:

a. Members of the Enterprise and their associates committed, attempted, and threatened to commit acts of violence, including murder, to protect and expand the Enterprise's criminal operations;

b. Members of the Enterprise and their associates promoted a climate of fear through violence and threats of violence;

c. Members of the Enterprise and their associates used and threatened to use physical violence against various individuals; and

d. Members of the Enterprise and their associates trafficked in controlled substances, including heroin, cocaine, methamphetamine, and marijuana.

5. The above-described Enterprise, through its members and associates, engaged in racketeering activity as defined in 18 U.S.C. §§ 1959(b)(1) and 1961(1), namely, acts involving narcotics trafficking, in violation of 21 U.S.C. §§ 841(b)(1)(C), (b)(1)(D) and 846.

6. On or about December 21, 2017, in the Middle District of Florida, the defendants,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy," and
CODY WESLING,
a/k/a "Little Savage,"

for the purpose of gaining entrance to and maintaining and increasing position in the 69'ers Motorcycle Club, an enterprise engaged in racketeering activity, unlawfully and knowingly conspired to murder Paul Anderson, in violation of Fla. Stat. §§ 782.04(1)(a)1 and 777.04.

In violation of 18 U.S.C. § 1959(a)(5).

COUNT TWO

(Murder in Aid of Racketeering Activity)

1. Paragraphs One through Five of Count One of this Second Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about December 21, 2017, in the Middle District of Florida, the defendants,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,

a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy," and
CODY WESLING,
a/k/a "Little Savage,"

for the purpose of gaining entrance to and maintaining and increasing position in the 69'ers Motorcycle Club, an enterprise engaged in racketeering activity, unlawfully and knowingly murdered Paul Anderson in violation of Fla. Stat. § 782.04(1)(a)1.

In violation of 18 U.S.C. §§ 1959(a)(1) and 2.

COUNT THREE

(Use of a Firearm During and in Relation to a Crime of Violence)

On or about December 21, 2017, in the Middle District of Florida, the defendants,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy," and
CODY WESLING,
a/k/a "Little Savage,"

did knowingly use, carry, brandish, and discharge a firearm, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, Murder in Aid of Racketeering Activity, as charged in Count Two of this Second Superseding Indictment, which Count is

realleged and incorporated by reference as though fully set forth herein.

In violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2.

COUNT FOUR

(Use of a Firearm During and in Relation to a Crime of Violence Causing Death)

On or about December 21, 2017, in the Middle District of Florida, the defendants,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy," and
CODY WESLING,
a/k/a "Little Savage,"

did knowingly use, carry, brandish, and discharge a firearm, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, Murder in Aid of Racketeering Activity, as charged in Count Two of this Second Superseding Indictment, which Count is realleged and incorporated by reference as though fully set forth herein, and in the course of those crimes, did cause the death of a person, Paul Anderson, through the use of the firearm, the killing of whom was murder as defined in 18 U.S.C. § 1111.

In violation of 18 U.S.C. §§ 924(j)(1) and 2.

COUNT FIVE

(Accessory After the Fact)

On or about December 21, 2017, in the Middle District of Florida, the defendant,

ERICK RICHARD ROBINSON,
a/k/a "Big E,"

knowing that an offense against the United States had been committed by CHRISTOPHER BRIAN COSIMANO, a/k/a "Durty," MICHAEL DOMINICK MENCHER, a/k/a "Pumpkin," ALLAN BURT GUINTO, a/k/a "Big Beefy," and CODY JAMES WESLING, a/k/a "Little Savage," that is, Conspiracy to Commit Murder in Aid of Racketeering Activity, as charged in Count One of this Second Superseding Indictment, and Murder in Aid of Racketeering Activity, as charged in Count Two of this Second Superseding Indictment, which Counts are realleged and incorporated by reference as though fully set forth herein, did receive, relieve, comfort, and assist the offenders, CHRISTOPHER BRIAN COSIMANO, MICHAEL DOMINICK MENCHER, ALLAN BURT GUINTO, and CODY WESLING, in order to hinder and prevent the offenders' apprehension, trial, and punishment.

In violation of 18 U.S.C. § 3.

COUNT SIX

(Assault with a Dangerous Weapon in Aid of Racketeering Activity)

1. Paragraphs One through Five of Count One of this Second Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about July 25, 2017, in the Middle District of Florida, the defendant,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"

for the purpose of gaining entrance to and maintaining and increasing position in the 69'ers Motorcycle Club, an enterprise engaged in racketeering activity, unlawfully and knowingly committed an assault with a dangerous weapon of James Costa, in violation of Fla. Stat. § 784.021.

In violation of 18 U.S.C. § 1959(a)(3).

COUNT SEVEN

(Use of a Firearm During and in Relation to a Crime of Violence)

On or about July 25, 2017, in the Middle District of Florida, the defendant,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"

did knowingly use, carry, brandish, and discharge a firearm, during and in

relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault with a Dangerous Weapon in Aid of Racketeering Activity, as charged in Count Six of this Second Superseding Indictment, which Count is realleged and incorporated by reference as though fully set forth herein.

In violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2.

COUNT EIGHT

(Accessory After the Fact)

On or about July 25, 2017, in the Middle District of Florida, the defendant,

ALLAN BURT GUINTO,
a/k/a "Big Beefy,"

knowing that an offense against the United States had been committed by CHRISTOPHER BRIAN COSIMANO, a/k/a "Durty," that is, Assault with a Dangerous Weapon in Aid of Racketeering Activity, as charged in Count Six of this Second Superseding Indictment, which Count is realleged and incorporated by reference as though fully set forth herein, did receive, relieve, comfort, and assist the offender, CHRISTOPHER BRIAN COSIMANO, in order to hinder and prevent the offender's apprehension, trial, and punishment.

In violation of 18 U.S.C. § 3.

COUNT NINE

(Narcotics Conspiracy)

Beginning on an unknown date, but not later than on or about January 1, 2016, and continuing through on or about December 21, 2017, in the Middle District of Florida, and elsewhere, the defendants,

MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin," and
ERICK RICHARD ROBINSON,
a/k/a "Big E,"

did knowingly, willfully, and intentionally conspire with each other and other persons, both known and unknown to the Grand Jury, to possess with intent to distribute controlled substances.

The violation involved a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, and a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, each of which are punishable under 21 U.S.C. § 841(b)(1)(C), and involved a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance, which is punishable under 21 U.S.C. § 841(b)(1)(D).

In violation of 21 U.S.C. § 846.

SPECIAL FINDINGS

Paragraphs One through Five of Count One of this Second Superseding Indictment are realleged and incorporated by reference as though fully set forth herein. With respect to Counts Two, Three and Four, the Grand Jury finds that the defendants,

CHRISTOPHER BRIAN COSIMANO,
a/k/a "Durty,"
MICHAEL DOMINICK MENCHER,
a/k/a "Pumpkin,"
ALLAN BURT GUINTO,
a/k/a "Big Beefy," and
CODY WESLING,
a/k/a "Little Savage,"

1. Were 18 years of age or older at the time of the offense charged;

2. Intentionally killed Paul Anderson (18 U.S.C. § 3591(a)(2)(A));

3. Intentionally inflicted serious bodily injury that resulted in the death of Paul Anderson (18 U.S.C. § 3591(a)(2)(B));

4. Intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force could be used in connection with a person, other than one of the participants in the offenses, and Paul Anderson died as a direct result of the act (18 U.S.C. § 3591(a)(2)(C));

5. Intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one

of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and Paul Anderson died as a direct result of the act (18 U.S.C. § 3591(a)(1)(D)); and

6. Committed the offense after substantial planning and premeditation to cause the death of a person (18 U.S.C. § 3592(c)(9)).

FORFEITURE

1. The allegations contained in Counts One through Nine of Second Superseding Indictment are hereby realleged and incorporated by reference as if fully set forth herein for the purpose of alleging forfeitures pursuant to the provisions of 18 U.S.C. § 924(d)(1), 21 U.S.C. § 853, and 28 U.S.C. § 2461(c).

2. Upon conviction of the violations charged in Counts Three, Four, and Seven, pursuant to 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c), the defendants shall forfeit any firearms and/or ammunition involved in the offense of conviction to the United States of America.

3. Upon conviction of the violation charged in Count Nine, pursuant to 21 U.S.C. § 853(a)(1) and (2), the defendants shall forfeit to the United States any property constituting, or derived from, any proceeds the defendants obtained, directly or indirectly, as a result of such violations, and any property used, or intended to be used, in any manner or part, to commit,

or to facilitate the commission of, such violations.

4. If any of the property described above, as a result of any acts or omissions of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property, which cannot be divided without difficulty,

the United States shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p), directly and as incorporated by 28 U.S.C. § 2461(c).

A TRUE BILL,

Foreperson

MARIA CHAPA LOPEZ
United States Attorney

By:
Carlton C. Gammons
Assistant United States Attorney

By:
Natalie Hirt Adams
Assistant United States Attorney

By:
Christopher F. Murray
Assistant United States Attorney
Chief, Violent Crimes and Narcotics Section

No. 8:18-cr-234-T-35MAP

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

THE UNITED STATES OF AMERICA

vs.

CHRISTOPHER BRIAN COSIMANO, a/k/a "Durty,"
MICHAEL DOMINICK MENCHER, a/k/a "Pumpkin,"
ALLAN BURT GUINTO, a/k/a "Big Beefy,"
ERICK RICHARD ROBINSON, a/k/a "Big E," and
CODY JAMES WESLING, a/k/a "Little Savage"

SECOND SUPERSEDING INDICTMENT

Violations: Title 18, United States Code, Section 1959(a)(5)
Title 18, United States Code, Section 1959(a)(1)
Title 18, United States Code, Section 924(c)(1)(A)(iii)
Title 18, United States Code, Section 924(j)(1)
Title 18, United States Code, Section 3
Title 18, United States Code, Section 1959(a)(3)
Title 18, United States Code, Section 3
Title 21, United States Code, Section 846

A true bill,

Foreperson

FILED
2018 SEP 25 PM 5:06
CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

Filed in open court this 25th day of September, 2018.

Clerk

Bail $_____

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