NO.

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN CLAYTON, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

1. Whether the Due Process Clause of the Fifth Amendment, and the Jury Trial guarantees contained in the Sixth Amendment were violated when the District Court sentenced Mr. Clayton above the statutory maximum in a racketeering conspiracy based on a jury's finding that murder was involved in the Conspiracy, but where murder was defined to include crimes which do not carry life sentences.

Rule 14(b) Statement

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)iii:

District Court No.: *United States v. Kevin Clayton*, 1:16-cr-145 TWT JKL (N.D. Ga.)

Appeal Court No.: *United States v. Kevin Clayton*, No. 19-15024 (11th Cir.)

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is available at: *United States v. Caldwell*, 81 F.4th 1160 (11th Cir. 2023) and attached in Appendix A.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 16, 2023. A petition for an *enbanc* hearing was requested. The request was denied on October 18, 2023. Mandate was issued on October 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. V:

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

United States Constitution, Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. §1963(a)

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

O.C.G.A. §16-4-1

A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime.

O.C.G.A. §16-4-8

A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy. A person convicted of the offense of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed, by one-half the maximum fine to which he could have been subjected if he had been convicted of such crime, or both. A person convicted of the offense of criminal conspiracy to commit a

misdemeanor shall be punished as for a misdemeanor. A person convicted of the offense of criminal conspiracy to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one year nor more than ten years.

O.C.G.A. § 16-5-1

a. A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
b. Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
c. A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.
d. A person commits the offense of murder in the second degree when, in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice.
e.
    1. A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life.

2. A person convicted of the offense of murder in the second degree shall be punished by imprisonment for not less than ten nor more than 30 years.

I. THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND SIXTH AMENDMENT'S JURY TRIAL GUARANTEES PROHIBIT THE IMPOSITION OF A SENTENCE ABOVE THE STATUTORY MAXIMUM IN A RACKETEERING CONSPIRACY WHERE THE JURY FOUND MURDER WAS INVOLVED IN THE CONSPIRACY, BUT WHERE MURDER WAS DEFINED TO INCLUDE CRIMES WHICH DO NOT CARRY LIFE SENTENCES.

This appeal arises from a multi-count racketeering indictment where Mr. Clayton was charged with a single count of conspiring to violate Title 18 U.S.C. §1962(c). *United States v. Caldwell*, 81 F.4th 1160, 1171-72 (11th Cir. 2023) (included in appendix at A-1). The indictment also contained an enhanced sentencing provision, which would allow the District Court to sentence a Defendant over the statutory maximum if the jury determined the conviction was based on a racketeering act punishable by life imprisonment. A-9-10; 18 U.S.C. §1963(a).

The indictment alleged, and the jury was instructed, that the conspiracy contained three variations of murder: (1) actual murder, in violation of O.C.G.A. §16-5-1, which carries a maximum sentence of life; (2) attempted murder, in violation of O.C.G.A. §16-4-1, which carries a 30-year maximum sentence; and (3) conspiracy to murder, in violation of O.C.G.A. §16-4-8. A-14. A-53

Five Defendants, including Mr. Clayton, went to trial. At conclusion of the trial the jury was presented with a verdict form which contained a special

interrogatory asking the jury to decide whether "murder was involved in the conspiracy". A-13. The special interrogatory read:

> Did the RICO conspiracy involve murder?
> _____ Yes
> _____ No

A.77.

An otherwise simple question was complicated when the jury was charged that murder included actual murder, felony murder, and conspiracy to murder:

> With regard to acts involving murder, under Georgia law, a person commits the offense of murder when he unlawfully and with malice aforethought causes the death of another human being.
>
> A person also commits the offense of murder when in the commission or attempted commission of a felony he causes the death of another human being.
>
> Conspiracy to commit murder occurs where a Defendant knowingly and willfully joins in an unlawful plan to accomplish a murder and any conspirator does any overt act to effect the object of the conspiracy.

A-53-57. The Court used a general attempt instruction to assist the jury in its attempted murder deliberations:

> An attempt to commit an act requires the knowingly intent to commit the crime and strongly corroboration of that intent through the taking of a substantial step toward committing the crime.

Id. at 57. Moments later, the Court addressed the requirements of the enhanced sentencing provision and the special verdict form:

> You will also need to decide specific questions about certain types of racketeering activity, namely, acts involving murder... For these racketeering activity types, you must unanimously decide whether the Defendant

> joined or remained in the RICO conspiracy knowing that the enterprise engaged in this type of racketeering activity.

Id. at 58. During its closing arguments the government drove this point home, explaining to the jury:

> … the racketeering activity that is alleged in the Indictment includes murder and attempted murder. That's basically called acts involving murder. You'll see that term, "acts involving murder." So that includes the actual murder, and it includes attempted murder. It includes conspiracy to murder, too.

A-14. The jury returned its verdict, determining murder was involved in the conspiracy. *Id.* A presentence report was conducted which found Mr. Clayton's sentencing guideline range was life, because the conspiracy involved "murder". A-15. Mr. Clayton objected to the guideline calculation, arguing it would violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to sentence Mr. Clayton over the statutory maximum because the jury was given a definition of murder that made it impossible for the Court to determine whether the jury found a racketeering activity that carried a life sentence was involved in the conspiracy. *Id.* Mr. Clayton's case proceeded to sentencing where Mr. Clayton continued to object that the imposition of a sentence over twenty years would violate *Apprendi*. *Id.* The District Court overruled the defense objection and sentenced Mr. Clayton above the statutory maximum. *Id.*

Mr. Clayton's case proceeded to appeal where a panel of the Eleventh Circuit declined to analyze the case under *Apprendi*, instead characterizing the issue as an "unpreserved objection to the verdict form and jury instructions masquerading as

an *Apprendi* challenge". *United States v. Caldwell*, 81 F.4th 1160, 1181 (11th Cir. 2023); A-29. The Eleventh Circuit reframed the *Apprendi* issue as a jury instruction issue, and then applied plain error review to the unpreserved objection to deny the appeal without consideration of the *Apprendi* challenge.

II. THIS COURT SHOULD GRANT WRIT BECAUSE THE ELEVENTH CIRCUIT'S DECISION UNDERMINES PROTECTIONS CONTAINED IN THE FIFTH AND SIXTH AMENDMENT AND IS CONTRARY TO *JONES* AND *APPRENDI*.

In *Jones v. United States* this Court determined the Due process clause of the Fifth Amendment and the jury trial guarantees contained in the Sixth Amendment require any fact other than a prior conviction, that increases the maximum penalty for a crime, to be submitted to the jury and proven beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227 (1999). *Apprendi* applied this rule to the states via the Fourteenth Amendment. *Apprendi*, 530 U.S. at 476.

Here, *Apprendi* is being violated because the District Court sentenced Mr. Clayton above the statutory maximum based on an ambiguous jury verdict. It was impossible to know which type of murder was found in this racketeering conspiracy based on the jury's verdict and the jury instructions. As such, when the District Court used this ambiguous verdict to enhance a sentence, it violated the Fifth Amendment's Due Process clause and the Sixth Amendment's right to have a jury decide these issues. At stake in this request for certification is the deprivation of liberty without due process of law, and the Sixth Amendment right to an impartial jury. The same issues the Court characterized as having "surpassing importance" in *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000).

CONCLUSION

The panel decision violates *Jones* and *Apprendi* this Court should accept certification to correct the error in this case and to stop future improper applications of Supreme Court precedent.

This 12th day of January, 2024.

Respectfully Submitted,

/s/*Thomas C. Wooldridge*

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 19-15024

Kevin Clayton, Defendant, Appellant

v.

United States of America, Appellee

Filed August 16, 2023

Appeal from the United States District Court
For the Northern District of Georgia
USDC No. 1:16-cr-145

Before Chief Judge William Pryor, Jill Pryor, and Coogler

William Pryor, Chief Judge:

This appeal arises from a multiple-count indictment against dozens of members of the Gangster Disciples. Five of them, Alonzo Walton, Kevin Clayton, Donald Glass, Antarious Caldwell, and Vancito Gumbs, appeal their convictions and sentences following a joint trial. Some argue that the district court should have suppressed wiretap evidence against them. Some argue that their enhanced sentences under the Racketeer Influenced and Corrupt Organizations Act violate the Sixth Amendment because the jury failed to find that the ***1169** conspiracy involved murder. Several argue that the district court abused its discretion when it refused to play a video

about unconscious bias, excluded a professor of social work's expert opinion testimony, secured the defendants with ankle restraints at trial, allowed the prosecution to store evidentiary firearms in the courtroom, and questioned a witness. And they also bring individual procedural and sentencing challenges. We vacate one of Caldwell's convictions and his sentence due to an intervening precedent, but we otherwise affirm the convictions and sentences.

I. BACKGROUND

We divide our review of the background into three parts. First, we explain the Gangster Disciples gang and the defendants' roles within it. Second, we describe the crimes relevant to this appeal. Third, we recount the relevant parts of the pretrial proceedings, trial, and sentencing.

A. The Gangster Disciples

The Gangster Disciples began as a loosely affiliated network of street gangs in Chicago but later became a hierarchical national organization. At the times relevant to this appeal, that hierarchy consisted of a "Chairman" and "national board" for the country, "Governors of Governors" in charge of multi-state regions, "Governors" in charge of each state, "Regents" in charge of counties, and "Coordinators" in charge of municipal-level divisions or, in larger cities, subdivisions called "counts" or "decks." Other leaders had specific portfolios within the gang. For example, the "Chief

Enforcer" managed a team of "Enforcers" who exacted punishments for violations of the gang's rules, such as the prohibition against cooperating with the police.

The investigation that led to this trial and appeal focused on the activities of a group called the "Hate Committee." The committee served as an "enforcement" team for the gang in Georgia. Donald "Smurf" Glass led the Hate Committee.

The defendants held a variety of posts within the Georgia Gangster Disciples. Alonzo "Spike" Walton was Governor. In that role, he approved all "greenlights" of violent acts by subordinates. He "stamped"—that is, approved the formation of—the Hate Committee and integrated it in his chain of command. Kevin "K.K." Clayton was Chief Enforcer, responsible for countering internal threats. In 2013, he earned the dubious distinction of "Enforcer of the Year." Clayton had the authority to issue a "greenlight" to punish a Disciple for a violation of the gang's rules. Donald "Smurf" Glass was the leader of the Hate Committee and, in Clayton's words, his "right hand guy." In that role, he maintained a close relationship with committee members. For example, one member, Quantavious Hurt, lived in his home. Antarious "Fat" Caldwell was a committee member. Finally, Vancito Gumbs, a police officer, was a Disciple who worked directly with Clayton. Quantavious Hurt identified Gumbs as a Disciple, and another police officer said that Gumbs confessed to being a member and had Disciple tattoos. A month after the crimes we recount below, Gumbs expressed remorse for being a "gd hitman" in a text to his girlfriend.

In November 2013, the Federal Bureau of Investigation secured judicial authority to wiretap Walton's phone. In the required affidavit explaining the necessity for the wiretap, Agent William K. Murdock explained that no human source had been able to infiltrate the gang and secure the trust of key members, though three confidential human sources and four cooperating defendants had provided some helpful information. In January 2014, the Bureau ***1170** requested a 30-day extension of the wiretap. Agent Murdock provided a similar affidavit, explaining that alternatives to wiretapping were not viable and that "no viable confidential human sources have been identified that are able to infiltrate the gang." He did not discuss the specific human sources he had mentioned in the first affidavit. The district judge approved the extension.

B. Relevant Crimes

The indictment charged an array of criminal activities. We narrate those relevant to this appeal. And we review them in chronological order.

1. Carjacking of Mildred Frederick

Alonzo Walton volunteered to help his friend Mildred Frederick after she damaged her car by failing to put oil in it. His "help" was insurance fraud: Walton destroyed the car, and Frederick reported it stolen.

Frederick started dating Walton's friend Laderris Dickerson. But in March 2014, after Frederick and Dickerson started having troubles with their relationship, Dickerson and Walton decided to rob Frederick of the proceeds from the insurance fraud and other savings.

Later that month, Walton and Dickerson lured Frederick to a parking lot with the promise that someone would meet her there to sell her a car for a good price. The co-conspirators arranged for another Disciple whom Dickerson did not know to arrive at the scene and demand Frederick's cash and rental car at gunpoint. Walton assured Dickerson that he would use his authority as Governor to ensure that Frederick would not be harmed.

The plan succeeded. Frederick and Dickerson drove to the site, and the robber demanded Frederick's money at gunpoint. When Frederick said she had only five dollars, Dickerson revealed that $14,000 was in the glove compartment. Frederick then attacked the robber and wrestled with him for a few seconds before he took control of her car, kicked her out of it while it was moving, and sped away. Walton, Dickerson, and the robber split the proceeds. Dickerson and Frederick surmised that the robber had been instructed not to use the gun because he had allowed Frederick to resist without shooting her.

2. Attempted Robbery of Eric Wilder

On June 27, 2015, Caldwell and another Hate Committee member invaded Eric Wilder's home to rob him of drugs and money. The robbers knocked on Wilder's door

and pointed a gun at him when he cracked it open. Wilder slammed the door shut. Caldwell fired through the door and hit Wilder in the chest. The robbers then forced their way into the apartment, stole a small amount of marijuana, and fled.

3. Murder of DeMarco Franklin

Hate Committee member Quantavious Hurt murdered DeMarco Franklin on July 1, 2015. Hurt sparked a dispute with members of the Bloods gang when he leaned on one of their cars at a gas station. After members of the rival gang opened fire, Hurt fled to a friend's house. Hurt later went to Glass's home to inform him of the situation. Glass said that the committee needed to "do something about the situation"—per Hurt's later trial testimony—because Hurt's flight made the committee look bad. Glass apparently preferred that Hurt's colleague "handle" the situation—Hurt took this to mean "shoot somebody." But Hurt also understood Glass to allow Hurt to "handle" the situation if he wanted to. Glass gave Hurt a symbolic black flag, to ***1171** remove any fingerprints from the gun he would use and to cover his face.

Hurt returned to the gas station and found DeMarco Franklin, whom he believed was involved in the first incident. Hurt followed Franklin and murdered him in front of his girlfriend and her four-year-old child. When Hurt reported back, Glass was "in shock" that Hurt had personally settled the score, but also said that Hurt "did what [he was] supposed to do." Hurt later learned that Franklin had nothing to do with the earlier incident.

4. Stone Mountain Inn and Central Avenue Shootings

The spree of violence continued two days later on July 3. Glass planned a robbery of the Stone Mountain Inn, where a drug dealer named "Zay" based his operations. Zay was a member of the Stone Mountain "deck" of the Gangster Disciples who came from North Carolina. These Disciples were not "plugged in"—that is, not "stamped official" or initiated "full member[s]" of the gang. The Hate Committee aborted its initial attempt to rob the drug dealer at the Inn because police officers were there. Some Hate Committee members returned in the evening to "chill" with the Stone Mountain Gangster Disciples. A dispute broke out over the status of the out-of-town Disciples as "plugged in." Acting on a standing order from Glass against Disciples who were not plugged in, the Hate Committee attacked the Stone Mountain Disciples and killed Edward Chadmon. A member of the Hate Committee, Rodricious Gresham, was wounded in the firefight.

The Hate Committee held a meeting to discuss the injury of one of its own. At the meeting, the ranking Disciple decided that the Stone Mountain deck was to blame for the incident. That deck would be "put on hold," or excommunicated, and the Hate Committee was given an "S.O.S.," or "smash on [sight]," order to "[k]ill, beat, [and] assault" any members of the deck. Glass provided weapons and ammunition for the attack and passed along the directive to "apply pressure" by killing and assaulting people.

Members of the Hate Committee opened fire on a crowd on Central Avenue in the Stone Mountain area and injured a bystander. When the members returned to Glass's home afterward, he appeared to approve of their actions and encouraged them to "continue" with the same activity. The committee members went back to Central Avenue, murdered Rocqwell Nelson, and injured a woman standing with Nelson on her patio. When they returned to Glass, he again praised their actions and encouraged them to continue. Again the group went out, greeted "White Boy"—a member of the "on hold" Stone Mountain deck—then shot him in the stomach at point-blank range. Again, Glass was "pleased" with the result.

5. Murder of Robert Dixon

The last crime relevant to this appeal was Glass's killing of Robert "Rampage" Dixon in August 2015. Dixon was accused of stealing from another Disciple in violation of gang rules. According to Gresham, a Hate Committee member and prosecution witness, Glass gave a "greenlight" to punish Dixon for this violation. Glass recruited other Disciples to "go holler" at Rampage. He brought Dixon outside the apartment where Dixon was staying to "talk," but after a few minutes of talking, according to a witness, Glass pulled out his gun and shot Dixon in the head, killing him.

C. Pretrial and Trial Proceedings

The principal charge against all the defendants was count one, which charged ***1172** that the defendants conspired to "conduct and participate directly and indirectly in the conduct of [the Gangster Disciples] through a pattern of racketeering activity" in

violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). The indictment also charged the defendants with the enhanced sentencing provision of the Act, *see id.* § 1963(a), for joining and remaining in the conspiracy "knowing and agreeing that members of the enterprise engaged in acts involving murder, in violation of Official Code of Georgia 16-5-1." The indictment named 34 defendants, and this appeal concerns the joint trial of Alonzo Walton, Kevin Clayton, Donald Glass, Antarious Caldwell, and Vancito Gumbs, who were convicted, and Perry Green, who was acquitted.

Before trial, Gumbs moved the district court to show prospective jurors a video on unconscious bias prepared by the district court for the Western District of Washington. *See Unconscious Bias Juror Video*, United States District Court for the Western District of Washington, https://www.wawd.uscourts.gov/jury/unconscious-bias (available at https://www.ca11.uscourts.gov/media-sources). He also proposed a list of voir dire questions about their possible unconscious biases and requested that the prospective jurors be given accompanying jury instructions. The instructions told the jurors that they "must not be influenced by" their unconscious biases—the same biases the instructional video asserted were "automatic" and inevitable.

The district court denied the motion. It described "a lot of this discussion" about unconscious bias as "politically correct nonsense ... not based on any valid scientific or empirical study." It doubted that the Western District of Washington could know that the jurors in Georgia were unconsciously biased and worried about telling the jurors at the outset that they were biased. The district court expressed concern that

the video would "cause jurors to question their ability to make judgments based upon their common sense"; would "suggest that jurors of one race ... should think that the opinions of a juror of another race are based on bias and prejudice" to the detriment of collective deliberation; and would be ineffective in ameliorating the cultural differences between the prospective jurors and the defendants.

The district court later denied Gumbs's motion, filed six business days before trial, to admit Dr. Roberto Aspholm as an expert witness. Aspholm, a professor of social work, researched and taught about the Gangster Disciples. Gumbs said that Aspholm's testimony would illuminate the structure of the Gangster Disciples, on which the prosecution's theory of a unified criminal organization depended. He did not explain the basis of Aspholm's proposed testimony except that it would be "based on his years of first-hand (particularly university/academic-based) investigations." The district court denied Gumbs's motion as untimely and because the explanation of the proffered testimony was inadequate. *See* Fed. R. Crim. P. 16(b)(1)(C) (2018). When the prosecution introduced non-expert testimony about the structure of the Gangster Disciples, Gumbs moved again to be allowed to call Aspholm to rebut that testimony, but the district court denied the request.

The district court ordered that all the defendants be secured with ankle restraints throughout the trial. Over the defendants' objections, the district court accepted the marshal's request to restrain the defendants "because of the number of the defendants and the difficulty of preventing an incident if they collectively decided that something was going to happen." The district court ordered that the chains be

muffled, that no restraints be ***1173** visible, and that the defendants enter the courtroom before the jurors and remain seated so that the jury would never see the chains. And at the outset of trial, the district court requested that a defendant stand up to test whether the restraints would be audible when the defendants rose and sat. The defendants were each seated next to their counsel, so they could consult with them despite the restraints.

The district court allowed the prosecution to bring firearms as evidence. The prosecution was permitted to bring the firearms into the courtroom and store them in boxes next to the counsel table for the duration of the day in which they would be used. The district court denied Gumbs's request to keep the boxes outside the jury's sight.

The district court denied a motion to suppress the fruits of the extension of the wiretap of Walton's phone. Clayton argued that the extension was unlawful because the underlying supporting affidavit was incomplete and the application did not provide the court with statutorily mandated information. *See* 18 U.S.C. § 2518(1)(c). The district court denied the motion to suppress on the ground that the application was adequate despite any omission. It concluded, in the alternative, that suppression was not justified because there was no allegation that the affidavit was intentionally deceptive or reckless with respect to the truth or that the failure to discuss the human sources was material to the statutory criteria for a wiretap. *See Franks v. Delaware*, 438 U.S. 154, 171–72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The district court also ruled that the good-faith exception to the exclusionary rule foreclosed suppression of

the fruits of the wiretap. *See United States v. Leon*, 468 U.S. 897, 922–24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

At the end of the prosecution's case-in-chief, the district court asked Agent Murdock whether DeKalb County, in which the events to which he had testified took place, was within the Northern District of Georgia. Murdock said yes; no one objected; and the government rested.

The verdict form proposed by the district court asked whether each defendant was guilty of "Count One of the indictment charging RICO conspiracy" and whether "the RICO conspiracy involve[d] murder." The second question corresponded to the notice of enhanced sentencing in the indictment, which depended on a finding that "members of the enterprise engaged in acts involving murder, in violation of Official Code of Georgia 16-5-1." *See* Ga. Code § 16-5-1 (defining malice and felony murder and setting the maximum penalty at death); 18 U.S.C. § 1963(a).

Walton, in an objection all the defendants joined, argued that the district court should specify that "to find the Enhanced sentence for murder," the jury must find beyond a reasonable doubt that "the Defendants joined and remained in the RICO conspiracy charged in Count One knowing and agreeing that members of the enterprise engaged in acts involving murder." Gumbs contended that his verdict form should ask whether he was guilty of "conspiracy to commit murder." The district court overruled the objections. The final verdict form for each defendant included an interrogatory that asked whether "the RICO conspiracy involve[d] murder."

The relationship between the two questions for count one was muddled in the jury instructions. For count one, the jury had to find a "pattern of racketeering activity" to convict, which meant that it had to find that at least two racketeering acts were committed by members of the criminal enterprise. *See* 18 U.S.C. §§ 1962(c), 1961(5). The indictment alleged ten types ***1174** of racketeering acts. In its instructions, the district court labeled three of these categories of racketeering acts—Georgia-law actual murder, attempted murder, and conspiracy to commit murder—as "acts involving murder." The district court defined "murder" to mean only actual murder, not any inchoate version of that offense. The enhanced sentencing provisions applied to the defendants only if a racketeering act on which the conviction was based was *actual* "murder" because the enhanced sentencing provisions require a racketeering act punishable by life imprisonment. *See id.* § 1963(a); Ga. Code §§ 16-5-1(e)(1), 16-4-6, 16-4-8. In closing arguments, the prosecution elided this distinction and argued that the special interrogatory in the verdict form asked whether the Gangster Disciples "engaged in acts involving murder, which includes murder and attempted murder."

The jury returned mixed verdicts. Walton was convicted of the racketeering conspiracy, carjacking Frederick, and using a firearm during that carjacking. *See* 18 U.S.C. § 2119; *id.* § 924(c)(3)(A). Clayton was convicted of the racketeering conspiracy only. Glass was convicted of the racketeering conspiracy, acquitted of the murder of Robert Dixon, convicted of carrying a firearm during a crime of violence, namely the killing of Robert Dixon, *id.* § 924(c)(3)(A), convicted of causing the death of Robert

Dixon with a firearm, *see id.* § 1111, and acquitted of two marijuana possession charges. Caldwell was convicted of the racketeering conspiracy, the attempted Hobbs Act robbery of Eric Wilder, *see id.* § 1951, and carrying a firearm during a crime of violence, the attempted robbery, *see id.* § 924(c)(3)(A). Vancito Gumbs was convicted of the racketeering conspiracy. For each of the convicted defendants, the jury found that "the RICO conspiracy involve[d] murder." The jury acquitted a sixth codefendant, Perry Green.

At sentencing, the defendants objected to the recommendation in the presentence investigation report that they receive enhanced sentences under the Racketeer Influenced and Corrupt Organizations Act. The Act provides for a maximum sentence of life imprisonment instead of only 20 years if "the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." *Id.* § 1963(a). The defendants argued that the verdict form question whether "the RICO conspiracy involve[d] murder" asked the jury whether the conspiracy involved either actual murder or inchoate versions of that offense. Because the jury verdict did not distinguish between actual murder, which can support a life sentence under Georgia law, and inchoate forms of murder, which cannot, they argued that their sentences could not exceed 20 years. *See id.* They styled this objection as an argument that a sentence based on the finding of actual Georgia-law murder would violate the Sixth Amendment. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The district court disagreed. It reasoned that the verdict form said "murder" without mentioning the inchoate forms, so the district court was "convinced beyond any doubt that ... the jury meant ... malice murder." It sentenced the defendants under the enhanced sentencing provisions.

The district court imposed lengthy sentences of imprisonment. Walton received 384 months of imprisonment. Clayton received 396 months of imprisonment. Glass received a sentence of life imprisonment plus 120 months. Caldwell received 360 months of imprisonment. And Gumbs received 180 months of imprisonment.

*1175 II. STANDARDS OF REVIEW

[1] [2] [3] [4] [5] Several standards of review govern this appeal. We review the conduct of voir dire, the refusal to admit expert opinion testimony, the decision to shackle the defendants, the regulation of the use of firearms as courtroom evidence, and the judge's decision to question a witness for abuse of discretion. *United States v. Hill*, 643 F.3d 807, 836 (11th Cir. 2011) (conduct of voir dire); *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1242 (11th Cir. 2021) (expert testimony and evidentiary rulings); *United States v. Baker*, 432 F.3d 1189, 1245 (11th Cir. 2005) (shackling determination), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *United States v. Day*, 405 F.3d 1293, 1297 (11th Cir. 2005) (judge's engagement with witness testimony).

[6] [7] [8] [9] [10] When reviewing the denial of a motion to suppress wiretapped communications, we review legal conclusions *de novo* and factual findings for clear error. *United States v. Goldstein*, 989 F.3d 1178, 1192–93 (11th Cir. 2021). Preserved *Apprendi* challenges are reviewed *de novo*. *United States v. Candelario*, 240 F.3d 1300, 1306 (11th Cir. 2001). We review the legal correctness of jury instructions *de novo*, but the district court has "wide discretion as to the style and wording employed." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014) (citation omitted). And "[w]e reverse only where we are left with a substantial and ineradicable doubt as to whether the district court properly guided the jury." *Id.* (citation and internal quotation marks omitted). Sufficiency of the evidence is reviewed *de novo*, and we ask whether "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Morel*, 63 F.4th 913, 917 (11th Cir. 2023) (citation omitted).

[11] [12] [13] We "review the reasonableness of a sentence for abuse of discretion using a two-step process." *United States v. Feldman*, 931 F.3d 1245, 1254 (11th Cir. 2019) (citation omitted). First, we determine whether there was a "significant procedural error," including failing to consider the statutory factors, ignoring or miscalculating the guideline range, or "failing to adequately explain the chosen sentence." *Id.* (citation omitted). Second, we evaluate the substantive reasonableness of the sentence. *Id.* At that stage, the defendant "has the burden of showing that the sentence is unreasonable in light of the entire record, the [section] 3553(a) factors, and the substantial deference afforded sentencing courts." *United States v. Fox*, 926

F.3d 1275, 1282 (11th Cir. 2019) (citation and internal quotation marks omitted). The interpretation of statutory terms like "crime of violence" is reviewed *de novo*. *United States v. Johnson*, 399 F.3d 1297, 1298 (11th Cir. 2005).

[14] [15] Issues that are not properly preserved by timely objection are reviewed for plain error. *Puckett v. United States*, 556 U.S. 129, 134–35, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). We can correct such errors if they are plain, if they affect a substantial right, and "if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Laines*, 69 F.4th 1221, 1229 (11th Cir. 2023) (citation omitted).

III. DISCUSSION

We divide our discussion into 13 parts. In the first five parts, we explain why the district court did not abuse its discretion in its pretrial and trial procedural decisions. In the next two parts, we address the defendants' arguments that their convictions ***1176** must be overturned because the wiretap evidence should have been suppressed and because the defendants should not have been subject to enhanced sentencing provisions. We then turn to five individual challenges to convictions and sentences. And finally, we briefly explain that Caldwell's sentence must be vacated because of *United States v. Taylor*, —— U.S. ——, 142 S. Ct. 2015, 213 L.Ed.2d 349 (2022).

A. The District Court Did Not Abuse Its Discretion When It Declined to Play a Video about Unconscious Bias.

[16] The defendants argue that the district court should have required the jury venire during voir dire to watch a video about unconscious bias to mitigate potential racial bias against them and that the district court should have given corresponding jury instructions. Although the district court sometimes has an obligation to permit defendants "to ask questions about racial bias during *voir dire*," *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 868, 197 L.Ed.2d 107 (2017); *see also Ham v. South Carolina*, 409 U.S. 524, 526–27, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), it retains "broad discretion to manage *voir dire*," *United States v. Tsarnaev*, 595 U.S. 302, 142 S. Ct. 1024, 1036, 212 L.Ed.2d 140 (2022). We have never held that a district court must conduct unconscious bias training or allow unconscious bias questioning during voir dire.

[17] The district court did not abuse its discretion. Jurors are entitled—indeed, expected—to make inferences based on common sense. *See, e.g.*, *United States v. Marino*, 562 F.2d 941, 944–45 (5th Cir. 1977); Pattern Crim. Jury Instr. 11th Cir. BI B4 (2020) ("In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions."). The proffered video, in contrast, labels *all* deeply ingrained judgments based on experience, even those not based on racial, religious, or other protected characteristics, as "biases." And it encourages jurors to second-guess their conclusions and to engage in counterfactual thought experiments flipping the age, race, or gender of various trial participants. The district court

reasonably determined that the video could "cause jurors to question their ability to make judgments based upon their common sense and experience." The video encourages jurors to doubt their own conclusions and the conclusions of their peers, and to presume that any decision is tainted by an "automatic" and unavoidable bias. It was also not an abuse of discretion to conclude that it would be harmful to jury deliberations to suggest to the jurors that they should be suspicious of their prospective colleagues' decisions based on the possibility of unconscious racial bias. And, insofar as racial biases stemming from cultural differences could have tainted the trial, the district court reasonably doubted "that a ten-minute video from the district court in Washington is going to ameliorate in any way th[ose] cultural differences." *See United States v. Mercado-Gracia*, 989 F.3d 829, 839–41 (10th Cir. 2021) (upholding a rejection of the same video).

[18] **[19]** The district court also did not abuse its discretion when it declined to ask questions during voir dire about unconscious bias. The choice of procedure to identify and respond to bias on the part of potential jurors is left to the "sound discretion" of the district court. *Hill*, 643 F.3d at 836 (citation omitted). The district court highlighted serious concerns with juror education materials and instructions that simultaneously tell each potential juror that he has inevitable unconscious biases *and* that he has a legal duty not to let these unconscious biases influence him. Gumbs ***1177** does not dispute that the district court allowed some questions that explicitly touched on potential racial bias by jurors; it barred only the unconscious-bias line of questioning.

B. The District Court Did Not Abuse Its Discretion When It Declined to Admit Dr. Aspholm's Expert Testimony.

The defendants next argue that the district court abused its discretion when it declined to admit the expert opinion testimony of Dr. Roberto Aspholm about the nature and structure of the Gangster Disciples. The district court found that Gumbs's disclosure was untimely and inadequate. The defendants contend that Gumbs's disclosure was timely because it gave the prosecution several weeks of notice before Aspholm would testify even though it had only six business days before trial began. And they contend that even if Gumbs's initial disclosure was untimely, Aspholm should have been allowed to testify to rebut the prosecution's portrayal of the gang. The defendants argue that the disclosure was specific enough to provide the prosecution fair notice of the content of Aspholm's testimony. *See* Fed. R. Crim. P. 16(b)(1)(C) (2018). The district court's decision was not "manifestly erroneous," *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc) (citation omitted), with respect to any ground, so we affirm.

[20] It was not an abuse of discretion to find that Gumbs did not provide timely notice of the testimony. Gumbs filed his notice only six business days before trial began. The district court determined that six business days before a complicated multidefendant trial was insufficient time for the prosecution to prepare a rebuttal of Aspholm's testimony or to secure a comparable expert witness to respond to his testimony. And it reasonably concluded that it was unfair to ask the government to formulate its response after the trial had started.

Although not in effect when the trial occurred in 2019, the revised Rules explicitly adopt this commonsense proposition. The current version of Rule 16, effective as of December 1, 2022, requires that notice of expert opinion testimony come "sufficiently before *trial*" for adequate preparation and does not measure timeliness based on the expected date of the testimony. Fed. R. Crim. P. 16(b)(1)(C)(ii) (2022) (emphasis added). We are loath to condemn as an abuse of discretion a decision of the district court that accords with the rule that would apply today, particularly where the earlier rule was silent on the issue.

[21] **[22]** The defendants' defense for Gumbs's late disclosure—that he did not realize until shortly before trial that the prosecution would portray the Gangster Disciples as a hierarchical criminal conspiracy—is frivolous. The second paragraph of the indictment alleges that the Gangster Disciples "employ a highly structured organization" to commit their crimes. That portrayal was never in doubt. For the same reason, the district court did not abuse its discretion when it declined to reconsider admitting Aspholm after the prosecution presentation of the structure of the Gangster Disciples.

[23] The district court also did not abuse its discretion when it ruled that Gumbs failed to provide an adequate description of Aspholm's testimony and "the bases and reasons for those opinions." Fed. R. Crim. P. 16(b)(1)(C) (2018). Gumbs never informed the prosecution of the sources on which Aspholm would base his testimony. The best explanation of Aspholm's testimony came in Gumbs's reply to the government's

opposition to his admission. ***1178** That document states Aspholm's *conclusions* that "the Gangster Disciples is not and has not been the unitary, tightly organized, structured, coordinated, and controlled organization that the Government characterizes it as" and that the organization "sometimes serves political, philosophical, cultural, and even quasi-religious functions" instead of criminal ones. The district court did not abuse its discretion when it found vague references to "interviewing and field work ... and statistical analysis" and "research, analysis, and teaching" on gangs in general to be an inadequate explanation of the basis for Aspholm's opinions.

C. The Ankle Restraints Did Not Violate the Defendants' Rights.

Gumbs, Glass, and Caldwell argue that the district court abused its discretion when it ordered them to be restrained at the ankles throughout trial. They argue that the district court failed to conduct an individualized inquiry into their dangerousness and to give notice of the grounds for its decision. This argument fails.

[24] **[25]** Our legal tradition strongly disfavors visibly restraining criminal defendants. As the Supreme Court explained, "Blackstone wrote that 'it is laid down in our antient books, that, though under an indictment of the highest nature,' a defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.' " *Deck v. Missouri*, 544 U.S. 622, 626, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (quoting 4 William Blackstone, Commentaries on the Laws of England *322). "[T]he use of physical restraints visible to the jury" is prohibited

"absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id*. at 629, 125 S.Ct. 2007. This rule exists to prevent prejudice to the presumption of innocence, the right to counsel, and the dignity of criminal proceedings. *Id.* at 630–31, 125 S.Ct. 2007.

[26] The common-law rule against shackling prevents creating an unfair impression of guilt for the jury and is limited to contexts that implicate that danger. We have held the rule does not apply to proceedings in which the jury is not present, such as sentencing. *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015). In rejecting a petition for a writ of habeas corpus, we have explained that Supreme Court precedents about shackling "are not applicable to security devices or measures that are not visible." *Nance v. Warden, Ga. Diag. Prison*, 922 F.3d 1298, 1305 (11th Cir. 2019). And we have *never* reversed a conviction based on the use of restraints *invisible* to the jury. *See, e.g.*, *Baker*, 432 F.3d at 1246; *United States v. Mayes*, 158 F.3d 1215, 1226–27 (11th Cir. 1998); *United States v. Battle*, 173 F.3d 1343, 1346–47 (11th Cir. 1999).

[27] We reject the defendants' challenge because the record makes clear that the ankle restraints were not perceptible to the jury and no defendant alleges that he lacked access to counsel. The district court ordered that the restraints be placed on the defendants' legs only, that they be muffled to prevent clanking, that a curtain around the defense table conceal them from the jury, and that the defendants enter and exit the courtroom outside the presence of the jury. The defendants unpersuasively complain that the district court could have done *more* to investigate the possibility of

prejudice. They also make the unsubstantiated assertion that the ankle restraints "very probably caused fear of the defendants." The district court took steps to verify that the restraints were imperceptible, so we do not credit the ***1179** defendants' speculation about the jurors' perceptions.

D. The District Court Did Not Abuse Its Discretion in Regulating the Use of Firearms as Evidence.

[28] Gumbs, Glass, and Caldwell argue that the prosecutors' use of firearms as physical evidence at trial violated their right to due process by undermining the presumption of innocence. They contend that the district court should have granted Gumbs's motion to "prohibit the storing of weapons in the courtroom, in boxes, from which boxes various of those weapons regularly were extracted, paraded around the court room, and handed to the jurors to pass amongst themselves." They argue that there was "no real reason" for this procedure except to paint the defendants as "dangerous renegade[s]." We disagree.

The district court followed a reasonable procedure for handling the weapons. The prosecution showed the weapons as evidence to prove the charged crimes that involved firearms at trial. The defendants fail to substantiate their accusation that the weapons were stored in this manner solely to prejudice them. And they fail to mention any specific instances where the prosecution used the guns in an inappropriate way. The district court reasonably balanced the inconvenience of storing the weapons in a separate room against the prejudice of piling up weapons in

the courtroom and struck a sensible balance in which the guns were kept out of view in boxes and the boxes were limited to those needed that day. The district court did not abuse its discretion.

E. The District Court Did Not Impermissibly Depart from Neutrality When It Questioned a Witness.

[29] Caldwell, Gumbs, and Walton contend that the district court committed plain error and deprived them of a fair trial when it asked a prosecution witness whether DeKalb County—the location of some of the criminal activity he described—is in the Northern District of Georgia. That DeKalb County is within the Northern District of Georgia established venue, *see United States v. Snipes*, 611 F.3d 855, 865–66 (11th Cir. 2010), so the defendants contend that the question unfairly helped the prosecution. We disagree.

[30] [31] The trial judge is "more than a referee to an adversarial proceeding." *United States v. Harris*, 720 F.2d 1259, 1261 (11th Cir. 1983). Consistent with the common-law tradition, the judge may "comment on the evidence" and "question witnesses and elicit facts not yet adduced or clarify those previously presented." *Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979). This questioning is limited only by the principle that a judge must maintain neutrality between the parties. *See id.* (approving a trial judge's decision to ask 105 questions of the defendant).

The district judge stayed well within these bounds. He asked a single question without commenting on the veracity or relevance of the witness's testimony. The legal status of DeKalb County is a "legislative fact" not particular to the parties, so the district court was entitled to instruct the jury that the county was within the Northern District of Georgia. *See* Fed. R. Evid. 201, advisory committee notes to 1972 proposed rules; *United States v. Bowers*, 660 F.2d 527, 530–31 (5th Cir. Unit B 1981). The district court did not err, let alone clearly err, when it asked a witness for that information.

F. The District Court Correctly Declined to Suppress the Fruits of the Extended Wiretap.

[32] Clayton and Walton argue that the district court should have suppressed ***1180** the fruits of the January 2014 extension of the wiretap on Walton's phone. They argue that Murdock failed to provide the required "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(1)(c), because his extension application did not discuss the seven human sources mentioned in the initial application. They also argue that *Franks v. Delaware* does not limit the suppression of the fruits of wiretaps and that the good-faith exception to the suppression remedy also does not apply to wiretap cases. Because the district court properly applied *Franks* and the good-faith exception to the motion

to suppress, we do not reach the argument that its ruling on section 2518(1)(c) was erroneous.

Franks addressed the suppression of evidence obtained pursuant to a warrant obtained through an affidavit containing false information. *Franks*, 438 U.S. at 155, 98 S.Ct. 2674; *see* U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause ...."). The Court held that a factual error requires suppression of the evidence the warrant produced only if the defendant establishes "deliberate falsehood or ... reckless disregard for the truth" by the affiant *and* "if, when material that is the subject of the ... falsity or reckless disregard is set to one side," probable cause would not support the warrant. *Franks*, 438 U.S. at 171–72, 98 S.Ct. 2674; *see also id.* at 156, 98 S.Ct. 2674. The defendants argue that *Franks* does not limit the statutory suppression remedy that applies to wiretaps obtained through a defective application. *See* 18 U.S.C. § 2518(10)(a)(i).

[33] We have consistently applied *Franks* to motions to suppress the evidentiary fruits of wiretaps. *See United States v. Capers*, 708 F.3d 1286, 1296 n.6 (11th Cir. 2013) ("The rule in *Franks* has since been held applicable to affidavits submitted in support of court-ordered electronic surveillance."); *accord United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988); *United States v. Novaton*, 271 F.3d 968, 984, 986 (11th Cir. 2001); *United States v. Votrobek*, 847 F.3d 1335, 1342 (11th Cir. 2017); *United States v. Perez*, 661 F.3d 568, 581 n.18 (11th Cir. 2011). Based on this binding precedent, we reject the defendants' challenge because they have failed to allege that Murdock asserted "deliberate falsehoods" or exhibited "reckless disregard for the

truth." *Franks*, 438 U.S. at 171, 98 S.Ct. 2674. And we affirm on the alternative ground that, as the defendants concede, our precedent also bars suppression of evidence obtained in good-faith reliance on a court-approved wiretap. *See Leon*, 468 U.S. at 922–24, 104 S.Ct. 3405; *Malekzadeh*, 855 F.2d at 1496–97 (applying *Leon* to a motion to suppress the fruits of a wiretap). The defendants do not dispute the district court's determination that law enforcement acted in good faith.

G. The Sentences Do Not Violate Apprendi.

[34] Walton, Clayton, Glass, and Caldwell contend that their sentences are unconstitutional because they rest on enhanced sentencing provisions of the Racketeer Influenced and Corrupt Organizations Act for which, they argue, the jury did not make the requisite findings. Gumbs joins this argument insofar as it bears on the district court's exercise of discretion in sentencing him. The defendants contend that the district court's alleged misreading of the jury's verdicts violates the Sixth Amendment requirement that "any fact other than a prior conviction that increases the penalty for a ***1181** crime" must be found by a jury beyond a reasonable doubt. *Candelario*, 240 F.3d at 1303 (citations omitted and alterations adopted); *see Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348. We disagree.

[35] This argument involves an unpreserved objection to the verdict form and jury instructions masquerading as an *Apprendi* challenge. *Apprendi* forbids a district court from making a factual finding necessary for an increased criminal penalty; only a jury may make that finding. *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348. Here, the

relevant factual finding was that the conspiracy involved actual murder, not attempted murder or conspiracy to commit murder. *See supra* Part I.C. The district court did not purport to find this fact when it applied the enhanced sentencing provisions. It instead determined that the jury's verdict form reflected that the *jury* had made that finding beyond a reasonable doubt. Clayton argues that because the verdict form was unclear—an objection we address below—the district judge had to "speculat[e]" about what the jury found and that *Apprendi* forbids that kind of speculation. But *Apprendi* does not address the district court's duty to interpret jury verdicts. It addresses a trial judge's inability to make factual findings that alter the penalty for a crime. *See, e.g.*, *Candelario*, 240 F.3d at 1304. The defendants argue that the district court *misread* the jury verdict and then applied the wrong statutory punishment based on that mistake. That argument does not implicate *Apprendi*.

The jury found that the conspiracy included actual, not inchoate, murder as part of its racketeering activities. Although the prosecutor in closing arguments elided the difference between the "acts involving murder" that could serve as predicate racketeering activities for *conviction* on count one and the actual "murder" required for the enhanced sentencing provision, the district judge did not make the same mistake. He instructed the jury that "acts involving murder" for the purposes of finding the two racketeering activities needed for conviction extended to Georgia-law conspiracy to commit murder and attempted murder. But the district court never said that the jury should read the phrase "involve murder" to mean "involve acts involving murder." The district court specifically defined "murder" to include only actual

murder under Georgia law, which is "a racketeering activity for which the maximum penalty includes life imprisonment," 18 U.S.C. § 1963(a); *see* Ga. Code § 16-5-1(e)(1). And the verdict form asked whether the conspiracy "involve[d] *murder*," not "acts involving murder." The plain meaning of this phrase is that the question concerns what the district court defined as *murder*, not what the district court defined as *acts involving murder*. Any other reading would render the interrogatory purposeless; if it asked about "acts involving murder," it would not have any implications for the defendants' convictions or sentences. The district court correctly concluded that the jury found that the conspiracy involved actual murder, as required for the enhanced sentencing provision.

[36] **[37]** As the government suggests, one could understand the defendants to argue that the jury verdict form was so *unclear* that the jury was confused about what it was being asked, but that challenge is unpreserved and meritless at this late stage. A challenge to jury instructions or the verdict form after the jury has delivered its verdict is too late. *United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998). None of the defendants raised the ambiguity on which they now rely before jury deliberations. Walton, in an objection the other defendants joined, specifically ***1182** argued that the verdict form ought to ask whether the conspiracy included "acts involving murder." We explain in the next section why the district court did not err when it rejected Gumbs's requested verdict form, but his objections to the proposed verdict forms did not rely on the difference between actual and inchoate murder. So

the defendants never adequately brought the problem to the district court's attention, and our review is for plain error. *Id.*

[38] "Meeting all four prongs [of the plain-error test] is difficult, as it should be," *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423 (citation and internal quotation marks omitted), and the defendants do not even attempt to establish that the district court plainly erred in a way that prejudiced them. The defendants offer no caselaw that establishes that it was "obvious or clear under current law," *Candelario*, 240 F.3d at 1309 (citation and internal quotation marks omitted), that the verdict form should have been phrased differently or that a specific clarifying instruction was necessary. Nor have they established a "reasonable probability," *United States v. Shelton*, 400 F.3d 1325, 1331–32 (11th Cir. 2005), that the jury would have found that the conspiracy involved only attempted murder or a conspiracy to commit murder. And the record was replete with evidence of actual murders by members of the Gangster Disciples. Because of these deficiencies, we need not address the other elements of the plain-error test.

H. Gumbs's Challenges to His Jury Verdict Form and Conviction Fail.

[39] Gumbs contends that the district court should have used his preferred verdict form and that the failure to do so resulted in his being convicted on legally insufficient evidence. Glass agrees that the district court should have given Gumbs's proposed instructions. Gumbs's proposed verdict form asked whether he was guilty of "conspiracy to commit murder" and required the jury to name the intended victim of

the murder if it answered affirmatively. Gumbs contends that there was no evidence from which the jury could have reasonably found that he was involved in the Gangster Disciples conspiracy before the murders alleged in the indictment took place. He argues that a properly instructed jury would not have found that he was part of a conspiracy in which actual murder was involved, so his sentencing guideline calculation was erroneous. We disagree.

The district court acted within its "wide discretion" when it rejected Gumbs' proposed verdict form and jury instructions. *Bhogaita*, 765 F.3d at 1285. For the enhanced sentencing finding, Gumbs wanted the district court to ask the jury whether Gumbs was guilty of "conspiracy to commit murder." That question could have easily misled the jury to believe that the *object* of the conspiracy had to be murder, when the relevant question was whether Gumbs was vicariously liable for a murder that was part of the pattern of racketeering activity that supported the conspiracy in which he was involved. *See* 18 U.S.C. §§ 1962(c), 1963(a). Moreover, Gumbs identifies no precedent supporting his request that the jury *name* the victim murdered. And as we have explained above, the district court gave accurate instructions and provided a verdict form for which no plain error has been established.

[40] Gumbs has also not established that there was insufficient evidence that he was a member of a conspiracy that involved murder. He maintains that two key pieces of evidence tying him to the conspiracy—the wiretapped conversations between him and Walton and the text ***1183** messages to his girlfriend in which he described himself as a "gd hitman"—took place *after* the murders alleged in the indictment. But this

fact does not allow us to set aside the jury's verdict. Even on its own terms, Gumbs's argument does not make sense; a jury could fairly infer that if Gumbs expressed regret for being a hitman for the Gangster Disciples in August 2015, then he was already a Disciple only a month earlier during the July 2015 wave of violence. And other evidence presented at trial could support the finding that he was in the Gangster Disciples earlier than he argues. Quantavious Hurt testified that he knew Gumbs was part of the gang, and Gumbs joined the police force with what at least one witness identified as preexisting Gangster Disciples tattoos.

I. Clayton's Sentence Was Not Based on Clearly Erroneous Facts.

Clayton argues that we should vacate his sentence because it rested on clearly erroneous findings of fact. The district court explained that his 33-year prison sentence was "appropriate" because of the violent acts that the Gangster Disciples committed and because Clayton "was a high-ranking official" in the organization and had a role "of encouragement, recruitment, and applauding acts including murder that took place by others." Clayton argues that this description of his role was clearly erroneous because he did not personally recruit certain members of the Hate Committee nor encourage the Central Avenue murders in advance. But the district court committed no clear error.

Clayton's objection to the description of his role as "a high-ranking official" who was involved in recruiting criminals and encouraging murder is frivolous. Clayton admits that he was at one time "Chief Enforcer" for the Gangster Disciples—and indeed

"*Enforcer of the Year"* in 2013. Ample testimony supported a finding that this role required violence, up to murder, to enforce gang discipline. Clayton also misses the mark when he argues that he did not initially recruit the individuals the prosecution mentioned at sentencing and did not know about the Central Avenue murders in advance. Wiretap evidence establishes that Clayton consistently held himself out as responsible for Hate Committee activities and for recruiting younger members of the Gangster Disciples to new roles in the gang. Clayton called Glass, the leader of the Hate Committee, his "right hand guy." He referred to the younger members of the Hate Committee as "KK shooters," a reference to his nickname, and he boasted that he "brought the shooters to the ... eastside." Likewise, Clayton's argument that the prosecution did not know exactly when he was Chief Enforcer is irrelevant to the findings underpinning his sentence; the district court did not rest its sentencing on a finding that Clayton was Chief Enforcer at a particular time.

J. Sufficient Evidence Supported Glass's Racketeering Conviction.

[41] Glass challenges his conviction for the racketeering conspiracy on the ground that the jury acquitted him of the only predicate racketeering activities for which he was indicted. *See United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (explaining that a racketeering conviction requires finding at least "two predicate racketeering acts"). He argues that because the jury acquitted him of the murder of Robert Dixon and for possessing drugs with intent to distribute them—the only

crimes that were predicate "racketeering activities"—there must have been insufficient evidence for his conviction for the racketeering conspiracy. We disagree.

***1184** [42] The jury was instructed that to convict on the racketeering conspiracy, it had to find two predicate acts on the list of several acts alleged in count one, which included many more crimes besides those specifically charged as traceable to Glass. We presume the jury followed this instruction. *See United States v. Kennard*, 472 F.3d 851, 858 (11th Cir. 2006). It could have relied on any two of the acts described in count one. And settled precedent bars Glass's argument that there must not have been sufficient evidence for count one based on acquittal on the other counts. "[I]nconsistency between verdicts on different counts of the indictment does not vitiate convictions on those counts of which the defendant is found guilty." *United States v. Rosenthal*, 793 F.2d 1214, 1229 (11th Cir. 1986).

K. Glass's Sentence Is Reasonable.

Glass challenges his prison sentence of life-plus-ten-years as procedurally and substantively unreasonable. He argues that his sentence was procedurally unreasonable because the district court miscalculated the guideline range, based his sentence on clearly erroneous factual findings, and failed to consider the statutory factors for sentencing. He argues that his sentence is substantively unreasonable because the district court impermissibly weighed the statutory sentencing factors and sentenced him unfairly compared to his codefendants. Each challenge fails.

1. Procedural Reasonableness

[43] [44] Glass reiterates, in the form of a guideline challenge, the supposed *Apprendi* argument that we have already rejected. A sentence is procedurally unreasonable if the district court miscalculated the relevant guideline range for a defendant. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Glass argues that the district court miscalculated his guideline range because it misread the verdict form to mean that the jury found the conspiracy involved actual, not inchoate, forms of murder. We reject this argument for the reasons we explained in Part III.G. He also argues that the district court must have relied on the Dixon murder to calculate his base offense level as corresponding to that of murder, but he misunderstands the record: the district court based his offense level on his conviction on count one for a conspiracy that "involve[d] murder," regardless of the Dixon killing.

[45] Aside from his guideline challenge, Glass argues that the district court sentenced him based on clearly erroneous factual findings. *See id.* (explaining that a sentence can be procedurally unreasonable if it is "select[ed] based on clearly erroneous facts"). Glass argues that the district court clearly erred when it said that he was the person in the case most responsible for "a trail of murder, mayhem, maiming and destruction of life" and found that he "physically murder[ed] Robert Dixon" and "directed [the Hate Committee's] teenage assassins to go out and simply randomly shoot, murder and maim people who were doing nothing other than just going about their lives."

None of these findings is clearly erroneous. Glass's only response to the findings is that he did not "corrupt[ ] an entire generation of teenagers" but rather "provided encouragement and support to local youth, including [Quantavious] Hurt." This assertion does not establish that the district court clearly erred. Ample evidence supported the finding that Glass led the Hate Committee that perpetrated the Central Avenue murders: multiple witnesses so identified him. Glass's assertion that he was a positive influence on local youth is belied by the uncontradicted evidence that ***1185** he, for example, encouraged the Hate Committee to *continue* the Central Avenue crimes after their first sortie and that he helped secure the weapons for the crimes. So it was not clearly erroneous to find that he was uniquely responsible for the violence and "directed" the Hate Committee to commit violent crimes.

[46] Although Glass asserts that he was "disappointed" to learn that Hurt killed DeMarco Franklin, Hurt testified that Glass told him that he did what he was "supposed to do." In any event, nothing contradicts Hurt's testimony that Glass ordered that *someone* engage in a reprisal killing after Hurt's dispute with the Bloods at the gas station. And notwithstanding Glass's acquittal of Dixon's murder under Georgia law, a district court is entitled to rely on acquitted conduct at sentencing if it finds that the conduct occurred based on a preponderance of the evidence. *United States v. Faust*, 456 F.3d 1342, 1347 (11th Cir. 2006). Multiple witnesses testified that Glass killed Dixon. Moreover, the jury found that Glass "cause[d] the death of Robert Dixon" in violation of federal law.

[47] [48] Glass's assertion that the district court failed to consider his individual characteristics is likewise meritless. *See* 18 U.S.C. § 3553(a)(1) (requiring that the district court consider "the history and characteristics of the defendant"). Glass complains that the district court did not "mention[his] personal history and characteristics," such as his difficult childhood. But the district court need not discuss each factor under section 3553(a). *See United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008). And the district court stated that it *did* consider Glass's history and characteristics, presumably including the very facts he now cites, in selecting his sentence.

2. Substantive Reasonableness

[49] Glass argues that his sentence is substantively unreasonable because it relied solely on one factor—protecting the public—in neglect of all other sentencing factors and because his sentence is much harsher than those of his codefendants. He also reiterates his argument that his sentence could not be based on the murder of Robert Dixon. We reject Glass's substantive challenge.

[50] [51] Our review is highly deferential. *United States v. Irey*, 612 F.3d 1160, 1191 (11th Cir. 2010) (en banc). A district court has discretion to assign relative weight to different sentencing factors, and the defendant has the "burden of showing that the sentence is unreasonable in light of the entire record, the [section] 3553(a) factors, and the substantial deference afforded sentencing courts." *Fox*, 926 F.3d at 1282 (citation omitted). Glass has not satisfied this heavy burden.

As we explained above, the district court did not clearly err when it found that Glass led the murderous Hate Committee and killed Robert Dixon. Glass received a harsher sentence than other leaders of the gang and other murderers, but he was the only defendant who combined leadership in the Gangster Disciples with personal commission of murder. It was not an abuse of discretion to give him the harshest sentence.

L. Sufficient Evidence Supports the Finding that Walton Intended to Cause Death or Serious Bodily Harm in the Frederick Carjacking.

[52] Walton argues that his carjacking conviction and related firearm conviction must be vacated because there was insufficient evidence that he intended for Frederick to be seriously harmed or killed in the plot to rob her at gunpoint. The carjacking statute prohibits "tak[ing] a motor vehicle" ***1186** involved in interstate commerce "with the intent to cause death or serious bodily harm." 18 U.S.C. § 2119. Walton concedes that he conspired to rob Frederick, but he denies that the prosecution proved that he intended to "cause death or serious bodily harm." But "drawing all reasonable inferences and credibility choices in the Government's favor," *Browne*, 505 F.3d at 1253, we conclude that sufficient evidence supported the jury's finding that Walton had the requisite intent for his conviction.

[53] The prosecution can prove the "intent to cause death or serious bodily harm," 18 U.S.C. § 2119, by proving that when the defendant demanded or took control of the car, he "possessed the intent to seriously harm or kill the driver *if necessary to steal the car*." *Holloway v. United States*, 526 U.S. 1, 12, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999) (emphasis added). It is not necessary that the defendant expect or desire that serious harm or death would result. *Id.* at 7, 119 S.Ct. 966. Frederick was robbed without being seriously harmed or killed, so the prosecution had to prove that the conspirators intended that she be seriously harmed or killed *if*, counterfactually, it had been necessary.

Walton acknowledges that he and Dickerson planned to bring a gang member who did not know Frederick to rob her at gunpoint, but he argues that the jury could not have reasonably found that his intent was that the robber use that gun if necessary. Dickerson testified that Walton assured him that he would use his authority as Governor to ensure that Frederick would not be harmed. And Walton argues that a robber who intended to use deadly force to ensure the success of the robbery would have shot Frederick when she attacked him. Both Frederick and Dickerson testified that they thought the robber would have used his gun if he had not been instructed that he could not.

[54] Pointing a gun at someone and demanding money is the kind of evidence on which prosecutors may rely to prove the mens rea for carjacking. *See, e.g.*, *United States v. Douglas*, 489 F.3d 1117, 1128 (11th Cir. 2007), *abrogated in part on other grounds by Perry v. New Hampshire*, 565 U.S. 228, 237–38, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012);

United States v. Diaz, 248 F.3d 1065, 1097–98 (11th Cir. 2001). And drawing all inferences against Walton, as we must, *Browne*, 505 F.3d at 1253, the jury's verdict was reasonable, even if it was "not inevitable," *id.* A jury was not required to credit the testimony of Dickerson about the importance of protecting his girlfriend when he orchestrated a scheme to have her robbed at gunpoint. Dickerson's testimony was probative of Walton's intent only if the jury believed both Dickerson's account of what Walton said *and* that Walton told Dickerson the truth.

Nor is Frederick's resistance—or the lack of a more forceful response to it—decisive. The robber knew that Dickerson was in on the plan, so he knew that Dickerson would not assist Frederick, who was not as much of a threat by herself. He was also willing to use enough force to kick her out of the car while it was moving, suggesting he did not share Dickerson's supposed concern for Frederick's safety. A jury could have reasonably found that the robber declined to use force sufficient to seriously harm or kill Frederick only because it was unnecessary, not because he was told he could not use that force.

M. Caldwell's Conviction Under the Armed Career Criminal Act and His Sentence Must Be Vacated.

[55] After briefing closed in this appeal, we granted Caldwell permission to file a supplemental brief based on intervening precedent to challenge his conviction ***1187** for using a firearm "during and in relation to a crime of violence, that is[,] the robbery of E[ric] W[ilder]." Count 17 of the indictment contemplated that the offense of

attempted Hobbs Act robbery, 18 U.S.C. § 1951, is a "crime of violence" within the meaning of the Armed Career Criminal Act, *id.* § 924(c)(3)(A). But the Supreme Court recently held in *Taylor* that attempted Hobbs Act robbery is not a "crime of violence" under section 924(c). 142 S. Ct. at 2020. So we must vacate Caldwell's conviction. We remand for the district court to resentence Caldwell for his remaining counts of conviction. *See United States v. Fowler*, 749 F.3d 1010, 1017 (11th Cir. 2014).

IV. CONCLUSION

We **VACATE** Caldwell's conviction on count 17 of the indictment and his sentence and **REMAND** for resentencing. We **AFFIRM** all the other convictions and sentences.

APPENDIX B

United States District Court
Northern District of Georgia
Atlanta Division

1:16-CR-145 TWT

United States of America

v.

Kevin Clayton

May 14, 2019

Transcript of Jury Instructions
May 14, 2019

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THE COURT: All right. Nobody will be allowed to enter or leave the courtroom while I'm charging the jury. So anybody that thinks they may need to leave, need to leave now.

All right. We're ready for the jury.

(Jury present at 1:56 p.m.)

THE COURT: Members of the jury: I'm now going to instruct you on the rules of law that you must use in deciding this case. While I'm giving you these instructions, I suggest to you that you not take notes. After I finish, I will have the court reporter type up a verbatim transcription of these

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instructions, and you will have that transcript with you in the jury room for your use if you wish to use it. So for now, I suggest that you just concentrate on listening to the instructions as I give them to you orally.

After I have completed these instructions, you will go to the jury room and begin your discussions -- what we call deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendants guilty beyond a reasonable doubt.

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendants or the Government.

You must follow the law as I explain it -- even if you do not agree with the law -- and you must follow all of my instructions as a whole.

You must not single out or disregard any of the Court's instructions on the law.

The Indictment or formal charges against a Defendant isn't evidence of guilt.

The law presumes every Defendant is innocent. The Defendant does not have to prove his innocence or produce any evidence at all. A Defendant does not have to testify; and if a Defendant chose not to testify, you cannot consider that in any way while making your decision. The Government must prove guilt beyond a

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reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any reasonable doubt concerning a Defendant's guilt. A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs.

If you are convinced that a Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in the case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

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Your own recollection and interpretation of the evidence is what matters. In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth?

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Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to accurately observe the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence? You should also ask yourself whether there was evidence that a witness testified falsely about an important fact, and ask whether there was evidence that at some other time a witness said or did something or didn't say or do something that was different from the testimony the witness

gave during this trial. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

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To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter. But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

You must consider some witnesses' testimony with more caution than others. In this case, the Government has made a plea agreement with Co-Defendants in exchange for testimony. Such "plea bargaining," as it's called, provides for the possibility of a lesser sentence than the Co-Defendant would normally face. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it. But a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government. So while a

witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses. And the fact that a witness has pleaded guilty to

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an offense isn't evidence of the guilt of another person. As I said, you must consider some witnesses' testimony with more caution than others. For example, a witness may testify about events that occurred during a time when the witness was using addictive drugs, and so the witness may have an impaired memory of those events. So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses. Now, with respect to the Defendants on trial here, the Indictment charges ten separate crimes, called "counts," against the Defendants. Each count has a number. You will be given a copy of the Indictment to refer to during your deliberations. Count One charges that the Defendants knowingly and willfully conspired to participate in a racketeering conspiracy. Counts Eight, Nine, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one and Twenty-two charge that one or more of the Defendants committed what are called "substantive offenses." I will explain the law governing those substantive offenses in a moment. But first note that the Defendants are not charged in Count One with committing a substantive offense. They are

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charged with conspiring to commit that offense. In general, a conspiracy is an agreement with someone else to do something which, if actually carried out, would amount to another federal crime or offense. I will more particularly define the conspiracy charged in this Indictment in a moment.

Count One of the Indictment charges the Defendants Alonzo Walton, Kevin Clayton, Donald Glass, Perry Green, Vancito Gumbs, and Antarious Caldwell with RICO conspiracy. It's a federal crime for anyone associated with an enterprise whose activities involve or affect interstate commerce to participate in conducting the activities of the enterprise through a pattern of racketeering activity.

As I earlier instructed you, a "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the Indictment were members of the plan or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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A Defendant can be found guilty only if all the following facts are proved beyond a reasonable doubt: One, the Defendant was associated with the enterprise; Two, that

two or more people agreed to try to accomplish an unlawful plan, namely, to engage in a pattern of racketeering activity as charged in the Indictment; Three, that the affairs of the enterprise affected interstate or foreign commerce; Four, that when the Defendant joined in the agreement, he specifically intended either to personally participate in committing at least two other acts of racketeering, or else to participate in the enterprise's affairs, knowing that other members of the conspiracy would commit at least two other acts of racketeering and intending to help them as part of a pattern of racketeering activity.

An "enterprise" includes any group of people associated for a common purpose of engaging in a course of conduct. The Government may prove the existence of such an enterprise by evidence of an ongoing organization, formal or informal, and by evidence that the various associates functioned as a continuing unit.

A person is "associated with" an enterprise when he has an awareness of the enterprise's general existence. So the Government must prove beyond a reasonable doubt that the

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Defendant was aware of the general existence of the enterprise described in the Indictment.

A defendant conducts or participates in the affairs of the enterprise when he agrees that a conspirator, including perhaps himself, would intentionally perform acts, functions or duties which are necessary to or helpful in the operation of the enterprise, or that a conspirator would have some part in directing the enterprise's

affairs. However, the Government need not prove that the conspirator would exercise significant control over or within the enterprise. The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement or that they directly discussed between themselves the details of the scheme and its purpose or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing any unlawful objective.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators. If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan and willfully joined in the plan on at least one

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occasion, that's sufficient for you to find the Defendant guilty. But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator. If you find that there is a conspiracy, you may consider the acts and statements of any other member of the conspiracy during and in the furtherance of the conspiracy as evidence against a defendant whom you have found to be a member of it. When persons enter into a conspiracy, they become agents for each other, so that the act

or statement of one conspirator during the existence of and in furtherance of the conspiracy is considered the act or statement of all the other conspirators and is evidence against them all.

"Interstate or foreign commerce" simply means business, trade, or movement between one state and another or between the United States and another country.

To show that the affairs -- let me start that again. To show that the affairs of the enterprise affected interstate or foreign commerce, the Government need only prove beyond a reasonable doubt either that the activities of the enterprise considered in their entirety had some minimal

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effect on interstate or foreign commerce, or that the enterprise was "engaged in" interstate or foreign commerce. It is not necessary for the Government to prove that the individual racketeering acts themselves affected interstate or foreign commerce or that each Defendant engaged in, or his activities affected, interstate or foreign commerce. Rather, it is the enterprise and its activities considered in their entirety that must be shown to have had that effect.

On the other hand, this effect on interstate or foreign commerce may also be established through the effect caused by the individual racketeering acts. Moreover, it is not necessary for the Government to prove that the Defendant knew that the enterprise would affect interstate or foreign commerce.

A "pattern of racketeering activity" requires at least two acts of "racketeering activity" having been committed within ten years of each other. At least two of the

predicate offenses must be connected by some common scheme, plan, or motive so as to be a pattern of criminal activity and not merely separate, isolated or disconnected acts. Two racketeering acts may be "connected" even though the specific conduct in each predicate offense is dissimilar or the predicate offenses are not directly related to each other, provided that the racketeering acts are related to the same enterprise.

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The Government must also show continuity of the racketeering acts, that is, that they extended over a period of time or that the racketeering activity is part of a long-term association that exists for criminal purposes, or that the racketeering activity is shown to be the regular way of conducting the affairs of the enterprise.

In this case, the Indictment alleges that the members and associates of the conspiracy committed seven different types of racketeering activity: One, acts involving murder, which includes murder, attempted murder, and/or conspiracy to murder; two, robbery and/or attempted robbery; three, extortion and/or attempted extortion; four, arson; five, drug offenses, including drug possession with the intent to distribute and/or conspiring to do so; six, fraud, including wire fraud and/or bank fraud; and seven, obstruction of justice.

I will now discuss each of these types of racketeering activities and the laws associated with them.

With regard to acts involving murder, under Georgia law, a person commits the offense of murder when he unlawfully and with malice aforethought causes the

death of another human being. To constitute malice murder, the homicide must have been committed with malice. Legal malice is not necessarily ill will or hatred, but it is the unlawful intention to kill. If a killing is done with malice, no

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matter how short a time the malicious intent may have existed, such killing constitutes murder. Malice can be "express" or "implied." Express malice is the deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Implied malice occurs when no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. A person also commits the offense of murder when, in the commission or attempted commission of a felony, he causes the death of another human being. In such a case, malice is not required. It is not necessary, therefore, for the Government to prove that the Defendant or someone he aided and abetted had any premeditated design or intent to kill the victim. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant or someone he aided or abetted knowingly and willfully committed or attempted to commit another felony and that the killing of the victim occurred during, and as a consequence of, the commission of that felony.

Conspiracy to commit murder occurs where a Defendant knowingly and willfully joins in an unlawful plan to accomplish a murder and any conspirator does any overt act to effect the object of the conspiracy.

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Georgia law defines robbery as the knowing and willful taking of property from another person, or from the immediate presence of another, by the use of force; or by intimidation, such as threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another.

Extortion, under Georgia law, is the unlawful obtaining of property from another person by threatening to inflict bodily injury on anyone; threatening to commit any other criminal offense; threatening to accuse someone of a criminal offense; or threatening to bring about a strike, boycott, or other collective unofficial action if the property sought is not received for the benefit of the group in whose interest the defendant purports to act. It is not a defense that the property obtained was honestly claimed as restitution or compensation.

A person commits arson under Georgia law when, by means of fire or explosive, he knowingly damages or causes another to damage any vehicle that is insured against loss or damage, without the consent of both the insurer and the insured.

A person commits the crime of possessing with the intent to distribute a controlled substance under federal law when he possesses a controlled substance and plans to deliver possession of the substance to someone else. As long as the

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defendant knows the substance is a controlled substance, he does not need to know exactly which controlled substance it is. As long as the defendant plans to deliver possession to someone else, he does not need to expect anything of value in

exchange.

To conspire to distribute controlled substances requires that two or more people agreed in some way to accomplish a shared and unlawful plan to possess at least one of the controlled substances listed in the Indictment, and the defendant knowingly and willfully joined in the plan. I instruct you that cocaine and marijuana are each controlled substances.

Wire fraud under federal law is the knowing participation, with the intent to defraud, in a scheme to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises about a material fact.

A "material fact" is an important fact that a reasonable person would use to decide whether to do something or not.

To constitute wire fraud, the offense must also involve the interstate transmission of wire communications. Wire communications include transmission by Internet, cellular service, or telephone. The wire transmission does not itself have to be false or fraudulent, as long as the

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wire transmission is sent as part of the scheme to defraud.

Bank fraud is, with the intent to defraud, knowingly carrying out a scheme to obtain money under the custody or control of a federally insured bank using false or fraudulent pretenses, representations, or promises about a material fact.

Obstruction of justice occurs under federal law when an individual knowingly uses intimidation, physical force or the threat of force to hinder, or corruptly persuades

another person or attempts to do so with the intent to delay or prevent communication to a federal law enforcement officer information relating to the commission or possible commission of a federal crime.

A person acts "corruptly" if he acts with the purpose of wrongfully impeding the due administration of justice.

An attempt to commit an act requires the knowingly intent to commit the crime and strongly corroboration of that intent through the taking of a substantial step toward committing the crime. A "substantial step" is an important action leading up to committing of an offense, not just an inconsequential act. It must be more than simple preparing. It must be an act that would normally result in committing the offense. It is not necessary that the defendant participated

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in two racketeering acts himself. Instead -- excuse me. Let me start that again. Instead, in proving a racketeering conspiracy, as alleged in Count One, the Government must prove that the defendant agreed to either commit two acts of racketeering or agreed that members of the conspiracy would commit at least two acts of racketeering. It is therefore enough that the defendant agreed that other gang members would commit at least two acts of racketeering, since supporters of the criminal activity can be equally responsible as the perpetrators of criminal activity.

So long as they share a common purpose, conspirators are liable for the acts of their

co-conspirators. Thus, a conspiracy may exist even if a particular conspirator does not agree to commit or facilitate every part of the substantive offense. It is only required that the defendant know the general nature and common purpose of the conspiracy and that the conspiracy extends beyond his individual role.

The Indictment alleges multiple types of racketeering activity that the Defendants agreed would be committed. You do not need to find that the Defendants agree to all these types of racketeering activity, but only that two racketeering acts of any of those types would be committed.

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However, to convict the Defendant in Count One, you must be unanimous as to which type or types of predicate racketeering activity the Defendant agreed would be committed; for example, at least two acts involving murder, or at least two acts involving robbery, or two different acts of any racketeering activity listed in the Indictment would all be sufficient, as long as you are unanimous as to which types.

You will also need to decide specific questions about certain types of racketeering activity, namely, acts involving murder or drug trafficking. For these racketeering activity types, you must unanimously decide whether the Defendant joined or remained in the RICO conspiracy knowing that the enterprise engaged in this type of racketeering activity.

The Indictment alleges a series of overt acts committed in furtherance of the racketeering activity. However, the Government is not required to prove any overt

act for any Defendant to be guilty of the conspiracy. Further, it is not necessary that the Government prove that a particular Defendant was a member or associate of the conspiracy from its beginning. Different persons may become members or associates of the conspiracy at different times.

Ladies and gentlemen, it's possible to prove a Defendant guilty of a crime even without evidence that the

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Defendant personally performed every act charged. Ordinarily, any act a person can do may be done by directing another person, or "agent," or it may done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime. A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate. But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime, not just proof that the Defendant was simply present at the scene of a crime or knew about it. In other words, you must find beyond a reasonable doubt that a Defendant was a willful participant and not merely a knowing spectator.

Ladies and gentlemen, Count Eight charges the Defendant Alonzo Walton with aiding and abetting a carjacking. It's a federal crime for anyone to take a motor

vehicle that has been transported, shipped, or received in interstate or foreign commerce from or in the presence of

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another person by force and violence or by intimidation with the intent to cause death or serious bodily harm. The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt: One, the Defendant took, or aided and abetted the taking of, a motor vehicle from or in the presence of another; Two, the Defendant, or the person he aided and abetted, did so by force and violence or by intimidation; Three, the motor vehicle had previously been transported, shipped, or received in interstate or foreign commerce; and, Four, the Defendant or the person he aided and abetted intended to cause death or serious bodily harm when the motor vehicle was taken.

"By force and violence" means the use of actual physical strength or actual physical violence. To take "by intimidation" is to say or do something that would make an ordinary person fear bodily harm. It doesn't matter whether the victim in this case actually felt fear.

To "transport, ship, or receive" a vehicle in interstate or foreign commerce means to move the vehicle between any two states or between the United States and a

foreign country.

It doesn't matter whether the Defendant knew that the vehicle had moved in interstate or foreign commerce. The Government only has to prove that the vehicle actually moved in interstate or foreign commerce.

To decide whether the Defendant "intended to cause death or serious bodily harm," you must objectively judge the Defendant's conduct as shown by the evidence and from what someone in the victim's position might reasonably conclude.

The Government contends that the Defendant or someone he aided and abetted intended to cause death or serious bodily harm if the victim refused to turn over the car. If you find beyond a reasonable doubt that the Defendant or someone he aided and abetted had that intent, then the Government has proved this element of the crime.

Count Nine charges the Defendant Alonzo Walton with aiding and abetting the using or carrying a firearm in furtherance of the carjacking charged in Count Eight. It's a separate federal crime to use or carry a firearm during and in relation to a violent crime. The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt: One, that the Defendant committed or aided and abetted the commission of the carjacking charged in Count

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Eight of the Indictment; and, Two, that during and in relation to that crime, the Defendant knowingly used or carried a firearm or aided and abetted someone in doing so, as charged in the Indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm by brandishing or displaying it in some fashion. To "carry" a firearm is to have the firearm on one's person or to transport the firearm, such as in a vehicle, from one place to another while committing the violent crime. To use or carry a firearm "in relation to" a crime means that the firearm had some purpose or effect with respect to the crime and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime.

If you find the Defendant guilty of using or carrying a firearm during or in relation to a crime of violence, you must also determine if the firearm was brandished during and in relation to that crime of violence. To "brandish" a firearm means to show all or part of the

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firearm to another person or otherwise make another person aware of the firearm in order to intimidate that person. The firearm need not be directly visible to the other person.

A defendant who aids and abets the crime of using or carrying of a firearm during and in relation to a violent crime can be found guilty even if the Defendant did not personally use or carry the firearm. But to be found guilty on this basis, the Defendant must have actively participated in, or aided and abetted, the violent crime with advance knowledge that another participant would use or carry a firearm during and in relation to that violent crime. "Advance knowledge" means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the violent crime. The Defendant chose to continue the Defendant's participation if he learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

The Defendant is guilty of aiding and abetting the brandishing of a firearm if he had advance knowledge that another participant in the crime would display or make the presence of a firearm known for purposes of intimidation. The Defendant need not have had advance knowledge that a participant would actually brandish the firearm. This

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requirement is satisfied if the Defendant knew that a participant intended to brandish a firearm to intimidate if the need arose.

In some cases, it's a crime to attempt to commit an offense, even if the attempt fails. In this case, the Defendant Antarious Caldwell is charged in Count Sixteen with attempting to obtain someone else's property by robbery and in doing so to obstruct,

delay, or affect interstate commerce. The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt: One, that the Defendant knowingly acquired or attempted to acquire someone else's personal property; Two, the Defendant took or attempted to take the property against the victim's will by using actual or threatened force or violence or causing the victim to fear harm; and, Three, the Defendant's actions obstructed, delayed, or affected or had the potential to obstruct, delay, or affect interstate commerce.

An attempt to commit the offense additionally requires that both of the following facts be proved beyond a reasonable doubt: First, that the Defendant knowingly intended to

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commit the crime of robbery as charged; and, Second, the Defendant's intent was strongly corroborated by his taking a substantial step toward committing the crime.

"Property" includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce, but it must prove that the natural consequences of the acts described in the Indictment would be to somehow delay, interrupt, or affect interstate commerce. I instruct you that if you find that the object of the robbery

was to rob or attempt to rob a drug dealer of drugs or drug proceeds, the third element, requiring some effect on interstate commerce, is satisfied.

A "substantial step" is an important action leading up to committing of an offense, not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in committing the offense.

Count Seventeen charges Defendant Antarious

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Caldwell with aiding and abetting the using or carrying a firearm in furtherance of the attempted robbery charged in Count Sixteen. As I earlier instructed, it's a separate federal crime to use or carry a firearm during and in relation to a violent crime. The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt: One, that the Defendant committed the attempted robbery charged in Count Sixteen of the Indictment; and, Two, that during and in relation to that crime, the Defendant knowingly used or carried a firearm or aided and abetted someone in doing so, as charged in the Indictment.

The definitions of the terms "firearm," "use," "carry," "brandish" and "in relation to" are those that I earlier provided in relation to Count Nine, above, and I refer you there.

If you find the Defendant guilty of using or carrying a firearm during and in relation to a crime of violence, you must then determine whether the firearm was discharged, even accidentally.

To aid and abet the possession or carrying of a firearm that was discharged, the Defendant need not have advance knowledge that the discharge would occur.

Ladies and gentlemen, I'm about two-thirds of

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the way through, and I think maybe we all should take a break. During the break, don't discuss the case with anyone. Don't allow anyone to discuss the case in your presence. Don't even begin discussing the case among yourselves. And you're excused for 20 minutes, and I'll finish the charge at that time.

(Jury not present at 2:51 p.m.)

THE COURT: Court's in recess until ten after 3:00.

(Recess taken at 2:51 p.m.)

(Jury not present at 3:15 p.m.)

THE COURT: We're ready for the jury.

(Jury present at 3:16 p.m.)

THE COURT: Ladies and gentlemen, Count Eighteen charges the Defendant Donald Glass with committing, or aiding and abetting another in committing, a violent crime in aid of racketeering -- in this case, murder. A Defendant can be found guilty of the offense only if all of the following facts are proved beyond a reasonable doubt: One, that there existed an enterprise engaged in racketeering activity, as charged in the Indictment; Two, that the affairs of the enterprise affected interstate or foreign commerce;

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Three, that on or about the date charged in the count, the Defendant committed the murder or aided and abetted another individual in the commission of the murder as charged; and, Four, that the Defendant did so for the purpose of increasing or maintaining his status in the enterprise. As I previously instructed, with regard to murder under Georgia law, a person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. "Express malice" is the deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. "Implied malice" occurs where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

With regard to this count, the term "enterprise" is the same as I previously defined in Count One. You must also find that the enterprise engaged in, or the activities of the enterprise affected interstate commerce. To satisfy the showing that the enterprise was engaged in or affected interstate commerce, the Government need only prove beyond a reasonable doubt either that the activities of the enterprise considered in their entirety had some minimal effect on interstate commerce, or that the enterprise was "engaged in"

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interstate commerce. It is not necessary for the Government to prove that the specific act of violence charged in Count Eighteen itself affected interstate

commerce. Rather, it is the enterprise and its activities considered in their entirety that must be shown to have that effect.

You must also find that the enterprise engaged in "racketeering activity." I have defined that term with regard to Count One, and you should apply those instructions here.

In order to establish that the Defendant committed, or aided and abetted in committing, a crime of violence for the purpose of maintaining or increasing his position within the enterprise, the Government must prove that the Defendant's general purpose in committing the crime was to increase or maintain his position within the enterprise. However, self-promotion need not have been the Defendant's only, or even his primary concern, if the crime was committed as an integral aspect of membership in the enterprise. If the Defendant committed the violent crime in furtherance of that membership, or because it would enhance his position or prestige within the enterprise, then the third element I referred to above is satisfied, even if he also had some personal motive for committing the crime. These examples are by way of illustration and are not exhaustive.

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It's a separate federal crime to carry or use --excuse me. Let me start that again. It's a separate federal crime to use or carry a firearm during and in relation to a violent crime. Defendant Donald Glass is charged with this crime in Count Nineteen. The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt: One, that the Defendant committed, or aided

and abetted the commission of, the violent crime charged in Count Eighteen of the Indictment; and, Two, that during and in relation to that violent crime, the Defendant, or someone he aided and abetted, knowingly used or carried a firearm, as charged in the Indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm by brandishing or displaying it in some fashion. To "carry" a firearm is to have the firearm on one's person or to transport the firearm, such as in a vehicle, from one place to another, while committing the

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violent crime. To use or carry a firearm "in relation to" a crime means that the firearm had some purpose or effect with respect to the crime, and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime. The Indictment charges that the Defendant, or someone he aided and abetted, knowingly carried or used a firearm during and in relation to a crime of violence. The Government can meet its burden of proof if it proves that the Defendant or another individual, aided and abetted by the Defendant, either carried or used a firearm during or in relation to a crime of violence. It is not necessary for the Government to prove that the Defendant or someone aided and abetted by the Defendant both used and carried a firearm. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant or someone aided and

abetted by the Defendant either used or carried a firearm; but, in that event, in order to return a verdict of guilty, you must unanimously agree that the Defendant used, or aided and abetted the use of a firearm; or carried, or aided and abetted in the carrying of a firearm. If you find the Defendant guilty of using or carrying a firearm during and in relation to a crime of violence, you must then determine whether the firearm was

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discharged, even accidentally. To aid and abet the possession or carrying of a firearm that was discharged, the Defendant need not have advance knowledge that the discharge would occur.

Ladies and gentlemen, Title 18 of the United States Code, Section 924(j), makes it a crime to cause the death of another person through the use of a firearm during and in relation to a crime of violence. Defendant Donald Glass is charged with this crime in Count Twenty as it relates to the use of a firearm charged in Count Nineteen.

If you find the Defendant not guilty of violating Section 924(c), as charged in Count Nineteen, you should not consider Count Twenty.

If you find the Defendant guilty of Count Nineteen, as explained above, you must then and only then proceed to a determination of whether the Defendant is also guilty of violating Section 924(j), which makes it a separate crime to violate 924(c) and, in the course of that offense, to cause the death of a person through the use of a firearm, if the death of that person would constitute murder pursuant to another federal statute, Title 18, United States Code, Section 1111.

I instruct you that murder as a violent crime in aid of racketeering qualifies as murder under Title 18, United States Code, Section 1111.

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A defendant can be found guilty of violating Section 924(j) only if the following fact is proved beyond a reasonable doubt: One, that the defendant, or someone he aided and abetted, caused the death of a person, as charged in the Indictment, through the use of a firearm; and, Two, that the death occurred as a consequence of and while the defendant or another individual aided and abetted by the defendant was knowingly and willfully engaged in perpetrating the crime of violent crime in aid of racketeering, as charged. The definition of "firearm" is the same as I instructed for Count Nineteen.

Count Twenty-one charges the Defendant Donald Glass with the federal crime of possessing a controlled substance with intent to distribute. I instruct you that marijuana is a controlled substance. The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:

One, the Defendant knowingly possessed marijuana; and, Two, the Defendant intended to distribute the marijuana.

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The Defendant "knowingly" possessed the controlled substance if, one, the Defendant knew he possessed a controlled substance listed on the federal schedules of controlled substances, even if the Defendant did not know the identity of the substance; or, two, the Defendant knew the identity of the substance he possessed,

even if the Defendant did not know the substance was listed on the federal schedules of controlled substances. To "intend to distribute" is to plan to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

Now, ladies and gentlemen, Count Twenty-two charges the Defendant Donald Glass with a separate federal crime of possessing a firearm in furtherance of a drug-trafficking crime. The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt: One, that the Defendant committed the drug-trafficking crime charged in Count Twenty-one of the Indictment; and, Two, that the Defendant knowingly possessed a firearm in furtherance of that drug-trafficking crime, as charged in the Indictment.

The definition of the term "firearm" is that which

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I earlier provided in relation to Count Nineteen, above, and I refer you there.

To "possess" a firearm is to have direct physical control of the firearm or to have knowledge of the firearm's presence and the ability and intent to later exercise control over the firearm. Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted or advanced the crime in some way. The law recognizes several kinds of possession. A person may have actual possession, constructive possession, sole possession, or joint possession. "Actual possession" of a thing occurs if a person knowingly has direct physical control of it. "Constructive possession" of a thing occurs if a person doesn't have actual possession of it but has

both the power and the intention to take control over it later. "Sole possession" of a thing occurs if a person is the only one to possess it. "Joint possession" of a thing occurs if two or more people share possession of it.

The term "possession" includes actual, constructive, sole, and joint possession.

Ladies and gentlemen, intentional flight or concealment by a person during or immediately after a crime

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has been committed, or after he is accused of a crime, is not, of course, sufficient in itself to establish the guilt of that person. But intentional flight or concealment under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person. Whether or not a Defendant's conduct constituted flight or concealment is exclusively for you, as the Jury, to determine. And if you do so determine whether or not that flight or concealment showed a consciousness of guilt on his part, and the significance to be attached to that evidence, are also matters exclusively for you as a jury to determine. I remind you that in your consideration of any evidence of flight or concealment, if you should find that there was flight or concealment, you should also consider there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to confront the witness. And may I also suggest to you that a feeling of guilt does not necessarily reflect actual guilt of a crime which you may be considering.

The Government must prove beyond a reasonable doubt that a Defendant was the person who committed the crime.

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If a witness identifies a Defendant as the person who committed the crime, you must decide whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still consider how accurate the identification is. I suggest that you ask yourself these questions: One, did the witness have an adequate opportunity to observe the person at the time the crime was committed? Two, how much time did the witness have to observe the person? Three, how close was the witness? Four, did anything affect the witness's ability to see? Five, did the witness know or see the person at an earlier time?

You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant. After examining all the evidence, if you have a reasonable doubt that a Defendant was the person who committed the crime, you must find the Defendant not guilty.

Now, the Defendant Gumbs introduced evidence of an alleged character trait.

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Evidence of a Defendant's character traits may create a reasonable doubt. You should consider testimony that the Defendant is a peaceable person along with all the other evidence to decide whether the Government has proved beyond a reasonable doubt that the Defendant Gumbs committed the offense alleged

in the Indictment.

You'll see that the Indictment charges that a crime was committed on or about a certain date. The Government doesn't have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find the person acted "willfully," the person need not be aware of the specific law or rule that his conduct may be violating. Each count of the Indictment charges a separate

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crime against one or more of the Defendants. You must consider each crime and the evidence relating to it separately. And you must consider the case of each Defendant separately and individually. If you find a Defendant guilty of one crime, that must not affect your verdict for any other crime or any other Defendant. I caution you that each Defendant is on trial only for the specific crimes charged in the Indictment. You're here to determine from the evidence in this case whether each Defendant is guilty or not guilty of those specific crimes. You must never consider

punishment in any way to decide whether a Defendant is guilty. If you find a Defendant guilty, the punishment is for the Judge alone to decide later.

Your verdicts, whether guilty or not guilty, must be unanimous. In other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone. Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think

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differently or because you simply want to get the case over with. Remember that, in a very real way, you're judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case. When you get to the jury room, choose one of your members to act as your foreperson. The foreperson will direct your deliberations and will speak for you in court.

Now, Verdict forms have been prepared for your convenience, and you'll have these Verdict forms in the jury room. You'll have a separate Verdict form for each Defendant. You'll see, for example, with respect to the Defendant Alonzo Walton, the form says Verdict. Count One. And then there are three questions. Question number one is, "As to Count One of the Indictment, charging RICO conspiracy, we, the jury, find the Defendant Alonzo Walton," and then you have two alternatives.

One is guilty, and one is not guilty. If your verdict as to Count One as to the Defendant Walton is guilty, your foreperson will put a check mark next to the word "guilty." If your verdict as to Count One is that the Defendant Walton is not guilty, your foreperson will put a check mark next to the words "Not Guilty."

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If you find the Defendant guilty of the RICO conspiracy, you go on to Question Two, which asks: Did the RICO conspiracy involve murder? If your answer is yes, your foreperson puts a check mark next to "Yes." If your answer is no, your foreperson puts a check mark next to the word "No." If you find the Defendant guilty as to the RICO conspiracy as to Question One, you would then also go on to Question Three, which reads: Did the RICO conspiracy involve at least five kilograms or more of a mixture and substance containing a detectable amount of cocaine? And, again, if your answer is yes, you put a check mark next to the word "Yes." If your answer is no, you put a check mark next to the word "No." Now, as to Count One, those three questions are asked as to each of the Defendants in this case. And as to each of the Defendants, you will answer the questions the way I just explained to you.

With respect to the Defendant Walton, using him as an example, as to Count One, they are all the same – the questions are all the same. Your answers may not be all the same.

As to the Defendant Walton, he is also charged in

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Count Eight. And as to that count, the Verdict form reads: As to Count Eight of the Indictment, charging carjacking, we, the jury, find the Defendant Alonzo Walton Guilty or Not Guilty. And, again, if you find him guilty, you put a check mark next to "Guilty." If you find him not guilty, you put a check mark next to "Not Guilty." The Defendant Walton is also charged in Count Nine. As to Count Nine, the Verdict form has two questions: Number one: As to Count Nine, charging the use or carrying of a firearm during a crime of violence, we, the jury, find the Defendant Alonzo Walton. And, again, your verdicts are either Guilty or Not Guilty. If you find the Defendant guilty, you go on to Question Two, which reads: As to Count Nine, was the firearm brandished? And if you find that it was, you put a check mark next to "Yes." If you find that the firearm was not brandished, you put a check mark next to the word "No."

As to the Defendant Donald Glass, as I said, the Verdict form as to Count One is identical to that of the Defendant Walton's. The Defendant Glass is also charged in Count Eighteen. As to Count Eighteen, charging the

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commission of a violent crime in aid of racketeering, the Verdict form provides for you to find the Defendant either guilty or not guilty. And you will check the word or words that are appropriate for your verdict. The Defendant Glass is also charged in Count Nineteen with the use or carrying of a firearm during a crime of violence. And you have three questions to answer as to that count: Number one, Is he guilty

or not guilty? If you find him guilty, you go on to Question Two, which reads: As to Count Nineteen, was the firearm discharged? If you find that it was, you put a check mark next to the word "Yes." If you find that it was not, you put a check mark next to the word "No." If you find the Defendant guilty as to Count Nineteen, you go on to Question Three, which is: As to Count Nineteen, was the firearm brandished? If you find that it was, you put a check mark next to "Yes." If you find that it was not, you put a check mark next to the word "No."

The Defendant Glass is also charged in Count Twenty with using a firearm during a crime of violence and causing the death of Robert Dixon. If you find the Defendant guilty of the crime

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charged in Count Twenty, you put a check mark next to the word "Guilty." If you find the Defendant not guilty, you put a check mark next to the words "Not Guilty."

The Defendant Glass is also charged in Count Twenty-One with possession with the intent to distribute marijuana. If you find the Defendant guilty as to Count Twenty-One, you'd put a check mark next to the word "Guilty." If you find the Defendant not guilty, you would put a check mark next to the words "Not Guilty."

The Defendant Glass is also charged in Count Twenty-Two with possessing a firearm in furtherance of a drug-trafficking crime. If you find the Defendant guilty of the crime charged in Count Twenty-Two, you would put a check mark next to the word "Guilty." If you find him not guilty, you would put a check mark next to the words "Not Guilty."

As to the Defendant Kevin Clayton, Count One is identical to Count One with respect to the Defendant Walton. And you would fill out the Verdict form following the same instructions I gave you as to Count One. And that is the only count charged as to the Defendant Kevin Clayton.

With respect to the Defendant Perry Green, the only charge against him, as reflected in the Verdict form, is

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Count One, the RICO conspiracy. And you would fill out the Verdict form as to the Defendant Perry Green following the same instructions that I gave you as to Alonzo Walton. With respect to the Verdict form as to Vancito Gumbs, he is charged only in Count One. And you would fill out the Verdict form following the same instructions I gave you as to Count One.

With respect to the Defendant Antarious Caldwell, he is charged in Count One with participating in the RICO conspiracy. And the Verdict form is identical to that with respect to the Defendant Walton, and you would fill out the Verdict form as to Count One following the instructions I gave you as to the Defendant Walton.

The Defendant Caldwell is also charged in Count Sixteen with attempted robbery. And if you find the Defendant guilty as to the charge of attempted robbery, you would put a check mark next to the word "Guilty." If you find him not guilty, you would put a check mark next to the words "Not Guilty."

The Defendant Caldwell is also charged in Count Seventeen with the use or carrying a firearm during a crime of violence. You'll have three questions to answer as to that count. Number one is, as to Count Seventeen: We, the jury,

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find the Defendant Antarious Caldwell guilty or not guilty. If your verdict is guilty, you would put a check mark next to the word "Guilty." If your verdict is not guilty, you would put a check mark next to the words "Not Guilty." If you find the Defendant guilty, you would go on to Question Two, which reads as to Count Seventeen: Was the firearm discharged? If you find that it was, you'll put a check mark next to the word "Yes." If you find that it was not, you put a check mark next to the word "No."

If you find the Defendant guilty as to Count One -- excuse me. If you find the Defendant guilty as to Count Seventeen in answer to Question One, you would then go on to Question Three. As to Count Seventeen, Was the firearm brandished? If you find that it was, you would check "Yes." If you find that it was not, you would check "No." As to both Question Two and Three, you could answer both yes; you could answer both no. You will take the Verdict forms with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the forms, sign them, date them, and

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return with them to the courtroom. If you wish to communicate with me at any time, please write down your message or question, and give it to the court security

officer. The court security officer will bring it to me, and I will respond as promptly as possible, either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted, one way or the other, at that time. Ladies and gentlemen, that completes my instructions to you on the law. In just a second, you're going to go into your jury room. You may elect your foreperson, but do not begin your deliberations until you've received the evidence that has been admitted in the case and these Verdict forms. Once you receive the evidence and the Verdict forms, you can then begin your deliberations. There was some marijuana that was admitted in evidence in the case, and it's going to go with you into the jury room. If you want to examine it, do that first thing, because after a few minutes, the court security officer is going to come in and take the marijuana and give it back to Agent Early, who will keep it in his possession. If you need to see it again, you can ask to see it again, and we'll provide it to you.

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Also, there were a lot of guns and ammunition introduced in evidence in this case. Obviously, we don't want those things lying around. So because of the number of the guns, I'm going to ask Agent Early to just keep them in his possession. If you want to see any of them for any reason, just let us know -- if you want to see all of them, just let me know, and whatever you want, we'll let you have, within reason. But for now, anyway, Agent Early is going to have the firearms. When the other jurors leave the jury box in just a second, I need to ask Jurors 52, 53, 54, 58, and 59 to remain there in the jury box.

The rest of you may go to your jury room.

(Jury not present at 3:52 p.m.)