APPENDIX A
UNITED STATES COURT OF APPEALS

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-1493, 14-2677 and 14-3975

UNITED STATES OF AMERICA

v.

KIDADA SAVAGE, agent of DA, agent of LI'L SIS, agent of DIZMATIC, STEVEN NORTHINGTON, also known as Smoke, also known as S1, also known as Syeed Burhannon, also known as Michael Tillery, also known as Darnell Doss, agent of Dollar Bill, ROBERT MERRITT, a/k/a CORRECTIONAL OFFICER BISHOP, a/k/a B.J., agent of DIRT

Kidada Savage,
Appellant in No. 14-1493
Steven Northington,
Appellant in No. 14-2677
Robert Merritt, Jr.,
Appellant in No. 14-3975

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. No. 2-07-cr -00550-006, 005, and 004)
District Judge: Honorable R. Barclay Surrick

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OPINION OF THE COURT

JORDAN, *Circuit Judge.*

The three appellants before us – Kidada Savage, Steven Northington, and Robert Merritt – are serving life sentences for their roles in the Kaboni Savage Organization ("KSO"), a violent drug trafficking gang that was based in North Philadelphia. The gang dealt in death and destruction, including on one occasion the firebombing of the family home of a former KSO member who had become a government witness. That firebombing killed six people, including four children.

We previously upheld the conviction and death sentence of the gang's eponymous ringleader, Kaboni Savage, who ordered the firebombing. (To avoid confusion, this opinion refers to Kaboni Savage and his sister Kidada Savage by their first names.) In a corresponding opinion, we considered and

with his older cousin, KSO member Lamont Lewis, and he participated in the firebombing murders.[2]

A. The Coleman Family Murders

The KSO's murders of the Coleman Family occurred in October of 2004. Between July and October of that year, Kaboni made numerous phone calls to Kidada to discuss his concern that KSO member Eugene Coleman was cooperating with the police.[3] On October 8, 2004, Kaboni and Lewis briefly spoke over the phone, during which time Lewis expressed his fealty to Kaboni. Lewis then handed the phone over to Kidada. After the Savage siblings finished their conversation, Kidada told Lewis that Kaboni had ordered him to "firebomb the Colemans' house." (App. at 10985-86.) Kidada instructed that the firebombing should be done around 3:00 or 4:00 a.m. when "everybody is in the house," and she promised to give Lewis $5,000 for his efforts. (App. at 10986.)

Lewis enlisted Merritt to assist him, and early the next morning the two cousins set out to firebomb the Coleman family home. Before going to the Coleman house, Lewis and Merritt went to a local gas station, bought two gas cans, filled

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[2] Lamont Lewis sold drugs for the KSO, which Lewis would "bag up" in Kaboni's basement. (App. at 10875, 10897.) Lewis entered into a plea agreement with the government in this case and testified as a government witness.

[3] Non-party Eugene Coleman also sold drugs for the KSO. He was known within the KSO to be non-violent. Coleman became a cooperating witness in a 2004 case against Kaboni, as discussed in more detail herein.

After the Coleman family murders, the government obtained court orders to place a recording device near Kaboni's federal detention center cell and another in the detention center's visitation room to intercept conversations Kaboni had with his friends, associates, and other inmates. In the recordings of the conversations that followed, Kaboni made various vulgar and brazen statements expressing satisfaction with the deaths of the Coleman family; he also threatened to kill additional witnesses and their relatives. *See infra* n.19.

B. Procedural History

On May 9, 2012, a grand jury in the Eastern District of Pennsylvania returned the Fourth Superseding Indictment in this case, upon which the parties ultimately proceeded to trial. The three defendants here were charged as follows: Count One charged Kidada, Northington, and Merritt with RICO conspiracy; Counts Five and Seven charged Northington with murder in aid of racketeering for the deaths of Barry Parker and Tybius Flowers, respectively; Count Nine charged Merritt with conspiracy to commit murder in aid of racketeering; Counts Ten through Fifteen charged Merritt and Kidada with murder in aid of racketeering, one count for each of the six Coleman family members who perished in the fire; Count Sixteen charged Merritt and Kidada with retaliating against a witness; and Count Seventeen charged Merritt and Kidada with using fire in the commission of a felony.[5]

[5] Count Eight, which charged Northington with witness tampering, was dismissed prior to trial, by agreement with the government. Kaboni was charged on all counts (Counts Two, Three, Four, and Six pertained only to him).

pertains to arguments raised by Kidada, Merritt, and Northington that we did not reach in our earlier opinion.

II. DISCUSSION[8]

A. The District Court did not abuse its discretion in refusing to grant Kidada a new trial based on a conflict allegedly held by one of her two attorneys.

Kidada asserts that she was denied her Sixth Amendment right to counsel because one of her attorneys,

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right to counsel, *Savage*, 970 F.3d at 244-48; (2) a capital defendant does not have a statutory right to a jury drawn from the county of the offense, *id.* at 250-52; (3) the District Court did not clearly err in finding that African Americans were not underrepresented in the qualified jury wheel, *id.* at 255-62; (4) the District Court did not clearly err in finding that a preemptory strike by the government was not racially motivated, *id.* at 262-72; (5) any error in the District Court's transferred intent instruction was not plain, *id.* at 272-83; (6) the admission of victim-impact evidence at the penalty phase was not clearly erroneous, *id.* at 298-303; and (7) as a matter of first impression, it was not unfairly prejudicial at the penalty phase to admit color autopsy photographs of the firebombing, *id.* at 303-06.

[8] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

in this case had charged the Lassiter murder as a predicate offense for the RICO conspiracy charge, and Phillips was tasked with defending Kidada as to that count.

To address the potential conflict, the government moved on April 5, 2013, for an evidentiary hearing. The District Court granted the motion and subsequently appointed separate counsel to represent the interests of Kidada and of Phillips with respect to the alleged conflict. Kidada's conflicts counsel then filed a motion for a mistrial on April 26, 2013. Instead of immediately holding an evidentiary hearing, the Court allowed the trial to continue uninterrupted, and the jury returned a guilty verdict against Kidada on May 13, 2013.

A few days after the jury returned its verdict, the District Court set a briefing schedule for the mistrial motion and scheduled a hearing for June 17, 2013. Phillips, through his conflicts counsel, filed a brief opposing the mistrial motion. At the hearing, he testified that he had no recollection of having been assigned to the Lassiter matter when he was appointed to represent Kidada. He further testified that he never reviewed the evidence in that case, met with witnesses, contacted the victim's family, or discussed the case with anyone. Indeed, nine days after Phillips was assigned to the Lassiter murder prosecution, the case was reassigned to another assistant district attorney.

The District Court denied Kidada's motion for a mistrial. In denying the motion, the Court credited Phillips's testimony about his lack of involvement in the prior case, found that Phillips's brief assignment to the Lassiter matter did not limit his ability to vigorously defend Kidada, and observed that Kidada had failed to demonstrate that she suffered any

As the District Court explained, the potential conflict in this case came to light "six weeks after trial began, and after the case had already demanded a significant amount of time from jurors, the parties, counsel, witnesses, and the Court." (Kidada Supp. App. at 66 n.9.) The Court concluded that "[i]t would have made little sense to adjourn the trial to deal with this issue. The only reasonable course was to continue with the trial and address the conflict issue after the jury had reached its verdict." (Kidada Supp. App. at 66 n.9.)

We agree that the District Court's course of conduct was reasonable, and we reject Kidada's suggestion that the Sixth Amendment imposes a rigid, blanket requirement that a court halt trial proceedings to inquire into an alleged conflict.[13] Rather, what constitutes "adequate steps" will necessarily vary depending on the circumstances of each case. In an instance such as this, where the timing of a court's investigation is at issue, we will generally defer to the district court's judgment unless the objecting party can articulate prejudice and show that the court abused its discretion. *Cf. Dietz v. Bouldin*, 579 U.S. 40, 47 (2016) ("[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.").

Here, Kidada recognizes that the post-trial timing of the conflict hearing "reflected the court's concern about the time and expense that already had been incurred in connection

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[13] Kidada cites several out-of-circuit cases to support that proposition, but those cases address circumstances in which the trial court failed to undertake any inquiry into an alleged conflict.

requires, at a minimum, that the dissatisfied defendant produce *some* evidence of divergent interests as to a material factual or legal issue. And that is something Kidada has never done.

B. The District Court did not abuse its discretion in denying motions to sever.[14]

Both Kidada and Northington filed motions to sever, seeking individual trials. They argued that severance was warranted because they were charged with only a subset of the crimes charged against Kaboni, and that the number of defendants and charges in the case would confuse the jury.

The District Court denied their severance motions in a comprehensive opinion, determining that "[t]he seventeen counts are manageable" for a jury in a single case. (Kidada Supp. App. at 25.) The Court reasoned that "the allegations in the Indictment with respect to each Defendant are clear," and that "[t]he jury will be able to compartmentalize the evidence against the various Defendants, particularly when provided with instructions by the Court." (Kidada Supp. App. at 41.) Kidada and Northington now appeal the denial of their severance motions.

As we have often observed, a defendant, properly joined with other defendants in a criminal indictment, has "a heavy burden in gaining severance." *United States v. Quintero*, 38 F.3d 1317, 1343 (3d Cir. 1994). We review for abuse of discretion a district court's denial of severance. *United States*

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[14] We review a district court's denial of a severance motion for abuse of discretion, *United States v. Hart*, 273 F.3d 363, 369 (3d Cir. 2001), as more fully discussed herein.

Kidada and Northington contend that, because they were charged with only a subset of the 12 murders instigated by Kaboni in furtherance of the RICO enterprise, and due to the complexity of the case, they were prejudiced by the spillover of emotion evoked by evidence of crimes they didn't commit.[15] But, as an initial matter, Kidada and Northington cannot show clear and substantial prejudice by simply pointing to the fact that the government introduced evidence pertinent to other defendants. Were that the case, "a joint trial could rarely be held." *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *abrogated on other grounds by Griffin v. United States*, 502 U.S. 46, 57 n.2 (1991). Rather, as explained above, the lodestar of the prejudice inquiry is "whether the evidence is such that the jury cannot be expected to compartmentalize it and then consider it for its proper purposes." *Id.* (internal citations omitted). That showing is absent here. We have repeatedly affirmed convictions of defendants who were jointly tried alongside co-defendants charged with more serious or additional crimes, so long as the jury could compartmentalize the evidence. *See, e.g.*, *United States v. Walker*, 657 F.3d 160, 168-71 (3d Cir. 2011) (affirming denial of severance where two brothers were charged with the same six crimes and only one of the brothers was charged with two additional but related crimes); *United States v. Sandini*, 888 F.2d 300, 304-07 (3d Cir. 1989) (affirming denial of severance where one conspirator was charged with a more serious

[15] As a reminder, Kidada abetted the murders of the six Coleman family members. Northington, for his part, participated in the murders of Barry Parker and Tybius Flowers.

proved that Kaboni and Kidada engaged in witness retaliation by killing the Coleman family members, but they found that the government failed to meet its burden of proof as to Merritt. By the same token, the jury found Merritt not guilty of substantive counts related to the murders but convicted the Savage siblings as to those counts. And finally, in a separate seven-day penalty proceeding, the jury unanimously sentenced Northington to life in prison after having sentenced Kaboni to death.

The jury's ability to thoughtfully differentiate among the defendants undermines Northington's assertion that, considering the "graphic" and "profane" evidence against Kaboni, the jury would necessarily find him "equally culpable." (Northington Opening Br. at 70-71.) On the contrary, it is possible that Northington and Kidada benefited from being tried alongside Kaboni, as it may have been apparent to the jury that they were relatively less culpable than he was and should be treated accordingly.[16]

Finally, Kidada asserts that "[t]he prejudice against [her] was further heightened by the fact that she was tried by a death-qualified jury as the only defendant who was not facing the death penalty." (Kidada Opening Br. at 77.) But the Supreme Court has specifically rejected that type of argument. *See Buchanan v. Kentucky*, 483 U.S. 402, 420 (1987)

[16] We are not suggesting that a severance motion should be decided one way or another on a "next to him you're a saint" rationale, although extreme differences in culpability could be a consideration. We are, however, observing that, in this case, the District Court's anticipatory assessment of the jury's capability proved to be accurate.

In pretrial motions, Kaboni moved to preclude wiretap recordings of things he said to fellow inmates. In those conversations, Kaboni made numerous damning admissions, telling of his delight with the Coleman murders and expressing his intent to kill law enforcement officials and other witnesses. The District Court allowed the government to introduce most of those recordings.

We decline to catalogue all his heinous statements and instead provide three examples in the footnote below, to illustrate their shocking character.[19] Because Kaboni did not

[19] In one instance, Kaboni complained to a prisoner in an adjoining cell about having missed his daughter's eighth grade graduation, stating, "[t]hat's why [they] got to pay ... Those ... rats." (App. at 1306.) Kaboni continued, "Their kids got to pay, for making my kids cry. I want to smack one of their four-year-old sons in the head with a bat .... Straight up. I have dreams about killing their kids ... [c]utting their kids' heads off." (App. at 1306-07.) In another statement to the same prisoner, Kaboni stated, "Yo. Can you imagine [Coleman's] face, man .... When that news flash or that captain went and got him. They didn't tell him we got some good news and we got some bad news. They said we got some bad news .... (Laughs) It don't stop. Just put[,] just put etcetera after the word dead." (App. at 1384.) And Kaboni bragged to another prisoner that Coleman "couldn't view" the bodies of his family members because they had been burned in the fire. Kaboni said, "They shoulda, you know where they shoulda took him? They should took him got, got some barbeque sauce and poured it on them[.]" (App. at 1144.)

are considered the acts and statements of all other conspirators and are evidence against them all.[20]

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[20] The District Court also instructed:

> [T]he acts or statements of any member of a conspiracy are treated as the acts and statements of all members of the conspiracy if these acts and statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy. Therefore, ladies and gentlemen, you may consider as evidence against a defendant any act or statement made by any member of the conspiracy during the existence of the conspiracy and to further the objectives of the conspiracy. You may consider these acts and statements, even if they were done or made in the absence of that defendant and without that defendant's knowledge at all. As with all of the other evidence presented, ladies and gentlemen, in this case, it is for you to decide whether you believe this evidence and how much weight you will give it. So, ladies and gentlemen, the acts and the statements of a conspirator in furtherance of the conspiracy are the acts and statements of all members of the conspiracy.

(App. at 15147-48.)

Kidada would have been returned in the absence of the overwhelming amount of uniquely and unfairly prejudicial hearsay that the government introduced at trial in the form of Kaboni's cell block recordings."[21] (Kidada Opening Br. at 60.) This argument falls flat. Her own inculpatory correspondence with Kaboni, the testimony of witnesses such as Lamont Lewis, and a threatening letter[22] from Kidada to Coleman provided the jury with a more than sufficient evidentiary basis to establish her participation in the Coleman family murders and in the affairs of the KSO.

For those reasons, the District Court did not abuse its discretion in admitting the cell block recordings and declining to give a contemporaneous limiting instruction.

D. The District Court did not abuse its discretion in denying Northington's motion for a mistrial.

Northington next argues that he is entitled to a mistrial because the prosecutor identified him as one of the perpetrators

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[21] (*See also* Kidada Opening Br. at 61 ("The government's case against Kidada, which was focused on linking her with her brother['s] activities, clearly would have been materially less compelling without the recordings of Kaboni, to whom – as the government portrayed it – she was particularly devoted.")).

[22] Kidada wrote to Coleman: "Death before dishonor ... to your family. If you said something, let us know. If you didn't, let us know. We have to know what's going on. Don't say shit to nobody." (App. at 8946.)

"unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (citation omitted). In addition to the District Court's specific and immediate instructions, the Court also instructed the jury at the close of the case that the comments of counsel, such as closing arguments, are not evidence.

And third, the jury heard overwhelming evidence in support of the government's racketeering conspiracy count and two murder counts against Northington, including extensive firsthand evidence of Northington's membership in the KSO and his participation in the murders of Barry Parker and Tybius Flowers.

In short, the government's error was harmless, and the denial of Northington's motion for a mistrial was no abuse of discretion.

E. The District Court properly admitted evidence seized from Northington's residence.

Northington next argues that the District Court clearly erred in admitting evidence seized from his residence pursuant to a search warrant that he contends was inaccurate and misleading.[24] Before addressing that argument, we describe

[24] "We review for clear error a district court's determination regarding whether false statements in a warrant application were made with reckless disregard for the truth. ... [A]fter putting aside any false statements made [knowingly and deliberately or] with reckless disregard for the truth, we

Franklin Street. The warrant application sought authorization to search the premises for evidence of murder, including guns, ammunition, a black baseball cap, black jackets, black jeans, and any contraband.

Detective Rossiter's affidavit contained three key pieces of information. First, Parker's mother was walking west on Luzerne Street toward 7th Street when she saw two men whom she knew to be Northington and Northington's younger brother, Allen, crouching behind a car, while Northington had a gun in his hand. Second, when the victim's mother heard gunshots, she walked toward the scene of the shooting and observed the Northington brothers run into 3908 North Franklin Street. She told officers what she had seen, and they checked the premises for armed men.[25] And third, the victim's nephew, E.G., reported that, at the time of the shooting, he was standing with Parker on the corner of Franklin and Luzerne Streets when a black man wearing a black leather jacket, black jeans, and a black baseball cap approached Parker and shot him three times in the chest. E.G. reported that the shooter then fled south on Franklin Street.

During the search undertaken pursuant to the warrant, police seized multiple handguns, ammunition, cocaine, and drug paraphernalia from Northington's house.

2. Northington's suppression motion

Northington filed a motion to suppress the seized evidence, asserting that the police filed a misleading warrant

[25] A SWAT unit secured the apartment until a search warrant was obtained.

enter his Franklin Street residence after the shooting. (Supp. App. at 166.)

As to Northington's claim that Detective Rossiter deceived the magistrate by omitting the fact that E.G. knew Northington but did not recognize the shooter, the District Court explained that this claim "misreads" the warrant application because "[a]t no point does the warrant application identify [Northington] as the shooter." (Supp. App. at 166.) Instead, "the warrant implicates [Northington] in the murder due to ... [the] positive identification [by the victim's mother of Northington] as having been at the scene of the murder, with a gun in his hand, and then placing him inside 3908 North Franklin after the shooting." (Supp. App. at 166-67.)

To succeed on a *Franks* claim, a defendant must prove by a preponderance of the evidence that the affiant knowingly and deliberately, or with reckless disregard for the truth, included a falsehood or omission in the warrant application, and he must prove that the resulting false statement was material to the probable cause determination. *Franks*, 438 U.S. at 171-72. In assessing materiality, the court excises the erroneous information, inserts the missing information, and then determines whether the "reformulated affidavit established probable cause." *United States v. Yusuf*, 461 F.3d 374, 383-84, 390 (3d Cir. 2006).

Northington fails on both prongs of the *Franks* test. First, as the District Court correctly observed, Northington has not pointed to any evidence to suggest that the affidavit in question was knowingly or recklessly false. And second, any omissions or misrepresentations were indeed immaterial to the probable cause determination. While it seems that E.G. did not

(Northington Supp. App. at 18 (citing Fed. R. Evid. 404(b)(2)).) The District Court admitted the evidence over Northington's objection.

Here is the backstory on that earlier arrest. On September 8, 2004, while Northington was driving with his cousin in a rental vehicle approximately two miles from the Coleman residence, he was pulled over by Philadelphia police officers. When the police asked him to identify himself, Northington, who was "dressed in Muslim garb," provided "one of his multiple false names." (Northington Br. at 18.) One of the officers recognized Northington, however, and he was arrested on a federal warrant. The officers subsequently found a loaded handgun, a full can of gasoline, and a bag of latex gloves in the car.

The government argued in a motion in limine that the circumstances of Northington's arrest were intrinsic evidence of his involvement in the charged RICO conspiracy.[28]

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justified by the evidence.'" *United States v. Butch*, 256 F.3d 171, 175 (3d Cir. 2001) (internal quotation marks omitted).

[28] The indictment alleged that Northington had been a member of the KSO since 1997, and that the KSO used violence and intimidation to maintain its drug trafficking operations and to intimidate or retaliate against potential witnesses. The indictment charged that KSO members committed murders to further the aims of the KSO, and that Northington participated in two such murders: the murder of rival drug dealer Barry Parker in 2003, and the murder of Tybius Flowers in 2004, to prevent Flowers from testifying in Kaboni's state trial for the murder of Kenneth Lassiter.

method of retaliation. Finally, the Court conducted a Rule 403 analysis. It determined that the evidence was highly probative of the existence of, and Northington's participation in, a RICO conspiracy, and that the probative value of the evidence was not substantially outweighed by a risk of unfair prejudice.

While "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with [his] character[,]" Fed. R. Evid. 404(b)(1), that rule "does not apply to evidence of uncharged offenses committed by a defendant when those acts are intrinsic to the proof of the charged offense." *United States v. Gibbs*, 190 F.3d 188, 217 (3d Cir. 1999). Intrinsic evidence is evidence that directly proves the charged offense, or that constitutes "uncharged acts performed contemporaneously with the charged crime ... if they facilitate the commission of the charged crime." *United States v. Green*, 617 F.3d 233, 248-49 (3d Cir. 2010) (internal quotation marks omitted).

Northington argues that the evidence relating to his September 2004 arrest is not intrinsic to the case against him because the government did not charge him with any acts relating to the Coleman killings. That argument is unavailing because, as the District Court observed, the indictment charged that the KSO used acts of intimidation and retaliation to maintain and further the objectives of the KSO, that murders were committed for this purpose, and that Northington committed two such murders. Accordingly, evidence that Northington endeavored to firebomb the Coleman home would be highly probative of his participation in the charged RICO conspiracy, as it would show unity of purpose and his commitment to the KSO's objectives.

to carry out the firebombing, and that he was therefore acting in furtherance of a conspiratorial objective, Northington was not charged with the Coleman murders. Additionally, Northington strenuously opposed the government's view of the evidence in his closing argument, attacking each link in the government's chain of logic. The jury therefore had the information it needed to sift through the evidence and resolve whether or not to draw the inference that Northington attempted to carry out the firebombing.

Finally, in light of the credible and extensive testimony implicating Northington in the murders of Barry Parker and Tybius Flowers, we conclude there was little risk that the evidence relating to Northington's arrest would cause the jury to convict Northington for those murders on an improper emotional basis rather than on the evidence presented at trial.

In sum, because we agree with the District Court that a jury could reasonably conclude that the evidence relating to Northington's arrest would allow the jury to conclude it was more likely than not that Northington intended to firebomb the Coleman home,[30] and because the Court's Rule 403 ruling was

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[30] When dealing with issues of relevance based on conditional facts, Federal Rule of Evidence 104(b) requires courts to examine the proffered evidence and determine whether a jury could reasonably find the conditional fact by a preponderance of the evidence. *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988) (citing Fed. R. Evid. 104(b)). "Evidence is reliable for purposes of Rule 404(b) 'unless it is so preposterous that it could not be believed by a rational and properly instructed juror.'" *Bergrin*, 682 F.3d at 279 (quoting *United States v. Siegel*, 536 F.3d 306, 319 (4th Cir. 2008), in

made her emotional and caused her to start crying. Third, she stated that she had maintained a relationship with a man who had been charged with assault, and that she had visited him in jail. And fourth, she indicated that she was opposed to the death penalty.

The government exercised a peremptory strike to remove Juror #364 from the jury, and in response Northington challenged the government's strike as being race-based. After hearing the government's explanations for striking the juror, the District Court rejected Northington's argument. The Court explained,

> Based upon all the circumstances, including the fact that, prior to this strike, an African-American juror had already been empaneled, and taking into account the prosecutor's demeanor and credibility, we are satisfied that the Government's reason for striking the juror was not pretextual, and not in any way motivated by a discriminatory intent.

(App. at 159, 161.)

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that "the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Id.* at 85. A district court's assessment of motions made under *Batson* involves a three-step process. The defendant must first establish a prima facie case of race-based discrimination in the exercise of a peremptory strike. *Hernandez v. New York*, 500 U.S. 352, 358 (1991). Among the

> Of the approximately 145 [potential jurors] who had at that point been summoned to court to be interviewed (up to and including Juror #364), all but 43 were excused for cause or hardship. Of those remaining 43 jurors, nine were seated, 12 were excused by the government, and 22 were excused by the defense. There were six African-Americans in the remaining group of 43, two of whom were struck by the defense.

(Answering Br. at 135.)

Furthermore, two of the 12 jurors seated on the jury were African-American, as was the first alternate juror. Nor has Northington demonstrated that any other factor traditionally considered at the first step of the *Batson* inquiry supports that conclusion that peremptory challenges were exercised based on the race of potential jurors. Because Northington has failed to make a prima facie case, we will affirm the District Court's ruling.[32]

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[32] Although we do not need to reach the second and third steps of the *Batson* inquiry, to remove any doubt of discriminatory taint, we note that Northington's contention that there was no race-neutral reason to strike Juror #364 is flatly wrong. Indeed, any one of the four race-neutral concerns identified by the government as to Juror #364, such as her opposition to the death penalty, or that her son, like Tybius Flowers, was shot while sitting in his car, would be sufficient to defeat Northington's *Batson* claim.

> a/k/a "B.J.," a/k/a "Bishop," was a drug distributor and enforcer for the KSO. He participated in murders, murder conspiracy, arson, the distribution of controlled substances, carrying firearms during violent crimes, carrying a firearm during a drug trafficking crime, witness tampering, and witness retaliation.

(App. at 453.)

At trial, the government argued that Merritt, as a member of the KSO, committed the specific crimes enumerated in Count One of the Indictment. In its opening statement, for example, the government repeatedly asserted that Merritt "threw those gas cans in the living room." (App. at 3386, 3394-95.) The government also reminded the jury that Merritt committed the alleged crimes as a KSO member:

> Members of the jury, the evidence in this case will show that the defendants Kaboni Savage, Steven Northington, Kidada Savage and Robert Merritt agreed to participate in the affairs of a racketeering enterprise involving drugs, money laundering, arson, witness tampering and murder.

(App. at 3479.)

While conceding that Merritt "may have been more on the periphery" of the KSO, the government argued in its summation that Merritt, like Kaboni, Kidada and Northington, knew the purpose of the conspiracy, and by selling drugs under the protection of Lamont Lewis, he, too, became a member of

> agreed to be employed by or to be associated with the enterprise.
>
> Nor does the RICO conspiracy charge require the government to prove that (name) personally participated in the operation or management of the enterprise, or agreed to personally participate in the operation or management of the enterprise.
>
> Rather, you may find (name) guilty of the RICO conspiracy offense if the evidence establishes that (name) knowingly agreed to facilitate or further a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who would be employed by or associated with the enterprise and who would participate in the operation or management of the enterprise.

(Merritt Supp. App. at 122-24 (quoting in part the Third Circuit Model Criminal Jury Instructions 6.18.1962D RICO Conspiracy-Elements of the Offense (18 U.S.C. §1962(d))).)

In opposing the model instruction, Merritt said it was "seemingly designed to accommodate a situation where individuals knowingly conspire to do something which, if successful, would intentionally promote the establishment of an as yet non-existent enterprise, the interests of which the conspirators then intend to conduct through a pattern of racketeering activity." (Merritt Supp. App. at 124.) In a second filing, Merritt proposed a RICO conspiracy charge that required the jury to first find as proven against Merritt all of the indictment's factual allegations pertaining to RICO

131, 148, 154 (3d Cir. 2002) (citation omitted). "An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *United States v. Daraio*, 445 F.3d 253, 259-60 (3d Cir. 2006). Such a modification impermissibly "amend[s] the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment." *United States v. Lee*, 359 F.3d 194, 208 (3d Cir. 2004).

"The key inquiry is whether the defendant was convicted of the same conduct for which he was indicted." *Daraio*, 445 F.3d at 260 (citation omitted). In other words, even when the district court instructs the jury on the very same statute that the indictment charged the defendant to have violated, the district court constructively amends the indictment if it instructs the jury that it can convict the defendant based on *facts not alleged in the indictment.*

The Supreme Court's decision in *Stirone v. United States*, 361 U.S. 212 (1960), illustrates the requirement that the factual basis for a conviction cannot exceed the four corners of the indictment. There, the indictment charged Stirone with a Hobbs Act violation because he used his influential union position and extortion to unlawfully interfere with the interstate importation of sand. *Id.* at 213-14. Over Stirone's objection, the district court allowed the government to offer evidence "of an effect on interstate commerce not only in sand ... but also in interference with steel shipments ...." *Id.* at 214. The Court held that, even though the government indicted

KSO member.[34] We part ways with Merritt, however, as to his assertion that his conviction cannot stand because "[t]he indictment never alleged that Merritt was a 'non-member' of the KSO who nevertheless conspired to further its criminal aims." (Merritt Opening Br. at 46.) In addition to charging Merritt with membership in a RICO organization under 18 U.S.C. § 1962(c), the indictment also charged him with RICO conspiracy under § 1962(d).[35] That the indictment charged Merritt with both crimes did not oblige the government to

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[34] It is likely that the jury believed that Merritt was not a KSO member, but that he nonetheless participated in the conspiracy as to the firebombing. The jury found Merritt guilty only of conspiracy but declined to convict him for the RICO murder charges. Moreover, during deliberations, the jury specifically asked the District Court whether membership in a racketeering enterprise is a prerequisite for a RICO conspiracy conviction.

[35] Section 1962(c) proscribes membership in a RICO enterprise:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d), in contrast, provides that "It shall be unlawful for any person to conspire to violate ... subsection ... (c) of this section."

provision that, "[i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators").

The circumstances here, then, are distinguishable from those in *Stirone* and *McKee*. In those cases, the trial courts' instructions authorized the jury to return a guilty verdict based on conduct different than that set forth in the indictment, whereas here, the jury charge did not expand the factual basis on which Merritt could be convicted. Although the government alleged more facts in the indictment than it proved to the jury's satisfaction at trial, the indictment alleged Merritt's involvement in the RICO conspiracy; and Merritt has not identified any reason why we should doubt that the jury convicted Merritt for RICO conspiracy based on facts alleged in the indictment, namely, that he "agreed to participate in the affairs of a racketeering enterprise involving ... arson." (App. at 3479 (Count One of the Indictment).)

I. The District Court did not commit plain error in violation of *Apprendi* in imposing a life sentence on Merritt.

Merritt argues that, because the jury did not make the specific finding that Merritt's RICO conspiracy conviction was "based on" a RICO qualifying activity for which the maximum penalty is life imprisonment, his sentence for life imprisonment violated *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which requires that any fact that increases a defendant's sentence beyond the default statutory maximum must be found

To secure a RICO conspiracy conviction, the government must prove, among other things, that the defendant engaged in "a pattern of racketeering activity," 18 U.S.C. § 1962, which requires at least two acts in furtherance of the RICO conspiracy. *United States v. Fattah*, 914 F.3d 112, 163 (3d Cir. 2019). The maximum penalty for violating the RICO statute is 20 years in prison unless "the violation is *based on* a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a) (emphasis added).

The jury found Merritt guilty of engaging in a RICO conspiracy. For each defendant, the jury was also "required to unanimously find, beyond a reasonable doubt" whether the government had "proven" or "not proven" that he or she committed other crimes. (App. at 662-63.) The other crimes were listed as "Special Sentencing Factors," and included drug distribution conspiracy, the individual murders, the Coleman family murders, and witness retaliation, as defined by federal or Pennsylvania law. (App. at 662-669.)

Under special sentencing factors #9 through #14, the jury found as "proven" Merritt's involvement in the Coleman family murders. Murder was defined under Pennsylvania law, and the verdict form definition read as follows:

> On or about October 9, 2004, in Philadelphia, in the Eastern District of Pennsylvania, the defendants KABONI SAVAGE, ROBERT MERRITT, and KIDADA SAVAGE, *knowingly and intentionally murdered, knowingly aided and abetted and willfully caused the murder of and aided, agreed or attempted to aid, and*

find him guilty of the several counts of RICO murder alleged against him.

If Merritt is correct that murder was not the predicate act on which the jury found him guilty of RICO conspiracy, then his sentence should have been no greater than the twenty-year statutory maximum. Although the verdict sheet could have more clearly indicated that the sentencing factors were crimes on which the RICO conspiracy charge was based, any error was not obvious and was unlikely to have impacted Merritt's sentence. First, the jury verdict form listed the special sentencing factors as clear sub-parts of the RICO conspiracy count. Second, the special sentencing factors were prefaced with the following: "If you have found one or more

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Merritt's first point is immaterial because neither party disputes that the jury found Sentencing Factor Nos. 9-14 proven beyond a reasonable doubt as to Merritt. As to the second point, Merritt acknowledges that second-degree murder also permits a life sentence and does not require a finding of specific intent. In any event, the District Court did instruct the jury about the specific intent requirement for first-degree murder. (*See* App. at 15172 ("Ladies and gentlemen, under Pennsylvania law, first degree murder is an intentional killing. A killing is intentional if it's committed by lying in wait or by otherwise willful, deliberate and premeditated means.")); (App. at 15174 ("[T]o be guilty of aiding and abetting, the defendant must possess the intent to promote or facilitate the commission of the crime. In the case of first degree murder, ladies and gentlemen, the defendant must have specifically intended that the murder occur in order for the defendant to be guilty of first degree murder under a theory of accomplice liability.")).

Because Merritt has not met his burden of establishing that the error was obvious and affected his substantial rights, any error here cannot be described as plain. Additionally, in light of the jury's unequivocal finding that Merritt assisted in incinerating an entire family, a semantic shortcoming in the verdict form is insufficient to satisfy the fourth (and discretionary) clear error factor, which looks to the justice of the outcome and whether it would seriously affect the public reputation of judicial proceedings. On the contrary, were we to reduce Merritt's life sentence for such a heinous crime, and were we to do so on a ground he did not bother to raise at trial, that might call our criminal justice system into disrepute. His life sentence is well founded.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.