APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

Argued: November 18, 2019
Decided: June 8, 2022
Amended: October 2, 2023)

Nos. 18-2482(L), 18-2610(Con)

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN PASTORE, SALVATORE DELLIGATTI,

Defendants – Appellants.

Before: WALKER, SULLIVAN, and NATHAN, *Circuit Judges*.*

Defendant-Appellant Salvatore Delligatti appeals from a judgment of conviction entered by the United States District Court for the Southern District of New York (Forrest, *J.*) on charges including attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Delligatti argues that his firearms conviction should be

* At the time this case was argued, Judge Nathan was a district judge on the United States District Court for the Southern District of New York, sitting by designation.

vacated because the predicate offenses on which the conviction was based are not "crimes of violence" in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), and *United States v. Taylor*, 142 S. Ct. 2015 (2022). We conclude that Delligatti's section 924(c) conviction remains valid even after *Davis* and *Taylor* because one of the predicate offenses underlying the conviction – attempted murder in aid of racketeering – is a categorical crime of violence. For the reasons stated herein and in our prior summary order, *United States v. Pastore*, Nos. 18-2482(L), 18-2610(Con), 2022 WL 2068434 (2d Cir. June 8, 2022), which disposed of Delligatti's other challenges along with those of his co-defendant, Steven Pastore, we **AFFIRM** the judgment of the district court.

AFFIRMED.

VIVIAN SHEVITZ (Larry J. Silverman, *on the brief*), South Salem, NY, for Appellant Steven Pastore.

LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY, for Appellant Salvatore Delligatti.

JORDAN L. ESTES (Samson A. Enzer, Jason M. Swergold, Karl N. Metzner, Won S. Shin, on the brief), Assistant United States Attorneys, for Damian Williams, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

RICHARD J. SULLIVAN, Circuit Judge:

This appeal requires us to determine whether attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), is a crime of violence as defined in 18 U.S.C. § 924(c)(1)(A)(i). Defendant-Appellant Salvatore Delligatti was convicted after a jury trial in the United States District Court for the Southern District of New York (Forrest, *J.*) on charges arising from his participation in a well-known racketeering enterprise known as the Genovese Crime Family. The government established at trial that, as an associate in the enterprise, Delligatti had participated in a range of criminal conduct that included extortion, conspiracy to commit murder, attempted murder, and the operation of an illegal gambling business.

The jury found Delligatti guilty of racketeering conspiracy, in violation of a provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (Count One); conspiracy to commit murder in aid of racketeering and attempted murder in aid of racketeering, in violation of a provision of the Violent Crimes in Aid of Racketeering ("VICAR") statute, 18 U.S.C. § 1959(a)(5) (Counts Two and Three); conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958 (Count Four); operating an illegal gambling business, in violation of 18 U.S.C. § 1955 (Count Five); and using and carrying a firearm during and in relation to a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Seven). The district court sentenced him to an aggregate term of 300 months' imprisonment.

Delligatti timely appealed, raising several challenges to his conviction and sentence. On June 8, 2022, we

affirmed the district court in all respects in an opinion and simultaneously issued summary order.[1] Our opinion considered whether, in the wake of *United States v. Davis,* 139 S. Ct. 2319 (2019), Delligatti's section 924(c) conviction was still validly based on a predicate "crime of violence." *See United States v. Pastore*, 36 F.4th 423, 426 (2d Cir. 2022).[2] We concluded that it was, because one of the predicate offenses underlying his section 924(c) conviction – attempted murder in aid of racketeering, premised on attempted murder under New York law – was a crime of violence. *See id.* At 427–30.

Shortly after our disposition of this appeal, but before the mandate issued, the Supreme Court issued its decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). On June 27, 2022, Delligatti filed a petition for a panel rehearing or rehearing *en banc*, arguing primarily that our opinion was inconsistent with the Supreme Court's reasoning in *Taylor*. Thereafter, a hold was placed on Delligatti's petition, as the panel waited in a post-*Taylor* "crime of violence" queue. Although neither *Taylor* nor any of our post-*Taylor* precedents affect the outcome of our prior opinion, we nevertheless grant Delligatti's petition for rehearing, withdraw our original opinion of June 8, 2022, and issue this amended opinion, which

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[1] Delligatti's appeal was consolidated with the appeal of his co-defendant, Steven Pastore. Pastore's challenges were addressed in our June 8, 2022 summary order, which was issued in tandem with the Court's original opinion.

[2] Our prior opinion in this case was delayed by the panel's need to await its turn in a queue of cases impacted by the Supreme Court's ruling in *Davis* interpreting the term "crime of violence" in section 924(c). *See United States v. Laurent*, 33 F.4th 63, 73 n.3 (2d Cir. 2022).

includes only minor changes to address the arguments made by Delligatti in light of *Taylor*.[3]

I. BACKGROUND

The Genovese Crime Family (the "Family") is one of five crime families that make up the larger criminal network known as "La Cosa Nostra" in New York. The Family operates through a well-defined hierarchical structure. The "administration," headed by the "boss," runs the Family and oversees various "captains" who run crews made up of "soldiers" and "associates." While both soldiers and associates serve the Family, only soldiers are formally inducted as – or "made" – members of the Family; associates are nevertheless involved in illegal activity with members of the Family and may receive protection from inducted members.

Delligatti was associated with members of the Family as early as 2008. By 2014, he was working as an associate under Robert DeBello, a soldier who operated in the Whitestone neighborhood of Queens. DeBello provided protection and resources to Family members and associates like Delligatti. In return, he received a cut of the proceeds from their illegal activities. While working under DeBello, Delligatti participated in a variety of criminal activities along with other members and associates in the Family, including associates Ryan Ellis and Robert Sowulski.

During this time, Delligatti and others connected to the Family frequented a local gas station owned by Luigi

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[3] Delligatti's petition also raises an additional argument – namely, that the government's evidence was not sufficient to prove an "enterprise" as required to convict him of his racketeering charges. We have considered this argument, which we reject for the reasons outlined in our June 8, 2022 summary order. *See United States v. Pastore*, No. 18-2482, 2022 WL 2068434, at *1 (2d Cir. June 8, 2022).

Romano. Romano was apparently having problems with Joseph Bonelli, a neighborhood bully who had been "terrorizing" him and stealing from his gas station. Delligatti App'x at 367; *see id.* At 341. In addition to his menacing Romano, Bonelli was also suspected of cooperating against "known bookies in the neighborhood," which made him a potential threat to the criminal activities of the Family, its members, and its associates. *Id.* At 341. Around May 2014, at Romano's request, Delligatti organized a plot to murder Bonelli. Romano paid Delligatti in advance for the hit, and Delligatti shared a portion of this payment with DeBello after receiving his permission to carry out the crime.

Although DeBello had given Delligatti permission to kill Bonelli, Delligatti ultimately paid another man – Kelvin Duke – $5,000 to coordinate the murder with several members of the "Crips" gang. Delligatti also provided a gun and a car for Duke and the murder crew to use in their scheme. The car came from Robert Sowulski, who agreed to give Delligatti his car to do "something illegal" before disposing of it permanently. *Id.* At 339. Sowulski planned to report the vehicle as stolen and collect insurance money after Delligatti finished using it for his own criminal purposes.

After receiving the car and gun from Delligatti, Duke and his crew drove to Bonelli's house and positioned themselves in a nearby parking lot to wait for his return. As Bonelli arrived home with a female companion, the crew watched and waited for the right moment to shoot; they eventually abandoned their plan, however, because too many potential witnesses were in the vicinity. Upon learning that Duke and his men had failed, Delligatti tried to convince them to return at once to shoot both Bonelli and his companion in Bonelli's home, but the crew refused. Delligatti then insisted that the men return the

following day to try again. The crew agreed and drove to the same location the next day, but this second attempt was thwarted when law enforcement officers who had learned of the plot arrested the would-be murderers following a car stop.

Shortly after the arrest of the murder crew, Delligatti met with several of his co-conspirators and others in the Family to discuss the botched murder attempt. First, he met with Sowulski and Ellis. The three men agreed that Sowulski should still report his car as stolen, which he did later that night. Delligatti next met up with Romano and Duke, who had been released on bail. At this meeting, Delligatti and Romano informed Duke that their intended victim, Bonelli, was "really [becoming] a problem" and had threatened them after learning of the murder plot. *Id.* At 153. Later that day, Delligatti suggested that he and Duke stay in contact so that "maybe [they] could plan to get rid of [Bonelli] for good." *Id.* At 154.

In May 2017, after a series of indictments and arrests, the grand jury returned a superseding indictment against Delligatti and a number of co-conspirators including DeBello and Ellis. The indictment charged Delligatti with racketeering conspiracy, conspiracy to commit murder in aid of racketeering and attempted murder in aid of racketeering, conspiracy to commit murder for hire, operating an illegal gambling business, and using and carrying a firearm in relation to – and possessing a firearm in furtherance of – a crime of violence. Delligatti proceeded to trial and was convicted of all six charges in March 2018. The district court ultimately sentenced him to a term of 300 months' imprisonment, to be followed by three years of supervised release.

II. DISCUSSION

On appeal, Delligatti argues that his conviction for possessing a firearm in furtherance of a crime of violence should be vacated because Counts One through Four – the predicate offenses upon which that conviction relied – are not "crimes of violence" in light of *United States v. Davis* and related decisions of the Supreme Court.[4] In *Davis*, the Supreme Court held that 18 U.S.C. § 924(c)(3)(B), often called section 924(c)'s "residual clause," is unconstitutionally vague. 139 S. Ct. at 2336. The question now before us is whether any of the predicate crimes underlying Delligatti's section 924(c) conviction are "crimes of violence" under section 924(c)'s remaining "elements" clause.

The elements clause of section 924(c) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). "To determine whether an offense is a crime of violence" under the elements clause, "courts employ what has come to be known as the 'categorical approach.'" United States v. Hill, 890 F.3d 51, 55 (2d Cir. 2018). Under this approach, we do not consider the particular facts

[4] When the parties first submitted briefing in this case, *Davis* had not yet been decided. Delligatti therefore relied on other Supreme Court decisions in which the Court had considered similarly worded residual clauses in other statutes and had held that those clauses were unconstitutionally vague. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1211, 1223 (2018) (holding that 18 U.S.C. § 16(b), the "residual clause" in the provision defining a "crime of violence" as incorporated into the Immigration and Nationality Act, is unconstitutionally vague); *Johnson v. United States*, 576 U.S. 591, 597–606 (2015) (holding the same with respect to 18 U.S.C. § 924(e)(2)(B)(ii), the "residual clause" of the provision defining a "violent felony" under the Armed Career Criminal Act).

before us; rather, we "identify the minimum criminal conduct necessary for conviction under a particular statute" by "look[ing] only to the statutory definitions – i.e., the elements – of [the] offense." *Id.* (internal quotation marks omitted). We then evaluate whether this minimum conduct falls within the definition of "a crime of violence under [section] 924(c)(3)(A)." *Id.* At 56.

Although determining the elements of a particular statute is usually a straightforward endeavor, that is not always the case. For certain statutes that "list elements in the alternative, and thereby define multiple crimes," we have deemed the statute to be divisible and applied a "modified" categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Under the modified categorical approach, we may review "'a limited class of documents' from the record of conviction to 'determine what crime, with what elements, a defendant was convicted of.'" *Gray v. United States*, 980 F.3d 264, 266 (2d Cir. 2020) (quoting *Mathis*, 136 S. Ct. at 2249); *see United States v. Moore*, 916 F.3d 231, 238 (2d Cir. 2019) (explaining that courts may consult "the indictment, jury instructions, or plea agreement and colloquy" to determine the offense of conviction (internal quotation marks omitted)). We "then return to the categorical analysis and compare the elements of the offense of conviction with" section 924(c)(3)(A)'s definition of a crime of violence. *Moore*, 916 F.3d at 238.

To determine whether Delligatti's section 924(c) charge is properly based on a crime of violence, we must determine whether any one of the section 924(c) predicate offenses listed in his indictment – racketeering conspiracy, conspiracy to commit murder in aid of racketeering, attempted murder in aid of racketeering, and murder-for-hire conspiracy – "categorically involve[s] the use of force." *United States v. Martinez*, 991 F.3d 347,

354 (2d Cir.), *cert. denied*, 142 S. Ct. 179 (2021); see also *United States v. Walker*, 789 F. App'x 241, 244–45 (2d Cir. 2019). Our most recent caselaw has made clear that the three conspiracy offenses do not. In *United States v. Laurent*, we squarely held that "a RICO conspiracy cannot qualify as a crime of violence, even if marked by violence or directed to violent objectives." 33 F.4th 63, 86 (2d Cir. 2022); *see United States v. Capers*, 20 F.4th 105, 117–18 (2d Cir. 2021) (holding same); *Martinez*, 991 F.3d at 354 (assuming same, without expressly so deciding); *see also United States v. Heyward*, 3 F.4th 75, 82, 85 (2d Cir. 2021) ("[C]onspiracy to murder is *not* a qualifying offense under [section] 924(c)."). Therefore, we must decide whether a substantive VICAR count for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) may constitute a valid predicate crime of violence for purposes of section 924(c).

To answer that question, we must first clarify whether substantive VICAR offenses should be analyzed under the modified categorical approach after *Davis*. We recently held that substantive *RICO* offenses are subject to the modified categorical approach. *Laurent*, 33 F.4th at 87–89; *see id.* At 89 ("[A]pplying a modified categorical approach to a substantive RICO conviction makes good sense given that (1) RICO requires that the specific crimes constituting the 'pattern' of the racketeering enterprise be identified in the charging instrument and proven beyond a reasonable doubt, and (2) sets forth distinct penalties for different categories of underlying violations." (citing *Martinez*, 991 F.3d at 356–57)). And we see no reason why the same mode of analysis should not apply to substantive offenses under the related VICAR statute. After all, VICAR complements RICO, and the statutes are similarly structured. *See United States v. Concepcion*, 983 F.2d 369, 380–81 (2d Cir. 1992); *see also*

S. Rep. No. 225, 98th Cong., 1st Sess. 304–07 (1983). Accordingly, we now hold that the modified categorical approach applies to substantive VICAR offenses, and that "a substantive [VICAR] offense is a crime of violence when predicated on at least one violent [crime in aid of] racketeering act[s]." *Laurent*, 33 F.4th at 88.

Applying the modified categorical approach, we further hold that Delligatti's substantive VICAR conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) – itself predicated, in this case, on attempted murder in violation of New York law – is a valid predicate crime of violence under section 924(c). Delligatti's substantive VICAR offense "hinge[s] on" the underlying predicate offense, and so "we look to th[at] predicate offense[] to determine whether" Delligatti was charged with and convicted of a crime of violence. *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009); s*ee also United States v. White*, 7 F.4th 90, 104 (2d Cir. 2021). Delligatti's superseding indictment specified that the 18 U.S.C. § 1959(a)(5) charge was predicated on his having "knowingly attempted to murder [a victim]" in violation of New York State Penal Law §§ 20.00, 110.00, 125.25. See Delligatti App'x at 53–54. At trial, Delligatti was convicted of attempting to commit murder under N.Y. Penal Law § 125.25(1), which states that a "person is guilty of murder in the second degree" when he has "intent to cause the death of another person, [and] he causes the death of such person or of a third person."[5] There is no question that

[5] Section 125.25 "list[s] elements [for second-degree murder] in the alternative," *Mathis*, 136 S. Ct. at 2249, and the district court's jury instructions made clear that Delligatti was convicted under section 125.25(1), *see* Delligatti App'x at 439 (instructing the jury that "[i]n order . . . to find that a person committed murder under New York law, the government must prove beyond a reasonable doubt that . . .

intentionally causing the death of another person involves the use of force. *See United States v. Castleman*, 572 U.S. 157, 169 (2014) ("[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force."); *Scott*, 990 F.3d at 98–99, 110 (holding that first-degree manslaughter under N.Y. Penal Law § 125.20(1), "a homicide crime second only to murder [under section 125.25] in its severity," is categorically a crime of violence because it requires intent to cause "serious physical injury" and results in the death of another); *Stone v. United States*, 37 F.4th 825, 833 (2d Cir. 2022) (holding that murder in the second degree under N.Y. Penal Law § 125.25(1) is categorically a crime of violence).

We have already recognized that attempt under New York law requires both "intent to commit the crime and an action taken by an accused so near [to] the crime's accomplishment that in all reasonable probability the crime itself would have been committed." *United States v. Tabb*, 949 F.3d 81, 86 (2d Cir.) (internal quotation marks and alterations omitted), *cert. denied*, 141 S. Ct. 2793 (2021). Thus, where an individual attempts to commit a crime of violence, "this latter element of New York attempt categorically requires that a person take a substantial step toward the use of physical force." *Id.* (internal quotation marks omitted); *see also United States v. Thrower*, 914 F.3d 770, 776–77 (2d Cir. 2019). Applying this logic in *Tabb*, we concluded that because assault in the second degree under N.Y. Penal Law § 120.05(2) is a crime of violence involving the use of force, *attempt* to

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the individual caused the death of [a] victim or aided and abetted the same; and . . . that the individual did so with the intent to cause the death of the victim or another person"). We therefore consider only that provision in our discussion of murder in the second degree. *See Moore*, 916 F.3d at 238; *cf. United States v. Scott*, 990 F.3d 94, 99 n.1 (2d Cir.) (*en banc*), *cert. denied*, 142 S. Ct. 297 (2021).

commit assault in the second degree is also categorically a crime of violence. 949 F.3d at 83–86. Likewise, because second-degree murder under New York law is a crime of violence, there can be no doubt that attempt to commit second-degree murder under New York law is itself categorically a crime of violence.

The Supreme Court's recent decision in *Taylor* does not alter this conclusion. There, the Supreme Court held that attempted Hobbs Act robbery is not a crime of violence under the elements clause of section 924(c). *Taylor*, 142 S. Ct. at 2021. That is because one element of completed Hobbs Act robbery is that the defendant must take property "by means of actual or threatened force." Id. At 2020 (quoting 18 U.S.C. § 1951(b)) (emphasis added). It follows then that attempted Hobbs Act robbery can be committed through the *attempted threat of force* – which need not involve the "use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), as is required for a section 924(c) conviction under the elements clause, *see Taylor*, 142 S. Ct. at 2021.

Here, unlike Hobbs Act robbery, the crime of second-degree murder cannot be committed through the mere threat of force and must instead involve the actual use of force. *See Stone*, 37 F.4th at 833; *Castleman*, 572 U.S. at 169; *Scott*, 990 F.3d at 98–99, 110. Accordingly, a conviction for attempted murder categorically means that the defendant took a "substantial step toward the use of physical force" – and not just a substantial step toward the *threatened* use of physical force. *Tabb*, 949 F.3d at 86 (internal quotation marks omitted). Since attempted murder requires both an intent to use physical force and a substantial step towards the use of physical force, it satisfies the "attempted use . . . of physical force" element under section 924(c), 18 U.S.C. § 924(c)(3)(A), and thereby qualifies as a crime of violence. Indeed, our decision today

is in line with those of our sister Circuits, which have held that other attempted-murder offenses are crimes of violence under section 924(c), even in the wake of the Supreme Court's decision in *Taylor*. *See Alvarado-Linares v. United States*, 44 F.4th 1334, 1346–48 (11th Cir. 2022) (explaining that, unlike attempted Hobbs Act robbery, VICAR attempted murder and attempted murder under Georgia law are still crimes of violence because they necessarily involve the "attempt[] to use force" and not just the "attempt to threaten" the "use of force"); *see also United States v. States*, 72 F.4th 778, 787–91 (7th Cir. 2023) (holding that attempted murder of a federal officer under 18 U.S.C. §§ 1113–14 remains a crime of violence after *Taylor*); *Dorsey v. United States*, 76 F.4th 1277, 1282–84 (9th Cir. 2023) (holding that witness tampering by "attempt[ing] to kill another person" under 18 U.S.C. § 1512(a)(1), like "attempted first-degree murder under Washington state law," constitutes a crime of violence, and noting that "*Taylor* does not hold that attempt crimes are categorically not crimes of violence" (internal quotation marks omitted)).

Delligatti nevertheless argues that attempted murder is not a crime of violence because it can be committed "by way of affirmative acts *or omissions*." Delligatti Br. At 48. This argument fails in light of our recent *en banc* decision in *Scott*. There, we rejected a similar argument regarding first-degree manslaughter by omission, explaining that "whether a defendant acts by commission or omission, in every instance, it is his intentional use of physical force against the person of another that causes death." *Scott*, 990 F.3d at 123. Further, in rejecting Scott's argument, this Court specifically pointed out the absurdity of an argument that, "carried to its logical – or illogical – conclusion, would preclude courts from recognizing even intentional murder

[under N.Y. Penal Law § 125.25(1)] as a categorically violent crime." *Id.* At 100.

Because Delligatti's conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) is premised on the predicate crime of attempted murder under New York law, which constitutes a crime of violence as defined in the elements clause of section 924(c), we conclude that Delligatti's conviction for attempted murder in aid of racketeering under section 1959(a)(5) is necessarily a crime of violence. *See White*, 7 F. 4th at 104 & n.75; *Ivezaj*, 568 F.3d at 96. Since this conviction for attempted murder in aid of racketeering serves as one of the predicate offenses underlying Delligatti's section 924(c) conviction, we uphold the section 924(c) conviction and affirm the judgment of the district court.

III. CONCLUSION

For the foregoing reasons, we conclude that Delligatti's section 924(c) conviction remains valid in the wake of *Davis* and *Taylor*. Accordingly, we **AFFIRM** the judgment of the district court.

APPENDIX B

[DATED: JUNE 8, 2022]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of June, two thousand twenty-two.

PRESENT: JOHN M. WALKER,
RICHARD J. SULLIVAN,
Circuit Judges,
ALISON J. NATHAN,
District Judge. *

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* Judge Alison J. Nathan, of the United States District Court for the Southern District of New York, sitting by designation at the time this case was heard.

UNITED STATES OF AMERICA, *Appellee*, v. STEVEN PASTORE, SALVATORE DELLIGATTI, *Defendants-Appellants*.[†]	Nos. 18-2482(L), 18-2610(Con)

FOR DEFENDANTS-APPELANTS

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LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY *for Appellant* Salvatore Delligatti.

FOR APPELLEE

JORDAN L. ESTES, Assistant United States Attorney (Samson Enzer, Jason M. Swergold, Karl Metzner, Assistant United States Attorneys, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

[†] The Clerk of the Court is respectfully directed to amend to official case caption as set forth above.

Appeal from judgments of conviction and sentences in the United States District Court for the Southern District of New York (Katherine B. Forrest, *Judge*).

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

Defendants-Appellants Steven Pastore and Salvatore Delligatti appeal from judgments entered by the United States District Court for the Southern District of New York in connection with their participation in a criminal enterprise known as the Genovese Crime Family (the "Family").[1] Delligatti was sentenced to 300 months' imprisonment after a jury found him guilty of conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d) (Count One); conspiracy to commit murder in aid of racketeering and attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Counts Two and Three); conspiracy to commit murder-for-hire, in violation of 18 U.S.C. § 1958 (Count Four); illegal gambling, in violation of 18 U.S.C. § 1955 (Count Five); and using a firearm during and in relation to a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Seven). Pastore, who pleaded guilty to Count One only, was sentenced to 24 months' imprisonment and was ordered to forfeit $125,000.

Delligatti raises an assortment of challenges on appeal, including that (1) the evidence at trial was not sufficient to sustain his convictions on Counts One, Two,

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[1] Decision of this case was delayed by the panel's need to await its turn in a queue of cases pending in this Circuit resolving questions arising from the Supreme Court's ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019), interpreting "crime of violence." *See United States v. Laurent*, 33 F.4th 63, 73 n.3 (2d Cir. 2022).

Three, and Five; (2) Counts One and Four of his indictment lacked adequate information and were constructively amended at trial; (3) the district court erroneously admitted certain testimony at trial; and (4) his sentence of 300 months' imprisonment is substantively unreasonable.[2] Pastore challenges his forfeiture order on various grounds, arguing that a jury should have determined the amount and that the district court improperly calculated the total and relied on insufficient evidence. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. Sufficiency of the Evidence

Delligatti challenges the sufficiency of the evidence underlying his racketeering convictions (Counts One through Three) and gambling conviction (Count Five). We review each challenge de novo, "and must affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004).

Delligatti first contends the government failed to identify the "core" personnel of the Family and thus did not sufficiently prove an "enterprise" as required to convict him of his racketeering charges. At trial, a government agent and a cooperating witness who was a member of another crime family testified about the structure of the Family, the illegal activities of Family members, and the Family's role in the broader network of

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[2] Delligatti also challenges his conviction on Count Seven for use of a firearm during and in relation to a "crime of violence," arguing that the underlying predicates were not crimes of violence in light of *Davis*, 139 S. Ct. 2319. We address that challenge in a separate opinion that accompanies this summary order.

organized crime families known as La Cosa Nostra. While these witnesses did not identify every individual in the Family, they described the structure of the enterprise and specified persons functioning as a "continuing unit" during the relevant period. *United States v. Turkette*, 452 U.S. 576, 583 (1981) (explaining that an enterprise is "proved by evidence of an ongoing organization, formal or informal, . . . [with] various associates function[ing] as a continuing unit"); *see United States v. Payne*, 591 F.3d 46, 60 (2d Cir. 2010) (recognizing that an enterprise "may continue to exist even though it undergoes changes in membership" (citation omitted)). Further, the government offered extensive evidence of Delligatti's association with the Family and his engagement in criminal activities with a Genovese soldier named Robert DeBello and two Genovese associates, Ryan Ellis and Robert Sowulski. This evidence was more than sufficient to establish the existence of an enterprise.

Next, Delligatti argues that the government did not sufficiently establish a "pattern" of racketeering activity to prove an offense under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). He also contends that, because the jury was not asked to return a special verdict sheet as to Count One, it is impossible to know which charged acts constitute the requisite "pattern" of activity. A "pattern of racketeering activity" under RICO requires at least two racketeering acts within a ten-year span, excluding periods of imprisonment; acts linked to the same racketeering enterprise are ordinarily sufficient to establish such a pattern. *See United States v. Daidone*, 471 F.3d 371, 374–76 (2d Cir. 2006); *United States v. Indelicato*, 865 F.2d 1370, 1383–84 (2d Cir. 1989) (stating that an act in furtherance of a racketeering business "automatically

carries with it the threat of continued racketeering activity").

Count One of the indictment charged that members and associates of the Family – a criminal enterprise – engaged in various crimes "including conspiracy to commit murder; attempted murder; extortion; and the operation of illegal gambling businesses." Delligatti App'x at 39. At trial, the district court instructed the jury that it did not need to "decide whether [Delligatti] agreed to the commission of any particular racketeering act" to convict him of Count One, but it had to "be unanimous as to which type or types of predicate racketeering activity [he] agreed would be committed." *Id.* at 438. The court later instructed the jury on the elements of each predicate offense.

Based on the trial record, we are persuaded that there was ample evidence to prove Delligatti's involvement in multiple predicate acts linked to the Family. As discussed below, the jury heard that (1) Delligatti directed a murder plot; (2) DeBello approved and financially benefitted from that plot; (3) Delligatti and DeBello intimidated a nightclub owner and employee to obtain payments from the club; and (4) Delligatti participated in an illegal gambling scheme run by another Genovese associate. The evidence shows that the predicate acts charged in Count One were "related" to the Family and together "amount[ed] to . . . continued criminal activity" sufficient to establish a "pattern" of racketeering activity. *Daidone*, 471 F.3d at 375.

Delligatti also argues that his convictions for conspiracy to commit murder in aid of racketeering and attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Counts Two and Three), must be dismissed because the government did not present

sufficient evidence that Delligatti planned a murder for the purpose of gaining entrance to or maintaining a position within the Family. But while section 1959 permits the government "to prosecute defendants for violent crimes intended . . . to permit a defendant to maintain or increase [his] position in a RICO enterprise," *United States v. Pimentel*, 346 F.3d 285, 295 (2d Cir. 2003) (internal quotation marks omitted), the government need not prove that "was the defendant's sole or principal motive," *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992).

Delligatti emphasizes that he was solicited and paid to kill Joseph Bonelli not by a member of the Family, but by Luigi Romano, the owner of a local gas station whom Bonelli had "terrorized." Delligatti App'x at 346. Trial testimony established, however, that Family members frequented Romano's gas station, that the Family was engaged in bookmaking, and that Bonelli was suspected of cooperating with the police against bookmakers. The jury also heard testimony that DeBello, a Genovese soldier, approved Bonelli's murder and received a cut of the amount Romano paid for the hit. From this evidence, a rational jury could readily infer that Delligatti plotted Bonelli's murder, at least in part, to benefit the Family and to advance his status within the Family. *See United States v. Whitten*, 610 F.3d 168, 179–80 (2d Cir. 2010) (finding intent under section 1959 where testimony established that committing violence authorized by crew leaders could enhance status); *Concepcion*, 983 F.2d at 381.

Finally, Delligatti argues there was insufficient evidence to support his conviction for participating in the operation of an illegal gambling business. To prove that Delligatti participated in the operation of an illegal gambling business as charged in the indictment, the

government had to show, among other things, that the business (1) involved five or more people and (2) received more than five bets totaling over $5,000 in one day. *See* 18 U.S.C. § 1955; N.Y. Penal Law § 225.10(1).

The evidence at trial clearly established that Delligatti was a "runner" in a sports-betting operation led by Genovese associate Ryan Ellis; that Delligatti had a "sheet" with Ellis – meaning that Delligatti set up clients to bet and received some of the proceeds if his clients lost; that DeBello also received a cut of the proceeds from the operation; and that the business employed numerous other runners, including Luigi Caminiti, Michael Vigorito, and Scott Jacobson. The government also introduced one of Jacobson's gambling sheets, which itself showed that fifteen clients had placed bets and lost a total of $5,982 in a single day. Considered as a whole, this evidence sufficiently supported Delligatti's conviction on Count Five.

II. Adequacy of Indictment & Jury Instructions

Delligatti argues for the first time on appeal that his convictions on Count One (racketeering conspiracy) and Count Four (murder-for-hire conspiracy) should be reversed because his indictment failed to specify certain necessary details and statutory citations. Because Delligatti did not raise this claim "prior to trial, as unambiguously required by the law of th[is] Circuit," and he has shown no cause for failing to timely do so, the claim "must be rejected." *United States v. Spero*, 331 F.3d 57, 61–62 (2d Cir. 2003); *see also* Fed. R. Crim. P. 12(b)(3)(B) (requiring that objections alleging "a defect in the indictment" for "lack of specificity" or "failure to state an offense" be raised by pretrial motion if "the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits").

Delligatti also maintains that the district court's jury instructions on Counts One and Four constructively amended his indictment. Because he failed to object to these instructions at trial, we review for plain error. See United States v. Hertular, 562 F.3d 433, 444 (2d Cir. 2009). To prevail on this challenge, Delligatti "must demonstrate that . . . the presentation of evidence and jury instructions . . . so modif[ied] *essential elements* of the offense charged that there is a substantial likelihood that [he] may have been convicted of an offense other than that charged in the indictment." *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012) (internal quotation marks omitted). Upon review of the indictment and the district court's detailed jury instructions, we find no basis for concluding that Count One or Four were constructively amended.

III. Evidentiary Rulings

Next, Delligatti challenges the district court's admission of certain testimony at trial. We review the court's evidentiary rulings for abuse of discretion and reverse only if the court based its decision "on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or if its decision cannot be located within the range of permissible decisions." *United States v. Barret*, 848 F.3d 524, 531 (2d Cir. 2017).

Delligatti first contests the admission of expert testimony from Special Agent John Carillo, who testified about the structure and conduct of La Cosa Nostra and the Genovese Crime Family, as well as the code of silence known as "Omerta." Agent Carillo's testimony gave context to the crimes charged; his specialized knowledge was also highly probative as to whether the Family was an "enterprise" and whether Delligatti's acts were related to that enterprise. *See* Fed. R. Evid. 702(a); *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993) (allowing

testimony "on the nature and function of organized crime families, imparting the structure of such families and disclosing the 'rules' of . . . La Cosa Nostra"). It was not an abuse of discretion to admit this testimony.

Delligatti next challenges the district court's decision to allow testimony from Philip Gurian, who testified that he ran a sports-betting operation with Delligatti and another Genovese associate – Christopher Castellano – who was later suspected of cooperating with law enforcement and subsequently killed. Although there was no evidence that Delligatti was involved in Castellano's murder, the court concluded that Gurian's testimony about Castellano was "directly relevant to the existence and nature of the charged [racketeering] conspiracy" and "would help the jury understand why Delligatti would have been willing to murder Bonelli – who, like Castellano, was suspected of cooperating with law enforcement." Delligatti App'x at 91. The court also found that such evidence was "similar to, and no more prejudicial than the crimes with which Delligatti has been charged." *Id.*

Evidence that Castellano had been considering cooperating and was later murdered was relevant to establishing Delligatti's motive for killing Bonelli (another suspected cooperator), especially when coupled with testimony about the Family's rule prohibiting cooperation on penalty of death. *See* Fed. R. Evid. 403. Moreover, Gurian's brief testimony about Castellano's murder was not "more sensational or disturbing" than evidence of the charged crimes, which included Delligatti's extensive efforts to have Bonelli killed. *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990). On balance, we find that the district court did not abuse its discretion in admitting this testimony.

Delligatti separately argues that Gurian's testimony included improper hearsay statements that Castellano made to Gurian when they were both incarcerated. We agree with the district court that these statements were admissible as statements against Castellano's penal interest under Rule 804(b)(3) of the Federal Rules of Evidence. Rule 804(b)(3) permits the admission of a hearsay statement at trial "if the declarant is unavailable as a witness," and the statement is one that (1) "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency . . . to expose the declarant to civil or criminal liability; and" (2) "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."

Gurian testified that Castellano said he was an "enforcer" for two Genovese soldiers, Federici and Romanello, which Gurian understood to mean that Castellano "would intimidate people, beat people up, [and] hurt people to collect money to end up accomplishing whatever result" the mobsters demanded. Delligatti App'x at 280. These statements clearly would have subjected Castellano to criminal liability. *See United States v. Gupta*, 747 F.3d 111, 129 (2d Cir. 2014); *United States v. Persico*, 645 F.3d 85, 102 (2d Cir. 2011). Corroborating evidence also bolsters the trustworthiness of Castellano's statements: Castellano made these statements to Gurian, his friend and fellow inmate, rather than to law enforcement agents "whose favor he might be expected to curry." *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983); *see Gupta*, 747 F.3d at 127. Further, after both men were out of prison, Castellano

introduced Gurian to Federici at a dinner and connected Gurian with Delligatti, a fellow Genovese associate who also knew Romanello. And since Castellano's death in 2010 made him unavailable at trial, the district court did not err in admitting Castellano's prior statements under Rule 804(b)(3).

Finally, Delligatti challenges the district court's decision to permit Robert Sowulski to testify about Delligatti's suggestion that they plant a bomb in a club targeted by the Family for extortion. Delligatti argues these statements made him look like a "volatile and violent person" but were not probative of an existing extortion conspiracy, and thus should have been excluded under Federal Rules of Evidence 402 and 403. Delligatti Br. at 56. But Delligatti's willingness to plant a bomb at a nightclub after prior failed efforts to intimidate and take over the club was highly probative of his participation in a racketeering conspiracy involving extortion. Though no bomb was ultimately planted, Delligatti's proposal was relevant to establish his state of mind and intent while participating in the racketeering conspiracy. The court properly exercised its discretion in admitting that testimony.

IV. Reasonableness of Sentence

Lastly, Delligatti challenges the substantive reasonableness of his below-Guidelines sentence because of "[t]he stark disparities" between his 300-month sentence and the sentences of his co-defendants. Delligatti Br. at 58. We review a sentence for substantive reasonableness under "a deferential abuse-of-discretion standard," "tak[ing] into account the totality of the circumstances" and "giving due deference to the sentencing judge's exercise of discretion." *United States v. Cavera*, 550 F.3d 180, 189–90 (2d Cir. 2008) (en banc)

(internal quotation marks omitted). In this case, Delligatti's sentence fell below the minimum advisory Sentencing Guidelines sentence of 324 months. Moreover, while district courts are not required to consider disparities among co-defendants – particularly if they are not similarly situated, *see United States v. Johnson*, 567 F.3d 40, 54 (2d Cir. 2009) – here the court properly considered the section 3553(a) factors and applied a downward variance to prevent too great a disparity between Delligatti and his co-defendants. Because this was well "within the range of permissible decisions," we affirm. *See Cavera*, 550 F.3d at 191.

V. Forfeiture

Pastore challenges his $125,000 forfeiture order, arguing that (1) a jury should have determined the forfeiture amount, and (2) the district court erred in calculating the amount based on gross receipts of funds that were not directly traced to any bettor in the gambling scheme. He also argues that the court determined the forfeiture amount based on insufficient and unreliable evidence.[3]

"We review a district [court's] legal conclusions regarding forfeiture de novo and [its] factual determinations for clear error." *United States v. Daugerdas*, 837 F.3d 212, 231 (2d Cir. 2016). "For a

[3] In his briefs, Pastore challenged the procedural and substantive reasonableness of his sentence. He has since withdrawn as moot his "argument concerning [his] incarceratory sentence." Case No. 18-2482, Doc. No. 153. To the extent that he maintains a procedural challenge to the district court's imposition of forfeiture, Pastore fails to explain how the error he alleges – a factual finding in violation of Federal Rule 32 of Criminal Procedure – affected the forfeiture calculation. Moreover, the record makes clear that this challenge lacks merit. *See* Pastore App'x at 67 (stating that court won't rely on disputed fact at sentencing).

criminal forfeiture order to pass muster, the government must establish, by a preponderance of the evidence, the 'requisite nexus between the property and the offense.'" *Id.* (quoting Fed. R. Crim. P. 32).

Pastore's argument that a jury should have determined his forfeiture amount is foreclosed by Supreme Court and Second Circuit precedent. In *Libretti v. United States*, the Supreme Court held that there is no right to a jury trial on a forfeiture determination, *see* 516 U.S. 29, 49–52 (1995), and this Circuit has since recognized that "*Libretti* . . . remain[s] controlling precedent," *United States v. Stevenson*, 834 F.3d 80, 85–86 (2d Cir. 2016).

Pastore also argues that the district court should have calculated his forfeiture based on *net*, rather than *gross*, proceeds. He cites to *United States v. Masters*, in which the Seventh Circuit "assume[d]" (with little analysis) "that the proceeds to which [18 U.S.C. § 1963] refers are net, not gross, revenues," and dismissed this Circuit's precedent, *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), as not "square[d]" with the statutory language. 924 F.2d 1362, 1369–70 (7th Cir. 1991). But *Masters* is an outlier; no other circuit to have addressed this issue has agreed with the Seventh Circuit. *See, e.g.*, *United States v. Cadden*, 965 F.3d 1, 38 (1st Cir. 2020); *United States v. Christensen*, 828 F.3d 763, 822–24 (9th Cir. 2015); *United States v. Simmons*, 154 F.3d 765, 770–71 (8th Cir. 1998); *United States v. DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997).

In any event, we remain bound by this Court's decision in *Lizza Industries*. In that case, after the defendants were convicted under RICO for colluding on bids for publicly funded construction contracts, 775 F.2d at 494, the district court calculated forfeiture "by deducting from the money received on the illegal

contracts *only* the direct costs incurred in performing those contracts," *id.* at 498. We affirmed the district court's calculation based on "gross rather than net profits." *Id.* (describing the court's calculation – which deducted only direct costs of performance from gross profits derived under illegal contracts – as "consistent with the purposes of the RICO statute"). In doing so, we explained that "[o]ften[,] proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative." *Id.* Accordingly, we emphasized that "RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced." *Id.*

More recently, in *United States v. Peters*, we likewise held that the term "proceeds" in another criminal forfeiture statute, 18 U.S.C. § 982(a)(2), refers to gross receipts rather than net profits, emphasizing that "it should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." 732 F.3d 93, 101 (2d Cir. 2013) (quotation mark and alteration omitted) (noting that a properly "broad reading of 'proceeds' in the context of criminal forfeiture" under RICO should "punish[] 'all convicted criminals who receive income from illegal activity, and not merely those whose criminal activity turns a profit'" (quoting *Simmons*, 154 F.3d at 771)).

Here, Pastore offered no evidence of direct costs that could be deducted from the proceeds he received, and even if he *had* offered such evidence, it is unlikely that this Court's holding in *Lizza Industries* – which contemplated deduction of lawful costs for the performance of illegally obtained construction contracts – would permit deduction of *unlawful* costs incurred in an illegal gambling scheme. *See* Pastore App'x at 54 (district court stating it had received no evidence of "any . . . amounts deducted from"

proceeds "received by Mr. Pastore"); *Peters*, 732 F.3d at 101; *cf. United States v. Ofchinick*, 883 F.2d 1172, 1181–82 (3d Cir. 1989) (noting that *Lizza Industries* "did not address whether a district court *must* deduct direct costs," and that "[i]f direct costs need be taken into account, it is the defendant who has the burden of going forward on this issue," because "[t]he government should not have to prove the absence of direct costs in a case in which the defendant has not pointed to costs that might be deductible"). We conclude that where the district court had no evidence of any direct costs paid out from Pastore's unlawful proceeds, it committed no error and appropriately followed this Court's reasoning in *Lizza Industries* and *Peters* by calculating forfeiture based on the proceeds that Pastore received.

Pastore also argues that the district court erred by including funds not traced to specific bettors in the bookmaking business. Citing to *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), he argues that that the district court was required to trace proceeds from a losing bettor to Pastore himself. We disagree.

In *Honeycutt*, the Supreme Court held that courts ordering forfeiture under 21 U.S.C. § 853(a)(1) cannot hold a defendant "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1630. This Circuit has not yet determined "whether *Honeycutt*'s ruling . . . applies equally in all respects to forfeiture orders under other statutes," *United States v. Fiumano*, 721 F. App'x 45, 51 n.3 (2d Cir. 2018); *see United States v. Gil-Guerrero*, 759 F. App'x 12, 18 n.8 (2d Cir. 2018), but even if we were to assume that the holding of *Honeycutt* applies equally to forfeiture under the criminal RICO statute, it would not affect the calculation in this case. "While we have not yet fully defined the parameters of *Honeycutt*," we have clarified that the "bar against joint

and several forfeiture for co-conspirators applies only to co-conspirators who *never possessed the tainted proceeds of their crimes*." *United States v. Tanner*, 942 F.3d 60, 67–68 (2d Cir. 2019) (emphasis added). So, if a defendant at one point possessed proceeds from criminal activity, he "can still be held liable to forfeit the value of those tainted proceeds, even if those proceeds are no longer in his possession because they have been dissipated or otherwise disposed of by any act or omission of the defendant." *Id.* at 68 (internal quotation marks omitted).

In this case, the government demonstrated that Pastore received payments from runners and thus possessed proceeds from the illegal gambling operation. While the payments may not have always come directly from bettors' hands, we recognize that money is fungible and the payments undoubtedly constituted proceeds from the gambling scheme. The district court's calculation of forfeiture based solely on these illegal proceeds paid to Pastore did not conflict with the Supreme Court's holding in *Honeycutt*, and we thus find no error.

Finally, although he conceded below that he received proceeds from the illegal gambling operation, Pastore asserts on appeal that there was insufficient evidence to support forfeiture in the amount of $125,000. In calculating forfeiture, a court "may [rely] on evidence already in the record . . . and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B); *see United States v. Capoccia*, 503 F.3d 103, 109–10 (2d Cir. 2007).

Here, the court considered evidence, including wiretapped calls and surveillance reports, that the government introduced at a forfeiture hearing to prove Pastore's receipt of at least $125,000 from the gambling operation. Pastore stipulated to the authenticity of this

evidence and did not call any witnesses to impeach the reliability of the evidence. The court's finding – "well beyond a preponderance" – that Pastore received $125,000 in proceeds traceable to the gambling operation was not clearly erroneous. Pastore App'x at 94; *see United States v. Gaskin*, 364 F.3d 438, 461 (2d Cir. 2004) ("[T]he government need prove facts supporting forfeiture only by a preponderance of the evidence.").

We have considered Defendants' remaining arguments and conclude that they lack merit. For the foregoing reasons and those in the concurrently filed opinion, the district court's judgment is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX C

[DATED: FEBRUARY 8, 2018]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SALVATORE DELLIGATTI,

Defendant.

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, United States District Judge:

On October 21, 2015, an Indictment was unsealed charging Salvatore Delligatti and a number of others with participating in a racketeering enterprise that involved acts of extortion and illegal gambling, as well as other crimes. Among the crimes with which Delligatti is charged is participating in conspiracies to commit murder-for-hire and attempted murder. A number of defendants charged in the same indictment have now pled guilty. Delligatti is scheduled for trial commencing on March 12, 2018.

Pending before the Court are Delligatti's motions to suppress evidence obtained pursuant to a judicially authorized wiretap, or, in the alternative, a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and to dismiss Count VII, which charges him with using, carrying, and possessing a firearm during and in relation to one or more crimes of violence.

For the reasons set forth below, both motions are DENIED.

I. APPLICABLE LEGAL STANDARDS

A. Probable Cause for Wire Tap

Applications for wiretaps are governed by Title III of the United States Code ("Title III application). 18 U.S.C. § 2510, *et seq.* A warrant authorizing a wiretap must be approved by a judge based upon a showing of probable cause. 18 U.S.C. § 2518(3) (a judge may "enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).") As with probable cause determinations generally, to support a Title III application the Government bears the burden of showing that (a) an individual was committing, had committed, or is about to commit a specified crime, (b) communications concerning that crime would be obtained through the wiretap, and (c) the facility (here, cell phones) to be wire tapped was being used for criminal purposes or was about to be used or owned by the target of the wiretap. *See id.* § 2518(3); *United States v. Yannotti*, 541 F.3d 112, 124 (2d Cir. 2008) (citing *United States v. Diaz*, 176 F.3d 52, 110 (2d Cir. 1999)) (same). In analyzing whether probable cause exists, a court reviews the "totality of the circumstances" and ask whether those circumstances reflect the fair probability that evidence of a crime will be found. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Courts are to use a practical, common sense approach. *Id.*

In reviewing a suppression motion regarding a judicially authorized wiretap, a court is not undertaking a *de novo* review: it should give considerable deference to the judge who authorized the wiretap. *United States v. Concepcion*, 579 F.3d 214, 217 (2d Cir. 2009) (noting that the appellate court grants "considerable deference to the district court's decision whether to allow a wiretap"); *see also Yannotti,* 541 F.3d at 124; *Diaz*, 176 F.3d at 110.

B. Franks Hearing

An affidavit submitted in connection with a Title III application carries a "presumption of validity." *See Franks*, 438 U.S. at 171. In certain circumstances, however, a defendant may "challenge the truthfulness of factual statements made in the affidavit, and thereby undermine the validity of the resulting search." *United States v. Martin*, 426 F.3d 68, 73 (2d Cir. 2005). One way of mounting such a challenge is to proffer facts supporting an inference that the affidavit supporting a Title III application contained deliberately or recklessly false or misleading information. *See United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000).

In the face of an assertion that judicial authorization was based on false and misleading information, a court must first determine whether the defendant has made a *substantial* preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included in the warrant affidavit, and also that such statement was necessary to the finding of probable cause. *See Franks*, 438 U.S. at 155–56. Even where a false statement was intentionally made, "[i]f, after setting aside the allegedly misleading statements or omissions, the affidavit, nonetheless, presents sufficient information to support a finding of probable cause, the district court need not conduct a *Franks* hearing."

Salameh, 152 F.3d at 113. "Omissions from a warrant affidavit 'are not material unless they cast doubt on probable cause.'" *United States v. Mandell*, 710 F. Supp. 2d 368, 374 (S.D.N.Y. 2010) (quoting *United States v. Marin-Buitrago,* 734 F.2d 889, 895 (2d Cir. 1984)).

Only after determining that this substantial preliminary showing has been made should the Court conduct a hearing to test the veracity of a search warrant affiant's statements. *Id.; see also United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008); *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998). "Unsupported conclusory allegations of falsehood or material omission cannot support a *Franks* challenge; to mandate a hearing, the plaintiff must make specific allegations accompanied by an offer of proof." *Velardi v. Walsh*, 40 F.3d 569, 573 (2d Cir. 1994). "The *Franks* standard is a high one." *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991).

II. DISCUSSION

A. The Wiretap Application

Delligatti argues that the Title III wiretap application was not supported by probable cause and that all evidence obtained therefore should be suppressed. This argument lacks merit and may be quickly dispensed with.

As an initial matter, Delligatti focuses on a single affidavit from Detective Angelo LaMorte, submitted in connection with a Title III application sought in June 2014. He argues that this affidavit lacks a sufficient factual basis for a finding of probable cause. Significantly, he ignores that this affidavit explicitly incorporates by reference a number of additional affidavits submitted in

connection with prior Title III applications.[1] As the Government's brief in opposition to this motion lays out in some detail, and this Court will not repeat here, the facts contained in those affidavits are part of the "totality of circumstances" that support a finding of probable cause.

But additionally and independently, the LaMorte affidavit is alone sufficient to support a finding of probable cause. Detective LaMorte sets forth impressive and substantial professional qualifications: he is a law enforcement officer with significant experience in investigating organized crime, and illegal gambling operations in particular. It is against this background of experience that he makes various statements in the affidavit.

Paragraphs 24–49 of LaMorte's affidavit lay out a series of events that support probable cause to believe that the participants (including the user of the telephone at issue, Ryan Ellis) were involved in an illegal gambling operation.[2] LaMorte's statements are generally laid out chronologically and principally based on recordings of actual conversations (derived from prior wiretaps) and surveillance. It is both straightforward and fair to draw the inferences that LaMorte suggests from these events—that the participants (including Ellis, and including the telephone at issue) were discussing illegal gambling, debts relating thereto, collection of debts, and

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[1] The Government raised this issue in its memorandum in opposition to this motion. The Court specifically asked whether Delligatti intended to submit a reply memorandum and he declined. (ECF No. 516.)

[2] The affidavit lays out how Ellis is connected to the cell phone at issue, the "Weir Phone", and how communications between Ellis and other targets of the investigation occurred over that line, and supported the inferences that LaMorte was drawing regarding the use of the Weir Phone for unlawful gambling activities.

the exchange of cash derived therefrom. There was ample evidence from which the judicial officer was able to base a finding of probable cause.

B. The Request for a Franks Hearing

The Court is troubled by what appears to have been a cavalier assertion by counsel for Delligatti that at the very least the defendant is entitled to a *Franks* hearing. As the legal standards set forth above make clear, entitlement to a *Franks* hearing requires a substantial preliminary showing that the warrant affiant has told an intentional or reckless falsehood under oath to a judicial officer—and that the judicial finding of probable cause depends on such falsehood. A request for a *Franks* hearing therefore necessarily implies wrongdoing or serious reckless conduct by a member of law enforcement. Any officer of the Court should only make arguments on behalf of a client when he or she has a good faith belief that such arguments have merit. It should go without saying that accusations of intentional or reckless falsehoods—such as those implied in any request for a *Franks* hearing—should only be made by an officer of the Court when the request has some reasonable factual basis. Here, Delligatti's request is utterly devoid of any supporting facts. This suggests to the Court that the request was made without serious belief that it would succeed, but in disregard of the seriousness with which such allegations must be made.

As Delligatti has failed to make any proffer as to what specific facts are incorrect or misleading in the LaMorte affidavit—let alone any factual proffer that would support a finding of requisite finding of intent—the request for a Franks hearing is DENIED.

C. Count VII

In Count VII, Delligatti is charged with Use of a Firearm in Connection with a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A). Conviction under this provision requires that the Government prove that the defendant used, carried, or possessed (or aided and abetted the same) a firearm in connection with a crime of violence or a drug trafficking crime.

Section 924(c)(3) defines a crime of violence as a felony that:

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

18 U.S.C. § 924 (c)(3). Clause (A) is referred to as the "force" clause, and (B) is referred to as the "residual" clause. Delligatti argues that the residual clause is unconstitutionally vague and that Count VII must therefore be dismissed. This is incorrect.

As an initial matter, there is no doubt that Delligatti is charged with several predicate offenses that would satisfy the "force" provision in § 924(c)(3)(A) – rendering the residual clause irrelevant. For instance, Count One charges the defendant with participating in a racketeering conspiracy that included predicate acts of extortion; Count Two charges him with participating in a conspiracy to commit murder in aid of racketeering; Count Three charges him with attempted murder in aid of racketeering, and Count Four charges him with participating in a conspiracy to commit a murder for hire. There can be no serious argument that allegations of

conspiracies to commit extortion in connection with racketeering, murder, murder-for-hire and attempted murder constitute crimes of violence. The Second Circuit has also rejected claims that conspiracies, as inchoate crimes, cannot constitute crimes of violence. *United States v. Patino*, 962 F.2d 263, 267 (2d Cir. 1992).

But in addition, the Second Circuit's 2016 decision in *United States v. Hill*, 832 F.3d 135, 146, forecloses this argument. In *Hill*, the Second Circuit held that Section 924(c)(3)(B)—the residual clause—is materially different from a residual clause found in the Armed Career Criminal Act ("ACCA"), and that was held unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

III. CONCLUSION[3]

For the reasons set forth below, the motions brought by Delligatti are DENIED. The Clerk of the Court is directed to terminate the motion at ECF No. 449.

SO ORDERED.

Dated: New York, New York
February 8, 2018

/s/ Katherine B. Forrest
KATHERINE B. FORREST
UNITED STATES DISTRICT JUDGE

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[3] The Court notes that in his memorandum in support of these motions, Delligatti purported to "join in motions filed by his co-defendants that may be applicable to him." (Mem. in Supp., ECF No. 450, p.2.) All other co-defendants have now pled and numerous motions they made are no longer before the Court. Accordingly, he should immediately advise the Court if he believes that he is awaiting a ruling on a motion brought by a co-defendant. The Court has terminated all open motions (other than *in limine* motions) and does not believe any other remain pending.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of December, two thousand twenty-three.

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN PASTORE, SALVATORE DELLIGATTI,

Defendants – Appellants.

ORDER

Docket No. 18-2482(L) 18-2610 (Con)

Appellant Salvatore Delligatti, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX E

McKinney's Penal Law § 125.25
§ 125.25 Murder in the second degree
Effective: June 30, 2019

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a)(i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another

person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or

death to another person less than eleven years old and thereby causes the death of such person; or

5. Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.