APPENDIX A - 1

22-3079 (Con)
United States v. Howard

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 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 31st day of May, two thousand twenty-four.

PRESENT: Reena Raggi,
Denny Chin,
Steven J. Menashi,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 22-3079 (Con)

CHRISTOPHER HOWARD, aka JUJU,

Defendant-Appellant.[*]

---

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

For Appellee: Alexandra N. Rothman and Hagan Scotten, Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant: Murdoch Walker, II, and Bingzi Hu, Lowther | Walker LLC, Atlanta, GA.

Appeal from a judgment entered on March 28, 2023, in the United States District Court for the Southern District of New York (Torres, J.).

Upon due consideration, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court is **AFFIRMED**.

Christopher Howard was convicted after a jury trial of racketeering conspiracy in violation of 18 U.S.C. § 1962(d), violent crime in aid of racketeering ("VICAR") in violation of 18 U.S.C. § 1959(a)(3), (5), and using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). On appeal, Howard argues that his Section 924(c) conviction must be vacated because the district court's jury instructions were erroneous in light of the Supreme Court's subsequent decision in *United States v. Davis*, 588 U.S. 445 (2019), and because the conviction is not predicated on a valid crime of violence in light of the Supreme Court's subsequent decision in *United States v. Taylor*, 596 U.S. 845 (2022). Howard also argues that the failure of his trial counsel and former appellate counsel to challenge the erroneous jury instructions amounted to ineffective assistance.

We review a district court's denial of a Rule 33 motion for a new trial for abuse of discretion. *United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016). We review a properly preserved challenge to an erroneous jury instruction for

harmless error and an unpreserved challenge for plain error. *See United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013).

We conclude that the district court did not abuse its discretion in denying Howard's motions for a new trial because the motions were untimely and, in any event, meritless. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I

Howard's motions were untimely and the district court did not abuse its discretion in concluding that the untimeliness was not excusable. "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). A district court may excuse a late filing for "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B). In determining whether neglect is excusable, the district court "consider[s] the danger of prejudice to the non-movant, the length of the delay and its potential impact upon judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith." *United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993) (internal quotation marks and alteration omitted).

Howard filed his motion first asserting the *Davis* argument in January 2022—nearly three years after the jury verdict and two-and-a-half years after *Davis* was decided. Howard filed a supplemental motion first asserting the *Taylor* argument in September 2022—three months after *Taylor* was decided. In his appellate brief, Howard does not provide any argument for why the untimeliness was excusable and we therefore have no basis on which to conclude that the district court abused its discretion in holding that it was not.[1]

---

[1] To the extent that Howard argues that the untimeliness was the result of his former counsel's deficient performance, as explained below the motion fails on the merits regardless.

II

Apart from the untimeliness, Howard's challenges to his Section 924(c) conviction under *Davis* and *Taylor*, and his ineffective assistance of counsel claims, fail on the merits.

A

Howard contends that the district court's Section 924(c) jury charge was erroneous in light of *Davis* because the district court instructed the jury only as to Section 924(c)(3)'s residual clause—which *Davis* held unconstitutional—and not as to the elements clause. This error was harmless. The jury found Howard guilty of the VICAR offense and, as we explained in an earlier appeal in this case, "post-*Davis*, the VICAR offense ... remains a valid predicate crime of violence as defined under the elements clause" because "[i]t is premised on the New York offense of assault in the second degree, which categorically 'has as an element the use, attempted use, or threatened use of physical force.'" *United States v. White*, 7 F.4th 90, 104 (2d Cir. 2021) (quoting 18 U.S.C. § 924(c)(3)(A)); *cf. United States v. Blanco*, 811 F. App'x 696, 701 (2d Cir. 2020) (explaining that because we have held bank robbery to be "categorically a crime of violence," the defendant's "bank robbery conviction ... supplies the 'crime of violence' element" and thereby "renders the jury's finding on [the residual clause] both irrelevant and unnecessary").

B

Howard contends that his Section 924(c) conviction is also invalid in light of *Taylor* because the VICAR count was based on alternative predicate crimes, not all of which, he suggests, are crimes of violence under the categorical approach employed in *Taylor*. This argument is meritless. The jury specifically found that the VICAR predicate offense was assault with a dangerous weapon. *See* Special Verdict Tr., App'x 148 ("On August 17, 2014, did the defendant commit attempted murder, assault with a dangerous weapon, neither, or both? Answer is: Assault with a dangerous weapon."). And, as previously noted, we have held that this offense is a categorical crime of violence. *See White*, 7 F.4th at 104 (holding that the

VICAR offense predicated on New York second-degree assault remains a "valid predicate crime of violence as defined under the elements clause").

C

Howard additionally contends that his trial and former appellate counsel were ineffective because they did not timely challenge the erroneous jury instructions.[2] "To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense." *United States v. Bodnar*, 37 F.4th 833, 845 (2d Cir. 2022) (internal quotation marks omitted). Howard's ineffective assistance claim fails because, as explained above, the arguments he faults counsel for not raising would have failed and so could not have prejudiced his defense. "Failure to make a meritless argument does not amount to ineffective assistance." *United States v. Regalado*, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (quoting *United States v. Arena*, 180 F.3d 380, 396 (2d Cir. 1999)).

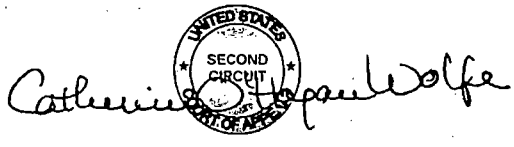
---

[2] Howard asserts that, even though his trial took place before the Supreme Court decided *Davis*, his trial counsel should have challenged the jury instructions for setting forth an incomplete definition of a crime of violence. But trial counsel's failure to do so did not prejudice Howard. If the district court had instructed the jury as to the elements clause, it would have instructed the jury that a finding of guilty on the VICAR count would satisfy the crime of violence element for the Section 924(c) count. And even though the cases establishing that the VICAR count was a categorical crime of violence had not yet been decided, the possibility that the district court might have supplied an *erroneous* instruction telling the jury otherwise does not constitute prejudice. *See Williams v. Taylor*, 529 U.S. 362, 392 (2000) ("[T]he likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in *Strickland*.").

* * *

We have considered Howard's remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

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



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: May 31, 2024
Docket #: 22-3079cr
Short Title: United States of America v. White (Howard)

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:17-cr-611-8
DC Court: SDNY (NEW YORK CITY)
DC Judge: Torres

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: May 31, 2024
Docket #: 22-3079cr
Short Title: United States of America v. White (Howard)

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:17-cr-611-8
DC Court: SDNY (NEW YORK CITY)
DC Judge: Torres

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

BER 5800.16
12/05/2021

ATTACHMENT A

OUTGOING SPECIAL MAIL RECEIPT

Name and Address of Person Receiving Special Mail	FCI BERLIN
Name Supreme Court of the US	
Address 1 st street NE	Enter Inmate Name, Register No. and Housing Unit Here: Christopher Howard 79627-054 B1
City State Zip Code Washington D.C 20543	

(Inmate Signature)

9589 0710 5270 0105 9118 19

RECEIVED
DEC 31 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The following is to be completed by staff:

ENTER SIGNATURE, TITLE AND DATE OF STAFF MEMBER RECEIVING SPECIAL MAIL.

J. Starkey (CSO) 12/24/24
(Signature and Title) (Date Special Mail Received from Inmate)

****Once this receipt is filled out by the inmate, and unit staff have signed and dated this receipt, the receipt and special mail will be forwarded by unit staff to the institutions outgoing mail box for further processing.***

4/2/2026/2024

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 31, 2024
Docket #: 22-3079cr
Short Title: United States of America v. White (Howard)

DC Docket #: 1:17-cr-611-8
DC Court: SDNY (NEW YORK CITY)
DC Judge: Torres

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: May 31, 2024
Docket #: 22-3079cr
Short Title: United States of America v. White (Howard)

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:17-cr-611-8
DC Court: SDNY (NEW YORK CITY)
DC Judge: Torres

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

APPENDIX A - 2

CONCLUSION

We **VACATE** the district court's decision and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES of America, Appellant-Cross-Appellee,

v.

Michael WHITE, Joey Colon, Demetrius Wingo, aka Poppa, Anthony Bush, aka Ant, David Oquendo, Christian Perez, aka Pun, James Robinson, Allen Knight, aka Stutter, Miguel Calderon, aka Mick, James Snipes, aka 80 Mese, Wesley Monge, aka Wes, Oscar Briones, aka O Block, Roy Robinson, aka Mob, Defendants,

Christopher Howard, aka JuJu, Defendant-Appellee-Cross-Appellant.

Docket Nos. 19-3833-cr(Con), 20-2051-cr(XAP)
August Term 2020

United States Court of Appeals, Second Circuit.

Argued: March 8, 2021

Decided: August 3, 2021

Background: Defendant was convicted in the United States District Court for the Southern District of New York, Robert W. Sweet, Senior District Judge, of Racketeer Influenced and Corrupt Organization Act (RICO) conspiracy, violent crime in aid of racketeering, and using firearm in furtherance of crime of violence. Following grant in part and denial in part of motion for judgment of acquittal, government and defendant cross-appealed.

Holdings: The Court of Appeals, Kaplan, J., sitting by designation, held that:

(1) evidence was sufficient to support conviction for RICO conspiracy;

(2) evidence was sufficient to support conviction for violent crime in aid of racketeering; and

(3) offense of violent crime in aid of racketeering was valid predicate crime of violence to sustain conviction for using firearm in furtherance of crime of violence.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⇐1081(2)

Defendant intended to appeal from district court's judgment of conviction, and thus Court of Appeals had jurisdiction over appeal, although notice of appeal stated that defendant was appealing from order denying judgment of acquittal, and defendant did not check box on form notice indicating that he was appealing from judgment of conviction; there was no practical difference between appealing from judgment of conviction and denial of motion for judgment of acquittal on that judgment of conviction, and defendant indicated on notice of appeal that his appeal concerned his "Conviction." 28 U.S.C.A. § 1291; Fed. R. App. P. 3(c)(1)(B); Fed. R. Crim. P. 29.

2. Criminal Law ⇐1023(8)

Order denying a motion for judgment of acquittal is not a final decision over which Court of Appeals has appellate jurisdiction. 28 U.S.C.A. § 1291; Fed. R. Crim. P. 29.

3. Criminal Law ⇐1081(2)

Not every technical defect in a notice of appeal constitutes a jurisdictional defect.

4. Criminal Law ⇐1081(1)

Court of Appeals will take the parties' intentions into account when construing a notice of appeal and will find jurisdiction when the intent to appeal from a decision is clear on the face of, or can be inferred from, the notice of appeal. Fed. R. App. P. 3(c)(1)(B).

5. Criminal Law ⇐753.2(6)

If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal pursuant to rule governing motion for judgment of acquittal, but it may do so only when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Fed. R. Crim. P. 29(c).

6. Criminal Law ⇐1139

Court of Appeals reviews challenge to sufficiency of evidence de novo, though defendant carries heavy burden in making such challenge.

7. Criminal Law ⇐1159.2(7)

Conviction must be upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

8. Criminal Law ⇐1144.13(3, 5), 1159.2(9), 1159.4(2)

In conducting review of sufficiency of evidence, Court of Appeals considers the totality of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.

9. Conspiracy ⇐152

Essence of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy is existence of agreement to violate RICO's substantive provisions. 18 U.S.C.A. § 1962(d).

10. Conspiracy ⇐152

Though substantive Racketeer Influenced and Corrupt Organizations Act (RICO) offenses require proof of enterprise and pattern of racketeering activity, establishment of enterprise is not element of RICO conspiracy offense; government need only prove that defendant knew of, and agreed to, general criminal objective of jointly undertaken scheme. 18 U.S.C.A. §§ 1961(4), 1962(d).

11. Conspiracy ⇐152

To be convicted as conspirator under Racketeer Influenced and Corrupt Organizations Act (RICO), one must be shown to have possessed knowledge of only general contours of conspiracy. 18 U.S.C.A. § 1962(d).

12. Conspiracy ⇐329

Proof of actual existence of Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, though not necessary to convict on conspiracy charge, can be highly relevant to establishing alleged RICO conspiracy. 18 U.S.C.A. §§ 1961(4), 1962(d).

13. Racketeer Influenced and Corrupt Organizations ⇐36

For purposes of Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, association-in-fact enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. 18 U.S.C.A. § 1961(4).

14. Racketeer Influenced and Corrupt Organizations ⇐35

Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise must have at least three structural features: purpose, relationships among those associated with enterprise, and longevity sufficient to permit these associates to pursue enterprise's purpose. 18 U.S.C.A. § 1961(4).

15. Conspiracy ⇐152

If government proves existence of Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, court need inquire only whether alleged conspirator knew what other conspirators were up to or whether situation would logically lead alleged conspirator to suspect he was part of larger enterprise. 18 U.S.C.A. §§ 1961(4), 1962(d).

16. Conspiracy ⇐350

Evidence was sufficient to support conviction for Racketeer Influenced and Corrupt Organization Act (RICO) conspiracy; there was adequate proof that defendant knew of, and agreed to, gang's general criminal objective of committing acts of violence against rival gang, defendant routinely told other gang members about his desire to harm rival gang members, and defendant, accompanied by another gang member, shot three men from rival gang. 18 U.S.C.A. §§ 1961(4), 1962(d).

17. Racketeer Influenced and Corrupt Organizations ⇐36

Evidence that an alleged associated-in-fact enterprise had a hierarchy, induction requirements or rituals, and decision-making procedures, or that members were expected to serve any kind of roles is not required to sustain a Racketeer Influenced and Corrupt Organizations Act (RICO) conviction; nor is it a requirement that RICO enterprises have unique greetings. 18 U.S.C.A. § 1961(4).

18. Criminal Law ⇐1159.1

Court of Appeals defers to the jury's rational determinations of the weight of the evidence, the credibility of the witnesses, and choice of the competing inferences that can be drawn from the evidence.

19. Racketeer Influenced and Corrupt Organizations ⇐49

To convict the defendant of a violent crime in aid of racketeering, the government is obliged to prove five elements: (1) that the organization was a Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise. 18 U.S.C.A. §§ 1959(a), 1961(4).

20. Racketeer Influenced and Corrupt Organizations ⇐49, 95

In prosecution for violent crime in aid of racketeering, element that general purpose in committing alleged crime of violence was to maintain or increase his position in the enterprise is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership; the government need not prove that maintaining or increasing the defendant's position in the Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise was his sole or principal motive. 18 U.S.C.A. §§ 1959(a), 1961(4).

21. Courts ⇐107

Denying summary orders precedential effect does not mean that the court consid-

ers itself free to rule differently in similar cases.

22. Racketeer Influenced and Corrupt Organizations ⇐49

Defendant's personal motive for committing act of violence does not preclude his conviction under statute prohibiting violent crimes in aid of racketeering as long as he likewise was motivated by desire to increase or maintain his position in Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise. 18 U.S.C.A. §§ 1959(a), 1961(4).

23. Racketeer Influenced and Corrupt Organizations ⇐49

Evidence was sufficient to support finding that defendant committed shooting with requisite motive to maintain or increase his membership in gang, so as to support conviction for violent crime in aid of racketeering; defendant's conflict with victim stemmed entirely from gang's rivalry with another gang, defendant openly discussed his desire to retaliate against members of rival gang, and when defendant committed shooting, he did it with another gang member, consistent with gang practices, on rival gang's territory. 18 U.S.C.A. § 1959(a).

24. Criminal Law ⇐1159.2(8)

Equipoise rule is of no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences; the rule applies only where evidence is nonexistent or so meager as to preclude the inferences necessary to a finding favorable to the government.

25. Weapons ⇐194(2)

Offense of violent crime in aid of racketeering was valid predicate crime of violence to sustain conviction for using firearm in furtherance of crime of violence; offense was premised on New York offense of assault in the second degree, which categorically had as element the use, attempted use, or threatened use of physical force against person or property of another. 18 U.S.C.A. §§ 924(c)(3)(A), 1959(a); N.Y. Penal Law § 120.05(2).

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(c)(3)(B)

Appeal from the United States District Court for the Southern District of New York

ALEXANDRA ROTHMAN, Assistant United States Attorney (Christopher Clore, Jordan Estes, Thomas McKay, Assistant United States Attorneys, on the brief), for AUDREY STRAUSS, United States Attorney for the Southern District of New York, for Appellant-Cross-Appellee.

JOHN A. DIAZ, Diaz & Moskowitz PLLC, New York, New York, for Defendant-Appellee-Cross-Appellant.

Before: SACK and MENASHI, Circuit Judges, and KAPLAN, District Judge.*

KAPLAN, District Judge:

This case arises from a violent rivalry between two neighborhood gangs that operated in and around the Mill Brook Houses, a housing project in the Bronx. Gang violence divided the Mill Brook Houses into two warring territories: the "up-the-block" section, which was controlled by a gang called MBG ("Mill Brook Gangstas"

* Judge Lewis A. Kaplan, United States District Judge for the Southern District of New York, sitting by designation.

or "Money Bitches Guns"), and the "down-the-block" section, which was controlled by a gang called Killbrook. Members of the rival gangs fought, shot, and robbed one another for years.

On the night of August 17, 2014, defendant Christopher Howard, a member of MBG, ventured down-the-block with another MBG member and shot three men. One of the victims, Shadean Samuel, was a Killbrook member who had broken Howard's jaw in a fight between MBG and Killbrook in 2011. After a one-and-a-half week trial in the United States District Court for the Southern District of New York, a jury convicted Howard of a racketeering conspiracy in violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(d), a violent crime in aid of racketeering ("VICAR") in violation of 18 U.S.C. § 1959(a), and using a firearm in furtherance of the racketeering conspiracy and the VICAR offense in violation of 18 U.S.C. § 924(c).

The district court subsequently granted in part Howard's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, vacating the VICAR and firearm counts. In the district court's view, the evidence was insufficient to support the determination that Howard committed the August 2014 shooting in furtherance of the racketeering conspiracy or to advance his position within MBG, rather than because of an alleged personal vendetta against Samuel. The district court denied the motion insofar as it sought to overturn the conviction on the racketeering conspiracy count. The government and Howard cross-appeal from the district court's order.

For the following reasons, we agree with the court below that the evidence was sufficient to sustain Howard's conviction on the racketeering conspiracy count but hold that the district court erred in vacating his convictions on the VICAR and firearm counts.

FACTS

Howard's Trial

In July 2018, a superseding indictment charged Howard and nine co-defendants with racketeering and other crimes in connection with MBG and the YGz, a larger gang also operating in and around the Mill Brook Houses ("Mill Brook") that shared overlapping membership with MBG. Howard was charged in Count One with the racketeering conspiracy relating to MBG, in Count Six with committing a violent crime in aid of racketeering (namely, the August 2014 shooting), and in Count Twelve with using a firearm in furtherance of the racketeering conspiracy and the VICAR offense.

The case originally was assigned to Judge Sweet, who passed away shortly after presiding over Howard's jury trial. It was reassigned to another judge, who decided the post-trial motion at issue. The evidence, viewed in the light most favorable to the government, established the following.

A. MBG

MBG is a "neighborhood gang" that was started in Mill Brook around 2003.[1] Mill Brook consisted of ten numbered apartment buildings that sloped up a hill. Residents referred to buildings eight, nine, and ten – located up the hill – as the up-the-block section, which was MBG's territory. They referred to buildings one through six

1. All appendix and special appendix references are to the appendices filed in No. 19-3313-cr(L).

as the down-the-block section, which was Killbrook's territory.[2]

The rivalry between MBG and Killbrook began in 2007, when one of MBG's leaders, Joey Colon, shot a man from down-the-block. After that shooting, MBG and Killbrook clashed violently for some time, although there were intermittent periods when the violence subsided. Witnesses testified that there were robberies, fights, stabbings, and shootings between MBG and Killbrook members with varying frequency from about 2007 to 2016. Colon testified that he tried to "squash" the rivalry around October 2010 because it had led to an increased police presence in the area, which made it harder for him to sell drugs.[3] But the rivalry roared back to life in spring 2011, when several fights and shootings occurred. When tensions were high, any Killbrook member was a "fair target" for MBG members to shoot.[4]

Howard was one of MBG's original members. Though not high-ranking, he routinely posted on Facebook about his MBG membership. His Facebook account included posts about MBG, photographs of Howard with other MBG members, and conversations between Howard and other MBG members in which they discussed shootings and tension with people from down-the-block.[5] MBG had its own handshake (known as "peacing") that its members, including Howard, used to greet each other.[6]

MBG members customarily committed acts of violence together. It was their practice to inform one another of their exploits so that no member would be caught off guard by an act of retaliation. According to cooperating witnesses, MBG members earned respect and rose in rank by committing shootings against rivals. Colon testified that he became one of MBG's leaders by committing several shootings. Howard openly discussed both his desire to retaliate against members of Killbrook and his need to "put in work" – *i.e.*, "[p]romote violence [and] shootings" – for MBG.[7]

Some MBG members sold drugs, typically crack cocaine and marijuana, around Mill Brook. MBG had a "stash house" in up-the-block Mill Brook where Howard often spent time.[8] MBG members stored drugs, packaged and cooked crack cocaine, and maintained shared firearms at the stash house. Any gun kept at the stash house was considered an "MBG gun" that all MBG members could use.[9]

Most MBG members were members also of the YGz, the "Young Gunnaz."[10] The YGz was a "larger" gang that, unlike MBG, operated throughout New York.[11] MBG members sometimes used the YGz phrase "what's gunning" to greet each other.[12] At trial, Judge Sweet – at Howard's request – limited the evidence about the YGz to basic evidence of its functions and

2. Building seven was "a neutral building" colloquially referred to as "midtown." A466.

3. A474.

4. A499.

5. A620, A639.

6. A470.

7. A481-82, A514, A623, A629.

8. A526.

9. *Id.*

10. A465. Count Two of the superseding indictment charged certain of Howard's co-defendants with a racketeering conspiracy in connection with the YGz. Howard was not charged with being a member of the YGz. A417.

11. A511.

12. A470.

organizational structure. He gave a limiting instruction stating that Howard's charges did not relate "in any way" to the YGz and that the jury was "to draw no inference from any of the testimony about [the] YGz against . . . Howard.[13]

B. The August 2014 Shooting

On the night of August 17, 2014, Howard ventured down-the-block with fellow MBG member Jonathan Jose and shot three men: two Killbrook members, including Samuel, and one other man from down-the-block. There was evidence that Howard committed this shooting at least in part in retaliation for a fight between MBG and Killbrook in 2011 in which Samuel broke Howard's jaw. The government introduced a number of Howard's Facebook messages in which he informed other MBG members that he wanted to retaliate against Killbrook generally and Samuel in particular for the 2011 fight.

On the night of the shooting, Jose went down-the-block and saw Samuel.[14] Once Jose located Samuel, Jose called Howard, who joined him down-the-block. Around 3:00 A.M., Howard and Jose approached Samuel, who was sitting with a few other people in a courtyard near a flagpole.[15] Howard fired three or four shots, wounding Samuel and the two other men.[16] An eyewitness, Raynaldo Melendez, identified Howard as the shooter.[17]

By the time of the shooting, the rivalry between MBG and Killbrook apparently had become more subdued, although it had not subsided completely. Melendez testified that, as of August 2014, the relationship between MBG and Killbrook was both "hostile" and "cordial," and there had been no shootings for about a year.[18] Nevertheless, "there was still some tension between the two sides."[19] Melendez recalled noticing Jose near a down-the-block store hours before the shooting, which he thought was unusual because MBG members typically did not venture into Killbrook's territory.[20]

After the shooting, Howard ran into Melendez at a memorial service. Howard told Melendez that he had meant to shoot only Samuel, not the other two men.[21] Around 2015, Howard ran into Killbrook member Jose Rodriguez on the Staten Island Ferry. Howard aggressively approached Rodriguez, who had robbed Howard in 2009 "to get status" with Killbrook.[22] But Howard ultimately agreed to refrain from fighting Rodriguez so as to not "start something up again" between MBG and Killbrook.[23] Howard told Rodriguez that his "main focus" down-the-block was Samuel.[24] Rodriguez testified that he believed that Samuel had broken Howard's jaw in 2011 because Samuel "was trying to get in good with [Killbrook]."[25]

In relevant part, the trial court charged the jury as follows:

13. A502.
14. A519.
15. A455.
16. A425, A432-33.
17. A456-57.
18. A454-55.
19. *Id.*
20. *Id.*
21. A456-57.
22. A542-43.
23. *Id.*
24. A543.
25. A544.

The fifth element that the government has to prove with respect to Count Two[26] is that the defendant acted for the purpose of gaining entrance to, maintaining a position in, or increasing a position in that enterprise [MBG]. To establish that the defendant committed the crime alleged for the purpose of gaining entrance or maintaining or increasing his position in the enterprise, the government must prove that the defendant's general purpose in committing the crime in question was to gain entrance to, to increase his position in, or to maintain his position in the enterprise.

The government does not need to prove that maintaining or increasing his position in the enterprise was the defendant's sole or principal motive, so long as it was a substantial motivating factor in the defendant's decision to participate in the attempted murder and/or the assault with a deadly weapon.[27]

The jury convicted Howard on all counts.

Following the verdict, Howard moved, pursuant to Fed. R. Crim. P. 29, for judgment of acquittal on all counts. By order dated November 4, 2019, the district court granted so much of the motion as sought a judgment of acquittal on the VICAR and firearm counts but denied it as to the racketeering conspiracy count. The government promptly appealed from that order.[28]

[1–4] On June 11, 2020, Howard was sentenced on the undisturbed count of conviction, principally to two years' imprisonment. Judgment was entered the same day and, on June 24, 2020, Howard filed a notice of appeal.[29]

26. It appears that the counts in the superseding indictment were renumbered at Howard's trial, causing the VICAR count to become Count Two. This is common where, as here, the defendant being tried was not charged with all of the counts in the indictment.

27. A580 (emphasis added).

28. A738. The government's appeal is No. 19-3313-cr(L).

29. Before proceeding, we address a jurisdictional issue raised by Howard's notice of appeal, which stated that he was appealing from the "order denying a judgment of acquittal entered in this action on November 4, 2019." Notice of Appeal, *United States v. Howard*, No. 17-cr-611 (S.D.N.Y. June 24, 2020), ECF No. 673 (hereinafter "ECF No. 673"). Howard did not check the box on the form notice indicating that he was also appealing from the district court's judgment of conviction. *See id.* He filed no notice of appeal from that judgment.

An order denying a motion for judgment of acquittal under Rule 29 is not a final decision over which we have appellate jurisdiction. *United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001) (citing 28 U.S.C. § 1291 and *United States v. Aliotta*, 199 F.3d 78, 81 (2d Cir. 1999)). Moreover, Fed. R. App. P. 3(c)(1)(B) requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." Hence, it is arguable that Howard has not appealed from the judgment of conviction and that his appeal from the order should be dismissed for want of jurisdiction.

However, " 'not every technical defect in a notice of appeal constitutes a jurisdictional defect,' " *Elliott v. City of Hartford*, 823 F.3d 170, 172 (2d Cir. 2016) (quoting *Grune v. Coughlin*, 913 F.2d 41, 43 (2d Cir. 1990)), and we have held that Rule 3(c)(1)(B) should be applied "quite liberally on the understanding that 'mere technicalities should not stand in the way of consideration of a case on its merits.' " *United States v. Caltabiano*, 871 F.3d 210, 215 (2d Cir. 2017) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988)). We accordingly will " 'tak[e] the parties' intentions into account" when construing a notice of appeal and will find jurisdiction when " 'the intent to appeal from a decision is clear on the face of, or can be inferred from, the notice of appeal.' " *Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128, 134 (2d Cir. 2016) (quoting *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 65-66 (2d Cir. 2008)) (alteration omitted).

DISCUSSION

I

[5] "If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal" pursuant to Federal Rule of Criminal Procedure 29(c), but it may do so only when "there is 'no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' "[30]

[6–8] We review a challenge to the sufficiency of the evidence *de novo*, though a defendant "carries a heavy burden" in making such a challenge.[31] A conviction must be upheld "if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "[32] In conducting our review, we consider the totality of the evidence " 'in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.' "[33] We turn first to Howard's challenge to the conviction on the racketeering conspiracy charge (Count One).

A. *Howard's Appeal – Racketeering Conspiracy*

Howard contends that the evidence was insufficient to permit a conclusion that MBG was a RICO enterprise in which he knowingly participated. We disagree.

[9–11] We note at the outset that Howard's argument is inherently flawed. The essence of a RICO conspiracy is "the existence of *an agreement* to violate RICO's substantive provisions."[34] Though the substantive RICO offenses require proof of an enterprise and a pattern of racketeering activity, "the establishment of an enter-

Under these principles, we conclude that Howard intended to appeal from the district court's judgment of conviction and that we have jurisdiction over his appeal. There is no practical difference between appealing from a district court's judgment of conviction and a district court's denial of a motion for a judgment of acquittal on that judgment of conviction. Moreover, Howard indicated on the notice of appeal that his appeal concerned his "Conviction." *See* ECF No. 673. Construing the notice of appeal liberally – as we must – it is clear that Howard's intent to appeal from the district court's judgment of conviction can "be inferred from . . . the notice of appeal," *Kovaco*, 834 F.3d at 134 (quotation marks omitted), and that his failure to do so expressly is a "mere technicalit[y]" that "should not stand in the way of" our adjudication of this case. *Caltabiano*, 871 F.3d at 215 (quotation marks omitted).

30. *United States v. Irving*, 452 F.3d 110, 117 (2d Cir. 2006) (quoting *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir.1972)).

31. *Id.*

32. *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

33. *United States v. Aquart*, 912 F.3d 1, 17 (2d Cir. 2018) (quoting *United States v. Sheehan*, 838 F.3d 109, 119 (2d Cir. 2016)).

34. *See United States v. Benevento*, 836 F.2d 60, 73 (2d Cir.1987) (emphasis added), *abrogated on other grounds by United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989); *see also United States v. Arrington*, 941 F.3d 24, 36-37 (2d Cir. 2019); *United States v. Applins*, 637 F.3d 59, 72-76 (2d Cir. 2011). Notably, the RICO conspiracy provision is broader than the general conspiracy provision applicable to federal crimes, 18 U.S.C. § 371. "There is no requirement of some overt act or specific act in the [RICO conspiracy provision], unlike the general conspiracy provision . . ., which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.' " *Salinas v. United States*, 522 U.S. 52, 61, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (quoting 18 U.S.C. § 371).

prise is not an element of the RICO conspiracy offense."[35] The government "need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme."[36] We have analyzed whether the government has satisfied this burden by looking to whether the evidence permitted a conclusion that the defendant knowingly "agreed with other[s] ... to function as a unit for the common purpose" of engaging in racketeering activity.[37] "To be convicted as a conspirator [under RICO], one must be shown to have possessed knowledge of only the general contours of the conspiracy."[38]

[12–15] Of course, proof of the actual existence of a RICO enterprise – though not necessary to convict on a conspiracy charge – can be highly relevant to establishing an alleged RICO conspiracy.[39] A RICO enterprise "includes any ... group of individuals associated in fact although not a legal entity."[40] An association-in-fact enterprise, which the government argues the evidence sufficiently established at Howard's trial, "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[41] The enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[42] If the government proves the existence of a RICO enterprise, "we need inquire only whether an alleged conspirator knew what the other conspirators 'were up to' or whether the situation would logically lead an alleged conspirator 'to suspect he was part of [the] larger enterprise.' "[43]

[16] The evidence at Howard's trial was more than sufficient under either of these standards. First, there was adequate proof that Howard knew of, and agreed to, MBG's general criminal objective of committing acts of violence against Killbrook. For years, MBG collectively engaged in violence, including fights and shootings, against its rivals from down-the-block. Howard routinely told other MBG members about his desire to harm Killbrook members and his need to "put in work" – *i.e.*, "[p]romote violence [and] shootings" – for MBG.[44] He committed such an act of violence when he – accompanied by another MBG member – shot three men from down-the-block, two of whom were Killbrook members. From this evidence, a juror reasonably could have inferred that

35. *Applins*, 637 F.3d at 75; *see also City of New York v. Bello*, 579 F. App'x 15, 17 (2d Cir. 2014) (summary order).

36. *Arrington*, 941 F.3d at 36-37.

37. *Id.* at 37.

38. *United States v. Zichettello*, 208 F.3d 72, 100 (2d Cir. 2000).

39. *See United States v. Pizzonia*, 577 F.3d 455, 463 (2d Cir. 2009) ("Just as the evidence used to establish the enterprise and pattern elements 'may in particular cases coalesce,' so too may the evidence used to prove those elements and a conspiratorial agreement to engage in racketeering." (citations omitted) (quoting *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).

40. 18 U.S.C. § 1961(4).

41. *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

42. *Boyle v. United States*, 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

43. *Zichettello*, 208 F.3d at 99 (quoting *United States v. Viola*, 35 F.3d 37, 44-45 (2d Cir. 1994)).

44. *See* A481-82, A514.

Howard agreed with other MBG members to function as a unit for the common purpose of committing acts of violence.

Second, the evidence permitted the jury to find that MBG was a RICO enterprise in which Howard knowingly participated. The government adduced evidence that MBG members committed acts of violence in groups and that performing such acts of violence could increase an MBG member's status in the gang. Moreover, MBG members functioned as a unit for the common purpose of selling drugs. MBG maintained a stash house where its members kept guns, sold drugs, and discussed their exploits. Howard spent time with other MBG members at the stash house, from which a juror reasonably could have inferred that Howard was part of an enterprise that sold drugs. Finally, MBG had a gang handshake and phrase that its members, including Howard, used to greet each other. This was further evidence of MBG's existence as an association-in-fact enterprise.

Howard argues also that there was insufficient evidence to establish that MBG was a RICO enterprise "separate and apart from the YGz enterprise."[45] This argument finds no support in the record, which – at Howard's request – was limited with respect to the YGz. Indeed, Judge Sweet instructed the jury that Howard's charges did not relate "in any way" to the YGz. In these circumstances, and in light of the evidence described above, it would defy reason to conclude that the government proved a racketeering conspiracy only in connection with the YGz.

[17] In any event, the evidence was sufficient to establish that, though many MBG members were members also of the YGz, MBG members functioned separately as a unit for the purpose of engaging in violence against Killbrook and selling drugs. MBG had its own leaders, members, and practices, which included committing acts of violence in groups and disseminating information about the gang's activities to protect members from retaliation.[46] Contrary to Howard's contention, evidence that an alleged enterprise had a "hierarchy, induction requirements or rituals, decisionmaking procedure[s], or that . . . members were expected to serve any kind of roles"[47] –which he argues that MBG lacked – is not required to sustain a RICO conviction.[48] Nor is it a requirement that RICO enterprises have "unique" greetings.[49]

[18] Finally, Howard argues that MBG was not a separate RICO enterprise because many of the acts of violence the government attributed to the MBG/Killbrook rivalry actually were committed personally by Colon or in connection with the YGz. This argument is meritless. The government presented extensive evidence about the violent MBG/Killbrook rivalry, which extended from at least 2007 to 2016. To the extent that there was some evidence that MBG members made an effort to "squash" the rivalry or that certain shootings were personal in nature, that

45. Brief for Defendant-Appellee-Cross-Appellant Christopher Howard ("Howard Br.") at 18, *United States v. Howard*, No. 19-3313-cr(L) (2d Cir. Sept. 24, 2020); *see also id.* at 21, 23, 25-26.

46. *See* A470, A485-87.

47. *Id.* at 19.

48. *See, e.g., Boyle*, 556 U.S. at 948, 129 S.Ct. 2237.

49. *See* Howard Br. at 20 (taking issue with the fact that "none of the witnesses described how the MBG 'peacing' and 'greeting' was separate or distinct from the YGz['s]" greeting); *Boyle*, 556 U.S. at 948, 129 S.Ct. 2237.

would not require us to vacate Howard's conviction in light of the ample evidence the government presented about the nature of the conflict. We defer to the jury's rational determinations "of the weight of the evidence," "the credibility of the witnesses," and "choice of the competing inferences that can be drawn from the evidence."[50]

Accordingly, we hold that the district court did not err in denying Howard's motion for judgment of acquittal on Count One.

B. The Government's Appeal

The government appeals from so much of the district court's November 4, 2019 order as granted Howard's Rule 29 motion for judgment of acquittal on Count Six and Count Twelve.[51]

For the reasons that follow, we hold that the district court erred in both respects.

1. Count Six – VICAR

[19] The district court vacated Howard's conviction on Count Six, which charged him with a violent crime in aid of racketeering under 18 U.S.C. § 1959(a) in connection with the August 2014 shooting. To convict the defendant of a violent crime in aid of racketeering, the government was obliged to prove five elements: "(1) that the Organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise."[52] In vacating Howard's conviction on this count, the district court relied solely on the fifth element. In its view, the evidence was not sufficient to establish that Howard committed the shooting with the requisite motive – *i.e.*, to maintain or increase his membership in MBG – rather than to further his alleged personal vendetta against Samuel.

[20–22] We consistently have construed "the 'maintaining or increasing position' language in § 1959 . . . 'liberally.' "[53] This element is "satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership."[54] The government need not prove that maintaining or increasing the defendant's position in the RICO enterprise was his "sole or principal motive."[55] Indeed, as we held in *United States v. Santiago-Ortiz*,[56] a defendant's personal motive for

50. *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998).

51. There are references in the record and the briefs to Counts One, Two, and Three. From the context, it is clear that these are Counts One, Six and Twelve of the superseding indictment. They apparently were referred to as Counts One, Two and Three, respectively, in a redacted version of the superseding indictment that excluded references to co-defendants who were not tried together with Howard, a practice common in the Southern District of New York and doubtless elsewhere.

52. *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992).

53. *United States v. Bruno*, 383 F.3d 65, 83 (2d Cir. 2004), *as amended* (Oct. 6, 2016) (quoting *United States v. Rahman*, 189 F.3d 88, 127 (2d Cir.1999)).

54. *Concepcion*, 983 F.2d at 381.

55. *Id.*

56. 797 F. App'x 34 (2d Cir. 2019) (summary order), *cert. denied*, — U.S. —, 141 S. Ct. 662, 208 L.Ed.2d 270 (2020). Though we de-

committing an act of violence does not preclude his conviction under § 1959 as long as he likewise was motivated by a desire to increase or maintain his position in the RICO enterprise.[57]

The trial court's jury instructions were consistent with this principle. As noted, the court charged the jury in relevant part that "[t]he government does not need to prove that maintaining or increasing his position in the enterprise was the defendant's sole or principal motive, so long as it was a substantial motivating factor in the defendant's decision to participate in the attempted murder and/or the assault with a deadly weapon."[58] Howard does not claim here that it erred in doing so.

[23] Moreover, the evidence permitted the jury to find that Howard committed the August 2014 shooting, at least in part, to further his membership in MBG. Howard's conflict with Samuel stemmed entirely from MBG's rivalry with Killbrook. The fight in 2011 – when Samuel broke Howard's jaw – was part of the ongoing conflict between the two gangs. Indeed, witnesses testified that Samuel broke Howard's jaw in order to increase his (Samuel's) own status with Killbrook. Appearing to recognize this, Howard repeatedly expressed a general desire to retaliate against Killbrook for that fight. And when Howard got around to committing the shooting in 2014, he did it with another MBG member – consistent with MBG practices – on Killbrook territory.

In vacating Howard's conviction, the district court failed to view the evidence in the light most favorable to the government and overlooked or minimized evidence tending to show that Howard was motivated at least in part by his position in MBG. For instance, citing our opinion in *United States v. Thai*,[59] the district court wrote that "[t]he evidence in this case fails to show that the Shooting was consistent with MBG's operations or goals *at the time it was committed*" because the "rivalry between MBG and Killbrook had reached a standstill by August 2014."[60] We disagree with that characterization of the evidence at trial. Though there was evidence that the intensity of the rivalry may have decreased by the time of the shooting, there was evidence also to suggest that it had not subsided completely. This alone distinguishes this case from *Thai*, in which there was "no evidence from which the jury could conclude that Thai's motive for [the violent crime] was [anything] other than purely mercenary."[61] As Melendez testified, there was "tension between the two sides" at the time of the shooting.[62] A rational juror could have weighed the extensive evidence about the rivalry – including testimony that MBG and Killbrook had a "hostile" or tense relationship at the time of the shooting – and concluded that Howard's shooting was in furtherance of the ongoing MBG/Killbrook feud and of his standing in the gang even if he had also a personal motive.

Nor was the government required to prove that the shooting was "explicitly or

cided *Santiago-Ortiz* by nonprecedential summary order, " '[d]enying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases.' " *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009) (citations omitted).

57. *See Santiago-Ortiz*, 797 F. App'x at 36-37.

58. A580.

59. 29 F.3d 785 (2d Cir. 1994).

60. SPA-91 (emphasis in original).

61. 29 F.3d at 818.

62. A455.

implicitly authorized by the gang's leaders," that Howard had a "noteworthy" position in MBG, that Howard "had any interest in becoming a leader ... in the gang," or that Howard's status in fact was enhanced by the shooting.[63] The government was required only to adduce evidence from which the jury was entitled to conclude that a desire on Howard's part to maintain or increase his status or membership in the gang was among his motives. There was ample evidence to support such a conclusion. Among other things, Howard openly discussed his desire to retaliate against members of Killbrook and to "put in work" – *i.e.*, "[p]romote violence [and] shootings" – for MBG, which could have increased his status in the gang.[64]

[24] Finally, the district court's reliance on the equipoise rule derived from *United States v. Glenn*[65] was misplaced. Citing *Glenn*, the district court wrote that it was obliged to "conclude that the evidence was insufficient for a reasonable juror to conclude that Howard committed the Shooting in order to maintain or increase his position in MBG" because it "'gave nearly equal circumstantial support to competing explanations.'"[66] But the equipoise rule "is of 'no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences.'"[67] The rule applies "only where evidence 'is nonexistent or so meager' as to preclude the inferences necessary to a finding favorable to the government."[68] For the reasons described above, that is not the case here. Accordingly, we hold that the evidence was sufficient to sustain Howard's conviction on Count Six and that the jury's verdict with respect to this count should stand.

2. Count Twelve – Firearm In Furtherance of Crime of Violence

The district court vacated also the conviction on Count Twelve, which charged Howard with using a firearm during and in relation to, or in furtherance of, the MBG racketeering conspiracy and VICAR counts in violation of 18 U.S.C. § 924(c). Because the district court erred in entering a judgment of acquittal with respect to Count Six, it erred also when it entered its judgment of acquittal on Count Twelve.

Section 924(c) proscribes the use or possession of a firearm "during and in relation to" or "in furtherance of" "any crime of violence."[69] The statute defines "crime of violence" in two subparts known as the "elements clause" and the "residual clause."[70] The elements clause provides that a crime of violence is "an offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[71] In *United States v. Davis*, the Supreme Court struck down the residual clause as unconstitutionally vague.[72]

63. SPA-91-94.

64. A470, A481-82.

65. 312 F.3d 58 (2d Cir. 2002).

66. SPA-96.

67. *Aquart*, 912 F.3d at 44 (quoting *United States v. MacPherson*, 424 F.3d 183, 190 (2d Cir. 2005)).

68. *Id.* at 44-45 (quoting *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013)).

69. 18 U.S.C. § 924(c)(1)(A); *see also Smith v. United States*, 508 U.S. 223, 237, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

70. *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2324, 204 L.Ed.2d 757 (2019).

71. *Id.*

72. *Id.* at 2336.

The superseding indictment alleged that the predicate crimes of violence for Count Twelve were both Count One (the RICO conspiracy count) and Count Six (the VICAR count).[73] After vacating Count Six, the district court vacated Count Twelve because it found that Count Twelve now "rest[ed] solely on [Howard's] conviction for Count One" and that the evidence at trial was insufficient to establish that Howard used a firearm in furtherance of the MBG racketeering conspiracy charged in Count One.[74]

[25] In light of *Davis*, the government does not here contend that Count One is a valid predicate crime of violence to sustain a conviction under 18 U.S.C. § 924(c). But, post-*Davis*, the VICAR offense in Count Six remains a valid predicate crime of violence as defined under the elements clause. It is premised on the New York offense of assault in the second degree, which categorically "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[75] Accordingly, in view of our holding today that the evidence was sufficient to sustain the conviction on Count Six, the conviction on Count Twelve also should stand.

II

We turn to the proper disposition of these appeals.

The partial grant of Howard's Rule 29 motion resulted in the entry of a judgment of conviction that reflected a conviction only on Count One. In view of our conclusion that the grant of the Rule 29 motion was erroneous, Howard should have been sentenced on all three counts of conviction and judgment entered accordingly.[76] As it is not clear that the district court would have imposed the same sentence for the convictions on all three counts as it did on Count One only, resentencing is necessary.[77] Consequently, the judgment entered on June 11, 2020 must be vacated.

CONCLUSION

Based on the foregoing, the district court's order of November 4, 2019, insofar as it set aside the jury verdict finding Howard guilty on the VICAR and firearm counts, was erroneous. We therefore **RE-**

73. A18.

74. SPA-97-98.

75. 18 U.S.C. § 924(c)(3)(A); N.Y. Penal L. § 120.05(2); *see also United States v. Tabb*, 949 F.3d 81, 84-85 (2d Cir. 2020), *cert. denied*, No. 20-579, — U.S. —, 141 S.Ct. 2793, — L.Ed.2d — (June 21, 2021) (§ 120.05(2) is a crime of violence under force clause of U.S.S.G. § 4B1.2(a)); *Singh v. Barr*, 939 F.3d 457, 462-64 (2d Cir. 2019) (§ 120.05(2) is a crime of violence under "force clause" in 18 U.S.C. § 16(a)); *United States v. Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (§ 120.05(2) is a violent felony under the force clause of 18 U.S.C. § 924(e)(2)(B)(i)).

76. Howard claimed in his Rule 29 motion that the government had failed to adduce evidence that he "had a position" in MBG, thus perhaps suggesting that this too was a basis for setting aside the VICAR conviction. Def. Post-Trial Mem. at 28, *United States v. Howard*, No.17-cr-611 (S.D.N.Y. May 13, 2019), ECF No. 486. The district court noted, however, that there was evidence that Howard had been a member of MBG for more than a decade. SPA-93. Howard neither disputes that conclusion nor presses on appeal any contention that he lacked a position in the gang. Accordingly, there is no remaining issue for consideration here or below with respect to the Rule 29 motion.

77. *See United States v. Kirsch*, 903 F.3d 213, 233 (2d Cir. 2018) (remanding for resentencing after vacating judgment of conviction "[i]n order 'to give the district court an opportunity to reevaluate the sentence[ ] in this changed light' " (quoting *United States v. Petrov*, 747 F.2d 824, 832 (2d Cir. 1984) (alteration in original))).

VERSE so much of that order as did so and **VACATE** the judgment of conviction entered on June 11, 2020, which did not reflect the convictions on those two counts, and **REMAND**. The district court is instructed on remand to reinstate the entire jury verdict, to resentence Howard in light of the entire jury verdict, and to enter a new judgment of conviction.

UNITED STATES of America,
Appellee,

v.

James REED, aka Fats, Byron Cobb, aka Cobb, Theodore Huffman, Jamar Paul, aka Crook, Christopher Huff, Sheltrice Rhodes, Curtis Moss, Norma Thompson, Defendants,

Martell Jordan, aka Telly,
Defendant-Appellant.

No. 19-3620-cr
August Term 2020

United States Court of Appeals,
Second Circuit.

Argued: March 12, 2021

Decided: August 4, 2021

Background: Defendant serving sentence of 254 months for conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack cocaine and 5 kilograms or more of powder cocaine, filed motion to reduce sentence under First Step Act, which made retroactive the amendments to the Fair Sentencing Act that increased the quantities of crack cocaine necessary to trigger mandatory minimum penalties. The United States District Court for the Western District of New York, Richard J. Arcara, Senior District Judge, denied motion, and defendant appealed.

Holdings: As a matter of first impression, the Court of Appeals, Bianco, Circuit Judge, held that defendant was eligible for reduced sentence, under First Step, on conviction for conspiracy for which one of objects involved possession with intent to distribute and distribution of crack cocaine.

Vacated and remanded.

Lynch, Senior Circuit Judge, concurred in judgment, with opinion.

1. Criminal Law ⇐1139

An appellate court reviews questions of statutory interpretation de novo.

2. Sentencing and Punishment ⇐2262

A sentence arising from a multi-object conspiracy conviction involving a crack cocaine object is a "covered offense" eligible for a sentencing reduction, under the First Step Act, which made retroactive the amendments to the Fair Sentencing Act that increased the quantities of crack cocaine necessary to trigger mandatory minimum penalties, even when the other objects of the conspiracy (involving different controlled substances) triggered statutory penalties that were not modified such that the applicable minimum and maximum penalties for the conspiracy offense remain unchanged. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. §§ 841(b)(1)(A)(iii), (B)(iii).

See publication Words and Phrases for other judicial constructions and definitions.

3. Sentencing and Punishment ⇐2262

Defendant was eligible for reduction in sentence of 254 months on conviction for conspiracy to possess with intent to dis-

APPENDIX - B

promulgate a rule that the plaintiff does not endorse. Instead, under the APA, the plaintiff's claim is that the agency has breached the plaintiff's (and the public's) entitlement to non-arbitrary decision making and/or their right to participate in the rulemaking process when the agency undertook to promulgate the rule. Consequently, to provide the relief that any APA plaintiff is entitled to receive for establishing that an agency's rule is procedurally invalid, the rule must be invalidated, so as to give interested parties (the plaintiff, the agency, and the public) a meaningful opportunity to try again.

Make the Rd. N.Y. v. McAleenan, No. 19 Civ. 2369 (KBJ), 405 F.Supp.3d 1, 72, 2019 WL 4738070, at *49 (D.D.C. Sept. 27, 2019). This reasoning is compelling. It applies with even greater force to a finding of invalidity under the APA like that here, made on summary judgment.

Accordingly, as a remedy, the Court vacates the 2019 Rule in its entirety, pursuant to APA § 706(2).

The Conscience Provisions recognize and protect undeniably important rights. The Court's decision today leaves HHS at liberty to consider and promulgate rules governing these provisions. In the future, however, the agency must do so within the confines of the APA and the Constitution.

CONCLUSION

For the foregoing reasons, the Court grants plaintiffs' motions for summary judgment; denies HHS's motions both to dismiss and for summary judgment; and denies as moot plaintiffs' motion for preliminary relief. The Court accordingly vacates HHS's 2019 Rule in its entirety.

A separate order will issue shortly terminating these and all other outstanding motions. The Clerk of Court is respectfully directed thereafter to close these cases.

SO ORDERED.

UNITED STATES of America,

v.

Christopher HOWARD, a/k/a "JuJu," Defendant.

17 Cr. 611-8 (AT)

United States District Court, S.D. New York.

Signed 11/04/2019

Background: Defendant filed post-verdict motion for judgment of acquittal, relating to his convictions for racketeering conspiracy, committing violent crime in aid of racketeering conspiracy, and possessing, brandishing, or discharging a firearm during and in relation to a crime of violence.

Holdings: The District Court, Analisa Torres, J., held that:

(1) evidence established that criminal gang, of which defendant was a member, conducted its affairs through a pattern of racketeering activity;

(2) evidence established defendant's agreement to participate in the affairs of the enterprise; but

(3) evidence presented on charge of committing violent crime in aid of racketeering conspiracy did not establish defendant's purpose of maintaining or increasing his position in the enterprise; and

(4) evidence presented on firearm charge did not establish that the shooting in-

volved use of the firearm in relation to racketeering conspiracy for which predicate acts included multiple acts involving murder.

Motion granted in part and denied in part.

1. Criminal Law ⇐753.2(6)

A court must grant a motion for judgment of acquittal if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Fed. R. Crim. P. 29(a).

2. Criminal Law ⇐753.2(3.1, 8)

The ultimate question on a motion for judgment of acquittal is not whether the court believes the evidence adduced at trial established the defendant's guilt, but whether any rational trier of fact could so find, and thus, a defendant making an insufficiency claim bears a very heavy burden. Fed. R. Crim. P. 29(a).

3. Criminal Law ⇐753.2(8)

In considering the sufficiency of the evidence, on a motion for judgment of acquittal, the court must view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor. Fed. R. Crim. P. 29(a).

4. Criminal Law ⇐753.2(8)

On a motion for judgment of acquittal, a court must analyze the pieces of evidence not separately, in isolation, but together, in conjunction with one another. Fed. R. Crim. P. 29(a).

5. Conspiracy ⇐28(3)

To sustain a conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy provision, the Government must prove that the defendant agreed with others: (1) to conduct the affairs of an enterprise (2) through a pattern of racketeering activity. 18 U.S.C.A. § 1962(c, d).

6. Racketeer Influenced and Corrupt Organizations ⇐25

Predicate acts form a pattern of racketeering activity, as element for a conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), only if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 18 U.S.C.A. §§ 1961(5), 1962(c).

7. Racketeer Influenced and Corrupt Organizations ⇐28, 49

To constitute a pattern of racketeering activity, as element for a conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), the predicate acts must be related to each other, i.e., horizontal relatedness, and they must be related to the enterprise, i.e., vertical relatedness. 18 U.S.C.A. §§ 1961(5), 1962(c).

8. Racketeer Influenced and Corrupt Organizations ⇐28

One way to show that the predicate acts are horizontally related to each other, for purposes of the pattern of racketeering activity element for a conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), is to show that each predicate act is related to the RICO enterprise, by linking each predicate act to the enterprise, although the same or similar proof may also establish vertical relatedness. 18 U.S.C.A. §§ 1961(5), 1962(c).

9. Conspiracy ⇐28(3)

To be found guilty of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, a defendant need only know of, and agree to, the general criminal

objective of a jointly undertaken scheme. 18 U.S.C.A. § 1962(c, d).

10. Conspiracy ⇐28(3)

Neither overt acts, nor specific predicate acts that the defendant agreed personally to commit, need be proved for a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy offense. 18 U.S.C.A. § 1962(c, d).

11. Conspiracy ⇐47(3.1)

In determining whether the evidence is sufficient to support a conviction for a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy offense, the court need inquire only whether an alleged conspirator knew what the other conspirators were up to or whether the situation would logically lead an alleged conspirator to suspect he was part of a larger enterprise. 18 U.S.C.A. § 1962(c, d).

12. Conspiracy ⇐47(3.1)

Evidence established that criminal gang, of which defendant was a member, conducted its affairs through a pattern of racketeering activity, in prosecution for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy; witnesses testified that the gang was a neighborhood gang that was comprised of people from one area in housing project who engaged in a rivalry with another neighborhood gang associated with another area of the housing project, that defendant's gang committed multiple acts of violence, including shootings, in connection with the rivalry, and that when a member of defendant's gang would commit a shooting on behalf of the gang or its members, the member would often bring other gang members with him to "be [his] eyes." 18 U.S.C.A. §§ 1961(5), 1962(c, d).

13. Conspiracy ⇐47(3.1)

Evidence established defendant's agreement to participate in the affairs of the enterprise, i.e., a criminal gang, in prosecution for Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy; evidence of defendant's membership in gang included defendant using the gang's specific handshake with other gang members and defendant's repeated references to gang in his social media postings, including postings showing support for incarcerated gang members, and evidence was presented that defendant was well aware of general contours of conspiracy of which he was a member, including gang's rivalry with another gang in same housing project and related acts of violence, and defendant hanging out in apartment in which guns were kept, drugs were sold, and gang members discussed their exploits. 18 U.S.C.A. § 1962(c, d).

14. Racketeer Influenced and Corrupt Organizations ⇐49

For a defendant to be convicted of committing a violent crime in aid of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Government must prove five elements: (1) that the organization was a RICO enterprise; (2) that the enterprise was engaged in racketeering activity as defined in RICO; (3) that the defendant in question had a position in the enterprise; (4) that the defendant committed the alleged crime of violence; and (5) that defendant's general purpose in so doing was to maintain or increase his position in the enterprise. 18 U.S.C.A. § 1959(a).

15. Racketeer Influenced and Corrupt Organizations ⇐49, 95

To convict a defendant of committing a violent crime in aid of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Government need not prove that maintaining or increasing his position in the enterprise was the defendant's sole or principal mo-

tive, and instead, the motive requirement is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership. 18 U.S.C.A. § 1959(a).

16. Racketeer Influenced and Corrupt Organizations ⇐95

Evidence that defendant was member of criminal gang, that defendant discussed with another gang member retaliating against member of rival gang who had punched defendant three years earlier, that a member of defendant's gang assisted defendant in connection with defendant's shooting of rival gang member, and that members of defendant's gang, as part of rivalry, had shot at members of rival gang on several occasions but the rivalry had reached a standstill at time of defendant's shooting and defendant's gang had an interest in maintaining the truce, did not establish defendant's purpose of maintaining or increasing his position in the enterprise, in prosecution for committing violent crime in aid of racketeering conspiracy, which violent crime was assault with a dangerous weapon. 18 U.S.C.A. §§ 2, 1959(a)(3).

17. Racketeer Influenced and Corrupt Organizations ⇐49

Determining, in a prosecution for committing violent crime in aid of racketeering, whether defendant's general purpose in committing an assault was to maintain or increase his position in the enterprise asks only whether the intended assault, whatever the association of its victims, was intended to aid the racketeering. 18 U.S.C.A. § 1959(a)(3).

18. Racketeer Influenced and Corrupt Organizations ⇐49

Even when the victim of a defendant's assault was a member of a rival gang, the Government must show that the assault was intended to aid the defendant's racketeering, in a prosecution for committing violent crime in aid of racketeering. 18 U.S.C.A. § 1959(a)(3).

19. Racketeer Influenced and Corrupt Organizations ⇐49

In determining, in a prosecution for committing violent crime in aid of racketeering, whether defendant's general purpose in committing a violent crime was to maintain or increase his position in the enterprise, the question is not whether the defendant's position in the enterprise was actually advanced in fact by violent crime, but whether his purpose in committing the crime was to benefit his position. 18 U.S.C.A. § 1959(a).

20. Criminal Law ⇐552(3)

Where trial evidence gives nearly equal circumstantial support to competing explanations, a reasonable jury must necessarily entertain a reasonable doubt.

21. Weapons ⇐194(2)

A Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy can be a crime of violence, as predicate for possessing, brandishing, or discharging a firearm during and in relation to crime of violence, if the underlying RICO offense is based on crimes of violence. 18 U.S.C.A. §§ 924(c), 1962(c, d).

22. Weapons ⇐192

For possession of a firearm to be "in relation to" a crime of violence, for purposes of possessing a firearm during and in relation to crime of violence, at a minimum, the firearm must have some purpose or effect with respect to the crime of violence. 18 U.S.C.A. § 924(c).

23. Weapons ⇐192, 194(2)

Evidence that defendant showed his gun to a member of defendant's criminal

gang in a social setting, and that defendant used the gun in a shooting of a rival gang member for which defendant's motive was entirely personal and, if anything, contrary to his gang's goal of maintaining a truce with rival gang, did not establish that the shooting involved use of the firearm in relation to a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy for which the RICO predicate acts included multiple acts involving murder, as would provide basis for the RICO conspiracy offense serving as a predicate crime of violence, in prosecution for possessing, brandishing, or discharging a firearm during and in relation to a crime of violence. 18 U.S.C.A. §§ 924(c), 1962(c, d).

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(c)(3)(B)

Alexandra Rothman, Drew Turner Johnson Skinner, Jordan Lancaster Estes, Maurene Ryan Comey, United States Attorney's Office, SDNY, Christopher Jordan Clore, Gina Marie Castellano, U.S. Attorney's Office, SDNY (St Andw's), Jacqueline Christine Kelly, Usao - SDNY, New York, NY, for United States of America.

Michael J. Gilbert, Amanda Nicole Tuminelli, Christine Isaacs, Deborah Olufolakemi Martin, Paul Curran Kingsbery, Steven Pellechi, Tanner Kroeger, Dechert, LLP (NYC), Camille Marie Abate, Nicholas Goodman & Associates, PLLC, Kristen Marie Santillo, Gelber & Santillo PLLC, John Anthony Diaz Diaz & Moskowitz PLLC Richard Bruce Lind, Richard Lind Attorney at Law, New York, NY, David Arthur Ruhnke, Jean Desales Barrett, Ruhnke & Barrett, Montclair, NJ, David Keith Bertan, Law Office of David K. Bertan, Esq, Bronx, NY, Kenneth Jamal Montgomery, Brooklyn, NY, for Defendant.

OPINION AND ORDER

ANALISA TORRES, United States District Judge

On March 6, 2019, a jury found Defendant Christopher Howard guilty on one count of racketeering conspiracy; one count of committing a violent crime in aid of a racketeering conspiracy, specifically, assault with a dangerous weapon; and one count of possessing, brandishing, or discharging a firearm during and in relation to a crime of violence. Howard now moves for a post-verdict judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. For the reasons stated below, Howard's motion is GRANTED in part and DENIED in part.

BACKGROUND

I. Procedural History

On July 16, 2018, Howard and nine other defendants were charged in a 12-count Superseding Indictment, which detailed the criminal activities of two gangs, known as "MBG" and the "YGz," in and around the Bronx, New York. ECF No. 169. Howard, for his part, was charged with three counts in the Superseding Indictment. Count One alleged that, from approximately 2007 to October 2017, Howard participated in a racketeering conspiracy in relation to his membership in the gang "MBG," in violation of 18 U.S.C. § 1962(d). *Id.* ¶¶ 1–6. Count Six charged Howard with committing a violent crime in aid of racketeering ("VICAR"), namely, a shooting on August 17, 2014, in violation of 18 U.S.C. § 1959(a)(3), (a)(5), and 18 U.S.C. § 2. *Id.* ¶¶ 22–23. Count Twelve charged Howard with using and carrying a firearm,

which was brandished and discharged, in connection with the racketeering conspiracy charged in Count One and the VICAR charged in Count Six, in violation of 18 U.S.C. § 924(c)(1)(A)(i), (ii), (iii), and 18 U.S.C. § 2. *Id.* ¶ 29.

Trial commenced on February 25, 2019 before the Honorable Robert W. Sweet. Over the course of four days, the Government presented testimony from 15 witnesses, including cooperating witnesses, eyewitnesses, and a ballistics expert. The Government rested its case on February 28, 2019, at which time Howard moved for a judgment of acquittal on each count pursuant to Rule 29. Tr. 548:2–8, Feb. 28, 2019. Judge Sweet denied the motion. *Id.* 548:15. Howard presented no witnesses and rested his case that day. *Id.* 548:17–22; *id.* 550:9–13.

On March 6, 2019, after roughly two days of deliberation,[1] the jury convicted Howard on all three counts with which he was charged. Tr. 724:6–728:22, Mar. 6, 2019. With respect to Count Six, the VICAR, the jury determined that Howard committed assault with a dangerous weapon. *Id.* 725:11–726:4. With respect to Count Twelve, the firearms offense, the jury determined that Howard was guilty in relation to both the MBG racketeering conspiracy charged in Count One and the VICAR charged in Count Six. *Id.* 726:5–727:2.

On May 5, 2019, Howard filed the instant motion for a judgment of acquittal pursuant to Rule 29. Def. Mot. J. Acquittal, ECF No. 479.

1. The jury deliberated from approximately 12:45 p m. to 5 p m. on March 1, 2019, Tr. 682:23–24, Mar. 1, 2019; 9:30 a.m. to 3:30 p.m. on March 4, 2019, Tr. 698:1–706:15, Mar. 4, 2019; and 9:30 a.m. to 12 p.m. on March 6, 2019, Tr. 724:4–5, Mar. 6, 2019.

II. Evidence Presented at Trial

A. The MBG Racketeering Conspiracy

i. The MBG Enterprise

As noted above, this case involves a gang known as MBG,[2] which operated in and around the Mill Brook Houses ("Mill Brook") in the Bronx.

Descriptions of MBG, as well as Howard's participation in the gang, were predominantly provided by two cooperating witnesses: Andy Seda and Joey Colon. Seda and Colon both testified that they grew up in Mill Brook and had been members of MBG since the gang was created in about 2003 or 2004. Tr. 194:1–4, Feb. 26, 2019; *id.* 195:11–12; Tr. 360:15–22, Feb. 27, 2019; *id.* 363:14–17. They explained that Mill Brook consists of ten buildings; three buildings—buildings eight, nine, and ten—constitute what is known as "up the block" Mill Brook. Tr. 195:4–6, Feb. 26, 2019; *id.* 198:6–8; Tr. 362:22–24, Feb. 27, 2019; *id.* 364:6–8. MBG, which stands for "Mill Brook Gangstas" or "Money Bitches Guns," is a "neighborhood gang" based in up-the-block Mill Brook. Tr. 194:23–24, Feb. 26, 2019; *id.* 195:4–10; *id.* 198:6–8; Tr. 363:11–13, Feb. 27, 2019; *id.* 363:18–25. Most of MBG's members were raised in up-the-block Mill Brook. Tr. 363:20–23, Feb. 27, 2019. Colon and Seda testified that MBG members had their own way of "peacing," *i.e.*, greeting, each other, and that MBG members would only "peace" other members of the gang. Tr. 212:1–15, Feb. 26, 2019; Tr. 377:3–8, Feb. 27, 2019; *id.* 379:4–7. Colon explained that MBG members would "peace" each other by using a specific handshake, though he could

2. Because Howard was not charged with participating in the YGz gang, descriptions of that gang are only provided insofar as they are relevant to the MBG racketeering conspiracy charge.

not recall at trial what the handshake was. Tr. 211:21–212:1, Feb. 26, 2019. Colon also testified that MBG members, who were typically also members of the YGz gang, would greet each other using the YGz phrase, "What's gunning?"[3] *Id.* 212:2–15; *id.* 225:13–14.

According to Seda and Colon, MBG members could earn respect and increase their status in the gang by committing shootings. *Id.* 213:3–12; 216; *id.* 259:14–21; Tr. 388:3–4, Feb. 27, 2019. Colon testified that he became one of MBG's leaders by committing several shootings. Tr. 212:22–213:2, Feb. 26, 2019; *id.* 281:5–6. It was common for MBG members to commit acts of violence together because it was safer to have others around to serve as a lookout or to grab a gun if necessary. *Id.* 259:11–13; Tr. 407:21–408:8, Feb. 27, 2019. MBG members would likewise often talk to one another about shootings they committed in order to ensure that no one would be caught off guard by an act of retaliation. Tr. 248:22–249:9, Feb. 26, 2019; Tr. 393:13–24, Feb. 27, 2019.

Beyond the shootings, some MBG members—including Seda and Colon—sold drugs, namely, crack cocaine and marijuana.[4] Tr. 269:1–8, Feb. 26, 2019; Tr. 431:4–15, Feb. 27, 2019. Colon, whose drug dealing earned him the nickname "Joey Crack," started selling crack cocaine in 2007. Tr. 211:5–10, Feb. 26, 2019; *id.* 267:21–24. Colon sold drugs every day from 2013 to 2015. Tr. 317:22–25, Feb. 27, 2019. He bought his drugs from someone who lived in Mill Brook and would sell his drugs in Mill Brook and its outskirts. *Id.* 317:5–17; *id.* 318:3–11. Seda, for his part, began selling crack cocaine at the end of 2013 to make money after his father was arrested. *Id.* 431:16–24. Seda and Colon both testified that MBG members Anthony Bush, Demetrius Wingo, James Robinson, David Oquendo, and Christian Perez were also involved in drug dealing at times. Tr. 269:1–6, Feb. 26, 2019; Tr. 431:4–15, Feb. 27, 2019. On one occasion, MBG member James Robinson used his drug money to buy a gun for other MBG members to use. Tr. 435:24–436:7, Feb. 27, 2019.

Some MBG members would use the apartment of James Robinson and Laquan Robinson (the "Robinson Apartment"), located in up-the-block Mill Brook, as a stash house. Tr. 269:11–21, Feb. 26, 2019; Tr. 433:1–17, Feb. 27, 2019. For example, James Robinson and Bush kept their drugs in that apartment. Tr. 434:2–4, Feb. 27, 2019. Drugs were also cooked in and sold from there. *Id.* 433:17–24. In addition to drugs, James Robinson stored guns in his apartment. *Id.* 434:5–8. Any gun that was kept in the Robinson Apartment was considered an "MBG gun"—all of the MBG members could use it. *Id.* 434:9–13. Many of the MBG members would also use this apartment as a place to hang out with one another. *Id.* 434:21–24. MBG members would tell each other about things that happened at the Robinson Apartment, including what drug dealing was going on there and what guns were being held there at a given time. *Id.* 435:2–10.

MBG's principal rival was a gang called Killbrook. *Id.* 366:13–14. Killbrook was also a neighborhood gang, whose members were generally from buildings 1, 2, 3, and 4 in Mill Brook—collectively referred to as "down-the-block" Mill Brook. Tr. 213:13–

3. "YGz" stands for "Young Gunnaz." Tr. 195:18–19, Feb. 26, 2017; Tr. 361:16–17, Feb. 27, 2019.

4. Seda knew these other MBG members were dealing drugs because he saw them dealing and discussed it with them. Tr. 431:10–13, Feb. 27, 2019. Colon knew these individuals were selling drugs because they had the same customers. Tr. 269:5–8, Feb. 26, 2019.

22, Feb. 26, 2019; Tr. 366:15–24, Feb. 27, 2019. Killbrook was created sometime in the fall of 2007, shortly after Colon shot an individual named Gio, who was friendly with people from down-the-block Mill Brook. Tr. 370:6–371:4, Feb. 27, 2019. By October 2010, the rivalry had subsided. Tr. 226:5–7, Feb. 26, 2019. In March 2011, however, Colon went to a party down the block with MBG member Wingo and their friend Kash, who was not from Mill Brook. *Id.* 226:8–227:15. Sometime before this party, Kash had gotten in a fight with one Killbrook member named Gary Davis, and Kash's arrival to the party was consequently ill received. *Id.* 226:14–18. When Colon and his friends tried to leave the party, Davis started shooting at them. *Id.* 226:19–24. Colon, who had a gun on him, tried to fire back at Davis, but the safety was on. *Id.* 227:7–13. Wingo grabbed the gun from Colon, took the safety off, and shot twice at Davis. *Id.* 227:13–15. Shortly after this shooting, Colon tried to "squash" the rivalry because shootings led to police presence in the area, which made it harder for him to sell drugs. *Id.* 229:9–18. Specifically, Colon met with Gary Davis to discuss setting up a one–on–one fight between Wingo and Davis to resolve things. *Id.* 230:1–4. While the two were talking, however, Kash, Seda, and another MBG member named Jarod Slater appeared, leading Gary Davis to believe that Colon had set him up. *Id.* 229:23–230:19. In April 2011, Colon was out with his girlfriend when he encountered Gary Davis and his brother Kareem Davis, who was also a Killbrook member. *Id.* 239:24–242:10. Gary and Kareem Davis shot in Colon's direction but instead hit Colon's girlfriend, who later died from her injuries. *Id.* 242:11–243:15. After this series of events in the spring of 2011, tension between the gangs escalated and more shootings at the hands of both MBG and Killbrook members ensued. *Id.* 230:20–231:1; *id.* 248:3–19; Tr. 371:9–25, Feb. 27, 2019; *id.* 375:7–13. Colon explained that, during the periods of time that MBG and Killbrook were at war, any member of Killbrook was a "fair target" for MBG members to shoot. *Id.* 328:3–19.

Background information about MBG and Killbrook was also provided by an individual named Jose Rodriguez, who testified pursuant to an immunity order. Tr. 492:9–13, Feb. 28, 2019. Rodriguez was from down-the-block Mill Brook and joined Killbrook in about 2009. *Id.* 493:20–494:18. He testified that MBG, "which was right up the block," was one of Killbrook's rivals. *Id.* 494:20–24. According to Rodriguez, the relationship between Killlbrook and MBG was initially just a "petty rivalry" with "little fights here and there," but things later escalated to involve more serious acts of violence, such as shootings in which "people almost lost their life." *Id.* 495:18–24. Rodriguez explained that he had been a victim of violent acts committed by MBG members and had also committed acts of violence against them. *Id.* 495:25–496:4.

Raynaldo Melendez similarly testified, pursuant to an immunity order, about the gangs in Mill Brook. Tr. 146:8–9, Feb. 26, 2019. Melendez grew up in down-the-block Mill Brook. *Id.* 147:15–20. He lived there for most of his life, except between 2005 and 2013 and after October 2014.[5] *Id.* 147:21–148:7. According to Melendez, the relationship between up-the-block and down-the-block Mill Brook was generally "a little bit hostile," meaning that there had previously been conflicts, shootings, and other incidents of that nature. *Id.*

5. Melendez was incarcerated for possession of a controlled substance from 2005 to 2009, and lived in South Carolina from 2009 to 2013. Tr. 147:23–148:8, Feb. 26, 2019. He had been incarcerated since October 2014. *Id.* 148:11–18.

151:4–22. He testified, however, that by August 2014, the relationship between MBG and Killbrook was "cordial," and there had not been any shootings for the preceding year, though there was still some tension between the two sides. *Id.* 151:24–152:9. Melendez believed that the violence had subsided partly because some of the people who were responsible for shootings in the past had been arrested and partly because other people in the neighborhood were making an effort to keep the relationship "peaceful" in order to preserve their ability to sell drugs. *Id.* 152:10–23.

ii. Howard's Involvement in MBG

As for Howard's participation in the gang, Seda and Colon testified that Howard was a member of MBG. *Id.* 195:22–196:7; Tr. 361:21–362:9, Feb. 27, 2019; *id.* 376:6–8. They explained that they would "peace him MBG," Tr. 377:9–12, Feb. 27, 2019; Tr. 212:18–19, Feb. 26, 2019, and that Howard would hang out in the Robinson Apartment. Tr. 269:24–270:2, Feb. 26, 2019; Tr. 434:21–24, Feb. 27, 2019. In addition, Howard spoke to Seda about committing crimes and shooting people. Tr. 479:4–11, Feb. 27, 2019, and was sometimes present when Colon was selling drugs. Tr. 270:3–4, Feb. 26, 2019. They both testified that MBG member Jonathan Jose was one of Howard's close friends. Tr. 201:21–202:5, Feb. 26, 2019; *id.* 202:17–21; Tr. 402:13–20, Feb. 27, 2019.

Seda testified that although Howard moved out of Mill Brook to Staten Island in approximately 2010, he did not stop coming to Mill Brook or hanging out with MBG members. *Id.* 399:24–400:4. Seda further testified that he personally saw Howard in up-the-block Mill Brook every weekend after Howard moved to Staten Island. *Id.* 400:5–8. During cross examination, Seda stated that the reason he saw Howard at Mill Brook was that his two grandmothers lived there, so Howard would visit them on the weekends. *Id.* 468:7–25. Seda could not recall whether he ever saw Howard at Mill Brook during the week. *Id.* 467:24–468:2.

During cross examination, Seda stated that he never saw Howard discharge a gun, cut anyone, beat anyone up, or commit any other act of violence. Tr. 464:5–11, Feb. 27, 2019; *id.* 465:2–5. Seda also admitted that Howard did not participate in a single one of the 30 crimes that Seda pleaded to in his cooperation agreement. *Id.* 460:11–15. According to Seda, for Howard to be a member of MBG, it was not required that he commit acts of violence or otherwise participate in crimes; there were a lot of MBG members that did not do anything. *Id.* 464:15–20. Seda explained that, while these people did not necessarily engage in acts of violence, they were still "real members" of MBG. *Id.* 464:21–465:1.

Colon and Seda also testified that they would take trips to Atlantic City with their friends, including Howard. Colon testified that he, Howard, Jose, James Robinson, Laquan Robinson Seda, and some non–MBG members were supposed to go to Atlantic City for Colon's birthday in 2013. Tr. 261:18–262:10 Feb. 26, 2019. The group took the bus to Howard's house on Staten Island first, where they waited for someone to pick them up to drive them to Atlantic City. *Id.* 262:15–263:6. While at Howard's house, they hung out; some of them went to the store. *Id.* 264:18–265:4. The person who was supposed to drive them that day never showed up, so Colon eventually went back to Mill Brook with James and Laquan Robinson. *Id.* 262:11–16; *id.* 265:5–10.

Seda likewise testified about going to Howard's house in Staten Island as part of the unconsummated trip to Atlantic City in 2013. Seda explained that he, Colon, Howard, Bush, Wingo, Devin White, Jose,

James Robinson, and a few other non-MBG members took a bus to Staten Island. Tr. 400:21–402:22, Feb. 27, 2019. When they got to Howard's house, Seda was smoking and drinking in Howard's bedroom. *Id.* 402:23–403:9. At some point in the night, Seda watched Howard pull a .40 caliber gun from a shoebox. *Id.* 403:10–23. After showing Seda, Howard put the gun back in the box. *Id.* 403:24–404:1. Seda never again saw Howard with the gun. *Id.* 404:2–4.

Rodriguez likewise identified Howard as a member of Killbrook's rival gang. Tr. 495:4–16, Feb. 28, 2019. Rodriguez also described a time that he robbed Howard in 2009. *Id.* 499:8–20. According to Rodriguez, he and another Killbrook member named Quentin Starkes were walking around the neighborhood looking for rivals—something they did to "get status"—when they saw Howard entering a store in up-the-block Mill Brook and decided to follow him. *Id.* 499:21–500:3. Once inside the store, Rodriguez threatened Howard with a razor and told him to turn over whatever possessions he had. *Id.* 499:8–500:4. Howard handed over his jacket and cell phone, among other items. *Id.* 501:20–25. Later, Rodriguez and his fellow gang members carved "KB" into the back of the jacket and took a video of the jacket being lit on fire. *Id.* 502:1–4. According to Rodriguez, they did this for "status" and to let the entire neighborhood know that Killbrook members had "put in work" on a rival gang member. *Id.* 502:5–9. Prior to this incident, Howard had never attempted to engage in any violent acts against Rodriguez. *Id.* 510:5–8.

In addition to the foregoing testimony, the Government also presented evidence from Howard's Facebook account—specifically, several posts in which Howard references MBG, photographs of Howard with other MBG gang members, and conversations between Howard and other MBG members in which they discuss recent shootings and tension with people from down-the-block Mill Brook. *See* GX 400; GX 401; GX 402; GX 403; GX 404; GX 405; GX 407; GX 408; GX 410; GX 423; GX 425; GX 426.

B. Violent Crime in Aid of Racketeering

At trial, the following evidence was presented regarding the charge that, on August 17, 2014, Howard committed a shooting in furtherance of his MBG membership (the "Shooting").

1. Howard's Broken Jaw

According to Seda, Howard had problems with one particular person from Killbrook named Shadean Samuel, also known as "Scraps." Tr. 396:24–397:8, Feb. 27, 2019. Seda explained that Howard had issues with Samuel because he had broken Howard's jaw in 2011. *Id.* 397:24–398:2. Seda was not present for this incident, but he heard about it after the fact—first, from others; later, from Howard. *Id.* 398:9–10. Specifically, Howard told Seda that he was at a restaurant near Mill Brook when Samuel and other Killbrook members walked in. *Id.* 399:7–9; *id.* 480:17. Samuel approached Howard and punched him in the face. *Id.* 399:7–9. Seda thought he recalled Howard saying he was with other MBG members at the time, though he could not remember exactly. *Id.* 398:21–25; *id.* 399:1–2. Howard also told Seda that he was going to shoot Samuel in response. *Id.* 399:10–12. In Seda's view, this incident was gang-related insofar as MBG was "beefing with Killbrook." *Id.* 398:17–20.

During cross examination, Seda admitted that he did not help Howard seek revenge after Samuel broke his jaw. *Id.* 461:23–25. When asked if the reason he did not retaliate on Howard's behalf was that he did not like Howard very much, Seda responded that he would not say he did not

like Howard—Howard was just not in his circle. *Id.* 461:23–462:3. Howard's counsel asked if this meant his "circle of shooters and killers," to which Seda answered in the affirmative. *Id.* 462:2–5.

Colon similarly testified that he recalled a time when he saw Howard with a broken jaw, and that his understanding was that Samuel was responsible for the injury. Tr. 231:5–24, Feb. 26, 2019.

Rodriguez also provided testimony relating to the fight between Howard and Samuel. Although he had seen Howard around Mill Brook "a couple times" after the robbery in 2009, Rodriguez had no further interactions with Howard until the two ran into each other on the Staten Island Ferry in 2015.[6] Tr. 502:10–18, Feb. 28, 2019; *id.* 511:19–512:20; *id.* 515:15–18. When Rodriguez saw Howard on the ferry that day, Howard approached him "kind of aggressively" and asked Rodriguez if he wanted to fight because of the time he robbed Howard. *Id.* 503:8–12. Rodriguez replied that fighting would only "spark up energy ... [and] start something up again" between MBG and Killbrook, which Rodriguez did not think they should do. *Id.* 503:13–17. Howard agreed and, noting that Rodriguez and Starkes had not really hurt him during the robbery, told Rodriguez that he would forget about it. *Id.* 503:18–504:2. Howard then told Rodriguez that his "main focus down the block" was Samuel. *Id.* 503:22–504:3. Rodriguez understood this to mean that Samuel and Howard "had an issue," which was that Samuel had broken Howard's jaw. *Id.* 504:4–11. Rodriguez believed that Samuel broke Howard's jaw because, after moving to Mill Brook from Queens, he was "trying to get in good with Killbrook, so he put in work on [Howard]," a member of MBG.[7] *Id.* 504:12–505:6. Rodriguez believed this to be the case because, to his knowledge, Samuel and Howard did not have any interactions before Samuel moved into Mill Brook and started associating with Killbrook; thus, he felt that Mill Brook was the only thing that Samuel and Howard had in common. *Id.* 505:7–13. According to Rodriguez, Howard was not confiding in him during this conversation, but rather "boasting" that Samuel was "the only person [he was] beefing with ... from Mill Brook." *Id.* 513:7–15.

In addition to this testimony, the Government introduced the following evidence from Howard's Facebook account regarding his injury. On April 10, 2011, Howard sent a message to MBG member Devin White complaining about his broken jaw. Tr. 233:6–22, Feb. 26, 2019; GX 407. On April 12, 2011, Howard sent another message to Devin White complaining about his jaw and stating, "[N]o lie i gotta catch one of dese niggaz n show dem i aint playing n i knoo ur situation so u just gotta take care ur kids." GX 407. According to Colon, Howard was telling Devin White that he wanted to retaliate against someone from down the block but did not want Devin White getting in the middle of it because he had children. Tr. 237:8–18, Feb. 26, 2019. In that same message, Howard

6. While Rodriguez testified on direct that it was in 2014 or 2015, Tr. 502:17–503:1, Feb. 28, 2019, he testified on cross that he was "certain" that this conversation took place in 2015. *Id.* 511:19–512:14. He explained that it must have been 2015 because that is when he started working for a State Island–based company, and the only reason he was on the ferry that day was to pick up a pay check. *Id.* 511:19–512:15. The Government appears to concede that this conversation occurred in 2015. Gov't Mem. Opp. at 9, ECF No. 500 (describing conversation between Rodriguez and Howard "[s]everal months after the Shooting").

7. Rodriguez testified that he would "peace [Samuel] KB" and that Samuel would hang out with other Killbrook members. *Id.* 504:12–19.

wrote, "[I] havent heard niggaz try to get niggaz yet n datz brazy cuz when i was out here looking 4 niggaz niggaz was talking a gd one but i aint expecting niggaz to do anythi[n]g." GX 407. Colon testified that in this message, Howard was talking about Colon and his friends possibly retaliating against Samuel for breaking Howard's jaw. Tr. 236:14–237:7, Feb. 26, 2019. On April 22, 2011, Howard sent Devin White a message telling him to "go to kelly santana['s] profile[.] dat nigga in dat pic is da one who snuk me," which Colon testified meant the person who broke Howard's jaw. GX 407; Tr. 238:12–14, Feb. 26, 2019. Howard then wrote, "I want to murk dat nigga real shit." GX 407. Colon understood this to mean that Howard wanted to kill that person. Tr. 238:15–17, Feb. 26, 2019. In another message dated April 23, 2011, Howard told Devin White that he wanted to "peter roll one of dese niggaz especially dat birch ass nigga dat suckerpunched me." GX 407. Colon explained that "peter roll" means to kill somebody. Tr. 239:15–20, Feb. 26, 2019.

The Government likewise introduced hospital records indicating that Howard was treated for a broken jaw in April 2011. GX 800–B.

2. The Shooting

New York Police Department ("NYPD") Officer Surfraz Syed ("Officer Syed") testified that, at 3:10 a.m. on August 17, 2014, he and another officer were patrolling on 138th Street between St. Ann's Avenue and Brook Avenue when they received a report of shots fired at 137th Street and St. Ann's Avenue. Tr. 30:13–18, Feb. 25, 2019; *id.* 31:24–32:25; *id.* 34:15–35:2; *id.* 35:5–20. Upon arriving at the scene, Officer Syed saw one person who had been shot, as well as two other people who were complaining that they had been shot. *Id.* 40:16–19. He also observed a large group of people standing around a nearby deli. *Id.* 41:1–8. Officer Syed later identified the victims as Samuel, Jonathan Perez, and Aaron Dykes.[8] *Id.* 42:16–25.

NYPD Detective Scott Patterson testified that he was notified of a shooting in Mill Brook on August 17, 2014 and arrived at the scene around 3:30 a.m. Tr. 114:16–20, Feb. 26, 2019. In connection with the investigation that followed, he contacted certain individuals who had called 911 around the time of the incident. *Id.* 110:10–111:1. Although he had no recollection at trial of calling someone named Nikiena Perez, Detective Patterson had notes from that call and read them as part of his testimony.[9] *Id.* 113:13–114:5. According to these notes, Perez reported the following: "I was, 165 St. Ann's, smoking a cigarette ... [when] a guy, some dude, came out of nowhere. I ran. He came from – three or four shots, braids, red fitted hat, skinny, possibly Hispanic, tall." *Id.* 115:4–8. The notes further state, "She said that she was standing in front of her building, and she saw a male." *Id.* 115:8–9.

Perez was called to testify during trial and provided the following testimony about the events of August 17, 2014. On the night of the Shooting, Perez was inside her apartment at 165 St. Ann's Avenue ("Building 165"), on the corner of St. Ann's Avenue and 135th Street, listening to music and smoking marijuana with one of her friends. *Id.* 78:12–80–25; GX 300; GX 306.

8. Hospital records indicated that Dykes was treated at the hospital for a gunshot wound to his right upper arm in the early hours of on August 17, 2014, GX 801A; that Jonathan Perez was treated for a suspected gunshot wound to his right thigh, GX 802A; and that Samuel was treated for a gunshot wound to his left shoulder/arm, GX 803A.

9. Detective Patterson's notes reflected that he began returning 911 calls at approximately 4:08 a m. Tr. 114:11–15, Feb. 26. 2019.

Around midnight, she walked her friend out to St. Ann's Avenue to put her in a cab home. Tr. 81:3–82:22, Feb. 26, 2019. As she walked back from St. Ann's Avenue to her apartment building, Perez saw about four or five men in the courtyard in front of Building 165 sitting on benches underneath a flagpole. *Id.* 84:6–86:7; GX 211; GX 214. She recognized two of the men, Jonathan Perez and Dykes, from growing up in the neighborhood. *Id.* 86:8–10; *id.* 87:2–6; *id.* 87:23–88:1. Upon reaching her building, Perez stopped outside the entrance to finish a cigarette, facing the courtyard. *Id.* 88:14–89:7. Two or three minutes later, Perez saw a man coming from the same route she had just taken to St. Ann's Avenue. *Id.* 89:15–25; GX 211; GX 218. The man, who was alone, approached the group on the benches but then stopped abruptly before he reached them, approximately four or five feet from the flagpole. *Id.* 89:15–19; *id.* 104:18–21; *id.* 106:2–6. A couple of seconds later, Perez saw the individual raise his hand and heard three to four gunshots. *Id.* 89:13–20. She then ran into an apartment on the fourth floor of her building, where Jonathan Perez's mom, Milka, lived. *Id.* 93:6–15. Perez told Milka that she thought something bad may have happened to her son and that she should call him to make sure he was okay. *Id.* 95:8–12. About 10 to 15 minutes after the Shooting, Perez and Milka went to 137th Street, where Perez saw ambulances outside of a deli. *Id.* 95:18–96:25; GX 209. She stood nearby for about another 15 to 20 minutes before heading back home; at this point, nearly an hour had passed since the Shooting. *Id.* 97:17–24. When Perez got back to her apartment that night, she smoked some marijuana to calm her nerves and help her sleep. *Id.* 99:1–5.

During direct examination, Perez testified that she did not see the shooter's face and could not recall how he was dressed or anything else about his appearance, other than that he was slim and on the tall side. *Id.* 91:14–92:1. She explained that, although it was dark outside at the time, there were light posts near the flagpole, in front of her building, and elsewhere in the area. *Id.* 93:18–94:24. Perez likewise testified that she may have called the police that night to report the Shooting and that she remembered the police coming to her apartment after the Shooting, though she could not recall what exactly she said during those conversations. *Id.* 98:4–11.

During cross examination, Perez was asked about her previous statements to law enforcement regarding the Shooting. Perez testified that she "probably" told police she did not hear any shots until she was already inside her building taking the stairs up to her apartment, but she could not remember. *Id.* 100:13–24. Perez further stated that she did not recall telling police that she went into her building when she saw the person raise his hand, but supposed that was what happened if that was what she told police that night. *Id.* 101:11–15. As for identification of the shooter, Perez remembered telling police that she could not identify the perpetrator but thought that she told police that he was Hispanic. *Id.* 103:23–24. She likewise acknowledged that, a couple of weeks before trial, she told prosecutors that the shooter was "not too tall." *Id.* 104:14–17.

Kelly Santana, the mother of Samuel's children, was also called to testify about the Shooting. *Id.* 124:17–23. Santana testified that she "somewhat" remembered the night when Samuel was shot. *Id.* 127:12–14. Earlier that evening, she, Samuel, and Dykes had been drinking in a courtyard in between Building 165 and a building at 530 East 137th Street ("Building 530").[10] *Id.*

10. Santana lived in Building 165 in down-the-block Mill Brook from approximately 2005

127:12–128:14; *id.* 129:19–130:10; GX 211. Around 9 p.m., Santana left Samuel and Dykes to go home because she was drunk. *Id.* 130:11–21. Sometime later, she received a call from someone telling her that Samuel had been shot and made her way to 137th Street, where she saw Samuel and Dykes. *Id.* 130:22–132:20. Samuel was getting into an ambulance and told Santana that he had been shot. *Id.* 132:4–7. Dykes had been grazed. *Id.* 132:19–20. Santana joined Samuel in the ambulance to the hospital. *Id.* 132:21–23. On the ride there, she did not ask him who was responsible for the Shooting. *Id.* 132:24–133:1. Santana explained that she did not want to be involved and did not have any interest in what happened; all she cared about was Samuel's well-being. *Id.* 133:2–133:17.

Melendez, who testified that he was present for the Shooting,[11] provided the following details. Earlier in the night, before the incident, Melendez was hanging out with some friends outside a store in down-the-block Mill Brook when he noticed that someone from up-the-block was also hanging around outside the store. *Id.* 149:22–150:15. Melendez thought it was "weird" for this person to be there because people from up-the-block typically did not go down the block, and vice versa. *Id.* 150:16–23. Melendez did not know the person's name but identified him as the individual pictured in Government Exhibit 4.[12] *Id.* 164:10–19; *id.* 165:2–3. Eventually, Melendez and his friends—but not the person from up the block—made their way back into the projects, specifically, into the courtyard between Buildings 165 and 530. *Id.* 153:1–154:5; GX 211. Melendez testified that he and some others, including Jonathan Perez and Samuel, spent the night hanging out, drinking, and smoking near the flagpole in that courtyard. Tr. 154:9–17, Feb. 26, 2019. At some point, Melendez saw one of his friends freeze; when Melendez followed his gaze, he saw Howard approaching from St. Ann's Avenue with the same person from up-the-block who Melendez had noticed earlier in the night. *Id.* 154:18–1562:4; GX 211; GX 218. After they arrived, Melendez heard shots being fired and ran to his apartment in Building 165. *Id.* 150:16:19; *id.* 154:25–155:1; *id.* 157:7–12. Sometime later, Melendez went up the block with a gun looking for Howard because he wanted to retaliate. *Id.* 157:13–158:2. Melendez did not find Howard but instead ran into Colon, someone named Dre, and another person whose name he did not know. *Id.* 158:3–18. Melendez, who was upset, asked them if they knew where Howard was and if they knew why he had shot at the group down the block. *Id.* 158:19–23. Melendez also told Colon and the others about what he witnessed. *Id.* 158:24–159:1.

Sometime after the Shooting, a memorial was held in Mill Brook for Dykes, who had passed away in a car accident. *Id.* 154:10–15; *Id.* 159:2–14. According to Melendez, people from both up and down the block, including Howard, were present. *Id.* 159:11–14. When he saw Howard, Melendez asked him "[w]hat happened with [his] aim." *Id.* 159:15–18. Melendez explained that he asked this because he thought that

until 2015. *Id.* 124:4–15; *id.* 126:16–127:2; GX 300. Samuel was originally from Queens but moved into Santana's apartment when he was 16 years old; in 2014, he was living with her full time. *Id.* 127:5–10; *id.* 139:11–15.

11. In 2014, Melendez told law enforcement that he was not present for the Shooting. *Id.* 166:9–25.

12. Colon and Seda identified the person depicted in Government Exhibit 4 to be MBG member Jose. (*Id.* 201:17–22; Tr. 364:17–22, Feb. 27, 2019.)

Howard was only trying to shoot one person, but a couple of others ended up getting hit. *Id.* 159:18–23. Howard "kind of . . . laughed" in response, and Melendez told him that people were upset. *Id.* 159:24–160:2. Then Howard clarified that he was only coming for Samuel and was not trying to hit anyone else. *Id.* 160:3–4. Melendez told Howard that he would "deliver the message" but he did not know how much this apology would accomplish. *Id.* 160:4–5.

Colon testified that, on the night of the Shooting, he was alone in up-the-block Mill Brook selling drugs. *Id.* 255:6–256:6. At some point, Melendez approached him "kind of anxious[ly]" and "with an attitude" and asked where Howard was, but did not say anything more. *Id.* 256:10–257:3. After this interaction, Colon texted his friends—specifically, Seda, Bush, Wingo, and James Robinson—to find out what was going on. *Id.* 257:4–258:4. Colon explained that he wanted to know what happened in case someone tried to retaliate; as a leader of MBG, Colon felt that he would be a target for any act of retaliation by someone from down-the-block. *Id.* 258:7–22. Colon also testified that he was about 6 feet, 2 inches tall, and that, in 2014, he weighed about 160 pounds and wore his hair in braids. Tr. 305:5–21, Feb. 27, 2019.

Seda testified that he was at a strip club on the night of the Shooting when he heard from Colon that something had happened in Mill Brook. *Id.* 404:5–24. Seda stayed at the strip club for some time after that and then went back to his apartment to hang out with his girlfriend. *Id.* 404:25–405:10. While there, Seda called Melendez to find out what had happened. *Id.* 404:9–15. Eventually, Seda left his apartment and went down the block to meet Melendez. *Id.* 406:5–8. Seda brought a gun with him for this meeting because, having heard that something happened, he did not want to go down the block empty-handed. *Id.* 405:16–406:1. Melendez told him what happened and then Seda went back home for the night. *Id.* 406:5–8; *id.* 406:24–407:1. A week or two later, Seda discussed the Shooting with Jose. *Id.* 407:2–6. According to Seda, Jose told him that he went down the block with a girl, called Howard to tell him that Samuel was in the "park," and that Howard shot Samuel. *Id.* 407:7–16.

About a month and a half after the shooting, Seda saw Howard, Jose, and Devin White at a restaurant near Mill Brook. *Id.* 408:22–409:3; *id.* 410:9–12; *id.* 479:2–3. Seda explained that his relationship with Howard was not "really cool" at this point; Howard had been telling people that he had issues with Seda because Seda would not help Howard retaliate after he got cut by someone from another housing project. *Id.* 409:4–13. Seda, who was angry about this, asked Jose to tell Howard that he should stay in Staten Island because Seda would punch him in the face the next time they saw each other. *Id.* 409:20–24. When Seda tried to peace Howard MBG that day, Howard confronted Seda about this threat. *Id.* 410:17–20. In response, Seda punched Howard in the face. *Id.* 410:21–24. Howard threw his hands up, but nobody swung. *Id.* 410:25–411:2. Howard then told Seda he would "do [him] dirty," which Seda understood to mean that Howard would shoot him rather than beat him up. *Id.* 411:2–6. Seda then said to Howard, "[y]ou think you're tough because you shot [Samuel]," and told Howard to "get [his] punk ass .40"—referring to the gun that he saw at Howard's house in 2013. *Id.* 400:11–403:23; *id.* 411:7–14. Howard did not deny the accusation that he shot Samuel. *Id.* 411:15–17. Afterward, Seda went back to his apartment to get his guns—two .357s—and then went down the block to an apartment where the mother of Devin White's children lived. *Id.* 411:18–25. When

he got there, he saw Jose outside and told him to get Howard. *Id.* 411:24–25. Howard never came out, however, and eventually Seda went home. *Id.* 412:1–4. The next day, Seda awoke to several missed calls and text messages telling him that Howard wanted to fight. *Id.* 412:7–9. Around 8 p.m. that night, the two fought; Seda beat Howard up. *Id.* 412:21–413:1. Jose ultimately broke up the fight, at which time Seda and Howard "squashed" their problems, meaning they "gave each other a handshake, peace[d] each other MBG, and gave each other a hug." *Id.* 413:3–8.

The Government also introduced evidence that Howard had braids when he was arrested on October 11, 2017 and continued to have braids until approximately three days before trial. Tr. 119:24–120:15, Feb. 26, 2019; *id.* 140:25–145:7; GX 503; GX 504A.

The defense introduced an affidavit from Jose which stated that he has never been a member of MBG or the YGz; that he has no knowledge or belief that Howard shot anyone; that he did not help Howard locate Samuel on August 17, 2014 or otherwise assist Howard in setting up the Shooting; and that he never told anyone that Howard was responsible for any alleged shooting. DX A.

3. The Ballistics Evidence

Detective Estafani Cerda, a member of the NYPD's Evidence Collection Team, testified that she recovered two .40 caliber shell casings and a live .40 caliber bullet in front of 165 St. Ann's Avenue at approximately 4:20 a.m. on August 17, 2014. Tr. 48:10–13, Feb. 25, 2019; *id.* 57:4–28; *id.* 58:7–9; GX 100. NYPD Detective Jonathan Fox, the Government's ballistics expert, testified that the shell casings and the live bullet recovered by Detective Cerda were from the same manufacturer and of the same caliber (.40 caliber) and that the shell casings were fired from the same firearm. Tr. 544:3–5, Feb. 28, 2019; *id.* 547:1–4. He could not determine whether the live bullet was cycled through the same firearm as the two shell casings. *Id.* 544:6–14. During his analysis, he found nothing to suggest that the shell casings were fired from anything other than a .40 caliber semi-automatic handgun. *Id.* 546:8–11. He noted, however, that it would be possible to fire .40 caliber ammunition out of other types of firearms. *Id.* 544:25–545:17.

DISCUSSION

I. Standard of Review

[1, 2] Federal Rule of Criminal Procedure 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Specifically, a court must grant a motion under Rule 29 if there is "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States v. Irving*, 452 F.3d 110, 117 (2d Cir. 2006) (internal quotation marks and citation omitted). "The ultimate question is not whether [the court] believe[s] the evidence adduced at trial established [the defendant's guilt], but whether any rational trier of fact could so find." *United States v. Eppolito*, 543 F.3d 25, 45–46 (2d Cir. 2008) (internal quotation marks, citation and emphases omitted). Therefore, "a defendant making an insufficiency claim bears a very heavy burden." *United States v. Desena*, 287 F.3d 170, 177 (2d Cir. 2002).

[3, 4] In considering the sufficiency of the evidence, the court must "view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor." *United States v. Ware*, 577 F.3d 442, 447 (2d Cir. 2009). A court must analyze the pieces of evidence not sepa-

rately, in isolation, but together, in conjunction with one another. *See United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) ("[W]e consider the evidence in its totality, not in isolation, and the government need not negate every theory of innocence.").

II. Count One (The MBG Racketeering Conspiracy)

Howard argues that there was insufficient evidence to convict him of the MBG racketeering conspiracy charged in Count One. In particular, Howard contends that the Government failed to prove (i) that Howard conducted or conspired to conduct the MBG enterprise by engaging in a pattern of racketeering activity;[13] and (ii) that any of the alleged criminal acts committed by MBG gang members were interrelated or related to the MBG enterprise. Def. Mem. at 3.

A. Applicable Law

[5] The RICO conspiracy statute prohibits an individual from conducting or conspiring to conduct an enterprise by engaging in a pattern of racketeering activity.[14] 18 U.S.C. §§ 1962(c), (d). To sustain a conviction under this statute, the Government must prove that the defendant "agreed with others (a) to conduct the affairs of an enterprise (b) through a pattern of racketeering." *United States v. Applins*, 637 F.3d 59, 77 (2d Cir. 2011) (internal quotation marks omitted).

[6–8] "A pattern of racketeering involves, at minimum, two predicate racketeering activities . . . that occur within ten years of one another." *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016) (citation omitted). Moreover, predicate acts only form a pattern if they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc. v. Nw. Bell. Tel. Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (internal quotation marks omitted). In other words, to constitute a pattern of racketeering activity, the predicate acts "must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)." *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992). "[O]ne way to show that the predicate acts are horizontally related to each other is to show that each predicate act is related to the RICO enterprise," that is, "by linking each predicate act to the enterprise, although the same or similar proof may also establish vertical relatedness." *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006.)

[9–11] To be found guilty of RICO conspiracy, a defendant "need only know of, and agree to, the general criminal objec-

13. In Howard's opening memorandum, he appears to argue that the Government failed to prove he personally committed two predicate acts. *See, e.g.*, Def. Mem. at 3. In his reply, however, he contends that the Government failed to prove that he agreed that the MBG enterprise would engage in a pattern of racketeering activity. Reply Mem. at 4, ECF No. 507. Moreover, the Government addressed this latter argument in opposing Howard's motion; it has not, either in its opposition memorandum or thereafter, argued that Howard waived his right to challenge the sufficiency of the evidence regarding his agreement that MBG would be conducted through a pattern of racketeering activity. Gov't Mem. at 12. The Court thus concludes that Howard's challenge to his RICO conspiracy prediction is squarely before it.

14. RICO defines an "enterprise" as, *inter alia*, any union or group of individuals associated in fact although not a legal entity. 18 U.S.C. § 1961(4). Howard does not challenge the jury's determination that MBG was an enterprise as defined by the statute.

tive of a jointly undertaken scheme." *United States v. Yannotti*, 541 F.3d 112, 122 (2d Cir. 2008); *see also, e.g., United States v. Zichettello*, 208 F.3d 72, 100 (2d Cir. 2000) ("To be convicted as a conspirator [under RICO], one must be shown to have possessed knowledge of only the general contours of the conspiracy."). "Neither overt acts, nor specific predicate acts that the defendant agreed personally to commit, need be ... proved for a section 1962(d) offense." *United States v. Benevento*, 836 F.2d 60, 81 (2d Cir. 1987), *abrogated on other grounds by United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (internal citation and quotation marks omitted); *see also United States v. Ciccone*, 312 F.3d 535, 542 (2d Cir. 2002) (stating that conviction on a racketeering conspiracy charge does not require a showing that the defendant committed or even agreed to commit the predicate acts). Simply put, the Court "need inquire only whether an alleged conspirator knew what the other conspirators 'were up to' or whether the situation would logically lead an alleged conspirator 'to suspect he was part of a larger enterprise.'" *Zichettello*, 208 F.3d at 99 (quoting *United States v. Viola*, 35 F.3d 37, 44–45 (2d Cir. 1994)).

B. Application

[12] The Court first turns to the question of whether the MBG enterprise conducted its affairs through a pattern of racketeering activity.

Here, the evidence regarding the shootings committed by MBG members was sufficient to support a finding that they were related to the gang. Colon, Seda, and Rodriguez testified that MBG was a neighborhood gang comprised of people from up-the-block Mill Brook, and that MBG engaged in a rivalry with Killbrook, the gang associated with down-the-block Mill Brook. Tr. 194:23–24, Feb. 26, 2019; *id.* 195:4–10; *id.* 198:6–8; *id.* 213:13–22; Tr. 363:11–13, Feb. 27, 2019; *id.* 363:18–25; *id.* 366:13–14; Tr. 493:20–494:24, Feb. 28, 2019. According to Colon, after this rivalry began, the two gangs "wanted to hurt each other." Tr. 216:10–15, Feb. 26, 2019. Colon also testified that he and other MBG members committed multiple acts of violence, including shootings, in connection with the MBG/Killbrook rivalry. *See, e.g.*, Tr. 212:22–213:2, Feb. 26, 2019; *id.* 281:5–6. Seda likewise stated that, when an MBG member would commit a shooting, he would often bring other members with him to "be [his] eyes." Tr. 408:3–8, Feb. 27, 2019. Colon and Seda provided numerous examples of shootings directed at rival gang members that they committed or were involved in with other MBG members, which were committed on behalf of MBG or its members. Tr. 273:11–275:12, Feb. 26, 2019; *id.* 277:22–279:8; *id.* 280:7–281:19; Tr. 414:2–25, Feb. 27, 2019; *id.* 416:13–21; *id.* 416:22–427:20; *id.* 419:6–22.

[13] The evidence is also sufficient to show that Howard agreed to participate in MBG's affairs. At the outset, the Court notes that it is apparent from the record that Howard's membership in MBG did not entail active participation in the gang's violent crimes. As previously noted, however, the Government need not prove that Howard personally engaged in any predicate acts, or even that he agreed to personally commit any predicate acts, in order to sustain a conviction under the RICO conspiracy statute. *See, e.g., Ciccone*, 312 F.3d at 542. Instead, the Government must prove only that Howard "kn[e]w the general nature of the conspiracy and that the conspiracy extend[ed] beyond [his] individual role." *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000). This prong is satisfied so long as he "knew what the other conspirators 'were up to,'" or if "the situation would logically lead [him] to sus-

pect he was part of a larger enterprise." *Id.* (internal quotation marks and citation omitted).

Here, the Government presented evidence to satisfy this standard. For one, there was more than enough evidence to show that Howard was a member of the gang. Colon and Seda testified that they would peace Howard MBG, and that Howard would frequently hang out with other MBG members. Howard referenced MBG repeatedly in his Facebook posts and messages, including posts in which he shows support for incarcerated members of MBG. *See, e.g.*, GX 404; GX 405; GX 408. And the evidence shows that Howard was well aware of the general contours of the conspiracy of which he was a member, including the gang's rivalry with Killbrook and related acts of violence. He would hang out in the Robinson Apartment, where guns were kept, drugs were sold, and MBG members discussed their exploits. Tr. 269:24–270:2, Feb. 26, 2019; Tr. 434:21–24, Feb. 27, 2019. He spoke to Seda about Seda's committing crimes and shooting people. Tr. 479:4–11, Feb. 27, 2019, and was sometimes present when Colon was selling drugs. Tr. 270:3–4, Feb. 26, 2019. Moreover, the Government introduced Facebook messages between Howard and other MBG members in which the gang and the rivalry with people from down-the-block Mill Brook is discussed. *See, e.g.*, GX 407.

Accordingly, Howard's motion for acquittal on Count One of the Superseding Indictment is DENIED.

III. Count Six (Violent Crime in Aid of the MBG Racketeering Conspiracy)

Count Six of the Superseding Indictment charges that, on August 17, 2014, Howard, for the purpose of gaining entrance to and maintaining and increasing position in MBG, a racketeering enterprise, shot at, injured, and attempted to murder members of a rival gang near Mill Brook, in violation of 18 U.S.C. §§ 1959(a)(3), (a)(5), and 18 U.S.C. § 2.

A. Applicable Law

[14] For a defendant to be convicted of committing a violent crime in aid of racketeering under 18 U.S.C § 1959(a), the Government must prove five elements: "(1) that the Organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992).

B. Howard's Motive

[15] Howard contends that the Government failed to prove beyond a reasonable doubt that he committed the Shooting "for the purpose of maintaining or increasing his position in the enterprise." Def. Mem. Supp. at 28–31. The Second Circuit has noted that this phrase was "included [in the VICAR statute] as a means of proscribing murder and other violent crimes committed as an integral aspect of membership in [RICO] enterprises." *Concepcion*, 983 F.2d at 381 (internal quotation marks, brackets, and citation omitted). Accordingly, to convict a defendant under the VICAR statute, the Government need not prove that maintaining or increasing position in the enterprise was the defendant's "sole or principal motive." *Id.*; *see also United States v. Thai*, 29 F.3d 785, 817 (2d Cir. 1994) (holding that the government must prove that "the defendant's *general purpose* in committing the crime of violence was to maintain or increase his

position in the enterprise." (emphasis added)). Instead, the motive requirement is satisfied "if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Concepcion*, 983 F.2d at 381.

In accordance with these principles, courts have found the motive requirement met where, for example, the defendant's act was committed or authorized by leaders of an enterprise as part of an effort to protect its operations against threats or advance its objectives. *See, e.g., United States v. Aquart*, 912 F.3d 1, 19–20 (2d Cir. 2018) (sufficient evidence to infer that defendant, as a leader of the enterprise, was expected to act based on threat posed to enterprise by competitor's drug sales and that failure to do so would have undermined his position within the enterprise); *United States v. Rivera*, 273 F. App'x 55, 58 (2d Cir. 2008) (affirming conviction where evidence showed "that [the defendant's] motives for the murders were not only based on self-preservation, but also on preservation of the enterprise."); *United States v. Diaz*, 176 F.3d 52, 95–96 (2d Cir. 1999) (defendant sanctioned murders of both rival drug dealer and suspected informant to protect drug gang's territory and to maintain defendant's leadership position in the gang); *United States v. Pimentel*, 346 F.3d 285, 295–96 (2d Cir. 2003) (gang chapter president participated in murder to advance his position within the gang).

Courts have likewise found this element satisfied where the defendant's act was consistent with the enterprise's goals, rules, policies, or culture. For instance, VICAR convictions have been affirmed upon the Government's showing that members of the gang are expected to respond violently to certain actions by outsiders, and that failure to do so would undermine a member's standing in the gang. *See, e.g., United States v. Rubi-Gonzalez*, 311 F. App'x 483, 486 (2d Cir. 2009); *United States v. Roye*, No. 3:15 Cr. 29, 2017 WL 3670651, at *2 (D. Conn. Aug. 25, 2017), *rev'd on other grounds sub nom. United States v. Frank*, 749 F. App'x 5 (2d Cir. 2018) (denying acquittal on VICAR conviction because evidence was sufficient for a reasonable juror to "conclude that Defendant perceived [the victim] to be a threat to the enterprise and its members, and that Defendant's actions were in accordance with the expectations of the gang and were done with the intention of meeting his obligations as a member").

[16] The Government contends that the motive element was satisfied by evidence that Howard was a member of MBG; Samuel was a member of Killbrook; as part of the MBG/Killbrook rivalry, MBG members shot at Killbrook members on several occasions; and committing acts of violence would increase Howard's status within MBG. Gov't Mem. at 21–23. The Government also highlights evidence that Howard discussed retaliating against Samuel with Devin White, another MBG member, and that Jose, an MBG member, assisted Howard in connection with the Shooting. *Id.* at 23. These arguments fail for the reasons discussed below.

[17, 18] First, the VICAR motive element may not be satisfied merely by the fact that Howard was a member of MBG, Samuel was a member of Killbrook, and members of the two gangs shot at each other on several occasions as a result of a rivalry between them. The Second Circuit has held that such reasoning "misses the point, which asks only whether the intended assault, *whatever the association of its victims*, was intended to aid defendants' racketeering." *United States v. Sanchez*,

623 F. App'x 35, 41 (2d Cir. 2015) (emphasis added). *Sanchez* held that an assault could satisfy VICAR's motive prong even when the victims were not members of a rival gang. *See* 623 F. App'x at 41. But the opinion's logic applies just as strongly in reverse: even when the victim was a member of a rival gang, the Government must show that the assault was intended to aid the defendant's racketeering. *See United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008) (holding, in a case where the victim of an assault was a member of a rival gang, that it was impermissible to "convict [the defendant] on the VICAR counts even if it found that his battle with [the victim] was generally motivated by personal animosity and by a desire to regain the respect and affection of his girlfriend").

Courts in this circuit and elsewhere have also rejected the assumption that any violence in response to a personal affront to a member of an enterprise can satisfy VICAR's motive prong. For example, in *United States v. Jones*, 291 F. Supp. 2d 78 (D. Conn. 2003), the court rejected "[t]he government's argument that any personal act of disrespect toward [the defendant] was tantamount to an act of disrespect against the [e]nterprise," because that theory "blurs *Concepcion*'s distinction between violent crimes that are committed in connection with a criminal enterprise's affairs and those that arise from purely non-enterprise-related matters. Indeed, taking the government's theory to its logical conclusion, any act of violence committed by a member of a drug-trafficking group, whether related to its drug–trafficking objectives or not, would be a VICAR offense." *Id.* at 89; *see also, e.g., United States v. Hunter*, No. 5 Cr. 188, 2008 WL 268065, at *8 (E.D.N.Y. 2008), *aff'd*, 386 F. App'x 1 (2d Cir. 2010) ("I [ ] reject the government's argument that [the victim's] disrespect for [a gang member] (by sleeping with his girlfriend) damaged the reputation of the enterprise, thus leading [other gang members] to defend the enterprise against the 'threat' posed by this affair."); *United States v. Barbeito*, No. 2:09 Cr. 00222, 2010 WL 2243878, at *19 (S.D. W. Va. 2010) ("[C]ourts have rejected unsupported inferences, proffered by the Government, that acts of violence by a member of a racketeering enterprise committed for ostensibly personal reasons were motivated by a desire to increase the member's position.").

Moreover, while shooting Killbrook members and enlisting the assistance of other MBG members in doing so may have been acts that were *generally* consistent with MBG's modus operandi, such evidence is not necessarily dispositive. *See, e.g., Thai*, 29 F.3d at 818 (racketeering motive could not be evidenced merely by the fact that the bombing of an Asian restaurant was committed by a leader of a gang that earned money by committing violent crimes against Asians). The evidence in this case fails to show that the Shooting was consistent with MBG's operations or goals *at the time it was committed*. Melendez testified that, at the time of the Shooting, the relationship between Killbrook and MBG was "cordial" and there had not been any rivalry–related shootings for approximately a year. Tr. 151:24–152:9, Feb. 26, 2019. Melendez testified that this was because drug dealers decided that it would be better for business if there were not any shootings. *Id.* 152:10–23; *id.* 183:21–25. Colon, MBG's leader, was an active drug dealer in 2014; in fact, he was dealing drugs on the night of the Shooting. *Id.* 212:22–25; *id.* 255:6–17; *id.* 268:19–25. Rodriguez testified that, when Howard approached him to fight on the ferry in 2015, he told Howard that he did not want to fight because he did not want to reignite the rivalry between the two gangs. Tr. 503:13–17, Feb. 28, 2019. In

short, it was clear to virtually everyone that the rivalry between MBG and Killbrook had reached a standstill by August 2014 and that there was an interest in keeping things that way. If the Shooting were indeed related to the MBG/Killbrook rivalry, it would make no sense for Howard to retaliate in 2014—three years after Samuel broke his jaw, and during a time when there was a truce between the two gangs—rather than in 2011—immediately after Samuel punched him, and when tension between the two gangs was at a high.

The foregoing facts distinguish Howard's case from those in which a defendant's conduct was explicitly or implicitly authorized by the gang's leaders. Here, MBG's leaders did not help Howard plan the Shooting or in any way direct him to commit it. On the contrary, Colon—one of the gang's leaders—did not even know about it until Melendez informed him, and Howard used his own gun, as opposed to an MBG gun, to commit the Shooting. (Tr. 257:256:10–258:4, Feb. 27, 2019; *Id.* 402:23–403:23.) Indeed, the evidence indicated that the Shooting was directly contrary to the gang's interests because members were actively trying to reduce violence between the gangs at the time. Tr. 151:24–152:9, Feb. 26, 2019; Tr. 503:13–17, Feb. 28, 2019. *See United States v. D'Angelo*, No. 02 Cr. 399 (JG), 2004 WL 315237, at *13 (E.D.N.Y. Feb. 18, 2004) (insufficient evidence of VICAR motive where the evidence showed that the defendant was "acting *against* the interests of [the gang] by suddenly shooting someone whom [the gang] members would be suspected of killing, even though those same [gang] members did not want the murder to occur").

Moreover, Howard clearly did not have any noteworthy status in the gang such that his actions might be understood to evidence his interest in preserving his particular position in the gang. Nor does the evidence allow the inference that Howard—or anyone else—viewed Samuel's breaking of Howard's jaw as an affront to the gang such that one could infer Howard's desire to commit the Shooting in order to protect the gang's operations or reputation. On the contrary, Seda explicitly testified that he did not help Howard retaliate. Tr. 461:23–25, Feb. 27, 2019. This suggests that the attack on Howard was not viewed as an affront to the gang. Howard seemed aware of this, given that he told another MBG member that he did not expect anyone to retaliate on his behalf. GX 407.

Further, the evidence failed to show that Howard's position in the gang would be in question if he failed to retaliate against Samuel. Seda acknowledged that Howard was a "real member[ ]" of MBG even though he was not a "shooter" or "killer[,]" and explained that there were "a lot" of MBG members who did not engage in acts of violence or any other criminal acts. Tr. 461:23–462:6, Feb. 27, 2019; *id.* 464:12–465:1. Furthermore, Howard was evidently a member of the gang for roughly a decade before he committed a single crime. Tr. 195:11–12, Feb. 26, 2019; *id.* 199:3–5; 464:5–11, Feb. 27, 2019. This is true notwithstanding the fact that in 2009 another Killbrook member, Rodriguez, robbed Howard at knifepoint and then publicly burned Howard's jacket in an attempt to establish Killbrook's dominance over MBG—an act that would readily be understood as a threat to the enterprise. Tr. 499:8–502:9, Feb. 28, 2019; *id.* 502:10–18; *id.* 511:19–512:20; *id.* 515:15–18. The evidence, therefore, cannot support any inference that Howard committed the Shooting because it was expected of him by way of his MBG membership or because his position might have been undermined if he failed to retaliate. *Cf. Rubi-Gonzalez*, 311 F. App'x at 486–87 (citing evidence that the gang had a "fight at first sight" policy

with regard to rival gangs in affirming VICAR conviction); *United States v. Eldridge*, No. 1:09 Cr. 329, 2017 WL 3699312, at *11 (W.D.N.Y. Aug. 28, 2017) (finding sufficient evidence of gang–related motive where the defendant was recorded making statements such as: "The way I gotta respond to certain things in Buffalo . . . I don't have to respond when I'm somewhere else because there are no expectations of me . . ."; "I be around a lot of criminals and all that and I am the one who is looked up to"; "I ain't just being the average individual amongst the whole bunch"); *United States v. Smith*, No. 09 Cr. 331-A, 2017 WL 3529047, at *5 (W.D.N.Y. Aug. 17, 2017) (affirming VICAR conviction based on evidence "that [a rival gang's shooting of the brother of the defendant's gang member] was a compelling event for [the defendant's gang] members, that retaliation against the [rival gang] was widely viewed as essential to the gang among [ ] members, and that [the defendant] concluded he would not be left out of it").

As for enhancing his position, although there was testimony that MBG members could gain respect by committing acts of violence, Tr. 213:3–4, Feb. 26, 2019, there was virtually no evidence that in 2014 Howard had any interest in becoming a leader or otherwise advancing his status in the gang. There were, of course, the Facebook messages from 2011 in which Howard expressed a desire to harm Killbrook members, including Samuel. GX 404; GX 407. But there is nothing in the record between the time Howard made those statements and the night of the Shooting—a gap of more than three years—to indicate that Howard had any desire to gain status in MBG. The evidence, therefore, does not show that Howard intended to further his status or MBG's operations when he committed the Shooting. Indeed, if Howard were at all motivated by a desire to maintain or increase his standing within MBG, one would expect him to talk about the Shooting with other members, such as one of the gang's leaders, after the fact. *See, e.g., United States v. Farmer*, 583 F.3d 131, 142 (2d Cir. 2009) (affirming VICAR conviction based on evidence that the defendant "boasted about the crime to his fellow [gang members] in the days and months" after the crime); *United States v. Whitten*, 610 F.3d 168, 179–81 (2d Cir. 2010) (citing evidence showing that the defendant was "proud" of his crimes and "wanted others to be made aware of them," and that the defendant reported back to one of the gang's leaders after the crimes, to support conclusion that VICAR motive element was satisfied); *United States v. Mayes*, No. 12-CR-385, 2014 WL 3530862, at *8–9 (E.D.N.Y. July 10, 2014) ("[The defendant's] later references to this murder shed light on his motive for committing it[;] . . . numerous witnesses testified that [the defendant] told them about the murder, either directly or by implication."); *id.* ("[T]he jury could have inferred that Anthony Mayes committed the murder to increase his position in the enterprise, based on the way that he later referred to the murder to intimidate members and rivals, *coupled with* Timmons' testimony that a murder by a younger member of a group can play a critical role in helping that person gain respect.") (emphasis added). That is especially so given Seda and Colon's testimony that they generally did brag about their criminal exploits. *See* Tr. 279:24–280:2, Feb. 26, 2019; Tr. 424:24–425:5, Feb. 27, 2019. But here, the evidence shows that Howard made no effort to tell any MBG members about his role in the Shooting. For instance, when Seda confronted Howard about the Shooting, Howard did not deny it—but he also did not admit to it, much less boast about it. Tr. 411:7–17,

Feb. 27, 2019. Indeed, it appears that the only person to whom Howard *did* admit to the Shooting was Melendez—someone from down-the-block, who was not a member of MBG (or Killbrook) and could not have any influence over Howard's status in the gang. Tr. 147:15–20, Feb. 26, 2019; *id.* 159:15–160:4; *id.* 169:3–4.

On this point, the Court notes that Howard's statement to Melendez about the Shooting—that he was only coming for Samuel, *id.* 159:24–160:4—also undermines any conclusion that he committed the Shooting in connection with MBG or its rivalry with Killbrook. Colon, for example, testified about multiple instances in which he shot at one Killbrook member or another, and that at times, his target was any Killbrook member he could find. *See, e.g.*, Tr. 328:3–7, Feb. 27, 2019. Seda likewise testified about multiple instances in which he shot at Killbrook members who had not specifically done anything to him. *See, e.g.*, *id.* 429:18–430:16. Howard, by contrast, was not seeking to shoot at any Killbrook member; instead, as he explained to Melendez, he was only coming for one person—the same person who had previously attacked him. The same is also true of Howard's conversation with Rodriguez in 2015, in which Howard effectively told Rodriguez that Samuel was "the only person [Howard was] beefing with ... from Mill Brook." Tr. 513:7–15, Feb. 28, 2019.

[19] Finally, there was no evidence that Howard's status was enhanced by the Shooting. No member praised Howard for his accomplishment or otherwise addressed the Shooting in a manner that could allow for the inference that it was done in furtherance of the enterprise. Of course, "the question is not whether [a defendant's] position in the [enterprise] was advanced in fact by the murder he committed, but whether his purpose in committing the murder was to benefit his position." *Farmer*, 583 F.3d at 142. But it is nonetheless significant, in light of the substantial evidence of Howard's personal dispute with Samuel, that the shooting may have "actually *decreased* his standing in the [enterprise.]" *United States v. Bruno*, 383 F.3d 65, 85 (2d Cir. 2004), *as amended* Oct. 6, 2016. Just a few weeks later, Howard was in a fight with Seda, a senior member of MBG, and during the fight Seda mocked Howard for the shooting. Tr. 400:11–411:7–14, Feb. 27, 2019.

[20] Even straining to draw every inference in favor of Howard's having a motive of maintaining or improving his position in MBG, it is clear that the trial evidence "gave nearly equal circumstantial support to competing explanations," if not substantially greater support. *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) (internal quotation marks omitted). In that circumstance, "a reasonable jury must necessarily entertain a reasonable doubt." *Id.* (internal quotation marks and citation omitted). The Court therefore must conclude that the evidence was insufficient for a reasonable juror to conclude that Howard committed the Shooting in order to maintain or increase his position in MBG. Howard's motion for a judgment of acquittal on Count Six is GRANTED.[15]

IV. Count Twelve (Firearm Offense)

As noted above, the jury convicted Howard on Count Twelve in connection with both Count One, the racketeering conspiracy, and Count Six, the VICAR. Tr. 726:5–

15. Because the Court grants Howard's motion for acquittal on Count Six on this basis, there is no need to address the difficult question of whether the evidence was sufficient to demonstrate that he "had a position in the enterprise," *Concepcion*, 983 F.2d at 381. *See* Def. Mem. at 27, 29–30.

727:2, Mar. 6, 2019. Because Howard's motion for a judgment of acquittal as to Count Six has been granted, however, his conviction on Count Twelve now rests solely on his conviction for Count One.

[21] Count Twelve is charged under 18 U.S.C. § 924(c), which criminalizes using a firearm "during and in relation to," any "federal crime of violence," or possessing a firearm "in furtherance of" such a crime. The statute defines "crime of violence," in relevant part, as an offense that is a felony and [ ] has as an element the use, attempted use, or threatened use of physical force against the person or property or another." *See* § 924(c)(3).[16] The Second Circuit has made it clear that a RICO conspiracy can be a crime of violence if the underlying RICO offense is based on crimes of violence. *See United States v. Scott*, 681 F. App'x 89, 95 (2d Cir. 2017) ("Where, as here, the jury finds two RICO predicates constituting crimes of violence have been proven, [*United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009),] instructs us to treat the RICO offense as a crime of violence, and [*United States v. Elder*, 88 F.3d 127, 129 (2d Cir. 1996),] instructs us to treat the conspiracy to commit that offense—that is, the RICO conspiracy charged here—as a crime of violence as well."). In this case, the RICO predicate acts included multiple acts involving murder, ECF No. 169 ¶ 5(a), so the RICO offense was a crime of violence, and conspiracy to commit the RICO offense is a crime of violence too. *Scott*, 681 F. App'x at 95.

[22, 23] The evidence does not show, however, that Howard used a firearm "in relation to" the RICO conspiracy or possessed it "in furtherance of" the conspiracy. "The phrase 'in relation to' ... at a minimum, clarifies that the firearm must have some purpose or effect with respect to the ... crime." *Smith v. United States*, 508 U.S. 223, 238, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Likewise, for possession of a firearm to be "in furtherance" of a conspiracy, "[t]he defendant must be shown to have possessed the gun for the purpose of playing some role, even if small, in the furtherance of the conspiracy." *United States v. Gardner*, 602 F.3d 97, 100 (2d Cir. 2010) (affirming jury instruction with that language). Here, there was no evidence that Howard used his .40 caliber gun to any purpose or effect related to the RICO conspiracy, or that his possession of the gun played any role in furthering the conspiracy. The evidence at trial demonstrated Howard's use of the gun only twice: when he showed it to Seda on Staten Island in 2013, *see* Tr. 400:21–402:22, Feb. 27, 2019; *id.* 403:10–23; *id.* 403:24–404:1, and when he used it to shoot Samuel at Mill Brook in 2014, *see* Tr. 48:10–13, Feb. 25, 2019; *id.* 57:4–28; *id.* 58:7–9; Tr. 544:3–5, Feb. 28, 2019; *id.* 544:6–14; *id.* 546:8–11; *id.* 547:1–4. The former incident had no meaningful relationship to the RICO conspiracy, other than that Howard showed the gun to a co-conspirator in a social setting. The latter incident, too, did not further the conspiracy or have any purpose or effect related to it; as described above, Howard's motive for the Shooting was entirely personal, and if anything the shooting was contrary to MBG's goals at the time. *See supra* Section III.B.

Accordingly, Howard's motion for acquittal on Count 12 is GRANTED.

16. Section 924(c)(3)(B) also defines a crime of violence as including an offense "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." But the Supreme Court invalidated that portion of the definition as unconstitutionally vague earlier this year. *See United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019).

CONCLUSION

For the foregoing reasons, Howard's motion is GRANTED as to Counts Six and Twelve of the Superseding Indictment and DENIED as to Count One of the Superseding Indictment. Howard is, therefore, entitled to a judgment of acquittal on the jury's verdict finding him guilty on Counts Six and Twelve of the Superseding Indictment, and his conviction on those counts is VACATED. The Clerk of the Court is directed to terminate the motions at ECF Nos. 479 and 484.

SO ORDERED.

XL INSURANCE AMERICA, INC., et al., Plaintiffs,

v.

DIAMONDROCK HOSPITALITY CO., et al., Defendants.

18-CV-10025 (AJN)

United States District Court, S.D. New York.

Signed 09/30/2019

Background: Insurers brought action against insured, whose resort was damaged by hurricanes and who had filed parallel proceedings in Virgin Islands Superior Court, seeking declaratory judgment regarding forum selection clause and choice of law clause in insurance policy of one insurer. Following removal, insurer filed motion to dismiss or stay.

Holdings: The District Court, Alison J. Nathan, J., held that:

(1) forum selection clause did not require action to be conducted in New York, and

(2) abstention was warranted.

Motion granted.

See also 2019 WL 2156404.

1. Contracts ⇐206
Federal Courts ⇐2595

Forum selection clause in insurance policy did not require insurers' declaratory judgment action against insured, whose resort was damaged by hurricanes and who had filed parallel proceedings in Virgin Islands Superior Court, to be conducted in New York; presence of a forum selection clause did not preclude abstention in a declaratory judgment action, clauses were not required to be enforced in face of extraordinary circumstances such as abstention, and abstention was only possible in action because parallel proceedings found clause to be unenforceable.

2. Contracts ⇐127(4)

A forum selection clause is presumptively enforceable in federal court if it was communicated to the resisting party, has mandatory force, and covers the claims and parties involved in the dispute.

3. Contracts ⇐141(1)

Presumption that a forum selection clause is enforceable in federal court can only be overcome by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

4. Contracts ⇐127(4)

Contravention of a strong public policy can render a forum selection clause unreasonable or unjust and therefore invalid.

12/17/2024

Filing Date See Attached Letter from Clerk
Pg (2) Jurisdiction

12/17/2024

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 10, 2024

Christopher Howard
#79627-054
Berlin Federal Correctional Institute
PO Box 9000
Berlin, NH 03570

RE: Howard v. United States
USAP2 No. 22-3079

Dear Mr. Howard:

Returned is your submission in light of Clerk's correspondence dated from October 4, 2024.

Sincerely,
Scott S. Harris, Clerk
By:

Angela Jimenez
(202) 479-3392

Enclosures

10/16/2024

12/17/2024

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 4, 2024

Christopher Howard
#79627-054
Berlin Federal Correctional Institute
PO Box 9000
Berlin, NH 03570

COPY

RE: Howard v. United States
USAP2 No. 22-3079

Dear Mr. Howard:

The above-entitled petition for writ of certiorari was postmarked September 26, 2024 and received October 4, 2024. The papers are returned for the following reason(s):

The petition exceeds the limit of 40 pages allowed. Rule 33.2(b).

The petition fails to comply with Rule 14 in that the questions presented for review should be expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. Rule 14.1(a).

When re-filing the petition in its corrected form, please organize the petition so that each copy contains the required sections in chronological order.

You are informed, an inmate confined in an institution, if proceeding in forma pauperis and not represented by counsel, need file only an original petition and motion. Rule 12.2.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

10/16/2024

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Angela Jimenez
(202) 479-3391

Enclosures