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Nos. 15-1613, 15-1672, 15-1674, 15-1677, 15-1692

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

LEON GILLS, ALEXANDRA NORWOOD,
JOHNATHAN OLDHAM, JONATHAN WALKER,
and JATIMOTHY WALKER,

Defendants-Appellants.

FILED

Aug 04, 2017

DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

Before: DAUGHTREY, KETHLEDGE, and STRANCH, Circuit Judges.

KETHLEDGE, Circuit Judge. Murda Ville was a street gang that operated out of the Howard Estates, a housing project in Flint, Michigan. The defendants—all members of the gang—were convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Violent Crimes in Aid of Racketeering Act (VICAR). Of the defendants' many challenges to their convictions and sentences, none has merit. We affirm.

I.

Founded in 2002, Murda Ville has cycled through many names over the years: Hot Boys, Howard Boys, Howard Estate Hustlers, 858 Gang. But several things have remained constant. Gang members deal drugs; they do so in and around the Howard Estates; they prevent anyone else from dealing there; and they take extraordinary efforts to protect their individual and collective reputations for violence.

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In 2012, the Government indicted 12 members of the gang, charging them with (among other things) a RICO conspiracy in violation of 18 U.S.C. § 1962(d) and VICAR offenses in violation of 18 U.S.C. § 1959. Six defendants pled guilty. Five defendants were convicted at trial. They now appeal.

II.

A.

The defendants first argue that their RICO and VICAR convictions are based on insufficient evidence. Evidence is sufficient to support a conviction if, “viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

1.

A defendant violates RICO if he “conduct[s] or participate[s], directly or indirectly, in the conduct of [an] enterprise’s affairs through a pattern of racketeering activity[.]” or conspires to do so. 18 U.S.C. § 1962(c) and (d). Here, the Government charged the defendants with a RICO conspiracy. The Government therefore needed to prove four elements: agreement, to conduct or participate, in an enterprise, through a pattern of racketeering activity. *See Salinas v. United States*, 522 U.S. 52, 62-63 (1997).

a.

Norwood, Oldham, and Jonathan Walker contend that there is insufficient proof that Murda Ville was an enterprise. RICO defines “enterprise” to include “any union or group of individuals associated in fact[.]” 18 U.S.C. § 1961(4). A group qualifies as an association-in-fact if it has “three structural features”: a common purpose, that members pursue through

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coordinated effort, over a period of time long enough to allow them to commit multiple acts of racketeering. *Boyle v. United States*, 556 U.S. 938, 946 (2009); *see also United States v. McGill*, 815 F.3d 846, 930-31 (D.C. Cir. 2016). Under that test, other circuits have held that street gangs can be enterprises. *See, e.g., McGill*, 815 F.3d at 930-31; *United States v. Ramirez-Rivera*, 800 F.3d 1, 19 (1st Cir. 2015); *United States v. Kamahale*, 748 F.3d 984, 1003-05 (8th Cir. 2014). We agree.

Here, several prosecution witnesses testified to Murda Ville's purposes, coordinated efforts, and longevity. According to former members, the gang's primary purpose was to facilitate individual members' drug dealing. Related secondary purposes included maintaining exclusive control over the Howard Estates (so that only members could deal there), and preserving the gang's violent reputation (so that members would not be cheated by customers or attacked by rivals). The gang pursued those goals through coordinated efforts. Members pooled their money to buy drugs and took turns servicing customers. They armed themselves with jointly-owned weapons and patrolled the Howard Estates, banding together to assault or kill rivals found on their territory. And they "watch[ed] each other['s] back[s]" and "r[o]de for each other," meaning that when an individual member was disrespected or threatened, other members helped him retaliate, so as to preserve his (and the gang's) reputation for violence. Finally, former members testified that the gang existed for more than a decade—ample time in which to commit multiple acts of racketeering. *See Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 794-95 (6th Cir. 2012).

Norwood and Oldham have several responses, none of which are convincing. They first point out that "Howard Boys" could refer to all men who lived in the Howard Estates, rather than to a specific street gang. But several witnesses testified that the Howard Boys were a gang. The

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defendants next assert that, even if they called themselves a gang, they functioned as free agents, with each dealer keeping his own profits. But as noted above, Murda Ville's members jointly purchased drugs, defended their territory, and protected the gang's violent reputation. That coordination makes them an enterprise—regardless of whether they shared profits. *See Kamahale*, 748 F.3d at 1004; *cf. United States v. Hackett*, 762 F.3d 493, 497, 500 (6th Cir. 2014) (describing a gang whose members did not share profits as a “racketeering enterprise”). The defendants also assert that Murda Ville did not have the “hallmarks” of an organization: “hierarchy, meetings, by-laws[,] or dues collections.” Norwood's Br. at 27. But *Boyle* expressly held that none of those things are necessary to be a RICO enterprise. 556 U.S. at 948. Finally, the defendants say that the only evidence that Murda Ville was an “enterprise” is that its members committed “racketeering activity,” which blurs the distinction between two elements of a RICO offense. But again, former gang members testified not only about the defendants' crimes, but also about the gang's common purposes, which would allow jurors to infer that the defendants acted to further those purposes. *See Ouwinga*, 694 F.3d at 794-95. Hence there was sufficient evidence that Murda Ville was an enterprise.

Norwood also contends that his involvement with the gang ended in 2006, at which point, he says, the gang was not yet an enterprise. But gang members were dealing drugs together in 2006. They were also sharing weapons, jointly defending the Howard Estates from rival gangs, and collectively retaliating against anyone who disrespected them. Indeed, Norwood personally did all those things before he was incarcerated in 2006. Thus, there was sufficient evidence that Murda Ville was an enterprise when Norwood was part of the gang.

Relatedly, Jatimothy Walker argues that the trial evidence improperly varied from the indictment because the Government proved multiple conspiracies, not one overarching

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enterprise. But a Government witness identified each of the defendants as members of the same gang. That is sufficient evidence that they were part of a single enterprise—even if they belonged to different factions or subsets of the gang. *See, e.g., United States v. Fernandez*, 388 F.3d 1199, 1222-23 (9th Cir. 2004) (collecting cases). Thus, a jury could find that Murda Ville was a single enterprise here.

b.

Oldham also contends that there is insufficient proof that his racketeering acts were “related to the illegal purposes of the enterprise.” Oldham’s Br. at 68. If a defendant joins an enterprise but commits (or agrees to commit) racketeering acts that are not related to the purposes of the enterprise, then he has not violated RICO. *United States v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000); *see also United States v. Godwin*, 765 F.3d 1306, 1320 (11th Cir. 2014). As noted above, Murda Ville’s purposes were to facilitate drug dealing, control the Howard Estates, and maintain the gang’s violent reputation. And the Government presented evidence that Oldham dealt drugs, attempted to murder a member of a rival gang, and murdered a man whose brother had threatened Gills. A rational jury could find that all of those acts were related to the gang’s purposes.

c.

Jatimothy Walker contends that there is insufficient proof that he agreed to a pattern of racketeering activity. A “pattern” requires “at least two [predicate] acts[.]” 18 U.S.C. § 1961(5). And “racketeering activity” includes a host of state-law crimes, such as “murder” and “dealing in a controlled substance[.]” *Id.* at § 1961(1). A defendant can agree to a pattern of racketeering activity without committing any predicate acts himself. *See, e.g., Salinas*, 522 U.S. at 66. But when he does commit predicate acts, that is sufficient proof that he agreed to commit them.

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United States v. Lawson, 535 F.3d 434, 445 (6th Cir. 2008). Here, witnesses testified that Walker murdered a man named Marion Hardy and dealt drugs on a daily basis. Hence a rational jury could find that Walker in fact committed—and thus agreed to commit—at least two racketeering acts.

2.

The defendants also argue that their VICAR convictions are based on insufficient evidence. A defendant violates VICAR if he commits or attempts murder “for the purpose of . . . maintaining or increasing [his] position in an enterprise engaged in racketeering activity[.]” 18 U.S.C. § 1959(a)(1) and (5). To establish VICAR’s purpose element, the Government need not prove that the defendant “acted solely or primarily for a gang-related purpose.” *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (internal citation and quotation marks omitted). Instead, the purpose “element is met if . . . an animating purpose of the defendant’s action was to maintain or increase his position” in the gang. *Id.* (internal citation and quotation marks omitted).

a.

One of Gills’s VICAR convictions is for aiding and abetting the attempted murder of a man named Charles Orr. Orr was a one-time member of Murda Ville who left the gang—and fled Flint—after killing fellow member Matthew Oldham, Johnathan Oldham’s brother. Years later, Orr returned to Flint to visit his sister. While Orr was walking outside her apartment, Gills drove by in a brown minivan, and two passengers sprayed Orr with bullets, hitting him six times.

Gills first contends that there is insufficient evidence that he aided and abetted the shooters. A defendant is guilty of aiding and abetting when he “takes an affirmative act in furtherance” of an offense “with the intent of facilitating the offense’s commission.” *Rosemond*

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v. United States, 134 S. Ct. 1240, 1245 (2014). Here, Gills drove the shooters to, during, and from the drive-by. That is an affirmative act. And a jury could easily find that Gills intended to help kill Orr. Orr had murdered a member of Murda Ville. Under the gang's code, that meant the gang needed to retaliate against him. And when Orr returned to Flint, Gills showed up at his sister's apartment, with two other gang members, both of whom were armed. Perhaps, as Gills asserts, that was a mere coincidence. But a jury could conclude otherwise—that Gills knew Orr was at his sister's, and drove there intending to avenge Oldham. Thus, there was sufficient evidence that Gills aided and abetted the attempted murder.

Gills also contends that the Government failed to prove VICAR's purpose element. As noted above, Murda Ville expected its members to retaliate violently when someone disrespected or threatened a fellow member. Indeed, the gang's motto—"one bust and we all bang"—reflected that expectation. And if members failed to live up to the motto, they were viewed as "soft" or "weak." A failure to attack Orr in particular would have been especially unacceptable, given that he had betrayed Murda Ville by killing a fellow member and then evaded the gang for years after. A rational jury could therefore find that Gills attempted to kill Orr, at least in part, because he wanted to preserve his standing in the gang.

Gills's other VICAR conviction is for the attempted murders of four people who were friends of Jonathan Wilson. Gills's girlfriend was a woman named Crystal, who had previously dated Wilson. One day, Wilson came to Crystal's apartment and found her and Gills in bed together. Wilson threatened Gills with a gun, and the two argued before Gills stormed off. Later that day, Gills and another gang member went hunting for Wilson. They drove to a nearby store, where they spotted a van that Wilson frequently borrowed from a friend. Soon, four people—

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none of them Wilson—walked out of the store and got into the van. Gills made eye contact with them, and then began shooting, hitting two of them.

Gills again contends that there is insufficient proof that he had a gang-related purpose. He shot at the van, he says, because he was angry with Wilson and took it out on his friends. But a jury could conclude that was not Gills's only motive. Murda Ville's reputation for violence depended on each of its members maintaining their individual reputations. The gang therefore expected that members would respond violently, even to minor slights. After Gills left Crystal's apartment, he called a fellow gang member and told him that he had been "disrespected." Once Gills did that, he needed to respond with force, or else risk being seen as "soft." Moreover, the manner in which Gills responded could convince a jury that he sought to preserve his standing in the gang. He brought a fellow member along with him to witness his act of violence. *See Kamahale*, 748 F.3d at 1008. He stared down Wilson's friends, and then shot at them in "broad daylight," so that they—and everyone else in the neighborhood—would know exactly who did it. *See id.* And he later bragged about the shooting to other Murda Ville members. *See United States v. Farmer*, 583 F.3d 131, 142 (2d Cir. 2009). A reasonable jury could conclude that Gills had a gang-related purpose.

b.

Norwood's VICAR conviction is for the murder of Jonathan Parker. Parker had a long-standing feud with a man named Eddie Williams—an older drug dealer who was not a member of Murda Ville, but served as a mentor to many younger members of the gang. One day, Williams heard that Parker was hanging out near the Howard Estates. He called a Murda Ville member and offered to pay him to kill Williams. Norwood was there when the other member got

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the call and volunteered to take the job himself. He then tracked down Parker, shot him nine times, and fled as Parker bled out in the street.

Norwood contends that he killed Parker for money, not to maintain or increase his standing in the gang. For at least four reasons, however, a rational jury could find that he had both purposes. First, as a former Murda Ville member testified, the most respected members of the gang were those who were the most violent. Thus, a cold-blooded, murder-for-hire was likely to raise Norwood's status. Second, this murder was requested by a long-time friend of the gang. Other members were therefore especially likely to laud Norwood for this crime. Third, like Gills, Norwood committed his crime in public, in broad daylight, while fellow gang members looked on. That suggests that he was trying to impress his gangmates. *See Kamahele*, 748 F.3d at 1008. And like Gills, Norwood talked openly about the murder afterward, which would be odd if his motives were only financial. Finally, Williams offered to pay Norwood just \$2,000. A jury could conclude that, standing alone, that would not have been enough to convince Norwood to commit a capital crime. *See United States v. Whitten*, 610 F.3d 168, 180 (2d Cir. 2010). Thus, there is sufficient evidence that Norwood had a gang-related purpose.

Relatedly, Norwood argues that VICAR is unconstitutionally vague as applied to him. Just like the plain text of a statute, a court's interpretation of a statute can provide fair notice of what the statute prohibits. *See Skilling v. United States*, 561 U.S. 358, 404 (2010). *Boyle* provides fair notice that a street gang can be an "enterprise." 556 U.S. at 948. And *Hackett* provides fair notice that "position in an enterprise" refers not only to a formal role with a title, but also to a defendant's reputation among his gangmates. 762 F.3d at 497, 500-01. Thus, Norwood's constitutional challenge to VICAR fails.

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c.

One of Oldham's VICAR convictions is for the murder of Malachi Wilson, Jonathan Wilson's brother. After Gills shot at Wilson's friends, Wilson fled Flint. Gills called him and threatened that, if he did not return to face Gills, Gills would kill Malachi. Months later, Oldham spotted Malachi on Murda Ville's turf. At Gills's request, Oldham ran up to the SUV Malachi was sitting in, opened the door, and started shooting. Malachi ran, but Oldham chased him down and shot him in the head three times, execution-style.

Oldham contends that he killed Malachi because Gills asked him to, not because the gang's code demanded it. Perhaps Oldham was an exceedingly loyal friend to Gills. But no matter how loyal, people generally do not commit murder at a friend's say-so. *See United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996). A jury could therefore find that Oldham had another motive—the fear of losing standing in Murda Ville if he let Malachi go free.

Oldham's second VICAR conviction is for the attempted murder of Efreem Anderson. In February of 2010, a member of a biker gang called the Drifters shot Gills in the foot. Oldham and Jonathan Walker told fellow gang members that they planned to retaliate, and the next night, they drove to a nearby biker club. In the parking lot, they ran into Anderson, who was walking from the club to his car. Anderson pulled a gun on them, ordered them to leave, and then drove off himself. Oldham and Walker thought—mistakenly—that Anderson was a Drifter. They hoped he would return, so they waited for him in the parking lot and, when he came back minutes later, Oldham shot him three times, once in the head.

Oldham contends that there is insufficient proof that he had a gang-related motive. But Oldham went to the club to retaliate against a rival gang that had shot Gills. And once there, he was personally threatened by Anderson. Thus, if Oldham had failed to retaliate, he would have

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broken the gang's code twice over. Moreover, after the shooting, the Drifters and Murda Ville negotiated a ceasefire. Oldham bragged about scaring the rival into the truce, which is circumstantial evidence that he had a gang-related purpose all along. *Cf. Whitten*, 610 F.3d at 180 (after-the-fact boasting about a murder is circumstantial evidence that the defendant committed the crime to increase his standing in the gang). Thus, there is sufficient evidence to support Oldham's VICAR convictions.

d.

Jatimothy Walker's VICAR conviction is for the murder of Marion Hardy. Hardy ran into Walker on the street, and the two men argued. Walker then stormed off, returning minutes later with his brother, Jonathan. The Walkers confronted Hardy, who raised his fists to fight. But the brothers pulled out their guns, and, while taunting Hardy, shot him repeatedly. As Hardy bled out, Jonathan delivered a final shot to his head at point-blank range.

Jatimothy Walker contends that he killed Hardy simply because he was angry. But Hardy's only sins were bumping Walker and exchanging a few cross words with him afterward. Those acts, a jury could find, would not have made Walker angry enough to kill. *See Hackett*, 762 F.3d at 500. The more plausible explanation is that Walker killed Hardy to send a message—that Walker (and by extension Murda Ville) would not tolerate any slight, no matter how trivial. In sum, Walker's disproportionate response to Hardy's disrespect would allow a jury to conclude that Walker had a VICAR purpose.

e.

Jonathan Walker's first VICAR conviction is for the murder of Hardy. Again, Walker shot Hardy in the head, at point-blank range, while Hardy was already bleeding out. That gratuitous violence, a jury could find, was a transparent attempt to emphasize how "hard"

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Walker was so as to raise his standing in the gang. The evidence was sufficient that Walker had a gang-related purpose.

Walker's second VICAR conviction is for the attempted murder of Alonzo Golfin—a member of T Hood, Murda Ville's biggest rival. One day, Walker saw Golfin in Murda Ville territory. Walker quickly retrieved a gun, returned to where he had seen Golfin, and began shooting, hitting Golfin ten times. Like most gangs, Murda Ville expected its members to defend the gang's turf aggressively, especially against rival gangs. *See, e.g., United States v. Rubi-Gonzalez*, 311 F. App'x 483, 486 (2d Cir. 2009). If Walker had ignored Golfin and other gang members found out, he likely would have lost standing. That is evidence enough to conclude that Walker had a VICAR purpose.

B.

Three defendants argue that the district court erred by retaining or dismissing jurors. We review those decisions for an abuse of discretion. *United States v. Pennell*, 737 F.2d 521, 533 (6th Cir. 1984) (retaining jurors); *United States v. Cantu*, 229 F.3d 544, 550 (6th Cir. 2000) (dismissing jurors).

1.

Two weeks into trial, jurors told the district court about several instances of potential jury tampering. Four jurors reported that, while they were driving home from the courthouse one evening, they spotted cars that they thought were following them. Two of the jurors identified the drivers as people they had seen sitting in the courtroom gallery. Several other jurors told the court that, through the window of the jury room, they had seen people loitering in the jurors' parking lot. To the jurors, the people appeared to be recording jurors' license plate numbers.

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When jurors make reports like those, the district court must “hold a hearing to determine whether the incident[s] complained of” prejudiced the defendants. *Remmer v. United States*, 347 U.S. 227, 230 (1954). The court cannot assume prejudice just because jurors have been “placed in a potentially compromising situation.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Nor may the court dismiss as “inherently suspect” jurors’ assurances that they can remain impartial. *Id.* at 217 n.7. Instead, the defendant must prove “actual bias”—which means that, if jurors say they can be fair and the court finds them credible, the defendant must rebut the jurors’ assurances with circumstantial evidence of partiality. *Pennell*, 737 F.2d at 532-34.

Here, the district court held a *Remmer* hearing and questioned each sitting and alternate juror about the potential tampering. Fourteen of them said that they could remain impartial. The other two equivocated about whether they could be fair. The court dismissed those two—both sitting jurors—and replaced them with alternates.

According to the defendants, there were three problems with how the district court handled the potential jury tampering. First, the court dismissed the two jurors after closing arguments, rather than immediately after the *Remmer* hearing. The defendants say that might have prejudiced them because the two jurors might have shared their concerns with the other fourteen, thereby tainting the entire jury. After the *Remmer* hearing, the defendants did not object to the two jurors continuing to serve, so we review only for plain error. *United States v. Maxwell*, 160 F.3d 1071, 1076 (6th Cir. 1998). An error is plain only if it is “clear under current law.” *United States v. Olano*, 507 U.S. 725, 734 (1993). And the defendants have not pointed to any case that requires a district court to dismiss potentially biased jurors immediately after a *Remmer* hearing. That is reason enough to reject the defendants’ contention. Moreover, the district court instructed the two jurors not to discuss the potential tampering with the other

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fourteen. There is no evidence that the jurors ignored that instruction. The defendants have therefore failed to prove actual bias. *Maxwell*, 160 F.3d at 1077.

Next, the defendants contend that the district court should not have accepted the other fourteen jurors' assurances of impartiality. But we give great weight to such assurances. When examining jurors, the district court has an opportunity to assess their demeanor. And if after doing so the court finds the jurors to be credible, we will be hard pressed to find otherwise based on a cold record. *See Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001).

The defendants therefore needed to rebut the jurors' assurances with compelling evidence of partiality. To that end, the defendants point to three factors that they say prove bias. First, several jurors said expressly that they thought the people responsible for the tampering were friends or associates of the defendants. Second, the defendants were accused of violent gang crimes, so threats coming from their associates would likely seem quite credible. Third, jurors told the court that they were worried about the threats, and they acted differently because of them; indeed, one juror said that he had been varying his routes home from court so as to throw off anyone potentially following him.

We rejected a challenge on similar facts in *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988). There, the defendant was charged with a drug conspiracy. *Id.* at 93. Mid-trial, someone "who appeared to be associated with [the defendant]" threatened a group of jurors in the courthouse hallway. *Id.* The district court questioned the jurors about the incident, and several said that they were frightened, with one admitting that "she had been having nightmares since the trial began[.]" *Id.* Thus, like this case, *Zelinka* featured a defendant who committed a gang-related crime, an associate who had made a threat on the defendant's behalf, and jurors who admitted to being frightened by the threat. Yet we held that the district court did not abuse its

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discretion by relying upon the jurors' assurances that they could be impartial. *Id.* at 96. We reach the same decision here.

Finally, the defendants argue that the district court should have questioned two jurors more thoroughly, despite their assurances of impartiality. A day before the *Remmer* hearing, a juror complained that the others were "talking too much" and "airing out their problems" in the jury room. The "problems" they were discussing, however, were personal issues—not the alleged jury tampering. Thus, the district court did not need to ask the juror additional questions about the alleged tampering. Several days after the *Remmer* hearing, another juror said that she had been followed home, which she found "a little stressful." But again, where a juror says that she is frightened but can remain impartial, a district court can allow her to remain on the jury, and need not question her further. *Zelinka*, 862 F.2d at 93, 96. In sum, the district court did not abuse its discretion in handling the alleged jury tampering.

2.

The defendants also argue that the district court should not have dismissed a juror for lying during voir dire. The jury questionnaire asked potential jurors whether any of their friends or family members had been "accused of, investigated for, arrested for, or charged with a crime." The juror at issue checked "no," and then, during voir dire, attested that her form was accurate. But mid-trial, the court discovered—and the juror confirmed—that her parents had been imprisoned for murder and her brother imprisoned for drug offenses. The juror claimed that she had simply missed the question on her form. But another question asked whether she knew anyone "involved with gangs [or] drug sales." She answered by providing several friends' names, but not her brother's.

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A district court can dismiss a juror for “reasonable cause.” *Cantu*, 229 F.3d at 550. Reasonable cause exists where a juror’s answers during voir dire are inaccurate—even if her mistakes are honest ones. *See United States v. Daniels*, 528 F.2d 705, 709-710 (6th Cir. 1976). Here, the inaccuracies appeared intentional, so the district court had even more reason to dismiss the juror.

The defendants offer two responses. First, Jatimothy Walker asserts that, when the district court examined the juror, she swore that she could be impartial. The court took other jurors at their word, Walker says, so the court should have done the same with this juror. But this juror had not been truthful on her questionnaire, so the court had good reason to doubt her claim to impartiality. Second, Oldham asserts that the court should have removed the juror immediately after learning that she had lied, rather than waiting until after closing arguments. But again, Oldham cannot prove that the court’s decision resulted in any “actual bias.” *Pennell*, 737 F.2d at 532. Thus, the district court did not abuse its discretion.

C.

Three defendants argue that the district court should have tried them separately from their co-defendants. We review the denial of a motion to sever for an abuse of discretion. *United States v. Fields*, 763 F.3d 443, 457 (6th Cir. 2014). If evidence is admissible against one defendant but not another, a district court may try them separately. *United States v. Soto*, 794 F.3d 635, 656 (6th Cir. 2015). But the court is not required to do so unless the evidence will cause “compelling, specific, and actual prejudice.” *Unites States v. Medlock*, 792 F.3d 700, 711 (6th Cir. 2015). A district court can typically cure prejudice with a limiting instruction that the evidence can be used against only one of the defendants. *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

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1.

Oldham argues that, because he was tried with Gills and Norwood, the jury heard evidence that it would not have heard if he had been tried separately. Specifically, the Government introduced a recorded phone call between Gills and another Murda Ville member, in which they discussed moving younger members “to the frontline” of the gang. The Government also introduced a call between Norwood and Charles Orr, in which they discussed their mutual disdain for “snitches.” Finally, a detective testified that he interviewed Norwood, who admitted that Murda Ville was a gang, that it protected its territory through violence, and that he was a member.

Gills’s statements were admissible against Oldham. Statements made by a defendant’s coconspirator “during and in furtherance of the conspiracy” are admissible against the defendant. Fed. R. Evid. 801(d)(2)(E). Gills’s statements were about the gang’s ongoing dealings. And they furthered the gang’s purposes, helping to ensure that the gang would have the manpower to protect its turf. Thus, Gills’s statements cannot have prejudiced Oldham.

Norwood’s statements were not admissible against Oldham under 801(d)(2)(E). *See United States v. Smith*, 746 F.2d 1183, 1185 (6th Cir. 1984) (confessions do not further a conspiracy). But the district court recognized as much, and instructed the jurors that they should consider the statements only when evaluating Norwood’s guilt. Moreover, even without Norwood’s statements, the jury still could have convicted Oldham. Oldham concedes that the only element the statements helped prove was the existence of a RICO enterprise. Oldham’s Br. at 53-54. And as discussed above, former gang members testified about Murda Ville’s purposes, cooperative efforts, and longevity. Thus, Oldham was not prejudiced by being tried with Gills and Norwood.

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2.

Jonathan Walker argues that, because he was tried with Gills, the jury heard inflammatory raps that Gills wrote while he was in prison. But like Oldham, Walker concedes that the only element those raps helped prove was the existence of the enterprise. Jonathan Walker's Br. at 38. The former gang members' testimony is sufficient proof of that element, so Walker was not prejudiced by Gills's raps.

3.

Finally, Jatimothy Walker argues that, because he was tried with his brother, the jury heard Jonathan's confession to the Hardy murder, which implicated Jatimothy. In a trial with multiple defendants, the Confrontation Clause prohibits the Government from introducing a defendant's confession in all but two circumstances: where the confessing defendant testifies, or where the confession does not implicate any co-defendant. *Cruz v. New York*, 481 U.S. 186, 190 (1987). A confession does not implicate a co-defendant where the confession takes on significance "only when linked with evidence introduced later at trial." *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). Here, Jonathan Walker told the police that he had been involved in Hardy's murder. But he said nothing about his brother. Instead, his confession incriminated Jatimothy only when linked with another witness's testimony that the brothers had been together that night. Thus, per *Richardson*, the district court could admit the confession, so long as the court instructed the jury not to consider the confession against Jatimothy. *Id.* at 211. The court did so, and thus severance was not necessary.

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D.

Three defendants argue that the district court improperly admitted evidence against them. We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Ray*, 803 F.3d 244, 258 (6th Cir. 2015).

1.

Norwood argues that the district court should not have admitted evidence that he murdered a man named Omar Bashir. Federal Rule of Evidence 404(b) prohibits the Government from using evidence of uncharged crimes “to prove a person’s character in order to show that on a particular occasion the person acted in accordance with that character.” The Government can use uncharged crimes “for any other purpose.” *United States v. Tasis*, 696 F.3d 623, 627 (6th Cir. 2012). Thus, uncharged crimes can be admitted when they are directly probative of “an essential element of the crime.” *United States v. Johnson*, 803 F.3d 279, 283 (6th Cir. 2015).

Here, the Government introduced evidence of the Bashir murder to prove that Norwood committed (and thus agreed to commit) two acts of racketeering—an “essential element” of a RICO conspiracy charge. *Id.* Norwood responds that the indictment does not list the Bashir murder as an overt act in furtherance of the conspiracy. But the Government can prove racketeering acts that it does not list in the indictment. *United States v. Rios*, 830 F.3d 403, 427 (6th Cir. 2016). Indeed, the Government need not list *any* racketeering acts in the indictment. *Id.* Thus, evidence of the Bashir murder was admissible against Norwood.

2.

Jatimothy Walker argues that, during jury instructions, the district court improperly disclosed that Walker was convicted of manslaughter in state court. But the district court did no

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such thing. True, the court told the jury that “some of the defendants [had been] previously convicted of some of the same conduct” they were charged with here. But the court was referring to several defendants’ state drug convictions, which had been admitted earlier. Walker’s manslaughter conviction was never admitted, and the court did not mention it while instructing the jury. Walker’s claim is meritless.

3.

Finally, Jonathan Walker argues that the district court erred by admitting statements that he made during a proffer session with the Government. Before the proffer, Walker and the Government agreed that “no statement made by” Walker “during the proffer discussion [would] be offered against” him at trial. But the agreement required Walker to “make a complete and truthful statement [about] the matters under investigation.” And if the Government doubted Walker’s candor, then the agreement also required him to take a polygraph examination “to verify . . . [his] statement.” Six months before trial, prosecutors told Walker’s lawyer that they thought Walker had lied during his proffer session. They asked Walker to sit for a polygraph, but he refused.

The Government may introduce a defendant’s proffer statements against him if he materially breaches the proffer agreement. *United States v. Fitch*, 964 F.2d 571, 574-75 (6th Cir. 1992). A breach is material if it deprives the Government of “the benefit of its bargain.” *Id.* at 575. Here, Walker agreed to provide statements that could be verified by polygraph examination. His refusal to take the examination therefore deprived the Government of the benefit it had contracted for. Given that Walker’s breach was material, the district court did not abuse its discretion by admitting his statements.

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Moreover, any error would have been harmless. A witness saw Walker shoot Hardy. And another witness testified that Walker admitted to shooting Anderson and Golfin. That was more than enough evidence to convict Walker.

E.

The defendants' remaining challenges are insubstantial.

1.

Jonathan Walker argues that prosecuting him for the murder of Marion Hardy violated the Double Jeopardy Clause because he had already been convicted of that crime in Michigan state court. Double Jeopardy “does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense.” *United States v. Mardis*, 600 F.3d 693, 696 (6th Cir. 2010) (internal citation and quotation marks omitted). The only potential exception to that rule is for “sham prosecutions”—suits brought by one sovereign just “because the [other] told it to do so.” *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008). Walker says the exception applies here because federal and state law enforcement investigated the murder together. But that “everyday” level of cooperation does not establish that the federal government was “merely a tool” of the State of Michigan. *Id.* Walker’s claim fails.

2.

Jatimothy Walker argues that the district court should have held a hearing to investigate whether his trial counsel was constitutionally ineffective. Generally, a defendant is entitled to a hearing on whether his lawyer gave him effective assistance. *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007). But the proper time for that hearing is after appeal, when a defendant collaterally attacks his conviction under 28 U.S.C. § 2255. *See United States v.*

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Ferguson, 669 F.3d 756, 762 (6th Cir. 2012). Thus, the district court did not err by refusing to investigate Walker's claim.

3.

Norwood argues that his sentence violates the Sixth Amendment because the jury did not find facts “that increase[d] the penalty for [his] crime beyond the prescribed statutory maximum[.]” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). For a RICO offense, the maximum sentence is generally 20 years. 18 U.S.C. § 1963(a). But if a RICO “violation is based on a racketeering activity for which the maximum penalty includes life imprisonment”—e.g., murder—then the maximum sentence is life. *Id.* Thus, for a defendant to receive a life sentence, a jury must find beyond a reasonable doubt that his RICO violation is “based on” a murder. *United States v. Nagi*, 541 F. App'x 556, 576 (6th Cir. 2013). Here, the jury did just that. The special verdict form asked the jury whether, “[w]ith respect to Count One”—the RICO conspiracy count—they found that Norwood had murdered Parker. The jury checked yes. That satisfies *Apprendi*.

4.

Gills argues that the district court should have instructed the jury on accessory liability. We review the court's refusal to give a requested instruction for an abuse of discretion. *United States v. LaVictor*, 848 F.3d 428, 453-54 (6th Cir. 2017). As noted above, Gills's defense to the Orr murder was that he did not know his passengers were planning to shoot until they started doing so. If true, Gills would be an accessory after the fact, not an aider and abettor. *Compare* 18 U.S.C. § 2 and § 3. And the jurors seemed to struggle with the distinction between the two offenses, asking the court to clarify whether a person could aid and abet without advance knowledge that a crime was going to be committed. When the jurors made that inquiry, Gills

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says, the court should have instructed them on accessory-after-the-fact liability. But the court responded adequately to the jury's question, rightly stating that, to aid and abet, a person must form an intent to facilitate the crime "before completion of the crime." Thus, the court did not abuse its discretion by refusing to give Gills's requested instruction.

5.

Gills also argues that, when the district court sentenced him, it miscalculated his criminal-history score by factoring in a state drug conviction that was "invalid." Gills's Br. at 36. Specifically, Gills contends that the conviction was unconstitutional because the drugs were seized in violation of the Fourth Amendment. But at sentencing, a district court may discount a state conviction in only three circumstances: where a federal statute authorizes the district court to do so, where a state court has declared the conviction invalid, or where the defendant was denied his right to counsel in the case resulting in the conviction. *United States v. Aguilar-Diaz*, 626 F.3d 265, 270 (6th Cir. 2010). None of those exceptions apply here.

6.

Finally, Gills argues that the district court failed to explain his sentence, and failed to consider the disparity between his sentence and those of his gangmates. But the court's explanation was sufficient, and the disparity was warranted given that Gills had attempted to kill at least five people. Gills's final challenges fail.

* * *

The district court's judgment is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 04, 2017

Mr. Andrew Goetz
Mr. Harold Z. Gurewitz
Mr. Steven Richard Jaeger
Mr. Randall C. Roberts
Mr. Kevin Michael Schad
Mr. Anthony P Vance

Re: Case No. 15-1613/15-1672/15-1674/15-1677/15-1692, *USA v. Leon*
Gills
Originating Case No. : 4:12-cr-20287-8

Dear Counsel,

The Court issued the enclosed Opinion today in this case.

Sincerely yours,

s/Robin Baker
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Glenn Michael Simmington
Mr. David J. Weaver

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 17a0612n.06

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Nov 06, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

LEON GILLS, ALEXANDRA NORWOOD,)
JOHNATHAN OLDHAM, JONATHAN WALKER,)
and JATIMOTHY WALKER,)

Defendants-Appellants.)

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

AMENDED OPINION

Before: DAUGHTREY, KETHLEDGE, and STRANCH, Circuit Judges.

KETHLEDGE, Circuit Judge. Murda Ville was a street gang that operated out of the Howard Estates, a housing project in Flint, Michigan. The defendants—all members of the gang—were convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Violent Crimes in Aid of Racketeering Act (VICAR). Of the defendants' many challenges to their convictions and sentences, none has merit. We affirm.

I.

Founded in 2002, Murda Ville has cycled through many names over the years: Hot Boys, Howard Boys, Howard Estate Hustlers, 858 Gang. But several things have remained constant. Gang members deal drugs; they do so in and around the Howard Estates; they prevent anyone else from dealing there; and they take extraordinary efforts to protect their individual and collective reputations for violence.

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In 2012, the Government indicted 12 members of the gang, charging them with (among other things) a RICO conspiracy in violation of 18 U.S.C. § 1962(d) and VICAR offenses in violation of 18 U.S.C. § 1959. Six defendants pled guilty. Five defendants were convicted at trial. They now appeal.

II.

A.

The defendants first argue that their RICO and VICAR convictions are based on insufficient evidence. Evidence is sufficient to support a conviction if, “viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

1.

A defendant violates RICO if he “conduct[s] or participate[s], directly or indirectly, in the conduct of [an] enterprise’s affairs through a pattern of racketeering activity[,]” or conspires to do so. 18 U.S.C. § 1962(c) and (d). Here, the Government charged the defendants with a RICO conspiracy. The Government therefore needed to prove four elements: agreement, to conduct or participate, in an enterprise, through a pattern of racketeering activity. *See Salinas v. United States*, 522 U.S. 52, 62-63 (1997).

a.

Norwood, Oldham, and Jonathan Walker contend that there is insufficient proof that Murda Ville was an enterprise. RICO defines “enterprise” to include “any union or group of individuals associated in fact[.]” 18 U.S.C. § 1961(4). A group qualifies as an association-in-fact if it has “three structural features”: a common purpose, that members pursue through

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coordinated effort, over a period of time long enough to allow them to commit multiple acts of racketeering. *Boyle v. United States*, 556 U.S. 938, 946 (2009); *see also United States v. McGill*, 815 F.3d 846, 930-31 (D.C. Cir. 2016). Under that test, other circuits have held that street gangs can be enterprises. *See, e.g., McGill*, 815 F.3d at 930-31; *United States v. Ramirez-Rivera*, 800 F.3d 1, 19 (1st Cir. 2015); *United States v. Kamahale*, 748 F.3d 984, 1003-05 (8th Cir. 2014). We agree.

Here, several prosecution witnesses testified to Murda Ville's purposes, coordinated efforts, and longevity. According to former members, the gang's primary purpose was to facilitate individual members' drug dealing. Related secondary purposes included maintaining exclusive control over the Howard Estates (so that only members could deal there), and preserving the gang's violent reputation (so that members would not be cheated by customers or attacked by rivals). The gang pursued those goals through coordinated efforts. Members pooled their money to buy drugs and took turns servicing customers. They armed themselves with jointly-owned weapons and patrolled the Howard Estates, banding together to assault or kill rivals found on their territory. And they "watch[ed] each other['s] back[s]" and "r[o]de for each other," meaning that when an individual member was disrespected or threatened, other members helped him retaliate, so as to preserve his (and the gang's) reputation for violence. Finally, former members testified that the gang existed for more than a decade—ample time in which to commit multiple acts of racketeering. *See Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 794-95 (6th Cir. 2012).

Norwood and Oldham have several responses, none of which are convincing. They first point out that "Howard Boys" could refer to all men who lived in the Howard Estates, rather than to a specific street gang. But several witnesses testified that the Howard Boys were a gang. The

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defendants next assert that, even if they called themselves a gang, they functioned as free agents, with each dealer keeping his own profits. But as noted above, Murda Ville's members jointly purchased drugs, defended their territory, and protected the gang's violent reputation. That coordination makes them an enterprise—regardless of whether they shared profits. *See Kamahale*, 748 F.3d at 1004; *cf. United States v. Hackett*, 762 F.3d 493, 497, 500 (6th Cir. 2014) (describing a gang whose members did not share profits as a “racketeering enterprise”). The defendants also assert that Murda Ville did not have the “hallmarks” of an organization: “hierarchy, meetings, by-laws[,] or dues collections.” Norwood's Br. at 27. But *Boyle* expressly held that none of those things are necessary to be a RICO enterprise. 556 U.S. at 948. Finally, the defendants say that the only evidence that Murda Ville was an “enterprise” is that its members committed “racketeering activity,” which blurs the distinction between two elements of a RICO offense. But again, former gang members testified not only about the defendants' crimes, but also about the gang's common purposes, which would allow jurors to infer that the defendants acted to further those purposes. *See Owunga*, 694 F.3d at 794-95. Hence there was sufficient evidence that Murda Ville was an enterprise.

Norwood also contends that his involvement with the gang ended in 2006, at which point, he says, the gang was not yet an enterprise. But gang members were dealing drugs together in 2006. They were also sharing weapons, jointly defending the Howard Estates from rival gangs, and collectively retaliating against anyone who disrespected them. Indeed, Norwood personally did all those things before he was incarcerated in 2006. Thus, there was sufficient evidence that Murda Ville was an enterprise when Norwood was part of the gang.

Relatedly, Jatimothy Walker argues that the trial evidence improperly varied from the indictment because the Government proved multiple conspiracies, not one overarching

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enterprise. But a Government witness identified each of the defendants as members of the same gang. That is sufficient evidence that they were part of a single enterprise—even if they belonged to different factions or subsets of the gang. *See, e.g., United States v. Fernandez*, 388 F.3d 1199, 1222-23 (9th Cir. 2004) (collecting cases). Thus, a jury could find that Murda Ville was a single enterprise here.

b.

Oldham also contends that there is insufficient proof that his racketeering acts were “related to the illegal purposes of the enterprise.” Oldham’s Br. at 68. If a defendant joins an enterprise but commits (or agrees to commit) racketeering acts that are not related to the purposes of the enterprise, then he has not violated RICO. *United States v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000); *see also United States v. Godwin*, 765 F.3d 1306, 1320 (11th Cir. 2014). As noted above, Murda Ville’s purposes were to facilitate drug dealing, control the Howard Estates, and maintain the gang’s violent reputation. And the Government presented evidence that Oldham dealt drugs, attempted to murder a member of a rival gang, and murdered a man whose brother had threatened Gills. A rational jury could find that all of those acts were related to the gang’s purposes.

c.

Jatimothy Walker contends that there is insufficient proof that he agreed to a pattern of racketeering activity. A “pattern” requires “at least two [predicate] acts[.]” 18 U.S.C. § 1961(5). And “racketeering activity” includes a host of state-law crimes, such as “murder” and “dealing in a controlled substance[.]” *Id.* at § 1961(1). A defendant can agree to a pattern of racketeering activity without committing any predicate acts himself. *See, e.g., Salinas*, 522 U.S. at 66. But when he does commit predicate acts, that is sufficient proof that he agreed to commit them.

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United States v. Lawson, 535 F.3d 434, 445 (6th Cir. 2008). Here, witnesses testified that Walker murdered a man named Marion Hardy and dealt drugs on a daily basis. Hence a rational jury could find that Walker in fact committed—and thus agreed to commit—at least two racketeering acts.

2.

The defendants also argue that their VICAR convictions are based on insufficient evidence. A defendant violates VICAR if he commits or attempts murder “for the purpose of . . . maintaining or increasing [his] position in an enterprise engaged in racketeering activity[.]” 18 U.S.C. § 1959(a)(1) and (5). To establish VICAR’s purpose element, the Government need not prove that the defendant “acted solely or primarily for a gang-related purpose.” *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (internal citation and quotation marks omitted). Instead, the purpose “element is met if . . . an animating purpose of the defendant’s action was to maintain or increase his position” in the gang. *Id.* (internal citation and quotation marks omitted).

a.

One of Gills’s VICAR convictions is for aiding and abetting the attempted murder of a man named Charles Orr. Orr was a one-time member of Murda Ville who left the gang—and fled Flint—after killing fellow member Matthew Oldham, Johnathan Oldham’s brother. Years later, Orr returned to Flint to visit his sister. While Orr was walking outside her apartment, Gills drove by in a brown minivan, and two passengers sprayed Orr with bullets, hitting him six times.

Gills first contends that there is insufficient evidence that he aided and abetted the shooters. A defendant is guilty of aiding and abetting when he “takes an affirmative act in furtherance” of an offense “with the intent of facilitating the offense’s commission.” *Rosemond*

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v. United States, 134 S. Ct. 1240, 1245 (2014). Here, Gills drove the shooters to, during, and from the drive-by. That is an affirmative act. And a jury could easily find that Gills intended to help kill Orr. Orr had murdered a member of Murda Ville. Under the gang's code, that meant the gang needed to retaliate against him. And when Orr returned to Flint, Gills showed up at his sister's apartment, with two other gang members, both of whom were armed. Perhaps, as Gills asserts, that was a mere coincidence. But a jury could conclude otherwise—that Gills knew Orr was at his sister's, and drove there intending to avenge Oldham. Thus, there was sufficient evidence that Gills aided and abetted the attempted murder.

Gills also contends that the Government failed to prove VICAR's purpose element. As noted above, Murda Ville expected its members to retaliate violently when someone disrespected or threatened a fellow member. Indeed, the gang's motto—"one bust and we all bang"—reflected that expectation. And if members failed to live up to the motto, they were viewed as "soft" or "weak." A failure to attack Orr in particular would have been especially unacceptable, given that he had betrayed Murda Ville by killing a fellow member and then evaded the gang for years after. A rational jury could therefore find that Gills attempted to kill Orr, at least in part, because he wanted to preserve his standing in the gang.

Gills's other VICAR conviction is for the attempted murders of four people who were friends of Jonathan Wilson. Gills's girlfriend was a woman named Crystal, who had previously dated Wilson. One day, Wilson came to Crystal's apartment and found her and Gills in bed together. Wilson threatened Gills with a gun, and the two argued before Gills stormed off. Later that day, Gills and another gang member went hunting for Wilson. They drove to a nearby store, where they spotted a van that Wilson frequently borrowed from a friend. Soon, four people—

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none of them Wilson—walked out of the store and got into the van. Gills made eye contact with them, and then began shooting, hitting two of them.

Gills again contends that there is insufficient proof that he had a gang-related purpose. He shot at the van, he says, because he was angry with Wilson and took it out on his friends. But a jury could conclude that was not Gills's only motive. Murda Ville's reputation for violence depended on each of its members maintaining their individual reputations. The gang therefore expected that members would respond violently, even to minor slights. After Gills left Crystal's apartment, he called a fellow gang member and told him that he had been "disrespected." Once Gills did that, he needed to respond with force, or else risk being seen as "soft." Moreover, the manner in which Gills responded could convince a jury that he sought to preserve his standing in the gang. He brought a fellow member along with him to witness his act of violence. *See Kamahale*, 748 F.3d at 1008. He stared down Wilson's friends, and then shot at them in "broad daylight," so that they—and everyone else in the neighborhood—would know exactly who did it. *See id.* And he later bragged about the shooting to other Murda Ville members. *See United States v. Farmer*, 583 F.3d 131, 142 (2d Cir. 2009). A reasonable jury could conclude that Gills had a gang-related purpose.

b.

Norwood's VICAR conviction is for the murder of Jonathan Parker. Parker had a long-standing feud with a man named Eddie Williams—an older drug dealer who was not a member of Murda Ville, but served as a mentor to many younger members of the gang. One day, Williams heard that Parker was hanging out near the Howard Estates. He called a Murda Ville member and offered to pay him to kill Williams. Norwood was there when the other member got

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the call and volunteered to take the job himself. He then tracked down Parker, shot him nine times, and fled as Parker bled out in the street.

Norwood contends that he killed Parker for money, not to maintain or increase his standing in the gang. For at least four reasons, however, a rational jury could find that he had both purposes. First, as a former Murda Ville member testified, the most respected members of the gang were those who were the most violent. Thus, a cold-blooded, murder-for-hire was likely to raise Norwood's status. Second, this murder was requested by a long-time friend of the gang. Other members were therefore especially likely to laud Norwood for this crime. Third, like Gills, Norwood committed his crime in public, in broad daylight, while fellow gang members looked on. That suggests that he was trying to impress his gangmates. *See Kamahele*, 748 F.3d at 1008. And like Gills, Norwood talked openly about the murder afterward, which would be odd if his motives were only financial. Finally, Williams offered to pay Norwood just \$2,000. A jury could conclude that, standing alone, that would not have been enough to convince Norwood to commit a capital crime. *See United States v. Whitten*, 610 F.3d 168, 180 (2d Cir. 2010). Thus, there is sufficient evidence that Norwood had a gang-related purpose.

Relatedly, Norwood argues that VICAR is unconstitutionally vague as applied to him. Just like the plain text of a statute, a court's interpretation of a statute can provide fair notice of what the statute prohibits. *See Skilling v. United States*, 561 U.S. 358, 404 (2010). *Boyle* provides fair notice that a street gang can be an "enterprise." 556 U.S. at 948. And *Hackett* provides fair notice that "position in an enterprise" refers not only to a formal role with a title, but also to a defendant's reputation among his gangmates. 762 F.3d at 497, 500-01. Thus, Norwood's constitutional challenge to VICAR fails.

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c.

One of Oldham's VICAR convictions is for the murder of Malachi Wilson, Jonathan Wilson's brother. After Gills shot at Wilson's friends, Wilson fled Flint. Gills called him and threatened that, if he did not return to face Gills, Gills would kill Malachi. Months later, Oldham spotted Malachi on Murda Ville's turf. At Gills's request, Oldham ran up to the SUV Malachi was sitting in, opened the door, and started shooting. Malachi ran, but Oldham chased him down and shot him in the head three times, execution-style.

Oldham contends that he killed Malachi because Gills asked him to, not because the gang's code demanded it. Perhaps Oldham was an exceedingly loyal friend to Gills. But no matter how loyal, people generally do not commit murder at a friend's say-so. *See United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996). A jury could therefore find that Oldham had another motive—the fear of losing standing in Murda Ville if he let Malachi go free.

Oldham's second VICAR conviction is for the attempted murder of Efreem Anderson. In February of 2010, a member of a biker gang called the Drifters shot Gills in the foot. Oldham and Jonathan Walker told fellow gang members that they planned to retaliate, and the next night, they drove to a nearby biker club. In the parking lot, they ran into Anderson, who was walking from the club to his car. Anderson pulled a gun on them, ordered them to leave, and then drove off himself. Oldham and Walker thought—mistakenly—that Anderson was a Drifter. They hoped he would return, so they waited for him in the parking lot and, when he came back minutes later, Oldham shot him three times, once in the head.

Oldham contends that there is insufficient proof that he had a gang-related motive. But Oldham went to the club to retaliate against a rival gang that had shot Gills. And once there, he was personally threatened by Anderson. Thus, if Oldham had failed to retaliate, he would have

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broken the gang's code twice over. Moreover, after the shooting, the Drifters and Murda Ville negotiated a ceasefire. Oldham bragged about scaring the rival into the truce, which is circumstantial evidence that he had a gang-related purpose all along. *Cf. Whitten*, 610 F.3d at 180 (after-the-fact boasting about a murder is circumstantial evidence that the defendant committed the crime to increase his standing in the gang). Thus, there is sufficient evidence to support Oldham's VICAR convictions.

d.

Jatimothy Walker's VICAR conviction is for the murder of Marion Hardy. Hardy ran into Walker on the street, and the two men argued. Walker then stormed off, returning minutes later with his brother, Jonathan. The Walkers confronted Hardy, who raised his fists to fight. Jatimothy responded with gunfire, shooting Hardy three times. Jonathan then stood over Hardy as he lay bleeding on the ground and shot him several times more.

Jatimothy Walker contends that he killed Hardy simply because he was angry. But Hardy's only sins were bumping Walker and exchanging a few cross words with him afterward. Those acts, a jury could find, would not have made Walker angry enough to kill. *See Hackett*, 762 F.3d at 500. The more plausible explanation is that Walker killed Hardy to send a message—that Walker (and by extension Murda Ville) would not tolerate any slight, no matter how trivial. In sum, Walker's disproportionate response to Hardy's disrespect would allow a jury to conclude that Walker had a VICAR purpose.

e.

Jonathan Walker's first VICAR conviction is for the murder of Hardy. Again, Walker shot Hardy while he was already bleeding out—"to finish him[,]" as Walker later put it to a fellow gang member. That gratuitous violence, a jury could find, was a transparent attempt to

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emphasize how “hard” Walker was so as to raise his standing in the gang. The evidence was sufficient that Walker had a gang-related purpose.

Walker’s second VICAR conviction is for the attempted murder of Alonzo Golfin—a member of T Hood, Murda Ville’s biggest rival. One day, Walker saw Golfin in Murda Ville territory. Walker quickly retrieved a gun, returned to where he had seen Golfin, and began shooting, hitting Golfin ten times. Like most gangs, Murda Ville expected its members to defend the gang’s turf aggressively, especially against rival gangs. *See, e.g., United States v. Rubi-Gonzalez*, 311 F. App’x 483, 486 (2d Cir. 2009). If Walker had ignored Golfin and other gang members found out, he likely would have lost standing. That is evidence enough to conclude that Walker had a VICAR purpose.

B.

Three defendants argue that the district court erred by retaining or dismissing jurors. We review those decisions for an abuse of discretion. *United States v. Pennell*, 737 F.2d 521, 533 (6th Cir. 1984) (retaining jurors); *United States v. Cantu*, 229 F.3d 544, 550 (6th Cir. 2000) (dismissing jurors).

1.

Two weeks into trial, jurors told the district court about several instances of potential jury tampering. Four jurors reported that, while they were driving home from the courthouse one evening, they spotted cars that they thought were following them. Two of the jurors identified the drivers as people they had seen sitting in the courtroom gallery. Several other jurors told the court that, through the window of the jury room, they had seen people loitering in the jurors’ parking lot. To the jurors, the people appeared to be recording jurors’ license plate numbers.

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When jurors make reports like those, the district court must “hold a hearing to determine whether the incident[s] complained of” prejudiced the defendants. *Remmer v. United States*, 347 U.S. 227, 230 (1954). The court cannot assume prejudice just because jurors have been “placed in a potentially compromising situation.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Nor may the court dismiss as “inherently suspect” jurors’ assurances that they can remain impartial. *Id.* at 217 n.7. Instead, the defendant must prove “actual bias”—which means that, if jurors say they can be fair and the court finds them credible, the defendant must rebut the jurors’ assurances with circumstantial evidence of partiality. *Pennell*, 737 F.2d at 532-34.

Here, the district court held a *Remmer* hearing and questioned each sitting and alternate juror about the potential tampering. Fourteen of them said that they could remain impartial. The other two equivocated about whether they could be fair. The court dismissed those two—both sitting jurors—and replaced them with alternates.

According to the defendants, there were three problems with how the district court handled the potential jury tampering. First, the court dismissed the two jurors after closing arguments, rather than immediately after the *Remmer* hearing. The defendants say that might have prejudiced them because the two jurors might have shared their concerns with the other fourteen, thereby tainting the entire jury. After the *Remmer* hearing, the defendants did not object to the two jurors continuing to serve, so we review only for plain error. *United States v. Maxwell*, 160 F.3d 1071, 1076 (6th Cir. 1998). An error is plain only if it is “clear under current law.” *United States v. Olano*, 507 U.S. 725, 734 (1993). And the defendants have not pointed to any case that requires a district court to dismiss potentially biased jurors immediately after a *Remmer* hearing. That is reason enough to reject the defendants’ contention. Moreover, the district court instructed the two jurors not to discuss the potential tampering with the other

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fourteen. There is no evidence that the jurors ignored that instruction. The defendants have therefore failed to prove actual bias. *Maxwell*, 160 F.3d at 1077.

Next, the defendants contend that the district court should not have accepted the other fourteen jurors' assurances of impartiality. But we give great weight to such assurances. When examining jurors, the district court has an opportunity to assess their demeanor. And if after doing so the court finds the jurors to be credible, we will be hard pressed to find otherwise based on a cold record. *See Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001).

The defendants therefore needed to rebut the jurors' assurances with compelling evidence of partiality. To that end, the defendants point to three factors that they say prove bias. First, several jurors said expressly that they thought the people responsible for the tampering were friends or associates of the defendants. Second, the defendants were accused of violent gang crimes, so threats coming from their associates would likely seem quite credible. Third, jurors told the court that they were worried about the threats, and they acted differently because of them; indeed, one juror said that he had been varying his routes home from court so as to throw off anyone potentially following him.

We rejected a challenge on similar facts in *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988). There, the defendant was charged with a drug conspiracy. *Id.* at 93. Mid-trial, someone "who appeared to be associated with [the defendant]" threatened a group of jurors in the courthouse hallway. *Id.* The district court questioned the jurors about the incident, and several said that they were frightened, with one admitting that "she had been having nightmares since the trial began[.]" *Id.* Thus, like this case, *Zelinka* featured a defendant who committed a gang-related crime, an associate who had made a threat on the defendant's behalf, and jurors who admitted to being frightened by the threat. Yet we held that the district court did not abuse its

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discretion by relying upon the jurors' assurances that they could be impartial. *Id.* at 96. We reach the same decision here.

Finally, the defendants argue that the district court should have questioned two jurors more thoroughly, despite their assurances of impartiality. A day before the *Remmer* hearing, a juror complained that the others were "talking too much" and "airing out their problems" in the jury room. The "problems" they were discussing, however, were personal issues—not the alleged jury tampering. Thus, the district court did not need to ask the juror additional questions about the alleged tampering. Several days after the *Remmer* hearing, another juror said that she had been followed home, which she found "a little stressful." But again, where a juror says that she is frightened but can remain impartial, a district court can allow her to remain on the jury, and need not question her further. *Zelinka*, 862 F.2d at 93, 96. In sum, the district court did not abuse its discretion in handling the alleged jury tampering.

2.

The defendants also argue that the district court should not have dismissed a juror for lying during voir dire. The jury questionnaire asked potential jurors whether any of their friends or family members had been "accused of, investigated for, arrested for, or charged with a crime." The juror at issue checked "no," and then, during voir dire, attested that her form was accurate. But mid-trial, the court discovered—and the juror confirmed—that her parents had been imprisoned for murder and her brother imprisoned for drug offenses. The juror claimed that she had simply missed the question on her form. But another question asked whether she knew anyone "involved with gangs [or] drug sales." She answered by providing several friends' names, but not her brother's.

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A district court can dismiss a juror for “reasonable cause.” *Cantu*, 229 F.3d at 550. Reasonable cause exists where a juror’s answers during voir dire are inaccurate—even if her mistakes are honest ones. *See United States v. Daniels*, 528 F.2d 705, 709-710 (6th Cir. 1976). Here, the inaccuracies appeared intentional, so the district court had even more reason to dismiss the juror.

The defendants offer two responses. First, Jatimothy Walker asserts that, when the district court examined the juror, she swore that she could be impartial. The court took other jurors at their word, Walker says, so the court should have done the same with this juror. But this juror had not been truthful on her questionnaire, so the court had good reason to doubt her claim to impartiality. Second, Oldham asserts that the court should have removed the juror immediately after learning that she had lied, rather than waiting until after closing arguments. But again, Oldham cannot prove that the court’s decision resulted in any “actual bias.” *Pennell*, 737 F.2d at 532. Thus, the district court did not abuse its discretion.

C.

Three defendants argue that the district court should have tried them separately from their co-defendants. We review the denial of a motion to sever for an abuse of discretion. *United States v. Fields*, 763 F.3d 443, 457 (6th Cir. 2014). If evidence is admissible against one defendant but not another, a district court may try them separately. *United States v. Soto*, 794 F.3d 635, 656 (6th Cir. 2015). But the court is not required to do so unless the evidence will cause “compelling, specific, and actual prejudice.” *United States v. Medlock*, 792 F.3d 700, 711 (6th Cir. 2015). A district court can typically cure prejudice with a limiting instruction that the evidence can be used against only one of the defendants. *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

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1.

Oldham argues that, because he was tried with Gills and Norwood, the jury heard evidence that it would not have heard if he had been tried separately. Specifically, the Government introduced a recorded phone call between Gills and another Murda Ville member, in which they discussed moving younger members “to the frontline” of the gang. The Government also introduced a call between Norwood and Charles Orr, in which they discussed their mutual disdain for “snitches.” Finally, a detective testified that he interviewed Norwood, who admitted that Murda Ville was a gang, that it protected its territory through violence, and that he was a member.

Gills’s statements were admissible against Oldham. Statements made by a defendant’s coconspirator “during and in furtherance of the conspiracy” are admissible against the defendant. Fed. R. Evid. 801(d)(2)(E). Gills’s statements were about the gang’s ongoing dealings. And they furthered the gang’s purposes, helping to ensure that the gang would have the manpower to protect its turf. Thus, Gills’s statements cannot have prejudiced Oldham.

Norwood’s statements were not admissible against Oldham under 801(d)(2)(E). *See United States v. Smith*, 746 F.2d 1183, 1185 (6th Cir. 1984) (confessions do not further a conspiracy). But the district court recognized as much, and instructed the jurors that they should consider the statements only when evaluating Norwood’s guilt. Moreover, even without Norwood’s statements, the jury still could have convicted Oldham. Oldham concedes that the only element the statements helped prove was the existence of a RICO enterprise. Oldham’s Br. at 53-54. And as discussed above, former gang members testified about Murda Ville’s purposes, cooperative efforts, and longevity. Thus, Oldham was not prejudiced by being tried with Gills and Norwood.

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2.

Jonathan Walker argues that, because he was tried with Gills, the jury heard inflammatory raps that Gills wrote while he was in prison. But like Oldham, Walker concedes that the only element those raps helped prove was the existence of the enterprise. Jonathan Walker's Br. at 38. The former gang members' testimony is sufficient proof of that element, so Walker was not prejudiced by Gills's raps.

3.

Finally, Jatimothy Walker argues that, because he was tried with his brother, the jury heard Jonathan's confession to the Hardy murder, which implicated Jatimothy. In a trial with multiple defendants, the Confrontation Clause prohibits the Government from introducing a defendant's confession in all but two circumstances: where the confessing defendant testifies, or where the confession does not implicate any co-defendant. *Cruz v. New York*, 481 U.S. 186, 190 (1987). A confession does not implicate a co-defendant where the confession takes on significance "only when linked with evidence introduced later at trial." *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). Here, Jonathan Walker told the police that he had been involved in Hardy's murder. But he said nothing about his brother. Instead, his confession incriminated Jatimothy only when linked with another witness's testimony that the brothers had been together that night. Thus, per *Richardson*, the district court could admit the confession, so long as the court instructed the jury not to consider the confession against Jatimothy. *Id.* at 211. The court did so, and thus severance was not necessary.

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D.

Three defendants argue that the district court improperly admitted evidence against them. We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Ray*, 803 F.3d 244, 258 (6th Cir. 2015).

1.

Norwood argues that the district court should not have admitted evidence that he murdered a man named Omar Bashir. Federal Rule of Evidence 404(b) prohibits the Government from using evidence of uncharged crimes "to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." The Government can use uncharged crimes "for any other purpose." *United States v. Tasis*, 696 F.3d 623, 627 (6th Cir. 2012). Thus, uncharged crimes can be admitted when they are directly probative of "an essential element of the crime." *United States v. Johnson*, 803 F.3d 279, 283 (6th Cir. 2015).

Here, the Government introduced evidence of the Bashir murder to prove that Norwood committed (and thus agreed to commit) two acts of racketeering—an "essential element" of a RICO conspiracy charge. *Id.* Norwood responds that the indictment does not list the Bashir murder as an overt act in furtherance of the conspiracy. But the Government can prove racketeering acts that it does not list in the indictment. *United States v. Rios*, 830 F.3d 403, 427 (6th Cir. 2016). Indeed, the Government need not list *any* racketeering acts in the indictment. *Id.* Thus, evidence of the Bashir murder was admissible against Norwood.

2.

Jatimothy Walker argues that, during jury instructions, the district court improperly disclosed that Walker was convicted of manslaughter in state court. But the district court did no

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such thing. True, the court told the jury that “some of the defendants [had been] previously convicted of some of the same conduct” they were charged with here. But the court was referring to several defendants’ state drug convictions, which had been admitted earlier. Walker’s manslaughter conviction was never admitted, and the court did not mention it while instructing the jury. Walker’s claim is meritless.

3.

Finally, Jonathan Walker argues that the district court erred by admitting statements that he made during a proffer session with the Government. Before the proffer, Walker and the Government agreed that “no statement made by” Walker “during the proffer discussion [would] be offered against” him at trial. But the agreement required Walker to “make a complete and truthful statement [about] the matters under investigation.” And if the Government doubted Walker’s candor, then the agreement also required him to take a polygraph examination “to verify . . . [his] statement.” Six months before trial, prosecutors told Walker’s lawyer that they thought Walker had lied during his proffer session. They asked Walker to sit for a polygraph, but he refused.

The Government may introduce a defendant’s proffer statements against him if he materially breaches the proffer agreement. *United States v. Fitch*, 964 F.2d 571, 574-75 (6th Cir. 1992). A breach is material if it deprives the Government of “the benefit of its bargain.” *Id.* at 575. Here, Walker agreed to provide statements that could be verified by polygraph examination. His refusal to take the examination therefore deprived the Government of the benefit it had contracted for. Given that Walker’s breach was material, the district court did not abuse its discretion by admitting his statements.

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Moreover, any error would have been harmless. A witness saw Walker shoot Hardy. And another witness testified that Walker admitted to shooting Anderson and Golfen. That was more than enough evidence to convict Walker.

E.

The defendants' remaining challenges are insubstantial.

1.

Jonathan Walker argues that prosecuting him for the murder of Marion Hardy violated the Double Jeopardy Clause because he had already been convicted of that crime in Michigan state court. Double Jeopardy “does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense.” *United States v. Mardis*, 600 F.3d 693, 696 (6th Cir. 2010) (internal citation and quotation marks omitted). The only potential exception to that rule is for “sham prosecutions”—suits brought by one sovereign just “because the [other] told it to do so.” *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008). Walker says the exception applies here because federal and state law enforcement investigated the murder together. But that “everyday” level of cooperation does not establish that the federal government was “merely a tool” of the State of Michigan. *Id.* Walker’s claim fails.

2.

Jatimothy Walker argues that the district court should have held a hearing to investigate whether his trial counsel was constitutionally ineffective. Generally, a defendant is entitled to a hearing on whether his lawyer gave him effective assistance. *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007). But the proper time for that hearing is after appeal, when a defendant collaterally attacks his conviction under 28 U.S.C. § 2255. *See United States v.*

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Ferguson, 669 F.3d 756, 762 (6th Cir. 2012). Thus, the district court did not err by refusing to investigate Walker's claim.

3.

Norwood argues that his sentence violates the Sixth Amendment because the jury did not find facts “that increase[d] the penalty for [his] crime beyond the prescribed statutory maximum[.]” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). For a RICO offense, the maximum sentence is generally 20 years. 18 U.S.C. § 1963(a). But if a RICO “violation is based on a racketeering activity for which the maximum penalty includes life imprisonment”—e.g., murder—then the maximum sentence is life. *Id.* Thus, for a defendant to receive a life sentence, a jury must find beyond a reasonable doubt that his RICO violation is “based on” a murder. *United States v. Nagi*, 541 F. App'x 556, 576 (6th Cir. 2013). Here, the jury did just that. The special verdict form asked the jury whether, “[w]ith respect to Count One”—the RICO conspiracy count—they found that Norwood had murdered Parker. The jury checked yes. That satisfies *Apprendi*.

4.

Gills argues that the district court should have instructed the jury on accessory liability. We review the court's refusal to give a requested instruction for an abuse of discretion. *United States v. LaVictor*, 848 F.3d 428, 453-54 (6th Cir. 2017). As noted above, Gills's defense to the Orr murder was that he did not know his passengers were planning to shoot until they started doing so. If true, Gills would be an accessory after the fact, not an aider and abettor. Compare 18 U.S.C. § 2 and § 3. And the jurors seemed to struggle with the distinction between the two offenses, asking the court to clarify whether a person could aid and abet without advance knowledge that a crime was going to be committed. When the jurors made that inquiry, Gills

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says, the court should have instructed them on accessory-after-the-fact liability. But the court responded adequately to the jury's question, rightly stating that, to aid and abet, a person must form an intent to facilitate the crime "before completion of the crime." Thus, the court did not abuse its discretion by refusing to give Gills's requested instruction.

5.

Gills also argues that, when the district court sentenced him, it miscalculated his criminal-history score by factoring in a state drug conviction that was "invalid." Gills's Br. at 36. Specifically, Gills contends that the conviction was unconstitutional because the drugs were seized in violation of the Fourth Amendment. But at sentencing, a district court may discount a state conviction in only three circumstances: where a federal statute authorizes the district court to do so, where a state court has declared the conviction invalid, or where the defendant was denied his right to counsel in the case resulting in the conviction. *United States v. Aguilar-Diaz*, 626 F.3d 265, 270 (6th Cir. 2010). None of those exceptions apply here.

6.

Finally, Gills argues that the district court failed to explain his sentence, and failed to consider the disparity between his sentence and those of his gangmates. But the court's explanation was sufficient, and the disparity was warranted given that Gills had attempted to kill at least five people. Gills's final challenges fail.

* * *

The district court's judgment is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 03, 2018

Mr. Harold Z. Gurewitz
Mr. Randall C. Roberts
Mr. Glenn Michael Simmington

Re: Case No. 15-1613/15-1672/15-1677, *USA v. Leon Gills*
Originating Case No. : 4:12-cr-20287-8

Dear Counsel,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Andrew Goetz
Mr. Anthony P Vance

Enclosure

Nos. 15-1613/1672/1677

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 03, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEON GILLS, ALEXANDRA NORWOOD, AND JONATHAN WALKER,

Defendants-Appellants.

ORDER

BEFORE: DAUGHTREY, KETHLEDGE, and STRANCH, Circuit Judges.

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

Case No. 12-20287

D-1 ALEXANDRA L. NORWOOD,
D-2 JATIMOTHY E. WALKER,
D-3 JONATHAN E. WALKER,
D-4 JOHNATHAN L. OLDHAM,
D-8 LEON GILLS,
D-12 JAMIL CURETON,

Defendants.

JURY TRIAL, VOLUME 36

BEFORE THE HONORABLE MARK A. GOLDSMITH

Flint, Michigan, Monday, July 21st, 2014.

APPEARANCES:

FOR THE PLAINTIFF: ANTHONY P. VANCE
CRAIG F. WININGER
U.S. DEPARTMENT OF JUSTICE
600 Church Street, Room 210
Flint, MI 48502

FOR ALEXANDRA NORWOOD: HAROLD Z. GUREWITZ
333 W. Fort Street
Suite 1400
Detroit, MI 48226

1 (Appearances, continued):

2

3 FOR JATIMOTHY WALKER: JEROME SABBOTA
4 26862 Woodward Avenue
Suite 200
5 Royal Oak, MI 48502-1523

6

7 FOR JONATHAN WALKER: RANDALL C. ROBERTS
8 117 North First Street
Suite 104
9 Ann Arbor, MI 48104

10

11 FOR JOHNATHAN OLDHAM: JOHN R. MINOCK
12 339 E. Liberty Street
Suite 200
13 Ann Arbor, MI 48104

14

15 FOR LEON GILLS: GLENN M. SIMMINGTON
16 503 South Saginaw Street
Suite 1000
17 Flint, MI 48502-1822

18

19 FOR JAMIL CURETON: MARK A. GATESMAN
20 211 East Grand River Avenue
Howell, MI 48843

21

22

23

24 David B. Yarbrough, CSR, FCRR
25 Official Court Reporter
(313) 410-7000

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WITNESSES:

NONE

EXHIBITS

(Identified)

(Admitted)

NONE

1 Flint, Michigan

2 Monday, July 21st, 2014.

3 At or about 9:21 a.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United
6 States District Court for the Eastern District of Michigan is
7 now in session, the Honorable Mark Goldsmith presiding. You
8 may be seated.

9 The Court calls case number 12-20287, United States
10 versus Alexandra Norwood, Jatimothy Walker, Jonathan Walker,
11 Johnathan Oldham, Leon Gills and Jamil Cureton. Counsel,
12 please state your appearances for the record.

13 MR. VANCE: Good morning, your Honor. Anthony Vance
14 on behalf of the United States.

15 MR. WININGER: Good morning, your Honor. Craig
16 Wininger on behalf of the United States.

17 MR. GUREWITZ: Harold Gurewitz on behalf of Alexandra
18 Norwood.

19 MR. SABBOTA: Hello. Jerome Sabbota on behalf of
20 Jatimothy Walker.

21 MR. ROBERTS: Good morning, your Honor. Randall
22 Roberts on behalf of Jonathan Walker.

23 MR. MINOCK: John Minock on behalf of Johnathan
24 Oldham.

25 MR. SIMMINGTON: Good morning, your Honor. May the

1 Court please, Glen Simmington on behalf of Leon Gills who's
2 seated behind me.

3 MR. GATESMAN: Mark Gatesman for Jamil Cureton. He's
4 present.

5 THE COURT: Good morning, everyone. We have received
6 a couple questions already from our jury. One question states
7 we understand the audio transcripts are not evidence, but may
8 we have copies of them to help us remember the conversations as
9 we deliberate? Comment from counsel?

10 MR. WININGER: It makes sense to the government, your
11 Honor.

12 MR. GUREWITZ: Your Honor, I think that the, on
13 behalf of Mr. Norwood, the jury was consistently instructed
14 that the transcripts were only aids to use during listening to
15 the evidence and are not evidence themselves. They shouldn't
16 be considered in that fashion and I think that to avoid that
17 happening, they should not be provided to the jury during
18 deliberations. They should rely upon their ability to attempt
19 to understand what is in the particular recording they're
20 listening to.

21 MR. WININGER: Your Honor, the effective result of
22 that is that when they want to listen or refresh themselves on
23 a call, they're going to have to traipse back in to hear the
24 call and see the transcript at that point. I'm not sure I
25 understand the harm in allowing them to have a transcript, the

1 same thing that they're going to view in court.

2 MR. SIMMINGTON: Your Honor, on behalf of Mr. Gills,
3 I think I agree with Mr. Norwood of course. I think even if we
4 had a guarantee that these transcripts were 100 percent
5 accurate which we don't, but even if we did, to send these
6 transcripts that are not evidence into the jury room would give
7 undue weight to that particular piece of evidence and I know
8 you can instruct them it's not evidence, but there were some
9 places on the transcripts that even here in real time we had to
10 replay them in order to hear what was on them, so -- I think we
11 did that, I know we did that with some of the music. So again,
12 I think it would give undue weight and I don't think they're
13 100 percent accurate, nobody's said they are and I object to
14 them going in.

15 MR. SABBOTA: On behalf of Jatimothy Walker, I agree
16 with both brother counsel relative to letting them hear the
17 tape because the transcript also doesn't give them the tone of
18 the conversation which is what is evidence is on the CDs.

19 MR. ROBERTS: We concur.

20 THE COURT: All right. Well, first regarding
21 accuracy, we had a whole pretrial motion practice regarding
22 accuracy and the defendants agreed that the transcripts were
23 accurate, so that's not an issue, but I also instructed that
24 the transcripts are not evidence, they're aids in helping the
25 jury with regard to the audio recordings which are in evidence

1 and I believe the appropriate response to this question is that
2 we cannot give them the transcripts to take into the jury room,
3 but if they want to identify recordings that they would like
4 played, we'll bring the jury here into the courtroom where
5 we'll assemble and play whatever recording they want and
6 there'll be a transcript as there was at trial as an aid for
7 them as they hear the recording. Is there any objection to me
8 giving that response to this question?

9 MR. GUREWITZ: No, your Honor.

10 MR. WININGER: No, your Honor.

11 THE COURT: Okay. The other question the jury asked
12 is can we have the large maps Exhibits and the faces exhibit,
13 please?

14 MR. WININGER: Those are each in evidence, your
15 Honor. I think they can have those.

16 MR. GUREWITZ: I have no objection to the jury
17 getting anything that's in evidence.

18 THE COURT: All right. So there's no objection then
19 to giving them the maps Exhibit and the face Exhibit? Is that
20 what I'm hearing?

21 MR. SABBOTA: No objection, your Honor.

22 MR. VANCE: And Judge for the record as it relates to
23 Exhibit 5 which was the large timeline, we took out some of the
24 acts that weren't, there was no evidence presented on. We
25 don't have the big board, but I did print out a small version

1 of that same timeline. It's in the book as well as some extra
2 copies.

3 THE COURT: Well, that was in evidence, right?

4 MR. VANCE: Correct.

5 THE COURT: All right. Well, it seems to me we
6 should, consistent with the practice of getting them all the
7 Exhibits that are the not contraband or not recordings, that we
8 should just send them all of those Exhibits. Any objection to
9 that?

10 MR. SABBOTA: No, your Honor.

11 MR. WININGER: No, your Honor. That's my question,
12 your Honor, is that these Exhibits that are all together here
13 in the court, they're actually going to go back with the jury?

14 THE COURT: Well, I'll get to that in just a second,
15 but we're all in agreement that all of the Exhibits including
16 the larger Exhibits, the map Exhibits, the face Exhibits,
17 they're all in evidence so they'll all going to go into the
18 jury room. I hear there's no objection to that; am I right?

19 MR. GUREWITZ: Right.

20 MR. SABBOTA: You're right.

21 THE COURT: All right. Now with respect to the
22 Exhibits, we had sent out an e-mail over the weekend about
23 redacting some nomenclature that were on some of the Exhibits
24 binders. Now has that all been resolved, that whole issue?

25 MR. VANCE: Yes, your Honor. I replaced those this

1 morning. I don't think the defense has any objection to the
2 way they were named.

3 THE COURT: All right. So we've resolved that issue;
4 is that right?

5 MR. GUREWITZ: Yes.

6 THE COURT: All right and then as far as the
7 indictment goes, have we resolved this issue then that with --
8 the indictment the government redacted presented to my staff on
9 Friday, is that all right to go into the jury room? We had
10 circulated an e-mail questioning whether all the redactions had
11 been taken care of. Do we have agreement then on the form of
12 the Exhibit -- pardon me, the form the indictment?

13 MR. VANCE: Yes, Judge. I believe so. We went over
14 that last week. Those allegations that are in the indictment
15 that pertain to other defendants are germane to the charges
16 here and are incidents that we heard testimony on so I think
17 we're all in agreement with the indictment as it stands now.

18 THE COURT: All right. One other matter that
19 occurred to me after we had left the courtroom was I had as is
20 my usual practice when instructing the jury about the signing
21 of the verdict form, I indicated that the foreperson should
22 sign the verdict form and print his or her name below it. It
23 occurred to me that a question might arise in the jury's mind
24 about whether or not that would end up undermining the
25 anonymity of the foreperson. What I would propose to do is

1 send the jury a note that the foreperson will sign his or her
2 name to the verdict form, but that the name is going to be
3 redacted. The original will be filed under seal, but the
4 verdict form that appears in the docket will not have the
5 foreperson's name. Is there any objection if I send that kind
6 of note to the jury?

7 MR. GUREWITZ: No, your Honor.

8 MR. WININGER: No, your Honor.

9 THE COURT: While we are all assembled, are there any
10 other housekeeping matters that we need to address?

11 MR. WININGER: Nothing on behalf of the government,
12 your Honor.

13 MR. GUREWITZ: No, your Honor.

14 THE COURT: Okay, thank you. Then we're in recess.

15 (Recess taken at 9:30 a.m.)

16 (Reconvened at 12:18 p.m.)

17 THE CLERK OF THE COURT: All rise. Court is back in
18 session. You may be seated.

19 THE COURT: All right. We received a note from the
20 jury which reads we would like to hear the recording between
21 Carvelle Gordon and Leon Gills about Cureton "flooding the
22 bricks", and then they put 366 or 367, question mark. So I
23 would propose that we play that recording for them. Do we have
24 that?

25 MR. WININGER: Your Honor, actually I don't believe

1 that recording was ever played or entered into evidence;
2 rather, Mr. Gills on cross-examination acknowledged having made
3 the statement and I believe Mr. Gatesman referred to it and may
4 have shown some transcript of it in his closing argument, but I
5 don't believe the recording was ever played and I don't think a
6 transcript was ever shown to the jury about that.

7 THE COURT: Okay. What's the defense view?

8 MR. MINOCK: Mr. Wininger's correct.

9 MR. WININGER: Those Exhibit numbers, they do refer
10 to the Gills Gordon recording as well as the Oldham Gordon
11 recording, but that session, that particular conversation was
12 not on either of those, it was not admitted.

13 THE COURT: All right. Well, how do you propose we
14 respond to this jury question?

15 MR. SABBOTA: I would think you'd have to respond it
16 was not admitted into evidence, therefore they can't hear it.

17 THE COURT: Should we reference the fact that
18 Mr. Gills testified about it or not?

19 MR. WININGER: I believe it's correct to reference
20 that so that they know where it came, where it was referred to.
21 I think you can also say in addition it may have been referred
22 to in a closing argument and I'd say it again the arguments of
23 counsel or the statements of counsel are not evidence.

24 MR. GATESMAN: Well, I would object to the Court
25 giving an instruction directing them where the evidence came.

1 We may have the impression that's the case. They have the
2 right to have the impression that's not the case. I guess my
3 request would be the Court consider instructing them that the
4 evidence they're requesting was not introduced, please rely on
5 your memories, individual and collective, to resolve this
6 issue.

7 MR. WININGER: Well, to say the evidence was not
8 introduced, there was reference to this. There was a
9 discussion about this recording having been made and Mr. Gills
10 acknowledged having made this recording, but to say that
11 there's no evidence of this I think is incorrect.

12 MR. GATESMAN: Well, that's not what I'm saying. I
13 think in fact what Mr. Wininger's arguing is kind of the
14 opposite of what the Court just suggested to say in fact this
15 did happen. If there's a subsequent question to that, then we
16 could address it. The way I am proposing to address it perhaps
17 would resolve it and they can refer on their collective memory
18 and individual memory to resolve it.

19 MR. WININGER: The only problem here I believe your
20 Honor is the fact that a transcript was shown to the jury in
21 closing argument that was never introduced into evidence and
22 they never saw it other than in closing argument and so I think
23 there is a reason to clarify what was and what was not admitted
24 and clarify that the things that the jury was shown in argument
25 are not evidence.

1 It may be a way to square this is to simply say that
2 there was a discussion of this conversation in this particular
3 testimony, you'll have to use your collective recollection to
4 determine the nature of that testimony or that discussion, so
5 I'm not asking the Court to direct the jury that particular
6 evidence took place or the nature of that, but simply to say
7 there's a discussion of this in the testimony of Mr. Gills and
8 beyond that, the evidence, the call or the recording itself was
9 not admitted into evidence beyond this discussion.

10 THE COURT: Mr. Gatesman?

11 MR. GATESMAN: Again, I think the question as I
12 understand it is they want to listen to that evidence and I
13 think that the proper response is it wasn't admitted. I think
14 they understand there was -- we don't know that they don't
15 recall that this wasn't on cross or direct or how it happened.
16 Their question is can we listen to it again and then based on
17 the proofs and what was admitted, I think the answer to that is
18 no. I think to go further is liable to confuse them and it's
19 quite frankly not fair in terms of Mr. Cureton's case.

20 MR. WININGER: Confusion in this case exists because
21 they were shown a transcript that they'd never seen before.
22 They were shown, frankly, you know, hindsight being 2020, we
23 should have objected at that moment, but we didn't, but they
24 were shown a transcript of a recording that they had never
25 heard before, they had never seen about. It contained words

1 and other portions of the transcript that Mr. Gatesman argued
2 showed Mr. Gordon was leading and directing this conversation.
3 None of that was in evidence, so the confusion here is because
4 Mr. Gatesman created it when he showed them a transcript that
5 wasn't a part of any piece of evidence. I think it's
6 appropriate to clarify what was and what was not evidence
7 relating to this conversation.

8 MR. GATESMAN: There is no confusion. The question
9 is can they listen to the evidence. The Court can answer it by
10 saying it wasn't admitted. They're reading into what the jury
11 is thinking and what they're going to next.

12 THE COURT: All right. Well, I don't know if there's
13 confusion or not. I really don't want to speculate about that.
14 The question just asks they'd like to hear the recording and
15 the simple direct answer to that is that the recording was
16 never admitted into evidence so they can't -- well, I think
17 that's just it. We would just tell them that the recording is
18 not admitted into evidence. That's what the defense wants. Is
19 that right, Mr. Gatesman?

20 MR. GATESMAN: That would be my request, yes.

21 THE COURT: I suppose if that presents then a
22 follow-up from the jury, we can hear from the jury. I don't
23 know if they're confused about anything or not, so I'm going
24 send them a note that says the recording between Carvelle
25 Gordon and Leon Gills that included a reference to flooding the

1 bricks was not admitted into evidence. I understand that
2 that's what the defense wants; is that right? Mr. Gatesman, is
3 that right?

4 MR. GATESMAN: That's my request.

5 THE COURT: Okay and that's the request of all the
6 defendants?

7 MR. SABBOTA: Yes. It wasn't admitted, Judge.

8 MR. GUREWITZ: Yes.

9 THE COURT: Okay and I understand the government has
10 an objection to that; is that correct?

11 MR. WININGER: That's correct, your Honor.

12 THE COURT: All right. Well, that's what I'm going
13 to do.

14 MR. WININGER: Your Honor and I understand and I'm
15 not quarreling with the Court's conclusion or opinion. Would
16 the Court be specific because there were Gills Gordon
17 recordings and I didn't hear everything the Court said, there
18 were Gills Gordon recordings that were admitted into evidence,
19 so to be specific about this particular phrase was not or a
20 conversation related to this particular phrase was not admitted
21 into evidence.

22 MR. SIMMINGTON: Your Honor --

23 THE COURT: Well, the recording between Mr. Gordon
24 and Mr. Gills about Mr. Cureton flooding the bricks was not
25 admitted into evidence.

1 MR. WININGER: Thank you, your Honor.

2 THE COURT: All right?

3 MR. ROBERTS: Your Honor, you're going to submit this
4 note through staff to the jurors?

5 THE COURT: That's right.

6 MR. ROBERTS: Might I suggest that we remain here for
7 a couple minutes to see if, they go, oh, well wait, that's not
8 what we wanted just so we don't have to re-assemble everybody
9 again?

10 THE COURT: Okay. I think that might makes sense.
11 Why don't we wait a few minutes and then we'll let you know
12 when we get anything within the next five minutes or so.

13 MR. WININGER: Thank you, your Honor.

14 (Recess taken at 12:28 p.m.)

15 (Reconvened at 4:39 p.m.)

16 THE CLERK OF THE COURT: Please rise. Court is back
17 in session. You may be seated.

18 THE COURT: All right. We have a jury question that
19 reads as follows: If someone shoots someone out of a vehicle I
20 am driving and I didn't know they were going to do it until
21 they did, but I then drive away with them and then not report
22 it, is that considered aiding and abetting?

23 MR. WININGER: Your Honor, I think the appropriate
24 response is likely reading the aiding and abetting instruction
25 again.

1 MR. SIMMINGTON: Yeah, I can't disagree with that,
2 your Honor. It's a classic accessory-after-the-fact situation
3 I think and the jury got no instructions on that so I think, I
4 don't think we can tell them much other than to please read the
5 instruction again. If I could have a moment, your Honor?

6 THE COURT: Okay.

7 MR. GUREWITZ: Your Honor, I agree that that's the
8 response would be to direct them to the instruction on aiding
9 and abetting.

10 THE COURT: Instruction 14 on page 19? Everyone
11 agree it's instruction 14 on page 19 and 20?

12 MR. WININGER: Your Honor, I don't have that
13 instruction in front of me.

14 MR. SIMMINGTON: Indeed there is, your Honor.
15 Apparently a --

16 (Pause)

17 THE COURT: All right. Everyone agree that's the
18 one?

19 MR. WININGER: Yes, your Honor.

20 THE COURT: All right. So you want me to send a note
21 to the jury that they should consult instruction 14 on pages 19
22 and 20 to answer this question?

23 MR. SIMMINGTON: Your Honor, as I said, it is a,
24 seems to me a classic accessory-after-the-fact situation that
25 the jurors have described. I would be remiss if I didn't ask

1 the Court to give an instruction on the distinction between
2 aiding and abetting and accessory after the fact. I don't
3 believe there's a Sixth Circuit pattern instruction on that.
4 If there is, I'd be glad to be corrected, but there's certainly
5 a state law, Michigan state law instruction on that distinction
6 and Mr. Minock in his computer happens to have that up and so I
7 think it's -- I think it would risk misinforming the jury about
8 what the law is if they've asked that specific question.
9 They're asking for a clarification between aiding and abetting
10 and accessory after the fact. We can read that into the
11 question. I don't see another interpretation of the question
12 so I guess I would request that the Court make use of the state
13 law distinction between the two and Mr. Minock is on to a Sixth
14 Circuit instruction apparently, 4.02?

15 MR. MINOCK: Yes.

16 THE COURT: What is it?

17 MR. SIMMINGTON: It's 4.02, your Honor.

18 THE COURT: Accessory after the fact?

19 MR. SIMMINGTON: Correct.

20 MR. WININGER: Your Honor, in the government's view,
21 I can't say that I've researched this at length, but it seems
22 to me it risks confusing the jury further if we instruct on a
23 crime that hasn't been charged and they are not being asked to
24 consider. Aiding and abetting defines the crime charged and
25 they can find it or not based on that instruction.

1 MR. SIMMINGTON: Well your Honor, I think they would
2 have to find as fact that the situation they've described in
3 the question is what they found and I'm -- they weren't asked
4 any special interrogatory about count, this is count 35 I think
5 or 36 -- I'm sorry, 35 is the only count that I can surmise
6 they're talking about. If they have found those to be the
7 facts and then they come back and say that they find guilt for
8 aiding and abetting, not only have we misled them, we've misled
9 them into making a mistake of law along the way.

10 THE COURT: Well Mr. Simmington, are you claiming
11 that a defendant has not committed the crime as an aider and
12 abettor if he assists the principal in fleeing from the scene?

13 MR. SIMMINGTON: I'm not, I don't know that I'm
14 claiming that, but I think that is the law and that would be my
15 position. The aiding and abetting statute is relatively clear
16 on the point that there has to be intentional assistance or
17 encouragement with awareness that the crime is to be committed
18 and if the assistance is entirely after the crime has been
19 committed which is the situation they seem to be describing in
20 their question, the defendant may be guilty of something else,
21 but he's not guilty of count 35.

22 MR. WININGER: Your Honor, I don't think we should
23 try to define what the jury is considering in this instance,
24 but more importantly I think the Court is correct. It sets up
25 what may be a false choice; that is, aider and abettor versus

1 accessory after the fact and I think that is the particular
2 risk we would encounter by giving them that instruction.
3 Aiding and abetting is defined and it's definable and it deals
4 with this issue.

5 MR. SIMMINGTON: I understand the government's
6 position, your Honor, but I've actual actually filed a Rule 29
7 motion on this very same issue and it's my position the jury
8 hadn't ought to even -- shouldn't even be considering this
9 issue, but the Court has not ruled on the Rule 29, but that's
10 exactly what is in my Rule 29 motion.

11 There was no evidence, no evidence that Mr. Gills had
12 any prior awareness of the passenger, Shawn Gardner's, intent
13 to shoot Charles Orr until he was basically in the act of doing
14 it and the only evidence the jury, the only evidence on the
15 point that the jury had was that Mr. Gills immediately said no,
16 chill, don't shoot out of this van and Mr. Gardner went forward
17 anyway and then the escape was on. So I filed the motion on
18 it. I suppose we can let the jury do whatever the jury will do
19 and the Court can rule on the motion later, but I still think
20 that it's unfair to Mr. Gills if they had found that he didn't
21 know ahead of time that there was going to be a crime committed
22 and he didn't do anything to encourage or assist or help that
23 crime be committed with knowledge of its, its
24 soon-to-be-committed status, then I'm looking here at
25 commentary for the state law, Michigan state law instruction on

1 accessory after the fact. It's CJI 2nd 8.7 and it reads, the
2 commentary for that instruction reads the most important
3 distinction between an aider and an abettor and an accessory
4 after the fact is that the aider and abettor is aware of and
5 intends to further the commission of the substantive offense
6 prior to its completion. While the accessory after the fact
7 does not decide to assist the preparation -- I'm sorry, the
8 perpetrator until after the crime has ended and then it says
9 the trial court's failure to instruct properly on this
10 instruction has resulted in numerous reversals and they cite
11 People v. Lucas, Michigan Supreme Court case 402 Mich, 302,
12 1978 and a host of other Court of Appeals cases for that
13 proposition. I think that's classically what we have here is
14 that very distinction.

15 I'm not defining anything I don't think. I think
16 the -- I think maybe listen to the jury's specific question
17 again, but they're talking entirely about assistance that
18 occurred after the crime was committed. To allow them to
19 possibly come back with a guilty verdict if those are their
20 findings, umm, would very likely result in a reversal if I make
21 a proper record here and I hope that's what I'm doing.

22 MR. VANCE: Judge, Mr. Simmington had the opportunity
23 to request an accessory after the fact instruction and didn't
24 do so. I think the jury can read the aiding and abetting
25 instructions, apply the elements and if they find what

1 Mr. Simmington is alleging that the question stands for, then
2 they'll find him not guilty.

3 MR. SIMMINGTON: Your Honor, I did not ask the
4 government to charge Mr. Gills with another count. I don't
5 believe I should in any way have that come back against my
6 client that I didn't ask them to charge a crime that I thought
7 may have been committed. The situation is dynamic now, your
8 Honor. We're past the charging documents. I think it's been
9 said before, the whole distinction is from the commentary we've
10 read and from the discussion we've had here is that once the
11 crime has been completed, then no assistance amounts to aiding
12 and abetting. In this case, the crime was completed when the
13 shooting stopped. There is no testimony from Mr. Orr, from any
14 other eyewitness, from any, anyone who says that Mr. Gills even
15 had a weapon in his hand at the time of the shooting, much less
16 that he participated in firing the shots. Once Mr. Gardner as
17 the evidence showed, once he's done pulling the trigger and
18 they're pulling away, I mean, that's leaving. That's leaving
19 the scene. That's assistance after the fact.

20 THE COURT: Okay. Well, I don't think we can reason
21 our way through this, we have to look at the cases. I just
22 point out in my very quick look through the booklet on Sixth
23 Circuit pattern jury instructions, points out at page 127,
24 quote:

25 "The line between an aider and abettor and

1 an accessory after the fact is sometimes
2 difficult to draw, particularly when dealing
3 with the escape immediately following the
4 crime."

5 End quote. That seems to be exactly the fault line
6 that we are crossing right here so it looks like we all may
7 have some homework to do. I think I need to know the answer to
8 that question before I can figure out exactly how to formulate
9 a response to the jury so if you want to get me something by
10 9:00 tonight, I'll be happy to look at it before I retire.
11 Anything else?

12 MR. WININGER: No, your Honor. Thank you.

13 THE COURT: All right. I think we'll tell the jury
14 then we're going to call it a day and we'll come back tomorrow
15 and resume. Thank you.

16 MR. SIMMINGTON: Thank you, your Honor.

17 (Trial adjourned at 4:53 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court
Reporter, do hereby certify that the foregoing pages
comprise a true and accurate transcript of the
proceedings taken by me in this matter on Monday, July
21st, 2014.

9/21/2014

Date

/s/ David B. Yarbrough

David B. Yarbrough, CSR, FCRR
231 W. Lafayette Street
Detroit, MI 48226

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

Case No. 12-20287

D-1 ALEXANDRA L. NORWOOD,
D-2 JATIMOTHY E. WALKER,
D-3 JONATHAN E. WALKER,
D-4 JOHNATHAN L. OLDHAM,
D-8 LEON GILLS,
D-12 JAMIL CURETON,

Defendants.

JURY TRIAL, VOLUME 37

BEFORE THE HONORABLE MARK A. GOLDSMITH

Flint, Michigan, Tuesday, July 22nd, 2014.

APPEARANCES:

FOR THE PLAINTIFF: ANTHONY P. VANCE
CRAIG F. WININGER
U.S. DEPARTMENT OF JUSTICE
600 Church Street, Room 210
Flint, MI 48502

FOR ALEXANDRA NORWOOD: HAROLD Z. GUREWITZ
333 W. Fort Street
Suite 1400
Detroit, MI 48226

1 (Appearances, continued):

2

3 FOR JATIMOTHY WALKER: JEROME SABBOTA
4 26862 Woodward Avenue
Suite 200
5 Royal Oak, MI 48502-1523

6

7 FOR JONATHAN WALKER: RANDALL C. ROBERTS
8 117 North First Street
Suite 104
9 Ann Arbor, MI 48104

10

11 FOR JOHNATHAN OLDHAM: JOHN R. MINOCK
12 339 E. Liberty Street
Suite 200
13 Ann Arbor, MI 48104

14

15 FOR LEON GILLS: GLENN M. SIMMINGTON
16 503 South Saginaw Street
Suite 1000
17 Flint, MI 48502-1822

18

19 FOR JAMIL CURETON: MARK A. GATESMAN
20 211 East Grand River Avenue
Howell, MI 48843

21

22

23

24 David B. Yarbrough, CSR, FCRR
25 Official Court Reporter
(313) 410-7000

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	(Identified)	(Admitted)
NONE		

1 Flint, Michigan

2 Tuesday, July 22nd, 2014.

3 At or about 9:10 a.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United
6 States District Court for the Eastern District of Michigan is
7 now in session, the Honorable Mark Goldsmith presiding. You
8 may be seated.

9 The Court calls case number 12-20287, United States
10 versus Alexandra Norwood, Jatimothy Walker, Jonathan Walker,
11 Johnathan Oldham, Leon Gills and Jamil Cureton. Counsel,
12 please state your appearances for the record.

13 MR. VANCE: Good morning, your Honor. Anthony Vance
14 on behalf of the United States.

15 MR. WININGER: Good morning, your Honor. Craig
16 Wininger on behalf of the United States.

17 MR. GUREWITZ: Good morning, your Honor. Harold
18 Gurewitz on behalf of Alexandra Norwood.

19 MR. SABBOTA: Jerome Sabbota on behalf of Jatimothy
20 Walker.

21 MR. ROBERTS: Good morning, your Honor. Randall
22 Roberts on behalf of Jonathan Walker.

23 MR. MINOCK: John Minock on behalf of Johnathan
24 Oldham.

25 MR. SIMMINGTON: May the Court please, Good morning,

1 your Honor. Glen Simmington appearing on behalf of Leon Gills
2 who's behind me.

3 MR. GATESMAN: Mark Gatesman on behalf of Jamil
4 Cureton.

5 THE COURT: Good morning. First of all, I don't know
6 why there were attorneys who were late this morning who knew
7 that we had a jury question to answer. I would have expected
8 everyone to be here by 8:30. There were two attorneys who were
9 here, so in the future I expect everyone to be here at 8:30
10 unless notified. We only allowed the late appearance of
11 attorneys on Monday because the jury was going to start
12 deliberation, but I would have expected that all the attorneys
13 understood to be here promptly. We've had the jury waiting
14 around and I wanted to get the jury responded to promptly. I
15 did circulate a proposed response. Any reaction to this from
16 the government?

17 MR. WININGER: Your Honor, the government believes
18 that is an appropriate response.

19 THE COURT: All right. Mr. Simmington?

20 MR. SIMMINGTON: Yes, your Honor. I have read the
21 response. All I will say is that we did file a brief last
22 evening and requested some alternative relief. That brief did
23 contain the word hypothetical and I see that the Court's
24 proposed response also contains that word. I acknowledge the
25 Court has given this some thought and has discretion to give

1 the instruction that you have suggested that you will. Again,
2 I would just indicate in the brief when I used the word
3 hypothetical, it wasn't a hypothetical made of whole cloth, but
4 a hypothetical based upon evidence that had been given in the
5 case, but our position is stated in the brief. I'll rely on
6 the brief otherwise. Thank you.

7 THE COURT: All right. Any other attorneys want to
8 weigh in on this issue? All right. Mr. Simmington, you still
9 want me to instruct the jury at this point on accessory after
10 the fact?

11 MR. SIMMINGTON: I still think that would address
12 their question so as to give them the assistance they
13 requested. What I didn't put in the brief was and I think if
14 the Court were inclined to do that at all, it would have to be
15 with the statement that he's not -- that Mr. Gills is not
16 charged with accessory after the fact, but this is the things
17 that I didn't put that in the prayer at the end, but that's
18 still my position, but I understand the Court's inclined to go
19 with the proposal and I don't think the proposal is
20 unreasonable at all, I just would prefer that the jury be given
21 better or given more information about the legal question that
22 they've asked.

23 THE COURT: Well, the jury's question is really a
24 hypothetical that's grounded in specific factual predicates of
25 our case and Courts generally do not answer such hypothetical

1 questions because it would appear to enter upon the jury's
2 fact-finding role. The job of the Court is to provide
3 instructions regarding the general principles of law that apply
4 to a case without giving instructions that would be seen as
5 applying principles to the specific factual predicates of the
6 case and it would seem to me that if I were to answer the
7 jury's question directly, that's exactly what I would be doing
8 so I'm not going to answer their question directly.

9 I'm also not, at least at this time, going to give an
10 instruction on aiding and abetting -- I'm sorry, strike that,
11 on accessory after the fact. First of all, the jury did not
12 ask about that. Second, the defendant is not charged with that
13 crime and I don't think it would be appropriate for me to give
14 an instruction to educate the jury about a crime with which the
15 defendant is not charged. It's also always hazardous to guess
16 what exactly is motivating a jury to ask a particular question
17 and I think Courts should not try to speculate exactly what
18 might be motivating a jury to ask a particular question so I
19 think the proposed instruction I circulated earlier this
20 morning provides an appropriate response to the jury's question
21 and it explains why the Court cannot directly answer their
22 specific question because their question is grounded in the
23 specific factual predicates of the case.

24 It then proceeds to tell them to review my prior
25 instructions and to review the instruction in particular of

1 aiding and abetting which is the specific principle of law that
2 they were inquiring about and then it opens the door for
3 additional questions and of course we can respond to those new
4 questions if and when they arise. So the response that I will
5 give them is as follows:

6 Regarding yesterday's question concerning aiding and
7 betting, I cannot answer your question as phrased. Courts do
8 not answer hypothetical questions that contain factual
9 predicates based on the specifics of a case as contrasted with
10 more generally-phrased questions about the law. At this point
11 you should review the instructions I gave you including the
12 aiding and abetting instruction. If you have additional
13 questions, I will respond to those.

14 Now we did just receive some additional questions
15 from the jury. They are as follows: We would like to hear
16 Exhibits 366 and 367. Can we see the Cureton surveillance
17 video from September 9th, 2009? Can we read transcripts of the
18 witness testimonies, specifically Charles Orr? How long must a
19 person know about a crime before it occurs to be considered
20 prior knowledge? Was Exhibit 1000 admitted as evidence? Would
21 like to see Exhibit 520. All right. Let's take these up then
22 one by one. I assume there's no objection to playing Exhibits
23 366 and 367?

24 MR. WININGER: No objection, your Honor.

25 MR. GATESMAN: None.

1 MR. SIMMINGTON: No objection.

2 THE COURT: Any objection to the Cureton surveillance
3 video from September 9, 2009?

4 MR. WININGER: I don't believe that was admitted into
5 evidence, your Honor.

6 MR. GATESMAN: It was not. It's in relation to the
7 charge that was dismissed.

8 THE COURT: Okay, all right. So shall we, what
9 should we tell them in response to that? It's not admitted
10 into evidence?

11 MR. WININGER: Yes, your Honor.

12 MR. GATESMAN: Yes, that would be appropriate.

13 THE COURT: All right. How should we respond to the
14 question can we read transcripts of the witness testimonies,
15 specifically Charles Orr?

16 MR. GUREWITZ: Your Honor, could you clarify? The
17 first part of that question was can we have it or can we read
18 it?

19 THE COURT: I'll repeat, this is exactly what it
20 says, quote, "can we read transcripts of the witness
21 testimonies, comma, specifically Charles Orr?"

22 MR. GUREWITZ: I have no objection to the testimony
23 being read to them, but I would object to them having the
24 transcript although it's probably about two and-a-half hours.
25 I don't know if that's what they are really asking for.

1 MR. SIMMINGTON: I have no objection, your Honor, on
2 behalf of Mr. Gills to them certainly hearing it read to them
3 and I don't know what the Court's practice might be as far as
4 giving them pieces of transcript. That could be problematic.
5 I'm not sure I have a position on that, but I do -- I don't
6 have any objection to them hearing it read.

7 MR. GUREWITZ: I would suggest a response to indicate
8 to them that they cannot have the transcript and to obtain some
9 clarification about whether they're asking for the entire
10 transcript.

11 MR. SABBOTA: The way the question's worded, your
12 Honor, it sounds like they want the testimony of everybody.
13 Can we read testimonies, specifically Charles Orr? -- I'm
14 sorry, can we read trans -- yeah, testimonies specifically
15 Charles Orr? Is that how it's worded?

16 THE COURT: I'll read it again. Can we read
17 transcripts of the witness testimonies, comma, specifically
18 Charles Orr?

19 MR. SABBOTA: It sounds like they want all of
20 witness' testimony and Charles Orr.

21 THE COURT: I seriously doubt that, but I will tell
22 you my practice is that when I get a jury question like this, I
23 send back an answer that says that the transcripts are not
24 available immediately, it will take some time to prepare them.
25 Also if you're going to want to hear testimony, we would have

1 to read the entire testimony to you without picking out various
2 portions of it and then I ask if they still would like to hear
3 the entirety of the testimony and then we can have two kinds of
4 arrangements. We can either all assemble here in the courtroom
5 to hear it or --

6 (Pause)

7 THE COURT: All right. After consulting with my
8 court reporter, I've now learned the testimony of Charles Orr
9 has been transcribed so it is now available. There is also an
10 audio recording of the testimony. The court reporter is not
11 sure what the audio quality of it is. Now one option in the
12 past that we've used is to play the audio recording for the
13 jury in the jury room and we instruct the jury not to
14 deliberate while the recording is being played for them and
15 obviously it means a staff person has to play the recording for
16 them, at least get it started so that's another option, but
17 since we have a transcript, we theoretically could bring them
18 in here and we could read it to them while we're here or
19 alternatively we could give them the transcript if they wanted
20 to review it. I could instruct them that they would need to
21 review all of it or I'm open to other suggestions about how to
22 respond.

23 MR. GUREWITZ: Your Honor, it would be my suggestion
24 if they're going to hear it, they need to hear the entirety of
25 it, the direct and the cross and I think it ought to be done in

1 the courtroom. It's possible if the audio is sufficient, that
2 that would suffice, but that would depend upon whether or not
3 the, all of that recording is something that all of them could
4 hear.

5 THE COURT: All right. Other views?

6 MR. WININGER: Your Honor, I'm not sure I understand
7 why they can't, number one, just be given the transcript with
8 an instruction to review the entire thing or to be given the
9 recording if for some reason they needed to listen to the
10 recording and listen to it in their deliberations room. It --
11 I'm not aware of anything which would suggest that we have to
12 bring them back in court so we could all listen to two
13 and-a-half hours of, umm, direct and cross and redirect and
14 recross-examination of a witness. I think they could be given
15 the transcript frankly.

16 MR. ROBERTS: This is probably a rare opportunity for
17 everybody to observe, but I actually agree with government
18 counsel on this one, on behalf of Jonathan Walker. The jurors
19 when they're going through the deliberative process, they're
20 focusing on something anyway. They likely don't want to hear
21 the entire two and-a-half hours or however long it would take.
22 They're going to zip to a spot in the transcript that they have
23 a question about and I really fully subscribe to the notion
24 that we should give them the tools they need if they're
25 available.

1 MR. SIMMINGTON: Your Honor, I'm in favor of them
2 having this testimony transcribed for them in audio form in any
3 place any time they want it and the Court can obviously
4 exercise discretion of how that goes about, but I have no
5 objection to them having that testimony available to them in
6 any form.

7 MR. SABBOTA: Well, I agree with Mr. Gurewitz, your
8 Honor. I think they ought to listen to it in the courtroom
9 because the transcript doesn't really portray the testimony of
10 the witness relative to the incantations and how he answered
11 the questions and expressions the witness might have had.

12 MR. GATESMAN: I agree with Mr. Sabbota and
13 Mr. Gurewitz. I think it's asking a lot of the jurors if I
14 understood the Court correctly that if they listen to audios,
15 that they would be instructed not to deliberate. I think
16 that's asking a lot of them for such a lengthy period of
17 testimony. I perhaps would feel differently if it was a
18 witness that wasn't so long so I would prefer if the Court's
19 going to allow them to review it, that it be done in the
20 courtroom with all parties present.

21 THE COURT: Well, if the audio's of sufficient
22 quality, would everyone agree that that's acceptable?

23 MR. SABBOTA: Yes.

24 MR. GATESMAN: Yes.

25 MR. GUREWITZ: My reason for my position is just

1 simply that I don't think they should be given or allowed to
2 focus on a particular part of the testimony out of context.
3 Whether their question's about something that came you on cross
4 or direct, I think that they ought to be exposed to, to both
5 sides of whatever the particular point is and rather than just
6 having the transcript in the jury room for somebody to pick up
7 and look at a particular part of that. That's not the way the
8 testimony is presented in court and that shouldn't be given to
9 them in any different way during deliberations.

10 MR. WININGER: If the Court is inclined to play the
11 video -- or the audio of the, for them, your Honor, I guess the
12 government would request that the Court instruct the jury that
13 if they want to hear it, they need to hear the entire thing,
14 but as an alternative they can rely on their individual and
15 collective recollections of this and to let us know if they
16 want to hear the entire thing.

17 THE COURT: Mr. Simmington?

18 MR. SIMMINGTON: Yes, your Honor. Forgive me, I
19 wonder if we might hear that question again, that specific
20 language of the jury's question?

21 THE COURT: Can we read transcripts of the witness
22 testimonies, comma, specifically Charles Orr?

23 MR. SIMMINGTON: Read transcripts. Well, obviously
24 as I said before I have no objection to them doing that,
25 however I also recognize that there's wisdom in other counsels'

1 statements here that transcripts are cold, they don't have
2 inflections, they don't have the real feel of testimony so I
3 would join with other counsel in saying we should do both or at
4 least, umm, we should do both and, umm, if that requires us to
5 sit here for some period of time. I think the wrong thing to
6 do would be to send a message to the jury well this is kind of
7 cumbersome, are you sure you really want this, which is kind of
8 what I think the government is advocating. I don't, I don't
9 think we need to tell them that this is going take a long time
10 and you have to hear the whole thing and are you sure you
11 really want to do this. I think that would be inappropriate.

12 THE COURT: Well, I always let them know what they're
13 in for. They don't know. They're not lawyers, they haven't
14 been through trials and some might think that there's a
15 transcript available which in this case there is and they might
16 be wanting to zoom in on one line and thinking this is an easy
17 way to answer their question and I don't see any harm in
18 letting them know what the procedure is and then they make the
19 call whether they want to sit through two and-a-half hours or
20 not. I don't see any reason to force them to sit through two
21 and-a-half hours. They may decide it turns out it's not an
22 important issue and they don't want to waste two and-a-half
23 hours of time looking at it.

24 (Pause)

25 THE COURT: All right. We've got the transcript.

1 We're going to play it for you, the recording of Charles Orr.
2 You tell us whether you think this is of sufficiently good
3 audio quality.

4 (Pause)

5 THE COURT: All right. Was that sufficient for you
6 to be able to determine whether or not the sound quality is
7 adequate?

8 MR. GUREWITZ: I think it is, your Honor.

9 THE COURT: All right. Everyone agree?

10 MR. ROBERTS: Yes.

11 THE COURT: Government agree?

12 MR. VANCE: Yes.

13 THE COURT: All right. Now there were side Bars so
14 we'll have to have someone in the jury room with earphones who
15 will block out the side Bars that cropped up if there were any.
16 I'm not sure if there were.

17 MR. GUREWITZ: Your Honor, I didn't understand when
18 we were talking about this before that the proposal it was play
19 this in the jury room for the jury?

20 THE COURT: Yes, that was the idea.

21 MR. GUREWITZ: My concern by doing that is it needs
22 all to be played and I don't know whether the jurors are going
23 to feel like they need to say something during the playing of
24 it like to stop it or to go ahead and continue and I think that
25 there's less ability and control obviously if it's going to be

1 done in the jury room.

2 THE COURT: So you still want to do it out here?

3 MR. GUREWITZ: Well, I think it just needs to be done
4 in a way so that the entire, the entirety of it is played
5 except for the side Bar conferences.

6 THE COURT: Well, like I said in the past what I've
7 done is we send somebody in there, we tell the jury we're going
8 to play the whole thing for them, they have to listen to
9 everything, all the direct examination, cross-examination and
10 that it's all played for them and that they're not going to
11 deliberate during the playing because someone outside the jury
12 is going to be in the jury room. If you don't like that
13 arrangement, if you tell me you want to have it all done here
14 in the courtroom, I'll consider that as well.

15 MR. GUREWITZ: I think that will be satisfactory as
16 long as long as it's done that way so that it's just not parts
17 of it that are played and also so that the jurors are not
18 engaging in anything that might be like deliberations during
19 the time period they're listening to it.

20 THE COURT: Well, they're told not to deliberate.
21 Now I'm not there, you know, if someone makes a side comment, I
22 don't know what they're talking about. I'm not there to police
23 it so if you want to tell me you want everything done here in
24 the courtroom, I'll entertain that as an option.

25 MR. GUREWITZ: No, I think that would -- it would be

1 okay to do it in the jury room with those kinds of controls.

2 THE COURT: Okay.

3 MR. VANCE: And Judge, we think they can abide by the
4 instruction to not deliberate and they'll be instructed to if
5 you're going to listen to the testimony, you're going to listen
6 to all of the testimony.

7 THE COURT: Okay.

8 MR. SIMMINGTON: And if I understood correctly there
9 would be staff to block out the white noise and stuff so
10 there's somebody there, they know that they're being monitored
11 as they go through the process.

12 THE COURT: There will be a staff person who has to
13 operate the equipment because if there were side Bars, all that
14 has to be blocked out so they have to be there to operate the
15 machinery and block out the side Bars.

16 MR. SIMMINGTON: They will essentially be a witness
17 as to whether or not they have violated the Court's
18 instructions. We don't expect they will.

19 THE COURT: Yes, I think so.

20 MR. SIMMINGTON: All right, thank you.

21 THE COURT: Now I'm first going to send them a note
22 though to let them know what the procedure is and then find out
23 if that's what they want to do. They will also let us know if
24 there's somebody besides Charles Orr because there is perhaps
25 some ambiguity in this question. I don't know if they want

1 just Charles Orr or if they want other witnesses as well and as
2 I said they may decide they don't want to hear everything
3 because now if they understand they do need to listen to
4 everything, they may decide it's not worth it to them to hear
5 everything so I will send them a note describing the procedure
6 and I'll let you know what they decide to do. If they send
7 back a note saying they want to hear Charles Orr's testimony,
8 then I'm just going to proceed to arrange that. If there's
9 something else in their note back to me, I'll let you know
10 about that.

11 All right, then their question is how long must a
12 person know about a crime before it occurs to be considered
13 prior knowledge? Let me say that again, how long must a person
14 know about a crime before it occurs to be considered prior
15 knowledge?

16 MR. SABBOTA: Excuse me. My position would be that
17 they should be told to follow the instructions relative to
18 aiding and abetting because I don't know that we can make a
19 factual determination for them in responding to that question.

20 MR. SIMMINGTON: With some hesitancy, your Honor, I
21 think I agree with that. The hesitancy is that this is not as
22 hypothetical, this really is a question about the law. It
23 doesn't have anything to do with the facts of the case. Now we
24 can guess about why they're asking, but I think to try to
25 fashion a response is probably, umm, and Mr. Wininger and I

1 have actually talked about a possible response. We think this
2 goes to the aiding and abettor accessory after the fact
3 question again. Since the Court's already I think made a
4 decision that you're going to give the instruction --

5 THE COURT: I already did. I've sent it in to them.

6 MR. SIMMINGTON: So I think to follow the same
7 practice is probably the best way to go here.

8 THE COURT: All right. What's the government's view
9 on this?

10 MR. WININGER: Your Honor, the language that we were
11 working on just now with Mr. Simmington in response to this is
12 actually a modification of what he submitted yesterday and that
13 is that in order to find and it's based on the Michigan pattern
14 instruction that Mr. Simmington included in his submission,
15 that the defendant needs to have known about it before, learned
16 about the crime during the commission of the crime and
17 encouraged or assisted the commission of the crime at that
18 point and that if all the government has proved is that he
19 learned of the crime after its commission and intended to
20 assist the defendant flee or avoid apprehension, that that
21 isn't sufficient, so it is designed as a way to answer this
22 question that the given defendant would need to know about it
23 before or learn about it during the commission of the crime and
24 encourage or otherwise assist the commission of the crime and
25 that after-the-fact knowledge isn't sufficient and I think

1 that -- it's what Mr. Simmington submitted and I think it
2 appropriately captures the law and answers the question.

3 THE COURT: Well, I assume everyone is assuming that
4 this has to do with aiding and abetting?

5 MR. WININGER: That's the government's assumption,
6 your Honor.

7 THE COURT: But there's nothing specifically about
8 prior knowledge in the aiding and abetting instruction. You
9 can aid and abet a crime while it's occurring. It doesn't have
10 to be giving aid before it occurs.

11 MR. WININGER: And that's, the particular language in
12 Mr. Simmington's proposal is that if the given defendant -- if
13 the prosecutor's proven beyond a reasonable doubt that before
14 or during the commission of the offense, the defendant gave his
15 encouragements or assistance and so I think that accurately
16 captures that they can aid and abet during the commission of
17 the offense. And so the more concise answer I suspect
18 Mr. Simmington won't agree to is that it doesn't require any
19 prior knowledge.

20 MR. SIMMINGTON: If I may, your Honor?

21 THE COURT: Yes.

22 MR. SIMMINGTON: I agree with the Court in looking at
23 the instruction it doesn't say anything at all about prior
24 knowledge. What it talks about is shared intent and I think
25 there would be no disagreement that you can form an intent on

1 the spot, but what it does talk about in subsection three of
2 4.01 is the proof the defendant may have known about the crime
3 even if he was there when it was committed is not enough for
4 you to find him guilty. I think that's as close as anything in
5 the instruction that's talking about knowledge and you can have
6 prior knowledge and you can be there while the crime is being
7 committed and still be found not guilty, so again I'm -- that's
8 why I'm hesitant about trying to fashion some kind of an
9 instruction such as Mr. Wininger and I have discussed or such
10 as the one that I proposed in the brief on the other issue, I
11 think just telling them to read this again is the best we can
12 probably do to answer their question and avoid misleading them
13 all along.

14 THE COURT: Well, I frankly am not sure I understand
15 fully what the question is asking because there isn't any
16 instruction I've given that specifically mentions prior
17 knowledge. I think we're all speculating on what they're
18 talking about, but we don't know for sure. Maybe the best
19 response to this question is to say that the Court's not sure
20 what the jury's asking and if they want to reformulate their
21 question, I'll respond to a reformulated question so we're not
22 guessing at what they're asking about. Would that be
23 acceptable?

24 MR. WININGER: It is for the government, your Honor.

25 MR. SIMMINGTON: Yes, I think it would be

1 appropriate.

2 THE COURT: All right. Moving on to 1000, it's my
3 understanding it was not admitted?

4 MR. GUREWITZ: That's correct, your Honor. I marked
5 that. I believe that that was marked as Agent Sondgeroth's --
6 Sondgeroth's handwritten notes of his interview made during the
7 interview with Mr. Norwood.

8 THE COURT: So we'll just tell them it was not
9 admitted then?

10 MR. GUREWITZ: Yes.

11 THE COURT: And they want to see Exhibit 520.

12 MR. WININGER: Your Honor, that's the video of the
13 shooting at the Boogie Down Motorcycle Club. It actually has
14 four sub-parts.

15 THE COURT: Just a minute, please.

16 (Pause)

17 THE COURT: All right. We were talking about 520,
18 Exhibit 520 and you were saying, Mr. Wininger?

19 MR. WININGER: Your Honor, that's a video of the
20 shooting at the Boogie Down Motorcycle Club. There's actually
21 five sub-sets to that Exhibit. There were two videos admitted,
22 one which has audio, one which has a four-camera view and three
23 stills from those videos which the Court admitted. Again, I
24 assume what they're talking about is watching the video of the
25 shooting, but the video at Mr. Minock's request, the video that

1 was actually admitted is several hours long. It includes all
2 of the surveillance from before and after the shooting at the
3 Boogie Down.

4 THE COURT: Well, why don't we show them what we
5 showed them here at the trial and if they want to see more in
6 here, they can tell us and if they want to see the whole thing,
7 I doubt seriously that they want to see the whole thing, but
8 why don't we just show them what we showed them at trial. Is
9 that acceptable?

10 MR. WININGER: It is for the government, your Honor.

11 MR. MINOCK: Yes.

12 THE COURT: All right. You have to get us then
13 Exhibit 366 and 367 and 520? Is that right?

14 MR. WININGER: Does the Court want us to play them
15 here with the transcripts?

16 THE COURT: Yes, I think that would make sense.

17 MR. WININGER: We are ready to do that.

18 THE COURT: You have it all ready?

19 MR. WININGER: Yes.

20 THE COURT: All right. I think they're on a break.
21 I'm just double-checking on something.

22 MR. SIMMINGTON: Your Honor, may I step into the hall
23 for a moment? I think I have a client waiting? Just to tell
24 him not to leave?

25 THE COURT: All right, but just one second.

1 (Pause)

2 THE COURT: All right. I believe then --

3 (Pause)

4 THE COURT: All right. I'm just trying to confirm
5 where the jurors are because they're on a break and I want to
6 make sure that we can comfortably move everyone who needs to be
7 moved here so I'm just awaiting word on it. What we're going
8 to do though is let Mr. Simmington go talk to his client. When
9 I get the all-clear sign, we're going to take a break from our
10 proceedings until we can get the jurors all back in the jury
11 room and so it will probably be about a 10-minute break. Then
12 when we come back, we'll bring the jury in here. We're going
13 to play them 366, 367, 520. I'll explain to them that there
14 was no admission of Exhibit 1000 or the Cureton surveillance
15 video. I'll explain to them the procedure for hearing
16 testimony. I'll tell them to go back into the jury room and
17 then send us word on if and what they want to review.
18 Mr. Gatesman?

19 MR. GATESMAN: Yes, your Honor, I'm sorry. In
20 relation to the question about the video regarding Mr. Cureton,
21 I'd suggest the Court consider this language perhaps; the
22 September 9th, 2009 video was not admitted into evidence, it
23 pertained to count 12 which has been dismissed.

24 MR. WININGER: Your Honor, I don't think there's any
25 reason to give that instruction.

1 MR. GATESMAN: Well, I think it addresses it and
2 explains any confusion. I mean, they've been told it's been
3 dismissed and now they're asking to see it and so I think it, I
4 think it accurately addresses why it's not -- why they can't
5 see it.

6 MR. WININGER: They may want to see it in terms of
7 possible drug dealing of Mr. Cureton in context of count one
8 and so to try to pigeon hole this into a count I think is
9 incorrect. I think they should simply be instructed that it's
10 not in evidence.

11 MR. GATESMAN: Well and then that brings up a good
12 point because that's completely contrary to the jury -- to the
13 government's theory. They could have argued that; they chose
14 not to.

15 THE COURT: I don't think I should be getting into
16 why something wasn't admitted. If it wasn't admitted, they
17 don't get to see it and I don't want to weigh in and give them
18 more information. I don't know in what context they wanted to
19 see this evidence. I don't know if it pertained to a mistaken
20 belief about count 12 or whether they wanted to see it in
21 relation to count one. It's not my job to go behind jury
22 questions to figure out why they're asking for certain things,
23 I'm just going to respond to their question to the extent I
24 can, so I'm just going to tell them it wasn't admitted. All
25 right, I understand we can move now so we're going to be in

1 recess for 10 minutes and we'll bring you back in a bit. Thank
2 you.

3 (Recess taken at 10:03 a.m.)

4 (Reconvened at 10:19 a.m.)

5 THE CLERK OF THE COURT: Please rise. Court is back
6 in session.

7 THE COURT: Have a seat. All right, we're all set
8 then with 366, 367 and 520 for them?

9 MR. WININGER: Your Honor, 520 is set. I'm just
10 making sure that we have the excerpts appropriately in the
11 system on the undercover recordings so if we can have just
12 another minute?

13 (Pause)

14 MR. WININGER: Your Honor, I'm sorry. We're having
15 some technical problems with one of the sessions and we're
16 trying to get the transcript back. It may take another five
17 minutes or so.

18 THE COURT: How long?

19 MR. WININGER: Another five minutes or so. We have
20 the video ready to play if the Court wants to play, bring the
21 jury in. Your Honor, the other option that we can entertain is
22 just print out a copy of the relevant transcript, hand it out,
23 play the audio and take it back once the audio is done.

24 THE COURT: Well, what is this pertaining to? 366?

25 MR. WININGER: Yes, your Honor, 366. What's been

1 identified as session five of 366.

2 (Pause)

3 MR. WININGER: Your Honor, I'm going to leave the
4 courtroom for a moment so I can go get headphones.

5 (Pause)

6 THE COURT: Do we think we have the technical issue
7 solved, Mr. Wininger?

8 MR. WININGER: Your Honor, I believe that -- the
9 technical issue is now we're trying to now isolate the right
10 portion of the transcript that was played for the jury about.
11 Ms. St. Onge is simply going to re-sync those so that they are
12 this correctly. Somehow they've become dissociated with one
13 another so we're going to try to do that now.

14 MR. SIMMINGTON: Are we on the record, your Honor?

15 THE COURT: You are now.

16 MR. SIMMINGTON: Well, I'm permitted to be on the
17 record?

18 THE COURT: Yeah, why not. I think we're trying to
19 get this technical difficulty solved.

20 MR. SIMMINGTON: Once again your Honor, I didn't
21 write down verbatim or even come close to remembering verbatim
22 what the jury's questions were on these. I thought they said
23 they just wanted to hear those Exhibits? 366, 367, they wanted
24 to hear them?

25 THE COURT: 366 and 367.

1 MR. SIMMINGTON: All right. Well, I don't know that
2 the transcripts are -- I mean, I understand why we had them
3 originally, I understand why you're going to want them now, but
4 they're not really evidence. I don't know why we need them to
5 respond to the jury's question. I'd ask the Court to so rule
6 if the government wouldn't object. And I might just add, your
7 Honor, this isn't just taking a flier. These are the
8 transcripts that have unintelligible throughout them, even in
9 the transcripts, there's -- I counted up when I filed my motion
10 one of these recordings, I don't know if it was session five or
11 26 or maybe some other one, there were something like 18 or 19
12 instances of open parens, capital U, capital I in the
13 transcript so while we agreed to play them because the case law
14 says or why we agreed to use them because the case law says
15 that unless the recordings are so unintelligible as to not make
16 any sense, it's permissible to use them, but they're not a 100
17 percent accurate because we don't know what goes in the
18 unintelligible spaces so again, I think that's part of why.
19 The jury hasn't asked to see them and unless they specifically
20 do, I don't know why we need to wait so I'd ask that the Court
21 so rule.

22 MR. WININGER: Your Honor, one full set of the
23 transcripts, that of Oldham and Gordon and there are four
24 sessions, those are ready to be played. The Boogie Down video
25 is ready to be played. The Gills Gordon undercover session,

1 one of two sessions we're missing the transcript for, that may
2 take a few minutes to find so we can play all these other
3 things and answer all the other juror questions. That final
4 portion of Exhibit 366 is going to take longer.

5 THE COURT: Well, can Ms. St. Onge do all of that
6 while we're doing all this other stuff? Can she continue her
7 syncing or whatever she needs to do while we're playing other
8 things? I wouldn't think she could.

9 MR. WININGER: I don't believe so, your Honor. I
10 think it's in the presentation software.

11 THE COURT: All right. Well, I interpret the jury
12 question regarding 366 and 367 as to present them the way they
13 were presented at trial which is to hear the recording and see
14 the transcript at the same time.

15 MR. MINOCK: Judge, if I might be heard on this?
16 Given the jurors' questions yesterday, it appears that they're
17 interested in Mr. Gills' statements and not Mr. Oldham's and
18 they just don't remember which Exhibit is which, 366 or 367. I
19 would request that you inquire of them if they want to hear all
20 of those from 366 or 367 or only the statements of Mr. Gills or
21 only the statements of Mr. Oldham.

22 MR. WININGER: I'd have no objection to further
23 inquiring, your Honor. I think Mr. Minock is correct that
24 yesterday in the question from the jury about Gills' statement
25 that LB was flooding the bricks, they had asked that that was

1 on the Gills Gordon recording and in the question my
2 recollection it said 366 slash 367 as if they couldn't recall
3 which was the Gills Gordon recording. One is Gills Gordon, one
4 is Gordon Oldham and so if the Court wants to inquire, I
5 certainly have no objection and again within each disk, within
6 each Exhibit there are multiple, separate recording sessions so
7 on 367 which is Gordon Oldham, there are four separate sessions
8 that are included on that disk and on 366 which is Gordon
9 Gills, there are two separate sessions.

10 THE COURT: All right. So there are six all
11 together?

12 MR. WININGER: Six all together.

13 THE COURT: Well, how long would those take to play?

14 MR. WININGER: 20 minutes probably total? It's my
15 recollection and I have, I have paper copies of the
16 transcripts, it's my recollection that there is one fairly
17 lengthy recording involving Mr. Oldham in which he discusses
18 the Boogie Down, the shooting at the Boogie Down where he
19 discusses Drifters and a truce and things like that and that's
20 perhaps 10 minutes on its own. The other recordings are I
21 think substantially shorter.

22 MR. MINOCK: The reason for my comment, Judge, is
23 based on the jurors' question yesterday. I think that they're
24 just not sure which of the disks is which and if they are only
25 interested for example in Mr. Gills' conversation with Gordon,

1 then there would be no reason to play Mr. Oldham's conversation
2 with Gordon.

3 THE COURT: All right. Well, why don't you describe
4 for me again these different conversations? Do you know what's
5 under 366 and what's under 367?

6 MR. WININGER: Yes, your Honor. In Exhibit 366 is a,
7 two conversation between Carvell Gordon and Leon Gills. In the
8 first conversation which is the conversation we're having
9 trouble loading, your Honor, there is a discussion of what
10 happened with respect to the Malachi Wilson shooting. In the
11 discussion Mr. Gills discusses Malachi having been shot,
12 indicates that he had --

13 THE COURT: Well, time out. 366 are Gills Gordon
14 conversations and 367 is Gills Oldham, right?

15 MR. WININGER: Gordon Oldham, your Honor. Carvell
16 Gordon was the cooperating witness who wore the recording
17 device.

18 THE COURT: All right. I'm just going to send them a
19 note and ask them if they want all of these or just some of
20 these.

21 MR. WININGER: Okay.

22 (Pause)

23 THE COURT: All right. Are we ready with everything
24 else then?

25 MR. WININGER: Yes, your Honor.

1 THE COURT: All right. We're going to bring the jury
2 in.

3 (Pause)

4 THE COURT: All right. Well, in response to my
5 question that I sent in whether they want to hear all of the
6 366 and 367 or only some of them, some of the conversations,
7 they said we'd like to hear both 367 and 366, so I guess they
8 want to hear everything. All right, we're just going to have
9 to just play whatever we can play. If you don't have the
10 transcript, we're just going to go ahead. We can't wait all
11 day to solve all technical difficulties. Let's bring the jury
12 in.

13 (Jury present at 10:49 a.m.)

14 THE COURT: All right. Have a seat. Good morning,
15 ladies and gentlemen.

16 THE JURY: Good morning.

17 THE COURT: I apologize for our delay. We've had
18 some technical difficulties with some of the equipment or
19 programs. I'm not sure exactly. I'm not a technician so I
20 have no idea why it's not in exactly the form we'd like it to
21 be, but that's the real world. Welcome to the real world. So,
22 let me respond to your questions.

23 First, you asked to see the surveillance video
24 regarding Mr. Cureton from September 9, 2009. That video was
25 not admitted into evidence. You also asked to see Exhibit or

1 you asked whether Exhibit 1000 was admitted into evidence. It
2 was not.

3 You asked can we read transcripts of the witness
4 testimonies, specifically Charles Orr? Let me explain to you
5 what our procedure is regarding witness testimony. What we can
6 do if you want to review the testimony of a witness is have the
7 audio regarding of that testimony brought into the jury room
8 and we'll play the testimony for you. We do have to abide by
9 certain ground rules so the ground rules are that we have to
10 play the entirety of the testimony, that means all of the
11 direct and cross-examination and any redirect and
12 recross-examination so you have to hear the entirety of the
13 witness' testimony. I'm not sure if your question, it was
14 asking only for the testimony of Mr. Orr or whether you want
15 today here other witnesses because of the way you framed the
16 question so when you go back to the jury room, I want you to
17 consult with each other and then decide if you want us to play
18 Mr. Orr's testimony or some other witness' testimony, just send
19 me out a note and we will then bring in the equipment.

20 Another ground rule I want you to understand is we'll
21 have to have someone obviously from outside the jury operate
22 the equipment and that means you cannot deliberate while the
23 audio is being played for you so you just have to sit there and
24 list. Don't talk amongst yourselves about anything and wait
25 until the staff person leaves the jury room with the equipment

1 and then you should resume your deliberations, but no
2 deliberations while someone from my staff is inside the jury
3 room. Again, you will have to listen to the entirety of the
4 testimony so again you'll let me know if you want to hear
5 Mr. Orr's testimony or any other witness' testimony and we'll
6 arrange for that to happen.

7 You also asked a question how long must a person know
8 about a crime before it occurs to be considered prior
9 knowledge? I'm not entirely sure of exactly what you are
10 asking about so I'm going to ask you to reformulate that
11 question if you want me to answer a question along those lines
12 because as you framed it, I'm not exactly sure what you're
13 asking me and I don't want to try to guess at what you're
14 asking me so if you want to reframe your question, I'll then
15 review it and come back to you with a response.

16 Now you asked to look at some Exhibits or hear some
17 Exhibits; specifically 520, 366 and 367. I think most of those
18 are in technically good shape to be played. I believe we have
19 a problem with one of the Exhibits or have we fixed that at
20 this point?

21 MR. WININGER: We have a problem with one session on
22 one Exhibit and Ms. St. Onge is working very quickly to get
23 that done and I think she'll be done with that in just a
24 minute, your Honor.

25 THE COURT: All right. So shall we just wait a

1 minute then to see --

2 MR. WININGER: If the Court would and the jury would
3 indulge us.

4 THE COURT: Okay. I guess we cannot play what's good
5 and still fix what's not yet good, so we'll have to wait just a
6 little bit. Not that I'm stalling for time, but I do want to
7 explain to you why things do take a little bit longer than
8 perhaps we all wish they would take. I know when a jury asks a
9 question, you're obviously anxious to get the judge's answer
10 and I appreciate that and I can imagine sometimes that may hold
11 up your deliberations because maybe you're waiting to hear my
12 answer before you move on and so I know that can be a cause for
13 some consternation perhaps or at least shall we say
14 disappointment that the answer is not forthcoming. First, I
15 have to review the question and then I do have to talk with the
16 attorneys about it and sometimes that can take some time
17 because sometimes the attorneys and I will have to have
18 conversation and it's not always apparent exactly what my
19 answer should be to your question and I want you to understand
20 that this case does have priority, it's not like I'm making you
21 wait while I take care of other matters. It's something that
22 we do try to address as promptly as we can, but it just
23 sometimes takes more time than I'd like, but we do try to
24 process your question as soon as we can and get back to you
25 with an answer as soon as we can. Do you have a question?

1 JUROR # 5: Just a very generic question. Can we try
2 to rephrase one of the questions that we are asked to rephrase
3 right now while we wait for the?

4 THE COURT: I'd like you to go in the jury room and
5 talk amongst yourselves because I really don't want you to be
6 doing anything outside the jury room together as a group. The
7 only thing we should be doing out here is watching something on
8 the screen or taking care of displaying some evidence for you,
9 but I don't want you to try to do any of your jury work out
10 here. Mr. Wininger?

11 MR. WININGER: I believe we're ready to go.

12 THE COURT: All right, that's good news. Okay. What
13 is it we're going to play for the jury first?

14 MR. WININGER: We're going to play the Boogie Down
15 which is Exhibit 520.

16 THE COURT: All right, 520.

17 (Video played for the jury in open court)

18 MR. WININGER: Your Honor, we're next going to play
19 Exhibit 366 which were identified as undercover recordings
20 between Carvell Gordon and Leon Gills. There are two separate
21 sessions or conversations that were identified. They are
22 session five and session 26 and we're going to start with
23 session five now.

24 (Audio played for the jury in open court)

25 MR. WININGER: The next session is session 26, your

1 Honor.

2 (Audio played for the jury in open court)

3 MR. WININGER: Next would be Exhibit 367 your Honor
4 which was identified as the recording between Carvell Gordon
5 and Jonathan Oldham and it starts with session six.

6 (Audio played for the jury in open court)

7 MR. WININGER: The next session is session 13, your
8 Honor.

9 (Audio played for the jury in open court)

10 MR. WININGER: Next session, your Honor, is session
11 18.

12 (Audio played for the jury in open court)

13 MR. WININGER: And the last session, your Honor, is
14 session 22.

15 (Audio played for the jury in open court)

16 THE COURT: All right. That's everything I believe?

17 MR. WININGER: That is, your Honor.

18 THE COURT: All right. Then ladies and gentlemen,
19 you can return to the jury room and resume your deliberations.
20 Thank you.

21 (Jury excused at 11:18 a.m.)

22 THE COURT: All right. The jury's left the
23 courtroom. You may be seated. Is there anything else we need
24 to take up while we're all together?

25 MR. WININGER: No, your Honor.

1 THE COURT: Okay. We'll be in recess. Thank you.

2 (Recess taken at 11:19 a.m.)

3 (Reconvened at 12:23 p.m.)

4 THE CLERK OF THE COURT: Please rise. Court is back
5 in session. You may be seated.

6 THE COURT: All right. We have a number of questions
7 from the jury. One question says please define brandishing a
8 firearm. Brandishing is referenced in Instruction 24 on page
9 62, but I don't believe it is defined. Is that defined in the
10 statute? Mr. Wininger, are you checking that out?

11 MR. WININGER: I am, your Honor.

12 THE COURT: I'm advised that there is no definition
13 in the statute. I don't know if that's the final word, but --

14 MR. SIMMINGTON: I'm sorry, that there is or there
15 isn't?

16 THE COURT: It's not according to one source.

17 MR. WININGER: Your Honor, I'm just attempting to
18 review cases to see if there's some definition provided.

19 THE COURT: I'm told cases equate brandishment with
20 displaying. Would everyone be comfortable if we gave them a
21 response that said brandishing means displaying?

22 MR. WININGER: Yes, your Honor.

23 THE COURT: Would the defense be comfortable with
24 that response?

25 MR. MINOCK: Not yet, Judge, just because I'm looking

1 at some of the cases on the definition and --

2 THE COURT: Okay.

3 MR. MINOCK: -- they appear to distinguish brandish,
4 display and possess.

5 (Pause)

6 MR. WININGER: Your Honor, actually if I'm reading
7 the correct place, brandish is defined in the statute and I'm
8 looking at 920 -- 18 United States Code --

9 THE COURT: I'm sorry, say that again?

10 MR. WININGER: Sorry, your Honor. 18 United States
11 Code -- trying to do this on my computer, your Honor. (C)(4) I
12 believe, your Honor? For purposes of this subsection, the term
13 brandish means with respect to a firearm to display all or part
14 of the firearm or otherwise make the presence of the firearm
15 known to another person in order to intimidate that person
16 regardless of whether the firearm is directly visible to that
17 person.

18 THE COURT: Give me the full cite. 18 U.S.C. what?

19 MR. WININGER: 924 I believe (c)(4), your Honor. I
20 don't have a code book and so I'm looking at it on a very small
21 screen. Does anybody have a code book?

22 MR. MINOCK: I've got it. It was (c) --

23 MR. WININGER: (D)(4) I believe?

24 MR. MINOCK: Yes. There is a statutory definition.

25 THE COURT: All right. Does everyone agree that's

1 the definition to be used?

2 MR. GUREWITZ: Yes.

3 MR. SIMMINGTON: Yes.

4 MR. ROBERTS: (Nodding)

5 THE COURT: So this definition says to display all or
6 part of a firearm or otherwise make the presence of the firearm
7 known to another person in order to intimidate that person
8 regardless of whether the firearm is directly visible to that
9 person. That's the definition. Shall I put that in a response
10 then to the jury?

11 MR. MINOCK: Yes.

12 MR. WININGER: Yes, your Honor.

13 THE COURT: Okay. That's how we'll answer that one.
14 There's another question; are we supposed to answer jury
15 interrogatory number three about Dartanian Edwards even though
16 we never voted on a charge related to this question? Is the
17 answer to that yes?

18 MR. SIMMINGTON: Your Honor, I'm interpreting that to
19 mean that they haven't voted on count one and it seems to me --

20 MR. GUREWITZ: No.

21 MR. SIMMINGTON: No?

22 MR. GUREWITZ: No.

23 MR. SIMMINGTON: I thought that was under count one.

24 THE COURT: It's an interrogatory that's related to
25 count one.

1 MR. SIMMINGTON: Right, so --

2 THE COURT: That's the only one that deals with that
3 interrogatory three and they're asking, I guess because there's
4 no charge that references Dartanian Edwards, they want to know
5 whether they're still supposed to be voting on -- pardon me,
6 answering jury interrogatory three.

7 MR. WININGER: I believe the answer is yes, your
8 Honor.

9 MR. SIMMINGTON: If that's the question, the answer
10 is yes. I interpreted, I don't think they're supposed to get
11 to that interrogatory unless they vote on one. Maybe I've
12 forgotten what the exact wording says.

13 MR. WININGER: The answer is yes, your Honor. This
14 has nothing to do with the underlying vote on one. I think the
15 Court's right, this relates to a specific count against
16 Dartanian Edwards.

17 MR. SIMMINGTON: I'll look at the form. The answer
18 may well be yes. I'm not convinced they're supposed to be
19 going to that paragraph if they haven't voted on one. Let me
20 see if I can find it.

21 THE COURT: Are you still thinking about that,
22 Mr. Simmington?

23 MR. SIMMINGTON: If I could, yes, please. I'll try
24 to be quick about it.

25 THE COURT: Mr. Simmington, are you looking for the

1 verdict form?

2 MR. SIMMINGTON: I am, your Honor. Yes.

3 THE COURT: You want to see my copy of it?

4 MR. SIMMINGTON: That would be great. I've stored it
5 in a place that I can't locate. Thank you very much.

6 THE COURT: All right. So Mr. Simmington, do you
7 have any objection to answering this yes?

8 MR. SIMMINGTON: I do, your Honor, because this
9 verdict form says if you find a defendant guilty of count one,
10 then answer the following interrogatories and from the jury's
11 question unless I misinterpreted it, they haven't done the
12 predicate to going on to that particular interrogatory.

13 MR. WININGER: I don't know what would lead to that
14 conclusion, your Honor.

15 MR. SIMMINGTON: Well, I must have misunderstood the
16 question.

17 THE COURT: Well, let me read it again just so we're
18 clear. The question reads as follows: Are we supposed to
19 answer jury interrogatory number three about Dartanian Edwards
20 even though we never voted on a charge related to this
21 question?

22 MR. WININGER: And so they're ask -- your Honor, I
23 think the answer is yes. They're asking based on whether or
24 not there's a separate VCAR count. There's no separate VCAR
25 count as there were with all the other interrogatories and so

1 they're wondering if they're supposed to vote on this
2 irrespective of that and the answer is yes. This doesn't
3 relate to the VCAR count.

4 MR. SIMMINGTON: I don't disagree with that logic and
5 that may be the natural explanation for what they've said, but
6 what they said was we haven't voted on a charge related to this
7 and related in count one would be related to this. My
8 suspicion and until they tell us, I don't know if we could ask
9 them -- we can't ask them what they've done with count one, but
10 it seems to me that this is an overt act which if it wasn't
11 related to count one, it wouldn't appear in this section of the
12 verdict form and it wouldn't appear in that section of the
13 indictment. It is related to count one and according to their
14 question, they haven't voted on count one so they can't -- it's
15 an if then and the if hasn't been satisfied.

16 MR. WININGER: Your Honor, I don't think -- number
17 one, I don't think that's the question, but I think this can be
18 answered easily. They need to answer all the interrogatories.

19 THE COURT: All right. Does anybody object if we
20 just send back an answer that says you must answer all the
21 interrogatories?

22 MR. SIMMINGTON: To me, that doesn't cure the
23 problem, so I have my objection on the record. That's all I
24 can say.

25 THE COURT: Well --

1 MR. SIMMINGTON: It doesn't address the issue of
2 whether this is an if-then situation where they're not supposed
3 to get to the then until they've satisfied the if which is
4 voting on --

5 THE COURT: What if we answered it this way. What if
6 we answered it with reference to the verdict form which says if
7 you find a defendant guilty with respect to count one, you
8 should answer all the interrogatories that pertain to that
9 defendant?

10 MR. ROBERTS: Sounds good to me.

11 MR. SIMMINGTON: I would agree with that, your Honor.
12 I think that addresses my issue and I would agree with that.

13 THE COURT: Is that okay with the government?

14 MR. WININGER: It is, your Honor.

15 THE COURT: Okay. In other words we're just going to
16 restate the predicate that precedes all of these
17 interrogatories.

18 MR. SIMMINGTON: Thank you, your Honor.

19 THE COURT: All right. Now we have one other
20 question, I should say it's two questions, but it's on the same
21 sheet of paper, they appear to be related. One is if someone
22 tells me they are going to commit a crime seconds before they
23 do, do I have prior knowledge of that crime? And the second
24 question on the same piece of paper reads by law, what length
25 of time is considered prior knowledge for aiding and abetting?

1 MR. WININGER: Your Honor, I would propose what
2 Mr. Simmington and I had discussed earlier. Obviously they're
3 hung up on this issue and I'm not sure from where it comes, but
4 they're hung up on this issue of prior knowledge and I can't
5 recall if there was argument to the jury about that.

6 I think the Court is correct and what Mr. Simmington
7 and I had discussed accurately captures that, that there's no
8 requirement of prior knowledge, that one can learn of the
9 commission of the crime during the commission of the crime and
10 abet the crime in that fashion and I think the jury, that needs
11 to be explained to the jury because they have, I think, an
12 inaccurate view of the law of aiding and abetting.

13 THE COURT: Well, what if we explain to the jury that
14 what is required is that the help and encouragement must occur
15 and the intent to help or encourage must be formed before
16 completion of the crime? Wouldn't that answer their question?

17 MR. SIMMINGTON: It would, that it is required that,
18 umm, that there was help and encouragement and that the intent
19 was to help and encourage and it has to occur before the
20 commission or before the crime is complete.

21 THE COURT: All right. I've drafted a proposed
22 response which I'll circulate to you and let me see if this
23 captures the thought.

24 MR. WININGER: Your Honor, the government has no
25 objection to the instruction the Court's drafted.

1 MR. SIMMINGTON: And neither does Mr. Gills.

2 THE COURT: All right. So, is that the view of all
3 the defendants then? That's all right? Yes?

4 MR. GUREWITZ: Yes.

5 THE COURT: All right. Then that's what we'll send
6 back to them. That completes the jury questions. I'm just
7 trying to find out if we can now take our break.

8 MR. SABBOTA: Your Honor, can I again just remind the
9 Court I'm going to leave about 2:30 to go to Judge Hood's
10 Court? My client has no objection to Mr. Gurewitz standing in.

11 DEFENDANT JATIMOTHY WALKER: No, I do not.

12 THE COURT: Okay, thank you. Okay. I'm told we can
13 now take our break so we're in recess then. Thank you.

14 (Recess taken at 12:46 p.m.)

15 (Reconvened at 1:53 p.m.)

16 THE CLERK OF THE COURT: Please rise. Court is back
17 in session. You may be seated.

18 THE COURT: We've received a note from the jury that
19 they've reached a verdict so we'll bring the jury in to hear
20 their verdict.

21 (Jury present at 1:54 p.m.)

22 THE COURT: All right. Have a seat. Ladies and
23 gentlemen, we've received word that you've reached a verdict.
24 I'm going to ask your foreperson to stand and read the verdict.
25 I'll ask the foreperson to recite for each count the name of

1 the defendant and the verdict as to each defendant under that
2 count, whether it's not guilty or guilty and then if there are
3 any questions for any count, the foreperson should read the
4 question number and the name of the defendant and the answer
5 yes or no for each defendant for every question. Who's the
6 foreperson? All right, sir.

7 JUROR # 11: Go ahead?

8 THE COURT: Go ahead.

9 JUROR # 11: Count one, racketeering RICO conspiracy,
10 as to count one of the amended first-superseding indictment, we
11 the Jury by unanimous verdict find Alexandra L. Norwood guilty,
12 Jatimothy -- or should I go to the --

13 THE COURT: Just go in order under each count.

14 JUROR # 11: Okay. Jatimothy E. Walker, guilty.
15 Jonathan E. Walker, guilty. Johnathan L. Oldham, guilty. Leon
16 Gills, guilty. Jamil Cureton, not guilty.

17 With respect to count one, with regard to the murder
18 of Jonathan Parker in count one of the indictment, do you find
19 that Alexandra L. Norwood committed or caused to be committed
20 or aided and abetted in the commission of the murder of
21 Jonathan Parker? That is, did Alexandra L. Norwood with intent
22 to kill, do great bodily harm or to act in wanton and willful
23 disregard with the likelihood that the natural tendency of said
24 act would cause injury or great bodily harm, kill or murder
25 Jonathan Parker, said act committed without pre-meditation and

1 deliberation in violation of Michigan law? Yes.

2 With regard to the murder of Marion Hardy in count
3 one of the indictment, do you find that Jatimothy E. Walker or
4 Jonathan E. Walker committed or caused to be committed or aided
5 and abetted in the commission of the murder of Marion Hardy?
6 That is, did Jatimothy E. Walker or Jonathan E. Walker with
7 intent to kill, to do great bodily harm or to act in wanton and
8 willful disregard of the likelihood that the natural tendency
9 of said act would cause death or great bodily harm, kill and
10 murder Marion Hardy, said act committed without premeditation
11 and deliberation in violation of Michigan law? Jatimothy E.
12 Walker? Yes. Jonathan E. Walker? Yes.

13 With regard to the attempted murder of Dartanian
14 Edwards in count one of the indictment, do you find that
15 Jonathan E. Walker or Leon Gills committed or caused to be
16 committed or aided and abetted in the commission of the
17 attempted murder of Dartanian Edwards? That is, did Jonathan
18 E. Walker or Leon Gills commit an assault with the intent to
19 commit the crime of murder of Dartanian Edwards in violation of
20 Michigan law? Jonathan E. Walker? Yes. Leon Gills? Yes.

21 With regard to the attempted murder of Maranda
22 Barnes, Rashema Doby, D'Angelo McEwen and Rodney Harden in
23 count one of the indictment, do you find that Leon Gills
24 committed or caused to be committed or aid and abetted in the
25 commission of the attempted murder of Maranda Barnes, Rashema

1 Doby, D'Angelo McEwen and Rodney Harden? That is, did Leon
2 Gills commit an assault with the intent to commit the crime of
3 murder with Maranda Barnes, Rashima Doby, D'Angelo McEwen or
4 Rodney Harden in violation of Michigan law? Yes.

5 With regard to the murder of Malachi Wilson in count
6 one of the indictment, do you find that Johnathan L. Oldham
7 committed and caused to be committed or aided and abetted in
8 the commission of the murder of Malachi Wilson? That is, did
9 Johnathan L. Oldham with intent to kill, to do great bodily
10 harm or to act in wanton and willful disregard of the
11 likelihood that the natural tendency of said act would cause
12 death or great bodily harm, kill or murder Jonathan Parker,
13 said act committed without premeditation and deliberation in
14 violation of Michigan law? Yes.

15 With regard to the attempted murder of Charles Orr in
16 count one of the indictment, do you find that Leon Gills
17 committed or caused to be committed or aided and abetted in the
18 commission of the attempted murder of Charles Orr? That is,
19 did Leon Gills commit an assault with the intent to commit the
20 crime of murder of Charles Orr in violation of Michigan law?
21 Yes.

22 With regard to the attempted murder of Alonzo Golfin
23 in count one of the indictment, do you find that Jonathan E.
24 Walker committed or caused to be committed or aided and abetted
25 in the commission of the attempted murder of Alonzo Golfin?

1 That is, did Jonathan E. Walker commit an assault with the
2 intent to commit the crime of murder of Alonzo Golfin in
3 violation of Michigan law? Yes.

4 With regard to the attempted murder of Efrem Anderson
5 in count one of the indictment, do you find that Johnathan L.
6 Oldham committed or caused to be committed or aided and abetted
7 in commission of the attempted murder of Efrem Anderson? That
8 is, did Johnathan L. Oldham commit an assault with the intent
9 to commit the crime of murder of Efrem Anderson in violation of
10 Michigan law? Yes.

11 Count two. As to count two of the amended
12 first-superseding indictment, we the Jury by unanimous verdict
13 find Alexandra L. Norwood guilty.

14 Count three. As to count three of the amended
15 first-superseding indictment, we the Jury by unanimous verdict
16 find Jatimothy E. Walker guilty, Jonathan E. Walker, guilty.

17 Count eight. As to count eight of the amended
18 first-superseding indictment, we the Jury by unanimous verdict
19 find Leon Gills guilty.

20 Count nine. As to count nine of the amended
21 first-superseding indictment, we the Jury find by unanimous
22 verdict Leon Gills guilty. If you find the defendant guilty,
23 please answer the following: Did the defendant you are
24 considering brandish the firearm when committing the offense?
25 Yes. Did the defendant you are considering discharge the

1 firearm when committing this offense? Yes.

2 Count 10. As to count 10 of the amended
3 first-superseding indictment, we the Jury by unanimous verdict
4 find Johnathan L. Oldham guilty.

5 Count 11. As to count 11 of the amended
6 first-superseding indictment, we the Jury by unanimous verdict
7 find Johnathan L. Oldham guilty. If you find the defendant
8 guilty, please answer the following: Did the defendant you are
9 considering brandish the firearm when committing this offense?
10 Yes. Did the defendant you are considering discharge the
11 firearm when committing this offense? Yes.

12 Count 13. As to count 13 of the amended
13 first-superseding indictment, we the Jury by unanimous verdict
14 find Johnathan L. Oldham guilty.

15 Count 14. As to count 14 of the an amended
16 first-superceding indictment, we the Jury by unanimous verdict
17 find Johnathan L. Oldham guilty.

18 Count 15. As to count 15 of the amended
19 first-superseding indictment, we the Jury by unanimous verdict
20 find Johnathan L. Oldham guilty.

21 Count 19. As to count 19 of the amended
22 first-superseding indictment, we the Jury by unanimous verdict
23 find Johnathan L. Oldham guilty.

24 Count 21. As to count 21 of the amended
25 first-superseding indictment, we the Jury by unanimous verdict

1 find Johnathan L. Oldham guilty.

2 Count 22. As to count 22 of the amended
3 first-superseding indictment, we the Jury by unanimous verdict
4 find Johnathan L. Oldham guilty.

5 Count 26. As to count 26 of the amended
6 first-superseding indictment, we the Jury by unanimous verdict
7 find Johnathan L. Oldham guilty.

8 Count 27. As to count 27 of the amended
9 first-superseding indictment, we the Jury by unanimous verdict
10 find Johnathan L. Oldham guilty.

11 Count 33. As to count 33 of the amended
12 first-superseding indictment, we the Jury by unanimous verdict
13 find Johnathan L. Oldham guilty.

14 Count 35. As to count 35 of the amended
15 first-superseding indictment, we the Jury by unanimous verdict,
16 find Leon Gills guilty.

17 Count 36. As to count 36 of the amended
18 first-superseding indictment, we the Jury by unanimous verdict
19 find Leon Gills -- I think this is a typo in here. What is --
20 oh, I'm sorry. No. As to count 36 of the amended
21 first-superseding indictment, we the Jury by unanimous verdict
22 find Leon Gills not guilty.

23 Count 37. As to count 37 of the amended
24 first-superseding indictment, we the Jury by unanimous verdict,
25 find Jonathan E. Walker guilty.

1 Count 38. As to count 38 of the amended
2 first-superseding indictment, we the Jury, by unanimous
3 verdict, find Jonathan E. Walker guilty. If you find the
4 defendant guilty, please answer the following: Did the
5 defendant you are considering brandish the firearm when
6 committing this offense? No. Did the defendant you are
7 considering discharge the firearm when committing this offense?
8 Yes.

9 Count 39. As to count 39 of the amended
10 first-superseding indictment, we the Jury by unanimous verdict
11 find Johnathan L. Oldham guilty.

12 Count 40. As to count 40 of the amended
13 first-superseding indictment, we the Jury by unanimous verdict
14 find Johnathan L. Oldham guilty. If you find the defendant
15 please answer the following: Did the defendant you are
16 considering brandish the firearm when committing this offense?
17 No. Did the defendant you're considering discharge the firearm
18 when committing this offense? Yes.

19 THE CLERK OF THE COURT: Ladies and Gentlemen of the
20 Jury, please rise. Please raise your right hands. Do you
21 solemnly swear or affirm that the verdict read by your
22 foreperson is your verdict? If so, state I do.

23 THE JURY: I do.

24 THE COURT: All right, thank you very much. Please
25 be seated. Is there anything any attorney wants me to do

1 before I discharge this jury?

2 MR. WININGER: Nothing on behalf of the government.

3 MR. GUREWITZ: Your Honor, we would request that
4 there also be an individual polling of the jury.

5 THE COURT: Okay. We'll poll the individual jurors.

6 THE CLERK OF THE COURT: If you could all please rise
7 once again. Juror in seat number one, was that and is that
8 your verdict?

9 JUROR # 1: Yes.

10 THE CLERK OF THE COURT: Juror in seat number three,
11 was that and is that your verdict?

12 JUROR # 3: Yes.

13 THE CLERK OF THE COURT: Juror in seat number four,
14 was that and is that your verdict?

15 JUROR # 4: Yes.

16 THE CLERK OF THE COURT: Juror in seat number five,
17 was that and is that your verdict?

18 JUROR # 5: Yes.

19 THE CLERK OF THE COURT: Juror in seat number six,
20 was that and is that your verdict?

21 JUROR # 6: Yes.

22 THE CLERK OF THE COURT: Juror in seat number eight,
23 was that and is that your verdict?

24 JUROR # 8: Yes.

25 THE CLERK OF THE COURT: Juror in seat number 10, was

1 that and is that your verdict?

2 JUROR # 10: Yes.

3 THE CLERK OF THE COURT: Juror in seat number 11, was
4 that and is that your verdict?

5 JUROR # 11: Yes.

6 THE CLERK OF THE COURT: Juror in seat number 12, was
7 that and is that your verdict?

8 JUROR # 12: Yes.

9 THE CLERK OF THE COURT: Juror in seat number 13, was
10 that and is that your verdict?

11 JUROR # 13: Yes.

12 THE CLERK OF THE COURT: Juror in seat number 14, was
13 that and is that your verdict?

14 JUROR # 14: Yes.

15 THE CLERK OF THE COURT: Juror in seat number 15, was
16 that and is that your verdict?

17 JUROR # 15: Yes.

18 THE COURT: All right, thank you. Have a seat.

19 Anything else before I discharge this jury?

20 MR. GUREWITZ: No, your Honor.

21 MR. WININGER: No, your Honor. Thank you.

22 THE COURT: All right. Ladies and gentlemen, I'm
23 going to discharge you at this time with the thanks of the
24 Court. I know this has been a very long trial and I want to
25 publicly thank you for your diligent service and I'm going to

1 come back to the jury room in just a minute to thank you
2 personally. Thank you very much.

3 THE CLERK OF THE COURT: All rise for the jury.

4 (Jury dismissed at 2:10 p.m.)

5 THE COURT: You may be seated. The jury's left the
6 courtroom. I'm going order that a presentence investigation
7 report be prepared. Sentencing date that I have available is
8 November 18, that will be at 9:30. Is there anything else at
9 this point?

10 MR. GUREWITZ: Yes, your Honor. Could we request on
11 behalf of the defense at this time on the record an extension
12 of time with which to file post-trial motions of Rule 29 and
13 Rule 33, an additional two weeks?

14 THE COURT: Okay. When do you want them filed by?

15 MR. GUREWITZ: There's some dissent here.
16 Mr. Roberts is asking for four weeks.

17 THE COURT: Tell me the date you want. Are you
18 saying four weeks from today?

19 MR. GUREWITZ: No. That would be six weeks from
20 today, right?

21 THE COURT: You want it six weeks from today?

22 MR. GUREWITZ: Yes.

23 THE COURT: September 2nd which I believe is Labor
24 Day. September 3rd?

25 MR. GUREWITZ: September 3rd.

1 THE COURT: Is that good for everybody?

2 MR. ROBERTS: Yes.

3 THE COURT: All right. That will be the due date. I
4 have taken all the pending Rule 29 motions, I've reserved
5 ruling on those so whatever post-trial motions you want to
6 file, you'll file them by September 3rd then?

7 MR. ROBERTS: Yes, your Honor.

8 THE COURT: Okay. Is there anything else?

9 MR. GATESMAN: On behalf of Mr. Cureton, I'd ask the
10 Court to discharge his bond at this point.

11 THE COURT: All right. Is there any objection to
12 that?

13 MR. WININGER: No, your Honor.

14 THE COURT: Okay, that will be granted. Anything
15 else? All the other detention orders remain in effect then and
16 is there anything else at this point?

17 MR. WININGER: No, your Honor.

18 THE COURT: All right.

19 MR. GUREWITZ: Can we just inquire of the procedure
20 then with regard to the probation department? Will they be --
21 will the probation department be notified automatically and
22 contact us to schedule an appointment? The defendants want to
23 be present when they take place.

24 THE COURT: Yes, they will notify you. Anything
25 else?

1 MR. WININGER: No, your Honor.

2 THE COURT: I want to thank all the attorneys for all
3 their diligent work throughout the case. I know it's been a
4 very long process and I appreciate everyone's diligent efforts.
5 We are adjourned.

6 MR. WININGER: Thank you, your Honor.

7 (Trial concluded at 2:14 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court Reporter, do hereby certify that the foregoing pages comprise a true and accurate transcript of the proceedings taken by me in this matter on Tuesday, July 22nd, 2014.

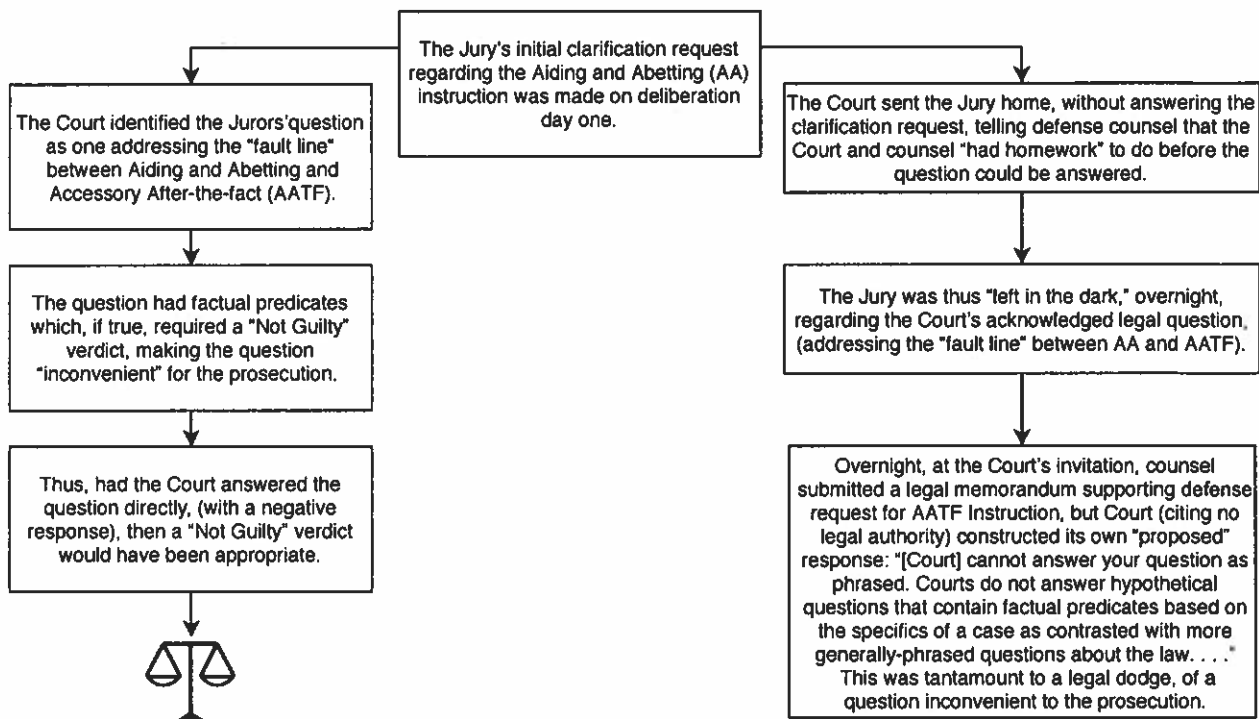
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Date

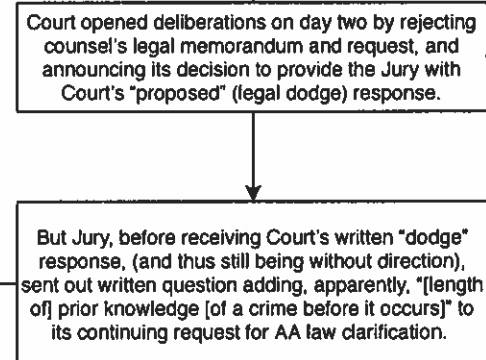
/s/ David B. Yarbrough

David B. Yarbrough,
(CSR, RPR, FCRR, RMR)
231 W. Lafayette Blvd.
Detroit, MI 48226

DAY ONE



DAY TWO



This written question evidences that "Day One dodge," of Jury's "Day One AA" question, began the process of "improperly guid[ing] the jury in such a substantial way as to violate due process;" the dodge, thus, was not harmless error.

Prosecution recognized question as further plea for help with AA issue, and stated *agreement* with defense request to instruct Jury that "[an accused] would need to know about [the crime] before or learn about it during the commission of the crime and encourage or otherwise assist the commission of the crime and the after-the-fact knowledge isn't sufficient," but Court then claimed ignorance regarding subject matter of "prior knowledge" question, and decided to instruct jury that "the Court's not sure what the jury's asking and if they want to reformulate their question, I'll respond to a reformulated question."

The Court, having first told the Jury that its AA question was improper, ("courts do not answer hypothetical questions"), thus continued the dodge, telling Jury its supplemental AA question was not understandable, and would need to be reformulated before it might be answered.

Court's combined response, in essence, represented admonition to Jury: if you are considering factual findings that would lead to a verdict of not guilty, don't ask the Court legal questions about the law that should be applied to those facts.

Court's serial dodges/"responses" to Jury's AA questions had the effect of guiding the jury away from consideration of whether a defendant could be convicted of aiding and abetting a crime with respect to with which he had *no* knowledge "before it was [did]," (answer "not guilty"), to consideration of the degree of "prior knowledge" that might be considered sufficient to find a defendant "guilty" of aiding in abetting.

So "guided," and undaunted by the Court's dodges, Jury "reformulated" question by asking two, both of which continued to address the question of "what length of time is considered prior knowledge for aiding and abetting?"

Court proposed to instruct, and then instructed, the Jury by stating "what is required is that the help and encouragement must occur and the intent to help or encourage must be formed before completion of the crime," thereby *reframing* Jury's original AA question – the one it "could not answer" – to whether someone who *did* have knowledge of the crime before it was completed, (so that he could intentionally help and encourage the crime), could be convicted of aiding and abetting.

Thus initially denied and admonished, and later "guided," the Jury returned a verdict of guilty.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

Case No. 12-20287

D-1 ALEXANDRA L. NORWOOD,
D-2 JATIMOTHY E. WALKER,
D-3 JONATHAN E. WALKER,
D-4 JOHNATHAN L. OLDHAM,
D-8 LEON GILLS,

Defendants.

SENTENCING HEARINGS, ET AL

BEFORE THE HONORABLE MARK A. GOLDSMITH

Flint, Michigan, Tuesday, May 19th, 2015.

APPEARANCES:

FOR THE PLAINTIFF: ANTHONY P. VANCE
CRAIG F. WININGER
U.S. DEPARTMENT OF JUSTICE
600 Church Street, Room 210
Flint, MI 48502

FOR ALEXANDRA NORWOOD: HAROLD Z. GUREWITZ
333 W. Fort Street
Suite 1400
Detroit, MI 48226

1 THE COURT: All right. The defendant is remanded to
2 custody.

3 (Recess taken at 11:55 a.m.)

4 (Reconvened at 12:12 p.m.)

5 THE CLERK OF THE COURT: Please rise. Court is back
6 in session. You may be seated.

7 THE COURT: All right. We are turning our attention
8 to sentencing for defendant Leon Gills who's in the courtroom
9 at this time with his attorney. Are we ready to proceed?

10 MR. VANCE: Yes, your Honor.

11 MR. SIMMINGTON: We are, your Honor.

12 THE COURT: All right. I'll ask the attorneys if
13 they've reviewed the presentence investigation report?

14 MR. VANCE: Yes, your Honor.

15 MR. SIMMINGTON: I have, your Honor.

16 THE COURT: And Mr. Simmington, have you gone over it
17 with your client?

18 MR. SIMMINGTON: Multiple times, yes, sir.

19 THE COURT: Other than the objections that I've dealt
20 with by way of an opinion that I issued yesterday, are there
21 any other corrections, additions or deletions for the report?

22 MR. VANCE: None for the government, your Honor.

23 MR. SIMMINGTON: I know of none, your Honor. Thank
24 you.

25 THE COURT: All right. The Court then adopts the

1 report as its findings in this matter. There was one
2 correction that I did want to bring to your attention and that
3 has to do with paragraph one. I mentioned earlier in our group
4 session that I thought paragraph one needed to be modified. I
5 have since been advised that probation views the phrase
6 continuing to May 2, 2012 with regard to the conspiracy as a
7 characterization of the indictment so I'd propose then to leave
8 that language in place, but add a sentence that says that later
9 rulings of the Court concluded that the conspiracy continued
10 into 2014. Is there any objection to that?

11 MR. VANCE: No, your Honor.

12 MR. SIMMINGTON: I have none, your Honor. Thank you.

13 THE COURT: All right. We'll make that change.

14 Let's turn to calculation of guidelines. They're advisory and
15 not mandatory, but the law does require us to calculate them.
16 The report utilized the 2014 guidelines manual and it utilized
17 a grouping analysis required under the guidelines. I know that
18 was the subject of an objection and I've ruled on that
19 objection and I agreed with the analysis that is set out here
20 in the report.

21 Group one consists of count one racketeering
22 conspiracy, attempted murder overt act, paragraph 38, Dartanian
23 Edwards and paragraph 29 elucidates the basis for the
24 conclusion that the base offense level is 27. Then there are
25 two levels added because the victim sustained serious bodily

1 injury and then two levels added for obstruction of justice
2 leaving us with an adjusted offense level of 31.

3 Group two consists of count one, racketeering
4 conspiracy, attempt murder, overt act, paragraph 24 for Maranda
5 Barnes and also count eight, attempted murder in aid of
6 racketeering for Maranda Barnes. Paragraph 36 elucidates the
7 analysis for the conclusion that the base offense level should
8 be 27. Two levels are added because defendant intimidated or
9 threatened witnesses during pretrial detention. Adjusted level
10 for group two is 29.

11 Group three is count one, racketeering conspiracy
12 attempted murder, overt act paragraph 44 for Rashima Doby and
13 count eight is the attempted murder in aid of racketeering for
14 Rashima Doby. Paragraph 43 lays out the analysis for the
15 conclusion that the base offense level should be 27. Two
16 levels are added because defendant intimidated or threatened
17 witnesses. Adjusted offense level for group three is 29.

18 Group four is count one racketeering conspiracy
19 attempted murder overt act paragraph 44 D'Angelo McEwen and
20 count eight, attempted murder in aid of racketeering, D'Angelo
21 McEwen. Paragraph 50 sets out the analysis for the conclusion
22 that the base offense level is 27. Two are added -- two levels
23 are added because the victim sustained serious bodily injury.
24 Two levels are added for obstruction of justice and that leaves
25 an adjusted offense level of 31.

1 Group five is for count one, racketeering conspiracy,
2 attempted murder, overt act paragraph 44 for Rodney Harden and
3 count eight is the attempted murder in aid of racketeering for
4 Rodney Harden. Paragraph 57 set out the analysis for the
5 conclusion that the base offense level is 27. Two levels are
6 added because the victim sustained serious bodily injury. Two
7 levels are added for obstruction of justice. Adjusted offense
8 level for group five, 31. Let me just restate that. The
9 adjusted offense level for group five is 31.

10 For group six, it's count one racketeering conspiracy
11 distribution of crack cocaine. Paragraph 63 sets out the
12 analysis for the conclusion that the base offense level is 24.
13 Two levels are added for obstruction of justice. The offense
14 level then is 26. Count seven is -- count nine, use and
15 discharge of a firearm during and in relation to a crime of
16 violence and the guideline sentence is the minimum term of
17 imprisonment required by statute. In this case it's 10 years
18 and it's consecutive.

19 For group eight, count one is racketeering conspiracy
20 attempted murder, overt act paragraph 68, Charles Orr and count
21 35 attempted murder in aid of racketeering, Charles Orr.
22 Paragraph 71 sets out the analysis for the conclusion that the
23 base offense level is 27. Four levels are added because the
24 victim sustained permanent or life-threatening bodily injury.
25 Two levels added for obstruction of justice. Adjusted offense

1 level is therefore 33.

2 Paragraph 77 sets out the assignment of units to the
3 various groups and based on the various units, five levels are
4 added to the greatest level which is 33 and that means the
5 combined adjusted offense level is 38. Given all of my
6 presentence rulings then, does everyone agree then that the
7 offense level is 38?

8 MR. VANCE: Yes, your Honor.

9 MR. SIMMINGTON: Given those rulings, we do, your
10 Honor.

11 THE COURT: Turning to criminal history, defendant
12 has eight points for his prior convictions. He receives two
13 more points because he committed the instant offenses while on
14 probation. His total point score is 10 and that places him in
15 category five. Is everybody in agreement with that?

16 MR. VANCE: Yes, your Honor.

17 MR. SIMMINGTON: Our objections have been previously
18 noted, but we agree given your ruling.

19 THE COURT: Based on a total offense level of 38,
20 criminal history category of five, the guideline imprisonment
21 range is 360 months to life and for count nine, the minimum
22 term -- well, strike that. For count nine, the guideline
23 sentence is the minimum term under statute which in this case
24 is 10 years. Is everybody in agreement with that?

25 MR. VANCE: Yes, your Honor.

1 MR. SIMMINGTON: Yes, your Honor.

2 THE COURT: Let's turn to consideration of our
3 sentencing option. Under the statute, maximum term of
4 imprisonment for count one is life. For count eight, the
5 maximum term is 10 years. For count nine, the minimum term is
6 10 years and the maximum is life. For count 35, the maximum is
7 10 years and count nine must be imposed consecutively to any
8 other count. Is everybody in agreement with that?

9 MR. VANCE: Yes, your Honor.

10 MR. SIMMINGTON: Yes, your Honor.

11 THE COURT: With respect to supervised release, under
12 the statute counts one and nine of the supervised release
13 provided for is not more than five years. For counts eight and
14 35, not more than three years. Multiple terms run concurrently
15 under the guidelines for counts one and nine. Guideline range
16 is two to five years. For counts eight and 35, it's one year
17 to three years.

18 With respect to probation, defendant is not eligible
19 under the statute or the guidelines for probation. With
20 respect to fines, under the statute maximum fine is 250,000
21 dollars for counts one, eight, nine and 35 each and for counts
22 one, eight, nine and 35 there's mandatory special assessment of
23 100 dollars for a total of 400 dollars. Under the guidelines,
24 the fine range is 25,000 dollars to 250,000 dollars.

25 With respect to restitution, it's mandatory under the

1 statute 18 United States Code, Section 3663(a). Is everybody
2 in agreement with that recitation of our sentencing options?

3 MR. VANCE: Yes, your Honor.

4 MR. SIMMINGTON: Yes, your Honor.

5 THE COURT: All right. At this time I'll invite
6 Mr. Simmington to address the Court regarding sentencing and
7 then when he's done, Mr. Gills can address the Court if he
8 wishes and we'll hear from the government.

9 MR. SIMMINGTON: Thank you very much, your Honor. As
10 the Court knows, I have submitted a sentencing memorandum which
11 I'm sure the Court has read and considered. I don't intend to
12 rehash that here. There's a line from a blues song of some, I
13 can't remember the artist that says consider this, he started
14 out in life with bad directions. It's a way of putting in
15 perspective some things that happen to people and I think in
16 terms of looking at Mr. Gills and how the Court should fashion
17 a sentence today that is sufficient, but not greater than
18 necessary, it is true that he did start out in life with bad
19 directions.

20 The Court heard testimony, some testimony during the
21 trial that he was born with alcohol and drugs in his system,
22 crack cocaine. I did receive a letter from his mother. I did
23 also attach two letters and I should ask respectfully did the
24 Court have an opportunity to read the attachments, the two
25 letters that I submitted with the memorandum?

1 THE COURT: Yes.

2 MR. SIMMINGTON: Well, this was not one of them and I
3 apologize, it just came to me. Ms. Shawn Anderson in her
4 letter says Leon Gills has always been a troubled child due to
5 my drug and alcohol consumption whilst pregnant with him. I
6 deeply regret the choices I've made. She's here today and if
7 the Court needed any edification, further edification about
8 that, but the fact of the matter is I mentioned in that
9 memorandum that his life circumstances were unimaginable and I
10 don't believe that was hyperbole.

11 Upon leaving the hospital after being treated for
12 those conditions at birth, his parents essentially abandoned
13 him. He was raised by a very loving grandmother. She's here
14 today. She submitted a letter your Honor and I'm sure your
15 Honor's read that and I thought that was a fairly compelling
16 letter to read more about his background. The other letter
17 that was submitted by Lynn Richardson I thought was also,
18 showed a different side of Leon Gills than anything we heard
19 during the evidence and testimony in the case.

20 I do believe that in terms of mitigation the Court
21 can look at a youth, youthfulness as a factor. As mentioned in
22 the memorandum, these events began to occur in this
23 neighborhood when he was 12 years old or I think 11 years old.
24 He did get lured into the streets, there isn't any question
25 about that and he's not challenging his convictions here for

1 purposes of sentencing. However, I think even to a greater
2 extent than youth should be considered a factor in mitigation
3 of a harsh sentence or to possibly consider the variance that
4 I've asked for in the memo, the troubled youth is a recognized
5 grounds for variance or departure and I won't give the Court
6 any cites on that.

7 The interesting thing for me as to Mr. Gills, two
8 things really. Despite his lure to the streets, despite the
9 things he got involved in, he actually was working on a
10 legitimate line of self-sufficiency at the time he was
11 arrested. Some folks would question legitimacy of gansta rap
12 music. Hollywood does not. The fact of the matter is that he
13 had an opportunity if he'd been able to get himself out of the
14 streets a little earlier, he probably had an opportunity to
15 make a good living in the music business. That didn't happen,
16 but I bring that up because, umm, because I think in his case
17 he doesn't have, hasn't killed anyone. There's an argument can
18 be made well he's a bad shot. Well, that argument is easy to
19 make, he did shoot into a van that had four people in it, but
20 it is not evident to me even after hearing the testimony and
21 reading the reports that he was trying to kill anybody. He's
22 not a born killer, he's not a learned killer and at the time
23 that he went to Georgia, he was actually seeking a better and
24 different life in the music business and I think for those
25 reasons, your Honor, he does have the capacity for

1 rehabilitation.

2 I did put into my sentencing memorandum some
3 scientific evidence having to do with the prefrontal cortex and
4 its development and its failure to develop for some years. I'm
5 not going to do anything more with that other than what I've
6 said, but I would ask the Court to consider all of these
7 factors and in truth I believe not, not throw away the life of
8 Leon Gills with a life sentence. I don't believe given his,
9 the distinguishing characteristics between him and some of the
10 other defendants and indeed from some of the other defendants
11 who were cooperators and who got as little as 10 years when
12 they had two murders; I'm speaking specifically of Carvell
13 Gordon. So for proportionality reasons and all other reasons,
14 I'm asking the Court to consider a sentence that is either at
15 the bottom end of the guidelines or possibly even below it.
16 Thank you.

17 THE COURT: Mr. Gills, anything you want to tell me
18 regarding sentencing?

19 DEFENDANT GILLS: Yeah. Umm, first of all I want to
20 apologize to my family for, umm, putting them through this and,
21 umm, I want to say, I want to apologize to all the victims of
22 the family members that's going through this whether the
23 defendants is innocent or not, still want to apologize and give
24 my condolence to them and I want to apologize to Tom for
25 putting his name in a rap and just giving the government a hard

1 time like I was giving them, you know what I'm saying? And I
2 want to, umm, and I want to, umm, I want to say if I had
3 another chance, I, I'd do things better, you know what I'm
4 saying? That's it.

5 THE COURT: All right. Anything for the government?

6 MR. VANCE: Yes, your Honor. And again I hate to be
7 redundant in this matter, but again I think it's imperative in
8 looking at the sentencing factors and discussing the nature and
9 circumstances of the offense to again point out the brutal
10 nature with which these crimes were committed. Mr. Gills
11 ordered the execution of Malachi Wilson when he instructed
12 Shawn Gardner and Johnathan Oldham to lay down law, a phrase
13 that we saw on Howard Boys T-shirts, a phrase that Mr. Gills
14 has used himself in various rap songs.

15 We have the, the shooting of Dartanian Edwards when
16 he came to the aid of other Howard Boys who were in an argument
17 with Mr. Edwards. The shooting at the 10-11 Party Store where
18 Mr. Gills shot essentially at close-blank range, point-blank
19 range into a van occupied by four people who had nothing to do
20 with the dispute that he was having with Jonathan Wilson,
21 Mr. Gills believing only that they were Joe Nate's boys, that
22 they were Jonathan Wilson's boys.

23 The shooting of Charles Orr who was shot six times in
24 the torso. Your Honor, the only reason that Mr. Gills is not
25 facing a mandatory life sentence like the rest of the

1 defendants is because he was lucky. He was lucky that no one
2 in that van was killed in the 10-11 shooting. He was lucky
3 that Charles Orr survived six bullet wounds to his torso. He
4 was lucky that Dartanian Edwards survived a gunshot wound and
5 he was lucky that he was not charged with aiding and abetting
6 or conspiring to kill Malachi Wilson.

7 The Court's also aware of the various other
8 demonstrations of Mr. Gills' affiliation with this enterprise
9 including his tattoos, social media postings, rap songs and I
10 know the Court is quite aware, but just to quote some of Mr.
11 Gills' lyrics in his rap that was posted on Facebook during the
12 pendency of this case, the song entitled Murder on My Mind. I
13 will murder niggas in broad day, murder niggas at night. I'm
14 the gunman from the Murda Ville and we murder niggas on sight.

15 Now there may be gangsta rappers in Hollywood that,
16 that do that, that rap those type of lyrics. People may buy
17 their CDs, they may receive large contracts, but when you
18 routinely shoot at people, when you order the execution of
19 another human being, those lyrics mean a little something more.

20 Another lyric from that song, fuck the feds, they
21 fatten me, I run shit like a track meet, got 100 shots on my
22 back seat and I lay law in my black T. Again, another
23 reference to the phrase of laying law.

24 The second song that he posted on his Facebook
25 account entitled Rats where he threatened individuals who he

1 believed were cooperating with the government; not only
2 threatened them, but threatened their family members. Yo mama
3 a rat, yo daddy a rat, kidnap yo son and your daughters, even
4 your kids, they all the rats, Malcolm no different from
5 Brandon, I hope Malaya get whacked and again we heard the
6 testimony that Malaya is the young daughter of Malcolm Evans
7 and again if you're a rapper in Hollywood and they're paying
8 you for this kind of music, so be it, but when you're out on
9 the street and involved in a criminal enterprise and you're
10 shooting at people, these lyrics mean something more.

11 He goes on in Rats to, to sing bitch if you dream
12 about Murda Ville, you should die in your sleep. Later in the
13 song, feds trying to get me life, if you tell, you gone die. A
14 very strong message to those individuals who were witnesses in
15 this case.

16 Judge, I believe based on all those factors as well
17 as the history and characteristics of Mr. Gills who sustained
18 his first felony conviction at age 11, again using marijuana at
19 age nine, I think that it's imperative that this Court send a
20 strong message. I would ask the Court to impose a life
21 sentence in addition to a 10-year consecutive sentence in
22 regards to count nine.

23 THE COURT: In fashioning a sentence, the Court must
24 follow the requirements of the statute enacted by Congress,
25 Title 18 United States Code, Section 3553. That statute

1 requires a Court to impose a sentence that is sufficient, but
2 not greater than necessary to comply with the purposes that are
3 set out in the statute. Those purposes are for a sentence to
4 reflect the seriousness of the offense, promote respect for the
5 law, provide just punishment for the offense, afford adequate
6 deterrence to criminal conduct, protect the public from further
7 crimes of the defendant, provide the defendant with needed
8 educational or vocational training, medical care or other
9 correctional treatment in the most effective manner.

10 The statute requires the Court to take into account a
11 number of factors including the nature and circumstances of the
12 offense, history and characteristics of the defendant, kinds of
13 sentences available, sentencing guideline range, pertinent
14 policy statements of the Sentencing Commission, the need to
15 avoid unwarranted sentence disparities among defendants with
16 similar records who have been found guilty of similar conduct
17 and the need to provide restitution to any victims of the
18 offense. The Court takes into account all of those factors in
19 fashioning a sentence that it believes will be sufficient, but
20 not greater than necessary to comply with the purposes that are
21 set out in the statute.

22 The defendant is before the Court for sentencing on
23 numerous convictions that are of an extremely serious nature.
24 Count one, racketeering conspiracy. Count eight, attempted
25 murder in aid of racketeering. Count nine, use and discharge

1 of a firearm during and in relation to a crime of violence.
2 Count 35, attempted murder in aid of racketeering. The Court
3 sat through the two-month trial, heard the same evidence that
4 the jury heard and believes that the jury's conclusion that
5 defendant was guilty beyond a reasonable doubt of these
6 offenses is amply supported by the evidence.

7 In terms of the seriousness of the offense, all of
8 these are of course serious matters, but the attempted murders
9 are at the top of the hierarchy. The attempts that involved
10 Dartanian Edwards, Charles Orr and the four people at the party
11 store reflect a callousness for life, not on a single occasion,
12 not in the heat of some particular moment, but a very
13 calculated manner of disregarding the sanctity of life to
14 accomplish selfish purposes.

15 The Court was also struck by the chilling evidence of
16 this defendant's orchestration of the execution of Malachi
17 Wilson and while it's true that the defendant did not himself
18 pull the trigger, he was the one who set that murder into
19 execution.

20 The Court agrees with the government that it's purely
21 a matter of fortuity that none of the victims who were the
22 subject of the charged events and the convictions in fact died.
23 The Court does not believe for a moment that there was anything
24 but an intent to kill the people who by the grace of God
25 survived the shootings that this defendant actually conducted

1 and it's a matter of fortuity or some other explanation not
2 apparent to the Court that the defendant is not convicted of
3 the murder of Malachi Wilson. Certainly the evidence showed
4 that such a charge would have been warranted, nor are these
5 events the only evidence of lawlessness by this defendant. The
6 presentence report shows that he's been convicted in the past
7 of drug offenses, carrying concealed weapon and throughout the
8 trial was clear that this defendant was a participant in the
9 enterprise that the jury founded existed and which the evidence
10 showed terrorized the Flint community.

11 The Court has read the sentencing memorandum filed by
12 the defendant and the letters as well. There may well be
13 reasons in the defendant's past that one can point to as
14 possible influences that led him into a life of crime. It may
15 well be that his mother's crack habit ended up causing him to
16 be influenced by that drug when he was in utero and her
17 abandonment of him undoubtedly had some influence on his
18 outlook on life, but I was also struck by the great love that
19 enveloped this young child through his grandmother who took him
20 in and certainly showed him a way of life and values far
21 different from the way of life and values that he ended up
22 practicing. How difficult it must be for her to see this day
23 arrive when the grandson that she showered with love returned
24 that love by living a life at variance with what she had taught
25 him. So this case shows that there are more victims than what

1 the evidence itself demonstrated.

2 The Court reviewed the discussion in the memorandum
3 regarding brain science. There's no question that people at a
4 younger age think and act differently than they do at an older
5 age, but this defendant was not a youngster when he engaged in
6 these shootings. He was not an adolescent when he ordered the
7 murder of Malachi Wilson. None of those callous acts of
8 reprehensible conduct can possibly be attributed to the
9 immaturity of youth and the defense throughout the trial and
10 then after trial as well through sentencing points to the
11 artistic skills that this defendant possesses. There's no
12 question he has a gift for music and for writing lyrics and
13 that only compounds the disappointment that a person with such
14 talents would have squandered those talents, used those talents
15 to threaten witnesses and obstruct justice. He would be in a
16 far better place today had he harnessed those creative energies
17 to entertain and inform people instead of to terrorize them.
18 His life would look very differently today. He would be making
19 a contribution to society that he would be proud of and those
20 who cared about him would be proud of, but instead, he led a
21 life of lawlessness that left at least one person dead and
22 several other people wounded.

23 The Court must take into account all of the factors
24 set out in the statute and it does. It has to protect the
25 public. It has to deter this defendant from re-offending,

1 deter others who might imitate his conduct and vindicate the
2 law that he has disregarded. The Court believes that the
3 sentence it will fashion will be sufficient and not greater
4 than necessary to accomplish those goals and based on what the
5 Court has said, it sees no basis for granting the defense
6 request for a variance from the guidelines. To the contrary,
7 the evidence in the record shows why the sentence in this case
8 must be very strong medicine to accomplish the sentencing goals
9 that are set out in the statute.

10 Therefore, pursuant to the Sentencing Reform Act of
11 1984, considering the sentencing guidelines which are advisory
12 and not mandatory, having taken into account all the factors
13 that are contained in Title 18 United States Code, Section
14 3553, the Court imposes the following sentence on this
15 defendant. It commits this defendant to the custody of the
16 United States Bureau of Prisons for a term of life on count one
17 and for 120 months on counts eight and 35. Those sentences
18 will run concurrently. On count nine, the Court imposes a
19 sentence of 120 months. That sentence will run consecutive to
20 all the other counts.

21 If defendant is released from prison, he will be
22 placed on supervised release for a term of three years on all
23 counts running concurrently. Defendant shall not have any
24 contact directly or indirectly with any victim or witness in
25 this case unless approved by probation in advance. Defendant