Case No. 26-_____

SUPREME COURT OF THE UNITED STATES

Markell Young,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-5765/5833/25-5053

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OCTAVIUS FERGUSON (24-5765); JORDAN POWELL aka Jordan Young (24-5833); MARKELL YOUNG (25-5053),

Defendants - Appellants.

FILED
Sep 09, 2026
KELLY L. STEPHENS, Clerk

Before: BUSH, READLER, and DAVIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Jackson.

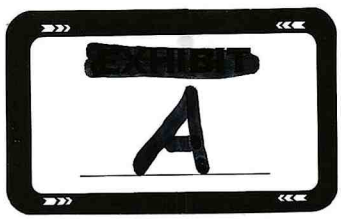
THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED on all grounds.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OCTAVIUS FERGUSON; JORDAN POWELL, aka Jordan Young; MARKELL YOUNG,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

O P I N I O N

Before: BUSH, READLER, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. Octavius Ferguson, Jordan Powell, and Markell Young were involved in the Hoover Criminal Gang ("HCG") in Tennessee. After a rival gang shot and injured a fellow HCG member, Young gave Ferguson and Powell the green light to retaliate. So Ferguson, Powell, and other HCG members shot and killed William Vinson, a member of the rival gang. A jury convicted Ferguson and Powell of four crimes relating to the murder, including conspiracy to commit murder in aid of racketeering, aiding and abetting murder in aid of racketeering, aiding and abetting the use of a firearm during and in relation to a crime of violence, and aiding and abetting death through use of a firearm. The jury acquitted Young of all but the third offense, and the district court later vacated Ferguson and Powell's convictions of the final offense.

On appeal, both Ferguson and Powell argue that the evidence was insufficient to prove any of the charged offenses and that the district court erred in admitting evidence of prior crimes by

Ferguson to convict them of the charged offenses. The remaining arguments are defendant-specific. Ferguson argues that his sentence was procedurally unreasonable and that his counsel was ineffective at his sentencing. Powell argues that the district court erred in denying his *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge to the government's use of peremptory strikes. And Young attacks the jury verdicts against him, arguing that his conviction on one count is inconsistent with his acquittal on another, so his conviction should be thrown out. He also challenges his sentence as procedurally and substantively unreasonable. We AFFIRM on all grounds.

I.

History of the Hoover Criminal Gang. HCG originated in California. Defendants were members of the "Eight Trey" or the 83rd Street set of HCG, which operates in Tennessee. (Trial Tr., R. 457, PageID 4718–19; Trial Tr., R. 456, PageID 4371, 4416). HCG members use flags, colors (orange and blue), gang signs, and tattoos (a five-point star) to indicate their membership. Some of the other gangs in the area are the Gangster Disciples, Rolling 60s, Bloods, and Vice Lords. The 83rd HCG refers to its meetings as "H calls," which typically take place at the "yellow house." (Trial Tr., R. 451, PageID 3307–08, 3312–13). At the yellow house, gang members hang out, store guns, and sell and do drugs.

HCG has an organized hierarchy. The highest position is called the "Original Gangster." (*Id.* at PageID 3287). A member called "Mane Mane" occupies this position in the 83rd set. "Big Homie" is how members refer to the person who brought them into the gang. (Trial Tr., R. 456, PageID 4422). For example, Mane Mane is Young's big homie, and Young is Ferguson's big homie. Young, who is one step below Mane Mane, is referred to as "G," (Trial Tr., R. 451, PageID 3289–90), or the "YOG." (Trial Tr., R. 456, PageID 4423). After the murder in this case, Ferguson

and Powell were promoted from "Tiny Locs" to "Baby Gangster[s]." (*Id.* at PageID 4423–24; Trial Tr., R. 451, PageID 3287).

Drug Trafficking and Violence. During the time relevant to Defendants' convictions, the 83rd HCG sold drugs, committed robberies, and carried out retaliatory shootings. Young received marijuana from Mane Mane, who lived in California, Washington, and Tennessee at different points. Ferguson and Powell sold marijuana alongside Young and contributed part of their earnings to "the pot," which operated as the gang's central fund. (Trial Tr., R. 456, PageID 4391–92, 4403). Young supplied the marijuana that Ferguson and Powell sold. 83rd HCG used money from the pot to fund more drug sales, pay bond for incarcerated members, purchase firearms, and bribe others. In addition to marijuana, Young sold "X pills" (3,4-methylenedioxymethamphetamine a/k/a MDMA or ecstasy), ice (methamphetamine), and cocaine. (*Id.* at PageID 4385).

Part of the evidence the government used against Defendants involved three traffic stops of Ferguson that happened before the events giving rise to this case. The stops culminated in Ferguson's (1) June 2015 arrest and conviction for possession of marijuana with the intent to sell or deliver; (2) January 2016 arrest and conviction for the same offense, and (3) March 2016 arrest and conviction for possession of a firearm with an altered serial number. In the June 2015 incident, an officer stopped Ferguson an estimated 200 feet or less from the yellow house. The officer seized marijuana that was stored in mason jars inside a plastic bag and digital scales from the vehicle. Ferguson admitted that the items were his. The district court allowed in evidence from the June 2015 traffic stop on the basis that it could help prove HCG's racketeering activities and Ferguson's involvement in HCG.

During the January 2016 vehicle stop, Ferguson was a passenger while traveling in Jackson, Tennessee. From that stop, police seized marijuana, money, scales, and cell phones from the vehicle, and Ferguson again claimed ownership of these items. The district court overruled the defendants' objection that the January 2016 stop was not gang-related based on testimony establishing that Ferguson may have joined the gang as early as 2015.

Finally, in March 2016, law enforcement responded to a call about shots fired from a vehicle in Trenton, Tennessee. Officers stopped a vehicle in which Ferguson was a back-seat passenger and ordered him to exit. When Ferguson stood up after stepping out of the car, two or three empty shell casings fell from his lap to the ground. Officers also recovered a Ruger 9mm handgun with thirty-one (31) rounds loaded in the clip at Ferguson's feet, one or two live rounds of ammunition in his front pocket, a Glock 9mm handgun under the passenger seat, and two bags of marijuana.

The morning after this third stop, officers searched a motel room using a key that they had retrieved from the pocket of one of the passengers. From the motel room, police seized more marijuana and another gun containing a thirty-round clip. The district court determined that this evidence was admissible "based upon the [government's] representations that it[was] going to tie together the previous testimony" and "provide context for the overall Enterprise." (Trial Tr., R. 455, PageID 4224).

Witness testimony and documents established that on the day of the third traffic stop, Daylon Ballard rented a room for Young, Ferguson, and others. Ballard also testified that, before renting the room, he had seen a bullet hole through the window of Young's mother's home. And Charius Ross testified that HCG retaliated against the Rolling 60s for this bullet hole by firing at

the home of a Rolling 60s member's grandmother, but he believed that the retaliatory shooting happened prior to 2016.

Vinson's Murder. At least prior to on or about January 31, 2017, to at least on or about February 1, 2017, 83rd HCG members conspired to murder William Vinson. On January 31, 2017, Ballard and Ferguson were together when Ferguson received a call from Young. Young told Ferguson that Marquarius Pettigrew, another HCG member, had been shot. Afterward, Ballard and several HCG members—Ferguson, Powell, Trevarius Sharp, Bakari Lenon, and Monterio Ross ("Monterio")—gathered at the yellow house to plan a response. The gang members discussed retaliating against a Gangster Disciple who they believed shot Pettigrew. Powell then asked Ballard to drive to Wee-Wee's house. Wee-Wee was a nickname for Vinson, who was the treasurer of the Gangster Disciples. While in the car, Ferguson, Powell, and Monterio declared that they were not going to "waste any bullets." (Trial Tr., R. 452, PageID 3458). When they arrived at Wee-Wee's house, Ballard witnessed Ferguson call Young and ask for permission "to go." (*Id.* at PageID 3464–66). Young gave his blessing, after which Ferguson, Powell, Monterio, and Lenon ran through the alley with firearms, and gunshots rang out.

After the shooting, Ballard drove the group back to the yellow house. Ferguson, Powell, and Lenon declared that they had "emptied the whole clip." (*Id.* at PageID 3477). Ballard later received a call from Ferguson informing him that Wee-Wee was dead. Ross also witnessed the shooting while he was parked across the street. He testified that he saw Powell shoot through the door, Ferguson enter the house with a gun followed by "a barrage of shots," and Lenon fire three times. (Trial Tr., R. 456, PageID 4471–72).

Later, while visiting Pettigrew in the hospital, Ballard overheard Mane Mane inform Ferguson of his promotion to baby gangster. Similarly, Ross heard Young tell Ferguson and Powell that they were both promoted from tiny locs to baby gangsters.

Convictions and Appeal. After an eleven-day trial, the jury found Ferguson and Powell guilty of four counts: conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count 1); aiding and abetting murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Count 2); aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 3); and aiding and abetting death through use of a firearm, in violation of 18 U.S.C. § 924(j) (Count 4). The jury acquitted Young of Counts 1, 2, and 4, but it convicted him for aiding and abetting the use of a firearm during and in relation to a crime of violence on Count 3. At the government's request, the district court later vacated Ferguson and Powell's convictions on Count 4 as a lesser-included offense of Count 3.

The district court sentenced both Ferguson and Powell to life plus 120 months' imprisonment. The district court sentenced Young to 180 months' imprisonment. Ferguson, Powell, and Young each timely appealed.

II.

A. Sufficiency of the Evidence—Murder in Aid of Racketeering

Ferguson and Powell advance three arguments challenging the sufficiency of the evidence on all counts, but their claims center on Count 2's murder-in-aid-of-racketeering charge. First, Ferguson argues that the government failed to prove that HCG engaged in activities affecting interstate commerce. Second, Powell contends that the government failed to demonstrate that the defendants' racketeering activity was linked to the gang's enterprise. Third, Ferguson asserts that

the government offered insufficient evidence to show that Ferguson murdered Vinson to maintain or increase his position within the gang. Powell adopts the first and third arguments by reference.

1. Standard of Review

We review challenges to the sufficiency of the evidence de novo. *United States v. Ray*, 803 F.3d 244, 262 (6th Cir. 2015). The key question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pritchett*, 749 F.3d 417, 431 (6th Cir. 2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A defendant challenging the sufficiency of the government's evidence "bears a very heavy burden." *United States v. Emmons*, 8 F.4th 454, 478 (6th Cir. 2021) (citation omitted). We "view[] the evidence in the light most favorable to the prosecution," *Pritchett*, 749 F.3d at 430–31 (citation omitted), and "draw all available inferences and resolve all issues of credibility in favor of the jury's verdict," *United States v. Jackson*, 470 F.3d 299, 309 (6th Cir. 2006) (citation omitted).

As an initial matter, the government asserts that both Ferguson and Powell failed to preserve their sufficiency-of-the-evidence arguments because they did not move for a judgment of acquittal or for a new trial under Federal Rules of Criminal Procedure 29 and 33, respectively, at the close of evidence. So, says the government, we should review their convictions only if they "represent a 'manifest miscarriage of justice.'" (Appellee's Br., ECF 39, 39 (quoting *United States v. Sease*, 659 F.3d 519, 522–23 (6th Cir. 2011))). Further, the government contends that the bases for their Rule 29 motions at the close of the government's proof differed from their arguments on appeal, so any new claims should be reviewed for plain error.

We agree with some but not all of this reasoning. Because Ferguson did not put on any evidence of his own, he was not required to renew his Rule 29 motion at the close of all proofs.

See United States v. Curry, 170 F.4th 559, 567 (6th Cir. 2026). So de novo review applies. By contrast, Powell presented a witness in his own defense then neglected to renew his motion for a judgment of acquittal at the end of trial. Defendants in Powell's circumstances have waived any challenge to the sufficiency of the evidence, so we review such claims only to determine "whether there has been a manifest miscarriage of justice." *Id.* (citation modified); *see also United States v. Page*, 163 F.4th 385, 393 (6th Cir. 2025) (reviewing for "a manifest miscarriage of justice" under these circumstances (citation omitted)). Yet, here, under any applicable standard, both defendants' sufficiency-of-the-evidence arguments fail on the merits. *See Curry*, 170 F.4th at 567–68; *see also United States v. Karasarides*, 159 F.4th 972, 987 (6th Cir. 2025) (noting "our general preference to resolve claims on the merits"). So we need not tease out which arguments may be subject to this lesser standard of review because when we ask whether any rational juror could have found Ferguson and Powell guilty on the evidence presented at trial, the answer is yes. And that being the case, there necessarily was no manifest miscarriage of justice.

2. Elements Analysis

To establish a Violent Crimes in Aid of Racketeering ("VICAR") violation, the government must prove the following: (1) that the organization was an "enterprise" as defined in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), "(2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant[s] . . . had a position in the enterprise, (4) that the defendant[s] committed the alleged crime of violence, and (5) that [their] general purpose in so doing was to maintain or increase [their] position in the enterprise." *United States v. Woods*, 14 F.4th 544, 555 (6th Cir. 2021) (citation omitted). Both Ferguson and Powell challenge the sufficiency of the trial evidence for elements one, two, and five.

a. Interstate Commerce

RICO defines an enterprise as "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2). Thus, to satisfy VICAR's interstate-commerce requirement, the government need only show "that the enterprise as a whole engaged in interstate commerce or that its activity affected interstate commerce." *United States v. Odum*, 878 F.3d 508, 517 (6th Cir. 2017), *vacated on other grounds sub nom. Frazier v. United States*, 586 U.S. 913 (2018). Moreover, the enterprise's economic activity is merely required to have "a de minimis connection" to interstate commerce. *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001). Examples of activities with an adequate connection include drug trafficking; extortion; and a combination of traveling, communicating, and transporting stolen goods across state lines and paying dues to national officers. *See Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004); *Riddle*, 249 F.3d at 537; *Odum*, 878 F.3d at 517. Drug trafficking in particular "is an economic enterprise" in that each deal "represents the end point of a manufacturing, shipping, and distribution network that is interstate . . . in nature." *United States v. Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996) (citation modified); *see also Taylor v. United States*, 579 U.S. 301, 307 (2016) ("Congress possesses the authority to regulate (and to criminalize) the production, possession, and distribution of controlled substances even when those activities occur entirely within the boundaries of a single State.").

Ferguson and Powell argue that, although the government provided evidence that Ferguson and others engaged in drug trafficking, it did not show that they did so to benefit the organization. For support, they point to Ballard's testimony that the drug dealing was unrelated to HCG.

Testimony from Ross and Ballard, however, readily supports a rational finding that HCG's activities affected interstate commerce. For example, Ross testified that Young held the rank of G or YOG in HCG, and that he maintained a group of young men around him who "sold drugs," "robbed," and "stole." (Trial Tr., R. 456, PageID 4384). He specifically listed Powell and Ferguson among the young men who sold drugs with Young and contributed to the pot held by the big homie. Ross also explained that Young received marijuana to sell from California, Washington, and Tennessee. And Young supplied other gang members with marijuana to sell because, as gang members, "[t]hey help each other." (*Id.* at PageID 4401). Additionally, Ballard testified that he would purchase marijuana from Young and that he drove Young to Memphis to purchase the drugs. He also accompanied Ferguson to sell marijuana, which he received from Young, daily. Taken together, these facts were more than enough to support the interstate-commerce element.

Ferguson's reliance on *Waucaush* to undermine an interstate-commerce connection is misplaced. In *Waucaush*, we recognized that evidence that a single gang member was arrested for drug trafficking was insufficient to show that the gang's activities affected interstate commerce. 380 F.3d at 256. But there, the government had conceded that the gang member's drug charges were not related to the gang's activities. *Id.* And it offered no other evidence that the gang engaged in activities affecting interstate commerce. *Id.* That is not the case here. Although Ballard testified that Ferguson's drug dealing did not "have anything to do" with HCG, (Trial Tr., R. 451, PageID 3281), details from Ross's testimony prove otherwise. The jury was free to consider those details in rejecting Ballard's assertion. *See United States v. Ledbetter*, 929 F.3d 338, 355 (6th Cir. 2019); *Jackson*, 470 F.3d at 309. Moreover, we agree with the government's contention that Ferguson's traffic stops involving drugs, its controlled buy from Datrilveyon Moore (another gang member),

and Ross's additional testimony about robbing drug dealers further combined to satisfy the interstate-commerce requirement.

b. Racketeering Activity

18 U.S.C. §§ 1959(b)(1) and 1961(1) define "racketeering activity" as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year." Under Tennessee law, murder and drug trafficking both qualify as racketeering activity. *See* Tenn. Code Ann. §§ 39-13-202 (first-degree murder), 39-17-417 (drug crimes); *see also United States v. Baskerville*, 164 F.4th 459, 473 (6th Cir. 2026). The government must show that the gang members performed the racketeering activity "for the group and/or in concert with other members, or acted in ways that contributed to the purposes of the group, or that were facilitated or made possible by the group." *Odum*, 878 F.3d at 517 (citation omitted).

Powell insists that the evidence at trial did not show that gang members sold drugs to service the enterprise, so the government failed to prove that the gang committed racketeering activity. The government counters that the evidence it presented on HCG's drug trafficking and violence sufficed for this purpose because those activities "were mutually reinforcing acts which were integral to the HCG criminal operations." (Appellee's Br., ECF 39, 42). We agree.

In addition to Ballard and Ross's testimony about Ferguson and Powell's drug trafficking, the jury saw HCG members' social media posts and messages describing their drug-trafficking ventures. Moreover, the jury learned about the drug paraphernalia recovered from Young's residence, Ferguson's traffic stops, and the controlled buy from Moore. And jurors also heard testimony about violent retaliatory measures HCG carried out, including killing Vinson and the

shooting at the home of a different rival gang member in March 2016. This evidence of drug trafficking, murder, and a retaliatory shooting was sufficient for a rational juror to conclude that HCG and these defendants engaged in racketeering activities. *See Woods*, 14 F.4th at 556 (concluding that evidence of a group distributing controlled substances and committing murders, attempted murders, and assaults was sufficient to prove that the group had engaged in racketeering activity); *Baskerville*, 164 F.4th at 473 (relying on evidence of the gang's violent "demonstrations" and phone records showing that the gang had engaged in "a spree of shootings" to reject the defendant's sufficiency challenge).

c. Maintain or Increase Position

VICAR "does not extend to every violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang." *Ledbetter*, 929 F.3d at 358 (citation modified). Nevertheless, the government is not "required to prove the defendant acted solely or primarily for a gang-related purpose." *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (citation modified). Instead, "VICAR's purpose element is met if the jury could find that an animating purpose of the defendant's action was to maintain or increase his position in the racketeering enterprise." *Id.* (citation modified). For example, the "defendant may be liable if the violent crime was sanctioned by the gang and . . . the defendant participated because he knew it was expected of him as a member or the crime fit the mold of the gang's typical missions against rivals." *Woods*, 14 F.4th at 557 (citation modified).

Ferguson contends that the evidence shows that he "act[ed] out of mere revenge separate from the gang," rather than to maintain or increase his position in the gang. (Ferguson's Br., ECF 26, 15). Powell adopts this argument by reference.

The evidence showed that HCG local leadership sanctioned Vinson's murder as an act of retribution for the shooting of a fellow HCG member, and therefore both defendants believed that they were expected to participate. *See Woods*, 14 F.4th at 557. Ross testified that members "[j]ust constantly have to put in work" to maintain their position in the gang. (Trial Tr., R. 456, PageID 4403). For instance, members commit "robberies, shootings, killings," sell drugs, and "bring[] more money to the pot." (*Id.*) And HCG encouraged such conduct. Indeed, after the retaliatory shooting in 2016, HCG members complimented Ferguson for his ambition because he was the first to shoot. And Ballard overheard Mane Mane advise Ferguson of his promotion to baby gangster based on Vinson's murder. Ross likewise heard Young tell Ferguson and Powell that he was raising their ranks from tiny locs to baby gangsters.

Therefore, even if Ferguson shot Vinson based on his own desire for revenge, the evidence shows that he also was motivated, at least in part, by his membership in HCG. And the testimony that Powell was present during planning for Vinson's murder, and he received a promotion soon after it was carried out, was enough for a rational juror to conclude that he acted to maintain his position in the gang.

Ferguson relies on *Ledbetter* to argue that the government failed to present sufficient evidence here, but that case is readily distinguishable. In *Ledbetter*, we concluded that the trial evidence was insufficient to prove that a defendant murdered a customer in a drug deal to benefit the gang. 929 F.3d at 356. In doing so, we explained that the defendant there had acted as "a single person, who happened to be in a gang." *Id.* And the evidence did not show "that members were expected or encouraged to unilaterally rob or murder low-level drug users who otherwise supported the gang by purchasing its drugs." *Id.* at 358.

Here, however, the government presented ample evidence that Ferguson and Powell acted in concert with other members of HCG, and at Young's instruction, to murder Vinson. Based on witness testimony, the gang members expressly murdered Vinson to avenge Pettigrew's shooting. Moreover, the record shows that Vinson's murder was not HCG's first retaliatory shooting; members also shot up the home of another rival gang's family member after the rivals shot at Young's mother's house in 2016. Thus, unlike in *Ledbetter*, Vinson's murder was not an isolated event performed by a gang member acting alone. *See* 929 F.3d at 356. And a rational juror could find that Ferguson and Powell participated because they were encouraged and expected to engage in retaliatory violence. *See Odum*, 878 F.3d at 519 (holding that a rational juror could find that the defendant engaged in a "spontaneous fight" to maintain his position in the gang and adhere to the gang's expectations); *Hackett*, 762 F.3d at 500–01 (concluding that a rational juror could have found that the defendant both acted in self-defense and that he "would have jeopardized his leadership position with the gang" if he did not shoot); *United States v. Burks*, Nos. 22-6094/6101/6102, 2024 WL 4250334, at *17 (6th Cir. Sep. 20, 2024) (observing that a rational juror could have determined that the defendant committed the murders to gain respect and notoriety with other gang members).

Further, to the extent that Ferguson and Powell argue insufficiency based on the claimed unreliability of Ballard and Ross's testimony, this argument is an attack on witness credibility. And "challenges to the credibility of a witness are not challenges to the sufficiency of the evidence, but instead to the quality of the government's evidence," which is beyond our purview. *Baskerville*, 164 F.4th at 476 (citation modified). As earlier explained, we may not "weigh the evidence presented, consider the credibility of witnesses, or substitute our judgment for that of the

jury." *Jackson*, 470 F.3d at 309 (citation omitted); *see also Ledbetter*, 929 F.3d at 355. So this argument does not move the needle.

B. Admissibility of Evidence of Ferguson's Drug Trafficking and Traffic Stops

Ferguson and Powell challenge the admissibility of the government's drug-trafficking evidence. Specifically, they argue that Ferguson's traffic stops from June 2015, January 2016, and March 2016 were irrelevant and inadmissible under Federal Rules of Evidence 401 and 404(b). Powell argues more broadly that Ballard and Ferguson's drug-dealing activities were inadmissible under Federal Rules of Evidence 404(b) and 403. Relatedly, Powell asserts that Ballard's testimony was not intrinsic to the enterprise.

We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Johnson*, 79 F.4th 684, 698 (6th Cir. 2023). And we will find that a district court abused its discretion only when it "relie[d] on clearly erroneous findings of fact, or when it improperly applie[d] the law or used an erroneous legal standard." *Id.* (citation modified).

1. Intrinsic Evidence

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401(a), (b). And "relevant evidence is admissible unless another rule says otherwise." *United States v. Lester*, 98 F.4th 768, 776 (6th Cir. 2024) (citing Fed. R. Evid. 402). Additionally, Rule 404(b) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, such evidence is admissible to prove other things not pertinent here. *See* Fed. R. Evid. 404(b)(2).

Importantly, intrinsic evidence is outside the scope of Rule 404(b) altogether. *United States v. Sadler*, 24 F.4th 515, 554 (6th Cir. 2022); *see also United States v. Johnson*, 95 F.4th 404, 417 (6th Cir. 2024). "Intrinsic acts are those that are a part of the criminal activity," while extrinsic acts encompass actions "that occurred at different times under different circumstances from the offense charged." *Sadler*, 24 F.4th at 554 (citation modified). Such evidence "forms the basis of the charges for which a defendant is being tried." *Id.*

The district court found that the government's drug-trafficking evidence was intrinsic to the VICAR charges against Defendants. So it was "not subject to Rule 404(b)." (Order, R. 236, PageID 1547). Specifically, the district court concluded that this evidence could show that HCG was an enterprise and that it engaged in racketeering activity. At issue here is testimony and other evidence about HCG members' drug-trafficking activity in general and Ferguson's traffic stops.

Ballard's Testimony. The district court did not abuse its discretion in concluding that Ballard's testimony about HCG members' drug sales was intrinsic evidence because drug trafficking was one of the activities central to the government's theory of HCG's involvement in racketeering. This approach is in line with our reasoning in other racketeering cases. For example, in *United States v. Nicholson*, we held that evidence of a motorcycle club member's shooting was intrinsic to the VICAR charge because the shooting "was one of the primary events used at trial to demonstrate [the enterprise's] racketeering activities." 716 F. App'x 400, 420 (6th Cir. 2017). Similarly, in *United States v. Fowler*, we affirmed the admission of evidence about the defendant's involvement in the disappearance and murder of a person who had incriminating evidence about gang members because it showed that the defendant "was attempting to preserve the criminal enterprise by protecting it from discovery" and therefore established his guilt in a RICO conspiracy. 535 F.3d 408, 422 (6th Cir. 2008).

Here, like the violent undertakings at the heart of the enterprises in *Nicholson* and *Fowler*, HCG members' drug trafficking pursuits were at the heart of the government's proof of HCG's racketeering activities. Ballard's testimony demonstrated (1) that Ferguson and Powell obtained the marijuana they sold from Young—a high-ranking HCG member—and (2) that they contributed earnings from their illicit drug sales to HCG's pot to fuel its activities. In this way, the evidence was part and parcel to an essential element of the VICAR charge.

Ballard's testimony was not unfairly prejudicial. Rule 403 protects against the admission of evidence whose "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues . . . or needlessly presenting cumulative evidence." *United States v. Smith*, 70 F.4th 348, 352 (6th Cir. 2023) (quoting Fed. R. Evid. 403). But evidence is unfairly prejudicial only if it "tends to suggest decision on an improper basis." *United States v. Sherrill*, 972 F.3d 752, 765 (6th Cir. 2020) (citation omitted). Because the question of HCG's involvement in racketeering activity revolved, in part, around whether its members were trafficking in drugs for the benefit of the gang, there is little chance that the jury decided this element on an improper basis. Added to that, Ballard's testimony also helped to establish HCG's status as an enterprise. So, while the testimony was prejudicial in that it showed that Ferguson was engaged in other illegal acts, it was not *unfairly* so. Further, to avoid any unfair prejudice, the district court instructed the jury that "none of these defendants [were] charged with possession or selling marijuana per se." (Trial Tr., R. 451, PageID 3277). The district court did not abuse its discretion in admitting this testimony.

Ferguson's Traffic Stops. For similar reasons, the district court did not abuse its discretion in admitting the evidence of Ferguson's three traffic stops from 2015 and 2016. As discussed, Ferguson's drug dealing was directly related to HCG's racketeering activity. And the details of

the traffic stops—which collectively netted marijuana, money, scales, phones, guns, and ammunition—supported the theory that Ferguson was selling drugs as part of his HCG responsibilities. Evidence from the stops thus served as proof of HCG's racketeering activities. Given Ballard's testimony that Ferguson received the marijuana that he sold from Young, the fact that the drug recovered from the stops was marijuana is meaningful. Further, the June 2015 stop occurred less than 200 feet away from the yellow house—HCG's hangout spot. And during the January 2016 stop, where police found marijuana and scales, Ferguson was with a fellow HCG member. Finally, Ballard testified that, on the same day as the March 2016 stop, he rented a motel room for Ferguson and other gang members. And officers seized a motel room key from one of the passengers during the stop and found more drugs and a loaded firearm in the motel room the next day. *See, e.g.*, *United States v. Hohn*, 293 F. App'x 395, 402 (6th Cir. 2008) (concluding that evidence of a shooting "was a part of the overall criminal scheme charged . . . in the indictment" and "was an act of violence that served to further the [enterprise's] reputation and power").

The circumstances surrounding these stops, thus, were probative of the charged offenses. And like Ballard's testimony, the traffic-stop evidence was not unfairly prejudicial. HCG's racketeering activities were a core element of the VICAR charge, and ample additional evidence showed that Ferguson and Powell trafficked drugs. Additionally, the district court's limiting instruction worked to avoid any undue harm.

Ferguson and Powell push back, insisting that the evidence from the stops had no connection to HCG. To be sure, there are inconsistencies in the record concerning Ferguson's timeline for joining HCG in relation to the timing of the stops. But, all in all, the circumstances and evidence seized during the traffic stops tend to show that Ferguson's drug dealing was related to his HCG commitments. So we see no reversible error.

C. Ferguson's Sentence

Next, Ferguson argues that his sentence was procedurally unreasonable. First, he claims that the district court miscalculated his advisory Guidelines range by classifying him as a career offender under U.S.S.G. § 4B1.1. This classification, says Ferguson, depended on two convictions that occurred after the instant offenses. Second, he contends that the district court did not adequately address the 18 U.S.C. § 3553(a) factors or explain the reason for his life sentence.

Because Ferguson did not object to the procedural reasonableness of his sentence below, we review these arguments for plain error. *See United States v. Hawkins*, 165 F.4th 442, 455 (6th Cir. 2026). To demonstrate plain error, a defendant must show an "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Southers*, 866 F.3d 364, 366 (6th Cir. 2017) (quoting *Johnson v. United States*, 520 U.S. 461, 466–67 (1997)). If these elements are met, we may consider the plain error "but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Johnson*, 520 U.S. at 466–67). The defendant "bears the burden of proof on plain error review." *United States v. Robinson*, 455 F.3d 602, 610 (6th Cir. 2006).

1. Career-Offender Classification

We need not decide whether the district court erred in classifying Ferguson as a career-offender—even if it did, it did not affect his substantial rights because his Guidelines range remains the same, regardless of his classification. True, the career-offender designation increased his criminal history category from IV to VI. But it did not affect his base offense level of 43. And the Guidelines range for an offense level of 43, paired with a criminal history category of IV *or* VI, is life imprisonment. Further, the mandatory minimum sentence for Count 2 was a term of life, and the mandatory minimum sentence for Count 3 was a consecutive 120-month (ten-year)

term. 18 U.S.C. §§ 1959(a)(1), 924(c)(1)(A)(iii). So Ferguson could not have received a sentence lower than life plus ten years. As such, any error in classifying Ferguson as a career offender was harmless. *See United States v. Castro*, 960 F.3d 857, 867 (6th Cir. 2020); *United States v. Faulkner*, 926 F.3d 266, 275 (6th Cir. 2019).

2. 18 U.S.C. § 3553(a) Factors

Ferguson also contends both that the district court did not sufficiently explain its reasoning for imposing a life sentence and did not account for his "youth and upbringing." (Ferguson's Br., ECF 26, 24–25). However, the district court considered the relevant § 3553(a) factors on the record, including information about Ferguson's parents and his childhood. So this argument fails.

Procedural reasonableness requires the district court to "properly calculate the [G]uidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Mitchell*, 107 F.4th 534, 540 (6th Cir. 2024) (citation omitted). The district judge must show that "he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Hawkins*, 165 F.4th at 455 (citation modified).

Here, the district judge explained that he would be considering the § 3553(a) factors in determining Ferguson's sentence. The district court then discussed on the record Ferguson's criminal history; the circumstances of the instant offenses, including that Ferguson was armed; his personal and familial background; his physical, mental, and emotional health; and his educational and employment history. In doing so, the district court expressly considered his youth and upbringing. Additionally, as mentioned, the district court was statutorily mandated to impose a sentence of at least life plus 120 months. 18 U.S.C. §§ 1959(a)(1), 924(c)(1)(A)(iii). And the

court explained the mandatory nature of the life sentence. So that was explanation enough for the life sentence. Moreover, it makes clear why Ferguson could not have received a lower sentence, regardless of whether the district court had afforded more weight to his youth and upbringing as part of its consideration of the § 3553(a) factors.

D. Ineffective Assistance of Counsel—Ferguson

Ferguson's final argument is that his counsel's lack of effort at his resentencing constituted a constructive denial of counsel or, alternatively, ineffective assistance of counsel. Specifically, Ferguson says that his counsel "made no meaningful objections to the PSR, filed no sentencing memorandum on [his] behalf . . . and made no argument in mitigation of the sentence imposed." (Ferguson's Br., ECF 26, 26).

To prevail on his claim of ineffective assistance of counsel, Ferguson would have to meet the two-prong test set forth in *Strickland v. Washington*, which requires defendants to show that their "counsel's performance was deficient" and that this deficiency "prejudiced the defense." 466 U.S. 668, 687 (1984). However, our "typical approach to ineffective-assistance claims on direct appeal is to decline to address such claims unless trial counsel's ineffectiveness is apparent from the record." *United States v. Burrell*, 114 F.4th 537, 548 (6th Cir. 2024) (citation modified). That is, the record must be "adequate to assess properly the merits of the claim." *United States v. Zheng*, 27 F.4th 1239, 1243 (6th Cir. 2022) (citation omitted). Otherwise, we require defendants to bring any ineffective-assistance claim in a 28 U.S.C. § 2255 petition to allow for an opportunity to further develop the record. *Id.*

It is not apparent from the record here that Ferguson's counsel was ineffective at his sentencing hearing. Indeed, because of the applicable statutory minimums, even if his counsel had objected to the PSR, filed a sentencing memorandum, and argued for mitigating factors, Ferguson

would not have received a lower sentence. Nor is the record sufficiently developed for us to otherwise evaluate his claim. We therefore decline to review Ferguson's ineffective-assistance-of-counsel claim at this time.

E. Powell's Batson Challenge

Powell argues that the district court erred in denying his *Batson* challenge to the government's striking of a Black venireperson—Juror 307. He specifically challenges the district court's finding that the government's race-neutral justification for its peremptory strike was credible. To this end, he suggests that the government's decision not to strike Juror 204, who is not Black[1] and who was similarly situated to Juror 307, demonstrates that its justification was pretextual. Powell also asserts that the district court should have considered the government's pattern of strikes, the anonymity of the jury, and the composition of the venire in evaluating his *Batson* claim.

In *Batson*, the Supreme Court held that a prosecutor is prohibited from "challeng[ing] potential jurors solely on account of their race." 476 U.S. at 89. "We review a district court's determination of a *Batson* challenge with great deference under the clear-error standard." *United States v. Gore*, 118 F.4th 808, 817 (6th Cir. 2024) (citation modified). A *Batson* challenge requires the district court to make a three-step inquiry. *See Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003). "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *United States v. Atkins*, 843 F.3d 625, 631 (6th Cir. 2016) (quoting *Cockrell*, 537 U.S. at 328). If the defendant satisfies the first step, the prosecutor then "must offer a race-neutral basis for striking the juror in question." *Id.* (quoting *Cockrell*, 537 U.S. at 328).

[1] As Powell points out, the record does not specifically state the race of Juror 204. But the government does not dispute that Juror 204 was not Black.

The prosecutor's reasoning need not be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)). And third, the district court must evaluate "the persuasiveness of the justification." *Id.* This is the pretext step, and it "requires the court to assess the prosecutor's credibility under all of the pertinent circumstances, and then weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances." *Gore*, 118 F.4th at 818 (citation modified).

Here, at step one, the district court, in what it viewed as a close call, concluded that Powell had made a prima facie showing that the government struck Juror 307 based on race. The government offered the race-neutral explanation that it struck Juror 307 due to her questionnaire answers. This explanation was consistent with its earlier-stated reasons for requesting (unsuccessfully) to strike Juror 307 for cause. In particular, the government was concerned about Juror 307's answers to questions 10, 11, and 14, which addressed her ability to impartially assess a defendant's, specifically a gang member's, guilt. Despite Powell's arguments to the contrary, the district court did not clearly err in deeming the government's explanation persuasive.

1. Rehabilitation of Juror 307

In the written questionnaire, Juror 307 stated that she had reservations about determining a person's guilt because she believed her brother was convicted and sentenced unfairly. She also indicated that she could not fairly and impartially consider whether a gang member is guilty, and it would be difficult for her to grapple with the possibility that the person is innocent. When asked whether there was any other reason why she should be excused, she responded that she could not decide on a person's guilt due to her experience with her brother. And she expressed concerns

about her potential bias. In total, Juror 307 suggested that she could not be impartial five times in the questionnaire.

Later, in a sidebar conversation with the district judge, Juror 307 clarified that the situation with her brother had occurred thirty years ago. When the district court asked whether she could put these prior experiences aside, she responded that being in the courtroom stirred up her emotions. But she explained that she could have an open mind and be unbiased. She also acknowledged that it would be unfair to favor one party over the other. Still, she maintained that it would be difficult for her to find someone guilty.

The district court recognized that, in this sidebar, Juror 307 attempted to show her impartiality, although her responses conflicted with her earlier written answers. Weighing the government's explanation against Powell's prima facie evidence of discrimination, the district court determined that, under the totality of the circumstances, Powell had failed to show purposeful discrimination. And we see no clear error in that conclusion.

Given that Juror 307 continued to adhere to some of her questionnaire answers and remained at least somewhat ambivalent during sidebar discussions about her ability to be unbiased, we cannot say that it was error for the district court to accept the government's explanation for the peremptory challenge. For despite the court's rehabilitation efforts, Juror 307 continued to voice concerns about her ability to remain impartial. Indeed, the government first voiced its reservations about Juror 307's rehabilitation when it requested to strike her for cause. And the district court thoroughly fleshed out the government's concerns at that earlier stage. Against this backdrop, the district court was well able to evaluate whether the government's peremptory strike of Juror 307 was rooted in a discriminatory purpose or in lingering skepticism about the questionnaire responses. We detect no error in the district court's weighing of Powell's prima facie showing

against the government's proposed justification to conclude that the government's proffered reason was more persuasive. *See Gore*, 118 F.4th at 818.

2. Claimed Disparate Treatment—Juror 307 versus Juror 204

Still, unsatisfied with the district court's balancing, Powell asserts that the government's decision to strike Juror 307, and not to strike Juror 204—who he claims offered similar answers—should have tipped the scales in his favor.

"[A] *Batson* violation may be shown by disparate treatment of white and [non-white] jurors." *United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir. 2008). In other words, a proper juror analysis entails "'side-by-side comparisons of some black [potential jurors] who were struck and white ones who were not' show[ing] that the only material distinction between the removed black [individuals] and the retained white individuals is their race." *Id.* (first alteration in original) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)). We can perform a comparative-juror analysis for the first time on appeal where:

> (i) the government purportedly strikes a venireperson because of an answer to a question posed during *voir dire*; (ii) venirepersons relevant to the comparison were asked the same question during *voir dire*; (iii) the relevant venirepersons actually answered that question in similar depth; and (iv) the purpose of the analysis is to show that the government treated jurors with similar answers differently.

Atkins, 843 F.3d at 636.

Here, although Jurors 307 and 204 answered the same questions, they arguably did not respond "in similar depth" to the written and oral questions. *See id.* This fact alone gives us pause about venturing further into this claim. At minimum, their answers were not sufficiently comparable to signify disparate treatment. For example, Juror 204 noted in his written questionnaire that he did not trust anyone. In his sidebar, he reiterated his lack of trust but clarified on several occasions that he would listen to all witnesses. He further explained that he could

determine that the defendants were guilty if the government offered sufficient evidence. And, critically, he noted that although his daughter is incarcerated for manslaughter, he believed that she was probably guilty and that she had been treated fairly. By contrast, Juror 307 stated that she thought her brother had been treated unfairly. And she repeatedly noted that she would have difficulty setting aside her personal feelings regarding her brother's conviction. She also offered several ambivalent answers about her ability to remain impartial, even in the sidebar conversation.

Due to the salient differences in these jurors' answers, we cannot say that the district court erred on the question of pretext. *Cf. Dretke*, 545 U.S. at 244–46 (holding that the government's explanation was pretextual because Black venirepersons who noted concerns about imposing the death penalty were excluded while non-Black jurors who expressed similar concerns were not excluded); *Cockrell*, 537 U.S. at 343 (explaining that the government struck Black venirepersons for their views on the death penalty, rehabilitation, and their own family histories but empaneled white jurors who had similar opinions and backgrounds). In all, Juror 307's mixed responses were enough for the district court to credit the government's explanation for its peremptory strike.

3. Pattern of Strikes and Composition of the Venire

Finally, Powell contends that the district court did not consider the government's pattern of striking Black venirepersons, the overall lack of Black people in the venire, and the anonymity of the jury in assessing whether the government's justification was pretextual. None of these contentions have merit.

The record does not clearly indicate the total number of Black people each party struck or the number of Black people who ultimately served on the jury. However, no one disputes that, in addition to the government's two peremptory strikes of Black venirepersons, the defendants also used a peremptory challenge to strike a Black person. And, as Powell acknowledges, the district

court recognized the lack of diversity in the venire. It therefore decided to give Juror 31, a Black man, an opportunity to make it to the jury box despite his expressed mistrust of the government. Moreover, the district court also granted Powell's *Batson* challenge to Juror 275, another Black venireperson. The record thus reflects that the district court considered both the composition of the venire and the government's pattern of strikes in its decisions.

Relying on *Flowers v. Mississippi*, 588 U.S. 284 (2019), Powell argues that the district court considered the government's strike of Juror 307 in isolation. But that case is largely inapt. In *Flowers*, the Supreme Court considered the government's pattern of striking Black venirepersons across a total of six trials for the same defendant. *Id.* at 306–07. The Court then evaluated the government's strike of a Black venireperson in the current trial based on the government's use of peremptory strikes in prior trials and its "vastly disparate questioning" of Black and white venirepersons. *Id.* at 315. Here, we consider the district court's consideration of events occurring in a single trial. And the record does not show that the government's questioning meaningfully differed between venirepersons of different races. Thus, *Flowers* does not support Powell's argument.

As to the anonymity of the jury, Powell cites no case in which the lack of consideration of this factor alone constitutes a clear error. Nor does he explain how the anonymity of the jury should have affected the district court's evaluation of the government's justification for striking Juror 307. As such, the district court did not clearly err on this basis either.

III.

A. Inconsistent Verdicts—Young

Young explains that, as to Count 3, the district court instructed the jury that it first must determine that he committed the crime charged in Count 2. Specifically, the district court stated

that the jury had to find that "the defendant committed the crime charged in Count 2, aiding and abetting the murder," beyond a reasonable doubt. (Jury Instructions, R. 409, PageID 2500). Therefore, because Young was acquitted on Count 2, he argues that the jury could not have found him guilty of Count 3. Young's sole argument on this point is that the verdicts for Counts 2 and 3 were inconsistent, though he characterizes his claim as a challenge to the sufficiency of the evidence for Count 3.

As an initial matter, the government contends that Young failed to file a timely motion for a judgment of acquittal and that the district court did not find excusable neglect for his failure to meet the deadline. So, according to the government, the district court lacked jurisdiction to consider Young's Rule 29 motion, and we should review his claim solely to determine whether there was a manifest miscarriage of justice. For his part, Young says that the district court blessed the late filing—as it was permitted to do under Federal Rule of Criminal Procedure 45(b)—when the issue was broached on the date first set for sentencing. In particular, Young points to the district court's statement that his counsel could "file whatever [he] believe[d] [was] appropriate" and the court's ruling on the motion, which Young filed the next day. (Sentencing Tr., R. 508, PageID 6773).

Contextually, based on the district court's colloquy with defense counsel and its invitation for Young to file what he deemed appropriate relative to the inconsistent-verdicts issue, it is plausible that the district court implicitly found excusable neglect for Young's untimely Rule 29 motion. After all, even after denying the Rule 29 motion, the court still left the door open for Young to renew the motion even later. So it seems unlikely that the reason for the denial was one of timeliness. Nonetheless, on this ambiguous record, we need not resolve this question because, under any applicable standard of review, Young's inconsistent-verdicts argument fails.

As Young acknowledges, inconsistent verdicts are generally unreviewable. *See Dunn v. United States*, 284 U.S. 390, 393–94 (1932); *United States v. Lawrence*, 555 F.3d 254, 262 (6th Cir. 2009) (collecting cases). Indeed, "the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest." *United States v. Powell*, 469 U.S. 57, 65 (1984). Therefore, we may review inconsistent verdicts under two narrow exceptions. The first exception is where the verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality." *United States v. Randolph*, 794 F.3d 602, 610 (6th Cir. 2015) (citation omitted). And the second is "where a guilty verdict on one count necessarily excludes a finding of guilt on another," otherwise referred to as "a mutually exclusive verdict." *Id.* at 610–11 (citation modified). Young contends that the first exception applies here.

We are unpersuaded that the verdicts for Counts 2 and 3 meet this exception, as Young has not demonstrated that his verdicts were arbitrary or irrational. Mere inconsistency between verdicts is not enough. For instance, in *Dunn*, the defendant's conviction for maintaining a common nuisance by "keeping for sale at a specified place" liquor seemed facially irreconcilable with his acquittals on unlawful possession and unlawful sale of that same liquor. 284 U.S. at 391–92. Yet the Supreme Court affirmed his conviction, reasoning that "[c]onsistency in [a] verdict is not necessary" because "[e]ach count in an indictment is regarded as if it was a separate indictment." *Id.* at 393–94. And even if the verdicts were "the result of compromise, or of a mistake on the part of the jury," such "verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 394. Drilling down further, even inconsistent verdicts "that acquit on a predicate offense while convicting on the compound offense," do not necessarily evince a "windfall to the Government at the defendant's expense." *Powell*, 469 U.S. at 65. Instead, a jury may be

"convinced of guilt" but still reach inconsistent verdicts based on "mistake, compromise, or lenity." *Id.* In *Powell*, the defendant argued that her acquittals on conspiracy to possess cocaine with intent to distribute and possession of cocaine were inconsistent with her convictions for using a phone "in committing and in causing and facilitating" those crimes. *Id.* at 59–60 (citation modified). Several key factors, including "the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of [juror] lenity," led the Court to decline review of the inconsistent verdicts for the predicate and compound offenses. *Id.* at 68–69.

These guiding principles lead us to the same conclusion on reviewability here. True, the district court instructed the jury that it must find that "the defendant" committed Count 2 (aiding and abetting murder in aid of racketeering) as the first element of Count 3 (aiding and abetting the use of a firearm during and in relation to a crime of violence). (Jury Instructions, R. 409, PageID 2500). But the Supreme Court considered a similar scenario in *Powell*. There, the Court noted that, even where the district court "instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense," such that the counts may seem "no longer independent," juror lenity or mistake typically accounts for the inconsistent verdicts on the predicate and compound offenses. 469 U.S. at 68. So juror lenity or mistake also may have contributed to Young's acquittal on Count 2. Ultimately, though, we are unable to discern "whose ox has been gored." *Id.* at 65. That is, we cannot assume that the acquittal on Count 2 was the correct verdict and that the guilty verdict on Count 3 was the wrong one. *See id.* at 68. Indeed, the government could argue the opposite—that Young's guilty verdict on Count 3 necessarily should have resulted in a guilty verdict on Count 2. We are thus doubtful about disturbing the jury's verdicts on this ground, however dependent they may be.

Importantly, Young points to no case in which an "interdependency of counts" has warranted dismissal of the guilty verdict. (Young Reply Br., ECF 38, 7). The closest analogies he offers are *Randolph* and *United States v. Shippley*, 690 F.3d 1192 (10th Cir. 2012). But neither case helps his cause. Both *Randolph* and *Shippley* involved inconsistencies within a single count—not inconsistencies across verdicts. In *Randolph*, for example, the jury convicted the defendant of a drug-trafficking conspiracy but found that none of the charged drugs—cocaine, crack cocaine, and marijuana—were involved in the conspiracy. 794 F.3d at 607. Before reversing the jury's verdict, we specifically explained that Randolph's scenario involved "an internal inconsistency in the same count," rather than inconsistent verdicts. *Id.* at 611. And, based on that internal inconsistency, we concluded that "the government [had] failed to prove an essential element of the charged drug conspiracy." *Id.* at 612. Similarly, in *Shippley*, the jury found the defendant guilty of a drug-conspiracy charge but simultaneously found that he had not conspired to distribute any of the drugs charged in the offense. 690 F.3d at 1193. The Tenth Circuit again noted that "an inconsistency on the *same count with the same defendant* . . . could not have been given full effect," as compared to inconsistencies between verdicts. *Id.* at 1195. By contrast, Young challenges an inconsistency across the verdicts for Counts 2 and 3. So Young cannot rely on *Randolph* and *Shippley* to sidestep the principles that underpin *Dunn* and its progeny. His challenge on this ground, therefore, fails.

B. Young's Sentence

Young asserts that his sentence was procedurally unreasonable because the district court implicitly considered Guidelines provisions not mentioned in the court's reasoning to depart upward. And the district court improperly relied on his leadership role within HCG to justify both the departure and variance. Young asserts that this improper reliance also contributed to making

his sentence substantively unreasonable, along with the fact that the district court imposed a higher sentence for him than for one or more codefendants who pulled the trigger in Vinson's murder.

We typically review challenges to both the substantive and procedural reasonableness of a sentence for an abuse of discretion. *United States v. Evers*, 669 F.3d 645, 661 (6th Cir. 2012). But if a defendant fails to raise his arguments about the procedural reasonableness of his sentence below, we review for plain error. *Hawkins*, 165 F.4th at 455. Here, Young preserved his argument that the district court considered the same facts for both the departure and variance. But Young did not raise his argument that the district court considered additional Guidelines regarding his leadership role below. So we review the district court's decision on the former for an abuse of discretion, and its decision on the latter for plain error.

1. Procedural Reasonableness

For a sentence to be deemed procedurally reasonable, the district court must, among other things, "adequately explain the chosen sentence—including an explanation for *any deviation* from the Guidelines range." *Mitchell*, 107 F.4th at 542 (citation omitted). In this vein, the court has to "explain the reasons justifying a departure," and "evidence of those reasons must appear in the record." *Id.* (citation omitted). A departure from the Guidelines is "the imposition of a sentence outside the advisory range or an assignment of a criminal history category different than the otherwise applicable category made to effect a sentence outside the range." *United States v. Grams*, 566 F.3d 683, 686 (6th Cir. 2009) (citing U.S.S.G. § 1B1.1(E)). A variance differs in that it "refers to the selection of a sentence outside of the advisory Guidelines range based upon the district court's weighing of one or more of the sentencing factors of § 3553(a)." *Id.* at 686–87. Despite their different sources, "the same facts and analyses can, at times, be used to justify both a Guidelines departure and a variance." *Id.* at 687.

The statutory minimum for brandishing a firearm during a crime of violence is 84 months under § 924(c)(1)(A)(ii), while the maximum is life. The Guidelines range is also 84 months. The PSR recommended that the district court depart upward and sentence Young to 180 months. It cited U.S.S.G. § 5K2.1 as a potential ground for departure because death resulted from the offense. The PSR also outlined 18 U.S.C. § 3553(a) factors that might warrant an upward variance. The government recommended that Young receive the maximum statutory sentence of life imprisonment. The district court followed the PSR and sentenced Young to 180 months, relying on both a departure and variance.

Though not immediately clear, Young's argument seems to be that the district court improperly applied the Guidelines in that it relied on Young's leadership position within HCG to depart upward under U.S.S.G. § 3B1.1(a). But that is not what happened: The district court relied on U.S.S.G. §§ 5K2.1, 4A1.3, 5K2.9, and 5K2.18 and considered Young's authority over other HCG members not as an independent reason to depart but in the context of those Guidelines. First, the district judge found that departure under § 5K2.1 was appropriate due to Vinson's death. Next, based on § 4A1.3, the district court assessed Young's past criminal history and found that he was likely to re-offend. The district court then applied § 5K2.9 and concluded that Young "committed the offense of conviction in order to facilitate the activities of the criminal Enterprise." (Sentencing Tr., R. 509, PageID 6849). Lastly, the district judge determined that the policy statement pertaining to defendants' involvement in criminal street gangs in § 5K2.18 was applicable because Young was a highly ranked member within HCG, and other gang members relied on his approval to kill Vinson. The district court did not mention any other Guidelines—instead, it evaluated Young's role in HCG and Vinson's murder as part of its rationale for applying these other Guidelines and the policy provision. Therefore, the record reflects the reasoning for departing

upward, and the district court did not plainly err. *See Mitchell*, 107 F.4th at 542.

Young also argues that the district court relied on the same information, including Young's authorization of Vinson's murder, to impose both a departure and variance. But the district court's reasons for varying upward were based on appropriate statutory factors, not its departure analysis. So this argument fails.

In assessing the § 3553(a) factors, the district court explained, among other things, that Young's offense was "extremely serious," considering that his conduct included authorizing Vinson's murder; the gang engaged in drug trafficking and violence; the other four defendants had pleaded or were found guilty; Young had a lengthy criminal history; and Young's "history and characteristics [were] somewhat of a mixed bag." (Sentencing Tr., R. 509, PageID 6850–53). The district court also considered mitigating factors, such as Young's relationship with his pastor and church. Based on the balance of this information, the district judge adopted the PSR's recommendation and applied an upward variance.

True, the district court considered Young's role in Vinson's murder for both the departure and variance. But the court was permitted to do so, and as discussed further in our substantive-reasonableness analysis, it considered ample additional information in its variance determination. *See United States v. Renteria*, 605 F. App'x 538, 542–43 (6th Cir. 2015) (noting that the district court "relied on some of the same facts" but "separated its analyses of the . . . upward departure from the upward variance and adequately justified both"). Because the record reflects the district court's reasoning for applying both a departure and variance, it did not abuse its discretion.

2. Substantive Reasonableness

With respect to substantive reasonableness, Young again argues that the district court could not apply both a variance and departure based on the same information, his sentence was too long

because Lenon and Monterio were present for the murder and received lower sentences, and the publication he shared at sentencing indicated that "the average sentence for a § 924(c) offense without a career offender enhancement [is] substantially lower" than Young's sentence. (Young's Br., ECF 32, 19–20). He also incorporates by reference his above arguments to the extent they are applicable to substantive reasonableness.

"If we agree that the sentence is procedurally sound, we then consider whether the sentence is substantively reasonable and not too long (if a defendant appeals) or too short (if the government appeals)." *Hawkins*, 165 F.4th at 457 (citation modified). In doing so, we examine "whether the length of the sentence is greater than necessary to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *Id.* (citation omitted). We "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall v. United States*, 552 U.S. 38, 51 (2007). But the district court must "consider the extent of the deviation to ensure that the justification is sufficiently compelling to support the degree of variance." *United States v. Perez-Rodriguez*, 960 F.3d 748, 754 (6th Cir. 2020) (citation omitted). For example, the district court should "explain[] how the present case is different from the typical or mine-run case that occupies the [Guidelines] heartland." *Id.* (citation modified). Importantly, "[t]he greater the variance, the more compelling the justification must be." *Id.*

As discussed, the district court evaluated the § 3553(a) factors on the record to support the variance. For instance, the district court described the seriousness of the offense, Young's supervisory role in giving the go-ahead for Vinson's murder, the gang's drug trafficking and violent activities, the other defendants' convictions, Young's involvement in the church, his extensive criminal history, his complicated family dynamics, his educational and financial background, and his mental and physical health. It is "outside our reviewing role" to "rebalance

the § 3553(a) factors" as they apply to Young. *United States v. Drake*, 126 F.4th 1242, 1247 (6th Cir. 2025) (citation omitted).

The district court also explained the differences between Young's crime and a mine-run § 924(c) offense. Specifically, the court noted the gang activity, Young's position in the gang, HCG's status as a criminal enterprise, HCG's retaliation against a member of another gang resulting in death, and Young's past acts of violence and intimidation. Based on these features, the district court dubbed Young's crime outside "the heartland of typical cases." (Sentencing Tr., R. 509, PageID 6843–44). And we take no issue with that determination.

Despite this explanation, Young maintains that the district court could not apply a variance under § 3553(a) because an above-Guidelines sentence for a § 924(c) offense constitutes a departure. Young's argument on this point is somewhat muddled. However, as noted, the district court identified specific § 3553(a) factors that warranted an above-Guidelines sentence. And it distinguished the circumstances of Young's offense from those within the Guidelines' heartland. The district court therefore provided "sufficiently compelling" reasons to vary upward—in addition to its decision to depart upward. *Perez-Rodriguez*, 960 F.3d at 754 (citation omitted); *see also United States v. Tristan-Madrigal*, 601 F.3d 629, 635 (6th Cir. 2010) (explaining that the district court may consider information relevant to both a departure and the § 3553(a) factors).

Further, although the district court's balancing of the § 3553(a) factors resulted in a higher sentence for Young than those of Lenon and Monterio, we have recognized that "§ 3553(a)(6) concerns *national* disparities between defendants with similar criminal histories convicted of similar criminal conduct—not disparities between codefendants." *United States v. Glover*, 167 F.4th 417, 430 (6th Cir. 2026) (citation modified). So the district court was not required to compare the sentences of Young's codefendants with his, especially where it detailed its reasoning

for the sentence selected for Young. Likewise, even if Young's sentence for his § 924(c) conviction did not align with the documentation that he provided about the average sentence, the record makes clear that the district court evaluated additional factors to reach a higher sentence. For example, the district judge noted Young's likeliness to reoffend based on his criminal history, the circumstances of Vinson's murder, and Young's past violent actions. Therefore, the district court did not abuse its discretion in sentencing Young to 180 months.

IV.

We AFFIRM.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Tennessee

UNITED STATES OF AMERICA
v.
MARKELL YOUNG

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:21-cr-10112-STA-1

USM Number: 81417-509

Matthew M. Maddox
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 3
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 924(c)(1)(A)(ii) and 2	Aiding and Abetting: Use, Carry, Brandish, and Discharge of a Firearm During and in Relation to a Crime of Violence	1/31/2017	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 1, 2, 4

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

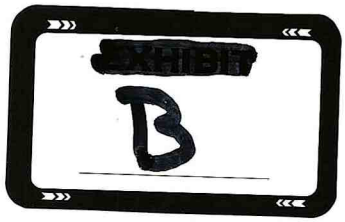
It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/16/2025
Date of Imposition of Judgment

s/S. Thomas Anderson
Signature of Judge

S. Thomas Anderson, U.S. District Court Judge
Name and Title of Judge

1/16/2025
Date



DEFENDANT: MARKELL YOUNG
CASE NUMBER: 1:21-cr-10112-STA-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

180 months

☑ The court makes the following recommendations to the Bureau of Prisons:
The defendant be housed at a BOP facility as close to West Tennessee as possible.
The defendant participate in the RDAP Drug Treatment Program.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MARKELL YOUNG
CASE NUMBER: 1:21-cr-10112-STA-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: MARKELL YOUNG
CASE NUMBER: 1:21-cr-10112-STA-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: MARKELL YOUNG
CASE NUMBER: 1:21-cr-10112-STA-1

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall participate in alcohol and/or drug testing and treatment as directed by the probation officer.

The defendant shall participate in mental health treatment as directed by the probation officer.

The defendant shall participate in Moral Reconation Therapy (MRT) or another similar and approved cognitive behavioral therapy program as directed by the probation officer.

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communication or data storage or media, or office to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: MARKELL YOUNG
CASE NUMBER: 1:21-cr-10112-STA-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

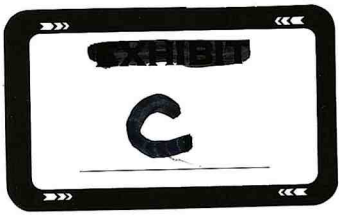
Fourth: That the death of Victim-1 was an unlawful killing of a human being with malice aforethought.

Now, I will give you more detailed instructions regarding some of these terms. I have previously instructed you as to the elements of the charge alleged in Count 2. You should apply those instructions here. The crime alleged in Count 2 is a crime of violence which may be prosecuted in a court of the United States. I have also previously instructed you as to the terms "use," "carrying," "firearm," "during and in relation to," "knowingly," and "advance knowledge." Those instructions apply here as well.

To kill with malice aforethought means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed or felt ill will toward the victim at the time. In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument, and the manner in which death was caused.

Also, in considering the defendant's state of mind, you may find that the defendant intended the natural and probable results of any acts he knowingly took. In other words, you may infer that the defendant intended the consequences that a reasonable person, standing in like circumstances and possessing like knowledge, would have expected to result from his actions. However, it is entirely up to you to decide what facts to find from the evidence.

If you are convinced that the government has proved all of these elements against a defendant, say so by returning a guilty verdict on this charge as to that defendant. If you have a reasonable doubt about any of these elements as to a defendant, then you must find that defendant not guilty of Count 4.



If you find a defendant guilty of this charge, you will be asked on the special verdict form to make additional findings as to whether the defendant "brandished" and/or "discharged" a firearm. The definitions of those terms are as follows:

To "brandish" a firearm means to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

To "discharge" means that the firearm was fired. The discharge of the firearm need not be intentional; it also includes an accidental firing.

Count 4 – Causing Death Through the Use of a Firearm During and in Relation to a Crime of Violence

Count 4 charges each defendant with aiding and abetting each other in causing death through the use of a firearm during and in relation to the murder of Victim-1.

For you to find a defendant guilty of this crime, you must find that the government has proved each of the following elements as to that defendant beyond a reasonable doubt:

First: That the defendant is guilty of the crime of violence charged in Count 2, to wit, aiding and abetting the murder of Victim-1.

Second: That the defendant is guilty of the gun crime charged in Count 3, to wit, aiding and abetting the use, carrying, brandishing, and discharging of a firearm during and in relation to the crime of violence alleged in Count 2.

Third: That in the course of committing the gun crime alleged in Count 3, the defendant caused, or aided and abetted others in causing, the death of Victim-1 through the use or discharge of the firearm.

further, or have the potential of facilitating or furthering the crime charged in Count 2, and its presence or involvement cannot be the result of accident or coincidence.

The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

The government need not prove that a particular firearm was used, carried, brandished, or discharged during and in relation to the crime of violence.

The defendant intended to aid and abet the crime of using, carrying, brandishing, or discharging a firearm during and in relation to a crime of violence if he had advance knowledge that an accomplice would use, carry, brandish, or discharge a firearm during the commission of a crime of violence. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime has begun. It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.

If you are convinced that the government has proved all of these elements against a defendant, say so by returning a guilty verdict on this charge as to that defendant. If you have a reasonable doubt about any of these elements as to a defendant, then you must find that defendant not guilty of using, carrying, brandishing, or discharging a firearm during and in relation to a crime of violence as an aider and abettor.

Second: That someone knowingly used, carried, brandished, or discharged a firearm.

Third: That the use, carrying, brandishing, or discharge of the firearm was during and in relation to the crime charged in Count 2.

Fourth: That the defendant helped to commit or encouraged someone else to commit the crime of using, carrying, brandishing, or discharging a firearm during and in relation to a crime of violence.

Fifth: That the defendant intended to help commit or encourage the crime of using, carrying, brandishing, or discharging a firearm during and in relation to a crime of violence.

Now I will give you more detailed instructions on some of these terms. To establish "use," the government must prove active employment of the firearm during and in relation to the crime charged in Count 2. "Active employment" means activities such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. "Use" also includes a person's reference to a firearm in his possession for the purpose of helping to commit the crime charged in Count 2. "Use" requires more than mere possession or storage.

"Carrying" a firearm includes carrying it on or about one's person. "Carrying" also includes knowingly possessing and conveying a firearm in a vehicle which the person accompanies including in the glove compartment or trunk.

The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

The term "during and in relation to" means that the firearm must have some purpose or effect with respect to the crime charged in Count 2; in other words, the firearm must facilitate or

crime with the intent that the crime be committed.

If you find that the defendant aided and abetted the murder of Victim-1, then you may find that this element of Count 2 is satisfied.

If you are convinced that the government has proved all of the elements of Count 2 against a defendant, say so by returning a guilty verdict on this charge as to that defendant. If you have a reasonable doubt about any of the elements of Count 2 as to a defendant, then you must find that defendant not guilty of the charge in Count 2.

Count 3 – Aiding and Abetting Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

Count 3 charges each defendant with aiding and abetting each other in using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence. For you to find a defendant guilty of this charge, it is not necessary for you to find that he personally used, carried, brandished, or discharged a firearm during and in relation to a crime of violence. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. As I have already instructed you, a person who does this is called an aider and abettor.

But for you to find a defendant guilty of using, carrying, brandishing, or discharging a firearm during and in relation to a crime of violence as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

First: That the defendant committed the crime charged in Count 2, aiding and abetting the murder of Victim-1. Aiding and abetting murder is a crime of violence which may be prosecuted in a court of the United States.

a reasonable doubt about any of the elements of Count 1 as to a defendant, then you must find that defendant not guilty of the charge in Count 1.

Count 2 - Element Five - Aiding and Abetting Murder

In order to prove a defendant guilty of Count 2, the fifth element of the charge in Count 2 that the government must prove beyond a reasonable doubt is that the defendant aided and abetted murder in violation of Tennessee law. For you to find that a defendant aided and abetted others in the murder of Victim-1, it is not necessary for you to find that he personally committed the murder. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. A person who does this is called an aider and abettor.

But for you to find a defendant guilty of murder as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt: (A) that the crime of murder was committed; (B) that the defendant helped to commit the crime or encouraged someone else to commit the crime; and (C) that the defendant intended to help commit or encourage the crime.

Once more you should apply my earlier instructions to you about murder under Tennessee law and the definitions of first-degree murder, second-degree murder, and criminal responsibility I described before. You should apply those same instructions and definitions here to decide whether a defendant conspired with others to murder Victim-1.

Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough. What the government must prove is that the defendant did something to help or encourage the

the defendant committed the charged crime to assist another person to gain entrance or to maintain or increase such person's position in the enterprise.

Count 1 - Element Five - Conspiracy to Commit Murder

In order to prove a defendant guilty of Count 1, the fifth element of the charge in Count 1 that the government must prove beyond a reasonable doubt is that the defendant conspired to commit murder in violation of Tennessee law. For you to find that the defendant conspired to commit murder, the government must prove beyond a reasonable doubt (A) that the defendant entered into an agreement with one or more people to commit murder; (B) that each of the parties to the conspiracy had the intent to commit murder; (C) that each party acting for the purpose of promoting or facilitating the commission of the murder agreed that one or more of them would engage in conduct which constitutes murder; and (D) that one of the parties to the conspiracy committed an overt act in furtherance of the conspiracy.

I have previously defined for you two ways a person is guilty of murder under Tennessee law, first-degree murder and second-degree murder. You should apply those same instructions and definitions here to decide whether a defendant conspired with others to murder Victim-1. An overt act is an act done by one of the parties to carry out the intent of the conspiracy and it must be a step toward the execution of the conspiracy. "Intent" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

If you find that the defendant conspired with others to murder Victim-1 in violation of Tennessee law, then you may find that this element of Count 1 is satisfied.

If you are convinced that the government has proved all of the elements of Count 1 against a defendant, say so by returning a guilty verdict on this charge as to that defendant. If you have

18 U.S. Code § 1959 - Violent crimes in aid of racketeering activity

U.S. Code Notes

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

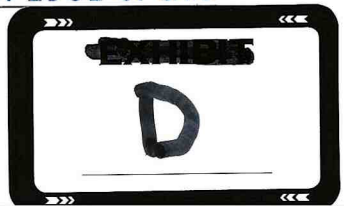
(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of[1] under this title, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and



(2)"enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

(Added Pub. L. 98–473, title II, § 1002(a), Oct. 12, 1984, 98 Stat. 2137, § 1952B; renumbered § 1959, Pub. L. 100–690, title VII, § 7053(b), Nov. 18, 1988, 102 Stat. 4402; Pub. L. 103–322, title VI, § 60003(a)(12), title XXXIII, §§ 330016(1)(J), (2)(C), 330021(1), Sept. 13, 1994, 108 Stat. 1969, 2147, 2148, 2150.)