14-3211-cr(L),
14-3226-cr(CON)

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

DONTAE SEBBERN, AKA K-Don, AKA KD, DEXTER WAITERS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT DONTAE SEBBERN, AKA K-DON, AKA KD

MERINGOLO LAW
Attorneys for Defendant-Appellant
Dontae Sebbern, aka K-Don, aka KD
375 Greenwich Street, 7th Floor
New York, New York 10013
(212) 941-2077

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JURISDICTIONAL STATEMENT

Appellant Dontae Sebbern appeals from a final judgment disposing of all charges against him entered by the United States District Court for the Eastern District of New York on August 29, 2014. *United States v. Sebbern, et al.*, 10-CR-87 (SLT) Dkt. # 181; SA-238-44. After his sentencing on August 22, 2014, Sebbern timely filed a notice of appeal on August 28, 2014. SA-245. The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Sebbern's conviction on Racketeering Acts Three and Four and Counts Three, Four, and Five (murder of Jermaine Dickersen, conspiracy to commit murder, and the use of a firearm in connection therewith) must be vacated:

(a) Because the government withheld material information concerning the alleged traffic stop on November 7, 2009, that should have been disclosed pursuant to *Brady v. Maryland*;

(b) Because there was no probable cause to stop the vehicle from which the murder weapon was recovered on November 7, 2009, and, therefore, no admissible evidence that linked Sebbern to the murder or to a murder conspiracy; and/or

(c) Because the evidence was insufficient to convict Sebbern of the murder, given that both Sebbern and his co-defendant were acquitted of having discharged the murder weapon, the murder was not committed in furtherance of any RICO enterprise, and the district court's instruction on aiding and abetting the 924(c) count was error in light of *Rosemond*.

2. Whether the district court erroneously and prejudicially admitted recorded phone calls and written statements made by Sebbern and his co-defendant after their incarceration in violation of the Sixth Amendment of the United States Constitution and *Crawford v. Washington* including what the district court termed statements against penal interest by co-defendant/Appellant Waiters concerning the Dickersen murder.

3. Whether the narcotics seized from Sebbern on July 15, 2009, should have been suppressed or, in the alternative, whether Sebbern's conviction on Racketeering Act Two and Count Eleven should be vacated for failure to prove intent to distribute.

4. Whether the evidence was insufficient to prove the existence of a narcotics trafficking conspiracy as alleged in Racketeering Act One and Count Nine.

5. Whether, on this record, Sebbern's conviction for racketeering (Count One) and RICO conspiracy (Count Two) must be vacated for lack of evidence.

STATEMENT OF THE CASE

I. The Indictment and Counts of Conviction

The fourth superseding indictment, on which the case was tried, alleged that Sebbern, a/k/a K-Don or KD, was a member or associate of the Gorilla Bloods, an enterprise within the meaning of the RICO statute, whose purposes included "[e]nriching the members and associates of the enterprise through criminal activity, including drug trafficking," "[p]romoting and enhancing the prestige, reputation and position of the enterprise with respect to rival criminal organizations," "[p]reserving and protecting the power, territory and criminal ventures of the enterprise through the use of intimidation, threats of violence and acts of violence, including murder, murder conspiracy and assault," and "[k]eeping victims and rivals in fear of the enterprise and its members and associates."[1] A-22-23.

Sebbern was charged with:

- Count One: Racketeering as a member of the Gorilla Bloods, a set of the Bloods street gang, "in or about and between May 2008 and June 2010" through the commission of four racketeering acts: **(1)** Conspiracy to Distribute Cocaine Base and Cocaine "[i]n or about and between May 2008 and June 2010;" **(2)** Possession of Narcotics (cocaine base and marijuana)

[1] Sebbern relies principally on the appendix of co-Appellant Waiters. References to Waiters' appendix are notated with "A-". References to materials contained in Sebbern's appendix are notated with "SA-".

with the intent to distribute on or about July 15, 2009; **(3)**[2] Murder of Jermaine Dickersen on or about November 7, 2009; and **(4)** Murder Conspiracy (conspiracy to murder Jermaine Dickersen and others) on or about November 7, 2009;

- Count Two: Racketeering Conspiracy "in or about and between May 2008 and June 2010" through the pattern of racketeering acts alleged in Count One;
- Count Three: Murder of Jermaine Dickersen In-Aid-Of Racketeering "on or about November 7, 2009" "for the purpose of maintaining and increasing position in the Gorilla Bloods;"
- Count Four: Conspiracy to Commit Murder In-Aid-Of Racketeering—conspiracy to murder Jermaine Dickersen, Elome Guinn, Dion Nelson, and "others";
- Count Five: Unlawful Use of Firearms in connection with the November 7, 2009 murder of Jermaine Dickersen and the crimes charged in Counts One, Two, Three, and Four, including the brandishing and discharge thereof;

[2] The indictment designates the murder as Racketeering Act ("RA") 3 and the conspiracy as RA 4. A-25-26. The jury charge and the verdict sheet designate the murder as RA 3(a) and the conspiracy to murder as RA 3(b). A-2393; SA-233.

- Count Six[3]: Felon in Possession of a Firearm on or about November 7, 2009, "to wit: a Harrington and Richardson .32 caliber revolver, and ammunition;"
- Count Nine: Conspiracy to Distribute Cocaine Base and Cocaine "in or about and between January 2004 and June 2010," involving 28 grams or more of a substance containing cocaine base and a substance containing cocaine;
- Count Ten: Unlawful Use of Firearms in connection with the drug trafficking crime charged in Count Nine "in or about and between January 2004 and June 2010," including the use and carrying thereof;
- Count Eleven: Possession of Narcotics with Intent to Distribute on or about July 15, 2009, including cocaine base and marijuana.

A-21-38.

The jury convicted Sebbern of all charged Counts and Racketeering Acts with the exception of Count Ten. On Count Five, the jury convicted both Sebbern and his co-defendant Dexter Waiters of use of a firearm during and in relation to

[3] The Court reserved on Count Six and did not charge the jury with respect to that offense until after the verdict on the other counts had been rendered. Sebbern's co-defendant Dexter Waiters was the sole defendant charged in Count Seven and Count Eight. Therefore, the verdict sheet used by the jury as to Sebbern numbers the counts differently. Counts One through Five are unchanged. Count Nine is the jury's Count Six; Count Ten is the jury's Count Seven; Count Eleven is the jury's Count Eight, and Count Six is the jury's Count Nine (in the supplemental verdict form). SA-233-37. This brief refers to the racketeering acts and counts as numbered in the indictment.

the crimes charged in Counts One, Two, Three, and Four, but found it not proved that either of them had discharged the firearm. A-2688; SA-234.

Sebbern was sentenced principally to life imprisonment plus 60 months. He is serving that sentence.

II. The Evidence At Trial

In addition to the following factual summary, Sebbern adopts and incorporates the factual statement in co-defendant/Appellant Waiters' brief on appeal insofar as it pertains to him.

A. The November 7, 2009, Stop and Arrest

Sebbern and Waiters were arrested shortly before 5:00 am on November 7, 2009, when NYPD officers stopped their black Mercedes for an alleged traffic violation and, after the Appellants' fled, took them into custody, searched the vehicle, and recovered evidence including bulletproof vests and two firearms, one of which was later linked to the bullet found in Jermaine Dickersen, who had been shot minutes earlier. A-119. The government attributed this weapon to Waiters. A-119.

The district court held a suppression hearing on November 28, 2012, at which NYPD Officer Richard Ortiz was the sole witness. Ortiz testified that, on the night of November 6-7, 2009, he had been working from 8:30 pm to 5:05 am with

Officer Pena, Officer Kim, Officer Aguilo[4], Officer Piscopo, and Sergeant Tai. SA-139. At approximately 4:30 am, the officers "responded to shots fired at 201 Arlington Avenue" on Staten Island. SA-141. Thereafter, the officers "received another call for shots fired at the Holland Houses," and the officers, all in plainclothes left 201 Arlington Avenue in unmarked cars at approximately 4:45 or 4:50 am. SA-141-42; SA-152. Sergeant Tai was driven by Officer Piscopo in the lead car. SA-143-44. Ortiz followed in a car with Officers Kim, Pena, and Aguilo. A-142; A-144. Ortiz did not recall receiving a description of the shooters. SA-153.

> As the cars were approaching the Holland Houses on Holland Avenue:
>
> [The lead police car] had made a right-hand turn on Benjamin Place, and proceeding up Holland Avenue, about to come to an intersection of Benjamin Place, when a black Mercedes runs a stop sign as we're coming up, almost colliding with our vehicle, where I had to swerve to the left to avoid being hit, at which point they right-turned, going back up towards Holland Avenue.

SA-144-45. The stop sign was on Benjamin Place. SA-145. Ortiz then "turned on our lights, to let the car stop before running the stop sign and almost colliding into our vehicle." SA-145. The Mercedes was traveling at a high rate of speed. SA-155. Ortiz pulled behind the Mercedes, turned on his lights and siren, and pursued the Mercedes (SA-157-58), attempting a traffic stop instead of continuing to the

[4] Officer Aguilo's name is spelled "Arguello" at the hearing but "Aguilo" at trial. A-263.

site of the "shots fired" call (SA-154). "The car refused to stop, proceeded up toward the Holland Houses, made the first right turn into the parking lot." SA-145. Thus, from Ortiz's description, the black Mercedes fled *toward* the Holland Houses—the location where the "shots fired" call had originated.

The car stopped in the parking lot of the Holland Houses, and the occupants fled. SA-146-47. Officers gave chase and apprehended Sebbern and Waiters. SA-147-49; SA-158-61. A silver firearm was recovered on the ground next to the Mercedes. SA-150.

The district court denied the motion to suppress, ruling that the officers' stop and the resulting search and seizure had been justified under *Illinois v. Wardlow*, 528 U.S. 119 (2000) because the Mercedes had fled from the officers' presence after the officers activated their flashing lights following an attempt to make a routine traffic stop. SA-222. Because the handgun had been found next to the Mercedes, not seized from Waiters' person, the district court ruled he had no possessory interest in the gun that would entitle him to seek suppression. SA-223.

At trial, the government called Officer Ortiz, Officer Aguilo, Officer Kim, Officer Piscopo, and Officer Pena—that is, everyone except Sergeant Tai—who had taken part in the arrests. Officer Ortiz testified to essentially the same series of events that he had recounted at the hearing. *See* A-192-208.

Officer Aguilo agreed that the black Mercedes had passed the stop sign on Benjamin Place, but did not describe the vehicle as traveling fast. A-273. In response to the officers' attempt to pull the Mercedes over, it "[c]ontinued to drive, made a right into the parking lot." A-274. Aguilo confirmed that the Mercedes was going toward the scene of the homicide. A-306.

Officer Kim testified that the Mercedes "just shot out of Benjamin Place, and almost hitting us, and . . . blew the stop sign, and made a right turn onto Holland Avenue." A-316.

Officer Pena testified that, "As we approached Benjamin Place we noticed headlights and basically a black vehicle that stopped—didn't stop through the stop sign and nearly striking our vehicle. Went through the stop sign and almost struck us." A-779. The officers turned on their lights and sirens to stop the vehicle, A-780, but the car kept going until it "stopped and then right at the very edge of this driveway, entrance to this parking lot, stopped and then the door opened—the front door opened again and then the vehicle went about five, ten feet and then stopped again." A-781.

In contrast, Officer Piscopo, who had been driving the lead vehicle, testified that he had taken "Arlington Place to Holland Avenue, I made a right turn to Benjamin Place, and I made a right turn onto Benjamin." A-353. "As I went onto Benjamin Place. I saw a black Mercedes coming out of the parking lot area from

behind the Holland Houses and coming out at a slow rate of speed, and as they passed, I pulled a U-turn to get a closer look at the vehicle." A-353. *See also* A-366 (the Mercedes "was going quite slow" and "was not speeding away"); A-372 (the Mercedes had not been driving quickly as Officer Piscopo made the turn onto Benjamin Place). Officer Piscopo's vehicle was unmarked and could not be identified from the outside as a police vehicle. A-367. After Officer Piscopo's U-turn, the Mercedes "took off quickly, ran the stop sign at Holland and Benjamin, almost striking my other officers in their vehicle." A-354, 367. The Mercedes was not breaking any traffic laws when he saw it. A-370. It had been "driving on the street slowly, breaking no laws" when Officer Piscopo spontaneously decided to follow it and made a U-turn. A-371.

B. The Murder of Jermaine Dickersen

Jermaine Dickersen, a/k/a Big Den, was killed in the parking lot of 65 Holland Avenue shortly before 5:00 am on November 7, 2009. A-162-63; A-167. The government argued that Sebbern and Waiters had shot him in retaliation for an earlier fight at Josie's, a nightclub at 201 Arlington Avenue. A-123; A-124 ("KD and Dex opened fire. A bullet tore through Jermaine Dickersen's chest and lungs and he went down."). As described in co-appellant Waiters' brief at pages 4-8, Sebbern, Waiters, and others including Dickersen and his "crew", and two visiting alleged members of the Gorilla Bloods, Joshua Demellier and Tyrone Harley,

attended the party.[5] See also A-1233-35. As Harley picked a fight with members of Dickersen's crew (A-1288-94) there is no evidence that Sebbern reacted in any way. A-1294 (cooperating witness Amos Boone: "Fresh, Tel, Dex, they all tried to step up."). Dickerson told them not to interfere. A-1294-95. During the course of the fight, Demellier was shot and wounded and Harley's jaw was broken. A-1297-98, 1305.

After the party, when Boone went outside, "all the Gorillas was right there," near a green Infiniti. A-1303-04. Harley was yelling at them. A-1304. "KD was on one side of the car," A-1305, and "you really couldn't judge like KD's demeanor," A-1307. Thereafter, there is no evidence concerning Sebbern until his arrest, discussed above.

Harley was upset. A-1305. In the parking lot outside Josie's, he addressed Fresh and Dex, saying "Trey Trey Little Gru," which Boone explained meant, "[W]hat's up with them niggers right there," asking whether Boone and his friend Eric had been involved in the fight. A-1310-11. Harley also said, "GTO," which Boone interpreted as "Gorilla take over," indicating that Fresh and Dex should "put

[5] The government's witness to this fight (Amos Boone) and the other partygoers had been drinking and smoking marijuana before and during the party. A-1224-25. Boone was drinking after the party as well, A-1322-23, and smoking marijuana at the time he allegedly saw Dickersen's shooting. A-1330-31.

in work." A-1312-13.[6] Under the circumstances, Boone understood that Harley was telling the Gorilla Bloods to "jump" or attack Boone. A-1313. They did not attack him. A-1313.

Boone claimed to have been in the parking lot at 65 Holland Avenue coincidentally at the time of the shooting a short time later because he was dropping off his sister Danielle and her boyfriend Eric. A-1328, A-1359. As he drove through the parking lot of 65 Holland Avenue, Boone saw Power standing alone by his car near 65 Holland. A-1331-32. At the same time, he saw Dickersen exit 65 Holland. A-1332-33. As he was driving down the parking lot, his lights illuminated the area and he saw "someone peeping," "creeping with a hoody on . . . peeping around the wall with a hoody on." A-1334-35. As he accelerated, he saw "somebody else in-between those parked cars, coming through those cars with a gun visible at his side." A-1336. He was not able to see either person's face. A-1337. As Boone left the parking lot, he heard gunshots go off and saw sparks in his rearview mirror. A-1337-38.

The only other eyewitness to the shooting, Tammy Lenoir, described how, in the early morning on November 7, 2009, she, her sister Quanesha, her boyfriend

[6] Boone was not a member of the Gorilla Bloods. A-1153. He did not know what "GTO" meant. *See, e.g.*, A-1283 (GTO is like a "greeting" meaning "Gorillas on the set."); A-1312-13 ("GTO" means to "put in work," i.e., to act on behalf of the Gorilla Bloods). The Bloods are divided into "sets" and each of the "sets" has different leaders and different codes. A-471; A-1152.

Wiz, and her sister's boyfriend (Dickersen) had all gone downstairs to wait for another friend, Power, who was going to take them for breakfast. A-161. As Power pulled up, Lenoir saw that "there was two boys in the parking lot walking. As we walked, walking to the car, they started shooting towards us." A-162. It was still dark outside and she did not see their faces. A-162. Neither she, nor Wiz, nor Big Den recognized the shooters. A-175-76. After the shooting, she fled inside the building but left again within half an hour to go to the hospital, A-166-67, where she learned that Dickersen had died. A-167.

Dickersen arrived at Richmond University hospital at 4:55 am and was admitted at 4:59 am. A-441; A-442. He died of a gunshot wound to the left lung and pulmonary artery. A-427. A bullet was found in his body on the left side of the back. A-430. That bullet, although deformed (A-433; A-1715-16; A-1741) was matched to the 9-milimeter semiautomatic gun found on the ground next to the black Mercedes. A-1712-13. When seized, the 9-milimeter handgun was fully loaded. A-376. No DNA, no fingerprints[7], and no eyewitness identifications linked Sebbern to the murder weapon or to the murder. *See* A-872-73 (car processed for fingerprints, DNA); A-1045-56 (no fingerprints matched to Sebbern); A-1000-01 ("very strong support" for finding that Sebbern's DNA is not on the grip of the 9-milimeter gun); A-1002 (DNA laboratory "couldn't conclude

[7] Only Tyrone Harley's fingerprints were matched to the Mercedes. A-1049-50.

whether Dontae Sebbern was a contributor or not" to the DNA found on the trigger); A-1012 (Sebbern was excluded as a contributor to the DNA on the gun). In fact, Sebbern, Waiters, and Jontel Sebbern were all excluded as contributors to the DNA found on the 9-milimeter's trigger. A-1013; A-1017.

Although he was invited to the party, cooperating witness Lamar Chase went to the movies instead. A-596. During the movie, Fresh called him and asked him for a gun "because something happened at the party that he was at." A-597; A-600. "He said . . . that him, KD and Dex, they had a fight inside the party with E-man, Booquan, and Den." A-600.[8] Chase told Fresh that he did not have a gun. A-600. Chase subsequently spoke to KD (Sebbern) who confirmed "that he had just had a fight and they was going back to Arlington." A-602.[9]

Sebbern did not have a gun at the time of the murder. As Chase testified:

Q Now, you testified that Fresh called you up on the night that Big Den was killed?
A Yes.
Q And Fresh told you that he was with Mr. Sebbern?
A Yes.
Q He told you he was with Mr. Waiters?
A Yes.
Q Right?
Fresh asked you for a gun?

[8] However, Boone stated that the fight was between the individual in Government Exhibits 6 and 10 [Harley and Demellier] and others, not including Sebbern. A-1288-99; A-1409. Derek Fields, the club owner, described "a commotion" but did not see what happened. A-1320-22.

[9] Fresh's former girlfriend Dava Allen testified that Fresh "said that his friend was fighting with E-man." A-922.

A Yes.
Q Is that -- Fresh didn't have a gun?
A No.
Q He was with Mr. Sebbern?
A Right.
Q Fresh didn't have a gun.
He was with Mr. Waiters, correct?
A Yes.
Q Fresh didn't have a gun.
He called you because you are a Blood, right?
A Yes.

A-649-50.

The following morning, Fresh again "told [Chase] that he was scared, that he wanted to get a gun." A-613. He asked Chase to get a gun for him, but Chase didn't. A-613.[10]

The jury found that neither Sebbern nor Waiters had discharged a gun in connection with the shooting of Dickersen. A-2688; SA-234.

C. The July 15, 2009, Stop

On October 24, 2012, the district court held a hearing on Sebbern's motion to suppress the narcotics seized from his car on July 15, 2009. The sole witness was Officer Christopher Parco, who had initiated the traffic stop and arrested Sebbern. Parco testified that he had been patrolling in the area of Port Richmond,

[10] Chase described one of the benefits of being a member of the Bloods as having "[a]ccess to weapons, drugs." A-468. If he needed a weapon, he would "go to another Blood member and ask for one." A-469. Yet, when Fresh called Chase on November 7, 2009, and asked him for a weapon, Chase did not give him one. A-613. Fresh had to go to Washington Heights to get a gun. A-916-17; A-927-28.

Staten Island, on Heberton Street in a marked police car with his partner, Sergeant Nancy Cirigliano. SA-35. Parco first testified that he was on Heberton, but then explained that, "I was traveling on Castleton Avenue towards New Street." SA-37. "As I approached the intersection of Heberton and New Street, I observed an older model green infinity traveling on New Street toward Heberton into the intersection, failing to stop at the stop sign as posted on New Street." SA-37. After Parco saw the Infiniti run the stop sign, he:

> moved my car over to the left, to avoid colliding with the defendant as he pulled out of the intersection in making a right-hand turn onto Heberton. I then proceeded to make a U-turn at the next intersection, without losing sight of the vehicle, and pull behind the defendant at the corner of Castleton Avenue and Heberton, where he was stopped at a traffic light, which was in the red position at the moment.

SA-40. Parco tried to pull the car over, but the car continued down Castleton until it turned into the driveway of 1465 Castleton Avenue, where it came to a stop. SA-42; SA-56-58. Parco pulled into the driveway behind the driver, walked to the driver's side window and asked for his license, registration, and insurance. SA-44. He was focused on the inside of the car and was not aware of what Cirigliano was doing. SA-59, 61. After initially refusing, Sebbern gave Parco a learner's permit. SA-45-46.

As Parco was standing by the driver's side door, he noticed "what appeared to be approximately two to three bags of what looked like to be crack cocaine lying

in the track of his sunroof." SA-47. The drugs were in the sunroof, underneath where it tilts up. SA-66-67; SA-76-77.

Parco then asked Sebbern to exit the car, at which point, Sebbern indicated that he was going to resist arrest. SA-51-52. Sebbern exited the car and, after a brief struggle, Parco put him in handcuffs. SA-52-53. Sebbern was "acting irate; kicking and yelling and causing a disturbance." SA-53. The Emergency Services Unit responded to the scene. SA-53-54. Parco searched the vehicle and found "approximately 26 bags of crack cocaine and approximately six bags of marijuana" "hidden in between the headliner and the roof of the car, where the sunroof would retract, when it was in an opened position." SA-54. He initially found two or three bags of crack, and then, during a more thorough search of the car, found the additional crack cocaine and the marijuana deeper inside the sunroof. SA-82.

On November 28, 2012, the district court orally denied the motion to suppress. SA-164. In a subsequent written decision, the district court credited Parco's testimony in its entirety and found the stop and arrest reasonable. SA-226; SA-230. Based on Parco's initial sighting of two to three bags of crack cocaine, the district court found the search justified. SA-231-32.

At trial, Officer Parco was again the only witness called concerning the events of July 15, 2009. Other than describing the car as a late-model Infiniti (A-382) and asserting that he had swerved to the right, not the left (A-382) his

testimony was substantially the same as at the suppression hearing. *See generally* A-378-404; A-413-420.

There was no evidence that the seized narcotics were intended for distribution or that they were related in any way to the Gorilla Bloods. No other witness testified about the incident on July 15, 2009. No witness testified that Sebbern sold or otherwise distributed marijuana. Sebbern used marijuana and crack cocaine from the age of 16 through the date of his arrest in 2009. PSR ¶ 87.

Sebbern's request for a lesser included offense charge of simple possession was denied. A-2134-35.

D. The Evidence At Trial Concerning the Gorilla Bloods' Narcotics Trafficking

The government attempted to prove that Sebbern had been involved in a narcotics distribution conspiracy in furtherance of the charged enterprise from 2004 until June 2010—seven months after his arrest in this case on November 7, 2009. A-33. However, as the government admitted in its opening statement, the narcotics trafficking was unrelated to any enterprise until 2008. A-120. The government alleged that both Waiters and Sebbern became members of the Gorilla Bloods in 2008 and began to expand their drug dealing operations based on a search for "more customers, more money, more power, and more respect in Staten

Island." A-121-22.[11] But the government failed to prove the existence of a RICO enterprise engaged in drug dealing for any purpose, much less the purposes alleged in the indictment.

The DEA had been investigating narcotics trafficking, racketeering and related violence in or around the North Shore of Staten Island since 2008, centering the investigation on Dickersen and his associates, including various Bloods subsets. A-2078-79. Despite this investigation, neither Sebbern's nor Waiters' phone was ever tapped and no undercover drug buys were made from them. A-2080. The DEA never photographed the porch at 131 Harrison Avenue—the Gorilla Bloods' alleged base of operations—or Sebbern or Waiters. A-2081. The DEA's investigation into Sebbern and Waiters began on November 7, 2009. A-2087.

None of the four cooperating witnesses were Gorilla Bloods. *See* A-467 (Chase was a member of Nine Trey)[12]; A-1143; A-1557. Nor had any of them been involved in a narcotics distribution conspiracy with Sebbern. *See, e.g.*, A-1160-73 (Boone sold drugs with "Wally," by himself, with "Killer," with "Pito," and with his brother); A-1639.

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[11] In fact, Sebbern was not a Gorilla Bloods member. He associated with the Gorilla Bloods. *See, e.g.*, A-134; A-1544.

[12] Dickersen was also a member of Nine Trey. A-586. He, Booquan, E-man, Wiz, and Frankie were "basically running everything that was out [in Arlington]." A-592.

1. Lamar Chase

Lamar Chase asserted that Sebbern had sold drugs in 2004 and 2005. A-448-49; A-451. However, Chase's memory proved unreliable. For example, although Chase claimed to have personal knowledge that Waiters sold drugs in 2004 and 2005, the parties stipulated at the close of trial that Waiters had, in fact, not done so. A-2123.[13]

Chase asserted that Sebbern sold crack from various locations including Waiters' house at Harrison and Treadwell. A-452-53. Chase was selling "down on the street" in the same locations at the same time. A-453-54. Other individuals were also "around them" and selling crack in the same locations. A-454. They did not have a name for themselves (i.e., a gang affiliation) in 2004-5. A-563. Chase lost track of Sebbern "after 2004, 2005" because he was in prison. A-496.

Chase was in jail for a substantial part of 2004. A-481-83. He was also imprisoned for most of 2006 through 2009. A-486; A-489-90. He was released in September 2009. A-490. While in jail, he learned from Fresh, who was a Gorilla Blood, that Sebbern, Waiters, and others were selling crack using a "money phone." A-455-56; A-496-97; A-566-67; A-570.

[13] In addition, Sebbern could not have sold drugs from early 2005 through 2008. He was arrested on February 9, 2005, and sentenced on August 15, 2005 to 42 months of imprisonment. He was released on May 13, 2008. PSR ¶ 67.

Although Fresh gave Chase some crack to sell in October 2009, when he was released from jail, there is no evidence that Chase joined any Gorilla Bloods conspiracy. A-572. Chase observed Sebbern selling crack in Port Richmond every day in 2009. A-473. Chase saw Sebbern make a hand-to-hand sale (A-574-75), but he only saw Fresh use the "money phone." A-575-76.

2. Dava Allen

Allen testified that Sebbern, Waiters, and Fresh were friends and sold crack together. A-902. Allen used to drop Fresh off at the house on Harrison where he would "[s]ell drugs. Hang out with his friends." A-904-05. "Different crackheads would come, they would make a sale to a crackhead." A-905. Fresh also used a phone to make sales. A-906. If Fresh was not able to make the sale, he would "call Dexter, K.D. or any other friend and tell him what the crackhead needs if they were around." A-907. Fresh told her that he was in a gang with Sebbern and Waiters in 2008 and 2009. A-911-12. "They all sold drugs together. They were friends, that's what they did. They hung out every day, the sold drugs together, and whatever crackheads that came by, they shared." A-940.

3. Amos Boone

Boone testified generally about drug sales; he did not testify about Sebbern's specific conduct or the activities of the Gorilla Bloods. A-1183-86. Although he

discussed others, Boone did not mention seeing Sebbern sell drugs. *See, e.g.*, A-11412.

4. Ramone Vaughn

Vaughn never saw Sebbern selling drugs in 2004 and 2005. A-1538. He saw him "[s]tanding in a spot where people sell drugs from." A-1538. In 2008 and 2009, he knew Sebbern sold drugs, although he did not witness sales. A-1540. Sebbern "would pull up [in front of Waiters' house], he would be over there for a little while, and his phone would ring, and he said he had to go make a sale." A-1540. *See also* A-1578 (Sebbern "would pull up sometimes" outside the Harrison house in 2008). He heard conversations that Sebbern had with others from which he deduced that Sebbern had a drug "route." A-1579; A-1588. Vaughn understood that Sebbern sold crack cocaine. A-1542.

* * *

After the parties stipulated that Waiters had not made any sales of narcotics from February 14th, 2004, through 2005 (A-2123), Sebbern moved for a mistrial, arguing that, "this goes directly to whether there was a conspiracy between Dexter Waiters and Dontae Sebbern. In other words, if Dexter Waiters did not participate in the drug sales as described by Lamar Chase, that will effect how the jury will look at Mr. Sebbern and his participation." A-2119. The motion for a mistrial was denied. A-2118.

After the government rested, counsel moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure Rule 29 on Counts One and Two (Racketeering and Racketeering Conspiracy), arguing that, particularly as concerned the narcotics counts, the government had not made any showing of relatedness. A-2125-26. The district court denied the motion. A-2132.

At the conclusion of the evidence, Sebbern renewed his objection to the district court's proposed *Pinkerton* charge, arguing that ultimately, it would be found unconstitutional for allowing a "conviction based on foreseeability rather than actual intent." A-2133.

On this record, there is no evidence that Sebbern sold drugs as part of a RICO enterprise from 2004 through the end of 2007, and there is no evidence that he sold drugs *in furtherance of* that enterprise in 2008 and 2009. The only phone call introduced against Sebbern in which he allegedly discussed a narcotics "route" was from December 3, 2009. A-1858-60. *See also infra* at 25, 93. There was no evidence that Sebbern participated in an ongoing drug conspiracy in 2010.

E. The Alleged Enterprise Evidence—Phone Calls and Letters

1. Pre-Trial Motion to Suppress Or Sever

Before trial, the government moved to admit (and the defense opposed) various phone conversations and letters that the government alleged constituted co-conspirator statements in furtherance of the conspiracy.

Sebbern moved for severance on November 13, 2012, arguing that admission of Waiters' post-incarceration telephone calls and letters were not co-conspirator statements. SA-125-27. Counsel argued under *United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999) and Fed.R.Evid. 801(d)(2)(E) that the statements could not be admitted unless the government had established (a) the existence of a conspiracy between the declarant and the defendant and (b) that the statement was made during the course of and in furtherance of that conspiracy. SA-125. Counsel noted that, "In order to be 'in furtherance' of a conspiracy, the statements must be such as to prompt the listener to respond in a way that promotes or facilitates carrying out a criminal act that is part of a conspiracy in which the defendant is a participant." SA-125 (citing *Gigante*).

Counsel argued that the statements could not be admitted as statements in furtherance of either charged conspiracy—the conspiracy to murder Dickersen or to sell cocaine and cocaine base—because the "government has not set forth any meaningful evidence that either conspiracy continued after Mr. Waiters and Mr. Sebbern was arrested, or that any of the statements Mr. Waiters made were in furtherance of those conspiracies rather than simply accounts of past events." SA-125-26. The statements, at best, were "about" or "related to" the conspiracy, but this, counsel argued, was insufficient to prove that they were made "in furtherance of" the conspiracy, as required by this Circuit. SA-126 (citing *United States v.*

Carneglia, 47 Fed. Appx. 27, 34 (2d Cir. 2002) [membership in organized crime alone does not constitute a conspiracy sufficient to meet the exception to the hearsay rule set forth in 801(d)(2)(E)]; *United States v. Gambardella*, 2012 U.S. Dist. LEXIS 11856 (S.D.N.Y. 2012) ["[T]he law requires more than that statements be 'about' or 'related to' the conspiracy, to be admissible as co-conspirator statements."]) (additional citations omitted).

The murder conspiracy ended on November 7, 2009, after Dickersen was murdered and Sebbern was arrested. The government offered no evidence, counsel argued, that the narcotics conspiracy continued after that same date. SA-126. Concerning the proffered telephone call on December 3, 2009, between Sebbern and an unknown male caller (introduced at trial as GX823T [*see* A-2664-74]), counsel argued that it was ambiguous at best and even if it did related to drugs, "it would be insufficient to establish that the narcotics conspiracy was on-going for the purpose of admitting Mr. Waiters' statements as co-conspirator statements." SA-127.

In the event that the district court admitted statements that the government characterized as Waiters' admissions that he killed Dickersen, counsel argued that a severance should be granted because such speculation would "cause enormous prejudice to Mr. Sebbern," given that he was arrested with Waiters moments after Dickersen was killed. Further, because Sebbern would not be able to cross-

examine Waiters, counsel argued that introduction of Waiters' statements would violate Sebbern's right to due process, right to confrontation, and the rule against hearsay. SA-127 (referencing *Crawford v. Washington*, 541 U.S. 36 (2004); *Richardson v. Marsh*, 481 U.S. 200 (1987); *Bruton v. United States*, 391 U.S. 123 (1968)).

The court reserved decision on the admissibility of the calls and letters. SA-197.

2. The Evidence Admitted At Trial

At trial, the district court admitted multiple phone calls by Sebbern and Waiters made from inside the jail during the months after their arrest and letters written by Waiters to other (alleged) members of the Gorilla Bloods that had been seized from Waiters at the Manhattan Detention Complex.

The government offered several statements as to both defendants as co-conspirator statements. A-1766. Sebbern objected several as "mere chatter." A-1769-70. Sebbern also objected to the introduction of any of Waiters' calls as co-conspirator statements. A-1773. Sebbern objected to the letters' admissibility against him because they failed to prove that Waiters was continuing to manage any operation. A-1774-75.

Counsel also argued that the government's theory that the phrase "dragging the knuckles" was an admission that Waiters had killed Big Den was "a little

farfetched." A-1775. To the extent that the government intended to pursue that argument, counsel renewed his motion for severance. A-1775. Counsel argued that Sebbern would be "overwhelmingly prejudiced by the idea that Mr. Waiters made any type of admission." A-1775.

The government argued that the calls, all of which had been made after the defendants were arrested on November 7, 2009, demonstrated that, "after the defendants were arrested in this case, they continued to manage the enterprise, which is the Gorilla Bloods conspiracy, and their drug-trafficking operations from the inside of the jail…." A-1771. "[E]ach one of these conversations . . . are examples of the defendants and their co-conspirators on the outside exchanging information about what's happening on the street, . . . what are people doing to maintain the integrity of the enterprise." A-1772. With respect to counsel's motion for severance, the government argued that admission of Waiters' statements would amount to nothing more than "the admission of a Mirandized confession" but also argued that they were admissible as co-conspirator statements and evidence that Waiters was still directing the Gorilla Bloods' activities from jail. A-1776.

After reviewing the proffered transcripts overnight, the district court stated, "I don't see anything in here that's relevant." A-1821. Following argument, the district court changed its position and admitted the majority of the calls. *See*

generally A-1821-1909 (discussing calls).[14] The district court also admitted papers and telephone numbers seized from Waiters at the Manhattan Detention Complex showing that he possessed contact information for other alleged members of the Gorilla Bloods (government exhibits 600, 603, 604, 606), and post-arrest letters written by and to Waiters as statements in furtherance of the conspiracy. *See* A-1913-15 (argument); A-1916 (admitting GX602[15]); A-1924 (admitting GX605 over defense objections); A-1926 (admitting GX607 over defense objections); A-1932 (admitting GX608 over defense objections); A-1935 (admitting GX609 over defense objections). Copies of most of the admitted call transcripts and other documents are reproduced at A-2585-2676.

One example demonstrates how unsubstantiated some of the government's arguments concerning enterprise evidence were. Discussing 814T, a call that the government alleged showed Waiters' leadership in the gang, the government asserted that the phrase "on to G" indicated that the conversation was turning to gang business. A-1894. The district court asked, "Where did we have that; on to G? What in the record lets us know that means talk about gang business?" *Id.* The government admitted, "Your Honor, I don't know that there is actually testimony

[14] The district court had previously admitted two calls against Sebbern and two against Waiters. A-1766-68.

[15] GX602 included a list of individuals alleged to be members of the Gorilla Bloods, and addresses for them in various maximum security New York State prison facilities. A-1966-68.

about that particular code but it's apparent from the context of [the] calls that when [the] phrase is spoken, then the discussion turns to gang business." *Id*. On that weak basis, the district court admitted the call into evidence. *Id.*

The district court admitted several of Waiters' letters as statements against penal interest concerning Dickersen's murder, and denied Sebbern's motions for severance. *See, e.g.*, A-1918 (admitting GX601 as "some proof of the enterprise, but also as an admission against Mr. Waiters' penal interests."); *see also* A-1916-17 (quoting from the letter: "If you should oppress a rilla [i.e., a Gorilla] you should be dealt with no matter who you are and that's basically what this is about."); A-1920 (motion for severance denied); A-1927 (denying renewed motion for severance in the context of GX607); A-1973 (GX607 read to the jury, ". . . You know I had to let my Knuckles drag on a few dirty monkeys who felt that they can disrespect Bee Es double Gee.[16] I know you must have heard we also took a fall too. . . .").[17]

The district court instructed the jury that statements could be considered only against the speaking defendant (A-1953-54; A-1956) and that Waiters' letters could be considered as to Sebbern "only . . . with regard to whether the enterprise has been proved and for no other reason," (A-1965).

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[16] BSGG (Black Stone Gorilla Gangsters)

[17] Vaughn, who was not a Gorilla Blood, testified that the phrases "beating my chest," "stomping my feet," and "dragging my knuckles" were terms used by Black Stone Gorilla Gangsters. A-1566. He did not explain their meaning.

SUMMARY OF THE ARGUMENT

It was undisputed that Sebbern associated with members of the Gorilla Bloods gang. However, the government failed to prove beyond a reasonable doubt that Sebbern engaged or conspired to engage in a pattern of racketeering acts consisting of narcotics distribution, murder, and conspiracy to commit murder.

First, Sebbern's conviction for murder, conspiracy to commit murder, and the use of a firearm in connection therewith (Racketeering Acts Three and Four and Counts Three, Four, and Five) should be overturned **(a)** because the conviction was obtained only after the government failed to produce *Brady* material concerning the circumstances preceding the traffic stop attempt during which Sebbern was arrested; **(b)** because the alleged traffic violation that formed the basis for the traffic stop was caused by police action and the stop, therefore, violated Sebbern's Fourth Amendment rights and *Terry v. Ohio*; and **(c)** because the evidence was insufficient to prove that Sebbern (or anyone) had acted with the requisite criminal intent to commit the charged crimes or had done so in furtherance of the charged enterprise.

Second, the district court erred in admitting written statements by Sebbern's co-defendant that the district court characterized as statements against penal interest concerning the Dickersen murder in violation of the Sixth Amendment and

Crawford v. Washington and the statements substantially prejudiced Sebbern and denied him a fair trial.

Third, the district court erred in not suppressing the narcotics seized from Sebbern during a traffic stop on July 15, 2009, or, in the alternative, abused its discretion by denying the defense's motion for a mere possession instruction. There was no proof of intent to distribute and there was significant evidence that the drugs were for personal use. Sebbern's conviction on Racketeering Act Two and Count Eleven should be vacated because each element of the offense was not proved beyond a reasonable doubt.

Fourth, the evidence was insufficient to prove the existence of a narcotics distribution conspiracy from 2004 through June 2010 as alleged in Racketeering Act One or from 2008 through June 2010 as alleged in Count Nine.

Fifth, on this record, the evidence was insufficient to prove that Sebbern had engaged in racketeering (Count One) or racketeering conspiracy (Count Two) and his conviction should be vacated.

ARGUMENT

POINT I
SEBBERN'S CONVICTION FOR MURDER, CONSPIRACY TO COMMIT MURDER, AND THE USE OF A FIREARM IN CONNECTION THEREWITH MUST BE OVERTURNED.

I. The Government Withheld *Brady* Material Concerning the Stop and Subsequent Arrest on November 7, 2009, Causing Sebbern Actual Prejudice and Rendering His Trial Unfair.

A. Legal Standard

When considering an alleged *Brady* violation, this Court conducts its "own independent examination of the record," and views "'the cumulative effect of suppression' in light of the evidence as a whole." *United States v. Santos*, 486 Fed. Appx. 133, 135-36 (2d Cir. 2012) (quoting *United States v. Orena*, 145 F.3d 551, 558 (2d Cir. 1998); *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995)).

"The government's duty under *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] is fairly settled." *United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002). Under *Brady* and its progeny, the "prosecution has a constitutional duty to disclose evidence favorable to an accused when such evidence is material to guilt or punishment." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). *Giglio* established that "[t]his duty covers not only exculpatory material, but also information that could be used to impeach a key government witness." *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Kyles*, the Supreme Court explained that the Government's *Brady* obligations impose a duty to disclose not just that material known to an

individual prosecutor, but "mean[ ] that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "[C]omplying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory material under *Brady*—a constitutional requirement that trumps the statutory power of 18 U.S.C. 3500." *United States v. Rittweger*, 524 F.3d 171, 181 n.4 (2d Cir. 2008).

"*Brady* requires that exculpatory witness statements be disclosed even if they are not memorialized in any document." *United States v. Villa*, 2014 WL 280400 (D. Conn. Jan. 24, 2014) (citing *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007)("The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form.")). Even statements or documents that are not themselves admissible evidence are material if they could lead to the discovery of admissible evidence. *Gil*, 297 G.3d at 104 (collecting cases).

"With respect to *when* the prosecution must make a disclosure required by *Brady*, the law . . . appears to be settled." *United States v. Douglas*, 525 F.3d 225, 245 (2d Cir. 2008). "*Brady* material must be disclosed in time for its effective use at trial." *Coppa*, 267 F.3d at 135. *See also Gil*, 297 F.3d at 106 (quoting *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001)) ("disclosure of critical information on

the eve of trial is unsafe for the prosecution" because "the opportunity to use it may be impaired."). *Brady* material that is not "disclos[ed] in sufficient time to afford the defense an opportunity for use" may be deemed suppressed within the meaning of the *Brady* doctrine. *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001). Thus, a *Brady* violation arises if there is a reasonable probability that earlier disclosure of the evidence would have produced a different result at trial. *See Douglas*, 525 F.3d at 245.

To establish a *Brady* violation, a defendant must show that: (1) the Government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant, either because it is exculpatory or because it is impeaching; and (3) the failure to disclose this evidence resulted in prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). *See also Coppa*, 267 F.3d at 140.

> [The] touchstone of materiality is a reasonable probability of a different result . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, 514 U.S. at 434 (internal citations and quotation marks omitted). *See also United States v. Mahaffy*, 693 F.3d 113, 127 (2d Cir. 2012) (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 867 (2006)) ("'[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed

evidence would have resulted ultimately in the defendant's acquittal,' but rather, a conviction must be reversed 'upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"); *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006) (exculpatory evidence is material when it "tends to show that the accused is not guilty") (quoting *Gil*, 297 F.3d at 101). "Where the evidence against the defendant is ample or overwhelming, the withheld *Brady* material is less likely to be material than if the evidence of guilt is thin." *Gil*, 297 F.3d at 103 (referencing *United States v. Orena*, 145 F.3d 551, 559 (2d Cir. 1998)).

Establishing prejudice requires that a defendant demonstrate that the suppressed evidence was material, that is, that there was "a reasonable probability of a different result" if the suppressed evidence had been produced. *United States v. Jackson*, 345 F.3d 59, 73 (2d Cir. 2003) (internal quotation marks omitted). *See also Leka*, 257 F.3d at 104, 106–07 (holding a *Brady* violation occurred where the withheld evidence was a police officer's eyewitness observations that contradicted the accounts of two eyewitnesses whose testimony constituted the sole evidence at trial implicating the defendant in the shooting).

B. Discussion

As became apparent at trial during Officer Piscopo's testimony, there was no legal basis for the traffic stop on November 7, 2009. In fact, Officer Piscopo, who

had been driving the lead unmarked police car, testified that there was no reason to suspect the Mercedes was involved in criminal activity. A-370-71; A-353. This testimony, which contradicted Officer Ortiz, who was the sole witness at the suppression hearing on October 24, 2012, was material to the defense and should have been disclosed before the suppression hearing. Because it was not, the trial court's suppression ruling rested on an inadequate factual basis.

By failing to disclose Officer Piscopo's conflicting version of the events of November 7, 2009, the government suppressed, whether intentionally or inadvertently, material evidence that could have caused the district court to suppress the evidence seized from the Mercedes after Sebbern's arrest. There can be no doubt that, if defense counsel had learned that the lead officer, who was in the best position to view the Mercedes, had made a U-turn without voicing any level of suspicion, let alone "some objective manifestation" that the Mercedes was (or had recently been) engaged in criminal activity (*see United States v. Cortez*, 449 U.S. 411, 417 (1981), discussed *infra* at p. 38-39), he would have contested the evidence at the suppression hearing in a manner calculated to bring this discrepancy to the district court's attention, quite possibly resulting in a favorable suppression ruling.

The government's entire case against Sebbern concerning the murder of Dickersen, the conspiracy to murder, and the use of a firearm in connection

therewith, stemmed from the fact that he was arrested a few minutes after the shooting, wearing a bulletproof vest, in a car that contained the murder weapon. If the fact of his arrest, the bulletproof vest, and the gun had been suppressed, as they should have been, there would have been no evidence tying him to the murder. Whether calculated or merely negligent, the government's *Brady* violation materially prejudiced Sebbern to such an extent that the verdict on Racketeering Acts Three and Four and Counts Three, Four, and Five must be vacated.

II. Trial Testimony Established That the Stop of the Black Mercedes on November 7, 2009, Violated *Terry v. Ohio*. The District Court's Denial of Suppression, Which Was Made Before Trial, Was Clearly Erroneous.

A. Legal Standard

This Court reviews the legal issues presented by a motion to suppress using a *de novo* standard, but "accept[s] the district court's factual findings unless clearly erroneous, and we view those facts in the light most favorable to the government." *United States v. Casado*, 303 F.3d 440, 443 (2d Cir. 2002) (referencing *United States v. Peterson*, 100 F.3d 7, 11 (2d Cir. 1996)).

Where a pretrial motion to suppress is denied but evidence at trial demonstrates a clear constitutional violation, reconsideration is proper. *See Gouled v. United States*, 255 U.S. 298 (1921) (overruled in part on other grounds by *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967)).

The Fourth Amendment of the United States Constitution recognizes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. AMEND. IV. Thus, the reasonableness of a search or seizure is determined by balancing the particular need to search or seize against the intrusion into an individual's privacy that it would cause. *United States v. Bailey*, 743 F.3d 322, 331 (2d Cir.) *cert. denied,* 135 S. Ct. 705, 190 L. Ed. 2d 461 (2014) (referencing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

To justify a warrantless investigatory stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The officer must have more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 US. at 27. "[D]ue weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. *See also United States v. Arvizu*, 534 U.S. 266, 273 (2002) (requiring a "particularized and objective basis for suspecting wrongdoing"); *Alabama v. White*, 496 U.S. 325, 329-30 (1990) (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984) ("The Fourth Amendment requires 'some minimal level of objective justification' for making the stop."); *Cortez*, 449 U.S. at 417 ("An investigatory stop must be justified by some

objective manifestation that the person stopped is, or is about to be, engaged in criminal activity"); *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (same) (referencing *Terry*, *Cortez*, and *White*).

"[W]hile a reviewing court cannot merely defer to police officers' judgment in assessing reasonable suspicion, the court must view the totality of the circumstances 'through the eyes of a reasonable and cautious police officer on the scene.'" *Bailey*, 743 F.3d at 332 (quoting *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000) (internal quotation marks omitted)). Presence in a high crime area is one relevant consideration. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144 (1972)). However, standing alone, presence "is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124 (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

B. Discussion

The November 7, 2009, stop of the black Mercedes, the subsequent search and seizure of evidence including the 9-milimeter semiautomatic handgun, and the arrest of Sebbern (and Waiters) in connection with the murder of Jermaine Dickersen violated the Fourth Amendment. Sebbern's conviction as to Racketeering Acts Three and Four and Counts Three, Four, and Five (murder of Jermaine Dickersen, conspiracy to commit murder, and the use of a firearm in

connection therewith) must be vacated because there was no probable cause to stop the vehicle on November 7, 2009, and, therefore, no admissible evidence that linked Sebbern to the murder or to a murder conspiracy.

Crediting Officer Piscopo's testimony, discussed above, there was no reasonable basis for the U-turn that initiated the traffic infraction and subsequent stop of the Mercedes. Officer Piscopo "saw a black Mercedes coming out of the parking lot area from behind the Holland Houses and coming out at a slow rate of speed, and as they passed, I pulled a U-turn to get a closer look at the vehicle." A-353. He did not articulate a specific fact or even a hunch that the vehicle was involved in criminal activity. *See Terry*, 392 U.S. at 21 ("the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). Here there was nothing. Officer Piscopo made a U-turn "to get a closer look" at the Mercedes, not because of any specific facts or reasonable inferences. To the contrary, the Mercedes were proceeding lawfully and, by Officer Piscopo's account, under the speed limit, when he initiated the U-turn. A-371. Appellant acknowledges that non-criminal acts may "justify the suspicion that criminal activity was afoot." *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (quoting *Reid v. Georgia*, 448 U.S. 438 (1980)). But merely driving a car in a lawful manner at 4:50 am, even in a

high crime area, cannot be the sort of non-criminal activity that the Supreme Court had in mind.

Appellant further acknowledges that the Supreme Court has instructed that, "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124. However, in this case, the Mercedes' flight was provoked by the unmarked police car making a U-turn as if to follow the Mercedes. A-353-54. Although the second police car, also unmarked, then activated its lights and attempted to stop the Mercedes, there is nothing in this record to demonstrate that the Mercedes was initially committing a traffic violation. To the contrary, the evidence is that the car was traveling slowly and lawfully. A-370-71. In an acknowledged high crime area, at night, it is not inexplicable that finding oneself suddenly followed by a strange car that is unidentifiable as a police vehicle, would have led the occupants of the Mercedes to take quick and evasive action. The traffic violation was provoked by police conduct. It cannot give rise to any level of reasonable suspicion such as required by *Terry* and the cases that followed.

In addition, it defies logic that, having allegedly committed a murder some five to ten minutes before, the Appellants would choose to flee *toward* the crime scene, which all accounts agree that they did, instead of leaving as quickly as

possible. *See* A-173 (Dickersen had already been shot at 4:45 am); A-212 (officers responded to the shots fired call at approximately 4:50 am); A-226-27 (Sebbern was arrested by 4:54 am). The fact that, in attempting to flee, the Mercedes turned onto Holland Avenue and stopped in a parking lot of the Holland Houses, a mere 300 to 400 feet from where Dickersen had been shot (A-731) supports the conclusion that Sebbern was not involved in the murder and was, in fact, unaware that it had occurred.

Because only Officer Ortiz, the driver of the second police car, testified at the suppression hearing on November 28, 2012, the district court did not have full information concerning the circumstances of the stop. If Officer Piscopo had been called to testify, the district court would have been able to evaluate the circumstances of the traffic stop and the reasonableness of the officers' alleged suspicions. Because he was not, the district court was deprived of full information and, on this basis the denial of suppression was clearly erroneous.

There was no justification for the U-turn or for the subsequent stop, search, and seizure. Therefore, the evidence seized from the Mercedes, including the 9-milimeter firearm recovered next to the car, the 32-milimeter firearm seized from Sebbern, and the bulletproof vests should have been suppressed. There is no DNA evidence, no fingerprints, and no eyewitness identifications that link him to the murder of Big Den. There is nothing other than the circumstantial case built from

the claimed match of the deformed bullet found in Dickersen's body to the 9-milimeter gun recovered next to the Mercedes, which both Sebbern and Waiters were found not to have discharged. In a case built on such weak evidence, the district court's ruling on suppression, which was clearly erroneous based on the trial testimony, and the consequent violation of Sebbern's Fourth Amendment rights, prejudiced his case and denied Sebbern a fair trial. For these reasons, Sebbern's conviction on Racketeering Acts Three and Four and Counts Three, Four, and Five should be vacated.

III. The Evidence Was Insufficient to Find that Sebbern Murdered or Aided and Abetted the Murder of Jermaine Dickersen.

A. Legal Standard

This Court reviews challenges to the sufficiency of the evidence under a deferential *de novo* standard. *United States v. Brock*, No. 14-239-CR, 2015 WL 2191135, at *2 (2d Cir. May 12, 2015) (citing *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (standard is "exceedingly deferential")); *id.* (citing *Coplan*, 703 F.3d at 62 [citing *United States v. Yannotti*, 541 F.3d 112, 120 (2d Cir. 2008); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)]) ("Although sufficiency review is *de novo*, we will uphold the judgments of conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"). In making this assessment, the Court "view[s] the evidence in the light most favorable to the Government, crediting

every inference that could have been drawn in the Government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Brock*, 2015 WL 2191135 at *2 (citing *Coplan*, 703 F.3d at 62 [citing *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)]).

However, although inferences must be in the government's favor, "inferences must be based on evidence and must be reasonable." *United States v. Ceballos*, 340 F.3d 115, 125 (2d Cir. 2003). *See also United States v. Autori*, 212 F.3d 105, 114 (2d Cir. 2002) ("we view the evidence presented in the light most favorable to the government, and we draw all *reasonable* inferences in its favor") (emphasis added); cf. *United States v. D'Amato*, 39 F.3d 1249, 1256-57 (2d Cir. 1994) ("a conviction based on speculation and surmise can not stand").

"[D]irect evidence is not required; '[i]n fact, the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the government still demonstrates each element of the charged offense beyond a reasonable doubt.'" *United States v. Graziano*, 616 F. Supp. 2d 350, 358 (E.D.N.Y. 2008) *aff'd*, 391 Fed. Appx. 965 (2d Cir. 2010) (internal citations omitted). "However, 'if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.'" *Graziano*, 616 F. Supp. 2d at 358 (quoting *United States v.*

Glenn, 312 F.3d 58, 70 (2d Cir. 2002) (internal quotation marks omitted); *accord United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005)).

Here, no rational jury could have drawn a *reasonable* inference from the evidence, whether direct or circumstantial, that Sebbern murdered or conspired to murder Dickersen in-aid-of the charged racketeering enterprise.

B. Discussion

1. The Evidence Was Insufficient to Prove That Sebbern Committed or Aided and Abetted Commission of the Murder of Jermaine Dickerson Under RICO.

The government charged the murder of Jermaine Dickersen as a murder in-aid-of racketeering or as the aiding and abetting of such a murder in violation of 18 U.S.C. §§ 1959(a)(1), 2, and 3551 *et seq.* and N.Y. Pen. L. §§ 125.25(1) and 20.00. *See* A-25-26; A-28-29.

a. Murder in Aid of Racketeering

Section 1959(a) provides, in pertinent part, that

> [w]hoever, ... for the purpose of ... maintaining or increasing position in an enterprise engaged in racketeering activity, murders ... 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....

18 U.S.C. § 1959(a)(1). To convict a defendant of murder in-aid-of racketeering in violation of 18 U.S.C. § 1959(a)(1) requires proof beyond a reasonable doubt:

> (1) that the organization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that that defendant committed or aided and abetted the murder, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

United States v. Persico, 645 F.3d 85, 105 (2d Cir. 2011) (referencing *United States v. Rahman*, 189 F.3d 88, 126 (2d Cir.), *cert. denied*, 528 U.S. 982, 120 S.Ct. 439, 145 L.Ed.2d 344 (1999); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992), *cert. denied*, 510 U.S. 856, 114 S.Ct. 163, 126 L.Ed.2d 124 (1993)). "Relatedness between the racketeering acts and the enterprise can be proven by showing either that: (i) the offense related to the activities of the enterprise, or (ii) the defendant was able to commit the offense solely because of his position in the enterprise." *United States v. Bruno*, 383 F.3d 65, 84 (2d Cir. 2004) (collecting cases).

The "[d]efendant's motive must be receiving payment or promise of payment of anything of pecuniary value from the racketeering enterprise or 'gaining entrance to or maintaining or increasing position' in the enterprise." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). This Court "interpret[s] that phrase by its plain terms, giving the ordinary meaning to its terms." *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001). Although "[s]elf-promotion need not have been the defendant's only, or even his primary, concern," the conduct must still have been his "general purpose." *United States v.*

Thai, 29 F.3d 785, 817 (2d Cir. 1994) (quoting *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *United States v. Rosa*, 11 F.3d 315, 340-41 (2d Cir. 1993)).

A conviction under § 1959 must be reversed if the connection between the offense and the motive is speculative. *Thai*, 29 F.3d at 819 (while conviction should be affirmed "if a motivation to maintain or increase his position may be *reasonably* inferred from the evidence, such a conviction may not be affirmed where, as here, that inference is based on no more than guesswork") (emphasis added).

b. Aiding and Abetting

Title 18 Section 2 provides that whoever, "aids, abets, ... commands, induces or procures" the commission of a federal offense, or "willfully causes an act to be done which if directly performed by him" would be a federal offense, "is punishable as a principal." 18 U.S.C. § 2(a) and (b). "Liability for aiding and abetting can be established by showing ... that the defendant 'consciously assisted the commission of the specific crime in some active way.'" *Persico*, 645 F.3d at 105 (quoting *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008) [quoting *United States v. Medina*, 32 F.3d 40, 45 (2d Cir. 1994)]).

To "convict a defendant of aiding and abetting the government must prove (1) commission of the underlying crime, (2) by a person other than the defendant,

(3) a voluntary act or omission by the person charged as an aider or abettor, with (4) the specific intent that his act or omission bring about the underlying crime." *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985) (citing *United States v. Perry*, 643 F.2d 38, 46 (2d Cir. 1981)).

In *Pipola*, this Court clarified that, to convict a defendant under 18 U.S.C. § 2(a), "[t]he government must . . . prove the underlying crime was committed by someone other than the defendant and the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime." *United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996) (referencing *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990)). Moreover,

> To show specific intent the prosecution must prove the defendant knew of the proposed crime—suspicion that it might occur is not enough—and had an interest in furthering it. *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir.1988). In sum, to prove the act and intent elements for aiding and abetting the commission of a crime, the evidence must demonstrate that the defendant joined and shared in the underlying criminal endeavor and that his efforts contributed to its success. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985).

Pipola, 83 F.3d at 562. *See also United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (approving jury instruction that, "The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to

establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.").

In *Concepcion*, this Court further discussed the requirements for finding liability under 18 U.S.C. § 2(a) and (b). Relying on the above-stated principles, the Court found that "Concepcion's conviction cannot be sustained on the basis of aiding and abetting under § 2(a) because there is no evidence as to who fired the shots that injured Ortiz and Reyes. Since the identity of that person or persons was not shown, there was no basis on which the jury could rationally infer that the shooter(s) had the criminal intent to violate § 1959 envisioned by § 2(a)." *United States v. Concepcion*, 983 F.2d 369, 383 (2d Cir. 1992) (referencing *Labat*; *United States v. Elusma*, 849 F.2d 76, 78 (2d Cir. 1988) (Under § 2(a), "an aider and abetter must share in the principal's essential criminal intent, [and] 'the principal must be shown to have had the "essential criminal intent."'")).

Under 18 U.S.C. § 2(b), "an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries." *Concepcion*, 983 F.2d at 384 (quoting *United States v. Kelner*, 534 F.2d 1020, 1022 (2d Cir.), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976)).

c. Discussion

The evidence was insufficient to prove either that Sebbern committed or aided and abetted the murder or that he did so for the purpose of maintaining or increasing his position in the charged Gorilla Bloods enterprise.

First, Sebbern did not commit the murder. The jury found that he had not discharged the gun that killed Dickersen. SA-234.

Second, he did not aid or abet the murder because Waiters, his only co-defendant, was also acquitted of having fired the gun. A-2688. The jury's verdict disproved the government's theory that Waiters had been the gunman and Sebbern had aided and abetted him.

Even assuming, *arguendo*, the accuracy of the ballistics match of the deformed bullet to the seized 9-milimeter gun, there was no evidence about who did fire that weapon, and no evidence that Sebbern took any step to aid, abet, or otherwise assist the murder, or to take any act that amounted to a "cause in fact of the criminal violation." There is no evidence that the individual who shot Dickersen had the requisite "essential criminal intent."

The evidence at trial was that two individuals who could not be identified were seen in the parking lot of 65 Holland Avenue at a time when Power and Boone were also present in the parking lot. A-1331-38; A-162. Shell casings from

other weapons, including four 22-milimeter shell casings and three 9-milimeter shell casings were also recovered. A-738-41.

Even cooperating witness Amos Boone, who has made a career out of evading responsibility for his crimes through cooperation agreements (*see, e.g.*, A-1144 [first arrested in 1991]; A-1144 [in prison from 1994 to 2000, 2004 to 2007, "and nine months, and in 08 and now"]; A-1174 [arrested and got a lower sentence because he helped the DA solve a murder][18]; A-1174-77; A-1189-91 [arrested and cooperated against a friend]; A-1195 [he would tell the DA "Come on, y'all. If you had me for something, you had me for something, I would admit it, do my time or whatever if I had something to bargain with."]), could not link Sebbern and Waiters directly to the murder.

In July 2010, Boone said that he thought it was the guys from Brooklyn (i.e., Harley) who shot Big Den because "everybody was thinking that it had something to do with them." A-1369-70. But he couldn't be sure who he had seen that night. A-1370. Later, when he learned that Sebbern and Waiters were charged with the shooting, he testified that, "They was with the guys from Brooklyn." A-1370-71.

There is no indication that Sebbern had any motivation to kill Dickersen. Boone, the only witness who was asked, couldn't describe his demeanor outside Josie's. A-1307. There is no indication that he said or did anything at the party, or

[18] Interestingly, that murder also occurred in the Holland Houses and, similarly to this instance, Boone witnessed it when he was in his car. A-1174.

that any of Demellier's or Harley's comments were directed to him. There is no indication that he had any status in the Gorilla Bloods that would be affected by shooting Dickersen.

The government asked the jury to find, based on this shaky foundation, that Sebbern had been in the parking lot of 65 Holland Avenue, had fled after the shooting in a car with the murder weapon, had committed a traffic infraction at the stop sign at Benjamin Place and Holland Avenue approximately nine minutes later (although it would have taken under a minute to reach that same intersection if Sebbern had actually been fleeing the location), and had then fled back *toward* the crime scene when police attempted to stop his car.

The government asked the jury to disregard the fact that other individuals were in the parking lot, that there was no DNA, no fingerprint evidence, and no eyewitness identification of Sebbern linking him to the weapon or proving that he was one of the individuals in the parking lot[19], and that there was no evidence he had been upset outside Josie's after the fight started by Harley in which Demellier was injured. In short, there was no non-speculative evidence that Sebbern aided and abetted the murder of Dickersen under either 18 U.S.C. § 2(a) or (b) and there was no possible rational basis for the jury's verdict.

[19] To the extent the government argued that one of the individuals in the parking lot was Sebbern because he was arrested wearing a "hoodie" sweatshirt, Appellant submits that wearing such a common article of clothing does not equate to an identification.

Under these circumstances, allowing the verdict of guilty as to Count Three and Racketeering Act Three to stand would violate this Court's instruction in *Thai* that a conviction under § 1959 must be reversed if the connection between the offense and the motive is speculative. *Thai,* 29 F.3d at 819. As in *Concepcion*, Sebbern's conviction cannot stand because "[s]ince the identity of that person or persons [who fired the shots] was not shown, there was no basis on which the jury could rationally infer that the shooter(s) had the criminal intent to violate § 1959 envisioned by § 2(a)." *Concepcion*, 983 F.2d at 383.

The circumstances of Sebbern's arrest were clearly troubling to the jury. But Sebbern was not charged vaguely with having done something bad. He was charged with committing and/or aiding and abetting a murder in-aid-of racketeering. The evidence to sustain the government's burden to prove guilt beyond a reasonable doubt simply was not there. Under these circumstances, Sebbern's conviction for murder should be reversed.

2. The Evidence Was Insufficient to Prove That Sebbern Murdered Dickersen or Aided and Abetted Murder Under New York State Law.

Sebbern was additionally charged with murder and aiding and abetting murder as a RICO predicate act under New York State law (Racketeering Act Three). To be guilty of murder under New York law, a person must have "cause[d] the death of another person" "with intent." N.Y. Pen. L. 125.25(1). To aid and

abet murder under New York law, it must be shown both that a principal caused the death and that the person charged with aiding and abetting, " acting with the mental culpability required for the commission thereof," "solicit[ed], request[ed], command[ed], importune[d], or intentionally aid[ed] such person to engage in such conduct." N.Y. Pen. L. 20.00.

This Court has instructed that a jury cannot find that a defendant committed the state law offense charged as a racketeering predicate act unless the conduct proved at trial satisfied every element of the state law offense. *United States v. Carrillo*, 229 F.3d 177, 183 (2d Cir. 2000). "Likewise, even assuming evidence from which a jury *could* find a violation of state law, if the defendant's acts as found by the jury did not include all the essential elements of the state law offense, by definition, no state offense would have been found." *Id.* (emphasis in original).

As discussed in co-Appellant Waiters' brief at pages 33 to 37, the arguments in which Sebbern adopts in full, the conduct of which Sebbern was convicted does not satisfy all of the elements of murder or of aiding and abetting murder under New York State law. First, Sebbern was acquitted of firing the gun. Therefore, he did not cause Dickersen's death under N.Y. Pen. L. 125.25(1). Nor is there any evidence that he intended to do so.

Second, there is no evidence that he "solicited, requested, commanded, importuned, or intentionally aided" any other person to murder Dickersen. In fact,

the only evidence of Sebbern's conduct before the arrest is that he was standing in a parking lot after the fight at Josie's, where Boone "really couldn't judge . . .[his] demeanor." A-1307. There is even less evidence of Sebbern's mental state before the murder than there was of Waiters'. *See* Waiters' Brief on Appeal at p. 36.

In *Carrillo*, this Court analyzed a hypothetical situation very similar to the actual circumstances in this case:

> Assume a defendant charged with a RICO violation based on a predicate racketeering act of murder. (1) If the evidence showed only that the victim was killed by a gun held by the defendant, without any evidence that the defendant intended to harm or threaten the victim or to fire the gun, it seems clear enough that the defendant could not be properly found guilty of the murder. The evidence would be insufficient to show murder; we would think that a RICO conviction necessarily predicated on a finding of murder in such circumstances would have to be vacated.

Carrillo, 229 F.3d at 184.

Here, there is even less evidence against Sebbern than in *Carrillo*'s hypothetical. Sebbern was arrested after fleeing from a vehicle next to which the alleged murder weapon was found. He was not arrested with the gun. If he had moved to suppress that gun before trial, his motion would have been denied for lack of standing. He was acquitted of firing the gun. There is no evidence that anyone fired the gun at his request, instruction, solicitation, command, or with his assistance. The most that can be said is that Lenoir and Boone both saw two individuals in hoodie sweatshirts in the parking lot of 65 Holland Avenue before

the murder, and that both Sebbern and Waiters were arrested wearing hoodies. Surely, this is less than even a preponderance of the evidence, in favor of conviction.

3. The Evidence Was Insufficient to Prove That Sebbern Conspired to Kill Dickersen or Any Other Individual.

To prove that Sebbern had conspired to murder Dickersen or others as charged in Racketeering Act Four and Count Four, the government was required to prove "both the existence of the conspiracy alleged and the defendant's membership in it beyond a reasonable doubt." *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008) (referencing *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008)).

The existence of a conspiracy is proved by evidence that "two or more persons entered into a joint enterprise with consciousness of its general nature and extent." *Chavez*, 549 F.3d at 125. An individual's participation in that conspiracy is established by "proof of [his] purposeful behavior aimed at furthering the goals of the conspiracy." *Id.* (quoting *United States v. Diaz*, 176 F.3d 52, 97 (2d Cir. 1999)). Although circumstantial evidence may suffice to prove both the existence of the conspiracy and an individual's participation in it, *United States v. Stewart*, 485 F.3d 666, 671 (2d Cir. 2007), "the government bears the burden of proving each element beyond a reasonable doubt," *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008) (internal footnote omitted).

Under New York law, an individual must "agree with one or more persons to engage in or cause the performance of" the unlawful conduct "with intent that [that] conduct" be performed. N.Y. Pen. L. 105.15.

In this case, Appellant did not dispute the government's contention that he was associated with the Gorilla Bloods. And there is no doubt that Dickersen was killed. But there is no support for any finding that the Gorilla Bloods killed Dickersen or that Sebbern was involved. To the contrary, the evidence is that Sebbern did not have a weapon after the fight at Josie's (nor did Waiters). A-649-50. The gun was not seized from either Sebbern or Waiters, but was found on the ground next to the Mercedes. No DNA or fingerprints were recovered that linked Sebbern to the gun.

No evidence supports the government's assertion that the murder was committed for the purpose of maintaining or increasing position in the Gorilla Bloods. There is no evidence that anyone conspired to murder any other individuals, including those named in the indictment.

Appellant acknowledges that it need not be shown that he "knew all of the details of the conspiracy, 'so long as he knew its general nature and extent.'" *United States v. Rosa*, 17 F.3d 1531, 1543 (2d Cir. 1994). However, there is no evidence that Sebbern knew even that a conspiracy to murder Dickersen existed.

Similarly, the fact that he was arrested in a high crime area in a bulletproof vest cannot suffice to prove that he entered into a conspiracy to murder Dickersen or anyone else. Although "a single act may be sufficient for an inference of involvement in a criminal enterprise of substantial scope," it must be "of a nature justifying an inference of knowledge of the broader conspiracy." *United States v. Tramunti*, 513 F.2d 1087, 1112 (2d Cir. 1975). No such inference is possible under the circumstances.

4. The Evidence Was Insufficient to Prove That Sebbern Aided and Abetted the Murder or Conspired to Murder Dickersen or Others Under a *Pinkerton* Theory.

This Court "review[s] challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice." *United States v. Bok,* 156 F.3d 157, 160 (2d Cir. 1998). In this case, the district court's *Pinkerton* instruction, which allowed the jury to convict Sebbern of murder without specific evidence, merely on the basis that Dickersen had been killed in furtherance of the Gorilla Bloods enterprise and that Sebbern had been a Gorilla Blood was error.[20]

"Under the *Pinkerton* doctrine, 'a jury [may] find a defendant guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the

[20] Sebbern's objection to the *Pinkerton* instruction was preserved. A-2133.

furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy.'" *United States v. Escobar*, 462 Fed. Appx. 58, 66 (2d Cir. 2012) (quoting *United States v. Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975) [citing *Pinkerton v. United States*, 328 U.S. 640, 645, (1946)]).

A *Pinkerton* charge "should not be given as a matter of course." *United States v. Sperling*, 506 F.2d 1323, 1341-42 (2d Cir. 1974). "[T]his caution is rooted in a concern that the jury may improperly infer the existence of the conspiracy "from the series of criminal offenses committed." *Escobar*, 462 Fed. Appx at 67 (quoting *Sperling*, 506 F.2d at 1342; referencing *United States v. Salameh*, 152 F.3d 88, 149 (2d Cir. 1998) ["We have cautioned that the *Pinkerton* charge should not be given as a matter of course and in particular where the evidence is such that the jury is required to resort to the inverse of *Pinkerton* and infer the existence of a conspiracy from the series of disparate criminal offenses."] [internal quotations omitted in *Escobar*]).

Although it is undisputed that Dickersen was killed on November 7, 2009, no one was shown to have committed the murder. A jury must find that a party to the conspiracy committed a crime both "in furtherance of" and "as a foreseeable consequence of" the conspiracy to find a coconspirator guilty of a substantive offense committed by a coconspirator. *United States v. Gonzalez*, 918 F.2d 1129, 1135-36 (3d Cir. 1990). There was no such finding.

There was no evidence that the murder of Dickersen had been committed in the furtherance of the conspiracy charged in the indictment—the Gorilla Bloods RICO enterprise. There was no evidence that the murder had been committed by any member of the Gorilla Bloods. No witness identified Sebbern or any other Gorilla Blood member or associate as the shooter. No witness provided clear evidence of motive from which it could be inferred that a Gorilla Blood member had killed Dickersen. There was only the government's argument that this fact could be inferred from the alleged fight at the party—as to which there is *no* evidence of Sebbern's conduct—and the circumstances of Sebbern's arrest—which, as argued above, should have been suppressed.

The government argued this point at every opportunity, but the actual evidence in the record was only that, at the party at Josie's, Dickersen had told other individuals—*not* Sebbern—not to get involved in a fight involving alleged Gorilla Blood Tyrone Harley.

To the extent that the government argued that it could be inferred that Harley killed Dickersen, there is no evidence that he did so or, if he did, that the murder was committed *in furtherance of* the Gorilla Bloods enterprise rather than as simple revenge for a perceived insult. Harley was not a local Staten Island Gorilla Blood. As counsel for Waiters argued at pages 37, killing Dickersen, who was a powerful local figure, would be likely to have a negative impact on the Staten

Island Gorilla Bloods, by exposing them to retaliation and lowering the status of the entire group, for acting against a powerful leader. There is likewise no evidence that the Staten Island Gorilla Bloods enterprise was related, other than in name, to the Brooklyn Gorilla Bloods enterprise, or that the actions of a Brooklyn gang member would have any impact on the Staten Island members. The killer could not have been Demellier, because Demellier was at Richmond University Hospital Center being treated for a gunshot wound at the time. A-1463-65.

As the Second Circuit has noted, "*Pinkerton* did not create a broad principle of vicarious liability that imposes criminal responsibility upon every co-conspirator for whatever substantive offenses any of their confederates commit." *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004); *United States v. Jordan*, 927 F.2d 53, 56 (2d Cir. 1991). The reasonable foreseeability requirement is meant to prevent *Pinkerton* from being unconstitutionally transformed into a broad principle of vicarious liability. *See Graziano*, 616 F.Supp. 2d at 375. Nonetheless, in this case, the district court's *Pinkerton* charge, combined with the lack of evidence and the government's speculative arguments, allowed the jury to speculate and to find Sebbern guilty even if it agreed that the government had not proved its case beyond a reasonable doubt.

Because, based on the lack of evidence that the murder had been committed in furtherance of the charged conspiracy, the district court's *Pinkerton* charge was

error, Sebbern's conviction for aiding and abetting Dickersen's murder should be vacated.

5. The Evidence Was Insufficient to Prove That Sebbern Used or Aided and Abetted the Discharge of the Firearm on November 7, 2009.

Count Five charged Sebbern with the unlawful use, including the brandishing and discharge of a firearm in connection with the November 7, 2009, murder of Dickersen and the crimes charged in Counts One (racketeering), Two (racketeering conspiracy), Three (murder), and Four (conspiracy to murder).

a. The Evidence Was Insufficient to Prove that Sebbern Used or Carried a Firearm in Relation to the Murder or Conspiracy to Murder

Title 18 U.S.C. § 924(c)(1)(A)(i) imposes a five-year mandatory sentence for "any person who, during and in relation to any crime of violence ..., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." A conviction for "use" of a firearm requires proof of "active employment of the firearm," which includes brandishing, displaying, and firing the firearm, *Rosario v. United States*, 164 F.3d 729, 734 (2d Cir. 1998) (citing *Bailey v. United States*, 516 U.S. 137, 144 (1995)), as well as "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense," *Bailey*, 516 U.S. at 148.

A defendant "carries" a firearm if he "'either (1) had physical possession of the firearm, ... or (2) moved the firearm from one place to another.'" *Rosario*, 164

F.3d at 734 (alteration in original) (quoting *United States v. Canady*, 126 F.3d 352, 358 (2d Cir. 1997)).

As the district court instructed, "In order to establish that a defendant possessed a firearm within the meaning of § 924(c), the government need not prove that he physically possessed it; proof of constructive possession is sufficient." *Chavez*, 549, F.3d at 129. "Constructive '[p]ossession of a firearm may be established by showing that the defendant knowingly [had] the power and the intention at a given time to exercise dominion and control over [it].'" *Id.* (alterations in original) (quoting *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001)).

Sebbern does not dispute that the district court's charge concerning the substantive violation of 18 U.S.C. § 924(c) was an accurate statement of the law. *See* A-2421-22. But the evidence was insufficient to prove a substantive violation of 18 U.S.C. § 924(c). The firearm that was found to be the murder weapon was located on the ground outside of the black Mercedes after Sebbern's arrest. Neither Sebbern's DNA nor his fingerprints were on the murder weapon.

Given the district court's cautionary instructions that, "the mere possession of a firearm at or near the site of the crime without active employment . . . is not sufficient to constitute use of the firearm" (A-2421) and that "[i]t is not sufficient if the carrying was inadvertent, coincidental or for some purpose other than

furthering or facilitating the crime" (A-2422), there was no rational basis for the jury's guilty verdict on Count Five against Sebbern. To the contrary, the evidence was that he did not use the 9-milimeter that killed Dickersen.

Therefore, the jury must have convicted Sebbern on Count Five under an aiding and abetting theory. As to that part of the jury charge, the district court's charge misstated the law and was plainly erroneous.

b. Sebbern's Conviction for Aiding and Abetting the Use or Carrying of a Firearm in Relation to the Murder or Conspiracy to Murder Must Be Reversed.

"[B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States,* 520 U.S. 461, 466–67 (1997) (internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

"A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Anderson v. Branen,* 17 F.3d 552, 556 (2d Cir. 1994); *see also United States v. Masotto,* 73 F.3d 1233, 1238 (2d Cir. 1996). A district court's jury instruction is reviewed *de novo*. *Id.*

The district court charged the jury that it could find a defendant guilty on Count Five under an aiding and abetting theory, "If you find that a defendant was a member of the conspiracy to murder charged in Racketeering Act 3(b) and Count Four, then you may also, but you not required to, find that defendant guilty of Count Five, provided you find beyond a reasonable doubt each of the following elements:

- First, that someone committed the crime charged in Count Five;
- Second, that the person or persons you find actually committed that crime were members of the conspiracy you found to have existed under Racketeering Act 3(b) and Count Four;
- Third, that the crime charged in Count Five was committed in furtherance of that conspiracy;
- Fourth, that the defendant you are considering was a member of that conspiracy at the time the crime charged in Count Five was committed;
- Fifth, that the defendant could have foreseen that the crime charged in Count Five might be committed by his coconspirators.

"If you find all five of these elements to exist beyond a reasonable doubt, then you may find the defendant guilty of Count Five even though he did not possess the firearm or have actual knowledge of its use." A-2423-24.

As the Supreme Court recently instructed, a defendant may be found guilty of aiding and abetting a § 924(c) violation if he "actively participated in the underlying . . . violent crime *with advance knowledge that a confederate would use or carry a gun during the crime's commission*." *Rosemond v. United States*, ––– U.S. ––––, ––––, 134 S.Ct. 1240, 1243, 188 L.Ed.2d 248 (2014) (emphasis supplied).

The Supreme Court's holding in *Rosemond* must be applied to Appellant's case because direct review of his conviction is pending. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). *See also United States v. Booker*, 543 U.S. 220, 268, 125 S. Ct. 738, 769, 160 L. Ed. 2d 621 (2005) ("As these dispositions indicate, we must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review" and quoting *Griffith*).

The district court's instruction, which followed *Pinkerton*'s "foreseeability" requirement in accordance with Second Circuit precedent (*see, e.g. United States v. Gallerani*, 68 F.3d 611, 620 (2d Cir. 1995)), was plainly erroneous under *Rosemond*. That the district court's instruction was an accurate statement of the

law at the time of trial "is of no moment, . . . given that '[a]n error is 'plain' if it is 'clear' or 'obvious' at the time of *appellate consideration.*'" *Bruno*, 383 F.3d at 79 (quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc) (emphasis added in *Bruno*) [quoting *Johnson v. United States*, 520 U.S. 461, 467–68 (1997)]).

Because the district court's instruction permitted a finding of liability without a specific finding as required by *Rosemond* that "a confederate would use or carry a gun during the crime's commission," the district court's instruction was erroneous. Under *Johnson*, the error affected Sebbern's substantial rights because it lowered the evidentiary burden for the government, requiring proof only that the crime "could have been foreseen" rather than that Sebbern had advance knowledge that a gun would be used. The jury convicted Sebbern using this lower standard. The evidence concerning Sebbern's knowledge of the events of November 7, 2009, was so thin, however, that it is not clear that he would have been convicted, had a correct instruction been given. Under the circumstances, allowing Sebbern's conviction to stand would seriously affect at least the fairness and public reputation of the judicial proceedings. Therefore, Sebbern's conviction on Count Five should be reversed.

In the alternative, in the unlikely event this Court disagrees with the foregoing argument and finds that the challenged jury instruction was proper, there

was absolutely no evidence from which it could be inferred that Sebbern could have foreseen that the charged crime would be committed or that a gun would be used in its commission. Fresh called Chase, while in a car with Sebbern and Waiters after the fight at Josie's, and asked Chase for a gun because neither he, nor Sebbern, nor Waiters had one. A-649-50. Chase did not give him one. A-613.

Under these circumstances, there is no evidence that it was reasonably foreseeable to Sebbern that a firearm would be used or carried less than an hour later, as alleged in Count Five. Instead, the jury was asked to "stack inference upon inference" to reach a verdict of guilty. *See Graziano*, 616 F. Supp. 2d at 371-72 (collecting cases) ("Such multiple inferences are especially problematic when based, in part, upon the private thought process of the co-conspirator that was not communicated to the defendant. . . . These double and triple inferences from circumstantial evidence, involving the uncommunicated thought processes of co-conspirators, are entirely too speculative in this particular case to support the jury's verdict . . ."). Sebbern's conviction on Count Five should be vacated.

POINT II
THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY ADMITTED INCRIMINATORY WRITTEN STATEMENTS MADE BY SEBBERN'S CO-DEFENDANT AFTER HIS INCARCERATION IN VIOLATION OF THE SIXTH AMENDMENT AND *CRAWFORD V. WASHINGTON*.

A. Admission of Waiters' Written Statements, Including Two Alleged Admissions of Involvement in Dickersen's Murder Was Prejudicial Error.

"Alleged violations of the Confrontation Clause ...[are reviewed] *de novo,* subject to harmless error analysis." *United States v. Jass*, 569 F.3d 47, 55 (2d Cir. 2009) (quoting *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006)).

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be "confronted with the witnesses against him." U.S. CONST. AMEND. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause bars "the admission of testimonial statements of a witness who did not appear at trial unless unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54. "'[T]he crux of [the Confrontation Clause] is that the Government cannot introduce at trial statements containing accusations against the defendant unless the accuser takes the stand against the defendant and is available for cross-examination.'" *United States v. Taylor*, 745 F.3d 15, 28-30 (2d Cir. 2014) (citing *Jass*, 569 F.3d at 56). *See also Pointer v. State of Texas*, 380 U.S. 400, 404-405 (1965) ("[T]he right of cross-examination is included in the right of an accused in a criminal case to

confront the witnesses against him" which is guaranteed by the Sixth Amendment.).

A party seeking to introduce the statement of a co-conspirator must satisfy a two-pronged test: first, the conspiracy involved must have included both the declarant and the defendant, and second, the statement must have been made during the course of and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Malonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990) The rule is based on the principle that, since members of a conspiracy operate as agents of one another, the statements of one co-conspirator are attributable to all other co-conspirators. *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002). Some evidence, beyond the conversations themselves, is required to establish the existence of an ongoing conspiracy. *United States v. Al-Moayad*, 545 F.3d 139, 173-74 (2d Cir. 2008) (independent corroborating evidence of the defendant's participation in the conspiracy required before statement could be admitted under Fed.R.Evid. 801(d)(2)(E)); *United States v. Zandstra*, 2001 WL 26211 at *2 (S.D.N.Y. 2001) (unreported) (citing *United States v. Padilla*, 203 F.3d 156, 161 (2d Cir. 2000) (out-of-court statement may not be admitted if statements themselves are the only evidence of the defendant's participation in a conspiracy).

Sebbern does not argue that Waiters' statements facially incriminated him and, therefore, there is no per se violation of *Bruton v. United States*, 391 U.S. 123, 135-36 (1968). But Waiters statements, including the two written statements that the government described as admissions of involvement in Dickersen's killing, under the circumstances of this trial, violated *Crawford* and denied Sebbern his Sixth Amendment right to confront the witnesses against him.

Waiters' statements, "If you should oppress a rilla [i.e., a Gorilla] you should be dealt with no matter who you are and that's basically what this is about" (A-1916-17), and ". . . You know I had to let my Knuckles drag on a few dirty monkeys who felt that they can disrespect Bee Es double Gee. I know you must have heard we also took a fall too. . . ." (A-1973), powerfully incriminated Sebbern because, as the only other person arrested with Waiters on November 7, 2009, if the jury believed that Waiters had admitted his involvement, it was logically bound to find that Sebbern had been involved as well. Yet, because Waiters was a co-defendant, he had a Fifth Amendment right not to incriminate himself and could not be called as a witness. Sebbern was irremediably prejudiced when Waiters' incriminatory statements were admitted for the jury's consideration without cross-examination. "[T]he powerfully incriminating extrajudicial statements of a codefendant, who [stood] accused side-by-side with the defendant, [were]

deliberately spread before the jury in a joint trial [. . .] and the incriminations [were] devastating" to Sebbern. *See Bruton*, 391 U.S. at 135-136.

Moreover, to the extent that Waiters' incriminating statements concerning Dickersen's murder were admitted as evidence of the conspiracy (A-1918; A-1926), the district court clearly erred. "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party." *Lutwak v. United States*, 344 U.S. 604, 617 (1953) (citing *Clune v. United States*, 159 U.S. 590, 593 (1895)) (additional citation omitted). "But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy." *Id.* (citing *Fiswick v. United States*, 329 U.S. 211, 217 (1946); *Logan v. United States*, 144 U.S. 263, 308-309 (1892)). "There can be no furtherance of a conspiracy that has ended." *Id*. at 617-18.

Assuming, *arguendo*, that it existed, the conspiracy to murder Dickersen ended with his death on November 7, 2009. Any statements concerning the murder that were made thereafter were, as counsel argued (*see, e.g.*, A-1927) merely retelling past events, not statements made *in furtherance of* any ongoing conspiracy. Admission of these statements was clear error.

B. Developments At Trial Demonstrate That Retroactive Misjoinder Occurred.

The Second Circuit has recognized a preference for "joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Because measures including limiting instructions may sufficiently limit the danger of prejudice to a defendant, the "possibility that codefendants may mount antagonistic defenses" alone "is not . . . a ground for severance." *United States v. O'Connor*, 650 F.3d 839, 858-59 (2d Cir. 2011) (citing *Zafiro*, 506 U.S. at 539; referencing *United States v. Losada*, 674 F.2d 167, 171 (2d Cir. 1982)). *See also Rittweger*, 524 F.3d at 179-80 (same). Similarly, severance is not "necessarily required by 'the fact that evidence may be admissible against one defendant but not another,' . . . especially where the charges against the defendants are straightforward and the jury is properly instructed to consider the evidence against each defendant separately. . . ." *O'Connor*, 650 F.3d at 858-59 (internal citations omitted).

Thus, the Second Circuit reviews the denial of a pretrial motion for severance under an abuse of discretion standard, reversing "only where the denial caused the defendant 'substantial prejudice . . . amounting to a miscarriage of justice.'" *O'Connor*, 650 F.3d at 859 (quoting *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984)).

Developments at trial may lead to a finding of retroactive misjoinder—i.e., a determination that the initial joinder was improper. *See United States v. Ivezaj*, 336 Fed. Appx. 6, 8-9 (2d Cir. 2009) (citing *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003)). "In order to be entitled to a new trial on the ground of retroactive misjoinder, a defendant 'must show compelling prejudice.'" *United States v. Hamilton*, 334 F.3d 170, 181-82 (2d Cir. 2003) (citing *United States v. Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir. 1996); *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994); *United States v. Novod*, 927 F.2d 726, 728 (2d Cir. 1991)). Compelling prejudice may result from spillover prejudice. *United States v. Jones*, 482 F.3d 60, 78 (2d Cir. 2006). "The concept of prejudicial spillover . . . requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Ivezaj*, 336 Fed. Appx. at 9 (quoting *Hamilton*, 334 F.3d at 182 [referencing *United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996); *United States v. Barton*, 647 F.2d 224, 241 (2d Cir. 1981)]).

"A RICO charge allows the government to introduce an "enormous amount of prejudicial spillover evidence" of "criminal activities in which a defendant did not participate to prove the enterprise element." *United States v. Tellier*, 83 F.3d 578, 581, 582 (2d Cir. 1996). In such a case, the jury may not be able to adequately differentiate between defendants and counts or to evaluate the evidence

separately. *Hamilton*, 334 F.3d at 183. "The absence of such spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others." *Id*. (citations omitted).

Both before and during trial, Sebbern's counsel moved repeatedly for severance on the ground that admission of Waiters' incriminating statements for any purpose was so prejudicial that it denied Sebbern a fair trial. A-1775; A-1920; A-1927; SA-125-27. Each motion was denied. A-1920; A-1927.

The evidence against Sebbern concerning Dickersen's murder was weak. The government built a circumstantial case out of conjecture and insinuation based on the circumstances of his arrest, despite the lack of eyewitnesses, fingerprints, DNA, or cooperator testimony concerning his involvement. Under these circumstances, Waiters' statements, which the district court admitted in part as statements against penal interest, undeniably prejudiced Sebbern by implying that he and Waiters had been involved in the murder and that Waiters, the only person who had been there with him, had confessed his involvement.

Even though the district court instructed the jurors that they could not consider Waiters' statements against Sebbern, it is evident that the jury was unable to follow this instruction. It is highly likely that "the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Ivezaj*, 336 Fed. Appx. at 9 (internal quotations

omitted). The undeniable spillover prejudice to Sebbern from Waiters' statements denied him a fair trial and requires that his conviction be vacated.

POINT III
THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS THE DRUGS SEIZED ON JULY 15, 2009, OR TO GIVE A "MERE POSSESSION" CHARGE TO THE JURY WAS ERROR. SEBBERN'S CONVICTION ON RACKETEERING ACT TWO AND COUNT ELEVEN SHOULD BE VACATED FOR FAILURE TO PROVE INTENT TO DISTRIBUTE.

I. The Trial Court's Denial of the Motion to Suppress Was Error.

This Court "will reverse an evidentiary ruling only for abuse of discretion, which we will identify only if the ruling was arbitrary and irrational." *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012) (citing *United States v. Abu–Jihaad*, 630 F.3d 102, 131 (2d Cir. 2010)).

A. Suppression

The Supreme Court has limited the circumstances under which a vehicle may be searched incident to a lawful traffic stop to situations where officers may be concerned for their safety or for evidence preservation. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)) (a search incident to a lawful arrest may be warranted "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"); *id* at 343-44 (referencing *Atwater v. Lago Vista*, 532 U.S. 318, 324 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118 (1998)

("In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence."). *See also Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (discussing *Gant*).

Officer Parco testified that he pulled Sebbern over on July 15, 2009, after seeing him run a stop sign. SA-37. There was no reason to believe that any evidence of that traffic violation would be found in the vehicle. Therefore, the subsequent search of the vehicle after Sebbern had been removed from it and arrested was not justified and the evidence should have been suppressed. *See Gant*, 556 U.S. at 344 (finding that the search was unreasonable because "Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car.").

Although the Supreme Court has instructed that "law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made, *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (citing *Horton v. California*, 496 U.S. 128, 136–140 (1990)), the evidence in this case that the seized narcotics were in plain view defies belief.

Parco testified that he had been "completely focused" on the inside of the car. SA-61. It defies logic that he could have seen the crack cocaine in the sunroof at the same time. To the contrary, the narcotics could only have been found after

Sebbern had been arrested and removed from the car, rendering the search improper under *Gant*.

Notably, Officer Parco did not testify without leading that the drugs had been in plain view. *See* SA-47 (asking twice, "[W]hat, if anything, did you see as you surveyed the outside of the car and the area of the car that was in plain view?"). In response to this leading question, Parco testified that he "noticed . . . what appeared to be approximately two to three bags of what looked like to be crack cocaine lying in the track of his sunroof." SA-47. After Sebbern had been removed from the car and arrested, Parco searched the car and discovered crack cocaine and marijuana in the sunroof compartment. *See* SA-54 (drugs were "hidden in between the headliner and the roof of the car, where the sunroof would retract, when it was in an opened position."); *id* ("I had to stick my hand . . . in between the headliner and the roof of the car" to retrieve the drugs.); SA-76 (drugs were in a "dark space underneath the right of the sunroof"); SA-77 (drugs were underneath where the roof tilts up).

Because there was no non-leading testimony that Officer Parco had seen the drugs in plain view, the district court's denial of suppression was an abuse of discretion. Furthermore, as argued below, there was absolutely no evidence that the drugs seized on July 15, 2009, were related in any way to the charged RICO conspiracy.

B. "Mere Possession" Jury Instruction

In the alternative, it was error for the district court not to give a mere possession jury instruction. "A criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990); *Bok*, 156 F.3d at 163. "A conviction will . . . be overturned for refusal to give a requested charge . . . [if] that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996).

Sebbern was arrested with a small quantity of crack cocaine and a small quantity of marijuana. There was no other testimony about marijuana in the entire trial. There was no evidence that Sebbern intended to distribute these drugs. To the contrary, his behavior when arrested tended to prove that he was, in fact, using the drugs himself. *See* SA-53-54; SA-56-58; SA-61. Based on this evidence, it was error for the district court to deny the defense's request for a mere possession instruction.

II. Sebbern's Conviction On Racketeering Act Two and Count Eleven Should Be Vacated for Failure to Prove Intent to Distribute.

Under the same deferential *de novo* standard of review cited in Point I Section III(A), above, the evidence was insufficient to prove that Sebbern's conduct on July 15, 2009, satisfied each element of the statute which he was charged with violating.

Racketeering Act Two and Count Eleven charged Sebbern with possession of crack cocaine and marijuana with intent to distribute on July 15, 2009, in violation of statutes including 21 U.S.C. § 841(a)(1). That statute provides in relevant part that, "it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

"[T]he mere purchase and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics." *Brock*, No. 14-239-CR, 2015 WL 2191135, at *2 (citing *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009)). "Nor is 'contact with drug traffickers,' standing alone, sufficient 'to prove participation in a conspiracy.'" *Id.* (quoting *United States v. Gaviria*, 740 F.2d 174, 184 (2d Cir. 1984)).

Although "a defendant's agreement to join in [a conspiracy] can reasonably inferred from circumstantial evidence," *United States v. Umeh*, 527 Fed. Appx. 57,

60 (2d Cir.) *cert. denied*, 134 S. Ct. 464, 187 L. Ed. 2d 311 (2013), "proof of a specific intention by [Appellant] to violate the substantive statute—that is, to possess [crack] cocaine [and marijuana] with intent to distribute it—is essential to sustain the conspiracy conviction," *United States v. Gaviria*, 740 F.2d 174, 184 (2d Cir. 1984).

Viewing the evidence in the light most favorable to the government, *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012), Sebbern's possession of crack cocaine and marijuana on July 15, 2009, was unrelated to the charged conspiracy.

First, there was no evidence of marijuana sales or distribution. All of the evidence pointed to the conclusion that the conspiracy, to the extent that one could be said to exist, revolved around the distribution of crack cocaine. There is no other explanation for Sebbern's possession of marijuana other than personal use.

Second, there was no evidence that Sebbern was intending to distribute the crack cocaine found inside the sunroof. *See Turner v. United States*, 396 U.S. 398, 422-23 (1970) (possession does not necessarily demonstrate that defendant was in the process of distributing narcotics); *Gaviria*, 740 F.2d at 184 (referencing *Turner*) ("even if that evidence was otherwise sufficient to support a conviction on a possession charge, the quantity of cocaine seized from the car does not establish beyond a reasonable doubt that [appellant] had the specific intent to distribute cocaine.").

Officer Parco seized 5.1 grams of crack cocaine and 3.795 grams of marijuana. A-400-401. The little evidence there was tended to prove that Sebbern was using drugs at the time of his arrest. *See* SA-53-54; SA-56-58; SA-61 (Sebbern was driving as if he didn't see the officer and acted belligerent when stopped). A finding of personal use would have been consistent with other evidence in the case. *See* A-1128-35 (Sebbern was arrested on June 13, 2005, with a small amount of crack and pled guilty to possession on July 5, 2005).

Unlike *Griffin*[21], the "with intent to distribute" clause is an integral part of the possession. It would have been impossible for the jury to have convicted Sebbern of possession *without* finding intent to distribute based on the wording of the statute. Yet, there was no evidence of intent to distribute either the marijuana or the crack cocaine. The most that can be said is that Sebbern was arrested in his own driveway, with a quantity of narcotics consistent with personal use. As trial counsel noted, drugs that are purchased come in packages meant for retail and the possession of narcotics that can be said to be "packaged for resale" is not evidence that the possessor is necessarily the seller rather than the buyer. A-190.

[21] *Griffin v. United States*, 502 U.S. 46, 56-57 (1991) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." (citing *Turner*, 396 U.S. at 420; additional citations omitted).

Although inferences must be in the government's favor, "inferences must be based on evidence and must be reasonable." *Ceballos*, 340 F.3d at 125. An inference that the drugs seized from Sebbern on July 15, 2009, were connected to any distribution scheme is neither. Therefore, Sebbern's conviction on Racketeering Act Two and Count Eleven should be vacated.

POINT IV
THE EVIDENCE WAS INSUFFICIENT TO PROVE THE EXISTENCE OF A NARCOTICS DISTRIBUTION CONSPIRACY OR, IN THE ALTERNATIVE, TO FIND THAT THE CONSPIRACY CONTINUED BEYOND NOVEMBER 7, 2009.

I. The Evidence Was Insufficient to Prove the Existence of a Narcotics Distribution Conspiracy from 2004 through November 7, 2009.

Viewing the evidence in the light most favorable to the government under a deferential *de novo* standard of review, the evidence was insufficient to find that Sebbern was a member of a RICO enterprise engaged in the distribution of crack cocaine from 2004 through 2010. Count Nine charged Sebbern with Conspiracy to Distribute Cocaine Base and Cocaine "in or about and between January 2004 and June 2010," involving 28 grams or more of a substance containing cocaine base and a substance containing cocaine (in violation of 21 U.S.C. §§ 841(b)(1)(B)(iii), 841(b)(1)(C) and 846). Racketeering Act One likewise charged a conspiracy to distribute cocaine and cocaine base but limited its duration to 2008 through 2010.

As discussed in Point III section II, above, "the mere purchase and sale of

drugs does not, without more, amount to a conspiracy to distribute narcotics." *Brock*, No. 14-239-CR, 2015 WL 2191135, at *2 (referencing *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009)). Based on the testimony of the cooperating witnesses—Chase, Boone, Vaughn, and Allen[22]—there is simply no evidence of the existence of the Gorilla Bloods organization or Sebbern's membership in it before 2008. *See supra* at 20-22. The evidence as to 2004-2005 was that there was no RICO conspiracy. *See* A-563. Crediting the government's evidence in the light most favorable to it, the testimony was that Waiters came home from jail in 2008 as a member of the Gorilla Bloods and that he, along with Sebbern and Fresh, sold crack using a "money phone". A-455-56; A-496-97; A-566-67; A-570. Before 2008, there was no gang involvement, let alone an enterprise sufficient to satisfy RICO. In fact, Sebbern was incarcerated from August 15, 2005 through May 13, 2008. PSR ¶ 67. There was no rational basis for a finding that he was involved in any illegal activity during that period.

Because there was no conspiracy in 2005, it was likewise error for the district court to admit the testimony of Police Officer Matthew Edelman, who testified that he arrested Sebbern on June 13, 2005, and seized 27 small purple Ziploc bags of crack from inside his left sneaker. A-1128; A-1131. It was further error for the district court to permit evidence of Sebbern's guilty plea to a

[22] Allen testified that Sebbern, Fresh, and Waiters "hung out" together. In a grand jury proceeding, she did not mention that Sebbern sold drugs. A-932-935; A-939.

possession charge arising out of that arrest. A-1134-35. Under Fed.R.Evid. 403, the prejudice of admitting this unrelated prior bad act strongly outweighed its probative value.

From 2008 to November 7, 2009, the most that can be said is that Sebbern was an associate of the Gorilla Bloods and that he engaged in small-scale narcotics sales. *See, e.g.*, A-455; A-905; A-1540. As Allen explained, Sebbern was part of a group of guys making individual sales and hanging out together. A-904-05; A-940. He was not charged with using a phone in relation to narcotics distribution. *See* 21 U.S.C. § 843(b). To the extent that the evidence tended to show that he had, a conviction on that basis would amount, Sebbern argues, to constructive amendment of the indictment.

There is no evidence that Sebbern was engaged in a conspiracy to distribute crack cocaine or cocaine in furtherance of the Gorilla Bloods enterprise at any time. As counsel for Waiters argued in his brief at pages 44-45, there were none of the indicia of a recognized RICO organization. No cooperating witness testified otherwise.[23] Moreover, none of the cooperators were members of the Gorilla

[23] Lamar Chase testified that Fresh, who was a Gorilla Blood, told him that Sebbern was selling drugs with him. A-496. Chase was in jail and had no personal knowledge of Sebbern's activities during this period. *Id.* However, Fresh's alleged statement to an individual who was not a co-conspirator was mere narrative, not a statement not in furtherance of the conspiracy and should not have been admitted as a co-conspirator statement under Fed.R.Evid. 801(d)(2)(E). *See*

Bloods. Thus, none were qualified to discuss that organization's structure or means and methods of operation. Without evidence, the jury was left to speculate and to fall back on the government's rhetoric which, although persuasive, was not evidence.

II. The Trial Court Erred In Admitting Jailhouse Phone Calls and Letters Made After November 7, 2009, to Prove the Narcotics Conspiracy Because There Was No Evidence That the Conspiracy Existed or That It Continued After Sebbern's Arrest.

This Court will "review a district court's admission of evidence under Rule 801(d)(2)(E) only for clear error." *Coppola*, 671 F.3d at 246 (referencing *United States v. Farhane*, 634 F.3d 127, 160–61 (2d Cir. 2011)).

"Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" *Bourjaily*, 483 U.S. at 175. *See also United States v. Cuti*, 528 Fed. Appx. 84, 87 (2d Cir. 2013) *cert. denied*, 135 S. Ct. 402, 190 L. Ed. 2d 289 (2014) and *cert. denied sub nom. Tennant v. United States*, 135 S. Ct. 402 (2014). "[W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party

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Birnbaum, 337 F.2d at 494-95 (A statement that is a "merely narrative declaration of a past fact" is not a statement in furtherance of a conspiracy.).

must prove them by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 176.

"The fact that one conspirator tells another something relevant to the conspiracy does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that . . . ." *United States v. Birnbaum*, 337 F.2d 490, 494-95 (2d Cir. 1964) (quoting *United States v. Nardone*, 106 F.2d 41, 43 (2d Cir.), *rev'd on other grounds*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939)). A statement that is a "merely narrative declaration of a past fact" is not a statement in furtherance of a conspiracy. *United States v. Birnbaum*, 337 F.2d 490, 494-95 (2d Cir. 1964) (citations omitted). Instead, "a statement is made 'in furtherance' of a conspiracy if it 'provides reassurance or serves to maintain trust and cohesiveness among the conspirators or informs other conspirators of the current status of the conspiracy." *In Re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 139 (2d Cir. 2008).

As argued in co-Appellant's brief at pages 42-45, there was insufficient evidence to find that any narcotics conspiracy existed—even for the more limited timeframe alleged in Racketeering Act One—or that the narcotics sales were related to Sebbern's membership in the Gorilla Bloods. The most that could be said was that he sold crack cocaine, often through the use of a phone. *See, e.g.*, A-1540; A-1542; A-1578-79. On this basis alone, admission of Sebbern's and

Waiters' jailhouse phone calls allegedly concerning a continuing narcotics distribution conspiracy was error.

Moreover, the only call in which Sebbern alleged discussed narcotics was cryptic at best. *See* A-2666 (unknown male caller telling Sebbern about "how we route my nigga," which the government interpreted as a discussion concerning a drug distribution route). As trial counsel pointed out, even if this conversation, which occurred on December 3, 2009, did relate to drugs, "it would be insufficient to establish that the narcotics conspiracy was on-going for the purpose of admitting Mr. Waiters' statements as co-conspirator statements." SA-127. Likewise, this single call is insufficient to prove that Sebbern was engaged in narcotics trafficking through June 2010, as alleged in Racketeering Act One and Count Nine.

Finally, to the extent this Court finds that a narcotics distribution conspiracy could have been found be a reasonable jury, the evidence was insufficient to find that these calls between the defendants and other, unidentified individuals constituted statements "in furtherance of" any charged conspiracy. The most that can be said is that they were calls between people who knew each other and who shared common acquaintances, who they discussed. For these reasons, the district court erred in admitting the jailhouse phone calls.

III. The Highly Prejudicial Cumulative Effect of the Admitted Phone Calls Outweighed Any Possible Probative Value, Given That the Defendants Had Admitted Membership and Association With the Gorilla Bloods.

The Federal Rules of Evidence permit the introduction of relevant evidence—that is, evidence that "has any tendency to make a fact more or less probable than it would be without the evidence; and . . . is of consequence in determining the action." Fed. R. Evid. 401. "Relevance is a relationship between the evidence and a material fact at issue which must be demonstrated by reasonable inferences that make a material fact more probable or less probable than it would be without the evidence." *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992). "Irrelevant evidence is not admissible." Fed. R. Evid. 402.

Rule 404(b) provides for the admission of prior bad act evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *See* Fed. R. Evid. 404(b)(2). Rule 404(b), however, specifically prohibits the introduction of evidence of a "crime, wrong, or other act" "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). The Second Circuit follows an inclusory rule which allows the admission of Rule 404(b) evidence for any purpose other than to show a defendant's propensity, as long as the evidence is relevant and satisfies the balancing test of Fed. R. Evid. 403. *Hynes v. Coughlin*, 79 F.3d 285, 290 (2d Cir. 1996) (Rule 404(b) codifies the

common law rule that "[ev]idence of other acts is not admissible to prove that the actor had a certain character trait, in order to show that on a particular occasion he acted in conformity with that trait."); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000); *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994). The inclusionary rule, however, is not a carte blanche to admit prejudicial extrinsic act evidence when... it is offered to prove propensity." *United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012) (referencing *United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009) (holding that evidence of prior convictions was "propensity evidence in sheep's clothing")). Thus, under the Second Circuit's inclusionary rule, "other act" evidence is admissible unless: (1) it is offered to show a defendant's bad character or for some other improper purpose; (2) it is not relevant to a consequential issue at trial; (3) its probative value is substantially outweighed by its possible prejudice. *See United States v. Edwards*, 342 F.3d 168, 176 (2d Cir. 2003) (citing *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 2003)).

Even if evidence is relevant and admissible for a proper purpose, it may still be excluded at the Court's discretion under Rule 403. Under Rule 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; s*ee Hickey v. Myers*, 09-CV-01307

MAD/DEP, 2013 WL 2418252 (N.D.N.Y. June 3, 2013) (referencing Fed. R. Evid. 403); *see also United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004)("Rule 403 provides the district court with broad discretion to exclude evidence where the probative value is substantially outweighed by the possibility of jury prejudice or confusion.").

"[W]hat counts as the Rule 403 probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives . . . [W]hen a court considers' whether to exclude on grounds of unfair prejudice,' the 'availability of other means of proof may . . . be an appropriate factor.'" *Old Chief v. United States*, 519 U.S. 172, 184 (1997) (quoting Advisory Committee's Notes on Fed. R. Evid. 403). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged . . . 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id*. at 180-81(internal quotation and citation omitted); *United States v. Quattrone*, 441 F.3d 153, 186 (2d Cir. 2006) (Such prejudice "'may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant.'"). In terms of unfair prejudice, evidence must be excluded that "unduly inflame[s] the

passion of the jury, confuse[s] the issues before the jury, or inappropriately lead[s] the jury to convict on the basis of conduct not at issue in the trial." *Quattrone*, 441 F.3d at 186.

Rule 403 does not provide for an exception for background or even "intertwined" evidence but rather the Rule dictates that all evidence which is more prejudicial than probative must be excluded. *United States v. Pugh*, 2003 WL 22132915 at *2 (D. Ct. Aug. 26, 2003) (citing *United States v. Berbal*, 62 F.3d 456, 463 (2d Cir. 1995)). Although "[d]istrict courts analyzing evidence under Rule 403 should consider whether a limiting instruction will reduce the unduly prejudicial effect of the evidence so that it may be admitted," the Court must likewise be cognizant that such limiting instructions may be insufficient to cure the prejudice. *See United States v. Bermudez*, 529 F.3d 158, 169-70 (2d Cir. 2008). *See also United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980) ("[T]he balancing required by Rule 403 would not be needed if a limiting instruction always insured that the jury would consider the evidence only for the purpose for which it was admitted. Giving the instruction may lessen but does not invariably eliminate the risk of prejudice notwithstanding the instruction.").

Here, the district court admitted numerous phone conversations as enterprise evidence. *See* A-1821-1909 (discussing and admitting phone calls). All of the calls occurred after Sebbern and Waiters had been arrested. To the extent that the

government asserted they proved the existence of an ongoing narcotics conspiracy as alleged in the indictment, the evidence was thin, if not non-existent as to Sebbern. *See* A-2664-74 (GX 823T conversation between Sebbern and unidentified male of "how we route"). Moreover, because the defendants had already admitted their involvement with the Gorilla Bloods (*see*, *e.g.*, A-134), there was no need to prove the existence of that enterprise or Sebbern's association with it. *Scott*, 677 F.3d at 81 (evidence must be "relevant to an issue *in dispute*") (emphasis in original).

The cumulative effect of the phone calls, however, even if offered solely as background evidence (*see Pipola*, 83 F.3d at 566) was highly prejudicial and inflammatory, despite the district court's instruction concerning the language used in the calls (A-2355-56) and the purpose for which the calls could be considered. On this record, it is entirely too probable that Sebbern was convicted based on the jury's assessment of his posturing[24] rather than on the evidence of an ongoing narcotics conspiracy, which was minimal at best.

[24] In this respect, see also A-2006 and A-2008 (text message and rap lyrics on Sebbern's phone read to the jury).

POINT V
ON THIS RECORD, SEBBERN'S CONVICTION FOR RACKETEERING (COUNT ONE) AND RICO CONSPIRACY (COUNT TWO) MUST BE VACATED FOR LACK OF EVIDENCE.

The sufficiency of the evidence is reviewed *de novo*. *United States v. Tyo*, 572 Fed. Appx. 42, 44 (2d Cir. 2014) (citing *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010)). Under an "exceedingly deferential" standard, the conviction will be upheld if, considering the totality of the evidence, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Tyo*, 572 Fed. Appx. at 44 (citing *United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009); *United States v. Huezo*, 546 F.3d 174, 178 (2d Cir. 2008)).

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The Sixth Amendment guarantees the accused a trial by jury. *See* U.S. Const. AMEND. VI. "Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Brunshtein*, 344 F.3d 91, 99 (2d Cir. 2003) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (internal quotation marks and alterations omitted)).

The RICO statute makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The government must prove that the defendant participated or conspired to participate, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering activity. *United States v. Allen*, 155 F.3d 35, 40 (2d Cir. 1998). A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). An enterprise is an entity. *Id.*

In order to have been engaged in a "pattern of racketeering activity," the government must prove that (1) the defendant committed at least two predicate acts of racketeering within ten years of one another; (2) that these racketeering predicates are interrelated; and (3) that they reveal continued, or the threat of continued, racketeering activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-39 (1989); *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992). The requirements of relatedness and continuity prevent the application of RICO to isolated or sporadic criminal acts. *See United States v. Indelicato*, 865 F.2d 1370, 1375-76, 1381-82 (2d Cir. 1989).

Relatedness may be established by showing that the predicate acts have "'the same or similar purposes, results, participants, victims, or methods of commission.'" *H.J., Inc.*, 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e) (1988)). Horizontal relatedness requires that the racketeering predicate acts be related to each other. However, that relationship need not be direct; an indirect relationship created by the relationship of each act to the enterprise will suffice. *United States v. Polanco*, 145 F.3d 536, 541 (2d Cir. 1998) ("A predicate act is related to a different predicate act if each predicate act is related to the enterprise."). Vertical relatedness means that the acts are related to the enterprise. It requires that the defendant was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise. *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) (per curiam). Although the government must provide sufficient evidence of each kind of relatedness, "both the vertical and horizontal relationships are generally satisfied by linking each predicate act to the enterprise. This is because predicate crimes will share common goals . . . and common victims . . . and will draw their participants from the same pool of associates (those who are members and associates of the enterprise)." *Id*. at 376.

The continuity prong of a RICO pattern "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct

that by its nature projects into the future with a threat of repetition." *H.J., Inc.*, 492 U.S. at 241. "The threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *United States v. Eppolito*, 543 F.3d 25, 51 (2d Cir. 2008) (quoting *H.J., Inc.*, 492 U.S. at 242-43).

I. The Evidence Was Insufficient to Prove Racketeering

The government charged Sebbern with four Racketeering Acts— conspiracy to distribute cocaine and cocaine base (crack) "[i]n or about and between May 2008 and June 2010;" possession of crack cocaine and marijuana with the intent to distribute on or about July 15, 2009; murder of Jermaine Dickersen in violation of New York State law on or about November 7, 2009; and conspiracy to murder Jermaine Dickersen and others on or about November 7, 2009.

As discussed above, the evidence was insufficient to prove any of the four racketeering acts beyond a reasonable doubt or to establish their relatedness –either horizontal or vertical—to the charged RICO enterprise—the Gorilla Bloods. Under the four-part test in *H.J. Inc.*, 492 U.S. at 236-39, the evidence was insufficient to prove that Sebbern had committed any of the charged racketeering acts or, in the alternative, that the acts he committed were interrelated either to each other or to the Gorilla Bloods enterprise. Therefore, the evidence was insufficient to sustain a conviction on Count One.

II. The Evidence Was Insufficient to Prove Racketeering Conspiracy

To find a defendant guilty of a conspiracy charge, the jury must find beyond a reasonable doubt that the defendant "was a member of the conspiracy charged in the indictment, not some other conspiracy." *United States v. Aracri*, 968 F.2d 1512, 1520 (2d Cir. 1992). The government must show that the defendant "agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Berger*, 224 F.3d 107, 114 (2d Cir. 2000).

A defendant can establish a multiple-conspiracies defense where "(1) the indictment charged a single conspiracy, but the proof disclosed several independent conspiracies, and (2) [the defendant] was so prejudiced by this variance as to be denied a fair trial." *United States v. Pena*, 274 Fed. Appx. 84, 85 (2d Cir. 2008) (summary order) (quoting *United States v. Desimone*, 119 F.3d 217, 225–26 (2d Cir.1997)). "[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." *United States v. Vilar*, 729 F.3d 62, 92 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 2684, 189 L. Ed. 2d 230 (2014) (citing *Eppolito*, 543 F.3d at 48).

This Court has "cautioned that the *Pinkerton* charge should not be given as a matter of course and in particular where the evidence is such that the jury is required to resort to the inverse of *Pinkerton* and infer the existence of a

conspiracy from the series of disparate criminal offenses." *United States v. Salameh*, 152 F.3d 88, 149 (2d Cir. 1998) (internal quotations omitted).

In this case, the indictment alleged that the pattern of racketeering activity that formed the basis for the charged racketeering conspiracy had been committed through the racketeering acts charged in Count One (i.e., the four racketeering acts discussed above). A-27 at ¶ 14.

Viewing the evidence in the light most favorable to the government, there was sufficient evidence to establish that both defendants were members of the Gorilla Bloods—a fact that is not, in itself, a crime. Likewise, the jury could reasonably have found that Sebbern and his friends distributed narcotics between 2008 and November 7, 2009. There was, however, insufficient evidence to prove that the narcotics distribution occurred in furtherance of the Gorilla Bloods enterprise or for any racketeering purpose, or that it occurred from 2004 through June 2010. *See also* Waiters' Brief at p. 41-45.

There was no evidence that Sebbern was involved with anyone in the possession of narcotics on July 15, 2009, or that this possession contemplated intent to distribute or any activity whatsoever to benefit the Gorilla Bloods enterprise.

Likewise, there was no legally sufficient evidence that Sebbern conspired, committed or aided and abetted the commission of the Dickersen murder in

furtherance of the Gorilla Bloods enterprise or his membership in it. To the contrary, the only evidence about Sebbern on the evening of November 7, 2009, is that his demeanor could not be determined. A-1307. There is no evidence that killing Dickersen would have any beneficial impact on the charged narcotics distribution conspiracy. In fact, the evidence was that Dickersen was not primarily a drug dealer. A-1394.

The most that can be said for the government's evidence, under *Vilar*, is that there were multiple, unrelated conspiracies—a conspiracy to distribute crack cocaine and a conspiracy to murder Dickersen for reasons entirely unrelated to the narcotics conspiracy. There was no "proof of mutual dependence and assistance" and no reasonable basis for finding that any of the charged acts had been committed in aid of racketeering. On this record, it was error for the district court to instruct the jury on *Pinkerton* liability because the jury was effectively urged to find the existence of a conspiracy from the series of disparate offenses, and Sebbern's conviction for racketeering conspiracy cannot stand.

* * *

In addition to the foregoing argument, Sebbern respectfully joins in the arguments in co-Appellant Waiters' brief on appeal insofar as they are applicable to him.

CONCLUSION

Wherefore Sebbern's conviction on Counts One, Two, Three, Four, Five, Nine, and Eleven, and Racketeering Acts One, Two, Three, and Four should be vacated and this case should be remanded to the district court for a new trial.

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Respectfully Submitted,
_/s/ John C. Meringolo____
John C. Meringolo
Meringolo Law
375 Greenwich Street
New York, New York 10013
(212) 941-2077

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's Order dated June 1, 2015 (granting leave to file an over-length brief of no more than 25,000 words) because this brief contains 23,307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

_/s/ John C. Meringolo____

John C. Meringolo

Attorney for Appellant