No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Respondents,

v.

AREF NAGI,
Petitioner,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2; requires proof of an intentional facilitation or encouragement of the use of the firearm as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits or, in the alternative, simple knowledge that the principal used the firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth and District of Columbia Circuits.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the court of appeals, Appendix 1a to 28a, is an unreported opinion at --- Fed. Appx. ---, 2013 WL 5433464 (6th Cir. September 30, 2013).

JURISDICTION

The district court in the Eastern District of Michigan had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Sixth Circuit Court of Appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Judgment of the Sixth Circuit Court of Appeals was entered on September 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> **(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) of the United States Code provides as follows:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possessed a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 2(a) provides, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

STATEMENT OF THE CASE

OVERVIEW

This petition for a writ of certiorari challenges petitioner Aref Nagi's conviction in Count 31 of a Fourth Superseding Indictment, of aiding and abetting the use of a firearm, in violation of 18 U.S.C. § 924(c) . Petitioner was charged with violating racketeering laws and other federal laws with members of the Highwaymen Motorcycle Club ("HMC") which was alleged to have been a multi-state organization with its own hierarchical structure and leadership apparatus involved inter alia, violent acts, firearms offenses, distribution of controlled substances, and the receipt of stolen property, including motorcycles.

A jury ultimately convicted petitioner of violations of RICO, conspiracy to violate RICO, assault with a dangerous weapon in aid of racketeering, conspiracy to transport stolen property, conspiracy to alter vehicle identification numbers, conspiracy to possess with intent to distribute cocaine, and use of a firearm in relation to a crime of violence.

At sentencing, the district court imposed a sentence of 240 months as to Count 1; 324 months concurrent as to Count 2; 20 years concurrent on Count 7; 10 years concurrent on Count 15; 5 years concurrent on Count 16; 324 months concurrent on Count 19 and, relevant to the instant matter, 10 years consecutive on

Count 31, on a conviction of aiding and abetting the discharge of a firearm. It is this later Count 31 offense that is the subject of the petition herein.

On appeal, the Sixth Circuit Court of Appeals affirmed the convictions against the petitioner. The court of appeals relied upon United States v. Franklin, 415 F.3d 537, 554-55 (6th Cir. 2005) to affirm the conviction of aiding and abetting the discharge of a firearm. The Sixth Circuit's analysis was "[a]s the district court concluded, there was sufficient evidence from which a reasonable jury could have inferred that Nagi was inside the Wheat & Rye during the assault, that he knew Manners possessed a gun, and that he acted with the intent to assist or influence the commission of the underlying crime of assault with a dangerous weapon." Appendix 17a.

Counsel questions the logic and the analyses below. In its opinion and order, the Sixth Circuit made no mention at all if there was sufficient evidence that petitioner actually (1) knew that Erik Manners possessed a firearm at that time, and, more importantly, (2) whether Manners had planned to use that weapon at any time while he was inside the bar. There is absolutely no evidence that petitioner did an affirmative act to facilitate or assist Manners in the use of that firearm. Instead, the Sixth Circuit focused on testimony and statements suggesting that the petitioner was inside the bar at the time of the shooting and that he had participated in phone conversations talking about it afterwards. Furthermore, the Sixth Circuit mistakenly relied on the presence of another weapon not related to the shooting that was found on the ground near a parked vehicle. Id.

RELEVANT CASE LAW

In United States v. Franklin, the Sixth Circuit held that the government must prove "that the defendant, as the accomplice, associated and participated in the use of the firearm in connection with the underlying ... crime." 415 F.3d 537, 554-55 (6th Cir. 2005).. In order to meet its burden, the Government must show that the defendant both knew that the principal was armed and acted with the intent to assist or influence the commission of the underlying predicate crime. Id. Under the Sixth Circuit's interpretation of the aiding and abetting statute, the government is not required to prove facilitation or encouragement. A conviction of aiding and abetting liability is appropriate in the Sixth Circuit as long as the government merely proves that a defendant was aware a codefendant was carrying a firearm and was "present at the scene of the crime during which his accomplice carries a firearm." United States v. Hopson, 134 F. App'x 781, 793 (6th Cir. 2004)(unpublished).

As was recently highlighted in the petition for certiorari submitted in Rosemond v. United States, No. 12-895, a split of circuits currently exists as it relates to the requisite elements for a conviction of aiding and abetting the use of a firearm. Eight circuits currently require actual proof of facilitation or encouragement for a conviction of aiding and abetting the use of a firearm. *See* United States v. Rodrguez-Lozada, 558 F.3d 29, 41 (1st Cir. 2009) "accomplice must know, to a practical certainty, that the principal would possess a gun in furtherance of the drug crime and must also facilitation that possession." United States v. Giraldo, 80 F.3d 667, 676 (2nd Cir. 1996); United States v. Garth, 188 F.3d 99, 113

(3d Cir. 1999), "liability for aiding and abetting someone else in the commission of a crime requires specific intent of facilitating the crime, United States v. Newman, 490 F.2d 139, 142 (3d Cir. 1974), and mere knowledge of the underlying offense is not sufficient for conviction."

Conversely, the Tenth, Sixth and D.C. Circuits do not require facilitation or encouragement of the use of a firearm. *See* United States v. Wiseman, 172 F.3d 1196, 1217 (10th Cir. 1999), where the court found that in order to be found guilty of aiding and abetting, facilitation is not required to be proven; United States v. Gardner, 488 F.3d 700, 712 (6th Cir. 2007); United States v. Harrington, 108 F.3d 1460, 1471 (D.C. Cir. 1997).

As cited in Rosemond, in its petition for writ of certiorari, there is an acknowledged conflict between Courts of Appeal on whether aiding and abetting liability under 18 U.S.C § 924(c) requires proof that the defendant facilitated or encouraged the principal's use of a firearm. The issue has important implications for the thousands of Section 924(c) prosecutions every year which routinely allege aiding and abetting, Jordan v. United States, 08-C-0209, 2008 WL 2245856, at 1 (E.D. Wisc. May 30, 2008); *citing* United States v. Golden, 102 F.3d 936, 945 (7th Cir. 1996).

REASONS FOR GRANTING THE PETITION

A conviction of aiding and abetting a §924(c)violation should not stand if it is not actually proven that the Defendant knew that a gun will be used or carried in relation to the underlying crime. Additionally, a conviction for the use of a firearm in violation of §924(c) must also fail if the conviction is predicated on a theory that

the Defendant aided and abetted the use of the firearm, where there is no proof that the Defendant engaged in some form of activity that directly facilitated or encouraged the principal's use of the firearm in question. Finally, there must also be proof that the defendant performed some affirmative act relating to the use or carrying of that firearm. Again, to paraphrase the petition for writ of certiorari in Rosemond, the Sixth Circuit decision below conflicts with the plain language of the aiding and abetting statute, 18 U.S.C. § 2, and basic principles of accomplice liability, subjecting less culpable associates to the more severe punishment which Congress intended for more culpable principals.

THIS CASE PRESENTS AN IDEAL VEHICLE TO CONFORM THE SIXTH CIRCUIT WITH THE OTHER CIRCUITS ON THE ELEMENTS OF AIDING AND ABETTING

There was no evidence presented to establish that Mr. Nagi specifically knew Mr. Manners was going to be either using or carrying a weapon to the Wheat & Rye that day. This is not to mention the fact that there was no evidence that anyone in that room knew or had any reason to believe that Erick Manners was going to pull a gun. Further, there was absolutely no proof at trial that petitioner had the intent to assist Mr. Manners' use of that firearm.

On appeal in the Sixth Circuit, the government pointed to four specific items it contended supported their position: testimony of Lou Fitzner, Alan Kirchoff, the responding officer and petitioner through recorded phone calls. None of these pieces of evidence established that Mr. Nagi had knowledge that Mr. Manners possessed a firearm or that he facilitated the use in any way.

Louis Fitzner provided no testimony that petitioner had prior knowledge that Mr. Manners was carrying a firearm or that petitioner intended to facilitate Manners' use of the firearm. Rather, Fitzner simply testified that that petitioner told him in a phone call after the fact that Manners fired shots in the bar.

Similarly, testimony regarding the firearm from the complaining witness and the officers who investigated the scene after the shooting is also bereft of any evidence to establish Mr. Nagi's knowledge or facilitation. The complaining witness, Alan Kirchoff, testified that he did not remember who attacked him on the night in question. Kirchoff testified that he had no specific recollection of seeing Mr. Nagi at all that night. Officer Kevin Locklear testified that Kirchoff identified Erick Manners as the person who fired gun. Officer Steven Samborski testified that he stopped a black pickup truck at the scene. At this stop, the petitioner, another male and a female exited the truck. The woman was placed under arrest for driving under the influence of alcohol. However, neither petitioner nor the other male in the truck were placed under arrest. A search of the truck uncovered a Glock pistol. However, the Glock pistol was eliminated as being from the same weapon that Mr. Manners had discharged in the bar. Bullets were retrieved from the Wheat & Rye bar by Detective Sergeant Falkner and he ruled out the Glock as being the same weapon that Mr. Manners used at the bar.

The wiretapped phone conversations also did not shed any further light on the requisite elements of knowledge or facilitation on behalf of Mr. Nagi. The conversations, in the main, occurred after the incident at the Wheat & Rye. None of

the conversations before the incident prove that Mr. Nagi knew that Mr. Manners had a firearm or that Mr. Nagi intended to assist or facilitate in any way Mr. Manner's discharge of the firearm.

In summary, the Government can point to no evidence that Mr. Nagi transported Mr. Manners to the Wheat & Rye; provided Mr. Manners with a gun; saw Mr. Manners in possession of a gun before or during the event;[1] or that Mr. Nagi in any way encouraged, aided, or assisted Mr. Manners in the sudden and unexpected brandishing or firing of the weapon in the Wheat & Rye.

At most, the Government proved that Mr. Nagi may have been a spectator of Mr. Manners' conduct. Ostensibly, the requirement of knowledge was imputed by nothing more than both Nagi and Manner's association with the HMC, which was alleged to have been a violent motorcycle gang. The elements of prior knowledge and facilitation are critically missing. *See* United States v. Winston, 687 F.2d 832, 835 (6th Cir. 1982).

THE VERY SAME LEGAL ISSUE IS PRESENT IN THE INSTANT MATTER AS WAS AT ISSUE IN ROSEMOND V. UNITED STATES

This Court recently heard oral argument in Rosemond v. United States. In that case, Rosemond argued that the Circuits were split over whether proof of intentional facilitation or encouragement of the use of a firmware was needed as well as knowledge that the principal used a firearm during a crime of violence or

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[1] It is acknowledged that Nagi spoke about Mr. Manners' use of the weapon after the fact. What is not clear is if it was from something he actually saw or what someone else told him.

drug trafficking crime in which the defendant also participated. This Court granted petition for certiorari in that matter and oral argument took place on November 13, 2013. To date, there has been no opinion by this Court. We believe the Court's decision in Rosemond will be dispositive on this issue and ask that this matter be held in abeyance pending the decision.

Upon review of the transcripts of oral argument in Rosemond, it is clear that the Justices on this Court questioned both the petitioner and respondent on the elements of knowledge and intent as it related to jury instructions. Of particular interest were the requirements of intent and prior knowledge on the part of one accused of aiding and abetting. This is spot on with the issues presented herein.

In light of the circuit split on the issue requirements of intent and facilitation in aiding and abetting the use of a firearm cases the instant petition for certiorari is ripe for review by this Honorable Court. *See* Rule 10 of the Rules of the Supreme Court of the United States. The Petitioner submits that the instant matter presents a more nuanced factual issue concerning both the requirements of facilitation and knowledge as interpreted by the Sixth Circuit Court of Appeals. No evidence was presented that petitioner had any prior knowledge of Manners' possession of the firearm on the night in question.

CONCLUSION

Petitioner respectfully requests this Honorable Court grant the petition for writ of certiorari.

Respectfully submitted,

By: _____

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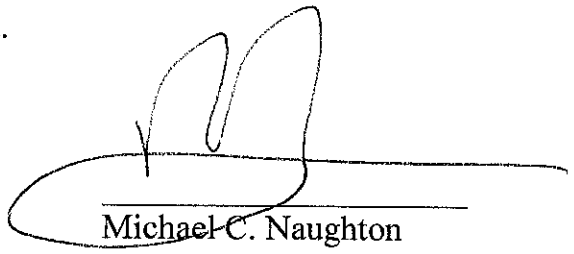
APPENDIX

Appendix 1a	United States v. Aref Nagi, 2013 WL 5433464 (6th Cir. September 30, 2013)
Appendix 29a	Second Amended Judgment in a Criminal Case, Opinion Addressing Relevant Conduct for the Purpose of Calculating Base Offense Level for Defendant Nagi's Count 2 RICO Conspiracy Conviction, United States v. Aref Nagi, No. 06-20465 (E.D. Mich. January 14, 2011)

PROOF OF SERVICE

I, Michael Naughton, do swear or declare that on December 30, 2013, as required by Supreme Court Rule 29 I have served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari on each party to the above proceeding and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.



Michael C. Naughton

NOT RECOMMENDED FOR PUBLICATION
File Name: 13a0854n.06

Nos. 11-1170, 11-1208 11-1221, 11-1223, 11-1349, 11-1354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AREF NAGI, MICHAEL CICCHETTI, GARY BALL, JR., LEONARD MOORE, JOSEPH WHITING, and ANTHONY CLARK, Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: SILER, GIBBONS, and GRIFFIN, Circuit Judges.

SILER, Circuit Judge. Aref "Steve" Nagi, Michael "Cocoa" Cicchetti, Gary "Junior" Ball, Leonard "Dad" Moore, Joseph "Little Joe" Whiting, and Anthony "Mad Anthony" Clark members of the Highwaymen Motorcycle Club were charged and convicted of numerous crimes, including violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c); RICO conspiracy, 18 U.S.C. § 1962(d); Violent Crimes in Aid of Racketeering ("VICAR"), 18 U.S.C. § 1959(a)(3); drug conspiracy, 21 U.S.C. § 846; conspiracy to transport stolen motor vehicles, 18 U.S.C. §§ 2312 and 371; conspiracy to alter or remove vehicle identification numbers, 18 U.S.C. §§ 511 and 371; and the illegal use of firearms, 18 U.S.C. § 924(c). They appeal their convictions and sentences on various grounds. For the following reasons, we **AFFIRM IN PART, REVERSE IN PART,** and **REMAND** for further proceedings.

I.

The Highwaymen Motorcycle Club ("HMC") is a multi-state organization with its national headquarters located in Detroit, Michigan. In its prime, HMC included approximately ten chapters, mostly in and around Detroit. Each chapter, with its own officers and internal leadership structure, operated within the hierarchy of the organization as a whole. Members earned their HMC "colors" after going through a probationary period and could earn lightning rods a symbol worn on the HMC vest by committing various types of criminal activity in the interest of the Club.

Illegal drugs were common within the HMC. Trial testimony suggested that many members did not hold regular jobs and met their obligation to pay weekly dues by selling drugs. Nagi, for instance, sold cocaine and marijuana. Cicchetti purchased cocaine from HMC member Gerald Peters both for distribution and personal use. On multiple occasions, Cicchetti brought his work crew to the HMC clubhouse so that they could obtain cocaine there. Robert Burton, a major cocaine dealer, testified that Defendant Ball was as big a cocaine distributor as himself. Clark worked with HMC member Daniel Sanchez to sell drugs. And Moore and Whiting, as senior members of the HMC, often received free cocaine from other HMC members.

HMC members also were involved in the theft and resale of motorcycles. During "bike week" in Myrtle Beach, South Carolina, HMC members including Nagi and Ball stole motorcycles and transported them back to Detroit via U-Haul. Later, some of the stolen bikes were found in the possession of HMC members. While executing a search warrant at Ball's family business, "Pal's Auto," agents found numerous stolen motorcycles and cars with altered vehicle identification

numbers. Trial testimony revealed that Cicchetti, Ball, and Whiting all possessed vehicles with altered VINs.

The HMC also has a history of violent acts. Many of the group's violent acts were done to further the Club's criminal enterprise and to protect the authority and reputation of the HMC amongst rival gangs. For example, in 2003, HMC member Burton attempted to buy cocaine from Ruben Guzman. When Guzman's cocaine broker refused to proceed with the deal, Guzman kept the money that Burton had already given him. In retaliation, Burton and fellow HMC members pistol-whipped and robbed Guzman before locking him inside the trunk of a car and driving away. Guzman, was able to escape by activating the trunk's emergency release.

Highly relevant to this case is a 2005 incident at a Detroit-area bar called the Wheat & Rye. Following an altercation at another bar, several HMC members assaulted Alan Kirchoff at the Wheat & Rye by punching him and breaking glass bottles over his head. HMC member Erick Manners brandished a gun, pointed it at Kirchoff, and proceeded to fire two rounds into the ceiling. Police officers who responded to the scene pursued a black pick-up truck that was speeding away from the bar. The truck came to a stop on a dead-end street and officers observed an individual running away from the driver's side of the truck. When the officers approached the truck, they observed Defendants Cicchetti and Nagi still inside, along with a Highwaymen vest in the cab. A Glock pistol with hollow point bullets was located on the ground nearby, although law enforcement officials determined that it was not the gun that was fired inside the Wheat & Rye. Wiretapped telephone conversations between Nagi and Bo Moore, "Dad" Moore's son and fellow HMC member, confirmed Nagi's and Cicchetti's involvement in the incident.

In 2006, some HMC members suspected that Gerald Deese had stolen their property. Burton encouraged HMC members to confront Deese. They did so, striking him with a shovel handle until he lost consciousness. Later, in an effort to dissuade Deese from pressing charges, Whiting and Dad Moore arranged for Deese to receive several thousand dollars in cash.

Later in 2006, a rival gang called the Latin Counts learned that the FBI was investigating both the Counts and the HMC. Believing that HMC member Doug Burnett was the informant, Whiting, who was the HMC national president at the time, sanctioned the elimination of Burnett by either the Counts or HMC members. Burnett's picture was displayed in the HMC clubhouse along with the caption "rat." Whiting, along with Detroit Chapter president Ronald Hatmaker, offered a bounty on Burnett's life, as well as a reward of time away from HMC business.

II.

The district court properly denied Nagi's motion to suppress wiretapped conversations, as well as his request for an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978).

During its investigation, the government obtained multiple Title III wiretap orders, authorizing the interception of thousands of telephone calls among HMC members. One such order, and extensions thereof, authorized the interception of Nagi's telephone number from October 2005 through May 2006. Prior to trial, Nagi unsuccessfully moved on various grounds to suppress the intercepted calls. While we review the district court's factual findings for clear error and its legal conclusions de novo, *United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002), the issuing judge's determination with respect to an electronic surveillance order is entitled to significant deference. *United States v. Corrado*, 227 F.3d 528, 539 (6th Cir. 2000).

Nagi argues that the wiretaps did not meet the necessity requirement of 18 U.S.C. § 2518(1)(c).[1] Specifically, he argues that the affidavits used to obtain judicial authorization did not establish that less intrusive investigatory techniques were insufficient to meet law enforcement needs. However, law enforcement officials are required only to "give serious consideration to the non-wiretap techniques prior to applying for wiretap authority" and inform the court of the reasons for their belief that non-wiretap techniques "have been or will likely be inadequate." *Stewart,* 306 F.3d at 305 (quoting *United States v. Lambert,* 771 F.2d 83, 91 (6th Cir. 1985)). The initial electronic surveillance affidavit detailed the reasons officials believed that a wiretap was necessary. It stated that while three confidential informants had been used, they had not shed light on all of the participants in the conspiracy. It also explained that at least one informant was reluctant to wear a wire due to safety concerns. Further, traditional surveillance techniques were hampered by counter-surveillance techniques employed by the HMC.

Nagi also argues that the government failed to minimize the intercepted calls to avoid unnecessary intrusion on private, non-criminal conversations, as required by 18 U.S.C. § 2518(5). However, defendants seeking to suppress wiretapped phone conversations must do more than identify particular calls that should not have been intercepted "they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap." *United States v. Lawson,* 780 F.2d 535, 540 (6th Cir. 1985). The burden of persuasion with respect to

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[1] Wiretaps applications are required to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c).

minimization rests with Nagi. *See United States v. Giacalone,* 853 F.2d 470, 482 (6th Cir. 1988). He has failed to make the requisite showing.

The wiretap orders at issue state:

> All of the interceptions will be minimized in accordance with Chapter 119, Title 18, United States Code. Interceptions will be minimized when it is determined through voice identification, physical surveillance or otherwise that none of the named interceptees or their confederates, when identified, are participants in the conversation, unless it is determined the conversation is criminal in nature.

At a February 2010 hearing, the government described in detail the minimization procedures it employed. Nagi fails to identify any particular conversations that should not have been monitored, stating only that "[i]t does not appear as if minimization consistent with the statute and case law took place." He relies on statistical data alone, claiming that when viewed in light of the low number of calls involving crime, an unreasonable percentage of calls was minimized. He goes on to state that some of the intercepted conversations were "personal" and did not relate to targets of the investigation. These conclusory arguments simply are insufficient to mandate reversal of the district court's denial of his motion to suppress the phone calls.

Finally, Nagi argues that the intercepted calls should have been suppressed because the government did not provide sealing orders during discovery. As Nagi points out, "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a). Nagi implies that the government delayed in making the recordings at issue available to the judges who issued the wiretap orders. His express complaint, however, is that the government should have provided him with the sealing orders issued by the judges after the recordings were made available

to them. In response to Nagi's motion to suppress, the government explained that "housekeeping items" such as sealing orders ordinarily are not provided in discovery. Nonetheless, the government provided the orders to Nagi upon his request. Nagi has failed to identify any prejudice resulting from the government's alleged delay in providing the sealing orders to him. Accordingly, his argument with respect to the sealing orders is without merit.

Nagi also fails to demonstrate that the district court erred in denying him a hearing under *Franks v. Delaware,* 438 U.S. 154 (1978). To mandate an evidentiary hearing under *Franks,* "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth." *Id.* at 171. Further, the allegedly false statement must have been necessary to the finding of probable cause for the wiretap order. *Id.* at 155-56. Other than the arguments outlined above, Nagi identifies no deficiencies with respect to the wiretap orders or the affidavits used to obtain them. Accordingly, Nagi's attack does not warrant reversal of the district court's decision to deny a hearing.

III.

Moore's motion for severance was properly denied.

We review a district court's denial of a motion to sever for an abuse of discretion. *United States v. Cody,* 498 F.3d 582, 586 (6th Cir. 2007). Since Moore did not renew his motion to sever at the close of evidence, however, we can reverse only upon a showing of plain error. *See United States v. Lopez,* 309 F.3d 966, 971 (6th Cir. 2002). Generally, persons jointly indicted should be tried together because "there is almost always common evidence against the joined defendants that allows for the economy of a single trial," *Id.* (internal citation omitted). Severance should be granted only "if there is serious risk that a joint trial would compromise a specific trial right of one

of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* (internal citation omitted). That a defendant might stand a better chance of acquittal if his trial were severed does not require the court to grant his motion. *Id.* Moore asserts that he suffered compelling, specific, and actual prejudice from being tried along with his co-defendants because he was convicted based on his "mere association with the HMC." This is precisely the type of generalized argument that cannot sustain a motion to sever, particularly when viewed through the deferential lens of plain-error review.

IV.

The government's evidence at trial did not create a variance from or a constructive amendment to the indictment.

"A variance to the indictment occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." *United States v. Caver,* 470 F.3d 220, 235 (6th Cir. 2006). "A variance is not reversible error unless the defendant demonstrates prejudice." *United States v. Nance,* 481 F.3d 882, 886 (6th Cir. 2007). If a variance is serious enough, it becomes a constructive amendment. *United States v. Budd,* 496 F.3d 517, 521 (6th Cir. 2007). This occurs "only when the variance creates a substantial likelihood that a defendant may have been convicted of an offense other than that charged by the grand jury." *Nance,* 481 F.3d at 886. Reviewing the district court's ruling *de novo, see Nance,* 481 F.3d at 886, we conclude that the government's proof did not create a variance or constructive amendment.

Both Nagi and Moore argue that the government varied from Count 2 of the Superseding Indictment conspiracy to violate RICO. Nagi argues that the government deviated from the indictment because "the HMC was a defendant in this case, as alluded to by the government in declaring it a criminal organization directly benefitting from the actions of its members." He contends that, at trial, the government "stated that the HMC was not a criminal organization, and it was not illegal to join the HMC, an organization it originally charged as a criminal enterprise." Essentially, Nagi argues that rather than proving one large racketeering conspiracy, the government introduced evidence of several different drug conspiracies involving HMC members. Contrary to Nagi's assertion, however, the HMC was never named as a defendant in this case. Further, the evidence used to prove the existence of a RICO conspiracy necessarily overlaps with evidence of the specific criminal acts of members of the conspiracy. While the existence of a RICO conspiracy was a question for the jury to decide, the question of the conspiracy's existence certainly did not create a variance from or a constructive amendment to the indictment. Under Nagi's theory, the government's failure to carry its burden of proof with respect to RICO would automatically constitute a variance from the indictment. This is an untenable proposition and is without support in the law.

Likewise without merit is Whiting's argument that the government varied from Count 13 of the Superseding Indictment conspiracy to commit murder. Whiting acknowledges that, per the indictment, he was charged with conspiring with Cicchetti, Moore, and Ball to kill Burnett. He argues that, during trial, the government presented evidence that he conspired separately with Anthony Viramontez, leader of the rival gang, Latin Counts, to murder Burnett. Whiting takes issue

with the fact that Viramontez was not listed as a co-conspirator in Count 13 of the indictment and that Count 13 did not contain the language "and others known and unknown." In *United States v. Pingleton,* 216 F. App'x 526 (6th Cir. 2007), two individuals were charged with agreeing to commit a drug offense, but the proof at trial implicated a third individual who was not named in the indictment. As is the case here, the indictment failed to include the customary "and others known and unknown" language. *Id.* at 529. We concluded that, although the lack of customary language was atypical, no variance or constructive amendment had occurred because the complaining defendant had otherwise received notice regarding the uncharged conspirator. *Id.* We also noted the general rule that the prosecution is not required to furnish co-conspirators' names so long as the defendant has notice of the conspiracy with which he is charged. *Id.* (citing *United States v. Rey,* 923 F.2d 1217, 1222 (6th Cir. 1991)). As in *Pingleton,* there is no doubt that Whiting received notice of the conspiracy with which he was charged and that Viramontez was thought to be part of the conspiracy. At the very least, Viramontez's involvement was discussed during a May 2009 detention hearing and his name was mentioned in at least 30 discovery documents that Whiting received well before trial. Accordingly, Whiting's argument is without merit.

V.

The jury instructions did not shift the burden of proof to Defendants.

Defendants Ball, Moore, Whiting, and Clark argue that, when instructing the jury, the district court impermissibly shifted the burden of proof to the defendants. The instruction portion of the original trial transcript revealed the following statement: "In order to convict a defendant on the RICO conspiracy offense charged in Count 2, the defendant must prove all of the following five

elements beyond a reasonable doubt . . . ." The court reporter reviewed the audio recording of the trial, however, and acknowledged that the word "defendant" was a typographical error the instruction actually given had placed the burden of proof on the government. Based on the error, the court reporter filed a corrected transcript.

None of the defendants addresses the government's argument or acknowledge the existence of the corrected transcript. Although Ball and Moore filed reply briefs, neither addressed this issue. Considering these circumstances, it seems that the defendants do not seriously dispute that the district court applied the correct burden of proof. Accordingly, the defendants' argument with respect to the jury instruction fails.

VI.

The defendants have not established prosecutorial misconduct.

Defendants argue that their trial was substantially affected by prosecutorial misconduct and that, as a result, their convictions should be overturned. Much of the defendants' quarrel with the government's conduct centers around the payment of money to witnesses.

As part of its case-in-chief, the government called several cooperating witnesses to testify. Some of those witnesses had previously received money from the government mainly to compensate them for relocation expenses. At a pretrial hearing in March 2010, the government gave to defense counsel a letter that described the payments made to six of the cooperating witnesses. On April 19, 2010 during trial, but well before Philip McDonald's May 11 testimony the government delivered another letter to defense counsel detailing a payment in excess of $44,000 to McDonald for relocation expenses. The defendants contend that the government's "delayed" production of the

information concerning the payment to McDonald constitutes a violation of the rule established in *Brady v. Maryland,* 373 U.S. 83 (1963). However, "*Brady* is concerned only with cases in which the government possesses information which the defendant does not, and the government's failure to disclose the information deprives the defendant of a fair trial." *United States v. Mullins,* 22 F.3d 1365, 1371 (6th Cir. 1994). Because the information was provided in a manner that gave the defendants ample time to cross-examine witnesses regarding the payments, the *Brady* concern is not present here. Defendants also argue that the government committed misconduct by promising another witness, Burnett, a bonus at the conclusion of the case. There is no indication in the record, however, that Burnett was promised a bonus that was contingent upon conviction or the nature of the testimony given. Accordingly, the defendants' opportunity to cross-examine Burnett was a sufficient safeguard against impropriety. *See United States v. Grimes,* 438 F.2d 391, 395-96 (6th Cir. 1971); *see also United States v. Levenite,* 277 F.3d 454, 462-463 (4th Cir. 2002) (describing additional safeguards that are necessary when payment is contingent upon conviction or testimony of a specific nature).

Additionally, Ball argues that the prosecution committed misconduct by proceeding to trial against him on Count 13 conspiracy to commit the murder of Burnett and then dropping the charge prior to jury deliberations. There is no indication, however, that the government had an improper motive for proceeding in the way that it did. Law enforcement's investigation revealed Ball to be among those implicated in the plan to kill Burnett. Prior to trial, essential witnesses became unavailable, leading the government to conclude that it would be unable to prove the charge against Ball. Further, the jury did not receive a copy of the indictment until the conclusion of the case, so

it never knew that Ball faced the charge and, thus, could not have been prejudiced against Ball on that basis.

VII.

Clark's indictment was not barred by the statute of limitations.

We review the district court's denial of Clark's motion to dismiss *de novo*. *See United States v. Cunningham,* 679 F.3d 355, 373 (6th Cir. 2012). The five-year statute of limitations begins running "only when the purposes of the conspiracy have either been accomplished or abandoned." *United States v. Tocco,* 200 F.3d 401, 425 n. 9 (6th Cir. 2000) (quoting *United States v. Salerno,* 868 F.2d 524, 534 (2d Cir. 1989)). Further, A RICO conspiracy charge is not time barred, even where the individual defendant has not committed a predicate act within the five-year limitations period, where there is no suggestion that the defendant withdrew from the conspiracy at any time. *United States v. Saadey,* 393 F.3d 669, 677-78 (6th Cir. 2005). Clark has offered no evidence that he abandoned his involvement in the HMC's criminal activities. Although he was no longer national president at the time, notes from a 2005 HMC meeting reveal that Clark was present, reviewing a list of honorary members of the club. Additionally, Clark offers no argument that the second superseding indictment fails to relate back to the original. *See United States v. Garcia,* 268 F.3d 407, 414-16 (6th Cir. 2001) (superseding indictments might not relate back for statute-of-limitations purposes when the charges therein are materially broadened from those in the previous indictment). Even if the second superseding indictment did not relate back to the first, however, Clark's argument still fails. The second superseding indictment was filed on December 15, 2009. Clark's documented

HMC activity within five years of that date renders the charges against him within the statute of limitations.

VIII.

Sufficient evidence exists to support each Defendant's conviction.

Each defendant challenges his conviction based on the sufficiency of the evidence against him. In considering such challenges, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

A. Nagi

Nagi was convicted of multiple counts, including violations of RICO, conspiracy to violate RICO, assault with a dangerous weapon in aid of racketeering, conspiracy to transport stolen property, conspiracy to alter vehicle identification numbers, conspiracy to possess with intent to distribute cocaine, and use of a firearm in relation to a crime of violence. He claims that the government did not provide sufficient evidence to establish the enterprise element of RICO. The RICO statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Further,

> the enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct . . . . [This element] is 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). And while there must be some structure to distinguish an enterprise from a mere conspiracy, there does not have to be much. *United States v. Johnson,* 440 F.3d 832, 840 (6th Cir. 2006) (citing *United States v. Rogers,* 89 F.3d 1326, 1337 (7th Cir. 1996)). The government does not need to prove that the particular defendant at issue committed or agreed that he, himself, would commit two predicate acts, or even that any overt acts have been committed. *Saadey,* 393 F.3d 669, 676 (6th Cir. 2005).

Specifically, Nagi relies on *United States v. Gibbs,* 182 F.3d 408 (6th Cir. 1999), to support the proposition that the defendants were disparate drug dealers and, therefore, did not form an enterprise. *Gibbs* is distinguished easily, however. *Gibbs* involved a group called the "Short North Posse" and their alleged conspiracy to monopolize the crack cocaine trade in a certain section of Columbus, Ohio. There, we found that the government had failed to present any specific evidence that the defendants agreed to participate in a conspiracy. *Gibbs,* 182 F.3d at 423. While some HMC members testified that they and others in the organization sold drugs "for themselves," there was ample evidence from which a jury could have concluded that the defendants actually committed the criminal acts in their capacities as members of the HMC. Also, unlike the Short North Posse, the HMC had a clearly defined hierarchy and held regular meetings, supporting the notion that they were, indeed, an enterprise for purposes of RICO.

There was also sufficient evidence to satisfy the "continuity plus" requirement. *See United States v. Fowler,* 535 F.3d 408, 419 (6th Cir. 2008). This test requires a relationship between the predicate acts and a threat of continued activity. *Id.* at 419-20. "Predicate acts do not necessarily need to be directly interrelated," but "they must . . . be connected to the affairs and operations of the

criminal enterprise." *Corrado*, 227 F.3d at 554. The jury was well within reason to conclude that the HMC's acts of violence were based on the group's rivalries and loyalties, as well as protecting the reputation of the group itself. The theft of vehicles and alteration of VINs came about as the result of HMC "runs," and drug dealing was widespread throughout the club and took place in the clubhouse. Additionally, there is no question that the racketeering acts presented a threat of continued activity. Ample evidence suggests that the predicates can be attributed to the defendants, operating as part of a long-term association which existed for criminal purposes. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 243 (1989) (continuity requirement is satisfied where predicate acts are a part of an ongoing entity's "regular way of doing business"). The evidence belies the defendants' suggestion that the group's racketeering acts were sporadic, unrelated activities.

Nagi also argues that there was insufficient evidence to support his conviction for Racketeering Act 8, Count 15 (conspiracy to transport stolen property in interstate commerce) and Count 16 (conspiracy to alter, remove, and obliterate vehicle identification numbers). In addition to the testimony of fellow HMC member Lou Fitzner, Burnett testified that HMC members, including Nagi, stole motorcycles in Myrtle Beach and transported them back to Michigan. Fitzner testified that Nagi worked with others to alter the serial number on a stolen motorcycle that Nagi stored in his garage. Based on the testimony of Fitzner and Burnett, rational jurors could have concluded that Nagi was guilty of the charges.

Finally, Nagi contends that there was insufficient evidence to convict him of aiding and abetting under 18 U.S.C. § 924(c) use of a firearm during and in relation to a crime of violence in relation to the incident at the Wheat & Rye. To sustain a conviction under section 924(c), the

government must prove "that the defendant, as the accomplice, associated and participated in the use of the firearm in connection with the underlying . . . crime." *United States v. Franklin*, 415 F.3d 537, 554-55 (6th Cir. 2005). As the district court concluded, there was sufficient evidence from which a reasonable jury could have inferred that Nagi was inside the Wheat & Rye during the assault, that he knew Manners possessed a gun, and that he acted with the intent to assist or influence the commission of the underlying crime of assault with a dangerous weapon. Fitzner testified that Nagi told him that he was inside the Wheat & Rye during the assault. Officers responding to the scene observed Nagi and others speeding away from the bar and later observed a pistol on the ground near the parked vehicle. Nagi's own statements to Bo Moore and Dennis Vanhulle, obtained through intercepted phone calls, further confirmed his involvement in the incident. This evidence is sufficient to support the verdict against Nagi.

B. Cicchetti

Cicchetti argues that there was insufficient evidence to convict him on Counts 7 (assault with a dangerous weapon in aid of racketeering) and 31 (use of a firearm during and in relation to a crime of violence) both based on the assault on Kirchoff at the Wheat & Rye Bar. As Cicchetti notes, a defendant cannot aid or abet a section 924(c) violation without knowing that a gun will be used or carried in relation to the underlying crime. *See Wright v. United States*, 182 F.3d 458, 465 (6th Cir. 1999). A reasonable juror could have determined that the government made this showing with respect to Cicchetti. Fitzner testified that Nagi told him that both he and Cicchetti were inside the Wheat & Rye when the shots were fired. Police officers identified Cicchetti, along with Nagi, inside a truck that was fleeing the scene. The intercepted phone calls between Nagi and his HMC

confidants confirmed that Cicchetti was an active participant in the Wheat & Rye incident. Further, given the HMC's penchant for violence, under these circumstances, it was fair for the jury to infer that Cicchetti was aware of and encouraged this particular use of a firearm. In his statement to the police, Kirchoff stated that "a group of about ten people busted in" and he immediately started being hit from all sides. Following the attack, Kirchoff visited Bo Moore and told him, "Your boys shot at me; they jumped me and hit me with beer bottles and stuff." It was within reason for the jury to infer, based on the evidence presented, that Cicchetti was one of those who "busted in" and began hitting Kirchoff with bottles. Accordingly, Cicchetti's conviction on Count 7 also is supported by sufficient evidence.

Cicchetti also argues that there was insufficient evidence to support his convictions based on Counts 2 (RICO conspiracy) and 19 (conspiracy to possess with intent to distribute less than one kilogram of cocaine). As to the RICO conspiracy, he contends that there was no evidence that he had a leadership role in the HMC enterprise or that he was involved in the affairs of the enterprise. The record contains ample evidence, however, from which a jury could have found the elements of the crime satisfied. First, "RICO liability is not limited to those with primary responsibility for the enterprise's affairs." *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 791-92 (6th Cir. 2012). Rather, the defendant need only have participated in the management or operation of the enterprise. *Id.* at 792. Cicchetti's management role can be inferred based on his membership in the "committee," as well as his two tenures as Detroit Chapter President. There was ample evidence that he was involved in the affairs of the enterprise, including that of his involvement in the assault on Kirchoff, as well as his using and selling drugs with other HMC members. There was also sufficient

evidence from which the jury could have concluded that Cicchetti agreed that someone would commit at least two of the predicate racketeering acts alleged in the indictment. Testimony from Burnett and Burton regarding Cicchetti's drug use and sales in connection to the HMC supports the conclusion that he conspired to distribute controlled substances, as alleged in Racketeering Act 11. Further, Burton testified that he distributed cocaine to Cicchetti and that he saw Cicchetti in possession of and using cocaine. Based on this testimony, the jury reasonably could have inferred that Cicchetti agreed that Burton, among others, would distribute cocaine, as alleged in Racketeering Act 9. Peters testified that Cicchetti bought a lot of drugs from him and that he would sell enough to pay for them. Additionally, wiretapped phone conversations between Cicchetti and Nagi were presented, in which the two discussed cocaine. This evidence would have allowed the jury to conclude that Cicchetti agreed to the conspiracy to distribute controlled substances alleged in Racketeering Act 11. Based on the testimony of Nat Sanchez and Lou Fitzner, the jury also reasonably could have concluded that Cicchetti agreed that HMC members would beat and rob members of the Liberty Riders Motorcycle Club, as alleged in Racketeering Act 7. For the reasons already discussed, there is sufficient evidence to support the jury's finding that Cicchetti is guilty of Count 19, involving less than one kilogram of cocaine.

C. Ball

Ball argues that because he was merely involved in a "handful of ordinary buy/sell drug transactions," there was insufficient evidence to support his drug conspiracy convictions under Counts 19 and 20. Several witnesses testified as to Ball's extensive drug dealing activities. Burnett executed at least three controlled buys of cocaine from Ball. Each buy was for about four and a half

ounces of cocaine, which cost around $3,400. Burton, a former HMC member, testified that Ball was his competitor when it came to selling cocaine and that the two men had a physical altercation when Ball accused Burton of stealing one of his customers. In April 2006, after executing a search warrant at Ball's home, agents seized 175.3 grams of cocaine. Ball's challenge to his conspiracy conviction (Count 2) fails for the reasons already given.

Ball also argues that the government did not establish that he participated in the "operation or management" of the criminal enterprise for purposes of Count 1. *See Reves v. Ernst & Young,* 507 U.S. 170, 179 (1993). However, Ball was an important member of the HMC. He was an "honorary," having achieved senior status, and also was the president of the Detroit East Side Chapter and opened his own chapter at Eight Mile. His principal role in stealing motorcycles in Myrtle Beach also demonstrates his key position in the organization's illegal acts.

Additionally, Ball contends that the trial court erred by failing to grant his motion for a mistrial following a spectator's outburst during the testimony of cooperating witness Daniel Sanchez. During Sanchez's testimony, a woman in the gallery stood up and allegedly pointed in the direction of Ball and the other defendants, shouting, "they murdered my son." After the jury was excused, the spectator informed the court that her outburst was motivated by her belief that Sanchez had been given immunity for the murder of her son, based on his testimony against the defendants. The trial judge is in the best position to evaluate the prejudicial effect of a spectator's outburst. *See, e.g., Staton v. Parke,* 12 F.3d 214 (6th Cir. 1993) (table); *United States v. Brooks,* 670 F.2d 148, 152 (11th Cir. 1982). In this case, the district court immediately instructed the jurors to disregard the statement and noted that the jurors nodded their heads in understanding. In the case of a spectator

outburst, a hearing to determine jury impact is not necessarily required. *See White v. Smith,* 984 F.2d 163, 166 (6th Cir. 1993). "This is particularly true when, as in this case, the trial judge follows up with a statement to the jury, allaying any apprehensions." *Id.* at 166-67. At this point, significant resources had been expended in trying the case, and the trial judge was within her discretion to determine that the defendants would not be prejudiced by the outburst. Further, we find no merit in Ball's arguments regarding his inability to cross-examine Sanchez about his involvement in a murder that was the subject of an ongoing investigation. After rejecting Ball's motion in limine to cross-examine Sanchez regarding the murder, the district court rejected his second request to cross-examine following the spectator outburst. The district court adhered to its previous rationale that under Federal Rule of Evidence 608(b), evidence of the murder was not probative of truthfulness. Further, it reasoned, in the context of the outburst, cross-examining Sanchez about a murder the jury knew nothing about would be of no benefit to the defendants. The district court did not abuse its discretion in restricting the defendants' ability to cross-examine Sanchez about the murder. *See United States v. Franco,* 484 F.3d 347, 353 (6th Cir. 2007) (providing standard of review).

D. Moore

Moore argues that because he was acquitted of the predicate acts in the substantive RICO count, he cannot be convicted for conspiracy to violate RICO. Like Ball, he also argues that the evidence was insufficient to show that he had a role in the "operation or management of the enterprise." *Reves,* 507 U.S. at 179. However, Moore was known as the "godfather" of the HMC and was likely the most powerful member of the organization. Trial testimony revealed that all significant club decisions had to go through him. As previously stated, it is not necessary that Moore

committed the predicate acts himself. Rather, he is a conspirator because he agreed to facilitate acts leading to the substantive offense. *See Saadey*, 393 F.3d at 676. Moore routinely accepted gifts of narcotics for his own personal use from drug dealing HMC members. Based on the totality of the evidence, it was reasonable for the jury to infer that, while Moore might not have been on the street committing illegal acts himself, he was aware of and directing HMC members' activities such that he was guilty of conspiring to violate RICO.

E. Whiting

Whiting argues that the government failed to present sufficient evidence to convict him on his four guilty counts racketeering, conspiracy to commit racketeering, conspiracy to commit murder in aid of racketeering, and possession of stolen vehicles. First, Whiting argues that there was no evidence demonstrating that he conspired to kill Burnett and that, rather, he was ambivalent about the situation. While there is no indication of an express command to "kill" Burnett, Whiting did say that Burnett "needed to go if anybody found him" and, at HMC meetings, if "anyone finds [Burnett], get his ass." Considering the contemporaneous talk amongst the HMC and rival gang Latin Counts concerning the need to eliminate Burnett the "snitch" a jury could have reasonably inferred that Whiting agreed to murder Burnett.

Whiting also argues that there was insufficient evidence to convict him of Count 47 (receipt and possession of stolen vehicles). Former HMC member McDonald testified, however, that club members had brought "quite a few" stolen bikes back from South Carolina and that Whiting showed him one, telling him that it was from Myrtle Beach. That particular bike did not have a motor on it, and Whiting said that he was going to "bring it out" after replacing the motor an act the HMC often

did with stolen bikes. A reasonable jury could have inferred from this testimony, and other testimony about HMC members stealing bikes from Myrtle Beach, that Whiting had received a stolen motorcycle and that he was in the process of altering it when he showed it to McDonald.

F. Clark

Like Moore, Clark argues that his acquittal on Count 1 (substantive RICO charge) precludes a finding of guilty on Count 2 (conspiracy to violate RICO). To be convicted of conspiracy to commit RICO, the defendant must have "agreed to join a racketeering enterprise and [have] agreed to the commission of any two of the various predicate acts charged in the indictment." *Callanan v. United States,* 881 F.2d 229, 235 (6th Cir. 1989). The defendant, however, does not have to agree that *he* will commit the predicate acts only that *someone* will commit at least two predicate acts. *See United States v. Russo,* 796 F.2d 1443, 1462 (11th Cir. 1986). While Clark was acquitted of both of the racketeering acts with which he was charged, there was sufficient evidence to support the jury's conclusion that he agreed that someone would commit at least two of the racketeering acts alleged in Count 1 of the indictment. For example, while Clark was acquitted of Racketeering Act 9 (conspiracy to distribute cocaine), there is ample evidence from which the jury could have concluded that Clark agreed that other HMC members would distribute cocaine. The same can be said of Racketeering Act 11 (conspiracy to distribute controlled substances). While Clark was not charged with this act, the jury easily could have found that Clark agreed for other HMC members to commit it. The record reveals that Clark conspired with Sanchez and others to purchase cocaine and provide that cocaine to other HMC members often for sale/distribution to the general public. Additionally, Nagi and Ball shared drugs with the HMC leadership, and Clark held leadership

positions during the time of the conspiracy. Clark even brought his employees to the HMC clubhouse so that they could purchase cocaine. That, combined with the fact that HMC leadership condoned drug use and sales at the clubhouse is sufficient evidence from which the jury could have inferred that Clark had conspired with other HMC members to distribute controlled substances. *See United States v. Driver,* 535 F.3d 424, 429 (6th Cir. 2008) (formal agreement not required tacit understanding among the parties is sufficient for conspiracy).

IX.

Clark and Moore are entitled to a limited remand for resentencing on Count 2. All other Defendants' sentences are proper.

A. Nagi

Under the United States Sentencing Guidelines ("USSG"), Nagi was assigned a range of 324-405 months and sentenced to 324 months in prison. He argues that, in relation to his Count 2 RICO conspiracy conviction, he was incorrectly sentenced based on the conduct of his co-defendants. In examining the district court's application of the Guidelines, we review factual findings for clear error. *See United States v. Hamilton,* 929 F.2d 1126, 1130 (6th Cir. 1991). Whether the facts determined by the district court warrant the application of a particular guidelines provision is a purely legal question, however, and is reviewed *de novo. United States v. Partington,* 21 F.3d 714, 717 (6th Cir. 1994).

USSG § 1B1.3(a)(1)(A) and (B) allows the court to take into account during sentencing "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as "all reasonably foreseeable acts and omissions of

others" in the case of "jointly undertaken criminal activity." The existence of relevant conduct for calculating a base offense level is determined by the court at sentencing by a preponderance of the evidence. *Corrado,* 227 F.3d at 541-42. The district court engaged in a lengthy and detailed analysis concerning the conduct of other HMC members that was relevant to determining Nagi's base offense level. The court determined that, because of Nagi's role of authority within the organization, USSG § 1B1.3(a)(1)(A) was satisfied. The record indicates that the HMC was very transparent concerning drug activity, crimes of violence, and theft, so Nagi reasonably should have foreseen the acts of his cohorts. Accordingly, the district court did not err in sentencing Nagi based on the predicate acts committed by others.

B. Ball

On a Guidelines range of 360 months to life, Ball received a sentence of 360 months in prison. He argues that the district court incorrectly calculated his drug quantity and improperly enhanced his sentence with a leadership role pursuant to USSG § 3B1.1(a). He correctly contends that because the district court failed to ask the *Bostic* question, the reasonableness of his sentence is reviewed for abuse of discretion rather than plain error. *See United States v. Ross,* 703 F.3d 856, 884-85 (6th Cir. 2012). The district court's interpretation of the Guidelines is reviewed *de novo* and its factual findings are reviewed for clear error. *Gall v. United States,* 552 U.S. 38, 46 (2007). Review of whether a defendant had an "organizer or leadership role," however, is deferential, in light of our decision in *United States v. Washington,* 715 F.3d 975, 982-84 (6th Cir. 2013).

Ball argues that he should not have been sentenced based on drug amounts attributed to his co-conspirators. However, a defendant is liable for quantities of drugs distributed by co-conspirators

provided such amounts are reasonably foreseeable to the defendant. *United States v. Lloyd,* 10 F.3d 1197, 1219 (6th Cir. 1993). During Ball's sentencing hearing, the district court discussed extensively the reasons it assigned him the drug quantity it did. The court applied the same analysis that it had to Nagi and determined that the drug quantities tied to other conspirators constituted relevant conduct for purposes of sentencing Ball. Further, the district court noted that Ball had "an active leadership role with respect to the distribution of controlled substances in the club" and that he was "one of the longest time, old-time members, an honorary member." The court also found that "he was in a leadership role in this club as president of the Eight Mile Chapter, and he certainly was in a leadership role and extremely active in the distribution of all kinds of controlled substances." As discussed with regard to Ball's sufficiency-of-the-evidence claim, the conclusions by the district court are supported by the record.

C. Whiting

With a Guidelines range of 360 months to life, Whiting was sentenced to 420 months imprisonment. He argues that the sentence was unreasonable and that he should not have been sentenced based on the acts of his co-conspirators. However, the district court considered the factors in 18 U.S.C. § 3553(a) and determined that a downward variance was not appropriate. Like the other defendants, Whiting argues that he should not be held responsible for the drug trafficking of his co-conspirators. The district court conducted a reasoned analysis, holding him accountable only for those acts that were foreseeable to him. Whiting was national president during much of the time at issue, and it was reasonable for the district court to infer that Whiting was involved in and foresaw the drug dealing activities of the Club.

D. Moore

On a Guidelines range of life, Moore was sentenced to life in prison. It is well established that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000); *see also Alleyne v. United States,* 133 S. Ct. 2151, 2158 (2013). The statutory maximum for a violation of the RICO statute is twenty years, unless the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment. *See* 18 U.S.C. § 1963(a). While Racketeering Acts 1, 2, 4, 6, 9, 11, and 13 are all violations for which the maximum penalty includes life, the jury never made any special findings as to Moore's participation with these acts. Accordingly, he is entitled to a limited remand for re-sentencing with respect to Count 2. *See Corrado,* 227 F.3d at 542.

E. Clark

On a Guidelines range of 292-365 months in prison, Clark was sentenced to 292 months. Clark, like Moore, was convicted of conspiracy to violate RICO, but acquitted of the substantive RICO charge. Because his sentence exceeds the statutory maximum of twenty years, like Moore, he is entitled to a limited remand for resentencing with respect to Count 2. Clark's other arguments regarding his sentence are without merit. For the reasons already discussed, the district court did not err in concluding that Clark acted as a leader in the drug conspiracy and that he is liable for the acts of his co-conspirators.

X.

Defendants' convictions are **AFFIRMED**. However, because Moore and Clark received sentences greater than the statutory maximum of twenty years without a special finding by the jury, their judgments are **REVERSED** and **REMANDED** to the district court for resentencing consistent with this opinion.

United States District Court
Eastern District of Michigan

United States of America
V.
AREF NAGI

Case Number: 06CR20465-1
USM Number: 40888-039

SECOND AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Date of Original Judgment: January 24, 2011
(or date of Last Amended Judgment)

James Thomas
Defendant's Attorney

Reason for Amendment:
Correction of Sentence Clerical Mistake (Fed.R.Crim.P.36). Page 3 corrected Count 1 to 240 months and not 340 months.

■ Was found guilty on count(s) **1, 2, 7, 15, 16, 19, 31 of 2nd Superseding Indictment** after a plea of not guilty.

■ The defendant has been found not guilty on count(s) **12 of 2nd Superseding Indictment** after a plea of not guilty.

Title & Section	Nature of Offense	Offense Ended	Count
See page 2 for details.			

The defendant is sentenced as provided in pages **2 through 7** of this judgment. This sentence is imposed pursuant of the Sentencing Reform Act of 1984

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

March 30, 2011
Date of Imposition of Judgment

s/Nancy G. Edmunds
United States District Judge

March 30, 2011
Date Signed

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 1963(c) and 1963(a)	Conducting or Participating in the Affairs of an Enterprise through a Pattern of Rackteering Activity	12/15/2009	1 of 2nd SSInd.
18 U.S.C. 1962(d) and 1963(a)	Conspiracy to Participate in the Affairs of an Interstate Enterprise through a Pattern of Racketeering Activity	12/15/2009	2 of 2nd SSInd.
18 U.S.C. 1959(a)(3)	Assault with a Dangerous Weapon in Aid of Racketeering	12/23/2005	7 of SSInd.
18 U.S.C. 371 and 2312	Conspiracy to Transport Stolen Property in Interstate Commerce	10/2006	15 of SSInd.
18 U.S.C. 511 and 371	Conspiracy to Alter, Remove and Obliterate Vehicle Identification Numbers	2006	16 of 2nd SSInd.
21 U.S.C. 846	Conspiracy to Possess with Intent to Distribute, and Distribution of Controlled Substances	12/15/2009	19 of 2nd SSInd.
18 U.S.C. 924(c)	Use of a Firearm During and in Relation to a Crime of Violence	12/23/2005	31 of 2nd SSInd.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **240 months as to Count 1; 324 months concurrent as to Count 2; 20 years concurrent on Count 7; 10 years concurrent on Count 15; 5 years concurrent on Count 16; 324 months concurrent on Count 19 and 10 years consecutive on Count 31. The Court took into consideration the Sentencing Guidelines and Factors contained in 18 U.S.C. 3553(a).**

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years on Counts 1,2 and 31, concurrent; three (3) years on Counts 7, 15, 16, each count concurrent; and four (4) years on Count 19, concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. Revocation of supervised release is mandatory for possession of a controlled substance.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report ot the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS:	$ 700.00	$ 0.00	$ 0.00

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS:	$ 0.00	$ 0.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:
[A] Lump sum payment of **$700.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, while in custody, the defendant shall participate in the Inmate Financial Responsibility Program. The Court is aware of the requirements of the program and approves of the payment schedule of this program and hereby orders the defendant's compliance. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit the defendant's interest in the following property to the United States:

See detail list attached.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1

ADDITIONAL FORFEITED PROPERTY

The defendant is forfeiting 37 assorted firearms as more particularly described and enumerated in Count Fifty of the Second Superseding Indictment, and forfeiting the amounts of U.S. Currency totaling $1,359.00 listed in Count Fifty-Eight of the Second Superseding Indictment.

A forfeiture money judgment against the defendant in the amount of $13,500.00 is hereby entered in favor of the United States.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1
Eastern District of Michigan

STATEMENT OF REASONS
(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The court adopts the presentence investigation report without change.**

B ■ **The court adopts the presentence investigation report with the following changes:**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)

1 ■ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics): **The Court did not apply a four level enhancement under 2A1.5(b)(1)**

2 ■ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility): **The Court did not apply a two level enhancement for obstruction of justice pursuant to 3 C1.1(a)**

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P.32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE. (Check all that apply.)

A ☐ No count of conviction carries a mandatory minimum sentence.

B ■ Mandatory minimum sentence imposed..

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on.

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C.§3553(e))

☐ the statutory safety valve (18 U.S.C.§3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: **41**

Criminal History Category: **I**

Imprisonment Range: **324** to **405 (plus 10 years)** months

Supervised Release Range: **3** to **5** years

Fine Range: **$25,000.00** to **$2,000,000.00**

■ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1
Eastern District of Michigan

STATEMENT OF REASONS
(Not for Public Disclosure)

IV ADVISORY GUIDELINE SENTENCING DETERMINATION. (Check only one.)

A ☐ The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.

B ■ The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons: **(See attached memorandum)**

C ☐ The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)

D ☐ The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one):

☐ below the advisory guideline range.

☐ above the advisory guideline range.

B **Departure based on** (Check only one):

1 **Plea Agreement.** (Check all that apply and check reason(s) below):

☐ 5K1.1 plea agreement based on the defendant's substantial assistance

☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program

☐ binding plea agreement for departure accepted by the court

☐ plea agreement for departure, which the court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense departure motion

2 **Motion Not Addressed in a Plea Agreement.** (Check all that apply and check reason(s) below):

☐ 5K1.1 government motion based on the defendant's substantial assistance

☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program

☐ government motion for departure

☐ defense motion for departure to which the government did not object

☐ defense motion for departure to which the government objected

3 **Other**:

☐ Other than a plea agreement or motion by the parties for departure (Check reasons(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.):

☐ 4A1.3	Criminal History Inadequacy	☐ 5K2.1	Death	☐ 5K2.11	Lesser Harm
☐ 5H1.1	Age	☐ 5K2.2	Physical Injury	☐ 5K2.12	Coercion and Duress
☐ 5H1.2	Education and Vocational Skills	☐ 5K2.3	Extreme Psychological Injury	☐ 5K2.13	Diminished Capacity
☐ 5H1.3	Mental and Emotional Condition	☐ 5K2.4	Abduction or Unlawful Restraint	☐ 5K2.14	Public Welfare
☐ 5H1.4	Physical Condition	☐ 5K2.5	Property Damage or Loss	☐ 5K2.16	Voluntary Disclosure of Offense
☐ 5H1.5	Employment Record	☐ 5K2.6	Weapon or Dangerous Weapon	☐ 5K2.17	High-Capacity, Semiautomatic Weapon
☐ 5H1.6	Family Ties and Responsibilities	☐ 5K2.7	Disruption of Government Function	☐ 5K2.18	Violent Street Gang
☐ 5H1.11	Military Record, Charitable Service, Good Works	☐ 5K2.8	Extreme Conduct	☐ 5K2.20	Aberrant Behavior
		☐ 5K2.9	Criminal Purpose	☐ 5K2.21	Dismissed and Uncharged Conduct
☐ 5K2.0	Aggravating or Mitigating Circumstances	☐ 5K2.10	Victim's Conduct	☐ 5K2.22	Age or Health of Sex Offenders
				☐ 5K2.23	Discharged Terms of Imprisonment

☐ Other guideline basis(e.g. 2B1.1 commentary):

D **Explain the facts justifying the departure.** (Use page 4 if necessary):

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1
Eastern District of Michigan

STATEMENT OF REASONS
(Not for Public Disclosure)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A The sentence imposed is (Check only one.):

- ☐ below the advisory guideline range.
- ☐ above the advisory guideline range.

B Sentence imposed pursuant to (Check Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

- ☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court.
- ☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable.
- ☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

- ☐ government motion for a sentence outside of the advisory guideline system
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object.
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

- ☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guidelines system (Check reason(s) below.):

C Reason(s) for Sentence Outside the Advisory Guideline System (Check Check all that apply.):

- ☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C.§3553(a)(1)
- ☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C.§3553(a)(2)(A))
- ☐ to afford adequate deterrence to criminal conduct (18 U.S.C.§3553(a)(2)(B))
- ☐ to protect the public from further crimes of the defendant (18 U.S.C.§3553(a)(2)(C))
- ☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C.§3553(a)(2)(D))
- ☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C.§3553(a)(6))
- ☐ to provide restitution to any victims of the offense (18 U.S.C.§3553(a)(7))

D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary)

DEFENDANT: AREF NAGI
CASE NUMBER: 06CR20465-1
Eastern District of Michigan

VII COURT DETERMINATION OF RESTITUTION

A ■ Restitution Not Applicable.

B Total Amount of Restitution: $0.00

C Restitution not ordered (Check only one):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C.§3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C.§3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C.§3663A, resitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C.§3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C.§3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C.§3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is order under 18 U.S.C.§3553(c) for these reasons:

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable)

March 30, 2001
Date of Imposition of Judgment

Defendant's Soc.Sec.No.: **086-60-4968**
Defendant's Date of Birth: **August 17, 1963**

Defendant's Residence Address: **36603 Waltham Drive, Sterling Heights, MI 48310**

s/Nancy G. Edmunds
United States District Judge

March 30, 2011
Date Signed

Defendant's Mailing Address: **Same as residence.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-01 AREF NAGI, et al.,

Defendants.
_____/

Case No. 06-20465

Honorable Nancy G. Edmunds

OPINION ADDRESSING RELEVANT CONDUCT FOR THE PURPOSE OF CALCULATING BASE OFFENSE LEVEL FOR DEFENDANT NAGI'S COUNT 2 RICO CONSPIRACY CONVICTION

This matter comes before the Court after an extensive jury trial that began on April 1, 2010 and concluded with guilty verdicts on June 3, 2010. Defendants Nagi, Cicchetti, Ball Jr., Leonard "Dad" Moore, Joseph Whiting, and Anthony Clark, along with numerous other individuals, were charged in a second superseding indictment with violating federal racketeering laws and other federal laws involving violent acts, firearms, controlled substances, and stolen property. Each of these above-named Defendants held a leadership position in the Highwaymen Motorcycle Club ("HMC"). As to Defendant Nagi, the jury returned the following guilty verdicts:

D-01 Aref "Steve" Nagi

Ct. 1 -	18 U.S.C. § 1962(c)	Racketeer Influenced and Corrupt Organization ("RICO") - Conducting or Participating in affairs of an Enterprise through a Pattern of Racketeering Activity
Ct. 2 -	18 U.S.C. § 1962(d)	Conspiracy to violate RICO

Ct. 7 -	18 U.S.C. § 1959(a)(3)	Assault with a dangerous weapon in aid of Racketeering ("Wheat & Rye")
Ct. 15 -	18 U.S.C. § 2312	Conspiracy to transport stolen vehicles in Interstate Commerce ("Myrtle Beach")
Ct. 16 -	18 U.S.C. §§ 511, 371	Conspiracy to alter, remove, and obliterate Vehicle Identification Numbers ("Walkabout Cycle")
Ct. 19 -	21 U.S.C. § 846	Conspiracy to Possess with intent to distribute and Distribution of Controlled Substances
Ct. 31 -	18 U.S.C. § 924(c)	Use of Firearm during and in relation to crime of violence ("Wheat & Rye")

The Court now considers an issue raised in Defendant Nagi's Sentencing Memorandum [1701] – how to calculate the base offense level for Defendant Nagi's Count 2 RICO conspiracy conviction. Specifically, what Racketeering Acts identified in Count 1 – the substantive RICO Count – constitute relevant conduct as defined in the United States Sentencing Commission, *Guidelines Manual*, § 1B1.3(a)(1)(A) & (B) (Nov. 2010), and thus should be attributed to Defendant Nagi for the purpose of calculating the base offense level for his Count 2 RICO conspiracy conviction.

I. Background

A. Indictment and Jury Verdict

The specific Racketeering Acts ("R.A.") identified in Count 1 were as follows:

R.A. 1	-	Ruben Guzman	9/10/03 Armed Robbery & Attempted Murder
R.A. 2	-	Gerald Deese	Conspiracy to Commit Murder
R.A. 3	-	Anthony Barton	Extortion
R.A. 4	-	Steve Peet	Armed Robbery
R.A. 5	-	Black Pistons	3/04 Conspiracy to Commit Arson
R.A. 6	-	Black Pistons	3/27/04 Conspiracy to Commit Murder
R.A. 7	-	Liberty Ridders	02/06 Robbery
R.A. 8	-	Myrtle Beach	Transporting & Receiving Stolen Vehicles
R.A. 9	-	Burton/Peters	Conspiracy to Distribute Cocaine
R.A. 10	-	Bo Moore	Conspiracy to Distribute Steroids
R.A. 11	-	Nagi/Ball Jr.	Conspiracy to Distribute Controlled Substances
R.A. 12	-	Dougie Burnett	Conspiracy to Commit Murder

R.A. 13 - Phil McDonald Conspiracy to Commit Murder

The Jury Verdict form, under Count 1 – the substantive RICO count – , provided the following with regard to Defendant Nagi:

Count One

Not Guilty _____

Guilty _____

Racketeering Act Eight

Not Proven _____

Proven _____

Racketeering Act Eleven

Not Proven _____

Proven _____

The jury found, beyond a reasonable doubt, that Defendant Nagi was guilty on Count 1 and also found that Racketeering Acts 8 and 11 had been proven.

The Jury Verdict form, under Count 2 – the RICO conspiracy count – , is not as specific. Under Defendant Nagi's name, it provides solely for a verdict of either Not Guilty or Guilty.

B. Stipulations Between Defendant Nagi and Government Re: Sentencing

At the initial sentencing hearing held on January 11, 2011, the Government and Defendant Nagi agreed to the following matters affecting the issue presented here:

1. Nagi's involvement in the RICO conspiracy was from June 2004 through October 3, 2006.

2. Because Nagi did not join the enterprise until June 2004, he should not be held

accountable for any acts committed earlier than that date (Govt's Sentencing Mem. at 8, n.2). This includes:

R.A. 1	-	Ruben Guzman	9/10/03 Armed Robbery & Attempted Murder
R.A. 5	-	Black Pistons	3/04 Conspiracy to Commit Arson
R.A. 6	-	Black Pistons	3/27/04 Conspiracy to Commit Murder

3. R.A. 7 (the Liberty Riders assault) and R.A. 13 (the Phil McDonald murder conspiracy) should not be taken into account at Nagi's sentencing (Govt's Sentencing Mem. at 4). This applies to both Counts 1 and 2 – the substantive RICO count and the RICO conspiracy count, respectively.

II. Analysis

In light of the above stipulations, the following eight Racketeering Acts remain to be evaluated under USSG § 1B1.3(a)(1)(A) & (B):

R.A. 2	-	Gerald Deese	Conspiracy to Commit Murder
R.A. 3	-	Anthony Barton	Extortion
R.A. 4	-	Steve Peet	Armed Robbery
R.A. 8	-	Myrtle Beach	Transporting & Receiving Stolen Vehicles
R.A. 9	-	Burton/Peters	Conspiracy to Distribute Cocaine
R.A. 10	-	Bo Moore	Conspiracy to Distribute Steroids
R.A. 11	-	Nagi/Ball Jr.	Conspiracy to Distribute Controlled Substances
R.A. 12	-	Dougie Burnett	Conspiracy to Commit Murder

USSG § 1B1.3(a)(1)(A) & (B) provide as follows:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in

> preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

USSG § 1B1.3(a)(1)(A) & (B).

It is not disputed that the appropriate base offense level for Nagi's Count 2 RICO conspiracy conviction should be determined by referencing USSG § 2E1.1, which provides that the base offense level is the greater of 19 or "the offense level applicable to the underlying racketeering activity." Two issues are in dispute: (1) the burden of proof required to prove the existence of relevant conduct under USSG § 1B1.3; and (2) whether Racketeering Acts 2, 3, 4, 8, 9, 10, 11, and 12 constitute relevant conduct for the purpose of calculating the base offense level for Defendant Nagi's Count 2 RICO conspiracy conviction.

A. Burden of Proof

As in *United States v. Corrado*, 227 F.3d 528, 541 (6th Cir. 2000), Defendant Nagi and the Government "dispute the burden of proof that the government bears in establishing an underlying offense that was not specified in a jury's verdict in order for that conduct to be used to calculate the defendant's base offense level" for sentencing on a RICO conspiracy conviction. In *Corrado*, the Sixth Circuit rejected the same USSG § 1B1.2 multi-object conspiracy Guidelines argument that Defendant Nagi makes here – "that the government is required to prove the existence of an underlying offense beyond a reasonable doubt." *Id.* After distinguishing RICO conspiracies from multi-object conspiracies, the *Corrado* court held that "[t]he existence of relevant conduct is determined at sentencing by a preponderance of the evidence." *Id.* at 542. It reasoned as follows:

> The defendants in this case were convicted of a RICO conspiracy, however, not a multi-object conspiracy. There is a critical distinction between the two.

> The multi-object conspiracy section of the Sentencing Guidelines was enacted to deal with multiple object conspiracies charged in a single count. By contrast, a RICO conspiracy is considered a single object conspiracy with that object being the violation of RICO.
>
> Thus, the underlying acts of racketeering in a RICO conspiracy are not considered to be the *objects* of the conspiracy, but simply conduct that is relevant to the central objective – participating in a criminal enterprise. The existence of relevant conduct is determined at sentencing by a preponderance of the evidence.

Id. at 541-42 (internal quotation marks and citations omitted).

The same reasoning applies here. Defendant Nagi's burden of proof argument is rejected. The existence of relevant conduct for calculating a base offense level for Defendant Nagi's Count 2 RICO conspiracy conviction is determined at sentencing by a preponderance of the evidence. *Id.*

B. Determination of Relevant Conduct Under USSG § 1B1.3(a)(1)(A) & (B)

"Relevant conduct includes, in pertinent part: (1) 'all acts or omissions' that the defendant 'committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused'; and (2) 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,' that occurred during, in preparation for, or in the course of attempting to avoid detection or responsibility for the RICO conspiracy." *United States v. Tocco*, 306 F.3d 279, 286 (6th Cir. 2002) (quoting USSG § 1B1.3(a)(1)(A) & (B)).

C. Nagi Conduct - Racketeering Acts 8 and 11

When convicting Defendant Nagi on Count 1, the substantive RICO count, the jury found, beyond a reasonable doubt, that Nagi agreed to commit Racketeering Acts 8 and 11 – Transporting & Receiving Stolen Vehicles (Myrtle Beach) and Conspiracy to Distribute

Controlled Substances ((Nagi/Ball Jr.), respectively. As the Sixth Circuit observed in *United States v. Corrado*, 304 F.3d 593, 608 (6th Cir. 2002), "RICO predicate acts . . . for which a defendant is convicted necessarily constitute relevant conduct for the purpose of calculating the defendant's base offense level for a RICO conspiracy conviction."

D. Conduct of Others - Racketeering Acts 2, 3, 4, 9, 10 and 12

As to a defendant's accountability for the acts of others under USSG § 1B1.3(a)(1)(B), the Sixth Circuit requires that a district court "make two particularized findings: (1) that the acts were within the scope of the defendant's agreement; and (2) that they were foreseeable to the defendant." *Tocco*, 306 F.3d at 289 (internal quotation marks and citations omitted). Moreover, "to determine the scope of the defendant's agreement, the district court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. The fact that the defendant is aware of the scope of the overall operation is not enough to satisfy the first prong of the test and therefore, is not enough to hold him accountable for the activities of the whole operation." *Id.* (internal quotation marks and citations omitted).

E. Particularized Findings

In making its relevant conduct determination, the Court relies on the trial testimony, the exhibits introduced at trial, including the numerous wire-tapped conversations involving Defendant Nagi, and the Court's Opinion and Order denying Defendants' Rule 29 and Rule 33 motions [Doc. No. 1584]. In that Opinion and Order, the Court laid out the evidence describing the HMC's hierarchal organizational structure and the roles of each Defendant, including Defendant Nagi's membership on the committee that oversaw the activities of, and made decisions for, the HMC. There was evidence at trial that Defendant Nagi was

the vice president of the West Side Chapter at a time when Bobby Burton was the president. After the West Side Chapter closed, Nagi became a member of the Detroit Chapter.

As evident from the numerous wire-tapped conversations, Defendant Nagi held a leadership role in the HMC. While involved in the RICO conspiracy, Nagi was running a very substantial drug ring. He was moving all kinds of marijuana and other illegal drugs. He was involved in the theft of motorcycles, and he was out there in front on virtually every incident that occurred in the two-year period when he was actively involved with the RICO conspiracy.

In the Rule 29/33 Opinion and Order, this Court determined that there was ample evidence at trial of the RICO enterprise's criminal activity. This included acts of violence like assault, conspiracy to commit murder, and armed robbery. It also included theft, drug trafficking, and weapons offenses. These acts of violence arose from constant conflict with rival biker clubs. They also arose out of the leadership's efforts to enforce HMC's authority over a territory and its own members by directing attacks on persons perceived to have disrespected a fellow member in some manner, those perceived to have squealed, and those suspected of being snitches. Members enhanced and protected their reputation and standing as Highwaymen by using intimidation, threats, violent acts, and possession of weapons while carrying out acts of discipline, punishment, intimidation, and retaliation. Witness testimony and wire-tapped conversations, including those involving Defendant Nagi, showed that members of the HMC traveled in large groups and went to bars in large numbers so as to intimidate others and invoke fear of retaliation. HMC members were expected to protect each other. Failure to do so would result in punishment. Numerous

witnesses testified that, because of their reputation for violence and fear of retaliation, HMC members were more likely to get away with a crime of violence. They also used this reputation of violence to intimidate potential witnesses from facilitating the prosecution of members' criminal activity. The evidence in general and especially the wire-tapped conversations support a finding that Defendant Nagi was aware of and actively cultivated this fear of retaliation.

The evidence at trial also showed that members of the RICO enterprise, including Defendant Nagi, freely discussed, distributed, and shared controlled substances with other members. Members also used their reputations for violence, intimidation, and retaliation to collect drug debts for other members. The leadership of the RICO enterprise never objected to this criminal activity. Members of the RICO enterprise, including Defendant Nagi, also transported, received and/or possessed stolen property. There was ample evidence that HMC members used this criminal activity as a source of income. There was evidence at trial that at least one member, Doug Burnett, used some of his drug sales profits to pay his HMC dues.

1. Racketeering Act 2 - Conspiracy to Murder Gerald Deese

Although this incident with Gerald Deese involved Bobby Burton and others, it did occur while Defendant Nagi was actively involved in the RICO enterprise. Nagi elected to join the West Side Chapter of the HMC under the leadership of Bobby Burton and served as Burton's vice president. This incident occurred in January 2006 when Burton was president of the West Side Chapter and Nagi was his vice president. At no time did Nagi or anyone else in a leadership position discourage Burton's violent tendencies. In fact, this act of discipline, punishment, and intimidation was consistent with similar conduct on the

part of the members of the RICO enterprise. Moreover, immediately after Bobby Burton assaulted Gerald Deese, the first person he called was Defendant Nagi. He made two additional calls to Nagi after the Deese incident. Accordingly, considering the evidence of Defendant Nagi's conduct and that of others, this Court finds that R.A. 2 was within the scope of Defendant Nagi's agreement to participate in the criminal activity of the RICO enterprise. The Court also finds that, because it was common to use violence as a form of discipline and punishment for doing wrong to a fellow HMC member, this act of violence was reasonably foreseeable to Defendant Nagi. This finding is consistent with Nagi's conviction on Count 7 for assault with a dangerous weapon in aid of racketeering (Wheat & Rye). Based on these findings, R.A. 2 constitutes relevant conduct for purposes of calculating Defendant Nagi's base offense level for his Count 2 RICO conspiracy conviction.

2. Racketeering Act 3 - Anthony Barton - Extortion

This February 2006 racketeering act occurred while Defendant Nagi was actively involved in the activities of the RICO enterprise. Evidence at trial showed that HMC member Anthony Barton was supposed to be selling stolen televisions for other HMC members, but they thought he had pocketed the money instead. He also owed the HMC money for back dues and fines. Another HMC member told Barton that he would not be beaten – a common HMC form of discipline – if he paid him $1,700. After Barton paid the money, a HMC member threatened to shoot Barton if he did not show up at the next HMC meeting.

There was testimony at trial that members of the RICO enterprise took part in, approved of, and received the benefit of stolen goods. This illegal activity served as a

source of income for some HMC members. When Defendant Nagi was convicted on Count 1, the substantive RICO count, the jury found, beyond a reasonable doubt, that he was involved in the transport and receipt of stolen motorcycles from Myrtle Beach. The evidence at trial also established that if one HMC member was suspected of cheating another out of profits from their joint criminal activity, threats of violence and intimidation were typically used to discipline the errant member. From this evidence and evidence of Defendant Nagi's conduct and that of others, this Court finds that the conduct in R.A. 3 was within the scope of Nagi's agreement to participate in the criminal activity of the RICO enterprise. Moreover, the Court finds that the use of threats of violence to intimidate and extort the payment of money thought to be owed to another member was reasonably foreseeable to Defendant Nagi. Based on these findings, this extortion constitutes relevant conduct for purposes of calculating Defendant Nagi's base offense level for his Count 2 RICO conspiracy conviction.

3. Racketeering Act 4 - Steve Peet - Armed Robbery

This June 2006 racketeering act also occurred while Defendant Nagi was actively involved in the activities of the RICO enterprise. Trial evidence showed that the armed robbery of Steve Peet involved the collection of a drug debt owed by Peet for the purchase of a quantity of cocaine. Based on evidence that HMC members used their reputations for violence to collect drug debts as well as evidence of Defendant Nagi's conduct and that of others, the Court finds that the armed robbery of Steve Peet was an act within the scope of Defendant Nagi's agreement to participate in the criminal activity of the RICO enterprise. The Court also finds that this act of violence was reasonably foreseeable to Defendant Nagi. Members of the RICO enterprise frequently engaged in acts of violence, and it was

reasonable for Nagi to foresee that violence would be used to intimidate and discipline an HMC member who owed another member money on a drug debt. Based on these findings, this armed robbery constitutes relevant conduct for purposes of calculating Defendant Nagi's base offense level on his Count 2 RICO conspiracy conviction.

4. Racketeering Acts 9 and 10 - Cocaine and Steroid Drug Conspiracies

As the Court observed in its Opinion and Order on Defendants' Rule 29/33 motions, evidence at trial showed that the drug trafficking activity in Racketeering 9 (evidence regarding the Robert Burton drug conspiracy), Racketeering Act 10 (evidence regarding the steroid drug conspiracy), and Racketeering Act 11 (evidence regarding the Nagi drug conspiracy) was related to and an integral part of the RICO enterprise and its activities. For example, ample trial evidence exists showing that members of the HMC sold to or distributed/shared drugs with other members. The record is replete with testimony about HMC members sharing cocaine with Defendants. There is abundant evidence that the HMC condoned drug trafficking and drug use despite language to the contrary in its constitution. It was a common occurrence to have drug deals and drug use at the HMC clubhouse. The HMC leadership did not stop this criminal activity. The opposite is true. Witnesses testified that leadership members, including Nagi, shared the cocaine that was provided by others who dealt drugs at the clubhouse. There was evidence that HMC leaders used other HMC members for protection, to distribute product, to collect drug debts, and to assault people who "stiffed" them on drug deals. There was ample evidence that officers, members, and associates of the HMC used HMC clubhouses to facilitate the sale and distribution of controlled substances. Based on the above-cited evidence and evidence of Nagi's conduct and that of others, this Court finds that the drug conspiracies

in R.A. 9 and 10 were within the scope of Defendant Nagi's agreement to participate in the criminal activity of the RICO enterprise. Based on this same evidence, the Court finds that the drug conspiracy conduct in R.A. 9 and 10 was reasonably foreseeable to Defendant Nagi. Based on these findings, these drug conspiracies constitute relevant conduct for purposes of calculating Defendant Nagi's base offense level for his Count 2 RICO conspiracy conviction.

5. Racketeering Act 12 - Conspiracy to Commit Murder Doug Burnett

The RICO enterprise's concern and desire to punish snitches was well established at trial. There are wire-tapped conversations, including one between Defendant Nagi and Jeff Olko that discusses the need to find the snitch. There is a lot of evidence that HMC members suspected that Doug Burnett was the snitch, that he had tipped off law enforcement and triggered searches of the HMC Clubhouse and members' homes. Multiple witnesses testified that, during the summer of 2006, there was a lot of talk at the Detroit Chapter Clubhouse about discovering and punishing the snitch or rat. Doug Burnett's picture was hanging behind the bar at the Detroit Chapter Clubhouse with "rat" written across it. There is ample evidence that the RICO enterprise operated by disciplining members and used intimidation and threats as well as acts of violence to stop HMC members and others from telling law enforcement about the enterprise's criminal activities. It was well known that snitches were not tolerated and would be violently punished.

Based on the above and evidence of Defendant Nagi's conduct and that of others, this Court finds that the conspiracy to murder a suspected snitch like Doug Burnett was an act within the scope of Defendant Nagi's agreement to participate in the criminal activity of the RICO enterprise. Because there was ample evidence at trial that members of the RICO

enterprise used both threats and acts of violence to discipline, intimidate, and punish those suspected of reporting criminal activity to law enforcement officials, the Court also finds that this particular act of violence was reasonably foreseeable to Defendant Nagi. Based on these findings, the conspiracy to murder Doug Burnett constitutes relevant conduct for purposes of calculating Defendant Nagi's base offense level on his Count 2 RICO conspiracy conviction.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: January 14, 2011