08-2199-cr

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2199-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

IRA I. BLOOM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alfred V. Covello, S.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant was sentenced on April 29, 2008, and judgment entered on May 5, 2008. Defendant's Appendix ("DA") at 15-16. On May 5, 2008, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. DA 16. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

I. (A) Whether Counts One and Two of the superseding indictment were multiplicitous, where both counts involved proof of facts not required by the other.

(B) Whether the superseding indictment did not violate the Double Jeopardy Clause, where jeopardy did not attach until the trial jury was sworn, months after the superseding indictment was returned.

II. Whether the district court committed plain error or abused its discretion in admitting other-act evidence, pursuant to Fed. R. Evid. 404(b), regarding the defendant's intent to have his ex-wife murdered.

III. Whether the district court correctly calculated the defendant's advisory guideline sentence, by determining that he was a "career offender" under U.S.S.G. § 4B1.1, and correctly applied U.S.S.G. § 5G1.2(d), which advised that the sentences on Counts One and Two should run consecutively.

IV. Whether the 240-month guideline sentence imposed by the district court was substantively reasonable for a defendant who tried to hire a hitman to rape and murder his ex-wife.

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Preliminary Statement

On October 6, 2006, after hearing three days of evidence, a jury returned guilty verdicts against the defendant, Ira Bloom, for one count of using a facility of interstate commerce in the commission of murder-for-hire and one count of traveling in interstate commerce in the commission of murder-for-hire, both in violation of 18 U.S.C. § 1958(a). DA 18-19. The jury was presented with overwhelming evidence regarding the defendant's plan to have a hitman "rape and murder" his ex-wife, Zhanna Portnov. This evidence included the following: the

testimony of Donald Levesque, a cooperating witness; the testimony of Deborah Needham, a close friend of the defendant; four recorded telephone calls between Levesque and the defendant; a recorded hour-long meeting between the defendant and Levesque; and a video and audio recording of a meeting between the defendant and Levesque, during which the defendant finalized his plan to pay $20,000 to have Portnov "raped and brutalized" and her body dumped in Hartford, Connecticut.

In his counseled appellate brief, the defendant now maintains that the trial court abused its discretion and committed plain error in admitting other-acts evidence that was introduced for the purpose of establishing that the defendant had acted with the requisite intent. In addition, the defendant argues that his twenty-year sentence – which was within his guideline range – was substantively unreasonable.

On August 14, 2009, the defendant filed a *pro se* supplemental brief, arguing that the superseding indictment violated the Double Jeopardy Clause and that the two charges were multiplicitous. In addition, the defendant argues that he was improperly classified as a career offender because his three predicate offenses purportedly were misdemeanors.

For the reasons that follow, the defendant's arguments all fail, and this Court should affirm the judgment.

Statement of the Case

On July 8, 2005, the defendant was arrested pursuant to a criminal complaint. DA 3. On July 14, 2005, a federal grand jury returned a one-count indictment charging the defendant with use of interstate commerce in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a). DA 4. On January 4, 2006, a grand jury returned a two-count superseding indictment charging the defendant in Count One with using a facility of interstate commerce in the commission of murder-for-hire and in Count Two with traveling in interstate commerce in the commission of murder-for-hire, both in violation of 18 U.S.C. § 1958(a). DA 18-19. The case was assigned to the Hon. Alfred V. Covello, Senior U.S. District Judge.

The government began presenting evidence on October 3, 2006. On October 6, 2006, after hearing three days of evidence, the jury returned a guilty verdict on both counts. DA 9-10. On April 29, 2008, the defendant was sentenced to 120 months on each count, to be served consecutively, followed by three years of supervised release. DA 156-58. On May 5, 2008, the judgment was entered. The same day, the defendant filed a timely notice of appeal pursuant to Fed. R. App. 4(b). DA 159-60. On June 30, 2008, the district court granted the government's motion to dismiss the original one-count indictment. DA 16. The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Trial

At trial, the government presented its case primarily through the following witnesses: Special Agent Joanna Lambert of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"); a cooperating witness named Donald Levesque; Deborah Needham, who was a close friend of the defendant; and the defendant's ex-wife, Zhanna Portnov. During Agent Lambert's testimony, the government introduced four recorded telephone conversations between the defendant and Levesque on July 5, July 7, and two on July 8, 2005; a recording of an hour-long meeting between the defendant and Levesque at a restaurant on July 8, 2005; and video and audio recordings of a meeting between the defendant and Levesque in an ATF undercover car on July 8, 2005. In addition, the government offered business records and testimony from the following: an automobile mechanic who worked on Portnov's car; a representative from T-Mobile, the defendant's cellular phone service provider; a representative from the Probate and Family Court for Hampden County, Massachusetts; and a representative of ING, with whom the defendant maintained a life insurance policy on Portnov. This evidence established the following:

1. Custody dispute between the defendant and Portnov

The defendant met Portnov in 1995. Trial Transcript ("TT") 176. Portnov was a Russian immigrant, who had a son from a prior marriage. TT 175-76. The defendant and Portnov married in 1996 and had their only child, Sammy, that same year. TT 177-78, 232. Beginning in September 2002, the defendant and Portnov were involved in a very contentious divorce and custody dispute for almost three years. GA 18.

The divorce became final in August 2004, but the defendant and Portnov remained involved in litigation over the custody of Sammy. Levesque and Needham testified that the defendant became increasingly consumed by the custody proceedings. TT 240-43, 374. Whenever they talked to the defendant, he always talked about the custody proceedings. TT 240-43, 374-75. The defendant kept complaining about his distrust of the judicial system, as he kept losing legal battles. TT 125, 132.

The judgment of divorce was entered on August 27, 2004, by Judge David G. Sacks of the Hampden County Probate and Family Court. Government's Appendix ("GA") 11-13. Court records revealed that Portnov was granted legal custody of Sammy, and the defendant and Portnov shared physical custody. GA 11-13. Specifically, Portnov had physical custody of Sammy from Thursday at noon until Monday morning at school drop-off or 9:00 a.m., and the defendant had physical custody of Sammy from the Monday morning transfer until Thursday at noon.

GA 11-13. The defendant filed numerous post-judgment motions, which were denied. GA 15. On December 14, 2004, Judge Sacks amended the divorce judgment to preclude the defendant from "disseminating to any third parties the following information concerning [Portnov]: namely, her Social Security number, home address, work address, motor vehicle registration number and description of her motor vehicle." GA 16. In February 2005, the defendant filed a complaint for modification of the judgment of divorce and, in March 2005, Judge Sacks dismissed the complaint. GA 17-20. In his decision, Judge Sacks stated that the proceedings "have been particularly contentious and protracted" and that "[m]atters of custody and parenting time have been central to the disputes and decisions." GA 18.

Needham testified that the defendant previously had told her that he would take Sammy to Israel if he did not get custody because, according to the defendant, "they don't deport children back to the U.S. or to any other country." TT 376-77. Records from the divorce and custody proceedings reveal that the defendant had in fact filed a motion to travel to Israel with Sammy, but Judge Sacks had denied his motion. GA 14.

During the divorce and custody proceedings, Portnov kept advising authorities that she was afraid that the defendant was going to kill her some day. TT 186. Portnov testified, "It was terrible. I have to go to court and I have to beg them to give me help and they thought I'm paranoid. I tell them he will try to kill me and no one believe me." TT 186. In fact, Portnov obtained three

restraining orders prohibiting the defendant from having contact with her or her children. DA 53.

On June 25, 2005, Portnov confronted the defendant as he was trying to sell an antique rug that belonged to her. TT 215-16. The defendant threatened Portnov, stating, "You're not going to live long. I'm gonna kill you." TT 216. As a result of the death threat, on June 29, 2005, Portnov obtained an abuse prevention order that prohibited the defendant from having any contact with Portnov and Sammy until July 5, 2005. TT 216-17, GA 24-25. The order stated that there was "[a]n imminent threat of bodily injury" to Portnov based on "allegations of death threat." GA 25.

On June 29, 2005, police officers served the restraining order on the defendant late at night, when the defendant returned from a Connecticut casino with Sammy. TT 217-19. The officers took Sammy from the defendant and returned him to Portnov. TT 217-19. Almost immediately, the defendant called Levesque and Needham. TT 458-59. Levesque testified that the defendant said, "The police just came to his house and took Sammy back to his mother. . . . He was crying about it. Real upset. Sammy was upset. He said that she had to go. He wanted his wife killed, she had to go." TT 262. Needham testified that the defendant "called hysterical saying state police had just tooken Sammy" and he said "that Zhanna would have to die, she should die because he didn't know if he was going to see Sammy because of restraining orders and domestic laws, new laws, that he would not see Sammy again." TT 377-78.

Levesque testified that the defendant came to Levesque's house for lunch during the weekend of July 2-4, 2005. TT 262. According to Levesque, the defendant said he wanted Portnov raped and killed when she arrived at work in the morning. TT 263-64. The defendant said "there have been incidents in that area and it would look like it was just what's happening there." TT 264. The defendant said "[h]e had a life insurance policy on her" and he would use the proceeds from the policy to pay for her murder. TT 263-64.

During that same weekend, Levesque contacted Detective Scott MacGregor of the Windsor Police Department regarding the defendant's efforts to have his ex-wife murdered. TT 260-65. On July 5, 2005, Levesque told Agent Lambert and Detective MacGregor that the defendant wanted Levesque to hire a hitman to murder Portnov and the defendant said he would pay Levesque $20,000 from a life insurance policy for the murder. TT 241, 261-66, 298. Levesque further advised that the defendant had previously talked about killing Portnov, but recent developments in the custody dispute generated a sense of urgency by the defendant and caused Levesque to believe that the defendant wanted Portnov murdered soon. TT 261-66.

2. Recorded telephone calls on July 5-8, 2005

Between July 5-8, 2005, Levesque had four recorded telephone conversations with the defendant, during which the defendant discussed his intention to have his ex-wife murdered. During the recorded calls, the defendant agreed

to drive from Springfield, Massachusetts, to Enfield, Connecticut, to meet with Levesque at a restaurant, so that the defendant could finalize the plan to have a hitman murder Portnov. The evidence revealed that each of these calls involved the use of interstate wires.

Levesque made the first recorded call to the defendant on July 5, 2005. Due to a malfunction in the recording equipment, however, only Levesque's side of this conversation was recorded. TT 267. During the call, the defendant was adamant that Portnov needed to be murdered before August 12, 2005, which was the next court date in the custody proceedings. DA 20. Court records reveal that August 12, 2005, was in fact the next court date, at which time the defendant was facing contempt proceedings before Judge Sacks. GA 21-23. They discussed meeting on Friday, July 8, 2005 and Levesque confirmed that the defendant was "serious." DA 20-21. They also discussed the defendant's need for an alibi. DA 21.

Levesque had the second recorded call with the defendant on July 7, 2005. Levesque asked the defendant if he really wanted this (i.e., the murder) to happen and the defendant responded that he was "99%" sure, but he was concerned that "if something happens and I'm gonna get arrested" or if it is "not done the right way, I'll get blamed for it." DA 22. Levesque informed the defendant of his intention to use a "professional" to commit the murder and suggested that they all meet. DA 22-23. The defendant responded adamantly that he could not know, and did not want to know, the identity of this individual and that this

individual could not know who he (i.e., the defendant) was or what he looked like. DA 23-24. Levesque asked about payment and collecting money up front, and the defendant said that he would not have the money for 90 days. DA 23-24. The defendant had previously told Levesque that payment was contingent on collecting on his ex-wife's life insurance policy, which would be approximately 90 days after her death. They discussed meeting in Enfield, Connecticut. DA 23. The defendant told Levesque, "After we meet, you take care of everything. I don't know nothin'." DA 24.

During the morning of July 8, 2005, Levesque and the defendant had a third recorded call. Levesque asked the defendant if he was "real serious about all this stuff." Levesque told the defendant, "I got everything in the works." DA 26. The defendant expressed concern about the person Levesque hired being caught and asked "what's gonna happen? I'm gonna lose my life and go to jail?" DA 26. The defendant said that "it has to look like a rape-murder." DA 26.

During the call, the defendant referenced his custody dispute and his concern of losing Sammy: "Listen, I gotta go in front of Judge Sacks August 12th on eight counts of contempt. He has it in for me. My son has a new lawyer. I don't trust the system, even though DSS is involved now . . . ." DA 27. The defendant said that Sammy was presently with Portnov and would be with her until Monday. DA 27. The defendant stated that nothing should be done to Portnov while she had Sammy and that it should take place on Tuesday, Wednesday or Thursday,

when the defendant had physical custody of Sammy. DA 27. The defendant told Levesque that the murder should take place when Portnov arrived at her place of employment. TT 280, DA 27. The defendant said that Portnov arrived at work at 7:45 a.m. and was always the first to arrive. DA 27. The defendant explained further that she always backed her car in. DA 27. When Levesque asked "where does she work again," the defendant responded, "I'm not going to talk on the phone." DA 27. The defendant and Levesque agreed to meet later on July 8, 2005. DA 27-29. The defendant told Levesque to call him when Levesque was at or leaving for the meeting location, stating, "I'm not going to run down [i.e., to Enfield, Connecticut] unless you're there. I trust you and I love you, but . . . ." DA 27.

During the afternoon of July 8, 2005, Levesque had a fourth recorded call with the defendant. Levesque called the defendant to confirm their meeting in Enfield. TT 65-67; DA 29. The defendant agreed to meet Levesque at the Hometown Buffet restaurant at 4:00 p.m. DA 29.

3. The restaurant meeting on July 8, 2005

During the afternoon of July 8, 2005, agents from ATF and officers from the Windsor and Enfield Police Departments established surveillance at the Hometown Buffet. Undercover agents were positioned inside the restaurant. TT 81-82. Levesque drove to the meeting in an undercover ATF car, which was equipped with video and audio recorders. TT 78-79. In addition, Levesque had a recording device and an audio transmitter on him, which

allowed agents to listen to his conversation with the defendant. TT 74-77.

When Levesque arrived at the restaurant, he met the defendant, who was with a young woman. TT 72. Levesque asked why he had brought the young woman and the defendant said not to worry, that she didn't understand English. TT 288. The defendant explained that she was from Colombia and did not really understand English. TT 83-84, 286; DA 32. Levesque testified that the woman was not involved in their discussions and did not appear to understand anything they were talking about. TT 288.

At the restaurant, the defendant again discussed his desire to have his ex-wife raped and murdered. Early in the conversation, the defendant said that she needs to be "physically raped, it cannot be a gun." TT 119. The defendant said, "He has to rape her. He has to physically rape her." TT 119. The defendant explained that he wanted it to look like a car-jacking, where his ex-wife would be mugged and raped, with her body dumped in Hartford. DA 33-34, 37. The defendant suggested that the hitman could "knock her out completely. Put her on the floor of the front seat and drive away. Take her out of state and rape her, and then enjoy himself." TT 124.

The defendant said he wanted this done early in the morning when his ex-wife arrived at work. DA 33-35. The defendant provided detailed information regarding Portnov's car, where she worked, when she arrived at work and where she parked. TT 292-97. The defendant told Levesque that Portnov drove a blue Chevy Suburban

and worked at a chiropractic business named PMR or Pioneer Chiropractic, located at 250 Belmont Avenue in Springfield. TT 292-97. As the defendant gave this information, Levesque wrote it on a piece of paper, which was admitted as a trial exhibit. TT 294-96. The defendant explained that there was a large sign that said "PMR and underneath that it says, Pioneer Chiropractic." TT 116.

The defendant said, "I want it at work." TT 122. The defendant explained that his ex-wife worked in a high crime area: "She works right near a hot spot, two muggings, drug addicts, prostitutes . . . . It's a hot spot right now." TT 122. The defendant further explained that "she pulls in ten to eight every morning when she doesn't have Sammy. She's the first one there. She backs in, she pulls into the parking lot." TT 123. The defendant explained that his ex-wife always parked in a particular corner of the parking lot. TT 292-94. While the defendant described this information, he drew a diagram of where she parked her car and gave it to Levesque. TT 292-94.

The information provided by the defendant regarding the make and model of Portnov's car, the name and location of her work, the diagram of the parking lot where Portnov parked her car, the specific manner in which she parked her car, and when she arrived at work when she didn't have Sammy was corroborated by Agent Lambert's testimony, numerous photographs, business records, and the testimony of Portnov. TT 116-18, 148-49, 190-94, 398-403, 459-60; GA 1-10, 26. In addition, by providing this information to Levesque, the defendant was violating Judge Sack's order prohibiting him from disclosing to any

other person where Portnov worked or a description of Portnov's car. GA 16.

The defendant repeatedly told Levesque about his financial problems. By July 2005, the defendant, by his own words, was $65,000 in debt and owed money to everyone. TT 128. The defendant said, "I don't got money to buy my son a – so he's pissed. My cable is shut off." TT 132. During the divorce and custody proceedings, the defendant was collecting welfare. TT 187. In addition, the defendant sued Portnov for alimony and child support, but did not get any money. TT 186-87; GA 11. Levesque said, "All this money you put out for this court case and everything" and, in response, the defendant said, "I keep getting screwed." TT 132. The defendant said that he didn't "give a shit anymore." TT 128. The defendant said that he would take the proceeds from Portnov's life insurance policy, leave the country with Sammy and "screw" all of his creditors. TT 128.

At one point, the defendant said that they could wait and see what happened on August 12, 2005, at the custody proceedings. TT 124. The defendant then said, "I don't trust the system. I'd rather have her freaking gone." TT 125. In response, Levesque said "Before we leave, get in my car with me and talk to me." Levesque said, "You got to make a decision, man. . . . I can't be wishy washy with him [i.e., the hitman]." TT 131. The defendant responded, "I know." TT 131.

The defendant said he would pay "twenty grand" for the murder of Portnov. TT 119. Levesque said "I told him

(i.e., the hitman) 15" and the defendant responded, "You're going to give him three-quarters of the money?" TT 127. At another point in the conversation, the defendant said, "I got a guy right now in California could do it for seven grand. Make it look like a car accident. I have been in touch with someone in California, someone I know who takes care of things." TT 133.

During their meeting, the defendant was worried about a female patron who was sitting at a booth near where the defendant and Levesque were sitting. TT 290. This female patron was in fact an undercover officer. TT 291.

The defendant said that he would pay for the murder with the proceeds or "death benefit" for Portnov's life insurance policy. The defendant said that no one knew about the life insurance policy and that it would take 90 days for the defendant to receive the proceeds. TT 121, 133. The defendant repeatedly said, "It's going to take about 90 days to get the money from the life insurance company. They'll pay it. I just paid the premium." TT 125. The defendant further said, "Instead of paying for the whole year, I paid it quarterly." TT 126.

Insurance records revealed that the defendant did in fact pay the premiums for an insurance policy covering Portnov's life. TT 476-82. The defendant was the policy's owner and sole beneficiary. TT 476-77. Under the policy, the defendant would receive a "death benefit" in the amount of $100,000 upon Portnov's death. TT 476-77. As the owner of the policy, all documents relating to the policy were sent to the defendant. TT 477-78. While the

defendant let his own life insurance policy lapse, the defendant changed the address for Portnov's life insurance policy to his P.O. Box in East Longmeadow, Massachusetts, and continued to pay the premiums, unbeknownst to Portnov. TT 478-82. Shortly before the defendant's arrest, he switched from an annual to a quarterly payment schedule of premiums, thereby reducing the last premium payment that he made on Portnov's life insurance policy. TT 478-81; DA 35.

While devising his plans to have Portnov murdered, the defendant was very concerned with ensuring that he had an alibi. The defendant said that, as an alibi, he would have Sammy with him and suggested that he would take Sammy to a synagogue or another public place while the murder was being committed. TT 140, 277-78. The defendant said, "It's got to happen Tuesday or Wednesday morning about 8:00 in the morning. I've got Sammy, I'm taking him to camp." TT 120. Later in the discussion, the defendant said that he would take Sammy to the synagogue between 7:00 and 8:30 a.m. TT 140.

The defendant was adamant that his ex-wife be raped and murdered. DA 33-37, 52-53; TT 119, 121. He said, "they need to find the body" for him to receive the insurance payment and that "it's got to be a rape and a murder and it's got to be when I'm with my son." TT 129. The defendant repeatedly said that he did not want the hitman to use a gun. DA 33, 35. The defendant explained, "if it's a gun, they're going to say I had something to do with it, but if it's a knifing and a rape . . . ." TT 125.

4. The meeting in the ATF undercover car and the arrest of the defendant

After leaving the restaurant, Levesque got into the driver's seat of the undercover ATF car. The defendant went to his own car, drove it next to the ATF car, got out of his car, and got into the front passenger seat of the ATF car. While in the ATF car, the defendant finalized the plan to have his ex-wife murdered in exchange for money that the defendant would receive from her life insurance policy. This meeting was recorded by video and audio. DA 150-56.

After the defendant got into the ATF car, Levesque said, "You want a rape . . . you don't want her shot," and the defendant responded:

> Not shot. It's gotta look like a rape . . . . She's gotta be raped and it's gotta look like a . . . a complete mugging. Now, if he grabbed her with the freakin' car, and dumped her in Hartford where they found the body a few hours later, and she was raped and brutalized and all that and they stripped the car down, that's a carjacking. It'd never come back to me. Never . . . .

DA 52-53; TT 142.

The defendant then said, "and fifteen thousand is kinda steep for, for an easy five foot girl." DA 53; TT 153. Levesque explained that the hitman is "a professional. That's why it's so high." DA 53. Levesque further said, "I mean, this is gonna be clean, there's gonna be no prints,

gonna be nothing, nada, zilch. I mean there's nothing that's gonna tie me, tie you, nothing." DA 53. The defendant explained that Portnov's "got stuff in her pocketbook . . . she's got jewelry." DA 53; TT 143.

When Levesque again asked about payment, the defendant said, "Let him know, it's about 90 days, and I got, I gotta be very careful because . . ." and Levesque interrupted, "I told him it's the insurance policy." DA 53. The defendant further stated:

> Tell him, she's already, tell him one thing, though. They've already pulled out three restraining orders that I've threatened to kill her. If this comes back to haunt me, he gets no money. And he, if he gets caught, he'll get his money as long as she's dead. But if he squeals, he'll get nothing. Cause I don't know him. I didn't, I . . .

DA 53; TT 143. Levesque assured the defendant that the hitman would not get caught. DA 53.

The defendant said, "I think we should wait, but I'll do whatever you say and I'm really tired of this game anyway." DA 53-54. The defendant continued,"This will save me . . . I mean . . . I only owe my lawyer about five hundred dollars right now. If we go into court on, on August 12th, I'll owe him about fifteen grand by, by then." DA 54. The defendant then said, "So everything's gone, I mean she's dead." DA 54; TT 144. When the defendant made this final statement, he reached out and shook hands

with Levesque. DA 156. Levesque then said, "See you Sunday." DA 54.

Before the defendant exited the ATF car, he expressed concern that he was being taped, stating, "What are you taping me?" DA 54; TT 145. Levesque denied it and the defendant demanded, "Are you taping me, I said are you taping me?" DA 54. Levesque again denied it. DA 54. Very soon thereafter, law enforcement officers converged on the car to arrest the defendant. TT 145. As the officers approached, the defendant said, "Don, what'd you do to me?" DA 54; TT 145.

B. The Sentencing

The PSR determined that Counts One and Two should be grouped together pursuant to U.S.S.G. §§ 3D1.1 and 3D1.2. PSR at ¶ 25. The PSR also determined that the defendant's adjusted offense level under the Sentencing Guidelines was 37. PSR at ¶ 34. In addition, the PSR reflected that the defendant had three prior felony convictions in Massachusetts courts for crimes of violence. On October 22, 1998, he was convicted of assault and battery, and on July 11, 2000, he was convicted of assault and battery with a dangerous weapon and assault with a dangerous weapon. PSR at ¶¶ 36-39. The PSR concluded that the defendant was a career offender, which resulted in a criminal history category of VI and a guideline imprisonment range of 360 months to life. PSR at ¶¶ 40 and 102. Both parties expressly agreed with the PSR's guideline calculation. DA 55-56, 102.

At the sentencing hearing, neither party had any objections to the PSR. DA 115. Counsel for the defendant argued that the defendant should receive a sentence of 120 months based on his diminished mental capacity, his mental and emotional condition, and consideration of the factors set forth in 18 U.S.C. § 3553(a). DA 115. The government argued that consideration of the Section 3553(a) factors called for a total sentence of 240 months, which represented the statutory maximum of ten years per count. DA 116.

In imposing sentence, the district court adopted the PSR's guideline analysis, calculating the defendant's guideline range as follows:

> Here, under our now advisory sentencing guidelines, we have a base offense level of 33, pursuant to sentencing guideline 2E1.4 and 2A1.5(a). This is increased by four to a level 37 pursuant to guideline 2A1.5(b), because the offense involved the offer of something pecuniary value for the undertaking of murder.
>
> So, you have an offense level her of 37, and a criminal history category of VI. This [is] because, under sentencing guideline 4B1.1(b), the defendant is a career offender. The guideline range, therefore, is 360 months to life.
>
> However, as counsel has ably pointed out, the statutory maximum for each count of conviction is 120 months. The guidelines deal

> with this circumstance under 5G1.2(d) and it provides that where there are multiple counts of conviction, the sentence imposed on the count carrying the highest statutory maximum being less than the total punishment, then the sentence imposed on the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.
>
> Through the application of that provision of the sentencing guidelines, therefore, the most that the sentence could be is 240 months.

TT 149-50.

In addition, the district court noted its consideration of the presentence report and its attachments, the submissions of the parties, everything that was presented at the sentencing hearing, including the arguments of counsel, and the factors outlined in 18 U.S.C. § 3553(a). DA 150. The district court determined that, in light of all of these considerations, it would sentence the defendant to consecutive terms of 120 months for each count, for a total term of 240 months. DA 150-51.

SUMMARY OF ARGUMENT

1. By failing to challenge the indictment in the district court, the defendant waived any claim that it was multiplicitous. Even if the claim were not extinguished, Count One, which charged the defendant with using a facility of interstate commerce in the commission of murder-for-hire, and Count Two, which charged the defendant with traveling in interstate commerce in the commission of murder-for-hire, were not multiplicitous. Both counts involved proof of facts not required by the other and were therefore properly charged as separate counts of the superseding indictment. Further, the act of bringing a superseding indictment did not, as alleged by the defendant in his *pro se* supplemental brief, violate the Double Jeopardy Clause. Jeopardy did not attach until his trial jury was sworn, months after the superseding indictment was returned.

2. The district court did not commit plain error in admitting evidence that someone had cut the power steering hose on Portnov's car; nor did the district court abuse its discretion in admitting testimony that someone had drained brake fluid from Portnov's car. This evidence was properly admitted under Fed. R. Evid. 404(b) because it was highly probative of the defendant's intent to have Portnov murdered and presented little, if any, unfair prejudice. Contrary to the defendant's claim, Portnov's vague testimony regarding Sammy getting hurt at a soccer game was neither Rule 404(b) evidence nor prejudicial, since it did not accuse the defendant of wrongful conduct. In addition, the testimony regarding the defendant

threatening his wife during an incident involving the rug is "inextricably intertwined with," and "necessary to complete the story" regarding the defendant's intent and plan to have Portnov murdered and, thus, is not Rule 404(b) evidence. Further, even if the testimony regarding those threats was Rule 404(b) evidence, the district court properly admitted this evidence.

Finally, even if the district court's admission of all of this alleged other-act evidence constituted plain error or an abuse of discretion, which they do not, the admission of this evidence was not prejudicial to the defendant, as it did not affect the outcome of his trial. Indeed, the evidence presented at trial demonstrating the defendant's intent to have his ex-wife raped and murdered was overwhelming. The alleged other-act evidence was a very minor part of the government's proof, which included numerous, detailed admissions during consensually recorded telephone calls and meetings regarding the defendant's intent to have his ex-wife raped and murdered.

3. The defendant's arguments in his *pro se* supplemental brief that the district court failed to correctly calculate his guideline range are unavailing. The district court properly classified the defendant as a career offender under U.S.S.G. § 4B1.1. Indeed, the defendant's trial counsel agreed that the defendant was a career offender and thus any claim on appeal is now waived; in addition, it appears that the defendant's appellate counsel also agrees that the defendant is a career offender. Contrary to the defendant's claims, his prior convictions for crimes of violence were all felonies under Massachusetts law.

Further, the district court properly applied both Chapter 3, Part D and Chapter 5, Part G, in calculating the defendant's advisory guideline range. These two parts are not mutually exclusive. Even when two counts are properly grouped under U.S.S.G. § 3D1.2, a court may be advised to run the sentences on each count consecutively pursuant to U.S.S.G. § 5G1.2.

4. The total sentence of 240 months of imprisonment was substantively reasonable for a defendant who tried to hire a hitman to rape and murder his ex-wife. The sentence was within the statutory range of penalties, and the guidelines advised imposition of a 240-month sentence. The district court understood that the sentencing guidelines are advisory and properly considered the sentencing factors under § 3553(a) in fashioning a sentence sufficient but not greater than necessary. In essence, the defendant is asking this Court to re-weigh the evidence before the district court. But as this Court has repeatedly held, the weight to be given any particular factor in the § 3553(a) analysis is a matter committed to the sound discretion of the district judge.

ARGUMENT

I. The superseding indictment did not violate the Double Jeopardy Clause

A. Relevant facts

The relevant facts are set forth above in the Statement of the Case.

B. Governing law and standard of review

1. 18 U.S.C. § 1958(a)

Section 1958(a) of Title 18 of the United States Code criminalizes traveling in interstate commerce, or using interstate commerce facilities, in the commission of murder-for-hire. This statute states, in relevant part:

> Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value . . . shall be fined under this title or imprisoned for not more than ten years, or both . . . .

2. The Double Jeopardy Clause

Under the Double Jeopardy Clause of the Fifth Amendment, a defendant has a right not to receive two punishments for the same crime. *See United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999).

The Double Jeopardy Clause bars a second indictment or prosecution only if jeopardy attached with respect to the prior indictment or prosecution. *See United States v. Dionisio*, 503 F.3d 78, 81 (2d Cir. 2007) ("'an accused must suffer jeopardy before he can suffer double

jeopardy'") (quoting *Serfass v. United States*, 420 U.S. 377, 388 (1975)), *cert. denied*, 129 S. Ct. 158 (2008). It is firmly established that jeopardy attaches "at the point in criminal proceedings at which the constitutional purposes and policies [of the clause] are implicated." *Id.* at 82 (internal quotation marks omitted). "As a result, the Supreme Court has long recognized that jeopardy attaches in a *jury* trial after the jury has been empaneled and sworn . . . ." *Id.*

When an indictment charges a defendant with the same crime in two counts, it is considered "multiplicitous" and therefore in violation of the Double Jeopardy Clause. *See United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006). To establish a claim of multiplicity, a defendant must show that "the charged offenses are the same in fact and in law." *United States v. Estrada*, 320 F.3d 173, 180 (2d Cir. 2003).

The test for multiplicity is whether each count "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (internal quotation marks omitted). An indictment is not multiplicitous merely because it charges more than one violation of the same statute based on related conduct; instead, a defendant can be convicted of multiple violations of the same statute if the conduct underlying each violation involves a separate and distinct act. *See, e.g.*, *United States v. Lartey*, 716 F.2d 955, 967 (2d Cir. 1983) (each unlawful distribution of drugs over a period of years is a separate crime).

3. Fed. R. Crim. P. 12(b)(2)

Fed. R. Crim. P. 12(b)(2) requires that "a motion alleging a defect in the indictment" be raised before trial, absent exceptions that are not applicable here. As a result, "there is a strong argument that if the alleged multiplicity is clear from the indictment the failure to raise this objection prior to trial constitutes a waiver." *United States v. Handakas*, 286 F.3d 92, 97 (2d Cir. 2002) (internal quotation marks omitted), *overruled on other grounds, United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc). *See Lartey,* 716 F.2d at 968 (declining to consider duplicity challenge not raised before the district court or on appeal); *see also United States v. Papadakis*, 802 F.2d 618, 621 (2d Cir. 1986) (finding waiver of double jeopardy claim because it was raised for the first time on appeal); *United States v. Young*, 745 F.2d 733, 753-54 (2d Cir. 1984) (finding waiver where defendant failed to oppose jury instructions with enough specificity and clarity to alert district court that he was renewing his earlier motion). *But cf. Chacko*, 169 F.3d at 145 (declining to find waiver where multiplicity challenge raised before the district court, but not until after trial); *United States v. Gore*, 154 F.3d 34, 41-42 (2d Cir. 1998) (declining to find waiver where pro se defendant never raised merger issue before district court because "[t]here [was] no evidence that [defendant] intentionally chose not to raise the merger issue for strategic reasons or knowingly and intelligently failed to raise the issue").

As the Seventh Circuit has observed, applying Fed. R. Crim. P. 12(b)(2) "promotes fairness and efficiency by

allowing courts to assess double jeopardy defects in indictments while evidence is still fresh, and by preventing defendants from making a tactical decision to delay raising such a challenge to make it more difficult, at trial or on appeal, for the prosecutor to reconstruct the evidence, much less justify multiple charges." *United States v. Wilson*, 962 F.2d 621, 626 (7th Cir. 1992) (citation omitted).

4. Plain Error

Where a defendant did not raise an issue before or during trial, the issue is forfeited, and can be reviewed only for plain error (assuming it has not been waived entirely). *See* Fed. R. Crim. P. 52(b); *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991) (applying plain error standard where the potential multiplicity was not apparent on the face of the indictment).

Under a plain error standard, there must be (1) error, (2) that is plain under current law and (3) that affects the substantial rights of the defendant to a fair trial. *United States v. Olano*, 507 U.S. 725, 731-37 (1993). If these three elements are met, then this Court may exercise its discretion to remedy the error, "but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Rybicki*, 354 F.3d at 129 (internal quotation marks omitted).

C. Discussion

In a *pro se* supplemental brief, the defendant argues that his convictions were based on multiplicitous counts and, thus, violated the Double Jeopardy Clause. Def. Suppl. Br. at 2-4. The defendant argues that Counts One and Two of the superseding indictment were multiplicitous because they charged the same offense in more than one count. Def. Suppl. Br. at 2. In addition, the defendant argues in his *pro se* supplemental brief that "the act of bringing a 'subsequent indictment' may, in and of itself, be considered as having subjected [the defendant] to the risk of double jeopardy." Def. Suppl. Br. at 6. Both arguments are unavailing.

1. Counts One and Two were not multiplicitous

The alleged basis for the multiplicity objection on appeal – that Counts One and Two both charge violations of 18 U.S.C. § 1958(a) (Def. Suppl. Br. at 2-4) – was clear from the face of the superseding indictment. DA 18. The defendant's trial counsel never raised this issue before or during the trial; nor did the defendant's appellate counsel raise this issue in his appellate brief. The defendant has therefore waived this issue pursuant to Fed. R. Crim. P. 12(b)(2). *See Lartey,* 716 F.2d at 968 (declining to consider duplicity challenge not raised before the district court or on appeal); *see also Papadakis*, 802 F.2d at 621 (finding waiver of double jeopardy claim because it was raised for the first time on appeal).

Even if this Court finds that the defendant forfeited, rather than waived, this objection, he cannot establish error, much less plain error. *See Coiro*, 922 F.2d at 1013 (applying plain error standard where the potential multiplicity was not apparent on the face of the indictment). Count One charges the defendant with *using interstate facilities* – namely, participating in telephone calls – in the commission of murder-for-hire; whereas, Count Two charges the defendant with personally *traveling* in interstate commerce in the commission of murder-for-hire. DA 18. In short, each count requires "proof of an additional fact which the other does not" and, as such, are not multiplicitous. *See Blockburger*, 284 U.S. at 304; *United States v. Villano*, 529 F.2d 1046, 1061-62 (10th Cir. 1976) (holding that convictions for multiple counts of 18 U.S.C. § 1952 arising from same course of conduct did not violate double jeopardy); *United States v. Polizzi*, 500 F.2d 856, 898-99 (9th Cir. 1974) (holding that "each act of travel may be treated as a separate violation of [18 U.S.C. § 1952]").

The government is not aware of any published appellate decisions that specifically address the multiplicity issue. Courts have, however, affirmed convictions and sentences where defendants have been convicted of multiple violations of 18 U.S.C. § 1958(a) as part of an ongoing scheme to commit murder-for-hire. *See, e.g.*, *United States v. Perez*, 414 F.3d 302, 303-05 & n.1 (2d Cir. 2005) (per curiam) (affirming conviction for, *inter alia*, two counts of violating 18 U.S.C. § 1958(a), where one count was based on interstate travel and other count based on use of interstate facilities as part of the same murder-for-hire

scheme); *United States v. Scott*, 145 F.3d 878, 882-83 (7th Cir. 1998) (affirming conviction for, *inter alia*, three counts of use of interstate facilities with intent that murder-for-hire be committed); *United States v. Wilson*, 920 F.2d 1290, 1294 (6th Cir. 1990) (affirming, in part, sentence where defendant was convicted of six counts of using interstate facilities with intent that his wife be killed). Moreover, courts have affirmed convictions and sentences where defendants have received consecutive sentences for multiple violations of 18 U.S.C. § 1958(a). *See, e.g.*, *United States v. Richeson*, 338 F.3d 653, 654-56 (7th Cir. 2003) (affirming conviction, where defendant was found guilty of four counts of conspiring to violate 18 U.S.C. § 1958(a) and sentenced to four consecutive terms of 91 months, resulting in a total sentence of 364 months).

In sum, the defendant cannot show that Counts One and Two of the superseding indictment were multiplicitous in violation of the Double Jeopardy Clause.

2. The superseding indictment did not violate the Double Jeopardy Clause

The defendant's claim that the act of bringing the superseding indictment violates the Double Jeopardy Clause is plainly without merit. As this Court has recognized, "[a]n accused must suffer jeopardy before he can suffer double jeopardy." *Dionisio*, 503 F.3d at 81 (internal citations omitted). Here, jeopardy did not attach until the trial jury was empaneled on September 28, 2006 – almost ten months after the superseding indictment was returned. DA 9. In this case, jeopardy had not attached

with respect to the original indictment prior to the grand jury returning the superseding indictment. Accordingly, the superseding indictment did not violate the Double Jeopardy Clause.

II. The district court did not commit plain error or abuse its discretion in admitting other-act evidence under Rule 404(b)

A. Relevant facts

Levesque testified that, during one of the defendant's discussions about having his ex-wife murdered, the defendant said that he had cut the brake lines on Portnov's car. TT 246. Portnov testified that the power steering hose on her car had been cut. TT 187-89. Portnov also testified that someone had taken brake fluid from her car. TT 212-13. In addition, Ray Perkins, a mechanic, testified that Portnov's power steering hose, which was in the same general area as the car's brake lines, had been cut by a knife. TT 398-403, 408-410. Portnov also provided vague testimony about Sammy getting hurt during a soccer game. TT 213-14.

Further, Portnov testified that, on June 25, 2005, she confronted the defendant as he was trying to sell a rug that belonged to her. TT 215-16. The defendant then threatened Portnov, stating "You're not going to live long. I'm gonna kill you." TT 216. As a result of the death threat, Portnov obtained a restraining order against the defendant. TT 216-17. Police officers served the restraining order late at night on June 29, 2005. TT 217-18. The officers took Sammy

from the defendant and returned him to Portnov. TT 218. Almost immediately thereafter, the defendant placed telephone calls to Levesque and Needham. TT 459. These witnesses testified that the defendant was hysterical and said words to the effect that Portnov must die. TT 261, 379.

Within the next several days, the defendant and Levesque had a lunch meeting, during which the defendant discussed his desire to have Portnov raped and murdered. TT 262-64. After this meeting, Levesque contacted Detective MacGregor and Agent Lambert regarding the defendant's efforts to have Portnov murdered for money. TT 264-66.

B. Governing law and standard of review

1. Admissibility of evidence under Rules 402, 403 and 404(b)

All relevant evidence is generally admissible. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence is relevant, however, the district court has discretion to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Federal Rule of Evidence 404(b) limits the admissibility of evidence of other crimes, wrongs, or acts. That rule states, in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Rule 404(b), however, does not apply to evidence that is intertwined with the charged offense:

> [E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (internal quotation marks omitted). Such "intrinsic evidence" falls outside the scope of Rule 404(b) and is admissible at trial where it tends to prove the existence of an element of the charged offense. *See United States v. Birbal*, 62 F.3d 456, 464 (2d Cir. 1995).

This Court takes an "inclusive approach" to "other acts" evidence, that is, it can be admitted "for any purpose

except to show criminal propensity," unless the trial judge concludes that its probative value is substantially outweighed by its potential for unfair prejudice. *United States v. Germosen*, 139 F.3d 120, 127 (2d Cir. 1998); *see also Carboni*, 204 F.3d at 44.

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court outlined the test for admission of other-acts evidence under Rule 404(b). First, the evidence must be introduced for a proper purpose, such as proof of knowledge or identity. *Id.* at 691. Second, the offered evidence must be relevant to an issue in the case pursuant to Rule 402. *Id.* Third, the evidence must satisfy the probative-prejudice balancing test of Rule 403. *Id.* Fourth, if the evidence of other acts is admitted, the district court must, if requested, provide a limiting instruction for the jury. *Id.* at 691-92. This Court has applied this four-prong test. *See United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007) (citing *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002)).

2. Standard of Review

A district court has "wide discretion in determining the admissibility of evidence under the Federal Rules," and this Court reviews the admission of evidence for abuse of that discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). A district court abuses its discretion when it "act[s] arbitrarily and irrationally," *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992), or its rulings are

"manifestly erroneous," *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (internal quotation marks omitted).

Trial errors that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction. *See United States v. Colombo*, 909 F.2d 711, 713 (2d Cir. 1990); Fed. R. Crim. P. 52(a). An error is harmless if the reviewing court is convinced that "'the error did not influence the jury's verdict.'" *Colombo*, 909 F.2d at 713 (quoting *United States v. Ruffin*, 575 F.2d 346, 359 (2d Cir. 1978) (quoting, in turn, *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)). In that determination, "[t]he strength of the government's case against the defendant is probably the most critical factor . . . ." *Id.* at 714 (citing 3A C. Wright, *Federal Practice and Procedure* § 854, at 305 (2d ed. 1982)). "Reversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003) (internal quotation marks omitted).

If a defendant fails to object to an evidentiary ruling at trial, the standard of review is even more stringent, and the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*,

535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.* "In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Id.* (citation omitted).

C. Discussion

The defendant argues that the district court erred in permitting testimony regarding "four instances of prior bad acts." Def. Br. at 18. Specifically, the defendant argues that the district court erred by admitting the following evidence: (1) Portnov's and her mechanic's testimony that someone had cut the power steering hose on her car; (2) Portnov's testimony that someone had taken brake fluid from her car; (3) vague testimony by Portnov that Sammy was injured during a soccer game; and (4) Portnov's testimony that the defendant tried to sell a rug she owned. Def. Br. at 18-19.

The defendant concedes in his brief that his trial counsel failed to object to the district court's admission of this evidence in the first and fourth instances above (Def.

Br. at 20) and, consequently, the admission of this evidence is subject to plain error review. The Court reviews the admission of the evidence in the second and third instances above for abuse of discretion. In either event, the defendant cannot show that the district court committed plain error or abused its discretion in admitting other-act evidence. Moreover, even assuming *arguendo* that the admission of the other-act evidence constituted plain error or was an abuse of discretion, which it was not, the admission of this evidence was not prejudicial to the defendant, as it did not come close to affecting the outcome of his trial.

1. The district court's admission of evidence that Portnov's power steering hose had been cut was not plainly erroneous

The defendant has not demonstrated, as he must, that the district court's admission of evidence that the power steering hose to Portnov's car had been cut was plainly erroneous. *First,* the defendant has failed to demonstrate that the district court erred, let alone plainly erred, by admitting this evidence.

As an initial point, the defendant concedes that this evidence, along with the other alleged 404(b) evidence, "was admitted for a proper purpose." Def. Br. at 20. Specifically, this evidence was admitted to show the defendant's intent to have his ex-wife murdered, which is an element of the offense. Thus, the first prong of the test for the admission of other-act evidence under Rule 404(b) is satisfied. *See Huddleston*, 485 U.S. at 691.

The defendant's argument that this evidence was not relevant to the issue of intent is misplaced. Levesque testified that, during one of the defendant's discussions with Levesque regarding the defendant's desire to have his wife murdered, the defendant said that he had cut the brake lines on her car. TT 246. Portnov testified that the power steering hose on her car had been cut, TT 187-89, and her mechanic testified that it had been cut with a knife. TT 398-403; GA 1. During cross-examination, the mechanic explained that the brake lines were in the same general area as the power steering hose. TT 408-10. This testimony circumstantially corroborates Levesque's testimony that the defendant claimed to have cut the brake line of Portnov's car, and was therefore highly probative of his intention to kill his ex-wife.

By contrast, this evidence presented little, if any, danger of *unfair* prejudice, which the Supreme Court has defined as a tendency to prompt the jury to decide guilt on an improper basis. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged"). There is nothing unfairly prejudicial about proving that the defendant manifested his intent to kill his ex-wife by slicing her brake lines, and the district judge certainly cannot be faulted for admitting that evidence. *See United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007) ("In reviewing Rule 403 challenges, we 'accord great deference' to the district court's assessment of the relevancy and unfair prejudice of proffered

evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence") (internal quotation omitted). Accordingly, the third prong of the test for the admission of other-act evidence under Rule 404(b) is satisfied. *See Huddleston*, 485 U.S. at 691.

Finally, the defendant's trial counsel never asked for a limiting instruction and, thus, the district court did not provide any such instruction with respect to this testimony. *See Huddleston*, 485 U.S. at 691 (if the evidence of other acts is admitted, the district court must, *if requested*, provide a limiting instruction to the jury). In sum, the evidence regarding Portnov's power steering hose was properly admitted under Rule 404(b). The defendant cannot meet his burden to show that the admission of this evidence was erroneous, let alone plainly erroneous. *See id.*

Second, even assuming *arguendo* that the admission of this evidence was error and the error was plain, the defendant has not come close to showing that it affected his substantial rights. Indeed, there was overwhelming evidence of the defendant's intent to have Portnov murdered. This evidence included four recorded telephone conversations; the hour-long recorded meeting at the restaurant; the recorded meeting in the ATF undercover car; and the testimony of Agent Lambert, Levesque, and Needham. The defendant does not challenge the admissibility of any of that evidence on appeal. In sum, given the compelling evidence of the defendant's unlawful intent, the defendant has not come close to demonstrating

that the evidence regarding the power steering hose affected the outcome of the trial. *See Olano*, 507 U.S. at 734.

Third, the defendant cannot show that the district court's admission of the other-act evidence seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See Williams*, 399 F.3d at 454. As detailed above, the jury was presented with overwhelming evidence of the defendant's intent to have his ex-wife raped and murdered.

For all these reasons, the district court did not commit plain error in admitting the evidence regarding Portnov's power steering hose pursuant to Rule 404(b).

2. The district court did not abuse its discretion in admitting testimony regarding the brake fluid from Portnov's car

The district court did not abuse its discretion in admitting testimony from Portnov that someone had taken the brake fluid from her car. As discussed above, Levesque testified that the defendant said that he had cut the brake lines on Portnov's car. TT 246. This is highly relevant to the defendant's intent to have his ex-wife murdered. Portnov testified that she had problems with the brakes on her car, stating that "someone took brake fluid from the car." TT 212. Portnov did not testify who took brake fluid from her car. TT 212-13. As with the evidence regarding Portnov's power steering hose, however, this testimony provides circumstantial support for Levesque's testimony

that the defendant claimed to have tampered with the brakes on Portnov's car. As such, the district court did not "act arbitrarily or irrationally," *Pitre*, 960 F.2d at 1119, or make a "manifestly erroneous" ruling, *Yousef*, 327 F.3d at 156 (internal quotation marks omitted), when it admitted this testimony.

Moreover, even if the district court's admission of Portnov's testimony regarding the brake fluid was an abuse of discretion, which it was not, any error was harmless, as it did not affect the outcome of the trial. *See Colombo*, 909 F.2d at 713. The testimony from Portnov regarding the brake fluid from her car comprised less than 2 pages of the 563-page trial transcript. TT 212-13. This testimony was never mentioned again during the trial. Further, this testimony was admitted after the jury was presented with overwhelming evidence of the defendant's guilt in the form of the recorded conversations and other evidence referenced above. As discussed above, the defendant does not challenge the admissibility of any of that evidence on appeal. In sum, the admission of the testimony regarding Portnov's brake fluid, as with the evidence regarding her car's power steering hose, did not come close to affecting the outcome of the trial, and therefore any error was harmless by any standard.

3. The testimony regarding Sammy's injury during a soccer game was not 404(b) evidence and, in any event, was harmless.

The defendant argues that Portnov's vague testimony regarding their then seven-year-old son, Sammy, getting

hurt at a soccer game was improper 404(b) evidence. This testimony did not, however, relate to any prior "crimes, wrongs or acts" committed by the defendant and, thus, was not 404(b) evidence.

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts" may be admissible to prove motive, intent and for certain other purposes. Fed. R. Evid. 404(b). When asked about her interactions with the defendant during the Summer of 2005, Portnov stated the following:

> In a soccer game when Sammy was playing and seven year old and playing some soccer game, and it was my days but it was – coach was on the other side of field and parents on the other side. I have to go around the field but Mr. Bloom close to game so he was before me and he cross while I was going around he cross again the field to go to the fountain but he was upset and he got upset and crying and –

TT 213. At this point, defendant's trial counsel objected and the Court overruled the objection. TT 213-14. The government asked Portnov to avoid getting into the background of disputes during the divorce and custody proceedings, and then asked whether Portnov and the defendant were having face to face interactions during that time frame (i.e., the Summer of 2005). TT 214. Portnov then provided a somewhat non-responsive answer, stating "No, I just put Sammy and went to my car to stop his blood. We don't have any interaction." TT 214. In response to more direct questioning, Portnov stopped testifying about this soccer incident and testified about the

defendant's repeated calls to Portnov, the admissibility of which are not challenged by the defendant. TT 214-15.

Portnov's vague testimony about Sammy's soccer game did not involve any "crime, wrong or act" committed by the defendant. Indeed, while Portnov's testimony is less than clear, it appears that she was testifying that their son Sammy was injured while playing soccer. In addition, it appears that she was saying that Sammy was upset and crying (presumably from the soccer injury); but even if it was the defendant who was upset and crying, this does not in any way indicate that the defendant committed another "crime, wrong or act." *See* Fed. R. Evid. 404(b). In short, this testimony simply did not constitute 404(b) evidence.

Moreover, even assuming that the testimony did somehow constitute 404(b) evidence, which it does not, the evidence did not have any bearing on the outcome of the trial. Any claim that this testimony prejudiced the jury rings hollow. As discussed above, the jury was presented with overwhelming evidence regarding the defendant's intent. Portnov's testimony regarding Sammy's injury during a soccer game did not have any bearing on the defendant's intent, either negative or positive. Indeed, the testimony regarding this soccer game was never again mentioned during the course of the trial. In sum, Portnov's testimony was not relevant and, in any event, it was harmless.

4. The district court did not plainly err in admitting Portnov's testimony regarding a death threat by the defendant during an incident involving a rug on June 25, 2005

As discussed above, on June 25, 2005, Portnov confronted the defendant as he was trying to sell a rug that belonged to her and the defendant threatened to kill her. TT 215-16. As a result of the death threat, Portnov obtained a restraining order against the defendant. TT 216-17. Almost immediately after police officers served the restraining order, the defendant hatched his plan to have Portnov murdered. TT 262, 377-78, 459.

The testimony regarding the defendant's threat to kill Portnov following the disagreement over a rug is "inextricably intertwined with," and "necessary to complete the story" regarding, the defendant's efforts to get Levesque to hire a hitman to kill her. Accordingly, the testimony regarding the rug falls outside the scope of Rule 404(b). *See Carboni*, 204 F.3d at 44.

Further, the district court did not commit plain error in admitting testimony regarding this incident with the rug. The incident was highly relevant to the charged offenses. Indeed, when Portnov confronted the defendant about the rug, the defendant threatened to kill her. TT 216. Even the defendant concedes, as he must, that this is relevant. It is a manifestation of the defendant's intent. Further, the timing of all of these events demonstrates the defendant's chain of decision-making. Any prejudice from Portnov's testimony that the defendant was trying to sell a rug that

belonged to her was, at most, minimal and was significantly outweighed by the probative value of this incident.

Moreover, the defendant cannot, as he must, demonstrate that the testimony regarding his efforts to sell Portnov's rug affected the outcome of this trial. It cannot reasonably be argued that testimony regarding the defendant's attempt to sell his ex-wife's rug had any bearing on the jury's verdict. What was important from this rug incident, was that the defendant threatened to kill Portnov, which triggered a series of events that resulted in the defendant's discussions with Levesque to have Portnov raped and murdered.

Finally, because the remaining evidence of guilt was so overwhelming, the defendant cannot show that the testimony regarding the rug seriously affected the fairness, integrity or public reputation of his trial. *See Williams*, 399 F.3d at 454. For all these reasons, the district court did not commit plain error in admitting the testimony regarding the rug.

III. The district court correctly calculated the defendant's guideline range

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts, Sentencing.

B. Governing law and standard of review

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 596 (2007). "In reviewing a sentencing on appeal, [the appellate court] must 'first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008) (quoting *Gall*, 128 S. Ct. at 597).

1. Career offender guidelines

Section 4B1.1 of the Sentencing Guidelines defines a career offender as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

The Sentencing Guidelines define a "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year,

that - (1) has as an element the use, attempted use or threatened use of physical force against the person of another; or (2) is a burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2. The district court's determination of whether a prior offense was a crime of violence, as defined by U.S.S.G. § 4B1.2, is reviewed *de novo*. *See Savage*, 542 F.3d at 964. "The government bears the burden of showing that a prior conviction counts as a predicate offense for the purpose of a sentencing enhancement." *Id.* (citing *United States v. Green*, 480 F.3d 627, 635 (2d Cir. 2007)).

2. Multiple counts of conviction

Under Section 3D1.1 and 3D1.2 of the Sentencing Guidelines, "[w]hen a defendant has been convicted of more than one count," the court shall group together "[a]ll counts involving substantially the same harm." Under Section 3D1.2, "Counts involve substantially the same harm . . . (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan . . . ."

Under Section 5G1.2(d) of the Sentencing Guidelines, "in a case involving multiple counts of conviction, [Section 5G1.2(d) of] the sentencing guidelines instructs that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of conviction, the district court must impose consecutive

terms of imprisonment to the extent necessary to achieve the total punishment." *See United States v. Outen*, 286 F.3d 622, 640 (2d Cir. 2002).

C. Discussion

As noted above, the PSR concluded – and, at the sentencing, the defendant, the government and the district court agreed – that the defendant was a career offender under U.S.S.G. § 4B1.1 and thus the defendant's guideline imprisonment range was 360 months to life. In addition, the parties and the district court agreed that Section 5G1.2(d) called for the sentences on Counts One and Two to run consecutively.

In the defendant's appellate brief, counsel acknowledges that the defendant "had a total offense level of 37 and, as a career offender, a criminal history category (CHC) of VI." Def. Br. at 13. Counsel further acknowledges that "[h]is advisory guideline range of imprisonment was 360 months to life." Def. Br. at 13. There is no suggestion in his appellate brief that this guideline calculation is incorrect.

On August 14, 2009, the defendant filed a *pro se* supplemental brief, in which he argues that he was erroneously classified as a career offender under U.S.S.G. § 4B1.1. Def. Suppl Br. at 4. The defendant argues that his "previous 3 convictions, resulting in period of probation only, were misdemeanors." Def. Suppl. Br. at 4. The defendant further argues that the "PSR also made unsubstantiated allegations of violent behavior and

referred to an inconclusive psychological evaluation" and "none of this was sufficient to his being labelled [sic] a 'career offender' under the sentencing guidelines." Def. Suppl. Br. at 4. In addition, the defendant argues that he was erroneously sentenced under U.S.S.G. § 5G1.2(d) and he should have been sentenced under U.S.S.G. § 3D1.1. Def. Suppl. Br. at 6-8.

Because defense counsel agreed to the guidelines calculations in the district court, the defendant's two *pro se* challenges have been waived. Even assuming hypothetically that they were still reviewable for plain error, these claims would still be unavailing.

1. The defendant was properly classified as a career offender under U.S.S.G. § 4B1.1, because all three of his crimes of violence were felonies.

There is no dispute that the defendant was at least eighteen years old at the time he committed the offenses of conviction and the offenses of conviction are crimes of violence. *See Ng v. Attorney General*, 436 F.3d 392, 397 (3d Cir. 2006) (use of interstate commerce facilities in the commission of murder-for-hire constitutes a "crime of violence"); *United States v. Luskin*, 926 F.2d 372, 379 (4th Cir. 1991) (a violation 18 U.S.C. § 1952A, the predecessor statute of 18 U.S.C. §1958, constitutes a "crime of violence").

In his *pro se* supplemental brief, however, the defendant argues that his prior convictions – for assault

and battery, assault and battery with a dangerous weapon and assault with a dangerous weapon – were misdemeanors and, thus, were not crimes of violence under U.S.S.G. § 4B1.2(a). *See* Def. Suppl. Br. at 4.

This Court can take judicial notice that the defendant's October 22, 1998 conviction for assault and battery (i.e., Mass. Gen. Laws Ch. 265 Sec. 13A), his July 11, 2000 conviction for assault and battery with a dangerous weapon (i.e., Mass. Gen. Laws Ch. 265 Sec. 15A) and his conviction for assault with a dangerous weapon (i.e., Mass. Gen. Laws Ch. 265 Sec. 15B) each are punishable by imprisonment for a term exceeding one year and, as such, are felonies that qualify as crimes of violence under the career offender guidelines. *See* U.S.S.G. § 4B1.2(a). This Court should, therefore, affirm the judgment below.

2. The district court correctly applied U.S.S.G. §§ 3D1.1, 3D1.2 and 5G1.2(d).

The defendant's argument, in his *pro se* supplemental brief, that the district court should have applied Chapter 3, Part D of the Sentencing Guidelines, rather than Section 5G1.2, is misplaced. These provisions of the Sentencing Guidelines are not mutually exclusive. To the contrary, the Guidelines require a court to apply *both* Chapter 3 and Chapter 5 in determining the appropriate guideline range. *See* U.S.S.G. § 1B1.1. Moreover, where, as here, two counts of conviction are grouped together under Sections 3D1.1 and 3D1.2, Section 5G1.2(d)"instructs that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of

conviction, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment." *United States v. McLean*, 287 F.3d 127, 136 (2d Cir. 2002).

Here, both parties and the district court agreed that the total punishment for the grouped offenses was 360 months to life imprisonment. Accordingly, Section 5G1.2(d) called for the court to impose consecutive terms of imprisonment for Counts One and Two. *See* U.S.S.G. § 5G1.2(d). This is precisely what the district court did. DA 149-50.

In short, the district court properly applied Sections 3D1.1, 3D1.2 and 5G1.2(d) in calculating the defendant's guideline range. *See United States v. Kapaev*, 199 F.3d 596 (2d Cir. 1999) (affirming imposition of consecutive sentences under 5G1.2(d) for conspiring to travel in interstate commerce in the commission of murder-for-hire and interstate travel in the commission of murder-for-hire to impose a sentence at the high end of the defendant's guideline range); *United States v. Bicaksiz*, 194 F.3d 390, 393-94 (2d Cir. 1999) (holding that 18 U.S.C. § 1958 authorized the imposition of consecutive sentences for conspiring to travel in interstate commerce with intent to commit murder-for-hire and for the underlying substantive offense); *United States v. Uccio*, 917 F.2d 80, 85 (2d Cir. 1990) (reversing district court's failure to impose consecutive sentences under Section 5G1.2 for offense and for conspiracy to commit the same offense where entire guideline range exceeded statutory maximum sentence for either offense).

IV. The 240-month guideline sentence imposed by the district court was reasonable.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts, Sentencing.

B. Governing law and standard of review

When reviewing a defendant's claim that his sentence is substantively unreasonable, this Court will not substitute its own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case," and will "set aside a district court's substantive determination only in exceptional cases . . . ." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). As the Supreme Court recently instructed, the "explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (citing *United States v. Booker*, 543 U.S. 220, 260-62 (2005)).

Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has recognized that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.

2005). *Accord Rita*, 127 S. Ct. at 2463-67 (holding that where both sentencing judge and Sentencing Commission reach same conclusion about appropriate sentence, it is likely reasonable).

C. Discussion

The defendant's sentence of 240 months – which was consistent with the guidelines – was reasonable. On this record, the district court's decision not to depart downwardly or impose a non-Guidelines sentence, but rather to impose a sentence consistent with Section 5G1.2(d) of the Guidelines, was perfectly reasonable. Indeed, the defendant tried to hire a hitman to rape and murder his ex-wife, and then dump her body in Hartford. It is hard to imagine how any *lesser* sentence could be reasonable.

That the district court, after consideration of the § 3553(a) factors, imposed a sentence called for by the guidelines, instead of exercising its discretion to impose a lower, non-Guidelines sentence, does not render the sentence unreasonable. *See Rita*, 127 S. Ct. at 2465, 2468 ("[W]hen the judge's discretionary decision accords with the Commission's view of the appropriate application of §3553(a) . . . it is probable that the sentence is reasonable").

The defendant's appellate counsel argues that the defendant may have suffered from a diminished mental capacity or a mental illness that was a significant factor in the offense. Def. Br. at 28. Yet that is simply asking this

Court to second-guess the weight that the district court afforded that factor – something that this Court has held it will not do. *See Fernandez*, 443 F.3d at 34 (holding that weight to be given any particular factor in the § 3553(a) analysis is a matter committed to the sound discretion of the district judge); *United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (the defendant "merely renews the arguments he advanced below . . . and asks [this Court] to substitute [its] judgment for that of the District Court, *which, of course, [it] cannot do*") (emphasis added).

In addition, the defendant's appellate counsel argues that the two counts of conviction were part of one, single plan and that "logic suggested that he be sentenced within the statute for a single, murderous plot, that is, 120 months' imprisonment." Def. Br. at 29. Yet, as discussed above, courts have imposed consecutive sentences for multiple violations of 18 U.S.C. § 1958(a) that were based on a single plan to have someone murdered *See, e.g., Richeson*, 338 F.3d at 654-56.

Additionally, the district court's sentence was clearly supported by the required § 3553 factors. As an initial matter, "the nature and circumstances of the offense and the history and characteristics of the defendant" strongly supported a sentence of 240 months of imprisonment. *See* 18 U.S.C. § 3553(a)(1). As discussed in the PSR, the defendant's "propensity toward violence is well documented" and "not only his family has been the target of his anger and rage." PSR ¶ 115. Indeed, overwhelming trial evidence revealed that the defendant tried to hire a

hitman to have his ex-wife raped, brutalized and her body dumped in Hartford, while the defendant used their eight-year-old son as an alibi. *See* DA 22-54.

In addition, the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant" strongly supported a sentence of 240 months of imprisonment. *See* 18 U.S.C. § 3553(a)(2)(A)-(C). Indeed, the need to protect Portnov and her family was highlighted by the fact that the defendant was undeterred by the fact that, in the defendant's own words, "[Portnov had] already pulled out three restraining orders that I've threatened to kill her." DA 53; TT 143. In fact, Portnov had obtained a restraining order against the defendant based on his death threats on June 29, 2005 – only *nine days* before the defendant finalized plans to have her murdered. *See* GA 24-25.

Furthermore, consideration of the devastating impact that the defendant's offense conduct had on Portnov and her children supported a 240-month sentence. Portnov is now "afraid of everything." PSR ¶ 20. Simple tasks, such as going to a mall or a crowded area, now provoke fear and anxiety. PSR ¶ 20. Knowing that the defendant actually plotted to have Portnov violently murdered has devastated Portnov and her children's lives. PSR ¶ 20-22. Sammy routinely awakes during the night "screaming" from nightmares. PSR ¶ 22. The impact of the defendant's offense on his family cannot be overstated.

Moreover, the need "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" also supported a sentence of 240 months. As demonstrated by the defendant's guideline range, career offenders who commit crimes of violence regularly receive sentences of 360 months to life imprisonment. *See Rita*, 127 S. Ct. at 2463-65. Further, defendants who commit multiple counts of the use of interstate commerce in the commission of murder-for-hire have received sentences in excess of 360 months, *see, e.g.*, *Richeson*, 338 F.3d at 654-56, and, in some cases, sentences at the *high end* of their Guidelines range. *See Kapaev*, 199 F.3d at 597-98. Here, anything less than 240 months arguably would have created a substantial and unwarranted disparity from sentences received by "defendants with similar records who have been found guilty of similar conduct."

In sum, the district court properly considered the § 3553(a) factors, along with the PSR, the parties' sentencing submissions and the parties' arguments at sentencing, and properly exercised its discretion not to impose a below-Guidelines sentence.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 29, 2009

Respectfully submitted,

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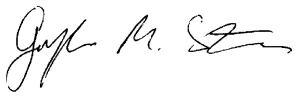

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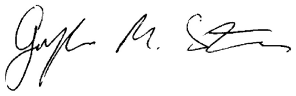
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,955 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

18 U.S.C. § 1958. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both

. . . .

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines

or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

. . . .

Federal Rules of Criminal Procedure

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

. . . .

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Rules of Evidence

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

. . .

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

U.S.S.G. § 3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in § 3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

. . . .

U.S.S.G. § 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

. . . .

U.S.S.G. § 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

. . . .

U.S.S.G. § 5G1.2. Sentencing on Multiple Counts of Conviction

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(e) In a case in which subsection (c) of § 4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the

sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

M.G.L.A. 265 § 13A. Assault or assault and battery; punishment

(a) Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 1/2 years in a house of correction or by a fine of not more than $1,000

. . . .

M.G.L.A. 265 § 15A. Assault and battery with dangerous weapon; victim sixty or older; punishment; subsequent offenses

. . .

(b) Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

. . . .

M.G.L.A. 265 § 15B. Assault with dangerous weapon; victim sixty or older; punishment; subsequent offenses

. . .

(b) Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.