Appendix (A)

TENTH CIRCUIT COURT OF APPEALS

CERTIFICATE OF APPEALABILITY DENIAL ORDER

APPENDIX (A)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RAYMOND L. ROGERS, Defendant - Appellant.	No. 19-3012 (D.C. Nos. 6:18-CV-01322-JWB & 6:10-CR-10186-JWB-1) (D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES, KELLY**, and **PHILLIPS**, Circuit Judges.

Raymond L. Rogers, proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's order dismissing his 28 U.S.C. § 2255 motion as an unauthorized second or successive § 2255 motion and dismissing it for lack of jurisdiction. We deny a COA and dismiss this matter.

Mr. Rogers was convicted after a jury trial of (1) bank robbery, in violation of 18 U.S.C. § 2113(a); (2) brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) unlawful possession of a firearm by a

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced to 234 months' imprisonment. We affirmed his convictions and sentence on direct appeal. *United States v. Rogers*, 520 F. App'x 727, 728 (10th Cir. 2013). In 2013, Mr. Rogers filed his first § 2255 motion based on ineffective assistance of counsel. The district court denied the motion, and we denied a COA. Mr. Rogers then filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), which the district court denied initially and on reconsideration. Mr. Rogers appealed that denial, and this court denied a COA. On November 19, 2018, he filed the underlying § 2255 motion in district court, arguing that his "Fifth and Sixth Amendment rights were violated because the original indictment on which he was tried was invalidated by the filing of a superseding indictment." R. at 358. The district court determined that the motion was an unauthorized second or successive § 2255 motion and dismissed it for lack of jurisdiction.

Mr. Rogers now seeks a COA under 28 U.S.C. § 2253(c) to appeal from that dismissal. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court dismissed his petition on procedural grounds, to obtain a COA Mr. Rogers must demonstrate both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473,

484 (2000). We need not reach the constitutional component of this standard since it is apparent Mr. Rogers cannot meet his burden on the procedural one. *See id.* at 485.

A prisoner may not file a second or successive § 2255 motion without authorization from this court. 28 U.S.C. § 2244(b)(3)(A); *id.* § 2255(h). The district court lacks jurisdiction to consider the merits of a second or successive § 2255 motion absent authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

In his motion filed in district court, Mr. Rogers sought vacatur of his convictions and sentence, arguing that the superseding indictment filed after the original indictment "effectively terminated the criminal case against [him]," making his convictions and sentence "an absolute nullity and void for want of indictment," R. at 348-49 (internal quotation marks and brackets omitted). He also argued his motion was not second or successive because the district court's ruling on his first § 2255 motion "was not an on the merits ruling, and [was] merely a ruling that [his] pleading was deficient," rendering 28 U.S.C. § 2255(h) inapplicable. R. at 346. The district court determined that the motion "is clearly a § 2255, as it seeks to vacate his conviction and sentence, and it is just as clearly a second or successive motion under § 2255." R. at 358. Because Mr. Rogers had not obtained the proper authorization from this court to file a second or successive § 2255 motion, the district court dismissed the motion for lack of jurisdiction and denied a COA.

In his COA application to this court, Mr. Rogers repeats his argument that the district court should not have deemed his filing a successive § 2255 motion because the district court's "denial ruling of [his first] § 2255 [motion] does not constitute an on the merits ruling," COA App. at 3. In support of his argument, Mr. Rogers cites *Sanders v. United States*, 373 U.S. 1, 10 (1963), for the proposition that "a [d]istrict [c]ourt's determination that the claims in a Petition 'lack[] merit in fact' is not a ruling on the merits, and is simply a finding[] that the Petitioner's pleadings are deficient." COA App. at 3. But *Sanders* does not stand for that proposition, and the district court's well reasoned 25-page order denying his first § 2255 motion undoubtedly reached the merits of his claims. Mr. Rogers concedes as much by stating that "[the district court] denied [his] first § 2255 [m]otion . . . after concluding that all his assignments of error[] are *without merit*," *id.* at 4 (emphasis added) (internal quotation marks and brackets omitted). We do not reach Mr. Rogers's merits argument that his Fifth and Sixth Amendment rights were violated by the filing of a superseding indictment because he has not shown that jurists of reason would find it debatable whether the district court's procedural ruling was correct. Accordingly, we deny a COA and dismiss this matter.

Mr. Rogers's motion to proceed without prepayment of costs or fees is granted. Nevertheless, he is required to pay all filing and docketing fees. Only prepayment of fees is waived, not the fees themselves. *See* 28 U.S.C. § 1915(a)(1). Payment shall be made to the Clerk of the District Court. Mr. Rogers's "Motion to

Expand or Supplement COA Application and Combined Opening Appellate Brief" is also granted.

Entered for the Court

s/ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER,
Clerk

Appendix (B)

KANSAS DISTRICT COURT'S

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 10-10186-01-JWB

RAYMOND L. ROGERS,

Defendant.

MEMORANDUM AND ORDER

This matter is before the court on Defendant's Motion to Vacate Sentence Under 28 U.S.C. § 2255. (Doc. 200.) As set forth below, the court finds the motion is a second or successive one under § 2255, and accordingly it is DISMISSED for lack of jurisdiction.

I. Background.

On December 7, 2010, Defendant and two others were charged by indictment with three counts: bank robbery, brandishing a firearm during a crime of violence, and unlawful possession of a firearm by a convicted felon. (Doc. 12). A superseding indictment adding three counts relating to another alleged robbery was filed (Doc. 54), but was later dismissed on a motion by the government. (Doc. 91.) A jury trial was held on the three charges in the original indictment; the jury convicted Defendant on all three counts. (Doc. 103.)

Defendant was sentenced by the Hon. J. Thomas Marten to a controlling term of 234 months imprisonment. Judgment was entered on April 17, 2012. (Doc. 120.) On direct appeal, the Tenth Circuit affirmed the judgment and sentence. (Doc. 142.)

On December 2, 2013, Defendant filed a motion to vacate under § 2255, arguing among other things that he received ineffective assistance of counsel. (Docs. 146, 147.) Defendant also filed several supplemental briefs. (Docs. 148, 155, 157, 158, 160.) Judge Marten denied the motion in a 25-page written order filed December 9, 2014, and denied a certificate of appealability. (Docs. 162, 164.) Defendant appealed the denial of his § 2255 motion, but the Tenth Circuit dismissed the appeal. (Doc. 169.) The Supreme Court denied a petition for writ of certiorari. (Doc. 170.)

On January 11, 2016, Defendant filed a Motion for Relief From the Judgment under Fed. R. Civ. P. 60(b)(4), arguing the court erred in the § 2255 ruling by failing to address certain arguments. (Doc. 175.) Defendant also moved to amend his § 2255 motion. (Doc. 177.) Judge Marten denied the motion for relief from judgment, denied the motion to amend as moot, and denied a motion by Defendant to reconsider. (Docs. 178, 180, 181.) Defendant appealed; the appeal was dismissed by the Tenth Circuit. (Doc. 189.) The Tenth Circuit also denied Defendant's petition for a writ of mandamus (Doc. 194), and the Supreme Court denied his petition for writ of certiorari. (Doc. 196.)

II. New § 2255 Motion

On November 19, 2018, Defendant filed the motion now before the court: an additional motion to vacate sentence under § 2255. (Doc. 200.) This motion argues that Defendant's Fifth and Sixth Amendment rights were violated because the original indictment on which he was tried was invalidated by the filing of a superseding indictment. (Id. at 3-4.)

III. Analysis

Section 2255(h) provides in part that a second or successive § 2255 motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain certain newly discovered evidence or a new rule of constitutional law made retroactive by the Supreme Court. 28 U.S.C. § 2255(h). Defendant's motion is clearly a § 2255, as it seeks to vacate his conviction and sentence, and it is just as clearly a second or successive motion under § 2255. *See United States v. McCoy*, 464 F.3d 1213, 1215 (10th Cir. 2006) (motion is second or successive petition if it reasserts a federal basis for relief from petitioner's conviction.) *See also Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (motion seeking to assert new challenge to conviction or new evidence in support of a previous claim challenging conviction is a successive habeas petition.)

Absent authorization from the appropriate court of appeals, a district court has no jurisdiction to consider a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). In such circumstances, the district court may

either dismiss the motion for lack of jurisdiction or transfer it to the court of appeals if it is in the interest of justice to do so. *Id.* at 1252. Where a defendant's petition is plainly insufficient, it is appropriate for the district court to dismiss the matter. *Id.*

The court concludes Defendant's § 2255 motion should be dismissed. Defendant's claim that the indictment against him was invalid due to the filing of a superseding indictment is contrary to well-established law. *See United States v. Bowen*, 946 F.2d 734, 736 (10th Cir. 1991) (no authority for "the proposition that a superseding indictment zaps an earlier indictment to the end that the earlier indictment somehow vanishes into thin air.")

IT IS THEREFORE ORDERED this 13th day of December, 2018, that Defendant's Motion to Vacate Sentence Under § 2255 (Doc. 200) is DISMISSED FOR LACK OF JURISDICTION.

An appeal from a final order on a § 2255 may not be taken absent a certificate of appealability, which may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The court concludes Defendant has failed to make such a showing and accordingly a certificate of appealability is DENIED.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

Appendix (C)

PETITIONER'S CRIMINAL DOCKET SHEET

APPENDIX (C)

U.S. District Court
DISTRICT OF KANSAS (Wichita)
CRIMINAL DOCKET FOR CASE #: 6:10-cr-10186-JWB-1

Case title: USA v. Rogers et al
Related Cases: 6:13-cv-01448-JTM
6:18-cv-01322-JWB
Magistrate judge case number: 6:10-mj-06187-KGG

Date Filed: 12/07/2010
Date Terminated: 04/17/2012

Assigned to: District Judge John W. Broomes

Appeals court case numbers: 12-3125 10CCA, 15-3013 10CCA, 16-3055 10CCA, 19-3012 10CCA

Defendant (1)

Raymond L. Rogers
TERMINATED: 04/17/2012

represented by **Raymond L. Rogers**
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Designation: CJA Appointment

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LEAD ATTORNEY
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Pending Counts	**Disposition**
18:2113(a) - Bank robbery by force or violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (1)	234 Months Imprisonment (Count 1: 150 months, Count 2: 84 months to run consecutive to counts 1 & 3, Count 3: 120 months to run concurrent to counts 1 & 2); 5 Years Supervised Release (Counts 1 & 3: 3 years each count, to run concurrent to each other, Count 2: 5 years to run concurrent to counts 1 & 3); $300 Assessment
18:924(c)(1)(A) - Possessing and brandishing a firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (2)	234 Months Imprisonment (Count 1: 150 months, Count 2: 84 months to run consecutive to counts 1 & 3, Count 3: 120 months to run concurrent to counts 1 & 2); 5 Years Supervised Release (Counts 1 & 3: 3 years each count, to run concurrent to each other, Count 2: 5 years to run concurrent to counts 1 & 3); $300 Assessment
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (3)	234 Months Imprisonment (Count 1: 150 months, Count 2: 84 months to run consecutive to counts 1 & 3, Count 3: 120 months to run concurrent to counts 1 & 2); 5 Years Supervised Release (Counts 1 & 3: 3 years each count, to run concurrent to each other, Count 2: 5 years to run concurrent to counts 1 & 3); $300 Assessment

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
18:2113(a) - Bank robbery and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT	Dismissed

06/21/2011) (1s)	
18:924(c)(1)(A) - Possession of firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (2s)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (3s)	Dismissed
18:2113(a) - Bank robbery and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (4s)	Dismissed
18:924(c)(1)(A) - Possession of a firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (5s)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (6s)	Dismissed

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
18:2113(a) - Bank robbery; 18:924(c)(1)(A) - Possession and brandishing a firearm in furtherance of a crime of violence, and 18:2 - Aiding and abetting.	

Plaintiff

USA

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/03/2010	1	COMPLAINT as to Raymond L. Rogers (1), David L. Hollis, III (2), Shelan D. Peters (3). (adw) [6:10-mj-06187-KGG] (Entered: 12/03/2010)
12/06/2010		ARREST of Raymond L. Rogers. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	3	MINUTE ENTRY for proceedings held before Magistrate Judge Kenneth G. Gale: RULE 5/INITIAL APPEARANCE as to Raymond L. Rogers held on 12/6/2010. Detention Hearing set for 12/13/2010 at 01:30 PM in Courtroom 406 (KGG) before Magistrate Judge Kenneth G. Gale. Preliminary Hearing set for 12/20/2010 at 09:00 AM in Courtroom 406 (KGG) before Magistrate Judge Kenneth G. Gale. (Tape #1:31-1:40.) (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	4	CJA 23 FINANCIAL AFFIDAVIT by Raymond L. Rogers. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	5	ORDER OF TEMPORARY DETENTION as to Raymond L. Rogers. Signed by Magistrate Judge Kenneth G. Gale on 12/6/10. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	6	CJA 20 as to Raymond L. Rogers: Appointment of Attorney Jeffrey L. Griffith. Signed by Magistrate Judge Kenneth G. Gale on 12/6/2010. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/07/2010	9	ENTRY OF APPEARANCE: by attorney Jeff L. Griffith appearing for Raymond L. Rogers (Griffith, Jeff) [6:10-mj-06187-KGG] (Entered: 12/07/2010)
12/07/2010	10	Arrest WARRANT returned executed on 12/6/2010 as to Raymond L. Rogers. (adw) [6:10-mj-06187-KGG] (Entered: 12/08/2010)
12/07/2010	12	INDICTMENT as to Raymond L. Rogers (1) count(s) 1, 2, 3, David L. Hollis, III (2) count(s) 1, 2, 3, Shelan D. Peters (3) count(s) 1, 2, 3. (aa) (Entered: 12/08/2010)
12/07/2010	13	NOTICE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (aa) (Entered: 12/08/2010)
12/13/2010	21	MINUTE ENTRY for proceedings held before Magistrate Judge Kenneth G. Gale: ARRAIGNMENT as to Raymond L. Rogers (1) to Counts 1, 2, 3 of Indictment held on 12/13/2010. DETENTION HEARING as to Raymond L. Rogers held on 12/13/2010. Defendant's

		next appearance per scheduling order before Judge Marten. (Tape #1:46-1:49.) (adw) (Entered: 12/14/2010)
12/13/2010	22	WAIVER OF DETENTION HEARING by Raymond L. Rogers. (adw) (Entered: 12/14/2010)
12/14/2010	24	GENERAL ORDER OF DISCOVERY & SCHEDULING as to Raymond L. Rogers, David L. Hollis, III, and Shelan D. Peters: Jury Trial set for 2/15/2011 at 9:00 AM in Courtroom 238 before District Judge J. Thomas Marten. Status Conference set for 2/3/2011 at 2:30 PM in Courtroom 238 before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 12/14/10. (mss) (Entered: 12/14/2010)
01/13/2011	29	MOTION to Withdraw Jeff Griffith as Attorney by Raymond L. Rogers. (Griffith, Jeff) (Entered: 01/13/2011)
01/18/2011	30	CJA 20 as to Raymond L. Rogers: Appointment of Attorney Sean McEnulty. Signed by Magistrate Judge Kenneth G. Gale on 1/14/2011. (alm) (Entered: 01/18/2011)
01/18/2011	31	ORDER granting 29 Jeff Griffith's Motion to Withdraw as Attorney for Raymond L. Rogers (1). Signed by District Judge J. Thomas Marten on 1/18/2011. (mss) (Entered: 01/18/2011)
01/21/2011	32	MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 01/21/2011)
01/24/2011	33	NOTICE OF HEARING re: 32 MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation: Responses shall be filed no later than February 4, 2011. A hearing is set for 2/7/11 at 1:30 p.m. in Courtroom 238 before District Judge J. Thomas Marten. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 01/24/2011)
01/27/2011	35	DEMAND FOR NOTICE OF ALIBI DEFENSE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Smith, Aaron) (Entered: 01/27/2011)
02/03/2011	38	NOTICE OF CANCELLED HEARING: The status conference set on February 3, 2011, at 2:30 p.m. as to Defendants Raymond L. Rogers and David L. Hollis, III is cancelled. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/03/2011)
02/07/2011	39	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: MOTION HEARING as to Raymond L. Rogers, David L.

		Hollis, III, and Shelan D. Peters held on 2/7/2011. Counsel for defendant Peters was present. Defendant Peters was not present. Order to follow. (Court Reporter Jana Hoelscher.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/07/2011)
02/08/2011	40	ORDER granting 32 Motion for Order as to Raymond L. Rogers (1) and David L. Hollis III (2). Signed by District Judge J. Thomas Marten on 2/7/2011. (alm) (Entered: 02/08/2011)
02/08/2011	41	ORDER FOR CONTINUANCE granting 37 Motion to Continue as to Raymond L. Rogers (1) and David L. Hollis III (2). Motions due by 3/11/11. Jury Trial set for 4/19/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference set for 4/6/2011 at 02:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 2/8/2011. (alm) (Entered: 02/08/2011)
03/24/2011	44	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Status conference RE-SET for Monday, April 11, 2011, at 2:00 p.m. This is a rescheduling of the April 6, 2011 hearing. The defendants will not be present for the status conference. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 03/24/2011)
04/07/2011	46	ORDER granting 45 Motion to Continue as to Raymond L. Rogers (1) and David L. Hollis III (2) Status Conference set for 5/11/2011 at 02:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Jury Trial set for 5/24/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 4/7/2011. (adw) (Entered: 04/07/2011)
05/11/2011	47	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 5/11/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 05/11/2011)
05/16/2011	48	MOTION to Continue Jury Trial by Raymond L. Rogers. (McEnulty, Sean) (Entered: 05/16/2011)
05/18/2011	49	ORDER granting 48 Motion to Continue. Time excluded from 5/16/2011 as to Raymond L. Rogers (1) and David L. Hollis, III. A Status Conference/Change of Plea and a Jury Trial date of this case will be scheduled by this Court at a later date. Signed by District Judge J. Thomas Marten on 5/17/2011. (adw) (Entered: 05/18/2011)

05/19/2011	50	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial set for 7/19/2011 at 9:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference set for 7/7/2011 at 2:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 05/19/2011)
06/03/2011	51	ARREST WARRANT returned executed on 12/01/2010 as to Raymond L. Rogers. (aa) (Entered: 06/06/2011)
06/21/2011	54	SUPERSEDING INDICTMENT as to Raymond L. Rogers (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, David L. Hollis, III (2) count(s) 1s, 2s, 3s, Shelan D. Peters (3) count(s) 1s, 2s, 3s. (aa) (Entered: 06/22/2011)
07/06/2011	63	MINUTE ENTRY for proceedings held before Magistrate Judge Karen M. Humphreys: ARRAIGNMENT as to Raymond L. Rogers (1) Count 1s,2s,3s,4s,5s,6s held on 7/6/2011. Defendant's next appearance before Judge Marten as directed. (Tape #1:36-1:39) (aa) (Entered: 07/07/2011)
07/07/2011	64	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 7/7/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 07/07/2011)
07/12/2011	65	MOTION to Continue Jury Trial by Raymond L. Rogers as to Raymond L. Rogers, David L. Hollis, III. (McEnulty, Sean) (Entered: 07/12/2011)
07/14/2011	66	AGREED ORDER CONTINUING JURY TRIAL granting 65 Motion to Continue. Time excluded from 07/14/2011 until 09/13/2011 as to Raymond L. Rogers (1) & David L. Hollis III (2). Jury Trial set for 9/13/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference is continued to 08/31/2011 at 3:00 PM. Signed by District Judge J. Thomas Marten on 7/13/2011. (aa) (Entered: 07/14/2011)
08/25/2011	67	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Status conference RE-SET for 8/31/11 at 1:00 PM in Courtroom 238 before District Judge J. Thomas Marten. THIS IS A TIME CHANGE ONLY. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 08/25/2011)
08/29/2011	68	MOTION to Continue Status Conference and Jury Trial by Raymond L. Rogers. (McEnulty, Sean) (Entered: 08/29/2011)
08/29/2011	69	NOTICE OF CANCELLED HEARING: The status conference set on August 31, 2011, at 1:00 p.m. as to Defendants Raymond L. Rogers and David L. Hollis, III is cancelled. (This is a TEXT ENTRY ONLY. There

		is no.pdf document associated with this entry.) (mss) (Entered: 08/29/2011)
08/30/2011	70	ORDER granting 68 Motion to Continue. Time excluded from 08/30/2011 as to Raymond L. Rogers (1). Signed by District Judge J. Thomas Marten on 8/30/2011. (aa) (Entered: 08/30/2011)
08/30/2011	71	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial RE-SET for 10/25/2011 at 9:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference RE-SET for 10/13/2011 at 3:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 08/30/2011)
09/09/2011	72	ARREST WARRANT on Superseding Indictment returned executed on 12/1/10 as to Raymond L. Rogers (smg) (Entered: 09/09/2011)
09/30/2011	76	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Attachments: # 1 Attachment A, # 2 Attachment B)(Smith, Aaron) (Entered: 09/30/2011)
10/13/2011	77	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 10/13/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 10/13/2011)
10/24/2011	79	ORDER FOR CONTINUANCE granting 78 Motion to Continue. Time excluded from 10/24/2011 until 11/29/2011 as to David L. Hollis III (2). Jury Trial set for 11/29/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 10/24/2011. (aa) (Entered: 10/24/2011)
10/24/2011	80	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III. Status Conference set for 11/14/2011, at 03:00 PM in Courtroom 238 before District Judge J. Thomas Marten. (jlw) (Entered: 10/24/2011)
11/07/2011	81	DEMAND FOR NOTICE OF ALIBI DEFENSE by USA as to Raymond L. Rogers (Smith, Aaron) (Entered: 11/07/2011)
11/07/2011	82	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III (Attachments: # 1 Attachment A)(Smith, Aaron) (Entered: 11/07/2011)
11/08/2011	83	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial RE-SET to commence on Monday, November 28, 2011 at 9:00 AM in Courtroom 238 before District Judge

		J. Thomas Marten. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/08/2011)
11/14/2011	84	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III (Attachments: # 1 Attachment A, # 2 Attachment B)(Smith, Aaron) (Entered: 11/14/2011)
11/14/2011	85	ENTRY OF APPEARANCE on behalf of USA by Lanny D. Welch (Welch, Lanny) (Entered: 11/14/2011)
11/14/2011	86	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 11/14/2011. (Court Reporter Michelle Hancock.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jlw) (Entered: 11/15/2011)
11/21/2011	87	RESPONSE by Raymond L. Rogers (McEnulty, Sean) (Entered: 11/21/2011)
11/28/2011	89	MOTION to Dismiss Indictment *(First Superseding Indictment)* by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 11/28/2011)
11/29/2011	91	ORDER granting 89 Motion to Dismiss Indictment as to Raymond L. Rogers (1), David L. Hollis III (2), Shelan D. Peters (3). Signed by District Judge J. Thomas Marten on 11/28/2011. (aa) (Entered: 11/29/2011)
11/30/2011	93	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: INSTRUCTIONS CONFERENCE as to Raymond L. Rogers held on 11/30/2011. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/30/2011)
11/30/2011	96	MINUTE ORDER by deputy clerk directing that lunch be provided by the clerk to the jury members during their deliberation. Entered by deputy clerk on 11/30/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/30/2011)
12/01/2011	98	JURY INSTRUCTIONS as to Raymond L. Rogers. (mss) (Entered: 12/01/2011)
12/01/2011	99	ORAL MOTION for Acquittal by Raymond L. Rogers. (aa) (Entered: 12/01/2011)
12/01/2011	100	ORDER denying 99 Motion for Acquittal as to Raymond L. Rogers (1). Signed by District Judge J. Thomas Marten on 12/1/2011. (aa) (Entered: 12/01/2011)

12/01/2011	101	WITNESS & EXHIBIT LIST by Raymond L. Rogers. (aa) (Entered: 12/01/2011)
12/01/2011	102	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: JURY TRIAL as to Raymond L. Rogers held on 12/1/2011. Sentencing set for 2/15/2012 at 03:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. All exhibits returned to counsel. Verdict of guilty to counts 1, 2 and 3. (Court Reporter Jana McKinney.) (aa) (Entered: 12/02/2011)
12/01/2011	103	JURY VERDICT as to Raymond L. Rogers (1) Guilty on Counts 1-3. (aa) (Additional attachment(s) added on 3/17/2015: # 1 UNREDACTED version) (cs). (Entered: 12/02/2011)
12/01/2011	104	QUESTIONS FROM THE JURY FILED as to Raymond L. Rogers. (Attachments: # 1 Question 2, # 2 Question 3)(aa) (Additional attachment(s) added on 3/17/2015: # 3 UNREDACTED version) (cs). (Entered: 12/02/2011)
12/02/2011	105	NOTICE OF HEARING as to Defendant Raymond L. Rogers: Sentencing set for 2/15/2012 at 3:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 12/02/2011)
01/26/2012	108	MOTION to Continue Sentencing Date and Motion to Continue The Defendant's Presentence Investigation Reports Response/Objection Date by Raymond L. Rogers. (McEnulty, Sean) (Entered: 01/26/2012)
01/27/2012	109	NOTICE OF HEARING as to Defendant Raymond L. Rogers: Sentencing RE-SET for 4/16/2012 at 10:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 01/27/2012)
01/27/2012	110	ORDER sustaining 108 Motion to Continue as to Raymond L. Rogers (1). See order for details. Signed by District Judge J. Thomas Marten on 1/27/2012. (aa) (Entered: 01/27/2012)
04/04/2012	117	PRESENTENCE INVESTIGATION REPORT as to Raymond L. Rogers **(NOTE: Access to this document is restricted to the USA and this defendant.)** (USPO) (Entered: 04/04/2012)
04/15/2012	118	OBJECTION TO Presentence Report by Raymond L. Rogers (McEnulty, Sean) (Entered: 04/15/2012)
04/16/2012	119	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: SENTENCING HEARING held on 4/16/2012 as to defendant

		Raymond L. Rogers. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 04/16/2012)
04/17/2012	120	JUDGMENT as to Raymond L. Rogers (1): 234 Months Imprisonment (Count 1: 150 months, Count 2: 84 months to run consecutive to counts 1 & 3, Count 3: 120 months to run concurrent to counts 1 & 2); 5 Years Supervised Release (Counts 1 & 3: 3 years each count, to run concurrent to each other, Count 2: 5 years to run concurrent to counts 1 & 3); $300 Assessment. Signed by District Judge J. Thomas Marten on 4/16/2012. (aa) (Entered: 04/17/2012)
04/17/2012	121	STATEMENT OF REASONS as to Raymond L. Rogers re 120 Judgment. **(NOTE: Access to this document is restricted to the USA and this defendant.)** (aa) (Entered: 04/17/2012)
05/01/2012	122	NOTICE OF APPEAL TO 10CCA as to defendant Raymond L. Rogers (McEnulty, Sean) (Entered: 05/01/2012)
05/02/2012	123	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA as to Raymond L. Rogers re 122 Notice of Appeal - Final Judgment. (Attachments: # 1 Preliminary Packet)(aa) (Entered: 05/02/2012)
05/02/2012	124	APPEAL DOCKETED in 10CCA on 05/02/2012 and assigned Appeal No. 12-3125 re 122 Notice of Appeal - Final Judgment filed by Raymond L. Rogers. Transcript order form, designation of record and docketing statement due 05/16/2012 for Raymond L. Rogers. Notice of appearance due on 05/16/2012 for Raymond L. Rogers and United States of America. (aa) (Entered: 05/04/2012)
05/03/2012		APPEAL FEE STATUS: filing fee waived re: Notice of Appeal - Final Judgment 122 on behalf of Defendant Raymond L. Rogers. (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (aa) (Entered: 05/03/2012)
05/17/2012	125	TRANSCRIPT ORDER FORM: Transcript Requested Jury Trial 11/28/11 to 11/30/11 re 122 Notice of Appeal - Final Judgment filed by Raymond L. Rogers (McEnulty, Sean) (Entered: 05/17/2012)
05/17/2012	126	TRANSCRIPT ORDER FORM: Transcript Requested Jury Trial 11/29/11 Morning Only re 122 Notice of Appeal - Final Judgment filed by Raymond L. Rogers (McEnulty, Sean) (Entered: 05/17/2012)
05/24/2012	127	TRANSCRIPT ORDER FORM by Court Reporter Jana McKinney ordering transcripts of Jury Trial re 122 Notice of Appeal - Final

		Judgment filed by Raymond L. Rogers (Appeal No. 12-3125) Transcript due by 7/5/2012. (jlh) (Entered: 05/24/2012)
06/01/2012	128	CERTIFICATE OF FILING OF TRANSCRIPT by Court Reporter Jo Wilkinson (jw) (Entered: 06/01/2012)
06/01/2012	129	TRANSCRIPT of Trial Volume 2 held November 29, 2011, as to Raymond L. Rogers before Judge J. Thomas Marten, Court Reporter Jo Wilkinson, 316-315-4334, jo_wilkinson@ksd.uscourts.gov. Transcript purchased by: Mr. Sean C. McEnulty. Volume: 2. **NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.** Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 8/30/2012. (jw) (Entered: 06/01/2012)
06/05/2012	130	DESIGNATION OF RECORD ON APPEAL by Raymond L. Rogers re 122 Notice of Appeal - Final Judgment (Appeal No. 12-3125) (Attachments: # 1 District Court Docket Sheet)(McEnulty, Sean) (Entered: 06/05/2012)
06/11/2012	131	TRANSCRIPT of Trial Volume 1 held November 28, 2011 as to Raymond L. Rogers before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Sean McEnulty. Volume: 1. **NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.** Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release

		of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 9/10/2012. (jlh) (Entered: 06/11/2012)
06/11/2012	132	TRANSCRIPT of Trial Volume 2B held November 29, 2011 as to Raymond L. Rogers before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Sean McEnulty. Volume: 2B. **NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.** Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 9/10/2012. (jlh) (Entered: 06/11/2012)
06/11/2012	133	TRANSCRIPT of Trial Volume 3 held November 30, 2011 as to Raymond L. Rogers before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Sean McEnulty. Volume: 3. **NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.** Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 9/10/2012. (jlh) (Entered: 06/11/2012)
06/11/2012	134	CERTIFICATE OF FILING OF TRANSCRIPT by Court Reporter Jana McKinney (jlh) (Entered: 06/11/2012)

07/12/2012	135	RECORD ON APPEAL transmitted to 10CCA electronically as to Raymond L. Rogers, Volume(s) 3, re 122 Notice of Appeal - Final Judgment. (Appeal No. 12-3125) (aa) (Entered: 07/12/2012)
09/11/2012	136	TRANSCRIPT ORDER FORM: Transcript Requested Sentencing Proceedings Held on 04/16/12 re 122 Notice of Appeal - Final Judgment filed by Raymond L. Rogers (McEnulty, Sean) (Entered: 09/11/2012)
09/14/2012	137	ORDER of 10CCA as to Raymond L. Rogers re 122 Notice of Appeal - Final Judgment. Order granting leave to supplement the record on appeal. Supplemental record on appeal due 09/24/2012 for Timothy M. O'Brien (KSwi), Clerk of Court. In light of the outstanding transcript, the 9/20/12 due date for the appellant's brief is vacated. Appellant's opening brief shall be served and filed within 30 day of filing of the supplemental record. Served on 09/14/2012. (Appeal No. 12-3125) (aa) (Entered: 09/17/2012)
09/20/2012	138	TRANSCRIPT ORDER FORM by Court Reporter Jana McKinney ordering transcripts of Sentencing re 122 Notice of Appeal - Final Judgment filed by Raymond L. Rogers. (Appeal No. 12-3125) Transcript due by 10/12/2012. (aa) (Entered: 09/21/2012)
10/03/2012	139	TRANSCRIPT of Sentencing held April 16, 2012 as to Raymond L. Rogers before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Sean McEnulty. **NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.** Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 1/2/2013. (jlh) (Entered: 10/03/2012)
10/03/2012	140	CERTIFICATE OF FILING OF TRANSCRIPT by Court Reporter Jana McKinney (jlh) (Entered: 10/03/2012)
10/04/2012	141	SUPPLEMENTAL RECORD ON APPEAL transmitted to 10CCA as to Raymond L. Rogers re 122 Notice of Appeal - Final Judgment. (Appeal No. 12-3125) (aa) (Entered: 10/04/2012)

04/29/2013	142	MANDATE from 10CCA: affirming decision of the District Court as to Raymond L. Rogers. (Appeal No. 12-3125) (Attachments: # 1 Mandate issued letter)(aa) (Entered: 04/29/2013)
06/14/2013	143	MOTION to Withdraw Sean C. McEnulty as Attorney by Raymond L. Rogers. (aa) (Entered: 06/14/2013)
06/14/2013	144	MOTION FOR FREE DOCUMENTS by Raymond L. Rogers. (aa) (Entered: 06/14/2013)
06/19/2013	145	ORDER. Pursuant to the Tenth Circuit's Mandate (Dkt. 142) affirming the district court's verdict, the court denies as moot Motion to Withdraw Sean C. McEnulty (Dkt. 143) and denies as moot Motion for Free Documents as Mr. McEnulty has provided the trial and sentencing transcripts and discovery to Mr. Rogers. Entered by District Judge J. Thomas Marten on 6/19/2013. Mailed to pro se party Raymond L. Rogers by regular mail. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 06/19/2013)
12/02/2013	146	MOTION to Vacate under 28 U.S.C. 2255 by Raymond L. Rogers. (smg) Civil case 6:13-cv-01448-JTM opened. (Entered: 12/03/2013)
12/02/2013	147	MEMORANDUM IN SUPPORT of 146 MOTION to Vacate under 28 U.S.C. 2255 by Raymond L. Rogers as to Raymond L. Rogers. (smg) (Entered: 12/03/2013)
12/16/2013	148	SUPPLEMENT to 146 Motion to Vacate under 28 U.S.C. 2255 by Raymond L. Rogers. (smg) Modified to correct title on 12/16/2013 (smg). (Entered: 12/16/2013)
01/08/2014	149	MOTION for Extension of Time to File Response as to 146 MOTION to Vacate under 28 U.S.C. 2255 by USA as to Raymond L. Rogers . (Welch, Lanny) Modified on 1/9/2014 to correct filing event and text (alm). (Entered: 01/08/2014)
01/09/2014	150	ORDER granting 149 plaintiff's Motion for Extension of Time to February 7, 2014 to respond to Raymond L. Rogers' Motion to Vacate. Signed by District Judge J. Thomas Marten on 1/9/2014. Mailed to pro se party Raymond L. Rogers by regular mail. (mss) (Entered: 01/09/2014)
02/06/2014	151	MOTION for Extension of Time to File Response/Reply *to Def.'s 2255 Motion* by USA as to Raymond L. Rogers. (Brown, James) (Entered: 02/06/2014)
02/06/2014	152	ORDER granting 151 plaintiff's Motion for Extension of Time to March 7, 2014 to respond to defendant Rogers' Motion to Vacate. Signed by

		District Judge J. Thomas Marten on 2/6/2014. Mailed to pro se party Raymond L. Rogers by regular mail. (mss) (Entered: 02/06/2014)
03/06/2014	153	MOTION for Extension of Time to File Response/Reply *to Def.'s 2255 Motion* by USA as to Raymond L. Rogers. (Brown, James) (Entered: 03/06/2014)
03/06/2014	154	ORDER granting 153 government's Motion for Extension of Time to April 7, 2014 to respond to defendant's 2255 motion. Entered by District Judge J. Thomas Marten on 3/6/14. Mailed to pro se party Raymond L. Rogers by regular mail. (mss) (Entered: 03/06/2014)
03/18/2014	155	SUPPLEMENT TO 146 MOTION to Vacate under 28 U.S.C. 2255 by Raymond L. Rogers. (smg) Modified on 3/18/2014 to correct title (aa). (Entered: 03/18/2014)
04/07/2014	156	RESPONSE TO MOTION by USA as to Raymond L. Rogers re 148 MOTION to Vacate under 28 U.S.C. 2255, 146 MOTION to Vacate under 28 U.S.C. 2255, 155 MOTION *to Vacate under 28 U.S.C. 2255* (Attachments: # 1 Exhibit)(Brown, James) (Entered: 04/07/2014)
05/14/2014	157	REPLY TO RESPONSE to Motion by Raymond L. Rogers re 146 MOTION to Vacate under 28 U.S.C. 2255. (smg) (Entered: 05/14/2014)
05/27/2014	158	MOTION to Amend 146 MOTION to Vacate under 28 U.S.C. 2255 filed by Raymond L. Rogers. (smg) (Entered: 05/28/2014)
06/06/2014	159	ORDER. The court grants petitioner Raymond L. Rogers's Motion to Amend (Dkt. 158). No response from the government is necessary. Entered by Chief Judge J. Thomas Marten on 6/6/14. Mailed to pro se party Raymond L. Rogers by regular mail. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 06/06/2014)
10/09/2014	160	MOTION FOR SUMMARY JUDGMENT ON PETITIONER 2255 MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE RULE 56 by Raymond L. Rogers. (aa) (Entered: 10/10/2014)
10/30/2014	161	RESPONSE TO MOTION by USA as to Raymond L. Rogers re 160 MOTION *for Additional Relief* (Welch, Lanny) (Entered: 10/30/2014)
12/09/2014	162	MEMORANDUM AND ORDER denying 146 Motion to Vacate (2255) as to Raymond L. Rogers (1); and denying 160 Motion for Summary Judgment as to Raymond L. Rogers (1). Signed by Chief Judge J. Thomas Marten on 12/9/14. Mailed to pro se party Raymond L. Rogers by regular mail. (mss) Civil Case 6:13-cv-01448-JTM closed. (Entered: 12/09/2014)

12/23/2014	163	MOTION for Certificate of Appealability by Raymond L. Rogers. (aa) (Entered: 12/23/2014)
12/29/2014	164	MEMORANDUM AND ORDER denying 163 Motion for Certificate of Appealability as to Raymond L. Rogers (1). Signed by Chief Judge J. Thomas Marten on 12/29/14. Mailed to pro se party Raymond L. Rogers by regular mail. (mss) (Entered: 12/29/2014)
01/20/2015	165	NOTICE OF APPEAL TO 10CCA by Raymond L. Rogers re 162 Order on Motion to Vacate (2255)(cs) (Entered: 01/21/2015)
01/21/2015	166	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA as to Raymond L. Rogers re 165 Notice of Appeal (Attachments: # 1 Preliminary Packet)(cs) (Entered: 01/21/2015)
01/21/2015	167	APPEAL DOCKETED in 10CCA on 01/21/2015 and assigned Appeal No. 15-3013 re 165 Notice of Appeal filed by Raymond L. Rogers. Fee and entry of appearance are due by 02/20/2015 for Raymond L. Rogers. Notice of appearance due on 02/04/2015 for United States of America. (aa) (Entered: 01/28/2015)
01/28/2015		APPEAL FEE STATUS: filing fee not paid re: Notice of Appeal 165 . (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (aa) (Entered: 01/28/2015)
03/05/2015	168	RECORD ON APPEAL transmitted to 10CCA electronically as to Raymond L. Rogers, Volume 1, re 165 Notice of Appeal. (Appeal No. 15-3013) (aa) (Entered: 03/05/2015)
04/17/2015	169	ORDER of 10CCA DISMISSING APPEAL as to Raymond L. Rogers re 165 Notice of Appeal. (Appeal No. 15-3013) (aa) (Entered: 04/20/2015)
07/21/2015	170	LETTER FROM 10CCA advising petition for writ of certiorari filed re 165 Notice of Appeal ; assigned Supreme Court No. 15-5261 as to Raymond L. Rogers. (Appeal No. 15-3013) (aa) (Entered: 07/22/2015)
08/17/2015	171	MOTION to Produce by Raymond L. Rogers. (aa) (Entered: 08/17/2015)
09/09/2015	172	RESPONSE TO MOTION by USA as to Raymond L. Rogers re 171 MOTION to Produce (Welch, Lanny) (Entered: 09/09/2015)
09/15/2015	173	MEMORANDUM AND ORDER denying 171 Motion to Produce as to Raymond L. Rogers (1). Signed by Chief Judge J. Thomas Marten on 09/14/2015. (aa) (Entered: 09/15/2015)
09/15/2015		NOTICE Re: Pro Se Mailing. Document 173 Order on Motion to Produce mailed on 9/15/2015 to Raymond L. Rogers by regular mail. (aa) (Entered: 09/15/2015)

10/05/2015	174	LETTER FROM 10CCA advising petition for writ of certiorari denied re 165 Notice of Appeal ; assigned Supreme Court No. 15-5261 as to Raymond L. Rogers. (Appeal No. 15-3013) (aa) (Entered: 10/07/2015)
11/06/2015	175	MOTION FOR RELIEF FROM A JUDGMENT OR ORDER by Raymond L. Rogers. (aa) (Entered: 11/06/2015)
11/18/2015	176	ENTRY OF APPEARANCE on behalf of USA by James A. Brown (Brown, James) (Entered: 11/18/2015)
11/20/2015	177	MOTION to Amend/Correct 146 MOTION to Vacate under 28 U.S.C. 2255 filed by Raymond L. Rogers. (aa) (Entered: 11/20/2015)
12/23/2015	178	MEMORANDUM AND ORDER denying 175 Motion for relief from a judgment or order pursuant to Fed. R. Civ. P. 60(b)(4) as to Raymond L. Rogers (1). The court declines to issue a certificate of appealability. Signed by Chief Judge J. Thomas Marten on 12/23/2015. (aa) (Entered: 12/23/2015)
12/23/2015		NOTICE Re: Pro Se Mailing. Document 178 Order on Motion to Vacate, mailed on 12/23/2015 to Raymond L. Rogers by regular mail. (aa) (Entered: 12/23/2015)
01/11/2016	179	MOTION for Reconsideration re 178 MEMORANDUM AND ORDER denying Motion for relief from a Judgment or Order pursuant to Fed. R. Civ. P. 60(b)(4), by Raymond L. Rogers. (sz) Modified on 1/12/2016 to correct docket entry relationship (aa). (Entered: 01/11/2016)
03/08/2016	180	ORDER denying as moot 177 Motion to Amend/Correct as to Raymond L. Rogers (1) Signed by Chief Judge J. Thomas Marten on 03/08/16.Mailed to pro se party Raymond L. Rogers, P.O. Box 3000, Forrest City, AR 72336 by regular mail (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Roach, Joyce) (Entered: 03/08/2016)
03/09/2016	181	ORDER DENYING RECONSIDERATION denying 179 Motion for Reconsideration as to Raymond L. Rogers (1). Signed by Chief Judge J. Thomas Marten on 03/09/2016. (aa) (Entered: 03/09/2016)
03/09/2016		NOTICE Re: Pro Se Mailing. Document 181 Order on Motion for Reconsideration mailed on 3/9/2016 to Raymond Rogers at Forrest City - FCI by regular mail. (aa) (Entered: 03/09/2016)
03/21/2016	182	NOTICE OF APPEAL TO 10CCA by Raymond L. Rogers re 178 Order on Motion to Vacate, 180 Order on Motion to Amend/Correct, 181 Order on Motion for Reconsideration. (aa) (Entered: 03/21/2016)
03/21/2016	183	MOTION for Certificate of Appealability by Raymond L. Rogers. (aa) (Entered: 03/21/2016)

03/21/2016	184	**(NOTE: Access to document is restricted pursuant to the courts privacy policy.)** MOTION for Leave to Appeal In Forma Pauperis by Raymond L. Rogers. (aa) (Entered: 03/21/2016)
03/21/2016	185	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA as to Raymond L. Rogers re 182 Notice of Appeal. (Attachments: # 1 Preliminary Packet)(aa) (Entered: 03/21/2016)
03/22/2016	186	APPEAL DOCKETED in 10CCA on 03/22/2016 and assigned Appeal No. 16-3055 re 182 Notice of Appeal filed by Raymond L. Rogers. Notice of appearance due on 04/21/2016 for Raymond L. Rogers and on 04/05/2016 for United States of America. Order on pending IFP motion due 04/21/2016. (aa) (Entered: 03/25/2016)
03/31/2016	187	ORDER denying 183 Motion for Certificate of Appealability as to Raymond L. Rogers (1); denying 184 Motion for Leave to Appeal In Forma Pauperis as to Raymond L. Rogers (1). Signed by Chief Judge J. Thomas Marten on 03/31/2016. (aa) (Entered: 03/31/2016)
03/31/2016		NOTICE Re: Pro Se Mailing. Document 187 Order on Motion for Certificate of Appealability, Order on Motion for Leave to Appeal In Forma Pauperis mailed on 3/31/2016 to Raymond L. Rogers by regular mail. (aa) (Entered: 03/31/2016)
04/13/2016	188	RECORD ON APPEAL transmitted to 10CCA electronically as to Raymond L. Rogers, Volume(s) 2, re 182 Notice of Appeal. (Appeal No. 16-3055) (aa) (Entered: 04/13/2016)
04/13/2016		NOTICE Re: Pro Se Mailing. Document 188 Record on Appeal Sent to 10CCA mailed on 4/13/2016 to Raymond L. Rogers at Forrest City by regular mail. (aa) (Entered: 04/13/2016)
07/20/2016	189	ORDER DENYING CERTIFICATE OF APPEALABILITY as to Raymond L. Rogers. (Appeal No. 16-3055) (aa) (Entered: 07/25/2016)
11/15/2016	190	LETTER FROM 10CCA advising petition for writ of certiorari filed re 182 Notice of Appeal ; assigned Supreme Court No. 16-6834 as to Raymond L. Rogers. (Appeal No. 16-3055) (aa) (Entered: 11/15/2016)
01/09/2017	191	LETTER FROM 10CCA advising petition for writ of certiorari denied re 182 Notice of Appeal ; assigned Supreme Court No. 16-6834 as to Raymond L. Rogers. (Appeal No. 16-3055) (aa) (Entered: 01/10/2017)
02/28/2017	192	LETTER FROM 10CCA advising re 182 Notice of Appeal ; assigned Supreme Court No. 16-6834 as to Raymond L. Rogers. The Court today entered the following order in the above-entitled case: The petition for rehearing is denied. (Appeal No. 16-3055) (aa) (Entered: 02/28/2017)

03/24/2017	193	LETTER FROM 10CCA as to Raymond L. Rogers re Petition for writ of mandamus filed. c/s: y Fee or ifp forms due for 10th Circuit by 05/02/2017 for Raymond L. Rogers. (Appeal No. 17-3063) (sz) (Entered: 03/24/2017)
04/14/2017	194	ORDER of 10CCA as to Raymond L. Rogers denying petition for writ of mandamus. (Appeal No. 17-3063) (aa) (Entered: 04/18/2017)
05/16/2017	195	LETTER FROM 10CCA advising petition for writ of certiorari filed re 182 Notice of Appeal ; assigned Supreme Court No. 16-9152 as to Raymond L. Rogers. (Appeal No. 17-3063) (aa) (Entered: 05/17/2017)
06/19/2017	196	LETTER FROM 10CCA advising petition for writ of certiorari denied; assigned Supreme Court No. 16-9152 as to Raymond L. Rogers. (Appeal No. 17-3063) (aa) (Entered: 06/20/2017)
10/10/2018	198	SERVICE BY PUBLICATION filed by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. Last publication date August 29, 2018. (Attachments: # 1 Attachment 1)(Gurney, Annette) (Entered: 10/10/2018)
10/10/2018	199	RETURN OF SERVICE of Notice of Forfeiture Served on the FBI as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Gurney, Annette) (Entered: 10/10/2018)
11/19/2018	200	MOTION to Vacate under 28 U.S.C. 2255 by Raymond L. Rogers. (aa) Civil case 6:18-cv-01322-JWB opened. (Entered: 11/20/2018)
11/20/2018		MINUTE ORDER REASSIGNING CASE: Case reassigned to District Judge John W. Broomes as to Raymond L. Rogers for all further proceedings. District Judge J. Thomas Marten no longer assigned to case. Signed by deputy clerk on 11/19/2018. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (aa) (Entered: 11/20/2018)
11/21/2018		NOTICE re Pro Se Mailing: Order Reassigning Case mailed on 11/21/2018 to Raymond L. Rogers at Forrest City FCI by regular mail. (mam) (Entered: 11/21/2018)
12/13/2018	201	MEMORANDUM AND ORDER dismissing 200 Motion to Vacate (2255) for lack of jurisdiction as to Raymond L. Rogers (1). An appeal from a final order on a § 2255 may not be taken absent a certificate of appealability, which may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The court concludes Defendant has failed to make such a showing and accordingly a certificate of appealability is DENIED. Signed by District Judge John W. Broomes on 12/13/2018. Mailed to pro se party Raymond L. Rogers at Forrest City FCI by regular mail. (mam) Civil Case 6:18-cv-01322-JWB closed. (Entered: 12/13/2018)

12/26/2018	202	MOTION for Certificate of Appealability pursuant to USC § 2253(c) by Raymond L. Rogers. (mam) (Entered: 12/26/2018)
01/11/2019	203	NOTICE OF APPEAL TO 10CCA by Raymond L. Rogers re 201 Order on Motion to Vacate (2255). (sz) (Entered: 01/11/2019)
01/11/2019	204	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA as to Raymond L. Rogers re 203 Notice of Appeal. Letter mailed to Defendant by regular USPS mail. (Attachments: # 1 Preliminary Packet)(sz) (Entered: 01/11/2019)
01/11/2019		APPEAL FEE STATUS: filing fee not paid re: Notice of Appeal 203 on behalf of Defendant Raymond L. Rogers. CJA 23 filed on 12/6/2010. Motion to Proceed In Forma Pauperis filed on 3/21/16 but was denied. (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (sz) (Entered: 01/11/2019)
01/11/2019	205	ORDER denying 202 Motion for Certificate of Appealability as to Raymond L. Rogers (1) for reasons previously stated in the court's Memorandum and Order (Doc. 201). Entered by District Judge John W. Broomes on 01/11/2019.Mailed to pro se party Raymond Rogers by regular mail (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jmr) (Entered: 01/11/2019)
01/11/2019	206	APPEAL DOCKETED in 10CCA on 1/11/2019 and assigned Appeal No. 19-3012 re 203 Notice of Appeal filed by Raymond L. Rogers. (mam) (Entered: 01/14/2019)
01/28/2019	207	**(NOTE: Access to document is restricted pursuant to the courts privacy policy.)** MOTION for Leave to Appeal In Forma Pauperis by Raymond L. Rogers. (mam) (Entered: 01/28/2019)
02/20/2019	208	MEMORANDUM AND ORDER denying 207 Motion for Leave to Appeal In Forma Pauperis as to Raymond L. Rogers (1). In accordance with Fed. R. App. P. 24(a)(4), the Clerk of the Court shall immediately notify the parties and the Tenth Circuit Court of Appeals of this order. Pursuant to Fed. R. App. P. 24(a)(5), Defendant may file a motion to proceed on appeal IFP in the Tenth Circuit Court of Appeals within thirty days after service of the aforementioned notice. Signed by District Judge John W. Broomes on 2/20/2019. Mailed to pro se party Raymond L. Rogers at Forrest City FCI by regular mail. (mam) (Entered: 02/20/2019)
02/22/2019	209	RECORD ON APPEAL retrieved by 10CCA as to Raymond L. Rogers re 203 Notice of Appeal. (Appeal No. 19-3012) (This is a TEXT

		ENTRY ONLY. There is no.pdf document associated with this entry.) (mam) (Entered: 02/25/2019)
04/15/2019	210	ORDER of 10CCA DENYING CERTIFICATE OF APPEALABILITY AND DISMISSING APPEAL re 203 Notice of Appeal. (Appeal No. 19-3012) (mam) (Entered: 04/15/2019)

U.S. District Court
DISTRICT OF KANSAS (Wichita)
CRIMINAL DOCKET FOR CASE #: 6:10-cr-10186-JWB-2

Case title: USA v. Rogers et al
Magistrate judge case number: 6:10-mj-06187-KGG

Date Filed: 12/07/2010
Date Terminated: 02/22/2012

Assigned to: District Judge John W. Broomes

Defendant (2)

David L. Hollis, III
TERMINATED: 02/22/2012

represented by **Charles A. O'Hara**
O'Hara & O'Hara, LLC
1223 East First Street
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316-263-5601
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

18:924(c)(1)(A) - Possession of firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (2s)

Disposition

7 years imprisonment, said term to run concurrently to the sentence imposed in Sedgwick County District Court Case No. 10CR623; 3 years supervised release; $100.00 Assessment

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
18:2113(a) - Bank robbery by force or violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (1)	Dismissed
18:2113(a) - Bank robbery and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (1s)	Dismissed
18:924(c)(1)(A) - Possessing and brandishing a firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (2)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (3)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (3s)	Dismissed

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
18:2113(a) - Bank robbery; 18:924(c)(1)(A) - Possession and brandishing a firearm in furtherance of a crime of violence, and 18:2 - Aiding and abetting.	

Plaintiff

USA

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/03/2010	1	COMPLAINT as to Raymond L. Rogers (1), David L. Hollis, III (2), Shelan D. Peters (3). (adw) [6:10-mj-06187-KGG] (Entered: 12/03/2010)
12/06/2010	2	ENTRY OF APPEARANCE: by attorney Charles A. O'Hara appearing for David L. Hollis, III (O'Hara, Charles) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010		ARREST of David L. Hollis, III. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	7	MINUTE ENTRY for proceedings held before Magistrate Judge Kenneth G. Gale: RULE 5/INITIAL APPEARANCE as to David L. Hollis, III held on 12/6/2010. Detention Hearing set for 12/10/2010 at 01:30 PM in Courtroom 406 (KGG) before Magistrate Judge Kenneth G. Gale. Preliminary Hearing set for 12/20/2010 at 09:00 AM in Courtroom 406 (KGG) before Magistrate Judge Kenneth G. Gale. (Tape #1:39-1:45.) (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/06/2010	8	ORDER OF TEMPORARY DETENTION as to David L. Hollis, III. Signed by Magistrate Judge Kenneth G. Gale on 12/6/10. (alm) [6:10-mj-06187-KGG] (Entered: 12/06/2010)
12/07/2010	11	Arrest WARRANT returned executed on 12/6/2010 as to David L. Hollis, III. (adw) [6:10-mj-06187-KGG] (Entered: 12/08/2010)
12/07/2010	12	INDICTMENT as to Raymond L. Rogers (1) count(s) 1, 2, 3, David L. Hollis, III (2) count(s) 1, 2, 3, Shelan D. Peters (3) count(s) 1, 2, 3. (aa) (Entered: 12/08/2010)
12/07/2010	13	NOTICE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (aa) (Entered: 12/08/2010)
12/10/2010	19	ORDER OF DETENTION PENDING TRIAL as to David L. Hollis, III. Signed by Magistrate Judge Kenneth G. Gale on 12/10/2010. (aa) (Entered: 12/10/2010)
12/10/2010	20	MINUTE ENTRY for proceedings held before Magistrate Judge Kenneth G. Gale: ARRAIGNMENT as to David L. Hollis III (2) Count 1,2,3 held on 12/10/2010. DETENTION HEARING as to David L. Hollis, III held on 12/10/2010. The court granted the government's

		motion for detention. Defendant's next appearance per scheduling order before Judge Marten. (Tape #2:17-2:28.) (adw) (Entered: 12/13/2010)
12/14/2010	24	GENERAL ORDER OF DISCOVERY & SCHEDULING as to Raymond L. Rogers, David L. Hollis, III, and Shelan D. Peters: Jury Trial set for 2/15/2011 at 9:00 AM in Courtroom 238 before District Judge J. Thomas Marten. Status Conference set for 2/3/2011 at 2:30 PM in Courtroom 238 before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 12/14/10. (mss) (Entered: 12/14/2010)
01/21/2011	32	MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 01/21/2011)
01/24/2011	33	NOTICE OF HEARING re: 32 MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation: Responses shall be filed no later than February 4, 2011. A hearing is set for 2/7/11 at 1:30 p.m. in Courtroom 238 before District Judge J. Thomas Marten. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 01/24/2011)
01/27/2011	35	DEMAND FOR NOTICE OF ALIBI DEFENSE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Smith, Aaron) (Entered: 01/27/2011)
02/02/2011	37	Joint MOTION to Continue time to file Defendants' Motions, Status Conference and Jury Trial by David L. Hollis, III. (O'Hara, Charles) (Entered: 02/02/2011)
02/03/2011	38	NOTICE OF CANCELLED HEARING: The status conference set on February 3, 2011, at 2:30 p.m. as to Defendants Raymond L. Rogers and David L. Hollis, III is cancelled. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/03/2011)
02/07/2011	39	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: MOTION HEARING as to Raymond L. Rogers, David L. Hollis, III, and Shelan D. Peters held on 2/7/2011. Counsel for defendant Peters was present. Defendant Peters was not present. Order to follow. (Court Reporter Jana Hoelscher.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/07/2011)
02/08/2011	40	ORDER granting 32 Motion for Order as to Raymond L. Rogers (1) and David L. Hollis III (2). Signed by District Judge J. Thomas Marten on 2/7/2011. (alm) (Entered: 02/08/2011)

02/08/2011	41	ORDER FOR CONTINUANCE granting 37 Motion to Continue as to Raymond L. Rogers (1) and David L. Hollis III (2). Motions due by 3/11/11. Jury Trial set for 4/19/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference set for 4/6/2011 at 02:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 2/8/2011. (alm) (Entered: 02/08/2011)
03/11/2011	42	MOTION to Continue Time to File Defendant's Motions by David L. Hollis, III. (O'Hara, Charles) (Entered: 03/11/2011)
03/16/2011	43	ORDER granting 42 Motion to Continue as to Raymond L. Rogers (1) and David L. Hollis, III (2): Motions due by 3/25/2011. Signed by District Judge J. Thomas Marten on 3/16/2011. (alm) (Entered: 03/16/2011)
03/24/2011	44	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Status conference RE-SET for Monday, April 11, 2011, at 2:00 p.m. This is a rescheduling of the April 6, 2011 hearing. The defendants will not be present for the status conference. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 03/24/2011)
04/06/2011	45	MOTION to Continue Status Conference and Jury Trial by David L. Hollis, III. (O'Hara, Charles) (Entered: 04/06/2011)
04/07/2011	46	ORDER granting 45 Motion to Continue as to Raymond L. Rogers (1) and David L. Hollis III (2) Status Conference set for 5/11/2011 at 02:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Jury Trial set for 5/24/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 4/7/2011. (adw) (Entered: 04/07/2011)
05/11/2011	47	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 5/11/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 05/11/2011)
05/18/2011	49	ORDER granting 48 Motion to Continue. Time excluded from 5/16/2011 as to Raymond L. Rogers (1) and David L. Hollis, III. A Status Conference/Change of Plea and a Jury Trial date of this case will be scheduled by this Court at a later date. Signed by District Judge J. Thomas Marten on 5/17/2011. (adw) (Entered: 05/18/2011)
05/19/2011	50	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial set for 7/19/2011 at 9:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status

		Conference set for 7/7/2011 at 2:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 05/19/2011)
06/21/2011	54	SUPERSEDING INDICTMENT as to Raymond L. Rogers (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, David L. Hollis, III (2) count(s) 1s, 2s, 3s, Shelan D. Peters (3) count(s) 1s, 2s, 3s. (aa) (Entered: 06/22/2011)
07/07/2011	64	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 7/7/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 07/07/2011)
07/12/2011	65	MOTION to Continue Jury Trial by Raymond L. Rogers as to Raymond L. Rogers, David L. Hollis, III. (McEnulty, Sean) (Entered: 07/12/2011)
07/14/2011	66	AGREED ORDER CONTINUING JURY TRIAL granting 65 Motion to Continue. Time excluded from 07/14/2011 until 09/13/2011 as to Raymond L. Rogers (1) & David L. Hollis III (2). Jury Trial set for 9/13/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference is continued to 08/31/2011 at 3:00 PM. Signed by District Judge J. Thomas Marten on 7/13/2011. (aa) (Entered: 07/14/2011)
08/25/2011	67	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Status conference RE-SET for 8/31/11 at 1:00 PM in Courtroom 238 before District Judge J. Thomas Marten. THIS IS A TIME CHANGE ONLY. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 08/25/2011)
08/29/2011	69	NOTICE OF CANCELLED HEARING: The status conference set on August 31, 2011, at 1:00 p.m. as to Defendants Raymond L. Rogers and David L. Hollis, III is cancelled. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 08/29/2011)
08/30/2011	70	ORDER granting 68 Motion to Continue. Time excluded from 08/30/2011 as to Raymond L. Rogers (1). Signed by District Judge J. Thomas Marten on 8/30/2011. (aa) (Entered: 08/30/2011)
08/30/2011	71	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial RE-SET for 10/25/2011 at 9:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Status Conference RE-SET for 10/13/2011 at 3:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 08/30/2011)

09/09/2011	73	ARREST WARRANT returned executed on 12/1/2010 as to David L. Hollis, III (smg) (Entered: 09/13/2011)
09/30/2011	76	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Attachments: # 1 Attachment A, # 2 Attachment B)(Smith, Aaron) (Entered: 09/30/2011)
10/13/2011	77	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 10/13/2011. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 10/13/2011)
10/20/2011	78	MOTION to Continue Jury Trial by David L. Hollis, III. (O'Hara, Charles) (Entered: 10/20/2011)
10/24/2011	79	ORDER FOR CONTINUANCE granting 78 Motion to Continue. Time excluded from 10/24/2011 until 11/29/2011 as to David L. Hollis III (2). Jury Trial set for 11/29/2011 at 09:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 10/24/2011. (aa) (Entered: 10/24/2011)
10/24/2011	80	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III. Status Conference set for 11/14/2011, at 03:00 PM in Courtroom 238 before District Judge J. Thomas Marten. (jlw) (Entered: 10/24/2011)
11/07/2011	82	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III (Attachments: # 1 Attachment A)(Smith, Aaron) (Entered: 11/07/2011)
11/08/2011	83	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III: Jury Trial RE-SET to commence on Monday, November 28, 2011 at 9:00 AM in Courtroom 238 before District Judge J. Thomas Marten. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/08/2011)
11/14/2011	84	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III (Attachments: # 1 Attachment A, # 2 Attachment B)(Smith, Aaron) (Entered: 11/14/2011)
11/14/2011	85	ENTRY OF APPEARANCE on behalf of USA by Lanny D. Welch (Welch, Lanny) (Entered: 11/14/2011)
11/14/2011	86	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 11/14/2011. (Court Reporter Michelle Hancock.)

		(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jlw) (Entered: 11/15/2011)
11/22/2011	88	NOTICE OF HEARING as to Defendant David L. Hollis, III: Change of Plea Hearing set for 11/29/2011 at 4:00 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 11/22/2011)
11/28/2011	89	MOTION to Dismiss Indictment *(First Superseding Indictment)* by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 11/28/2011)
11/29/2011	90	NOTICE OF HEARING as to Defendant David L. Hollis, III: Change of plea hearing RE-SET for 11/29/11 at 3:00 PM in Courtroom 238 before District Judge J. Thomas. NOTE: THIS IS A TIME CHANGE ONLY. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/29/2011)
11/29/2011	91	ORDER granting 89 Motion to Dismiss Indictment as to Raymond L. Rogers (1), David L. Hollis III (2), Shelan D. Peters (3). Signed by District Judge J. Thomas Marten on 11/28/2011. (aa) (Entered: 11/29/2011)
11/29/2011	92	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: CHANGE OF PLEA HEARING as to David L. Hollis, III held on 11/29/2011. Defendant entered a plea of guilty to Count 2 of the First Superseding Indictment. Sentencing set for 2/15/2012 at 2:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/29/2011)
11/29/2011	94	PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA as to David L. Hollis III (2) Count 2. Signed by District Judge J. Thomas Marten on 11/29/2011. (aa) (Entered: 11/30/2011)
11/29/2011	95	PLEA AGREEMENT as to David L. Hollis, III re 94 Petition and Order to Enter Plea of Guilty. (aa) (Entered: 11/30/2011)
11/30/2011	97	NOTICE OF HEARING as to Defendant David L. Hollis, III: Sentencing set for 2/15/2012 at 2:30 PM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 11/30/2011)
02/02/2012	111	PRESENTENCE INVESTIGATION REPORT as to David L. Hollis, III **(NOTE: Access to this document is restricted to the USA and this defendant.)** (USPO) (Entered: 02/02/2012)

02/15/2012	112	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: SENTENCING HEARING held on 2/15/2012 as to defendant David L. Hollis, III. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/15/2012)
02/22/2012	113	ORDER NUNC PRO TUNC as to David L. Hollis, III. The Court hereby corrects its earlier Order (Dkt. No. 91), so that the First Superseding Indictment was dismissed as to Mr. Rogers only, and not Mr. Hollis. Signed by District Judge J. Thomas Marten on 2/17/2012. (alm) (Entered: 02/22/2012)
02/22/2012	114	JUDGMENT as to David L. Hollis, III (2): Counts 1, 1s, 2, 3 and 3s are dismissed; Count 2s = 7 years imprisonment, said term to run concurrently to the sentence imposed in Sedgwick County District Court Case No. 10CR623; 3 years supervised release; $100.00 Assessment. Signed by District Judge J. Thomas Marten on 2/16/2012. (alm) (Entered: 02/22/2012)
02/22/2012	115	STATEMENT OF REASONS as to David L. Hollis, III re 114 Judgment. **(NOTE: Access to this document is restricted to the USA and this defendant.)** (alm) (Entered: 02/22/2012)
03/26/2012	116	JUDGMENT RETURNED EXECUTED as to David L. Hollis, III on 3/15/2012. (smg) (Entered: 03/27/2012)
01/18/2018		MINUTE ORDER REASSIGNING CASE as to David L. Hollis, III: Case reassigned to District Judge Eric F. Melgren for all further proceedings. District Judge J. Thomas Marten no longer assigned to case. Signed by deputy clerk on 1/18/2018. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mam) (Entered: 01/18/2018)
04/18/2018	197	MINUTE ORDER REASSIGNING CASE: Case reassigned to District Judge John W. Broomes for all further proceedings. District Judge Eric F. Melgren no longer assigned to case. Signed by deputy clerk on 4/18/18. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (cs) (Entered: 04/18/2018)
10/10/2018	198	SERVICE BY PUBLICATION filed by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. Last publication date August 29, 2018. (Attachments: # 1 Attachment 1)(Gurney, Annette) (Entered: 10/10/2018)

10/10/2018	199	RETURN OF SERVICE of Notice of Forfeiture Served on the FBI as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Gurney, Annette) (Entered: 10/10/2018)

U.S. District Court
DISTRICT OF KANSAS (Wichita)
CRIMINAL DOCKET FOR CASE #: 6:10-cr-10186-JTM-3

Case title: USA v. Rogers et al
Magistrate judge case number: 6:10-mj-06187-KGG

Date Filed: 12/07/2010
Date Terminated: 07/06/2011

Assigned to: District Judge J. Thomas Marten

Defendant (3)

Shelan D. Peters
TERMINATED: 07/06/2011

represented by **Timothy J. Henry**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Public Defender or Community Defender Appointment

Pending Counts

18:2113(a) - Bank robbery by force or violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010)
(1)

Disposition

97 Months Imprisonment (to run concurrent to the revocation sentence imposed in USDC case no. 02-cr-10147-01); 3 Years Supervised Release; $100 Assessment

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
18:2113(a) - Bank robbery and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (1s)	Dismissed
18:924(c)(1)(A) - Possessing and brandishing a firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (2)	Dismissed
18:924(c)(1)(A) - Possession of firearm in furtherance of a crime of violence and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (2s)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (INDICTMENT 12/07/2010) (3)	Dismissed
18:922(g)(1) and 924(a)(2) - Felon in possession of a firearm and 18:2 - Aiding and abetting (SUPERSEDING INDICTMENT 06/21/2011) (3s)	Dismissed

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
18:2113(a) - Bank robbery; 18:924(c)(1)(A) - Possession and brandishing a firearm in furtherance of a crime of violence, and 18:2 - Aiding and abetting.	

Plaintiff

USA

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/03/2010	1	COMPLAINT as to Raymond L. Rogers (1), David L. Hollis, III (2), Shelan D. Peters (3). (adw) [6:10-mj-06187-KGG] (Entered: 12/03/2010)
12/07/2010	12	INDICTMENT as to Raymond L. Rogers (1) count(s) 1, 2, 3, David L. Hollis, III (2) count(s) 1, 2, 3, Shelan D. Peters (3) count(s) 1, 2, 3. (aa) (Entered: 12/08/2010)
12/07/2010	13	NOTICE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (aa) (Entered: 12/08/2010)
12/08/2010		ARREST of Shelan D. Peters. (alm) (Entered: 12/09/2010)
12/08/2010	14	MINUTE ENTRY for proceedings held before Magistrate Judge Kenneth G. Gale: RULE 5/INITIAL APPEARANCE as to Shelan D. Peters held on 12/8/2010. ARRAIGNMENT as to Shelan D. Peters (3) Count 1,2,3 held on 12/8/2010. Defendant signed a Waiver of Detention Hearing. Court granted Defendant's oral request and ordered Marshal's service to communicate with counsel regarding Defendant's condition. Defendant't next appearance per the Scheduling Order before Judge Marten. (Court Reporter Jana Hoelscher.) (alm) (Entered: 12/09/2010)
12/08/2010	15	WAIVER OF DETENTION HEARING by Shelan D. Peters. (alm) (Entered: 12/09/2010)
12/08/2010	16	CJA 23 FINANCIAL AFFIDAVIT by Shelan D. Peters. (alm) (Entered: 12/09/2010)
12/09/2010	17	Arrest WARRANT returned executed on 12/7/2010 as to Shelan D. Peters. (adw) (Entered: 12/10/2010)
12/09/2010	18	Arrest WARRANT returned executed on 12/7/2010 as to Shelan D. Peters. (adw) (Entered: 12/10/2010)
12/14/2010	23	ENTRY OF APPEARANCE: by attorney Timothy J. Henry appearing for Shelan D. Peters (Henry, Timothy) (Entered: 12/14/2010)
12/14/2010	24	GENERAL ORDER OF DISCOVERY & SCHEDULING as to Raymond L. Rogers, David L. Hollis, III, and Shelan D. Peters: Jury

		Trial set for 2/15/2011 at 9:00 AM in Courtroom 238 before District Judge J. Thomas Marten. Status Conference set for 2/3/2011 at 2:30 PM in Courtroom 238 before District Judge J. Thomas Marten. Signed by District Judge J. Thomas Marten on 12/14/10. (mss) (Entered: 12/14/2010)
12/15/2010	25	SEALED MOTION for Leave to File Under Seal by Shelan D. Peters. (Attachments: # 1 Proposed Sealed Document)(Henry, Timothy) (Entered: 12/15/2010)
12/15/2010	26	ORDER granting 25 Sealed Motion for Leave to File Under Seal. Counsel is directed to file forthwith the requested document(s) with an event from the SEALED DOCUMENTS category as to Shelan D. Peters (3). Entered by District Judge J. Thomas Marten on 12/15/10. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 12/15/2010)
12/15/2010	27	SEALED MOTION by Shelan D. Peters. (Henry, Timothy) (Entered: 12/15/2010)
12/16/2010	28	SEALED ORDER granting 27 Sealed Motion as to Shelan D. Peters (3). Signed by District Judge J. Thomas Marten on 12/16/10. (alm) (Entered: 12/16/2010)
01/21/2011	32	MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 01/21/2011)
01/24/2011	33	NOTICE OF HEARING re: 32 MOTION for order Granting Authority to Consume Physical Evidence in Furtherance of the Investigation: Responses shall be filed no later than February 4, 2011. A hearing is set for 2/7/11 at 1:30 p.m. in Courtroom 238 before District Judge J. Thomas Marten. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 01/24/2011)
01/27/2011	34	MOTION to Sever Defendant, MOTION to Continue Pre-trial Motion Deadline, Status Conference and Jury Trial by Shelan D. Peters. (Henry, Timothy) (Entered: 01/27/2011)
01/27/2011	35	DEMAND FOR NOTICE OF ALIBI DEFENSE by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Smith, Aaron) (Entered: 01/27/2011)
01/31/2011	36	ORDER TO SEVER AND CONTINUE granting 34 Motion to Sever Defendant as to Shelan D. Peters (3); granting 34 Motion to Continue as to Shelan D. Peters (3). The deadline for filing pre-trial motions, the status conference and the jury trial are continued to a later date to be

		determined by the Court. Signed by District Judge J. Thomas Marten on 1/31/2011. (alm) (Entered: 01/31/2011)
02/07/2011	39	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: MOTION HEARING as to Raymond L. Rogers, David L. Hollis, III, and Shelan D. Peters held on 2/7/2011. Counsel for defendant Peters was present. Defendant Peters was not present. Order to follow. (Court Reporter Jana Hoelscher.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/07/2011)
06/15/2011	52	NOTICE OF HEARING as to Defendant Shelan D. Peters: Change of Plea Hearing set for 7/5/2011 at 10:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (mss) (Entered: 06/15/2011)
06/17/2011	53	NOTICE OF HEARING as to Defendant Shelan D. Peters: Change of Plea Hearing and Sentencing RE-SET for 7/5/2011 at 11:00 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. PLEASE NOTE TIME CHANGE. (mss) (Entered: 06/17/2011)
06/21/2011	54	SUPERSEDING INDICTMENT as to Raymond L. Rogers (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, David L. Hollis, III (2) count(s) 1s, 2s, 3s, Shelan D. Peters (3) count(s) 1s, 2s, 3s. (aa) (Entered: 06/22/2011)
06/30/2011	55	PRESENTENCE INVESTIGATION REPORT as to Shelan D. Peters **(NOTE: Access to this document is restricted to the USA and this defendant.)** (USPO) (Entered: 06/30/2011)
07/01/2011	56	ARREST WARRANT returned executed on 6/22/2011 as to Shelan D. Peters. (smg) (Entered: 07/01/2011)
07/05/2011	57	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: CHANGE OF PLEA HEARING as to Shelan D. Peters held on 7/5/2011. Defendant entered a plea of guilty to Count 1 of the Indictment. Sentencing set for 7/5/2011 at 11:45 AM in Courtroom 238 (JTM) before District Judge J. Thomas Marten. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 07/05/2011)
07/05/2011	58	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: SENTENCING HEARING held on 7/5/2011 as to defendant Shelan D. Peters. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 07/05/2011)

07/05/2011	59	PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA as to Shelan D. Peters (3): Count 1. Signed by District Judge J. Thomas Marten on 7/5/2011. (aa) (Entered: 07/05/2011)
07/05/2011	60	PLEA AGREEMENT as to Shelan D. Peters re 59 Petition and Order to Enter Plea of Guilty. (aa) (Entered: 07/05/2011)
07/06/2011	61	JUDGMENT as to Shelan D. Peters (3): Count 1 = 97 Months Imprisonment (to run concurrent to the revocation sentence imposed in USDC case no. 02-cr-10147-01); 3 Years Supervised Release; $100 Assessment; Count(s) 1s, 2, 2s, 3, 3s, Dismissed. Signed by District Judge J. Thomas Marten on 7/6/2011. (aa) (Entered: 07/06/2011)
07/06/2011	62	STATEMENT OF REASONS as to Shelan D. Peters re 61 Judgment. **(NOTE: Access to this document is restricted to the USA and this defendant.)** (aa) (Entered: 07/06/2011)
09/19/2011	74	MOTION for Forfeiture of Property *and for Preliminary Order of Forfeiture* by USA as to Shelan D. Peters. (Gurney, Annette) (Entered: 09/19/2011)
09/19/2011	75	PRELIMINARY ORDER OF FORFEITURE granting 74 plaintiff's Motion for Forfeiture of Property as to Shelan D. Peters (3). Signed by District Judge J. Thomas Marten on 9/19/2011. (mss) (Entered: 09/19/2011)
09/30/2011	76	NOTICE OF EXPERT TESTIMONY pursuant to Rule 16(a)(1)(G) by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Attachments: # 1 Attachment A, # 2 Attachment B)(Smith, Aaron) (Entered: 09/30/2011)
10/24/2011	80	NOTICE OF HEARING as to Defendants Raymond L. Rogers and David L. Hollis, III. Status Conference set for 11/14/2011, at 03:00 PM in Courtroom 238 before District Judge J. Thomas Marten. (jlw) (Entered: 10/24/2011)
11/14/2011	86	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: STATUS CONFERENCE as to Raymond L. Rogers and David L. Hollis, III held on 11/14/2011. (Court Reporter Michelle Hancock.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jlw) (Entered: 11/15/2011)
11/28/2011	89	MOTION to Dismiss Indictment *(First Superseding Indictment)* by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. (Smith, Aaron) (Entered: 11/28/2011)

11/29/2011	91	ORDER granting 89 Motion to Dismiss Indictment as to Raymond L. Rogers (1), David L. Hollis III (2), Shelan D. Peters (3). Signed by District Judge J. Thomas Marten on 11/28/2011. (aa) (Entered: 11/29/2011)
10/10/2018	198	SERVICE BY PUBLICATION filed by USA as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters. Last publication date August 29, 2018. (Attachments: # 1 Attachment 1)(Gurney, Annette) (Entered: 10/10/2018)
10/10/2018	199	RETURN OF SERVICE of Notice of Forfeiture Served on the FBI as to Raymond L. Rogers, David L. Hollis, III, Shelan D. Peters (Gurney, Annette) (Entered: 10/10/2018)
06/17/2019	211	MOTION for *Final Order of* Forfeiture of Property by USA as to Shelan D. Peters. (Gurney, Annette) (Entered: 06/17/2019)
06/20/2019	212	FINAL ORDER OF FORFEITURE granting 211 Motion for A Final Order of Forfeiture as to Shelan D. Peters (3). Signed by District Judge John W. Broomes on 6/20/2019. (mam) (Entered: 06/20/2019)

Appendix (D)

FIRST SUPERSEDING INDICTMENT

APPENDIX (D)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
	)	
v.	)	No. 10-10186 -01, 02, 03- JTM
	)	
RAYMOND L. ROGERS,	)	
DAVID L. HOLLIS III, and	)	
SHELAN D. PETERS	)	
	)	
Defendants.	)	

FIRST SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about December 1, 2010, in the District of Kansas, the defendants,

RAYMOND L. ROGERS,
DAVID L. HOLLIS III, and
SHELAN D. PETERS,

by force, violence, and intimidation did take from the person or presence of another, money, namely 102,743.00 United States Currency, belonging to, and in the care, custody, control, management, and possession of, the Equity Bank in Wichita, Kansas, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Section 2113(a) and Section 2.

COUNT TWO

On or about December 1, 2010, in the District of Kansas, the defendants,

RAYMOND L. ROGERS,
DAVID L. HOLLIS III, and
SHELAN D. PETERS,

did knowingly possess firearms and brandish firearms, to wit: a Intratec Luger 9mm handgun, and a Bersa Thunder .380 handgun, in furtherance of a crime of violence for which they may be prosecuted in a court of the United States, to wit: Bank Robbery in violation of Title 21, United States Code, Section 2113(a).

In violation of Title 18, United States Code, Section 924(c)(1)(A) and Section 2.

COUNT THREE

On or about December 1, 2010, in the District of Kansas, the defendants,

RAYMOND L. ROGERS,
DAVID L. HOLLIS III, and
SHELAN D. PETERS,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, firearms, to wit: a Intratec Luger 9mm handgun, and a Bersa Thunder .380 handgun, said firearm having been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) and Section 2.

COUNT FOUR

On or about November 15, 2010, in the District of Kansas, the defendant,

RAYMOND L. ROGERS,

by force, violence, and intimidation did take from the person or presence of another, money, namely $117,141.00 United States Currency, belonging to, and in the care, custody, control, management, and possession of, the Sunflower Bank in Wichita, Kansas, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Section 2113(a) and Section 2.

COUNT FIVE

On or about November 15, 2010, in the District of Kansas, the defendant,

RAYMOND L. ROGERS,

did knowingly possess firearms and otherwise use firearms, to wit: Intratec Tec 22 .22 caliber handgun, and a Modesa F.T. .22 caliber revolver, in furtherance of a crime of violence for which they may be prosecuted in a court of the United States, to wit: Bank Robbery in violation of Title 21, United States Code, Section 2113(a).

In violation of Title 18, United States Code, Section 924(c)(1)(A) and Section 2.

COUNT SIX

On or about November 15, 2010, in the District of Kansas, the defendant,

RAYMOND L. ROGERS,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, firearms, to wit: a Intratec Tec 22 .22 caliber handgun, and a Modesa F.T. .22 caliber revolver, said firearm having been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) and Section 2.

FORFEITURE NOTICE

Upon conviction of the offense in Count One, the defendants, RAYMOND L. **ROGERS, DAVID L. HOLLIS III**, and **SHELAN D. PETERS**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offense, including, but not limited to:

a) a Intratec Luger 9mm handgun,

b) a Bersa Thunder .380 handgun.

All pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

Upon conviction of the offense in Count Four, the defendants, **RAYMOND L. ROGERS**, and **SHELAN D. PETERS**, shall forfeit to the United States, pursuant to

Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offense, including, but not limited to:

a) a Intratec Tec 22, .22 caliber handgun,

b) a Modesa F.T., .22 caliber revolver.

All pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

A TRUE BILL

June 21, 2011
DATE

s/Foreperson
FOREMAN OF THE GRAND JURY

s/ Barry R. Grissom
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KS. S. Ct. No. 10866

(It is requested that trial be held in Wichita, Kansas.)

Appendix (E)

JURY INSTRUCTION NO. 18

"Constructive Amendment Violation Error"

APPENDIX (E)

INSTRUCTION NO. 18

Raymond L. Rogers is charged in Count I with a violation of 18 U.S.C. section 2113(a).

This law makes it a crime to take from a person by force, violence, and intimidation any money in the possession of a federally insured bank, and in the process of so doing, to put in jeopardy the life of any person by the use of a dangerous weapon or device.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt.

First: the defendant intentionally took money from the person;

Second: the money belonged to or was in the possession of a federally insured bank at the time of the taking;

Third: the defendant took the money by means of force and violence or intimidation; and

Fourth: the defendant put some person's life in jeopardy by the use of a dangerous weapon or device, while engaged in the taking of the money.

A "federally insured bank" means any bank with deposits insured by the Federal Deposit Insurance Corporation.

To take "by means of intimidation" is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it

necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property accompanied by intentional, intimidating behavior on the part of the defendant.

A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.

To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means to expose someone else to a risk of death by the use of a dangerous weapon or device.

Appendix (F)

UNITED STATES GOVERNMENT'S ADMISSION

THAT THE KANSAS DISTRICT COURT ALLOWED

PETITIONER TO BE CONVICTED OF AN

OFFENSE NO GRAND JURY CHARGED HIM WITH VIOLATING

APPENDIX (F)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Respondent/Plaintiff,	)	
Vs.	)	No. 10-10186-01-JTM
	)	13-CV-1448-JTM
RAYMOND L. ROGERS, Movant/Defendant.	)	

GOVERNMENT'S RESONSE TO DEFENDANT'S MOTION UNDER § 2255 TO VACATE, SET ASIDE, OR CORRECT

COMES NOW the plaintiff, the United States of America, by and through Barry R. Grissom, United States Attorney for the District of Kansas, and James A. Brown, Assistant United States Attorney for said District, and hereby responds to the defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 146) and his Motion to Supplement his § 2255 Motion (Doc. 148).

I. Statement of the Case

On June 21, 2011, the Wichita, Kansas grand jury charged the defendant in an Indictment with bank robbery, in violation of 18 U.S.C. § 2113(a) (Count 1); possessing and brandishing a firearm in furtherance of the bank robbery alleged in

Count 1, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 2); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 3). (Doc. 12, Indictment.) On December 1, 2011, a jury convicted the defendant on all counts. (Doc. 103, Verdict.) On April 16, 2012, this Court sentenced him 150 months on Count 1; 84 months on Count 2, to run consecutively with Counts 1 and 3; and 120 months on Count 3, to run concurrently with Counts 1 and 2. (Doc. 120, J. at 1-2.) He timely filed his Notice of Appeal on May 1, 2012. (Doc. 122, Not. of Appeal.)

The defendant directly appealed his conviction on Count 1 and his sentence to the United States Court of Appeals for the Tenth Circuit. *See United States v. Rogers*, 520 Fed. Appx. 727 (10th Cir. 2013). That court affirmed his conviction and sentence on April 5, 2013. *Id.* He did not file a petition for writ of certiorari with the United States Supreme Court.

On December 2, 2013, he filed a Motion to Vacate, Set Aside or Correct a Sentence or Conviction by a Person in Federal Custody; on December 16, 2013, he filed a Motion to Supplement his December 2, 2013 motion; on March 18, 2014, he filed another Motion to Supplement his § 2255 motion. (*See* Doc. 145, Def.'s § 2255 Mot.; Doc. 148, Def.'s Supp; Doc. 155, Def.'s 2nd Supp.) He filed all of these motions within the applicable statute of limitations. *See* 28 U.S.C. § 2255(f)(1) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . . the date on which the judgment of conviction becomes final.").

II. Legal Standards for Ineffective Assistance of Counsel

A successful claim of ineffective assistance of counsel must meet the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that his counsel's performance was deficient in that it "fell below an objective standard of reasonableness." *Id.* at 688. To meet this first prong, a defendant must demonstrate that the omissions of his counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. This standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Strategic or tactical decisions on the part of counsel are presumed correct, *Strickland*, 466 U.S. at 689, unless they were "completely unreasonable, not merely wrong, so that [they] bear no relationship to a possible defense strategy," *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (quotation and citations omitted) (alteration in *Fox*).

In all events, judicial scrutiny of the adequacy of attorney performance must be strongly deferential: "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, the reasonableness of the challenged conduct must be evaluated from counsel's perspective at the time of the alleged error; "every effort should be made to 'eliminate the distorting effects of hindsight.'" *Edens v. Hannigan*, 87 F.3d 1109, 1114 (10th Cir. 1996) (quoting *Strickland*, 466 U.S. at 689)).

Second, a defendant must also show that his counsel's deficient performance actually prejudiced his defense. *Strickland*, 466 U.S. at 687. To prevail on this prong, a defendant "must show there is a reasonable probability that, but for his

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* This, in turn, requires the court to focus on "the question whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

The defendant must satisfy both prongs, and his failure to satisfy either prong should result in denial of his motion. *See United States v. Orange*, 447 F.3d 792, 796-97 (10th Cir. 2006) ("Because [a defendant] must demonstrate both *Strickland* prongs to establish his claim, a failure to prove either one is dispositive.") (citations omitted); *Smith v. Robbins*, 528 U.S. 259, 286 (2000) ("The performance component need not be addressed first. 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'") (quoting *Strickland*, 466 U.S. at 697)); *see also Romano v. Gibson*, 239 F.3d 1156, 1181 (10th Cir. 2001) ("This court can affirm the denial of habeas relief on whichever *Strickland* prong is the easier to resolve.").

In a habeas proceeding, the defendant has the burden to demonstrate that his counsel performed deficiently, *see Beeler v. Crouse*, 332 F.2d 783, 783 (10th Cir. 1964) ("Habeas corpus is a civil proceeding and the burden is on the petitioner to show by a preponderance of the evidence that he is entitled to relief."), and this means that he has the burden to allege facts that would entitle him to relief upon

proof, *see Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir. 1995) ("To be entitled to an evidentiary hearing on claims raised in a habeas petition, the petitioner must allege facts which, if proved, would entitle him to relief.") (internal quotations omitted), *overruled in part on other grounds* by *Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001) (en banc). Further, "the allegations must be specific and particularized, not general or conclusory." *Id. See also United States v. Quarterman*, 242 F.3d 392, *2 n.3 (10th Cir. 2000) (table) (noting, in considering petitioner's unsupported § 2255 claim, "Despite [Petitioner's] pro se status, this court will not sift through her brief in an attempt to construct legal arguments or theories for her, *see Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) nor consider unsupported, conclusory allegations on appeal, *see Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981).").

Under § 2255, the district court is required to conduct an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *United States v. Lopez*, 100 F.3d 113, 119 (10th Cir. 1996).

III. Jury Trial Facts

A. Bank Robbery and Pursuit of Robbers

In the early morning hours of December 1, 2010, two citizens of Wichita, Kansas, reported that their vehicles had been stolen. A few minutes after 7:00 a.m. Patricia Arnett noticed that her blue Ford Escape had been stolen from her

driveway in Wichita, Kansas. (Trial Tr. at 126-29.)[1] She reported the theft to the Wichita Police Department and an officer took her report between 7:20 a.m. and 7:30 a.m. (*Id.* at 128.) At around 7:30 a.m., Margaret Henderson noticed that her 1996 Chevy Tahoe had been stolen from her driveway in Wichita, Kansas. (*Id.* at 118-20.) She reported the theft to the police between 7:35 a.m. and 7:40 a.m. that morning. (*Id.* at 120.)

Between 8:30 a.m. and 9:00 a.m. that morning, Sean M. Fitzgerald, a Special Agent with the Federal Bureau of Investigation, received a telephone call from a Wichita Police Department officer, who informed him that the police thought a bank robbery was about to occur based on the fact that these two vehicles had been reported stolen. (*Id.* at 150-51.) Agent Fitzgerald left his office to begin surveillance. (*Id.* at 150.)

At around 10:38 a.m. that morning, three African-American males wearing masks and gloves entered the Equity Bank on North Webb Road in Wichita, Kansas. (*Id.* at 9, 54-56, 378.) When they entered, the bank's branch manager, Kristen Myer, was in the vault room getting some supplies. (*Id.* at 8-9, 11, 34.) The only other employee working at the time, Susan Stevens, was on the teller line. (*Id.* at 10-12.) Two of the masked men jumped over the teller counter and started

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[1] The transcript of the jury trial consists of 450 sequentially paginated pages and is contained in Documents 131, 129, 132, and 133; the sequentially paginated numbers appear in the *lower right-hand corner* of each page. For convenience, the government cites to these four documents collectively as "Trial Tr." followed by the corresponding sequentially paginated page number in the lower right-hand corner of each page.

screaming, "Get down on the ground!" and "Where's the money?" and "Give me the money." (*Id.* at 34-35.) One of the two men had a gun. (*Id.* at 31, lines 4-11.) They took money from Stevens' teller drawer. (*Id.* at 36, 40.) The third man, who had a gun that looked like a machine gun, remained in the lobby. (*Id.* at 35-37.) Neither Myer nor Stevens got on the ground because they were so shocked. (*Id.* at 30.)

The two men behind the teller area instructed Myer and Stevens to open the vault. (*Id.* at 28.) When they encountered problems in opening the vault, one of the men, who was holding a firearm, told Myer, "If you don't open it, I'll shoot you. Don't make me shoot you." (*Id.* at 30-31.) Myer thought he was going to shoot her. (*Id.* at 31.) Once Myer and Stevens opened the vault, the two men started taking money from the vault and putting it in a laundry bag. (*Id.* at 31-32.) While they did so, Myer backed into a corner of the vault and crouched down because she was worried that the men would shoot her on the way out:

> I just wanted to get as small as possible, I–I don't–I didn't know what to do so I was thinking, What am I supposed to do now, but I wanted to get as small as possible because I was kind of worried that they were going to shoot me on the way out because, you know, even though they're in–they're covered up, you know, you never know if they're thinking, Oh, she saw me or something, I don't know.
>
> I was worried they were going to shoot me on the way out.

(*Id.* at 32-33 (Myer's testimony).)

During these events, the third man who had remained in the lobby area walked up to the teller counter, pointing and waving his firearm at Myer and

Stevens. (*Id.* at 41-42, 46.) After taking the money, the three men left the bank through the front door and drove away in a sport-utility vehicle. (*Id.* at 39.)

On this date, the bank had several security measures in place to track would-be bank robbers. (*Id.* at 63.) The bank had "bait money" in each of the teller drawers, consisting of a group of bills with recorded serial numbers. (*Id.* at 63-65.) The bank also had "dye-packs" in each of the teller draws and the vault. (*Id.* at 63-64.) A dye-pack is "a bundle of what looks like money that's sitting in the drawer but actually inside of it is a canister of tear gas and red dye" that becomes activated when it is removed and also when it passes through an "activation zone" in the bank. (*Id.*)

The robbers did not have permission to take the money, which totaled $102,743.00. (*Id.* at 33, 63.) On the date of this robbery, the bank was insured by the Federal Deposit Insurance Corporation. (*Id.* at 66.)

After the robbery, a citizen of Wichita, Randy Croley, was driving north on Webb Road when a vehicle filled with red smoke pulled out in front of him. (*Id.* at 71-73.) He described the vehicle as green Chevy Suburban. (*Id.* at 77.) Because of the red smoke, Croley thought the vehicle had been involved in a robbery, so he called 911. (*Id.* at 73-75.) Croley observed the vehicle stop in the area and observed an African-American male exit the vehicle. (*Id.* at 78.)

Sergeant Bruce Watts, of the Wichita Police Department, received reports from dispatch that a robbery had occurred and that "a citizen had observed the vehicle involved in the bank robbery, the green Tahoe, turn eastbound in front of

Webb." (*Id.* at 89-90.) He located the vehicle near the 9700 block of Van Thaden Street, off of Webb Road. (*Id.* at 93.) There, he approached the vehicle and found it unoccupied. (*Id.* at 93-94.) He looked in the vehicle and saw "a large sum of money stained in red dye, laying on the floor board." (*Id.* at 94-95.) He thought this money was proceeds from the bank robbery that had been stained with red dye from the dye-packs. (*Id.* at 95.) He also saw the smoke from the dye-packs coming from the vehicle, which was a green Chevy Tahoe. (*Id.*)

After turning custody of the vehicle over to other officers, Sergeant Watts heard from radio traffic that officers were chasing the blue Ford Escape that had been stolen earlier that morning. (*Id.* at 99-100.) Special Agent Fitzgerald heard that officers were pursuing this vehicle northbound on Woodlawn; he joined the chase. (*Id.* at 152.) He located the blue Ford Escape as it was being pursued by about 12 to 15 marked units near 21st and Woodlawn in the Woodgate apartment complex. (*Id.* at 152-54.)

As the vehicle was traveling down the frontage road adjacent to the apartment complex, Special Agent Fitzgerald observed two individuals exit the passenger side of the vehicle and run away from the vehicle while it was still moving. (*Id.* at 154-55.) The driver also exited. (*Id.* at 155.) He described the three individuals as "three black males," who "matched the general descriptions of Shelan Peters, David Hollis, and Raymond Rogers." (*Id.* at 155.) Special Agent Fitzgerald then chased the men, whom he saw running in between the carport and building 12 of the apartment complex. (*Id.* at 157.) The three eventually split up,

with the driver running eastbound and the other two men running south on the eastern side of building 12. (*Id.* at 158-60.) Fitzgerald pursued the driver, Shelan Peters, who was eventually caught by Wichita police officers after they shot him. (*Id.* at 159-60.)

Wichita Police Department Officer Bart Norton arrived at the apartment complex to assist. (*Id.* at 180.) There, he observed the blue Ford Escape, which had crashed into some other vehicles in the apartment complex outside of building 11. (*Id.* at 181.) He approached this vehicle to make sure that nothing was disturbed, and he saw a dark jacket lying directly under the driver's side of the door. (*Id.* at 183.) He also saw some red-stained U.S. Currency. (*Id.* at 184.)

At the scene, Norton heard "some commotion at the top floor of building 12, kind of like a lady screaming." (*Id.* at 185.) Norton and other officers went to building 12 and entered the apartment where the screaming was coming from. (*Id.* at 185-88.) In that apartment, they found David Hollis and arrested him. (*Id.* at 187.) Norton spoke with the lady who had been screaming, and she stated that she did not know him. (*Id.* at 188.)

Wichita Police Department Officer Robert Bachman was also assisting at the apartment complex. (*Id.* at 194-96.) After officers arrested Hollis in building 12, he and other officers focused their attention on finding the third suspect in building 12. (*Id.* at 198-99.) He and other officers went around to the apartments in the building and "started clearing the apartments, taking people out of the apartments and making sure the suspects weren't in the apartments." (*Id.* at 199-200.)

Eventually, the officers came to apartment 1217 in building 12. (*Id.* at 202.) The officers made contact with the lessor of that apartment, Raquel Mendia, and gained entry. (*Id.* at 202, 343-44.) Inside, they found several people, including Tom Bell, Bell's nephew Calvin Baker, Baker's girlfriend LaRhonda, and Jose Villa. (*Id.* at 202-03, 363.) In the process of clearing the apartment, Officer Bachman "saw a black male stick his head out from the southwest bedroom corner or southwest bedroom into the hallway and look real quick and then go back into the hallway–or into the bedroom." (*Id.* at 203.) Bachman ordered him to step out into the hallway. (*Id.* at 204.) Bachman arrested the man, who was the defendant. (*Id.* at 204-05.)

Officer Rex Leffew transported the defendant from the scene to the Sedgwick County Jail and took custody of the clothing he was wearing. (*Id.* at 222-26.) He collected a white T-shirt the defendant was wearing. (*Id.* at 226-27, 229; Govt. Ex. 25.) He noticed that the T-shirt "had some red dye in about the midsection, lower part of it." (*Id.*)

B. Forensic Investigation

Officers later processed apartment 1217, the white T-shirt, the blue Ford Escape, and the green Chevy Tahoe for evidence. Special Agent Fitzgerald searched apartment 1217. (*Id.* at 165.) In the bathroom, he found money wrapped in plastic bags inside the toilet tank. (*Id.* at 162, 166.) He saw "the bands from the bank" on the money. (*Id.* at 162.) Investigator Andrew Maul collected this bag, which he

found contained $62,300 in U.S. Currency. (*Id.* at 279-84; Govt. Ex. 30.) The U.S. currency in the bag contained bait money from the Equity Bank. (*Id.* at 370-71.)

Randall Fornshell, a forensic scientist with the Sedgwick County Regional Forensic Science Center, tested the red dye on the defendant's white T-shirt. (*Id.* at 302-04.) He tested the shirt to check "for bank dye components" and found "the bank dye itself, which is 1-(methylamino) anthraquinone" on the T-shirt. (*Id.* at 307, 314-15.) He explained that this substance "is a red dye that's not found normally on any product" except taillight lenses of a car. (Id. at 308, 315.) He explained the dye in taillight lenses could not be transferred from the taillight to another object just by rubbing against the taillight because "it's [e]ncapsulated in plastic so it doesn't rub off." (*Id.* at 308, 316.) Fornshell could not state how long the dye had been on the shirt. (*Id.* at 319-20.)

Investigator Maul processed the Ford Escape. (*Id.* at 262-63.) Inside he found some clothing and red dye on the rear seat. (*Id.* at 265, 268.) Underneath a jacket on the passenger's front seat, he found two firearms. (*Id.* at 268.) One was a loaded Intratec AB-10 .9 millimeter semi-automatic handgun. (*Id.* at 270, Govt. Ex. 41.) The other was a loaded Bersa semi-automatic handgun. (*Id.* at 272, Govt. Ex. 40.) Both firearms were manufactured outside of the State of Kansas and functioned as designed. (*Id.* at 292-301.) Investigator Maul processed the vehicle for fingerprints but did not find any. (*Id.* at 288.)

Crime Scene Investigator Colleen Jensen processed the Chevy Tahoe. (*Id.* at

237-40.) Inside that vehicle, she found a white plastic bag on the floor that contained money. (*Id.* at 241.) Both the bag and the money in it were stained with dye from the dye pack. (*Id.*) She observed red dye on the seats in the vehicle. (*Id.* at 242.) Along with the money, she found envelopes from the bank, bank bands from the bank, and unique two-dollar bills. (*Id.* at 250-53.) Kristen Myer recognized the two-dollars bills as having been stolen during the robbery. (*Id.* at 50-52.)

C. Defendant's Entry into Apartment 1217

Two civilian witnesses testified about how the defendant arrived at and entered into apartment 1217, where officers arrested him.

1. Raquel Mendia's testimony

On December 1, 2010, Raquel Mendia was living in apartment 1217 with her boyfriend, Tom Bell, and her daughter, Shamika. (*Id.* at 325-27.) She leased the apartment. (*Id.* at 343-44.) When Mendia got off work at 12:00 a.m. on December 1 and went home, she encountered three other people, including Calvin Baker, Calvin's girlfriend Rhonda, and their baby. (*Id.* at 327-28.) At some point, Mendia's sister and one of her sister's friends came over to play dominoes but they left after about an hour, which was before Mendia went to bed. (*Id.* at 328-30.)

Mendia woke up at 9:00 a.m on December 1 when she heard a knock on the door. (*Id.* at 330.) It was Tom's friend, Jose Villa, whom she knew as a friend. (*Id.* at 331.) Calvin and Rhonda were still in the apartment. (*Id.*) Calvin and Jose left the apartment to get food for breakfast, and Mendia and Tom returned to her

bedroom and went back to sleep. (*Id.* at 332-33.) After Calvin and Jose returned from the store, Mendia remained in her bedroom, Calvin went back to his bedroom, and Jose was in the front room watching television. (*Id.* at 333-34.)

At some later point, Mendia heard "a loud pounding" at the front door. (*Id.* at 336.) She left her bedroom to answer it. (*Id.* at 336-37.) She opened the door and saw "a guy standing there" who "comes in the door"; she did not recognize him. (*Id.* at 337.) He did not announce himself or ask to enter, and he looked "like he had been running" and "was sweaty." (*Id.*) He did not ask to speak with anyone in the apartment and was holding a jacket in front of him. (*Id.* at 338.) Mendia immediately went to get Tom "'cuz a guy had just walked in the apartment." (*Id.* at 337, 339.) Mendia went back to her bedroom and shut her door, and Tom came out of the bedroom and spoke with this individual, but eventually went back to the bedroom with Mendia. (*Id.* at 339-40, 353.) Calvin and Rhonda were in the spare bedroom. (*Id.* at 352.) While in her bedroom, Mendia heard some commotion outside. (*Id.* at 341.) She looked outside and saw "[p]olice officers and like the SWAT team surrounding the complex." (*Id.* at 342.)

About 20 to 30 minutes after the unknown individual entered the apartment, the police knocked at the door, entered the apartment, and asked the occupants to leave the apartment. (*Id.* at 353, 343-44.) Mendia, Tom, Calvin, Rhonda, and Jose left. (*Id.* at 344.) The officers then arrested the only individual who remained in the apartment, who turned out to be the defendant. (*Id.* at 344-45.) To Mendia's

knowledge, the money found in the toilet tank of her apartment was not there in the early morning hours of December 1, 2010. (*Id.* at 348-49.)

2. Defendant's Wife's Testimony

The defendant's wife, Ashley Rogers, testified on his behalf. (*Id.* at 398.) She testified that on the morning of December 1, 2010, she and the defendant took their kids to day care around 10:00 a.m., and then went to a beauty shop where she worked. (*Id.* at 400-08.) They got to the beauty shop around 10:30 a.m. (*Id.* at 405, 413.) While at the beauty shop, Shelan Peters, who is the defendant's cousin, telephoned. (*Id.* at 410-11.) Ms. Rogers answered, and Peters asked if she could come over to Rhonda's apartment and pick him up. (*Id.* at 415.) Ms. Rogers agreed. (*Id.*)

She and the defendant then drove to the Woodgate apartments to pick him up. (*Id.* at 417-18.) They arrived there about ten minutes later and parked in front of Rhonda's apartment building. (*Id.* at 420-23.) The defendant got out of their vehicle and Ms. Rogers "heard some commotion" that sounded like a car hit something but did not see any police. (*Id.* at 424-25.) She turned around and saw four people running after exiting a smaller SUV-type vehicle. (*Id.* at 426-27.) Then she saw the police "pulling up" in the area. (*Id.* at 428.)

While the police were arriving, Ms. Rogers "saw [the defendant] coming to the door, he opened up the door of the apartment complex." (*Id.* at 429.) She visually indicated to him to "to go back off into the apartment complex." (*Id.* at 429.) A short time later, the defendant called her from inside Rhonda's apartment and

asked what was going on. (*Id.* at 432.) She told him police were everywhere and were chasing people. (Id. at 432-33.) He told her to leave the area, so she started driving around. (*Id.* at 435.) She drove to a nearby park and the defendant telephoned her, asking where she was at and what was going on. (*Id.* at 437-38.) She told him there were police everywhere and somebody got shot. (*Id.* at 438.) The next time she saw her husband was on television. (*Id.*)

IV. Discussion

The defendant seeks relief under 28 U.S.C. § 2255 on numerous grounds. He alleges his counsel performed ineffectively during all phases of his prosecution, including the pretrial phase, his trial, his sentencing, and his direct appeal. The government discusses each of the defendant's claims in connection with the corresponding phase of his prosecution.

A. Claims Regarding Counsel's Pretrial Performance

1. Failure to Challenge Lawfulness of Search and Arrest

The defendant argues he was unlawfully arrested in apartment 1217 without probable cause and officers searched it without consent or a warrant. On this basis, he claims counsel ineffectively failed to file a motion to suppress the evidence found in that apartment as a result of the arrest and the search, including the white T-shirt stained with bank dye he was wearing, as well as the $62,300 from the bank that was found in the toilet. (*See* Doc. 146, at 3; Doc. 147, at 3-6.)

This Court should reject this claim both because (1) counsel's decision not to file a motion to suppress was a reasonable strategic choice that did not fall outside

the wide range of competence demanded of attorneys in criminal cases, so counsel did not perform ineffectively, and (2) any motion to suppress on the grounds advanced by the defendant would have been denied by this Court as lacking merit, so the defendant was not prejudiced. *See* Orange, 447 F.3d at 797 ("When, as here, the basis for the ineffective assistance claim is the failure to raise an issue, we must look to the merits of the omitted issue. If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance.") (internal citation omitted); *Sperry v. McKune*, 445 F.3d 1268 (10th Cir. 2006) (explaining that trial counsel's failure to raise a meritless issue is not ineffective assistance).

Counsel's decision not to file the motion to suppress was reasonable a reasonable strategic choice because no legal basis supported it. First, the defendant had no Fourth Amendment standing to challenge the search of the apartment because he did not live there, nor was he a social guest; rather, he claims he went to the apartment to conduct a business transaction, i.e., "to determine what Mr. Rogers would charge to conduct a complete tune-up" on a vehicle that Rhonda and Baker shared. (*See* Doc. 148, at 19.) Because the defendant was supposedly in the apartment to conduct a business transaction, he had no standing to object to its search.[2] And because he had no standing to challenge the search, he had no

[2] A criminal defendant has no standing under the Fourth Amendment to object to the admission against him evidence unlawfully seized from a third party. *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998); *Rakas v. Illinois*, 439 U.S. 128, 148–50 (1978). *See Carter*, 526 U.S. at 91 (holding that individuals in someone else's

cognizable legal basis to object to the officers' search of the apartment and their consequent of the incriminating evidence against him.

Second, this Court would have denied any motion to suppress the evidence found in the apartment as lacking merit on several alternatively sufficient grounds, so the defendant was not prejudiced by counsel's failure to file such motion. This Court could have found that the officers' entry into the apartment was justified because exigent circumstances existed, constituting an exception to the warrant requirement. The Supreme Court has recognized several types of exigent circumstances that may justify a warrantless entry into a home, including the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to police officers or other people inside or outside the home. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Here, the officers were in hot pursuit of the robbery suspects whom they knew they were at the apartment complex. They reasonably inferred the suspects might force their way into an apartment in the complex to escape the police, thereby creating a risk of danger to the occupants of the apartments in the complex. These exigent circumstances justified the warrantless entry.

Or, this Court could have found that the officers had probable cause to arrest the defendant based on the circumstances they confronted at the time they entered the apartment. When the officers entered the apartment and asked the occupants

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home, who were there for only a few hours and only to perform a commercial transaction, had no expectation of privacy in that home).

to leave, everyone left but the defendant. (Trial Tr. at 343-44, 353.) After everyone had left, an officer saw the defendant stick his head out from one on the bedrooms into the hallway, "look real quick and then go back" into the bedroom; the officer hollered at him to step out into the hallway and he came out. (*Id.* at 203-04.) These suspicious circumstances created probable cause the defendant was one of the robbery suspects they had been looking for.

Or, this Court could have denied any motion to suppress on the basis that even if the officers unlawfully arrested the defendant, it was legally inconsequential because the officers did not find the incriminating evidence as a result of their arrest of the defendant, but as a result of their entry into the apartment, which the defendant had no standing to contest. *See United States v. Forbes*, 528 F.3d 1273, 1278 (10th Cir. 2008) (Under the independent source doctrine, evidence that has been discovered by means wholly independent of any constitutional violation is admissible against a criminal defendant, notwithstanding any antecedent Fourth, Fifth, or Sixth Amendment violation.). While the defendant's presence in the apartment gave the officers reason to suspect evidence of the robbery would be in the apartment, the defendant's arrest was not the but-for cause of their discovery of the evidence. *See United States v. Coulter*, 461 Fed. Appx. 763, 765-66 (10th Cir. 2012) .

Accordingly, based on the existing law, counsel made a reasonable strategic choice not to file a motion to suppress the evidence seized in the apartment because no legal basis supported it; therefore, counsel did not perform ineffectively. And

because any such motion would have been denied by this Court as lacking merit, his failure to file such motion did not prejudice the defendant.

See Orange, Sperry, supra.

2. Failure to seek dismissal based on Speedy Trial Act

The defendant argues his counsel ineffectively moved to dismiss the indictment based on asserted violations of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. (Doc. 147, at 11-14.) He claims he "was deprived of a meritorious Speedy Trial dismissal request in violation of the Speedy Trial Act" (*id.* at 13), because counsel ineffectively failed to move for dismissal of the original Indictment and Superseding Indictment, opting instead to file motions to continue the trial. (*See id.* at 12 ("Instead of counsel filing a motion to dismiss both indictments for a Speedy Trial violation, he filed multiply (sic) continuances.").)[3]

Counsel's decisions—including his decisions to seek continuance and not to move to dismiss the Indictment and Superseding Indictment—were reasonable tactical decisions that fell within the wide range of professionally competent

[3] Before trial, counsel for the defendant and counsel for co-defendant, David Hollis, filed joint motions to continue the trial under 18 U.S.C. 3161(h)(7)'s "ends of justice" exclusion. (*See* Docs. 48, 65.) In the first motion, defendant's counsel represented that he needed more time to effectively prepare for trial in light of a recently-identified potential DNA match with the defendant in an unrelated and unindicted bank robbery. (Doc. 48, at 2.) In the second motion, his counsel stated he needed more time to prepare for trial because the government had filed a Superseding Indictment and he needed more time to review and analyze the government's evidence. (Doc. 65, at 2-3.) This Court granted both motions based on the reasons cited. (*See* Docs. 49, 66.) *See* 18 U.S.C. 3161(h)(7) (excluding from STA's 70-day time period "[a]ny period of delay resulting from a continuance . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial").

assistance. Indeed, counsel reasonably moved to continue the trial on the basis that he needed more time to prepare in light of new DNA evidence and the government's filing of a Superseding Indictment. *See* n.3. By any measure, these were sound reasons to move to continue the trial; from counsel's perspective at the time, the alternative was to go to trial unprepared. Therefore, his counsel did not perform deficiently in filing for the continuances.

The defendant makes much of the fact that the government obtained a Superseding Indictment and suggests that the government manipulated counsel into filing for the continuances, even suggesting that counsel "became loyal to the government believing that the AUSA was being truthful and fa[i]r about the government's case." (*See* Doc. 147, at 12.) However, this Court should give this claim no shrift because the government did not do anything improper by either seeking a Superseding Indictment or dismissing it before trial. Indeed, the fact that the government obtained a Superseding Indictment from the grand jury, charging an additional robbery not charged in the original Indictment, is dispositive evidence that the government had sufficient evidence in its possession to bring the Superseding Indictment, even though it eventually dismissed it and proceeded to trial on the original Indictment. (*See* Doc. 89.) The government did absolutely nothing improper.

As to prejudice, the defendant cannot bear his burden to show that he was prejudiced by his counsel's filing of the continuances. This is because counsel for co-defendant David Hollis obtained continuances in his case, and the continuances

granted in Hollis' case had the effect of tolling the speedy trial clock in this defendant's case. *See United States v. Vogl*, 374 F.3d 976, 983 (10th Cir. 2004) (An exclusion for delay attributable to one defendant is applicable to all co defendants.); *Henderson v. United States*, 476 U.S. 321, 323 n.2 (1986) ("All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant.").

Moreover, the defendant was not prejudiced by his counsel's failure to move to dismiss the Indictment because no legal basis existed for this Court to grant a dismissal *with prejudice*. In fact, "[a] district court does not have unfettered discretion to dismiss an indictment with prejudice for violation of the STA." *United States v. Rushin*, 642 F.3d 1299, 1308 (10th Cir. 2011). Its discretion is cabined by § 3162(a)(2), stating that before dismissing with prejudice, the court shall consider "the seriousness of the offense; the facts and circumstances of the case which led to dismissal; and the impact of a reprosecution on the administration of justice." Here, these factors weighed heavily against the granting of any motion to dismiss with prejudice because bank robbery is a serious offense, counsel moved for both continuances in reaction to the government's ongoing investigation of the defendant and its filing of a Superseding Indictment; and the defendant suffered no prejudice as a result of the delay.

Finally, insofar as the defendant alleges a *statutory* violation of his right to speedy trial, as opposed to a *constitutional* violation, his claim is not even

cognizable in the instant § 2255 context.[4] *See United States v. Taylor*, 454 F.3d 1075, 1078–79 (10th Cir. 2006) (dismissing defendant's claims alleging a violation of a statutory right to a speedy trial in § 2255 context, noting that a statutory right, as opposed to a constitutional right, will not support issuance of a certificate of appealability).

3. Failure to move for dismissal of original indictment based on vindictive prosecution or prosecutorial misconduct

The defendant suggests that counsel ineffectively failed to raise a "vindictive prosecution" or "prosecutorial misconduct" claim during his pre-trial and trial stages. (Doc. 146, at 8.) He claims the government sought and obtained the Superseding Indictment from the grand jury because "he would not plea[d] guilty to any charges in his Original Indictment," and then "dismissed the Superseding Indictment without reason on the first day of movant's trial." (*Id.*) This claim fails under both *Strickland* prongs because no legal basis existed for counsel to succeed on such a claim in light of existing Supreme Court precedent.

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[4] In his pleadings, the defendant focuses his claim on the statutory provisions of the Speedy Trial Act . (See Doc. 147, at 11-13.) Although he claims in passing that he was deprived of his constitutional right to a speedy trial (see id. at 13), he does not make the case for a constitutional violation under the factors set out in Barker v. Wingo, 407 U.S. 514, 530 (1972) (stating relevant factors bearing on a constitutional violation include the length of the delay, reason for the delay, the defendant's assertion of his speedy trial right, and whether the delay prejudiced the defendant). For example, he does not claim that the delay prejudiced his ability to prepare his case and defend himself on the instant charges, nor does he identify any evidence that was lost or witnesses he could not locate as a result of the delay.

The government acted within its discretion both by seeking and moving to dismiss the Superseding Indictment. The Attorney General and United States Attorneys retain "'broad discretion'" to enforce the Nation's criminal laws. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n. 11 (1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. Consequently, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

Notwithstanding this broad discretion, a defendant "may not be punished for exercising a protected statutory or constitutional right." *Goodwin*, 457 U.S. at 372. A rebuttable presumption of vindictiveness arises where the government takes unilateral action, such as obtaining a superseding indictment on additional or more serious charges, in a context that indicates a reasonable likelihood of vindictiveness as a response to the defendant's exercise of his rights. *See id.* at 372–77. Where the facts do not give rise to a presumption of vindictiveness, the defendant must show

actual vindictiveness by proving that the government's action was taken solely to penalize the defendant. *See id.* at 380–81, 380 n. 12.

Contrary to the defendant's suggestion, the filing of a superseding indictment before trial—after plea negotiations have failed—provides no basis for a vindictive-prosecution claim. The Supreme Court squarely held as much in *Bordenkircher*. There, the Court considered an allegation of vindictiveness that arose in a pretrial setting. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment. *Id.* at 358-59. The defendant refused to plead guilty and the prosecutor obtained the indictment. *Id.* at 359. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge. *Id.* The government obtained a conviction on the new indictment. *Id.* The Court held that the Due Process Clause of the Fourteenth Amendment did *not* prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. *See id.* at 365 ("We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on

which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.").

Likewise, in *Goodwin*, the Court held similarly in a pretrial context. There, the government initially charged the defendant with misdemeanor and petty offenses including assault. 457 U.S. at 370. He initiated plea negotiations with the government but later advised that he did not wish to plead guilty and wanted a jury trial. *Id.* at 371. Six weeks later, the government obtained a new indictment charging the defendant with one felony count of assault and other charges arising from the same incident. *Id.* A jury convicted him on one felony count and one misdemeanor count. *Id.*

After being convicted, the defendant moved to set aside the verdict on the ground of prosecutorial vindictiveness, contending that the felony indictment gave rise to an impermissible appearance of retaliation. *Id.* The Fourth Circuit reversed his conviction. Although the circuit court concluded that the prosecutor did not act with actual vindictiveness in seeking a felony indictment, it nonetheless applied a legal presumption of prosecutorial vindictiveness, holding that the Due Process Clause of the Fifth Amendment prohibits the government from bringing more serious charges against a defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. *Id.* at 372.

The Supreme Court reversed the Fourth Circuit and declined to adopt such a presumption in a pretrial setting. *Id.* at 381-83. In reversing, the Supreme Court recognized that strong public policy rationales weighed against applying such a presumption. *See id.* at 379 n.10; *id.* at 382 n.14. Significantly, it noted: "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *Id.* at 382. Accordingly, the Court failed to find a due process violation because no evidence of actual vindictiveness existed and a presumption of vindictiveness did not apply. *Id.* at 384.

Given this legal landscape, counsel's decision not to file a motion alleging vindictive prosecution on the basis suggested by the defendant was not outside the wide range of professionally competent assistance. The government does not acquiesce in the defendant's characterization of the government's motives for bringing the Superseding Indictment, but even assuming *arguendo* that the characterization is correct, any claim would have still failed because *Bordenkircher* and *Goodwin* clearly allow the government to bring additional and more serious charges in a pretrial setting after plea negotiations have failed. Thus, counsel did not deficiently perform in failing to file a prosecutorial vindictiveness claim because no legal basis existed for it. As a tactical matter, counsel could have reasonably deemed such a claim foreclosed by *Bordenkircher* and *Goodwin*, and such a decision would have been within the wide range of professionally competent assistance.

Moreoever, the defendant does not identify any evidence of actual vindictiveness that his counsel could have pointed to sustain such a claim.

The defendant also fails to show *Strickland* prejudice because counsel's failure to bring the claim did not prejudice the defendant for two reasons. First, this Court would have been constrained to deny any such claim based on *Bordenkircher*, *Goodwin*, as well as cases from the Tenth Circuit. *See, e.g., United States v. Sarracino*, 340 F.3d 1148, 1177-79 (10th Cir. 2003) (no vindictive prosecution occurred when, after defendant refused to accept the final plea proposal to a manslaughter indictment, the prosecution obtained a superseding indictment for second degree murder). Second, as the defendant points out, the government dismissed the Superseding Indictment prior to the trial (*see* Doc. 89), so the filing of the Superseding Indictment did not affect the outcome of his prosecution in any respect. The defendant's claim of prejudice hinges on the notion that his counsel could have obtained dismissal of *both* the original Indictment and the Superseding Indictment with a successful prosecutorial vindictiveness claim, but such a remedy would not have been available to this Court in light of the aforementioned authorities.

4. Failure to investigate and interview witnesses.

The defendant argues that counsel failed to properly investigate his case and interview witnesses. (*See* Doc. 147, at 14-15.) He asserts counsel ineffectively failed to interview any witnesses who were in apartment 1217 at the time of his arrest, and, had he done so, counsel "could have prevented 'Raquel Mendia' [who was inside

apartment 1217] from testifying for the government and changing her story on the last day of Movant's trial," both by advising her "about what to do if the government started to threaten or harass her," and by "obtain[ing] a sworn affidavit of Ms. Mendia['s] first statement to WPD Officers, so that her first testimony would have been sworn under oath."[5] (*Id.* at 14-15.)

This claim fails under both *Strickland* prongs. Counsel's decision not to interview Mendia or others in apartment 1217 was a reasonable strategic choice for four reasons. *See Wallace v. Ward*, 191 F.3d 1235, 1247 (10th Cir. 1999) ("Counsel . . . may make a reasonable decision that investigation is unnecessary."). First, counsel was not clairvoyant and had no way of knowing that Mendia would change her story, so he had no reason to lock in her story with an affidavit. Second, as far as counsel knew, Mendia's first story was *helpful* to his client—because in her first account she told police she did not see the defendant enter her apartment, *see* n.5, *supra*—and counsel could have reasonably perceived that interviewing Mendia could backfire by giving her an opportunity to change her story in an unhelpful way. Third, the defendant does not provide any credible reason for this Court to conclude that interviews of other witnesses in the apartment would have lead to favorable or

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5 (*See* Trial Tr. at 354-55 (Mendia testified on cross-examination that she originally told Wichita police officers that she did not know who answered the door of the apartment at the time the defendant entered but she changed her testimony on the morning of trial—almost a year later—because she "was just thinking about what could happen to me if I lied on the stand, and what would happen to my daughter."); *id.* at 335-39 (Mendia testified on direct that she heard a loud pounding at the door and saw an unknown sweaty guy holding a jacket in front of him who proceeded to walk into the apartment).)

exculpatory evidence, and counsel could have likewise reasonably concluded as much, thus obviating any need for further interviews. Fourth, his counsel probably did not know what these other witnesses would say in an interview, and the possibility existed that they could say something that incriminated the defendant.

Second, the defendant cannot show that he was prejudiced by counsel's failure to interview witnesses for three reasons. First he does not establish by a reasonable probability that Mendia or any other occupant would have consented to an interview; that they would have given favorable or exculpatory information during the interviews; or that they would have signed an affidavit if presented with one. *See United States v. Green*, 882 F.2d 999, 1008 (5th Cir. 1989) ("A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."). Second, even if counsel had interviewed Mendia and locked her into her initial story with an affidavit, she still could have changed her story on the morning of trial as she did. Third, even if he had locked Mendia into her first story and she did not change her testimony on the day of trial, it still would not have changed the result of the trial because officers still would have found the defendant in the apartment wearing a T-shirt that contained dye from the bank and money from the bank, and the defendant still would have been convicted. Accordingly, he fails to show that he suffered prejudice from his counsel's allegedly deficient representation.

B. Claims regarding counsel's performance at trial

1. Failure to raise fair cross-section claim

The defendant argues that counsel "render[ed] ineffective assistance when he failed to object to the under representation of black m[e]n or any minority males in the grand jury pool or the petit jury at trial." (*See* Doc. 148, at 9.) More specifically, he complains that his jury pool contained only two African-American males and the petit jury contained none. (*Id.* at 9-10.)

Counsel was not ineffective for failing to object because no apparent legal basis existed for such a claim. In order to establish a prima facie violation of the fair cross section requirement of the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. § 1861, a defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The Sixth Amendment demands that the jury venire represent a "fair cross-section" of the community. *Berghuis v. Smith*, 559 U.S. 314, 319 (2010); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

The defendant does not attempt to show that his counsel could have, but did not, establish any of these elements. He brings forth no statistics to demonstrate that black men were underrepresented in relation to the number of such persons in the community from which the jury was drawn. He presents no basis upon which

his counsel could have argued that the alleged underrepresentation was due to the *systematic exclusion* of African-American males in the jury selection process. Accordingly, he cannot show that his counsel's strategic decision not to object was unreasonable or ineffective under *Strickland*.

Nor can he show prejudice from the fact that his counsel failed to object. He cannot do so because this Court would have denied any such motion even if his counsel had raised it, because his counsel could not have made the requisite showings under *Duren*. The defendant claims his counsel should have objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), but a Batson challenge would likewise have been unsuccessful. *See id.* at 86 (noting settled law that "*a defendant has no right to a petit jury composed in whole or in part of persons of his own race,*" but he "does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria") (internal quotations omitted; emphasis added).

2. Failure to allow defendant to testify on his own behalf

The defendant asserts counsel "render[ed] ineffective assistance when he failed to allow Movant to testify on his own behalf, as instructed to do so by Movant." (Doc. 148, at 2.) He claims he told counsel he wanted to testify at the trial but counsel rested his case without allowing him to testify, in violation of his 5th and 6th Amendment rights. (*Id.* at 2; *see also id.* at 3-5.)

This Court should reject this claim because no factual basis exists for it.

Counsel has submitted an affidavit, averring that after the defendant's wife testified at trial, he asked the defendant if he wanted to testify, and the defendant replied that he did not. *See* Affidavit of Sean C. McEnulty, dated 1/8/14 (Attach. A.) *See United States v. Lee-Speight*, 529 Fed. Appx. 903, 905 n.2 (10th Cir. 2013) (noting "sworn statements generally constitute competent evidence in a § 2255 action") (quotations omitted). Accordingly, because the defendant's counsel did not ineffectively fail to allow the defendant to testify, his claim fails under *Strickland's* performance prong.

In addition, even assuming *arguendo* that the defendant could satisfy *Strickland's* performance prong, he still could not show prejudice because his testimony would not have changed the result of the trial. It would not have changed the result of because the defendant could not have effectively challenged the government's evidence that bank dye was found his shirt, which conclusively linked him to the robbery. As noted, Randall Fornshell, a forensic scientist with the Sedgwick County Regional Forensic Science Center, tested the red dye on the defendant's white T-shirt. (Trial Tr. at 302-04.) He tested the shirt to check "for bank dye components" and found "the bank dye itself, which is 1-(methylamino) anthraquinone" on the T-shirt. (*Id.* at 307, 314-15.) He stated that this substance "is a red dye that's not found normally on any product" except taillight lenses of a car. (*Id.* at 308, 315.) He explained the dye in taillight lenses could not be transferred from the taillight to another object just by rubbing against the taillight

in plastic so it doesn't rub off." (*Id.* at 308, 316.) Fornshell could not state how long the dye had been on the shirt. (*Id.* at 319-20.)

The defendant suggests that he would have testified that the dye got on his shirt in some manner because he was present in his wife's hair salon handling chemicals on the morning of the robbery. (*See* Doc. 148, at 18 (defendant claiming he and his wife went to his wife's beauty salon on morning of robbery where he cleaned salon and took inventory of hair care products and chemicals used at the salon).) But this testimony could not have overcome Mr. Fornshell's testimony that *bank dye* was found on his shirt. Thus, even if the defendant had testified, his testimony would not have changed the result of the trial.

3. Failure to object to bank robbery instruction—No. 18

The defendant claims his counsel ineffectively failed to object to jury instruction 18 (Attach. B), which instructed on the elements of the offense charged in Count 1, the bank robbery count. (*See* Doc. 147, at 6-11.) He claims that in instruction 18 this Court erroneously instructed the jury on the elements of a bank robbery charge tracking the elements of 18 U.S.C. § 2113**(d)**, which he was *not* charged with violating, and thereby impermissibly constructively amended Count 1 of the Indictment, which charged a violation of 18 U.S.C. § 2113**(a)**; he correctly points out that 18 U.S.C. § 2113(d) contains an element regarding the use of a dangerous weapon or device, while § 2113(a) does not. [6] (*Id.*)

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[6] (*See* Doc. 12, Indictment, Count 1 (charging under § 2113(a) that defendants "by force, violence, and intimidation did take from the person or presence of another, money, namely $102,743.00 United States Currency, belonging to, and in

> The prohibition on constructive amendments is derived from (1) the Fifth Amendment which limits a defendant's jeopardy to offenses charged by a grand jury, and (2) the Sixth Amendment which guarantees the defendant notice of the charges against him. A constructive amendment occurs when the Government, through evidence presented at trial, or the district court, through instructions to the jury, broadens the basis for a defendant's conviction beyond acts charged in the indictment. To constitute a constructive amendment, the district court proceedings must modify an essential element of the offense or raise the possibility that the defendant was convicted of an offense other than that charged in the indictment. Where an indictment properly pleads violation of a statute, and the defendant was not misled about the nature of the charges, his substantive rights are not prejudiced.

United States v. Van Tieu, 279 F.3d 917, 921 (10th Cir. 2002) (internal citations omitted).

In light of these authorities, the government is constrained to agree with the defendant that this Court constructively amended the Indictment by instructing the jury to determine whether "the defendant put some person's life in jeopardy by the use of a dangerous weapon or device, while engaged in the taking of the money."

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the care, custody, control, management, and possession of, the Equity Bank in Wichita, Kansas, a bank whose deposits were then insured by the [FDIC]").) *See* 18 U.S.C. § 2113(a) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . in the care, custody, control, management, or possession of any bank . . . Shall be fined under this title or imprisoned not more than twenty years, or both"); 18 U.S.C. § 2113(d) ("Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or **puts in jeopardy the life of any person by the use of a dangerous weapon or device**, shall be fined under this title or imprisoned not more than twenty-five years, or both.") (emphasis added). (*See* Doc. 98, Instr. No. 18 (instructing jury on Count 1 and setting forth following elements: (1) "defendant intentionally took money from the person"); (2) "the money belonged to or was in the possession of a federally insured bank at the time of the taking"; (3) "**the defendant took the money by means of force and intimidation"; and (4) "the defendant put some person's life in jeopardy by the use of a dangerous weapon or device, while engaged in the taking of the money**").)

(Doc. 98, Instr. No. 18.) This language tracks an element of a charge under 18 U.S.C. § 2113(d), which the government did not charge the defendant with violating. *See* n.6, *supra*. By instructing the jury on this element, this Court impermissibly modified an essential element of the offense, resulting in a constructive amendment to the indictment under *Van Tieu*.[7] *Cf. United States v. Brown*, 400 F.3d 1242, 1252-53 (10th Cir. 2005) (district court constructively amended indictment in § 924(c) prosecution where indictment charged defendant with *carrying* a gun under § 924(c), but instruction directed jury to convict him if he either *used or carried* a gun). Based on this concession, the government must also agree that the defendant's counsel performed ineffectively by failing to object to instruction 18, which constructively amended the Indictment. Thus, he has satisfied Strickland's performance prong.

Nonetheless, the defendant's claim still founders because he cannot show that his counsel's failure to object to the instruction prejudiced him as required to satisfy *Strickland's* prejudice prong. To prevail on this prong, a defendant "must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466

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[7] This Court's instruction tracked 10th Circuit Pattern Instruction 2.77. *See* 10th Cir. Pattern Crim. Jury Instr. 2.77 (2011) (Attach. C). The Use Note of 2.77 cautions: "This instruction also presupposes that the indictment charges a violation of subsections (a) and (d) in the same count. If a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted." *Id.* (Use Note). The Use Note further explains that "a violation of subsection (a) alone, i.e., the first three elements above, is a lesser included offense of the alleged violation of subsections (a) and (d) combined, i.e., all four elements." *Id.*

U.S. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* This, in turn, requires the court to focus on "the question whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

The defendant cannot demonstrate prejudice under these standards. First, notwithstanding the defective instruction, the defendant still received a fair trial with a reliable result because instruction 18 did not relieve the government of proving the elements of the § 2113(a) violation; in fact, it *required* the government to prove the § 2113(a) violation. As noted in footnote 7, *supra*, instruction 18 tracked Tenth Circuit Pattern Instruction 2.77, by instructing on the four elements listed in that instruction. *Compare* 10th Cir. Pattern Crim. Jury Inst. 2.77 (2011) (listing four elements) *with* Doc. 98, Instr. No. 18 (setting forth identical elements). The first three of these elements *accurately* set forth the elements of the § 2113**(a)** violation. *See* 10th Cir. Pattern Crim. Jury Instr. 2.77 (2011) (stating in Use Note that "[i]f a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted"). So in finding the defendant guilty on Count 1 based on the elements set forth in in instruction 18, the jury necessarily had to find that the defendant committed the three elements constituting a violation of § 2113(a).

Stated differently, because a § 2113(a) violation is a lesser included offense of a § 2113(d) violation, the jury's finding that he violated all of the elements of §

2113(d) necessarily encompassed a finding that he violated § 2113(a). The Supreme Court has described § 2113(a) as "the same offense as § 2113(d) without the elements of aggravation." *Green v. United States*, 365 U.S. 301, 303 (1961). *See also United States v. Fletcher*, 121 F.3d 187, 193 (5th Cir. 1997) ("[T]he elements of § 2113(d) include all of the elements of § 2113(a), plus the additional element of assault."), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002).

Second, even if counsel had objected to instruction 18, a reasonable probability exists that the result of the trial would have been the same. If counsel had objected that instruction 18 contained the superfluous element relating to a dangerous weapon or device, this Court would have simply removed it and instructed the jury on the first three elements in instruction 18, as advised in the Use Note to Pattern Instruction 2.77. This Court may confidently conclude that the jury still would have found the defendant guilty of these three elements because the jury considered these exact three elements in instruction 18 and found that the government proved each of those elements. Accordingly, the defendant cannot claim that but for counsel's errors the result of the proceeding would have been different; indeed, it would have been exactly the same.

Third, the defendant cannot show that he suffered any prejudice at sentencing as a result of the defective instruction. The statutory maximum sentence under § 2113(a) is 20 years, *see* 18 U.S.C. § 2113(a). This Court sentenced the defendant to 150 months' custody on Count 1 (Doc. 120, J. at 2), which is well

under that statutory maximum. The jury's finding that the defendant committed the § 2113(d) offense therefore had no impact on his sentence.

4. Failure to object to aiding-and-abetting instruction on § 924(c) count—Instruction 21

In his Motion to Supplement his § 2255 motion, which he filed on March 18, 2014 (*see* Doc. 155), the defendant argues his counsel "render[ed] ineffective assistance of counsel when he did not object to the Trial Court's [§] 924(c) aiding & abetting jury instructions." (Doc. 155, at 2.) Relying on the Supreme Court's recent decision in *Rosemond v. United States*, 134 S. Ct. 1240 (Mar. 5, 2014),[8] he claims that this Court's aiding-and-abetting instruction (Doc. 98, Instr. No. 21 (Attach. D)), which instructed the jury it could find the defendant guilty on each of the charged counts as an aider-and-abettor, was deficient as to the § 924 count of the Indictment, i.e., Count 2. Drawing on *Rosemond*, he argues the instruction was defective because it did explain to the jury that he needed advance knowledge of the firearm's presence, and it did not direct the jury to determine when he obtained the requisite knowledge. (Doc. 155, at 3.) (*See* Doc. 98, Instr. No. 21 (instructing that jury could find defendant guilty if government proved that "someone else committed the charged crime," and defendant "intentionally associated himself in some way

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[8] *See Rosemond*, 134 S. Ct. at 1251-52 (finding the district court erred in instructing jury that defendant Rosemond was guilty of aiding and abetting use of a firearm during a drug-trafficking offense if "(1) [he] knew his cohort used a firearm in the drug trafficking crime, and (2) [he] knowingly and actively participated in the drug trafficking crime" because the instruction "did not explain that Rosemond needed advance knowledge of a firearm's presence" and "[i]n telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine when Rosemond obtained the requisite knowledge").

with the crime and intentionally participated in it as he would something he wished to bring about" and "consciously shared the other person's knowledge of the underlying criminal act and intended to help him.").) Because his counsel did not object to the instruction on this basis, he asserts his counsel performed ineffectively and this Court should vacate his convictions on Counts 2 and 3.[9]

This Court should deny the defendant relief on this claim. First, counsel did not ineffectively fail to raise this claim during trial because it was not available during defendant's trial. The defendant's trial occurred in November 2011, and the Supreme Court did not grant certiorari in *Rosemond* until May 28, 2013, *see Rosemond v. United States*, 133 S. Ct. 2734 (2013), and it did not decide the case until March 5, 2014—more than two years after the defendant's trial. *See* 134 S. Ct. 1240. Therefore, judged from counsel's perspective at the time of trial, counsel's decision not to challenge instruction 21 as to the § 924(c) count was manifestly reasonable. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) ("[W]e have rejected ineffective assistance claims where a defendant faults his former counsel not for failing to find existing law, but for failing to predict future law and have warned that clairvoyance is not a

[9] Rosemond is facially inapplicable to offenses not charged under § 924(c), and therefore is irrelevant to the defendant's conviction for being a felon in possession of a firearm under Count 3. Therefore, Rosemond presents no basis for reversal of his conviction on Count 3.

required attribute of effective representation.") (internal quotation marks omitted). *Cf. United States v. Phillips*, 204 Fed. Appx. 765 (10th Cir. 2006) (Defense counsel's failure to object to 65-month sentence for possession of a firearm by a convicted felon on constitutional grounds under *Blakely* was not ineffective assistance of counsel, where defendant was sentenced even before certiorari was granted in *Blakely*.). Therefore, the defendant's claim fails under Strickland's performance prong.

Moreover, his counsel's failure to challenge the instruction did not prejudice him because, even if he had raised such a challenge, this Court would have been constrained to deny it based on then-existing law, which did not support it before *Rosemond* was decided. *See Orange*, 447 F.3d at 797 ("When, as here, the basis for the ineffective assistance claim is the failure to raise an issue, we must look to the merits of the omitted issue. If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance.") (internal citation omitted). The defendant's claim thereby fails under *Strickland's* prejudice prong.

It bears noting that the defendant is not otherwise entitled to relief under *Rosemond*—even if this Court did erroneously instruct the jury—because *Rosemond* is not retroactive on collateral review. This is so because "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The *Rosemond* rule was announced in a direct appeal without the Supreme Court expressly holding it to

be retroactive to cases on collateral review. Further, "the clearest instance, of course, in which [the Supreme Court] can be said to have 'made' a new rule retroactive is where [it has] expressly held the new rule to be retroactive in a case of collateral review and applied the rule to that case." *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring). But, the Supreme Court has not so stated in *Rosemond*. Accordingly, *Rosemond* provides no basis for this Court to vacate the defendant's conviction on Count 2 or 3.

C. Claims regarding counsel's performance at sentencing

1. Failure to move for dismissal of Count 2 on basis that Count 1 was not a qualifying predicate "crime of violence"

The defendant claims counsel "was 'Ineffective' for failing to move for dismissal of count 2 during sentencing stage after movant was unconstitutionally convicted of it." (Doc. 146, at 7.) Count 2 charged that the defendant, David Hollis, and Shelan Peters

> did knowingly possess firearms and brandish firearms . . . in furtherance of a crime of violence for which they may be prosecuted in a court of the United States, to wit: Bank Robbery in violation of Title 21, United States Code, Section 2113(a).
>
> In violation of Title 18, United States Code, Section 924(c)(1)(A) and Section 2.

(Doc. 12, Indictment at 2.) He explains: "Due to movant being indicted under the 'Unarmed Bank Robbery' provision [§ 2113(a)], Counsel should have requested that his § 924(c) conviction be dismissed on the ground that a 924(c) charge is not

applicable to an 'Unarmed Bank Robbery charge. This would be unconstitutional." (Doc. 146, at 7.)

The defendant is incorrect. A bank robbery charge under § 2113(a) is a qualifying crime of violence that will support a prosecution under 18 U.S.C. § 924(c). Relevantly, 18 U.S.C. § 924(c)(3) defines a "crime of violence" as an "offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3)(A)&(B). The offense of bank robbery under § 2113(a) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, so it qualifies. *See* 18 U.S.C. § 2113(a) ("Whoever, *by force and violence, or by intimidation*, takes, or attempts to take, from the person or presence of another . . . .) (emphasis added). *See also United States v. Thody*, 978 F.2d 625, 630 n.2 (10th Cir. 1992) ("Bank robbery is a crime of violence. 18 U.S.C. § 924(c)(3)."); *United States v. Thornton*, 539 F.3d 741,748 (7th Cir. 2008) ("Intimidation is the threat of force."); *United States v. Maddalena*, 893 F.2d 815, 820 (6th Cir. 1989) ("A bank robbery involves a confrontation between two people, and can arguably only succeed where there is substantial risk of physical force.").

Thus, defendant's claim fails under both *Strickland* prongs. That is, counsel's decision not to move for dismissal of Count 2 on the basis suggested by the defendant was reasonable because no legal basis existed for such a claim; therefore,

counsel's failure to file the claim did not constitute ineffective performance. Further, counsel's failure to file the claim did not prejudice the defendant because this Court would have been constrained to deny it based on the authorities discussed above. *See Orange, Sperry, supra.*

2. Failure to challenge 84-month sentence on Count 2 on basis of Apprendi and Alleyne

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (Jun. 17, 2013), the defendant argues that his counsel ineffectively failed to challenge this Court's 84-month sentence on Count 2; he claims he should have been sentenced to no more than 60 months. (*See* Doc. 147, at 15-16.) He correctly points out that although he was charged in Count 2 with possessing *and brandishing* a firearm, this Court's instruction on Count 2—instruction 19—omitted any reference to brandishing. (*See* Doc. 12, Indictment at 2 (charging in Count 2 that defendant "did knowingly possess firearms and brandish firearms . . . in furtherance of a crime of violence"); Doc. 98, Instr. No 19 (instructing that to convict defendant on Count 2, jury must find that he (1) "committed the crime of Bank Robbery as charged in Count 1 of the indictment, which is a crime of violence"; and (2) "possessed a firearm in furtherance of this crime").)

As a result, he posits that because "the jury never found Movant guilty of 'brandishing' which is an element under the 924(c)(1) statu[t]e that carries a penalty of 84 [months] minimum," this Court "did not have Jurisdiction to sentence Movant to[] 84 months for 'brandishing' of a firearm once the jury had already found

him guilty 'only' for possession." (Doc. 147, at 16.) Accordingly, he claims "Counsel was ineffective for [not] objecting to Movant's 84 months sentence in violation of Movant's Fifth and Sixth Amendment rights." (*Id.*) This claim lacks merit.

a. Legal Authorities

Section 924(c) of Title 18 provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," receive a sentence of "not less than 5 years." 18 U.S.C. § 924(c)(1)(A)(i). Section 924(c) provides for a higher mandatory minimum sentence if the firearm was brandished (7 years), id. § 924(c)(1)(A)(ii); or discharged (10 years), *id.* § 924(c)(1)(A)(iii); if the firearm was a short-barreled rifle, shotgun, or semi automatic assault weapon (10 years), *id.* § 924(c)(1)(B)(i); or a machinegun or destructive device (30 years), *id.* § 924(c)(1)(B)(ii).

In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). After deciding *Apprendi*, the Court held in *Harris v. United States*, 536 U.S. 545 (2002), that "brandishing," which sets a 7-year mandatory minimum sentence in § 924(c) prosecutions but does not increase the maximum sentence, is a sentencing factor for the judge to find, not an element that must be found by the jury. However, in *Alleyne v. United States*, 133

S. Ct. 2151 (Jun. 17, 2013), the Court overruled *Harris* on the basis of *Apprendi's* rationale:

> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. *See id.* at 483, n. 10, 490, 120 S. Ct. 2348. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled.

Alleyne, 133 S. Ct. at 2155.

Alleyne is factually similar to this case. The defendant in *Alleyne* was charged with using or carrying a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A), but the jury did not indicate on its verdict form that the firearm was brandished. *Id.* at 2156. Notwithstanding, the sentencing court imposed the 7-year mandatory minimum sentence on the basis of *Harris*, which held that brandishing was a sentencing factor that it could find by a preponderance of the evidence without violating the 6th Amendment. *Id.* The Supreme Court vacated the sentence, noting that "because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury[.]" *Id.* at 2162. It further observed: "Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the

jury beyond a reasonable doubt. The judge, rather than the jury, found brandishing, thus violating petitioner's Sixth Amendment rights." *Id.* at 2163-64.

b. Argument

The defendant's claim fails under both *Strickland* prongs. Simply put, counsel did not ineffectively fail to challenge the defendant's 84-month sentence on Count 2 on the basis of *Apprendi* because *Harris* had squarely foreclosed any such claim at the time of the defendant's sentencing. *See Harris*, 536 U.S. at 556–57 (holding that a fact increasing a defendant's mandatory minimum sentence, specifically brandishing a firearm under § 924(c)(1)(A)(ii), was not subject to the *Apprendi* rule and could be found by a sentencing judge rather than a jury). And any such claim was not cognizable until the Court decided *Alleyne* on June 17, 2013, which was more than a year *after* the defendant was sentenced on April 16, 2012. Moreover, the Court granted certiorari to hear the Alleyne case on October 5, 2012, *see* 133 S. Ct. 420, which was more than five months after this Court sentenced the defendant on April 16, 2012 (*see* Doc. 120, J. at 1).

Therefore, judged from counsel's perspective at the time of sentencing, his decision not to challenge the 84-month was manifestly reasonable. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *Bullock*, 297 F.3d at 1052 ("[W]e have rejected ineffective assistance claims where a defendant faults his former counsel not for

failing to find existing law, but for failing to predict future law and have warned that clairvoyance is not a required attribute of effective representation.") (internal quotation marks omitted). *Cf. Phillips*, 204 Fed. Appx. 765 (Defense counsel's failure to object to 65-month sentence for possession of a firearm by a convicted felon on constitutional grounds under *Blakely* was not ineffective assistance of counsel, where defendant was sentenced even before certiorari was granted in *Blakely*.).

Moreover, counsel's failure to challenge the 84-month sentence on Count 2 at sentencing did not prejudice the defendant because this Court would have been constrained to deny the defendant's challenge on the basis of *Harris*. So because his challenge would have been fruitless, the defendant cannot show he suffered any prejudice from his counsel's failure to mount any such challenge. In other words, even if counsel had challenged his sentence on this ground, this Court would have been constrained to impose the *same* 84-month sentence under *Harris*. *See Orange*, 447 F.3d at 797 ("When, as here, the basis for the ineffective assistance claim is the failure to raise an issue, we must look to the merits of the omitted issue. If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance.") (internal citation omitted).

The government also notes that *Alleyne* is not retroactive on collateral review, so the defendant is not entitle to relief even if this Court imposed sentence in violation of *Alleyne*. *See In Re Payne*, 733 F.3d 1027 (10th Cir. 2013) (*Alleyne* not retroactive on collateral review).

D. Claims regarding counsel's performance on direct appeal

The defendant claims his appellate counsel performed ineffectively in several respects. Whether the defendant can show that appellate counsel performed ineffectively depends on the merit of the claim that counsel failed to raise on appeal; if the claim lacked merit, then no ineffective assistance occurred.

> A claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances because counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* at 288, 120 S. Ct. 746 (following *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Thus, in analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001) (quotation omitted), *cert. denied*, 537 U.S. 835, 123 S. Ct. 145, 154 L. Ed. 2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003).

1. Failure to challenge sufficiency of evidence on Count 2

2. Failure to challenge sufficiency of evidence on Count 3

The defendant argues his counsel ineffectively failed to challenge the sufficiency of the evidence to support his conviction on Count 2, which was the § 924(c) gun charge. (*See* Doc. 146, at 7 (Ground 7); Doc. 147, at 17-19; Doc. 148 at 5-8.) He also contends his counsel ineffectively failed to challenge the

sufficiency of the evidence to support his conviction on Count 3, which was the felon-in-possession charge. (Doc. 146, at 7 (Ground 7); Doc. 147, at 17-19; Doc. 148, at 8-9.)

In support of both claims, he broadly asserts the government's evidence did not tie him to the bank robbery or the guns used to commit the robbery:

> Movant submits that the government did not present any evidence during trial that Movant robbed the bank, was a getaway driver, or was ever at the crime scene. Further more, the government failed to present any evidence that Movant possessed any firearm or even knew of the use of any firearm or the robbery for that matter. The government had to prove beyond a reasonable doubt that Movant possessed or carried a firearm or that he aided & abetted the principle's use and carriage of a firearm. [] The evidence adduced only proved that Movant was arrested in a home where US currency linked to the bank was found. . . . The government's evidence only placed Movant in a dwelling where US currency was discovered after the robbery had taken place, yet no firearms was ever discovered in the home.

(Doc. 148, at 5-6 (internal citation omitted).) (*See also id.* at 8 ("Movant submits that the government again failed to present any evidence that Movant possessed any firearm or had knowledge of any firearm. . . . [I]n the instant case there was no evidence that put Movant at the crime scene.").)

Even if counsel performed ineffectively by failing to challenge the sufficiency of the evidence on Counts 2 and 3, such failure did not prejudice the defendant because the Tenth Circuit would have rejected any such challenge, so his claim fails under *Strickland's* prejudice prong. First, counsel lodged a vigorous sufficiency-of-the-evidence challenge to Count 1, and the Tenth Circuit rejected it, finding "*the government presented ample evidence to support the jury's finding that Defendant was one of the three men who robbed Equity Bank.*" *See Rogers*, 520 Fed. Appx. at

729 (emphasis added). That the Tenth Circuit rejected his sufficiency claims as to Count 1 is dispositive evidence that it would have rejected a sufficiency challenge to Counts 2 and 3, because government presented *the same evidence* at trial to support Count 1 as it did to support Counts 2 and 3. And because the Tenth Circuit denied the defendant's challenge to Count 1, it would have also rejected any challenge to Counts 2 and 3. (*See id.* at 729 n.1 ("Because Defendant's robbery conviction stands, so do his other two convictions.").) Therefore, the defendant cannot show that but for his counsel's failure to challenge his convictions on Counts 2 and 3, the Tenth Circuit would have vacated his convictions on these counts.

Second, the Tenth Circuit's finding that the government proved beyond a reasonable doubt "that Defendant was one of the three men who robbed the bank," 520 Fed. Appx. at 729, effectively moots all of the defendant's assertions that he did not participate in the robbery. Because this finding is now law-of-the-case, this Court must consider the defendant's instant claim in light of this finding. So considered, this Court may easily conclude that the Tenth Circuit would have denied an appellate challenge to Counts 2 and 3 on the basis of the tellers' testimony that two of the three bank robbers possessed weapons during the robbery. (*See* Trial Tr. at 29-35 (one of the two robbers who jumped over the tellers' counter into the vault area had a gun and threatened to shoot her); *id.* at 41-42, 46 (third robber in lobby was pointing and waiving his firearm at tellers).)

Based on this evidence, the Tenth Circuit would have denied any sufficiency challenge to Counts 2 and 3 because this evidence established that two of the three

robbers had guns, and if the defendant was one of the three robbers, he was guilty of Count 2 under an aiding-and-abetting theory even if he was the robber who did not possess the gun. In instruction 21, this Court instructed jury that it could convict defendant on Count 2 under an aiding-and-abetting theory if it found: (1) "someone else committed the charged crime," and (2) defendant "intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about" and "consciously shared the other person's knowledge of the underlying criminal act and intended to help him").)[10]

Even assuming *arguendo* that the defendant was the robber who did not possess a gun and one of his cohorts committed the offense as a principal, the evidence overwhelming established the robber without the gun intentionally participated in the robbery and his cohorts' use of guns to facilitate that robbery as something he wished to succeed, and he consciously shared knowledge that the other two robbers were participating in the robbery with their firearms. The trial evidence showed as much:

At around 10:38 a.m. on the morning of the robbery, three African American males wearing masks and gloves entered the Equity Bank on North Webb Road in Wichita, Kansas. (Trial Tr. at 9, 54-56, 378.) When they entered, the bank's branch

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10 The government acknowledges that this instruction is erroneous in light of Rosemond, but because Rosemond does not apply retroactively on collateral review for the reasons already discussed, Rosemond has no application to this Court's resolution of this issue.

manager, Kristen Myer, was in the vault room getting some supplies. (*Id.* at 8-9, 11, 34.) The only other employee working at the time, Susan Stevens, was on the teller line. (*Id.* at 10-12.) Two of the masked men jumped over the teller counter and started screaming, "Get down on the ground!" and "Where's the money?" and "Give me the money." (*Id.* at 34-35.) One of the two men had a gun. (*Id.* at 31, lines 4-11.) They took money from Stevens' teller drawer. (*Id.* at 36, 40.) The third man, who had a gun that looked like a machine gun, remained in the lobby. (*Id.* at 35-37.) Neither Myer nor Stevens got on the ground because they were so shocked. (*Id.* at 30.)

The two men behind the teller area instructed Myer and Stevens to open the vault. (*Id.* at 28.) When they encountered problems in opening the vault, one of the men, who was holding a firearm, told Myer, "If you don't open it, I'll shoot you. Don't make me shoot you." (*Id.* at 30-31.) Myer thought he was going to shoot her. (*Id.* at 31.) Once Myer and Stevens opened the vault, the two men started taking money from the vault and putting it in a laundry bag. (*Id.* at 31-32.) While they did so, Myer backed into a corner of the vault and crouched down because she was worried that the men would shoot her on the way out:

> I just wanted to get as small as possible, I–I don't–I didn't know what to do so I was thinking, What am I supposed to do now, but I wanted to get as small as possible because I was kind of worried that they were going to shoot me on the way out because, you know, even though they're in–they're covered up, you know, you never know if they're thinking, Oh, she saw me or something, I don't know.
>
> I was worried they were going to shoot me on the way out.

(*Id.* at 32-33 (Myer's testimony).)

During these events, the third man who had remained in the lobby area walked up to the teller counter, pointing and waving his firearm at Myer and Stevens. (*Id.* at 41-42, 46.) After taking the money, the three men left the bank through the front door and drove away in a sport-utility vehicle. (*Id.* at 39.)

These facts, viewed in the light most favorable to the government, as the Tenth Circuit would have viewed them on appeal,[11] leave no doubt that each of the three robbers, including the one who did not have a firearm, was fully aware and knowledgeable that a bank robbery was occurring, that firearms were involved, and that those firearms were being used by at least two of the robbers to facilitate the robbery. No doubt exists that the robber without the gun consciously shared the other two robbers' knowledge of the guns and the underlying criminal act and intended to help them both commit the robbery and use the firearms to facilitate the robbery.

3. Failure to challenge 84-month sentence on Count 2

The defendant alleges that his appellate counsel ineffectively failed to challenge his 84-month sentence on Count 2. (*See* Doc. 146, at 8; Doc. 147, at 20.) He reasons that "the jury found movant guilty for 'possession' which carries 60 months (5 years), and not 'brandishing' as the Sentencing Court sentenced movant for." (Doc. 146, at 8.) As a result, he asserts "Movant's sentence is unconstitutional

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11 See United States v. Wells, 739 F.3d 511, 525 (10th Cir. 2014) (in addressing a sufficiency challenge on appeal, court "must take the evidence—both direct and circumstantial, and reasonable inferences drawn from that evidence—in the light most favorable to the government and ask only whether a reasonable jury could find the defendant guilty beyond a reasonable doubt") (quotations omitted).

under the 7 year sentence he was sentenced to." (*Id.*) This claim is without merit.

Appellate counsel did not ineffectively fail to challenge the defendant's 84-month sentence on Count 2 because *Harris* squarely foreclosed any such claim at the time of the defendant's appeal and remained the law until the Court overruled *Harris* in *Alleyne*, which occurred more than two months after the Tenth Circuit denied the defendant's direct appeal. *See Harris*, 536 U.S. at 556–57 (holding that a fact increasing a defendant's mandatory minimum sentence, specifically brandishing a firearm under § 924(c)(1)(A)(ii), was not subject to the *Apprendi* rule and could be found by a sentencing judge rather than a jury); *United States v. Rogers*, 520 Fed. Appx. 727 (10th Cir. 2013) (affirming defendant's conviction on April 5, 2013); *Alleyne*, 133 S. Ct. at 2163 (overruling *Harris* on June 17, 2013, because "*Harris* was inconsistent with *Apprendi*"). Therefore, judged from counsel's perspective at the time of appeal, his decision not to challenge the 84-month was reasonable because *Harris* was the controlling law while his appeal was pending. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

The government acknowledges that the Supreme Court granted certiorari to hear the *Alleyne* case on October 5, 2012, *see* 133 S. Ct. 420, during the pendency of the defendant's appeal. (*See* Doc. 124 (defendant's appeal docketed May 2, 2012); Doc. 142 (Mandate issued April 29, 2013).) The government also acknowledges that

appellate counsel could have raised an argument based on *Alleyne's* rationale in anticipation receiving a favorable decision from the Supreme Court. Even so, his failure to do so did not constitute ineffective assistance. *See Bajorski v. United States*, 276 Fed. Appx. 952, 954 (11th Cir. 2008) ("Even if a claim based upon an anticipated change in the law is reasonably available at the time counsel failed to raise it, such failure does not constitute ineffective assistance"); *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994) ("We have held many times that '[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.'"); *e.g.*, *United States v. Magleby*, 420 F.3d 1136, 1145 (10th Cir. 2005) ("Whatever the merits of Mr. Magleby's ... contention, it was not so obvious at the time of his direct appeal that counsel's failure to raise it was unreasonable. No decisions had yet adopted his view."). Because counsel did not ineffectively fail to raise an *Alleyne* claim in the defendant's direct appeal, the defendant is not entitled to relief on the basis of an ineffective-assistance claim. Moreover, because Alleyne is not retroactively applicable on collateral review, *see In Re Payne*, 733 F.3d 1027, the defendant is not entitled to relief on any other basis.

4. Failure to challenge bank robbery instruction— No. 18

The defendant argues that appellate counsel ineffectively failed to challenge instruction 18, which instructed on the elements of the offense charged in Count 1, the bank robbery count. (*See* Doc. 146, at 8 ("Although Counsel did not object to the jury instructions in the trial court, Counsel could have still raised the issue on

direct appeal for plain error."); Doc. 147, at 19 ("Counsel failed to raise the constructive amendment in the jury instructions on direct appeal.").)

Counsel's failure to challenge the instruction on appeal did not constitute ineffective assistance under *Strickland* because the Tenth Circuit would have rejected his challenge under the plain-error review standard.[12] The government has already acknowledged that instruction 18 was defective, *see* § IV. B. 3., *supra*; had counsel challenged the instruction on appeal, the government would have conceded that giving the instruction constituted error that was plain under current law for the reasons already explained. Thus, counsel could have established the first and second prongs under plain-error review.

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[12] Rule of Criminal Procedure 52(b) provides for review of a "plain error" not brought to the district court's attention. "Under the rigorous plain-error standard, a defendant has the burden of showing (1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *United States v. Begaye*, 635 F.3d 456, 470 (10th Cir. 2011) (internal quotation marks omitted). "If he satisfies these criteria, this Court may exercise discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted). Ordinarily, an error is considered "plain" only if the Supreme Court or the Tenth Circuit Court of Appeals has addressed the issue. *United States v. Ruiz–Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003). To establish prejudice to substantial rights, a defendant must demonstrate a "reasonable probability" that the error "affected the outcome of the district court proceedings." The court of appeals will notice a plain-error only if a miscarriage of justice would result of the error were not corrected. *See, e.g., United States v. Olano*, 507 U.S. 725, 736 (1993) (the "discretion conferred by Rule 52(b) should be employed [only] in those circumstances in which a miscarriage of justice would otherwise result.") (emphasis added); *United States v. Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005) (quotations omitted). On appeal, a defendant must establish all four elements of plain-error review. *United States v. McBride*, 633 F.3d 1229, 1233 (10th Cir. 2011) ("Defendant is not entitled to relief if he fails to establish one or more of the four elements of plain error.")

Notwithstanding, counsel's challenge would have still failed because he could not have established either the third prong—relating to substantial rights—or the fourth prong—relating to miscarriage of justice. *See* n.10, *supra*. Counsel could not have established either prong for the simple reason that instruction 18 required the jury to find *all* of the elements of the § 2113**(a)** violation, even though the instruction was tailored to a § 2113**(d)** violation. As noted, instruction 18 tracked Tenth Circuit Pattern Instruction 2.77 by instructing on the four elements listed in that instruction. *Compare* 10th Cir. Pattern Crim. Jury Inst. 2.77 (2011) (listing four elements) *with* Doc. 98, Instr. No. 18 (setting forth identical elements). The first three of these elements *accurately* set forth the elements of the § 2113(a) violation. *See* 10th Cir. Pattern Crim. Jury Instr. 2.77 (2011) (stating in Use Note that "[i]f a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted"). So in finding the defendant guilty on Count 1 based on the elements set forth in in instruction 18, the jury necessarily had to find that the defendant committed these first three elements constituting a § 2113**(a)** violation. *See Fletcher*, 121 F.3d at 193 ("[T]he elements of § 2113(d) include all of the elements of § 2113(a), plus the additional element of assault."). Accordingly, the defendant's substantial rights were not affected by the defective instruction because the jury found him guilty of all of the elements of the § 2113(a) violation. Nor did the defective instruction (or the jury's verdict in conformity with that instruction) affect his sentence; on Count 1 this Court imposed a sentence of

150 months' custody, which was *below* § 2113(a)'s statutory maximum of 20 years. (*See* Doc. 120, J. at 2.)

For these reasons as well, the court of appeals could not have found that the defendant received a miscarriage of justice based upon the defective instruction, so the defendant could not have established a basis for relief under the fourth plain error prong. Therefore, had appellate counsel challenged the instruction, his challenge would have failed under plain-error review.

5. Failure to raise fair cross-section claim

The defendant argues "counsel was ineffective . . . on appeal for failing to raise the issue that movant's petit jury or jury pool had no African American males in either." (Doc. 147, at 9 (capitalization omitted).)

The defendant cannot show that appellate counsel's failure to raise this claim constituted ineffective assistance under either *Strickland* prong because any challenge on this basis would have been unsuccessful for the reasons already explained in § IV. B. 1., *supra*. No further discussion is necessary.

6. Failure to raise cumulative error claim.

The defendant claims his due process rights were violated "[d]ue to the many 'Cumulative Effects" of Counsel's errors[.]" (Doc. 146, at 8.) (*See also* Doc. 147, at 20-21.) He does not specifically assert that his appellate counsel ineffectively failed to present this claim on appeal, but the government liberally construes the defendant's claim as alleging as much because any such claim would not have ripened until the proceedings in the district court had terminated. Even so

construed, however, the defendant's claim must fail. For reasons already explained, none of the defendant's claims of ineffective assistance of counsel are meritorious; therefore, no errors exist to cumulatively consider.

WHEREFORE, the government prays that this Court DENY the defendant's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2014, I electronically filed the foregoing response with the clerk of the court by using the CM/ECF system, which will send a copy of this pleading to the defendant's last attorney of record, and I sent a copy via first-class U.S. Mail to: Raymond L. Rogers, Reg. No. 20787-031, FCI Forrest City Medium, FEDERAL CORRECTIONAL INSTITUTION, PO BOX 3000, FORREST CITY, AR 72336..

s/ James A. Brown
JAMES A. BROWN