APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

January 31, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SITAMIPA TOKI,

Defendant - Appellant.

No. 17-4153

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC KAMAHELE,

Defendant - Appellant.

No. 17-4154

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEPA MAUMAU,

Defendant - Appellant.

No. 17-4155

Appeals from the United States District Court
for the District of Utah
(D.C. 2:16-CV-00730-TC, 2:08-CR-00758-TC-14, 2:15-CV-00600-TC, 2:08-cr-00758-TC-11, 2:15-CV-00506-TC, 2:08-CR-00758-TC-1)

Benjamin C. McMurray, Assistant Federal Public Defender (Kathryn N. Nester and Scott Keith Wilson, Federal Public Defenders, with him on the briefs), District of Utah, Salt Lake City, Utah, for Defendants - Appellants

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Before **HOLMES**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

LUCERO, Senior Circuit Judge.

This matter is before us on remand from the Supreme Court. As detailed in United States v. Toki, 822 F. App'x 848 (10th Cir. 2020), petitioners Sitamipa Toki, Eric Kamahele, and Kepa Maumau filed motions under 28 U.S.C. § 2255 to vacate, set aside, or correct their sentences stemming from a series of armed robberies. They made several arguments in their motions, including that their convictions under 18 U.S.C. § 924(c) for using or carrying a firearm during a crime of violence were invalid because their predicate convictions were not "crime[s] of violence" as defined by the statute. The district court denied the § 2255 motions, and we affirmed. The Supreme Court has now vacated our judgment and remanded for further consideration in light of its intervening decision in Borden v. United States, 141 S.

Ct. 1817 (2021), which held that a crime that can be committed with a mens rea of recklessness cannot qualify as a "violent felony" under the Armed Career Criminal Act's ("ACCA") "elements" or "force" clause, § 924(e)(2)(B)(i). Id. at 1825.

The parties agree that, after Borden, offenses that can be committed recklessly are not "crime[s] of violence" under § 924(c)'s nearly identical elements clause, § 924(c)(3)(A). As a result, the petitioners' predicate assault convictions under the Violent Crimes in Aid of Racketeering statute ("VICAR"), 18 U.S.C. § 1959, cannot support their separate convictions under § 924(c). We therefore reverse in part the district court's order denying petitioners' § 2255 motions and remand with instructions to vacate their § 924(c) convictions based on violations of VICAR.

I

Toki, Kamahele, and Maumau were convicted of various crimes in a joint trial.[1] Each was convicted of one or more counts under VICAR, which makes it a federal crime to commit certain state crimes in aid of racketeering. § 1959(a). Those VICAR convictions were based on violations of Utah and Arizona statutes criminalizing assault with a dangerous weapon. See Utah Code Ann. § 76-5-103(1) (2008); Ariz. Rev. Stat. § 13-1204(A) (2008). The government concedes that these state crimes can be committed with a mens rea of recklessness. Each VICAR conviction formed the basis for a separate § 924(c) conviction for using or carrying a

[1] Because we previously summarized the events giving rise to this appeal, see Toki, 822 F. App'x at 850-52, we recite only those facts relevant to our reconsideration of petitioners' § 924(c) claims.

firearm during a crime of violence. Kamahele and Maumau were also convicted of additional § 924(c) counts based on their convictions for Hobbs Act robbery, 18 U.S.C. § 1951. We affirmed on direct appeal. United States v. Kamahele, 748 F.3d 984 (10th Cir. 2014).

In their § 2255 motions, petitioners argued, inter alia, that their § 924(c) convictions based on VICAR offenses violated due process. Specifically, they contended that the elements-clause definition of "crime of violence" under § 924(c)(3)(A) did not encompass crimes that could be committed recklessly, and therefore their § 924(c) convictions necessarily relied on that statute's unconstitutional "residual clause," § 924(c)(3)(B). After the district court denied this claim,[2] we granted a certificate of appealability ("COA") on the issue of whether the

[2] The district court concluded that petitioners' challenges to their § 924(c) convictions were untimely. See Kamahele v. United States, No. 2:15-cv-00506-TC, 2017 WL 3437671, at *11-14 (D. Utah Aug. 10, 2017). Petitioners initially argued that their § 2255 motions, which were filed more than a year after their convictions became final, were timely because they were filed within a year of Johnson v. United States, 576 U.S. 591 (2015). See § 2255(f)(3) (stating that a § 2255 claim based on a right that "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" is timely if filed within one year of the date the right was recognized). Johnson held that ACCA's residual clause was unconstitutionally vague. 576 U.S. at 601-02. Petitioners contended that Johnson likewise compelled the invalidation of § 924(c)'s similar residual clause, an argument the district court rejected. See Kamahele, 2017 WL 3437671, at *13-14. While petitioners' appeals were pending, the Supreme Court held that § 924(c)'s residual clause was unconstitutional. See United States v. Davis, 139 S. Ct. 2319, 2336 (2019). Because Davis recognized the right asserted by petitioners as the basis for their § 2255 motions, the government asked that we waive the timeliness issue and rule on the merits of petitioners' claims. See Toki, 822 F. App'x at 852. It has renewed this request on remand. We therefore once again assume petitioners' motions are timely and proceed to the merits of their § 924(c) claims.

petitioners' "VICAR convictions based on Utah and Arizona aggravated assault are not categorically crimes of violence under the force clause of § 924(c) because they do not require the intentional use of violent force." However, counsel for petitioners conceded this issue in light of intervening circuit caselaw holding that § 924(c)'s elements clause encompasses crimes that can be committed recklessly. See United States v. Mann, 899 F.3d 898, 905 (10th Cir. 2018). We thus affirmed the district court's denial of petitioners' challenges to their § 924(c) convictions based on VICAR offenses. Toki, 822 F. App'x at 853. We also affirmed the denial of relief with respect to other issues for which a COA was granted, denied a COA on other claims, and dismissed the appeals. Id. at 853-58.

Kamahele and Maumau petitioned for a writ of certiorari,[3] seeking review, inter alia, of whether "a crime that can be committed recklessly qualif[ies] categorically as a 'crime of violence' under the force clause of § 924(c)." On October 4, 2021, the Supreme Court granted the petitions, vacated our judgment, and remanded for further consideration in light of Borden. We requested supplemental briefing from the parties to address the effect of Borden on petitioners' challenges to their § 924(c) convictions.

II

[3] Toki did not petition for certiorari because he was out of custody at the time Kamahele's and Maumau's respective petitions were filed. He is now back in custody pursuant to a supervised release violation in this case.

We agree with the parties that, after Borden, petitioners' VICAR convictions based on Utah and Arizona statutes criminalizing assault with a dangerous weapon cannot support their separate convictions under § 924(c). Those § 924(c) convictions were thus "imposed under an invalid—indeed, unconstitutional—legal theory" and must be vacated. United States v. Bowen, 936 F.3d 1091, 1108 (10th Cir. 2019) (quotation omitted).

Section 924(c) makes it a crime to use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime." § 924(c)(1)(A). It defines a "crime of violence" as:

> [A]n 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.

§ 924(c)(3). In United States v. Davis, 139 S. Ct. 2319 (2019), the Supreme Court held that the statute's residual clause—§ 924(c)(3)(B)—is unconstitutionally vague. Id. at 2336. We subsequently held that Davis announced a new substantive rule that applies retroactively on collateral review. Bowen, 936 F.3d at 1100-01. Therefore, petitioners' § 924(c) convictions must be based on predicate offenses that are categorically crimes of violence as defined by the elements clause, § 924(c)(3)(A).

In Borden, the Supreme Court held that an offense that can be committed recklessly does not categorically meet the definition of a "violent felony" under

ACCA's elements clause. Borden, 141 S. Ct. at 1825. ACCA's elements clause is nearly identical to the elements clause of § 924(c). Both require that a predicate offense "has as an element the use, attempted use, or threatened use of physical force against . . . another." §§ 924(c)(3)(A), 924(e)(2)(B)(i). The Court in Borden reasoned that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." Borden, 141 S. Ct. at 1825. Reckless conduct cannot satisfy this standard because it "is not aimed in that prescribed manner." Id.

On remand, the government concedes that Borden's reasoning applies in kind to § 924(c)'s elements clause. Indeed, we have previously held that the elements clauses of ACCA and § 924(c) should be interpreted identically with respect to what mens rea they require. See Mann, 899 F.3d at 907-08 (concluding that while § 924(c)(3)(A), unlike ACCA's elements clause, also reaches property crimes, this fact "does not offer a meaningful basis for a mens rea distinction" (cleaned up)). We therefore hold that, after Borden, an offense that can be committed recklessly is not categorically a "crime of violence" under § 924(c)'s elements clause. To the extent that our decision in Mann held to the contrary, it is overruled by Borden.

Moreover, and as the government likewise concedes, the new rule announced by Borden applies retroactively to the instant appeals. While new constitutional rules of criminal procedure usually do not apply to cases which have already become final, see Teague v. Lane, 489 U.S. 288, 310-11 (1989), new substantive rules announced by the Supreme Court "generally apply retroactively." Schriro v. Summerlin, 542

U.S. 348, 351 (2004). Substantive rules include decisions "that narrow the scope of a criminal statute by interpreting its terms." Id.; see also Bousley v. United States, 523 U.S. 614, 620-21 (1998) (holding that the rule announced in Bailey v. United States, 516 U.S. 137 (1995), which narrowed the scope of the term "use" in § 924(c), applied retroactively). Borden is properly understood as establishing a substantive rule because it interpreted the language of ACCA's elements clause—which, as discussed above, is materially identical to § 924(c)'s elements clause—and held it did not reach predicate crimes that can be committed recklessly. Borden, 141 S. Ct. at 1825. Accordingly, we accept the government's concession that Borden's rule applies to our review of petitioners' § 924(c) claims.

In light of the above, petitioners are entitled to relief from their VICAR-based § 924(c) convictions. The government concedes that, pursuant to Borden, petitioners' VICAR convictions for crimes that can be committed recklessly cannot satisfy § 924(c)'s elements-clause definition of a crime of violence. Those convictions also cannot qualify as valid § 924(c) predicates under the unconstitutional residual clause. See Bowen, 936 F.3d at 1100-01. Petitioners' VICAR offenses are therefore not "crime[s] of violence" that can support their separate § 924(c) convictions. The trial court erred when it instructed the jury otherwise. Moreover, the trial court's error had a "substantial and injurious effect or influence in determining the jury's verdict," and therefore was not harmless. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quotation omitted). Had the trial court correctly concluded that petitioners' VICAR offenses were not crimes of violence,

the jury could not have convicted them of § 924(c) crimes based on those offenses. See Bowen, 936 F.3d at 1109.

While petitioners' § 924(c) convictions based on VICAR must be vacated, we reaffirm those portions of our Order and Judgment denying relief on petitioners' other claims. See Toki, 822 F. App'x at 853-58. Notably, petitioners do not argue that Borden undermined the validity of Kamahele's and Maumau's § 924(c) convictions predicated on Hobbs Act robbery. See United States v. Melgar-Cabrera, 892 F.3d 1053, 1061-66 (10th Cir. 2018) (holding that Hobbs Act robbery is a crime of violence under § 924(c) based on the elements of the offense).

III

We **REVERSE IN PART** the district court's order denying petitioners' § 2255 motions and **REMAND** with instructions to **VACATE** petitioners' § 924(c) convictions that are based on predicate VICAR offenses.

FILED
United States Court of Appeals
Tenth Circuit

August 11, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SITAMIPA TOKI,

Defendant - Appellant.

No. 17-4153
(D.C. Nos. 2:16-CV-00730-TC &
2:08-CR-00758-TC-14)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC KAMAHELE,

Defendant - Appellant.

No. 17-4154
(D.C. Nos. 2:15-CV-00506-TC &
2:08-CR-00758-TC-1)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEPA MAUMAU,

Defendant - Appellant.

No. 17-4155
(D.C. Nos. 2:15-CV-00600-TC &
2:08-CR-00758-TC-11)
(D. Utah)

ORDER AND JUDGMENT*

Before **LUCERO**, **HOLMES**, and **McHUGH**, Circuit Judges.

These appeals involve a consolidated motion under 28 U.S.C. § 2255 filed by Sitamipa Toki, Eric Kamahele, and Daniel Maumau. Toki, Kamahele, and Maumau committed a series of armed robberies as members of the Tongan Crip Gang. They were tried and convicted of various crimes, including assault with a dangerous weapon in aid of racketeering under the Violent Crimes in Aid of Racketeering Statute ("VICAR"), 18 U.S.C. § 1959; using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c); Hobbs Act robbery, 18 U.S.C. § 1951; and conspiracy to engage in racketeering.

Toki, Kamahele, and Maumau filed § 2255 motions challenging their convictions, which the district court denied. The court granted a certificate of appealability ("COA") as to two of Kamahele's claims. We granted a COA with respect to two additional issues. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2255(d), we affirm on the four issues for which a COA has been granted. With respect to the remaining issues that petitioners raise, we deny a COA and dismiss the appeals.

* This order and judgment 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.

I

In 2011, Toki, Kamahele, and Maumau were tried in connection with several armed robberies they committed as members of the Tongan Crip Gang. About a month before trial, Kamahele entered a guilty plea. The next day, he told his counsel he wished to withdraw his plea. Counsel filed a motion with the court, and the court held a hearing at which Kamahele withdrew his plea.

Petitioners were charged under VICAR, which makes it a federal crime to commit certain state crimes in aid of racketeering. § 1959. All three petitioners were convicted under VICAR of one count of Utah assault with a dangerous weapon. Maumau was also convicted under VICAR of two counts of Arizona assault with a dangerous weapon. Each VICAR conviction was the basis for a separate conviction under § 924(c) for using or carrying a firearm during a crime of violence. In addition, Kamahele and Maumau were convicted of Hobbs Act robbery. These Hobbs Act robbery convictions were the basis for separate § 924(c) convictions. The two were also convicted of conspiracy to engage in racketeering. Toki was ultimately sentenced to six years' imprisonment, Kamahele to thirty years, and Maumau to 55 years. These sentences were based on the mandatory minimums required under § 924(c). We affirmed their convictions and sentences on direct appeal. United States v. Kamahele, 748 F.3d 984 (10th Cir. 2014).

In 2015, Kamahele filed a pro se § 2255 motion. The district court denied the motion but granted a COA as to two of his claims relating to the withdrawal of his guilty plea. Kamahele appeals these claims. Maumau filed a pro se § 2255 motion

bringing eleven ineffective assistance of counsel claims. The district court denied the motion and did not grant a COA. Maumau now seeks a COA from this court on four of these claims.

Toki, Kamahele, and Maumau were appointed counsel, and they filed § 2255 motions with the aid of counsel. First, they argued under Johnson v. United States, 135 S. Ct. 2551 (2015), that their convictions under § 924(c) violated due process because § 924(c)(3)(B) is unconstitutionally vague. Determining that this claim was untimely, the district court denied the claim and denied a COA. Petitioners also argued they were "actually innocent" of their VICAR and § 924(c) convictions because the predicate crimes on which those convictions were based are not crimes of violence. The district court denied this claim and did not grant a COA.

In 2017, petitioners filed these timely appeals. We granted a COA on the following issues:

> (1) Whether a challenge to a conviction based on the residual clause of § 924(c) is timely under 28 U.S.C. § 2255(f)(3) if it is filed within a year of Johnson.
>
> (2) Whether Appellants' VICAR convictions based on Utah and Arizona aggravated assault are not categorically crimes of violence under the force clause of § 924(c) because they do not require the intentional use of violent force.

At oral argument, counsel for petitioners conceded the second issue.

II

"On appeal from the denial of a § 2255 motion, ordinarily we review the district court's findings of fact for clear error and its conclusions of law de

novo." United States v. Barrett, 797 F.3d 1207, 1213 (10th Cir. 2015) (quotation omitted).

Petitioners contend that their § 924(c) convictions are unconstitutional under Johnson. In that case, the Supreme Court evaluated the constitutionality of the definition of "violent felony" in the Armed Career Criminal Act. It held that 18 U.S.C. § 924(e)(2)(B)(ii), known as the "residual clause," was unconstitutionally vague. 135 S. Ct. at 2560. As a result, it struck down enhancements for which the predicate crime was a "violent felony" under the residual clause and did not fall within § 924(e)(2)(B)(i), the "elements clause." Johnson did not address convictions under § 924(c).

The Court addressed § 924(c) in United States v. Davis, 139 S. Ct. 2319 (2019). Section 924(c) makes it a crime to use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime" or to possess a firearm "in furtherance of any such crime." § 924(c)(1)(A). It 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.

§ 924(c)(3). Like § 924(e)(2)(B), § 924(c)(3) includes an "elements" clause (also called the "force" clause)—§ 924(c)(3)(A)—and a "residual" clause—§ 924(c)(3)(B).

In Davis, the Court held that the residual clause of § 924(c) is unconstitutionally vague. 139 S. Ct. at 2336.

The district court dismissed petitioners' challenges to their § 924(c) convictions as untimely. Petitioners argue that their claims are timely because they were filed within a year of Johnson. See § 2255(f)(3) (if right "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," claim must be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court"). In its briefing, the government argued that the claims are untimely because they were filed before Davis. See United States v. Bowen, 936 F.3d 1091, 1100 (10th Cir. 2019) (Davis announced new rule retroactively applicable on collateral review). But at oral argument, the government asked us to waive the timeliness issue and proceed to the merits of the claim. We have done so on other occasions in which we considered a petition challenging a conviction under § 924(c) that was filed within a year of Johnson. See, e.g., United States v. Clark, No. 18-2048, 2020 WL 3124450, at *2 n.1 (10th Cir. June 12, 2020) (unpublished); United States v. Moore, 802 F. App'x 338, 341 & n.2 (10th Cir. 2020) (unpublished); United States v. Morgan, 775 F. App'x 456, 457 (10th Cir. 2019) (unpublished); United States v. Ryle, 778 F. App'x 598, 600 (10th Cir. 2019) (unpublished). Because of the government's waiver, we adopt the same approach in this case. We assume petitioners' challenges to their § 924(c) convictions are timely and proceed to the merits.

Petitioners argue that their § 924(c) convictions are unconstitutional because the crimes on which they are predicated—VICAR and Hobbs Act robbery—are not categorically crimes of violence. We granted a COA on whether petitioners' VICAR convictions based on Utah and Arizona aggravated assault are categorically crimes of violence, but counsel for petitioners conceded this issue at oral argument. Because of this concession, we affirm the district court's denial of petitioners' challenges to their § 924(c) convictions for which the predicate crime of violence was a conviction under VICAR.

Turning to Kamahele and Maumau's § 924(c) convictions predicated on Hobbs Act robbery, we note that neither we nor the district court granted a COA on whether Hobbs Act robbery is a crime of violence. A petitioner may not appeal the denial of habeas relief under § 2255 without a COA. 28 U.S.C. § 2253(c)(1). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). To make this showing, a petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted).

In United States v. Melgar-Cabrera, 892 F.3d 1053 (10th Cir. 2018), we held that Hobbs Act robbery is a crime of violence under the force clause of § 924(c).[1]

[1] Our sibling circuits that have considered the issue are in agreement. See United States v. Dominguez, 954 F.3d 1251, 1260 (9th Cir. 2020) (collecting cases).

Kamahele and Maumau argue we should hold that Hobbs Act robbery is not a crime of violence, relying on United States v. Dubarry, 741 F. App'x 568 (10th Cir.) (unpublished), cert. denied, 139 S. Ct. 577 (2018). In that case, we acknowledged that Melgar-Cabrera did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property. Id. at 570. But in Melgar-Cabrera, we categorically held that Hobbs Act robbery is a crime of violence based on the elements of the offense. Id. at 1061-66. "[W]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." Strauss v. Angie's List, Inc., 951 F.3d 1263, 1269 (10th Cir. 2020) (quotation omitted). We conclude that under our binding precedent in Melgar-Cabrera, the constitutionality of Kamahele and Maumau's § 924(c) convictions predicated on Hobbs Act robbery is not reasonably debatable. Accordingly, we do not grant a COA as to these convictions.

III

We turn to petitioners' actual innocence claims. Petitioners contend that they are actually innocent of their convictions under § 924(c) and VICAR. The district court denied their claims and did not grant a COA, and we also have not granted a COA on this issue. Because petitioners have renewed their request for a COA on these claims, our inquiry is whether they have shown "that reasonable jurists could debate" whether they are entitled to relief. Slack, 529 U.S. at 484.

Petitioners argue that they are actually innocent of their § 924(c) convictions because the corresponding VICAR and Hobbs Act robbery predicates are not

categorically crimes of violence. But as explained above, counsel for petitioners conceded at oral argument that petitioners' VICAR convictions were categorically crimes of violence, and Hobbs Act robbery is categorically a crime of violence under our binding precedent. Because petitioners advance no other argument in support of their actual innocence claims with respect to their § 924(c) convictions, we do not grant a COA on these claims.[2]

With respect to their VICAR convictions, petitioners argue that they are actually innocent because their crimes do not satisfy the elements of VICAR. This is a "freestanding" actual innocence claim: unlike a "gateway" actual innocence claim "enabl[ing] habeas petitioners to overcome a procedural bar in order to assert distinct claims for constitutional violations[,] . . . a freestanding claim asserts actual innocence as a basis for habeas relief." Farrar v. Raemisch, 924 F.3d 1126, 1130-31 (10th Cir. 2019) (quotation omitted). In Herrera v. Collins, 506 U.S. 390 (1993), the

[2] We need not address whether petitioners' claims of actual innocence would be viable if the predicate crimes for their § 924(c) convictions were not crimes of violence. See Bowen, 936 F.3d at 1097 n.2 ("[N]either our circuit nor the Supreme Court has definitively resolved whether a claim of actual innocence based on a new statutory interpretation—rather than such a claim based on new evidence—can overcome § 2255's statute of limitations."). We note that the Fifth Circuit and scholars have suggested that such a claim of actual innocence may be viable. See United States v. Reece, 938 F.3d 630, 634 n.3 (5th Cir. 2019), as revised (Sept. 30, 2019) ("If [the petitioner]'s convictions were based on the definition of [crime of violence] articulated in § 924(c)(3)(B), then he would be actually innocent of those charges under Davis."); Leah M. Litman, Legal Innocence and Federal Habeas, 104 Va. L. Rev. 417, 469 (2018) ("Bousley[v. United States, 523 U.S. 614 (1998),] . . . recognized that legal innocence, if the defendant's conduct did not fall within the scope of the relevant criminal statute, would constitute cause for procedural default.").

Supreme Court held that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 404; see also LaFevers v. Gibson, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("[A]n assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus.").

In McQuiggin v. Perkins, 569 U.S. 383 (2013), the Court stated that it had "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." Id. at 392; see also Case v. Hatch, 731 F.3d 1015, 1036 (10th Cir. 2013) ("[I]n Herrera, the Court refused to endorse [a freestanding actual innocence] habeas claim, and, as yet, it is an open question whether such a federal right exists."). But even after McQuiggin, we have consistently denied freestanding actual innocence claims. See, e.g., Farrar, 924 F.3d at 1131 ("[A]ctual innocence does not constitute a freestanding basis for habeas relief."); Vreeland v. Zupan, 906 F.3d 866, 883 n.6 (10th Cir. 2018), cert. denied, 139 S. Ct. 1586 (2019) (actual innocence does not support granting habeas relief (citing LaFevers, 238 F.3d at 1265 n.4)). Accordingly, we decline to grant a COA on petitioners' freestanding actual innocence challenges to their VICAR convictions.

IV

We turn to Kamahele's claims related to the withdrawal of his guilty plea, for which the district court granted a COA. Kamahele alleges that the day after his plea

hearing, he changed his mind about pleading guilty because his codefendant asked him to withdraw his guilty plea. He tried to contact his attorney and asked his attorney's secretary to convey to her that he wished to withdraw his plea. He alleges that his attorney did not contact him. Instead, she filed a motion representing that Kamahele wished to withdraw the plea but had not informed her of his reasons for the withdrawal. She requested an expedited hearing because trial was less than a month away. The court held a hearing the next day.

Kamahele represents that he did not speak to his attorney about the motion until the day of the hearing and that they spoke for only five minutes before the hearing. He states she told him he was "the dumbest person she had ever met" and that the judge would not grant his request. During the hearing, Kamahele's counsel indicated on the record that his decision to withdraw his plea was against her advice. The court then granted the motion to withdraw. Kamahele was tried, convicted, and ultimately sentenced to thirty years' imprisonment.

In his pro se § 2255 motion, Kamahele brought two claims that are at issue in this appeal: (1) ineffective assistance of counsel in connection with the withdrawal of his guilty plea and (2) denial of due process by the district court, which granted the motion to withdraw. The district court denied the claims but granted a COA.

A

Kamahele argues his ineffective assistance of counsel claim should be remanded for discovery and an evidentiary hearing. Section 2255(b) provides, "[u]nless the [§ 2255] motion and the files and records of the case conclusively show

that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." § 2255(b). Our review of this issue entails a two-step inquiry: "(1) whether the defendant is entitled to relief if his allegations are proved; and (2) whether the district court abused its discretion by refusing to grant an evidentiary hearing." United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992).

With respect to the first step, Kamahele argues that his counsel's assistance was ineffective in connection with the withdrawal of his plea. In general, "a defendant has no right to be offered a plea, nor a federal right that the judge accept it." Missouri v. Frye, 566 U.S. 134, 148 (2012) (citation omitted). But "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler v. Cooper, 566 U.S. 156, 168 (2012). This case concerns counsel's advice in connection with withdrawing a guilty plea (as opposed to entering one). Regardless, we evaluate counsel's conduct under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). A petitioner claiming ineffective assistance of counsel must show his or her attorney's representation "fell below an objective standard of reasonableness." Id. at 688. In evaluating such a claim, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The petitioner must also affirmatively prove that he or she was prejudiced by the allegedly deficient representation, meaning "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Kamahele alleges his attorney did not ensure he understood the consequences of withdrawing his plea, particularly the mandatory minimum sentence he would face if convicted. He alleges that counsel made no attempt to contact him after learning he wished to withdraw his plea; instead, she merely talked to him for five minutes before the hearing and told him he was "the dumbest person she had ever met." We need not decide, however, whether counsel's performance was deficient because Kamahele has not shown he was prejudiced by it.

To prove prejudice "[i]n the context of pleas[,] a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163; see also Frye, 566 U.S. at 147 ("[I]t is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable."); United States v. Hamilton, 510 F.3d 1209, 1216 n.3 (10th Cir. 2007) (for defendant alleging counsel ineffectively advised him to plead guilty, "the proper inquiry is whether the defendant has shown that, but for his counsel's conduct, he would not have pleaded guilty."). In this case, Kamahele pled guilty pursuant to an agreement that his sentence would be twelve years' imprisonment, but after withdrawing his plea, he was ultimately sentenced to thirty years' imprisonment. In order to show prejudice, Kamahele must show there was a reasonable probability that he would not have withdrawn his plea had counsel effectively advised him.

Based on the allegations in his pro se § 2255 motion, Kamahele cannot make

this showing. Kamahele argued that he was prejudiced because he lost "an opportunity to take a more favorable sentence"—the twelve-year sentence to which he had already pled guilty. But critically, he does not allege that had he received effective assistance of counsel, he would have decided not to withdraw his plea. Rather, he argues that counsel should not have submitted his motion to withdraw "[r]egardless of [his] wishes." Similarly, Kamahele asserts that he did not "fully grasp[] the concept of federal mandatory minimum sentences" and that counsel gave him different calculations of the amount of prison time he faced. But he does not allege that had he understood that the minimum sentence for two § 924(c) convictions was thirty years, he would not have withdrawn his plea.

We acknowledge that Kamahele filed his initial § 2255 motion pro se, and though we liberally construe his pleadings, we "do not assume the role of advocate," Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (quotation omitted). Absent any allegations or evidence in the § 2255 motion that could lead to an inference that Kamahele would not have withdrawn his plea but for counsel's performance, we conclude that he cannot show prejudice. On this basis, we affirm the district court's denial of Kamahele's ineffective assistance of counsel claim. We need not reach the question "whether the district court abused its discretion by refusing to grant an evidentiary hearing." Whalen, 976 F.2d at 1348.

B

As for Kamahele's due process claim, the district court concluded the claim is procedurally barred because it was not raised on direct appeal. We agree. "A § 2255

motion is not available to test the legality of a matter which should have been raised on direct appeal." United States v. Cox, 83 F.3d 336, 341 (10th Cir. 1996). A petitioner cannot raise a procedurally defaulted claim "unless he establishes either cause excusing the procedural default and prejudice resulting from the error or a fundamental miscarriage of justice if the claim is not considered." Id.

Kamahele did not argue cause and prejudice below or in his opening brief. He does so for the first time in his reply brief, contending the procedural default should be excused because it was caused by ineffective assistance of counsel. We decline to consider this argument. See Gutierrez v. Cobos, 841 F.3d 895, 902 (10th Cir. 2016) ("[A] party waives issues and arguments raised for the first time in a reply brief." (quotation omitted)).

As for the fundamental miscarriage of justice exception, we have explained that it applies only when a petitioner has made "a colorable showing of factual innocence." Cox, 83 F.3d at 341 (citing Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992)).[3] The Supreme Court has repeatedly "emphasized the narrow scope" of the exception. Sawyer, 505 U.S. at 340. Kamahele did not argue below, and he does not argue on appeal, that he is factually innocent. Accordingly, the fundamental miscarriage of justice exception does not apply. We affirm the denial of Kamahele's due process claim.

[3] The district court assumed without deciding that the exception applied.

V

Finally, we turn to Maumau's ineffective assistance of counsel claims, for which he seeks a COA. The district court denied all eleven of Maumau's claims and did not grant a COA. Maumau now seeks a COA on claims 4 through 6 and 11, which relate to his VICAR convictions.[4] Maumau does not dispute his membership in the Tongan Crip Gang, but argues that but for his attorney's alleged errors, the jury could have found that some of his robberies were not motivated by his gang membership. We disagree.

In claims 4 and 5, Maumau challenges (1) his counsel's failure to interview the government's fact witness Edward Kamoto and (2) his counsel's allegedly ineffective cross-examination of Kamoto. At trial, Kamoto testified that Maumau had participated with him in two robberies and that they were members of the gang. Maumau alleges that before trial, Kamoto had denied any connection to the gang, and after trial, Kamoto stated in an affidavit that the robberies in which he participated were neither "committed on behalf of the Tongan Crip Gang" nor committed to elevate his standing in the gang. Maumau contends that had Kamoto testified the two had acted "without a gang-related purpose," Maumau could have avoided his VICAR and associated § 924(c) convictions.

[4] VICAR makes it a crime to commit certain enumerated offenses "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." § 1959(a).

The district court denied the claims, concluding the evidence on the VICAR convictions was "overwhelming" and that any favorable testimony Maumau suggests would have been elicited from Kamoto "is contradicted by Kamoto's own testimony" and "was actually brought out on the stand" anyway. Accordingly, it concluded Maumau failed to satisfy Strickland. And in its denial of a COA on the issue, it specifically stated that a jury could have found the requisite gang-related motive based on the "compelling testimony of Officer Break Merino."

On appeal, Maumau contends that Kamoto's affidavit "calls into question" his testimony about whether Maumau's conduct was intended to increase his standing in the gang. But he does not address any of the other evidence presented at trial—including Officer Merino's testimony—from which a jury could have inferred a gang-related motive. As a result, even assuming counsel's performance was deficient because she did not elicit contradictory testimony from Kamoto, Maumau has not established prejudice from this deficiency because he has not shown a reasonable probability that the jury would have reached a different result regarding his VICAR convictions. Because Maumau has not shown that reasonable jurists could debate whether he has established prejudice on claims 4 and 5, we do not grant a COA on these claims.

In claim 6, Maumau contends his counsel was ineffective because she did not adequately investigate the argument that his need to pay for college expenses was a non-gang motive for his participation in the robberies. In support, he cites receipts for his college expenses found in his car. The district court denied this claim, stating

it could not discern "any relevant link between the college receipts, Maumau's motive and intent, and the purpose of the robberies." On appeal, Maumau states that the jury could have inferred that his real motive for committing the robberies was to pay for college. But he does not raise any argument about the reasonableness of his counsel's performance.

As the Supreme Court explained in Strickland, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. Maumau does not argue that his counsel's decision was not a reasonable strategic choice. Further, he does not contend that her choice prejudiced him. He is thus not entitled to a COA on claim 6.

In claim 11, Maumau argues the cumulative effect of his attorney's errors rendered her representation constitutionally ineffective. "[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect." United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added). In this case, "there is no holding of error, no error to cumulate, and no occasion to apply a cumulative-error analysis." Id. at 1472. We deny a COA as to this claim.

VI

For the foregoing reasons, we **AFFIRM** as to the issues for which a COA has been granted. With respect to the remaining issues, we **DENY** a COA and **DISMISS** the appeals.

Entered for the Court

Carlos F. Lucero
Circuit Judge

original

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERIC KAMAHELE aka "Smooth,"
MATAIKA TUAI aka "Fish,"
LATUTAOFIEIKII FAKAOSIULA,
VAINGA KINIKINI,
TEVITA TOLUTAU aka "Kingi,"
SIALE ANGILAU aka "C-Down,"
PENISIMANI FANGUPO aka "Deuce,"
DAVID KAMOTO aka "D-Down,"
VILIAMI LOUMOLI aka "Eazy-V,"
DANIEL MAUMAU aka "D-Loc,"
KEPA MAUMAU aka "Kap-Loc,"
CHARLES MOA aka "Slim-Loc,"
GEORGE PUPUNU aka "T-Rex,"
SITAMIPA TOKI aka "Tok-Loc"
JOHN TUAKALAU aka "Sin-Loc,"
PETER TUIAKI aka "Pistol-Pete," and
DAVID WALSH aka "D-Nutt,"

Defendants.

SEALED SEALED

SECOND SUPERSEDING
INDICTMENT

Case No. 2:08-cr-758 DAK

VIOS.

18 U.S.C. § 1962(d), CONSPIRACY TO CONDUCT THE AFFAIRS OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY;
18 U.S.C. § 1959(a), VIOLENT CRIMES IN AID OF RACKETEERING;
18 U.S.C. § 1951(a), HOBBS ACT ROBBERY;
18 U.S.C. § 2119(2), CARJACKING;
18 U.S.C. § 111(a), ASSAULT ON A FEDERAL OFFICER;
18 U.S.C. § 924(c), USE, CARRY, BRANDISH AND DISCHARGE OF A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE

The Grand Jury charges:

INTRODUCTION

THE RACKETEERING ENTERPRISE:

The Tongan Crip Gang, also known as "TCG"

1. At all times relevant to this Second Superseding Indictment, in the Central Division of the District of Utah, and elsewhere, Defendants,

SIALE ANGILAU aka "C-Down,"
PENISIMANI FANGUPO aka "Deuce,"
ERIC KAMAHELE aka "Smooth,"
DAVID KAMOTO aka "D-Down,"
VILIAMI LOUMOLI aka "Eazy-V,"
DANIEL MAUMAU aka "D-Loc,"
KEPA MAUMAU aka "Kap-Loc,"
CHARLES MOA aka "Slim-Loc,"
GEORGE PUPUNU aka "T-Rex,"
SITAMIPA TOKI aka "Tok-Loc,"
MATAIKA TUAI aka "Fish,"
JOHN TUAKALAU aka "Sin-Loc," and
PETER TUIAKI aka "Pistol-Pete,"

and others, were members and associates of the Tongan Crip Gang, also known as "TCG," a criminal organization comprised primarily of males of Tongan descent. Members and associates of TCG engage and have engaged in acts of violence, including murder, attempted murder, robbery and assault. TCG, including its leadership, membership and associates, constitutes an "enterprise" as defined by Title 18, United States Code, Section 1961(4), that is, a group of individuals associated-in-fact. The TCG criminal enterprise constitutes an ongoing organization whose members function as a continuing unit for a common purpose of achieving the objectives of the enterprise. The enterprise is and was engaged in activities which have an effect on interstate and foreign commerce.

Purposes of the Enterprise

2. The purposes of the enterprise include the following:

a. Promoting and enhancing the prestige, reputation and position of the enterprise with respect to rival criminal organizations;

b. Preserving and protecting the power and territory of the enterprise through the use of intimidation, threats and acts of violence including assaults and murder;

c. Keeping victims and rivals in fear of the enterprise's members and associates; and,

d. Enriching the members and associates of the enterprise through criminal activity including, among other things, murder and attempted murder, robbery and assault.

Means and Methods of the Enterprise

3. Among the means and methods by which the defendants and their associates conduct and participate in the conduct of the affairs of the enterprise are and were the following:

a. Members and associates of the enterprise committed, attempted to commit and threatened to commit acts of violence, including murder, attempted murder, robbery and assault, to enhance the enterprise's prestige and to protect and expand the enterprise's criminal operations;

b. Members and associates of the enterprise used and threatened to use physical violence against various individuals, including members of rival criminal organizations;

c. Members and associates of the enterprise used, attempted to use, and conspired to use robbery as means of obtaining goods and money.

TCG culture, lifestyle and protocol

4. TCG members and associates are aligned with the larger "Crip" organized gang culture of the western United States. As such, they maintain rivalries with "Blood" criminal organizations and use violence against members of those organizations as a means of protecting their enterprise and gaining prestige. TCG members and associates also maintain rivalries with the "Tongan Crip Regulators" and "Baby Regulators," criminal street gangs whose original members broke away from TCG.

5. Membership is informal and loosely organized around "families" and "generations." These "families" have names such as "Down," "Loc," "Roc," or "Nut" and consist of members who may be related to each other or associate together within the enterprise. These names are attached as a suffix to a member's gang name as a moniker once the member is sponsored and recruited into the gang by that family. The "generations" of the enterprise align generally with members of the same age group.

6. Membership rites of passage were originally more formal and involved the prospective member committing crimes of violence on behalf of the enterprise followed by a "courting" or "jumping in" where the prospective member fought other members as

a display of his strength and courage. More recently, associates or prospective members "put in work" to show their dedication to the enterprise. This "work" involves committing robberies and/or assaults on behalf of the enterprise. There is no formal method for declaring an individual a member, but once an associate puts in sufficient "work" and shows dedication to the enterprise, that individual is considered by others as a member.

7. Within the enterprise there is no formal structure or hierarchy. Members who have the most influence, referred to as "juice" or "street cred," are considered "shot callers" and have the ability to direct the activities of other members of the organization. These members gain that influence through their commission of criminal acts on behalf of the enterprise or violence against members who do not fully support the enterprise.

8. Members identify themselves through clothing, tattoos, hand signs and graffiti. As a "Crip" set, members generally wear the color blue in an article of clothing or bandanna. Tattoos often involve some variation of the letters "TCG" or the words "Tongan" or "Crip" as well as "Glendale" or the numbers "102" or "104." "Glendale" refers to the area of Salt Lake City where most members live; "104" is the last three digits of the zip code for that area; and "102" refers to a street in Inglewood, California, the city where TCG originated. Hand signs often involve making the letters "T," "C," and/or "G." Graffiti includes such items as "roll calls" of gang member monikers as well as gang symbols and numbers.

COUNT I
(18 U.S.C. § 1962(d), Racketeering Conspiracy)

9. The allegations contained in paragraphs 1 through 8 are realleged and incorporated as though fully set forth in this paragraph.

10. Beginning on or about 2002 and continuing thereafter through and including the date of this Second Superseding Indictment, both dates being approximate and inclusive, within the Central Division of the District of Utah and elsewhere, the Defendants,

SIALE ANGILAU aka "C-Down,"
PENISIMANI FANGUPO aka "Deuce,"
ERIC KAMAHELE aka "Smooth,"
VILLIAMI LOUMOLI aka "Eazy-V,"
KEPA MAUMAU aka "Kap-Loc,"
GEORGE PUPUNU aka "T-Rex,"
MATAIKA TUAI aka "Fish,"
JOHN TUAKALAU aka "Sin-Loc," and
PETER TUIAKI aka "Pistol-Pete,"

together with others, being persons associated with the TCG enterprise, an enterprise that engaged in activities which affected interstate and foreign commerce, knowingly and intentionally conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, as that term is defined by 18 U.S.C. § 1961(1) and (5), consisting of multiple acts involving: Robbery, in violation of Utah Code Ann. § 76-6-301 and Arizona Revised Statutes Annotated § 13-1204, and Murder, as defined in Utah Code Ann. § 76-5-201; and acts indictable under 18 U.S.C. § 1951(a).

It was a part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise.

In furtherance of the conspiracy and in order to effect the objects thereof, the defendants and their co-conspirators, known and unknown to the grand jury, committed and caused to be committed the following OVERT ACTS, among others, in the Central Division of the District of Utah and elsewhere:

10.1. On or about December 30, 2002, **SIALE ANGILAU** and another TCG member and associate robbed a 7-Eleven store and assaulted a store clerk in Salt Lake City, Utah.

10.2. On or about December 31, 2002, **SIALE ANGILAU** and another TCG member and associate robbed a 7-Eleven store and assaulted a store clerk in Salt Lake City, Utah.

10.3. On or about February 7, 2003, **GEORGE PUPUNU** and other TCG members and associates robbed a Maverick store in Salt Lake City, Utah.

10.4. On or about July 28, 2003, **VILIAMI LOUMOLI, GEORGE PUPUNU** and other TCG members and associates robbed a 7-Eleven store in Salt Lake City, Utah.

10.5. On or about August 18, 2003, **KEPA MAUMAU, GEORGE PUPUNU** and other TCG members and associates robbed a 7-Eleven store in Salt Lake City, Utah.

10.6. On or about August 20, 2003, **KEPA MAUMAU** and other TCG members and associates robbed a 7-Eleven store and assaulted a store clerk in Salt Lake City, Utah.

10.7. On or about August 23, 2003, **KEPA MAUMAU and GEORGE PUPUNU**

robbed a 7-Eleven store in Salt Lake City, Utah.

10.8. On or about December 26, 2003, **VILIAMI LOUMOLI, GEORGE PUPUNU** and another TCG member and associate robbed a 7-Eleven store and assaulted a store clerk in Salt Lake City, Utah.

10.9. On or about October 26, 2004, **MATAIKA TUAI** and other TCG members and associates robbed a Gen-X Clothing store and assaulted a store clerk in Taylorsville, Utah.

10.10. On or about December 4, 2004, **SIALE ANGILAU** and other TCG members and associates robbed a 7-Eleven store, assaulted and robbed a store clerk, and fled from the police in Salt Lake City, Utah.

10.11. On or about January 28, 2005, **PENISIMANI FANGUPO** carried a gun and, with other TCG members and associates, assaulted and robbed individuals and then fled from the police in Salt Lake City, Utah.

10.12. On or about June 25, 2005, **PENISIMANI FANGUPO** and other TCG members and associates robbed a 7-Eleven store, assaulted a store clerk and fled from the police in Taylorsville, Utah.

10.13. On or about October 29, 2005, **PETER TUIAKI**, and other TCG members and associates assaulted and robbed an individual in Salt Lake County, Utah.

10.14. On or about January 28, 2006, **SIALE ANGILAU and MATAIKA TUAI** robbed a 7-Eleven store, assaulted a store clerk and fled from the police in Salt Lake City, Utah.

10.15. On or about January 12, 2007, **PETER TUIAKI** carried a firearm and, along with **GEORGE PUPUNU**, robbed and assaulted an individual in Salt Lake City, Utah.

10.16. On or about January 12, 2007, **PETER TUIAKI** and **GEORGE PUPUNU** attempted a carjacking in Salt Lake City, Utah, during which **TUIAKI** shot the occupant of the vehicle.

10.17. On or about July 24, 2007, **SIALE ANGILAU, VILIAMI LOUMOLI** and another TCG member and associate committed a robbery of a 7-Eleven store in Salt Lake City, Utah, during which robbery **ANGILAU** assaulted one store clerk and shot another.

10.18. On or about July 30, 2007, **VILIAMI LOUMOLI and JOHN TUAKALAU**, while brandishing firearms, robbed a Beto's Restaurant and assaulted an employee in Salt Lake City, Utah.

10.19. On or about August 1, 2007, **JOHN TUAKALAU** and other TCG members and associates, while brandishing firearms, robbed a Factory 4 U store and assaulted a store employee in West Valley City, Utah.

10.20. On or about October 14, 2007, **JOHN TUAKALAU** and another TCG member and associate, while brandishing a firearms, robbed a Beto's Restaurant in West Valley City, Utah.

10.21. On or about December 21, 2007, **VILIAMI LOUMOLI, JOHN TUAKALAU**, and another TCG member and associate committed a robbery of a Gen X

Clothing store, in Salt Lake City, Utah, during which robbery, one of the TCG members and associates brandished and discharged a firearm.

10.22. On or about January 9, 2008, **VILIAMI LOUMOLI** and other TCG members and associates committed a robbery of a Factory 4 U store in West Valley City, Utah, during which robbery **LOUMOLI** brandished and discharged a firearm.

10.23. On or about January 18, 2008, **ERIC KAMAHELE** and other TCG members and associates committed a robbery of a Republic Parking booth attendant at the Hilton Hotel in Salt Lake City, Utah, during which robbery, one of the TCG members and associates brandished a firearm.

10.24. On or about February 1, 2008, **VILIAMI LOUMOLI** and another TCG member and associate committed a robbery at a Molca Salsa restaurant in Salt Lake County, Utah, during which robbery the two brandished firearms and one of them discharged a firearm.

10.25. On or about February 8, 2008, **JOHN TUAKALAU** and another TCG member and associate brandished firearms and robbed an Italian Village restaurant in Murray, Utah.

10.26. On or about March 2, 2008, **JOHN TUAKALAU**, and another TCG member and associate committed a robbery at an Alberto's Mexican Food restaurant in Murray, Utah, during which robbery **TUAKALAU** brandished a firearm.

10.27. On or about March 2, 2008, **JOHN TUAKALAU** and another TCG member and associate brandished firearms and robbed a Rancherito's Mexican Food restaurant in South Salt Lake City, Utah.

10.28. On or about March 15, 2008, **VILIAMI LOUMOLI** and another TCG member and associate committed a robbery at a Chuck-A-Rama restaurant in Salt Lake City, Utah, during which robbery, one of the TCG members and associates brandished a firearm.

10.29. On or about March 21, 2008, **VILIAMI LOUMOLI, JOHN TUAKALAU** and another TCG member and associate committed a robbery at a McDonald's restaurant in Riverton, Utah, during which robbery, two of the TCG members and associates brandished firearms.

10.30. On or about August 12, 2008, **KEPA MAUMAU** and another TCG member and associate committed a robbery at a Gen-X Clothing store in South Ogden, Utah, during which robbery **MAUMAU** brandished a firearm.

10.31. On or about August 19, 2008, **KEPA MAUMAU**, and another TCG member and associate committed a robbery at an El Pollo Loco restaurant in Tempe, Arizona, during which robbery, one of the TCG members and associates brandished a firearm.

10.32. On or about August 19, 2008, **KEPA MAUMAU**, and another TCG member and associate committed a robbery at a Jack in the Box restaurant in Tempe,

Arizona, during which robbery, one of the TCG members and associates brandished a firearm.

10.33. On or about September 25, 2008, **ERIC KAMAHELE, MATAIKA TUAI** and other TCG members and associates attempted to commit a robbery at a Wal-Mart store in Riverton, Utah, during which robbery **KAMAHELE** brandished a firearm.

10.34. During the course of the conspiracy, **ERIC KAMAHELE** and other TCG members and associates maintained MySpace accounts where they posted photographs, writings and communications related to TCG activities and court proceedings.

All in violation of 18 U.S.C. § 1962(d).

COUNT II
(18 U.S.C. § 1951(a), Hobbs Act Robbery)

11. The allegations contained in paragraphs 2 - 8 are realleged and incorporated as if fully set forth in this paragraph.

12. On or about June 25, 2005, in the Central Division of the District of Utah,

PENISIMANI FANGUPO and DAVID KAMOTO,

defendants herein, did take and attempt to take from employees of the 7-Eleven, 3180 West 5400 South, Taylorsville, Utah, by physical violence and threatened physical violence, commodities which belonged to and were in the care, custody, control, management and possession of the 7-Eleven, and by committing such robbery, obstructed, delayed, and affected commerce, and the movement of articles and

commodities in interstate commerce in any way and to any degree, and did aid and abet therein; all in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2.

COUNT III
(18 U.S.C. § 1959(a)(2), Maiming in Aid of Racketeering)

13. At all times relevant to this Second Superseding Indictment, TCG, including its leadership, membership and associates, constituted an "enterprise" as defined in 18 U.S.C. § 1959(b)(2), that is, a group of individuals associated in fact that was engaged in, and the activities of which affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

14. At all times relevant to this Second Superseding Indictment, TCG, through its members and associates, engaged in racketeering activity, as defined in 18 U.S.C. §§ 1959(b)(1) and 1961(1), that is, acts and threats involving robbery, assault with a dangerous weapon and assault resulting in serious bodily injury, in violation of the laws of the States of Utah and Arizona, and the United States.

15. The allegations contained in paragraphs 2 - 8 are realleged and incorporated as if fully set forth in this paragraph.

16. On or about June 25, 2005, in the Central Division of the District of Utah,

PENISIMANI FANGUPO and DAVID KAMOTO,

defendants herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did maim an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann.

§ 76-5-105 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(2) and 18 U.S.C. § 2.

COUNT IV
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

17. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

18. On or about January 12, 2007, in the Central Division of the District of Utah,

GEORGE PUPUNU and PETER TUIAKI,

defendants herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT V
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

19. On or about January 12, 2007, in the Central Division of the District of Utah,

GEORGE PUPUNU and PETER TUAIKI,

defendants herein, during and in relation to the crime of violence alleged in Count IV of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT VI
(18 U.S.C. § 2119(2), Carjacking)

20. The allegations contained in paragraphs 2 - 8 are realleged and incorporated as if fully set forth in this paragraph.

21. On or about January 12, 2007, in the Central Division of the District of Utah,

GEORGE PUPUNU and PETER TUIAKI,

defendants herein, did knowingly and with the intent to cause death and serious bodily harm, take a motor vehicle that had been transported, shipped and received in interstate or foreign commerce from the person or presence of another by force and violence and by intimidation, and did aid and abet therein, in violation of 18 U.S.C. § 2119(2) and 18 U.S.C. § 2.

COUNT VII
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

22. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

23. On or about January 12, 2007, in the Central Division of the District of Utah,

GEORGE PUPUNU and PETER TUIAKI,

defendants herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT VIII
(18 U.S.C. § 924(c), Discharging a Firearm During a Crime of Violence)

24. On or about January 12, 2007, in the Central Division of the District of Utah,

GEORGE PUPUNU and PETER TUAIKI,

defendants herein, during and in relation to the crimes of violence alleged in Counts VI and VII of this Second Superseding Indictment, did knowingly use, carry, brandish and discharge a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT IX
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

25. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

26. On or about February 3, 2007, in the Central Division of the District of Utah,

DAVID KAMOTO, DANIEL MAUMAU and SITAMIPA TOKI,

defendants herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did assault with a dangerous weapon, individuals whose identities are known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT X
(18 U.S.C. § 924(c), Discharging a Firearm During a Crime of Violence)

27. On or about February 3, 2007, in the Central Division of the District of Utah,

DAVID KAMOTO, DANIEL MAUMAU and SITAMIPA TOKI,

defendants herein, during and in relation to the crime of violence alleged in Count IX of this Second Superseding Indictment, did knowingly use, carry, brandish and discharge a

firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XI
(18 U.S.C. § 1959(a)(6), Conspiracy to Commit Assault Resulting in Serious Bodily Injury in Aid of Racketeering)

28. The allegations contained in paragraphs 2 - 8 and 13 - 14 are re-alleged and incorporated as if fully set forth in this paragraph.

29. On or about February 24, 2007, in the Central Division of the District of Utah,

DAVID KAMOTO, DANIEL MAUMAU, SITAMIPA TOKI and DAVID WALSH,

defendants herein, for the purpose of maintaining and increasing position in TCG, an enterprise that was engaged in racketeering activity, did conspire to commit a crime involving assault resulting in serious bodily injury against an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(6) and 18 U.S.C. § 2.

COUNT XII
(18 U.S.C. § 924(c), Discharging a Firearm During a Crime of Violence)

30. On or about February 24, 2007, in the Central Division of the District of Utah,

DAVID KAMOTO, DANIEL MAUMAU, SITAMIPA TOKI and DAVID WALSH,

defendants herein, during and in relation to the crime of violence alleged in Count XI of this Second Superseding Indictment, did knowingly use, carry, brandish and discharge a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XIII
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

31. The allegations contained in paragraphs 2 - 8 and 13 - 14 are re-alleged and incorporated as if fully set forth in this paragraph.

32. On or about June 9, 2007, in the Central Division of the District of Utah,

CHARLES MOA,

defendant herein, together with others, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activity, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XIV
(18 U.S.C. § 924(c), Discharging a Firearm During a Crime of Violence)

33. On or about June 9, 2007, in the Central Division of the District of Utah,

CHARLES MOA,

defendant herein, during and in relation to the crime of violence alleged in Count XIII of this Second Superseding Indictment, did knowingly use, carry, brandish and discharge a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XV
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

34. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

35. On or about June 9, 2007, in the Central Division of the District of Utah,

CHARLES MOA,

defendant herein, together with others, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activity, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XVI
(18 U.S.C. § 111(a), Assault on a Federal Officer)

36. The allegations contained in paragraphs 2 - 8 are re-alleged and incorporated as if fully set forth in this paragraph.

37. On or about August 11, 2007, in the Central Division of the District of Utah,

SIALE ANGILAU,

defendant herein, using a deadly and dangerous weapon, did forcibly assault, resist, oppose, impede, intimidate and interfere with two federal officers who were engaged in the performance of their official duties, and did aid and abet therein, in violation of 18 U.S.C. § 111(a) and (b) and 18 U.S.C. § 2.

COUNT XVII
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

38. The allegations contained in paragraphs 2 - 8 and 13 - 14 are re-alleged and incorporated as if fully set forth in this paragraph.

39. On or about August 11, 2007, in the Central Division of the District of Utah,

SIALE ANGILAU,

defendant herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activity, did assault with a dangerous weapon two individuals whose identities are known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XVIII
(18 U.S.C. § 924(c), Discharging a Firearm During a Crime of Violence)

40. On or about August 11, 2007, in the Central Division of the District of Utah,

SIALE ANGILAU,

defendant herein, during and in relation to the crime of violence alleged in Counts XVI and XVII of this Second Superseding Indictment, did knowingly use, carry, brandish and discharge a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XIX
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

41. The allegations contained in paragraphs 2 - 8 and 13 - 14 are re-alleged and incorporated as if fully set forth in this paragraph.

42. On or about January 18, 2008, in the Central Division of the District of Utah,

ERIC KAMAHELE,

defendant herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activity, did assault with a dangerous weapon, an

individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XX
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

43. On or about January 18, 2008, in the Central Division of the District of Utah,

ERIC KAMAHELE,

defendant herein, during and in relation to the crime of violence alleged in Count XIX of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XXI
(18 U.S.C. § 1951(a), Hobbs Act Robbery)

44. The allegations contained in paragraphs 2 - 8 are realleged and incorporated as if fully set forth in this paragraph.

45. On or about August 12, 2008, in the Northern Division of the District of Utah,

KEPA MAUMAU,

defendant herein, did take and attempt to take from employees at the Gen X Clothing store, 4005 South Riverdale Road, South Ogden, Utah, by physical and threatened physical violence, U.S. currency and commodities which belonged to and were in the care, custody, control, management and possession of the Gen X clothing store, and by committing such robbery, obstructed, delayed, and affected commerce and the movement

of articles and commodities in interstate commerce in any way and to any degree, and did aid and abet therein; all in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2.

COUNT XXII
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

46. The allegations contained in paragraphs 2 - 8 and 13 - 14 are re-alleged and incorporated as if fully set forth in this paragraph.

47. On or about August 12, 2008, in the Northern Division of the District of Utah,

KEPA MAUMAU,

defendant herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activity, did assault with a dangerous weapon, an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Utah Code Ann. § 76-5-103 and § 76-2-202; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XXIII
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

48. On or about August 12, 2008, in the Northern Division of the District of Utah,

KEPA MAUMAU,

defendant herein, during and in relation to the crime of violence alleged in Counts XXI and XXII of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, and did aid and abet therein; all in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XXIV
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

49. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

50. On or about August 19, 2008, in the District of Arizona,

KEPA MAUMAU,

defendant herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Arizona Rev. Stat. Ann.§ 13-1204 and § 13-303; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XXV
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

51. On or about August 19, 2008, in the District of Arizona,

KEPA MAUMAU,

defendant herein, during and in relation to the crime of violence alleged in Count XXIV of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, and did aid and abet therein; all in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XXVI
(18 U.S.C. § 1959(a)(3), Assault With a Dangerous Weapon in Aid of Racketeering)

52. The allegations contained in paragraphs 2 - 8 and 13 - 14 are realleged and incorporated as if fully set forth in this paragraph.

53. On or about August 19, 2008, in the District of Arizona,

KEPA MAUMAU,

defendant herein, for the purpose of maintaining and increasing position in TCG, an enterprise engaged in racketeering activities, did assault with a dangerous weapon an individual whose identity is known to the Grand Jury, and did aid and abet therein, in violation of Arizona Rev. Stat. Ann.§ 13-1204 and § 13-303; all in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2.

COUNT XXVII
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

54. On or about August 19, 2008, in the District of Arizona,

KEPA MAUMAU,

defendant herein, during and in relation to the crime of violence alleged in Count XXVI of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, and did aid and abet therein; all in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

COUNT XXVIII
(18 U.S.C. § 1951(a), Hobbs Act Robbery)

55. The allegations contained in paragraphs 2 - 8 are realleged and incorporated as if fully set forth in this paragraph.

56. On or about September 25, 2008, in the Central Division of the District of Utah,

ERIC KAMAHELE, MATAIKA TUAI, LATUTAOFIEIKII FAKAOSIULA, VAINGA KINIKINI, and TEVITA TOLUTAU,

defendants herein, did attempt to take from employees, against their will, at Wal-Mart, 13502 South Hamilton View Road, Salt Lake County, Utah, by physical force and

violence, threatened force and violence and fear of injury, U.S. currency, which belonged to and was in the care, custody, control, management and possession of Wal-Mart, and by attempting and conspiring to commit such robbery, obstructed, delayed and affected commerce or the movement of articles and commodities in interstate commerce, and did aid and abet therein; in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2.

COUNT XXIX
(18 U.S.C. § 924(c), Brandishing a Firearm During a Crime of Violence)

57. On or about September 25, 2008, in the Central Division of the District of Utah,

ERIC KAMAHELE, MATAIKA TUAI, LATUTAOFIEIKII FAKAOSIULA, VAINGA KINIKINI, and TEVITA TOLUTAU,

the defendants herein, during and in relation to the crime of violence alleged in Count XXVIII of this Second Superseding Indictment, did knowingly use, carry and brandish a firearm, that is, a shotgun, and did aid and abet therein, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

A TRUE BILL:

/s/

FOREPERSON OF THE GRAND JURY

CARLIE CHRISTENSEN
Acting United States Attorney

WILLIAM K. KENDALL
VEDA M. TRAVIS
Assistant United States Attorney

INSTRUCTION NO. 36

I am now going to define some of the other terms that were just used:

As used throughout these instructions, "property" includes money and other tangible and intangible things of value.

As used throughout these instructions, "fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.

As used throughout these instructions, "force" means any physical act directed against a person as a means of gaining control of property.

INSTRUCTION NO. 38

Three Counts of the Second Superseding Indictment charge violations of what is called "The Hobbs Act." Specifically:

- Count 2 of the Second Superseding Indictment charges Mr. Kamoto with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.
- Count 10 of the Second Superseding Indictment charges Mr. Kepa Maumau with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.
- Count 17 of the Second Superseding Indictment charges Mr. Kamahele and Mr. Tuai with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.

Before I explain to you what the government must prove to establish violation of the Hobbs Act, I want to repeat that the rights of each Defendant in this case are separate and distinct. You must separately consider the evidence against each Defendant and return a separate verdict for each. Similarly, each of these three Counts, Count 2, Count 10, and Count 17, charges a separate crime against the particular Defendant. Your verdict as to one Defendant and as to any one of the three Counts, whether it is not guilty or guilty, should not affect your verdict as to any other Defendant or Count.

The Hobbs Act makes it a crime to obstruct, delay or affect interstate commerce by robbery.

For each particular Count and for each particular Defendant, the government must prove beyond a reasonable doubt that:

First: the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;

Second: the particular Defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the particular Defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree.

"Robbery" is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. I have previously defined "property," "force," and "fear."

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The particular Defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the particular Defendant intended to take certain actions — that is, he did the acts charged in the particular Count in order to obtain property — and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

I have already defined "aiding and abetting" and "attempt" for you.

INSTRUCTION NO. 43

18 U.S.C. § 924(c) makes it a crime to use or carry a firearm during and in relation to any crime of violence for which a person may be prosecuted in a court of the United States.

To find a particular Defendant who is charged with a violation of 18 U.S.C. § 924(c) guilty of a violation of § 924(c), you must be convinced that the government has proved, as against the particular Defendant, each of the following beyond a reasonable doubt:

First: The particular Defendant committed the predicate crime as charged.

This means that the first element you must find when you are deciding whether Mr. Kamoto violated Count 5 is whether he violated Count 4, Assault with a Dangerous Weapon in Aid of Racketeering. You are instructed that Assault with a Dangerous Weapon in Aid of Racketeering is a crime of violence. So, the first element you must find when you are deciding whether Mr. Daniel Maumau violated Count 5 is whether he violated Count 4. The first element you must find when you decide whether Mr. Toki violated Count 5 is whether he violated Count 4.

The first element you must decide in considering whether Mr. Kamoto violated Count 7 is whether he violated Count 6 Conspiracy to Commit Assault Resulting in Serious Bodily Injury in Aid of Racketeering. You are instructed that Conspiracy to Commit Assault Resulting in Serious Bodily Injury in Aid of Racketeering is a crime of violence. So, the first element you must decide in considering whether Mr. Daniel Maumau violated Count 7 is whether he violated Count 6. The first element you must decide in considering whether Mr. Toki violated Count 7 is whether he violated Count 6. The first element you must decide in considering whether Mr. Walsh violated Count 7 is whether he violated Count 6.

The first element you must decide in considering whether Mr. Kamahele violated Count 9 is whether he violated Count 8, Assault with a Dangerous Weapon in Aid of Racketeering. You

are instructed that Assault with a Dangerous Weapon in aid of Racketeering is a crime of violence.

The first element you must decide in considering whether Mr. Kepa Maumau violated Count 12 is whether he violated Count 11, Assault with a Dangerous Weapon in Aid of Racketeering. You are instructed that Assault with a Dangerous Weapon in aid of Racketeering is a crime of violence.

The first element you must decide in considering whether Mr. Kepa Maumau violated Count 14 is whether he violated Count 13, Assault with a Dangerous Weapon in Aid of Racketeering. You are instructed that Assault with a Dangerous Weapon in aid of Racketeering is a crime of violence.

The first element you must decide in considering whether Mr. Kepa Maumau violated Count 16 is whether he violated Count 15, Assault with a Dangerous Weapon in Aid of Racketeering. You are instructed that Assault with a Dangerous Weapon in aid of Racketeering is a crime of violence.

The first element you must decide in considering whether Mr. Kamahele violated Count 18 is whether he violated Count 17, Hobbs Act Robbery. You are instructed that Hobbs Act Robbery is a crime of violence. So, the first element you must decide in considering whether Mr. Tuai violated Count 18 is whether he violated Count 17, Hobbs Act Robbery.

Second: the particular Defendant knowingly used or carried a firearm;

Third: during and in relation to the crime of violence.

The phrase "during and in relation to" means that the firearm played an integral part in the underlying crime, that it had a role in, facilitated (i.e., made easier), or had the potential of facilitating the underlying crime.

I have previously defined "knowingly."

A particular Defendant "uses" a firearm when it (1) is readily accessible and (2) is

actively employed during and in relation to the underlying crime.

A particular Defendant "carries" a firearm when he (1) possesses the firearm through the exercise of ownership or control and (2) transports or moves the firearm from one place to another.

In determining whether a particular Defendant knowingly used or carried a firearm during and in relation to the underlying crime, you may consider all of the facts received in evidence including the nature of the crime, the usefulness of a firearm to the crime, the extent to which a firearm actually was observed before, during and after the time of the crime, and any other facts that bear on the issue.

A firearm plays an integral part in the underlying crime when it furthers the purpose or effect of the crime and its presence or involvement is not the result of coincidence. The government must prove a direct connection between a particular Defendant's use of the firearm and the underlying crime but the crime need not be the sole reason the particular Defendant used the firearm.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

FILED
United States Court of Appeals
Tenth Circuit

July 27, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC KAMAHELE,

Defendant - Appellant.

No. 17-4154
(D.C. No. 2:15-CV-00506-TC)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEPA MAUMAU,

Defendant - Appellant.

No. 17-4155
(D.C. No. 2:15-CV-00600-TC)
(D. Utah)

ORDER

Before **HOLMES**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

This matter is before the court on Appellants' *Motion to Recall the Mandate.* The

motion is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk