No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAQUAIN YOUNG—PETITIONER

VS.

UNITED STATES OF AMERICA—RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
(vol. 1 of 1)

Steven S. Lubliner (California State Bar No. 164143)
LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
e-mail: sslubliner@comcast.net
Attorney for Petitioner Jaquain Young

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES HEARD, AKA Cheese, Defendant-Appellant.	No. 18-10218 No. 18-10228 No. 18-10239 No. 18-10248 No. 18-10258 D.C. Nos. 3:13-cr-00764-WHO-7 3:13-cr-00764-WHO-11 3:13-cr-00764-WHO-8 3:13-cr-00764-WHO-10 3:13-cr-00764-WHO-5 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted October 19, 2021
Submission Vacated October 27, 2021
Resubmitted July 11, 2022
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and BERMAN,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

In these consolidated appeals, Defendants-Appellants Charles Heard, Jaquian Young, Esau Ferdinand, Monzell Harding, Jr., and Adrian Gordon challenge their convictions and sentences for various crimes arising from their participation in the Central Divisadero Playas ("CDP"), a street gang operating in San Francisco's Fillmore District. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm, in part, and vacate and remand, in part.[1]

1. *Motions to Sever Trial and for New Trial*. Ferdinand and Young appeal the district court's denial of their motions to sever, and their motions for new trial. *See* Fed. R. Crim. P. 14. "Criminal defendants bear a heavy burden when attempting to obtain reversal of a district court's denial of a motion to sever." *United States v. Johnson*, 297 F.3d 845, 855 (9th Cir. 2002). We reverse "only when the joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion [on the motion to sever] in just one way, by ordering a separate trial." *Id.* (alteration in original) (internal quotation marks omitted).

The district court recognized the correct legal standard, and its application of that standard was not illogical, implausible, or lacking support in the record. *United States v. Espinoza*, 880 F.3d 506, 511 (9th Cir. 2018). Trying Ferdinand and Young together was not "so manifestly prejudicial" as to mandate separate

[1] We grant the Appellants' unopposed motions for judicial notice. Dkts 34, 44. *See* Fed. R. Civ. P. 201(b); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

trials. Their defenses were not mutually exclusive, considering evidence of possible third-party involvement. *See United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) (explaining that mutually exclusive defenses occur when two defendants claim innocence but blame each other and the "acquittal of one codefendant would necessarily call for the conviction of the other").

Ferdinand complains that he was prejudiced by the testimony Young's counsel elicited on cross-examination of the government's witnesses, but these isolated instances did not give rise to "compelling prejudice necessary to mandate a severance." *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1992). Nor did the testimony of a government informant who did not refer to Ferdinand. *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) (indicating that *Bruton* error could give rise to risk of prejudice sufficient to warrant separate trials); *Mason v. Yarborough*, 447 F.3d 693, 695 (9th Cir. 2006) ("*Richardson* . . . specifically exempts [from *Bruton*] a statement, not incriminating on its face, that implicates the defendant only in connection to other admitted evidence.").

Young and Ferdinand also challenge the district court's treatment of Tierra Lewis's testimony and the admission of Exhibit 779, on which Lewis had circled an image of Ferdinand in a photographic lineup and wrote that Ferdinand, "E. Sauce," shot Jelvon Helton, "Poo Bear." Under the circumstances of this case, the district court's rulings regarding Lewis's testimony and the photo lineup were a

reasonable exercise of its discretion and a reasonable application of Rules 403 and 801(d)(1) of the Federal Rules of Evidence. *See United States v. Flores-Blanco*, 623 F.3d 912, 919 and n.3 (9th Cir. 2010) (Rule 403); *United States v. Collicott*, 92 F.3d 973, 978 (9th Cir. 1996) (as amended) (hearsay exceptions). Those rulings did not violate Young's constitutional right to present a defense, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), or to argue that defense to the jury, *Herring v. New York*, 422 U.S. 853, 859 (1975). Young was able to present the substance of his defense through witness testimony, cross-examination, and during closing argument.

Further, the court minimized the prejudicial effect of Lewis's testimony and the photographic evidence against Ferdinand by giving limiting instructions that Ferdinand has not shown to be deficient. *See United States v. Fernandez*, 388 F.3d 1199, 1241 (9th Cir. 2004) (limiting instructions important factor for determining prejudice related to severance), *as modified*, 425 F.3d 1248 (9th Cir. 2005); *Johnson*, 297 F.3d at 856. Additionally, while Young did argue that Lewis had identified someone besides him as Jelvon Helton's shooter, Young also highlighted other weaknesses in the government's evidence related to that incident.

We conclude that it was not an abuse of discretion to deny the motions for severance or the related new trial motions.

2. *Motions to Suppress.* The district court did not err in denying

Young's motion to suppress evidence found during a warrantless search of his car. The district court correctly concluded that the search fell within the automobile exception to the Fourth Amendment. *See United States v. Faagai*, 869 F.3d 1145, 1150 (9th Cir. 2017) (discussing warrantless searches of automobiles). The police officers had probable cause to believe that the car contained contraband or evidence of a crime, at least as to the car's passenger, when he had marijuana on his person immediately after exiting the car, and he tried to discard the car keys. *See United States v. King*, 985 F.3d 702, 707 (9th Cir. 2021) (discussing probable cause).

The district court did not err in denying the motion to suppress recordings of informant Marshall's June 18, 2014 conversations with Young. Marshall surreptitiously recorded conversations during which Young discussed pimping conduct for which he had already been charged and other topics pertaining to uncharged conduct. The district court found that the government violated the Sixth Amendment and suppressed Young's statements about the charged pimping conduct. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that after a defendant's right to counsel has attached, the government violates the Sixth Amendment when it uses against the defendant his own incriminating statements that the government deliberately elicited in the absence of his counsel, either directly or through an informant).

The district court did not suppress Young's statements about uncharged conduct. Its ruling did not violate the Sixth Amendment, which is "offense specific" and "does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *see United States v. Hayes*, 231 F.3d 663, 676 (9th Cir. 2000) (en banc) (holding that the admission at trial of "surreptitiously" recorded statements did not violate the Sixth Amendment when formal charges had not been initiated). Additionally, for evidence to be suppressed as the fruit of a *Massiah* violation, it "must at a minimum have been the 'but for' cause of the discovery of the evidence." *United States v Kimball*, 884 F.2d 1274, 1279 (9th Cir. 1989) (as amended). Young failed to show the required causal link.

3. *Other Evidentiary Rulings*. The district court did not abuse its discretion by admitting evidence of the so-called silver van robberies. "In conspiracy prosecutions, the government has considerable leeway in offering evidence of other offenses" not charged in the indictment. *United States v. Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972) (evidence of prior illegal acts "admissible to show some material facts relating to the conspiracy charged"). This evidence was relevant to prove the existence of the CDP enterprise and to connect Harding to both the enterprise and to concerted criminal conduct with co-defendant and CDP affiliate Gordon. *See United States v. Rizk*, 660 F.3d 1125, 1131–32 (9th Cir. 2011) ("[U]ncharged acts may be admissible as direct evidence of the

conspiracy itself." (quoting *United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994))).

The district court permissibly excluded Dr. Pezdek's expert testimony regarding eyewitness identifications. The expert disclosure was untimely, and, under Rule 403, the court had the discretion to balance the probative value of the proffered testimony against prejudice to the government and the risk of juror confusion. *See United States v. Rincon*, 28 F.3d 921, 925–26, 925 n.6 (9th Cir. 1994) (affirming exclusion of expert testimony under Rule 403). While the expert's testimony may have been "informative," the court provided a comprehensive jury instruction discussing many of the same factors regarding eyewitness testimony "to guide the jury's deliberations." *Id.* at 925.

The district court did not abuse its discretion by denying a motion under 28 U.S.C. § 2241(a) for a writ of habeas corpus ad testificandum for Timon O'Connor, who was proffered to impeach the government's cooperating witness—Brown. The court considered the factors relevant to issuing such a writ. *See Wiggins v. Alameda County*, 717 F.2d 466, 468 n.1 (9th Cir. 1983) (per curiam). Heard failed to provide reliable information as to several of those factors, and the proffered testimony would not have "substantially further[ed] the resolution of the case," *id.* (internal quotation marks omitted), because it was cumulative. The district court's ruling did not infringe Heard's right to present a defense. *See Taylor v. Illinois*, 484 U.S. 400, 410

(1988) (right to offer witness testimony is not "unfettered"). Heard and the other appellants were able to pursue the theory that Brown was an untrustworthy criminal on cross-examination.

Over Young's objection, the district court admitted informant Marshall's notes of his unsuccessfully recorded jailhouse conversations with Young to rehabilitate Marshall on re-direct examination under Rule 801(d)(1)(B). On appeal, Young argues that Marshall had a motive to lie—his cooperation agreement with the government—that arose before, and continued during, the time he made the notes. *See Tome v. United States*, 513 U.S. 150, 167 (1995) (holding that Rule 801(d)(1)(B) includes the "common-law premotive rule" that prior consistent statements were admissible to rebut a charge of recent fabrication or improper motive or influence, only if the statements were made before the motive to lie arose). The government argues that Marshall had no way of knowing whether the recordings were successful at the time he made his notes and, thus, he had a motive to be truthful.

Even if the court erred in admitting Marshall's notes, which we do not decide, it is not "more probable than not" that their admission affected the verdict. *See United States v. Rohrer*, 708 F.2d 429, 432 (9th Cir. 1983) (as amended). Marshall's testimony, including his notes, was central to the government's case, but Appellants were able to thoroughly cross-examine him. Additionally, other

portions of Marshall's testimony implicated Young, as did other evidence connecting Young to the murder of Jelvon Helton. Thus, the notes were "unlikely to decide the case," *id.* at 433, and their admission does not constitute reversible error.

The district court did not abuse its discretion in admitting evidence of the uncharged Levexier murder. Gordon relies on *United States v. Murray*, arguing that "evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice." 103 F.3d 310, 319 (3d Cir. 1997). Unlike the defendant in *Murray*, Gordon was not charged with murder, and the evidence was relevant to prove the gang rivalry between CDP and KOP and Gordon's association with CDP, as opposed to proving Gordon's "homicidal character." *See id.* at 316–17. Gordon's other arguments challenging the admission of the murder are not persuasive.

Moreover, even if the court erred in admitting the related autopsy photographs, which we do not decide, it is not "more probable than not" that their admission affected the verdict. *See Rohrer*, 708 F.2d at 432. The photographs were one piece of evidence during a weeks-long trial, and other evidence connected Gordon and the other appellants to the enterprise.[2]

[2] Gordon also challenges the admission of blood-stained clothing and bullet fragments. He waived this issue by failing to object to that evidence at trial. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) (as amended).

4. *Sufficiency of the Evidence*. Several Appellants challenge the sufficiency of the evidence supporting their convictions for Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy under 18 U.S.C. § 1962(d). The indictment alleged an association-in-fact enterprise, and the government presented evidence of an ongoing entity with a common purpose, which included shooting at and killing rivals, from which a rational trier of fact could have concluded that CDP constitutes an association-in-fact enterprise for purposes of 18 U.S.C. § 1961(4). For example, CDP had longevity; an identity separate from its members, including identifying hand gestures and numbers; an informal hierarchy, including respected senior members and "shooters"; shared resources, which included guns and gang leaders giving younger members money to "benefit[] the gang." Notably, gang members earned respect by killing rival gang members. Other evidence illustrated Appellants' conduct as gang members, including shooting at and killing rivals and participating in witness intimidation.

Considering that the definition of enterprise "is not very demanding," *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (internal quotation marks omitted), and should not be construed too narrowly, *see Boyle v. United States*, 556

And he has not shown plain error. *See Lam v. City of Los Banos*, 976 F.3d 986, 1006 (9th Cir. 2020).

U.S. 938, 948–49 (2009), this evidence is sufficient to show CDP is an association-in-fact enterprise. 18 U.S.C. § 1961(4).

Sufficient evidence established Harding's and Gordon's intent to participate in the conspiracy. *See Smith v United States*, 568 U.S. 106, 110 (2013) (RICO conspiracy requires the government to prove, among other things, "that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy)"); *Fernandez*, 388 F.3d at 1230 ("[A] defendant is guilty of conspiracy to violate § 1962(c) if the evidence showed that [he] knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise." (third alteration in original) (internal quotation marks omitted)).

The government presented evidence that Harding was a member of CDP, had a tattoo honoring a deceased CDP member, referred to himself with numbers associated with CDP, participated with other CDP members in a witness intimidation incident, was present when CDP members shot at a rival gang, and participated in robberies with other gang members. This evidence was sufficient to show his intent to participate in the CDP enterprise and his knowledge that one of its purposes was to kill rival gang members. *See Christensen*, 828 F.3d at 780 ("[A] RICO conspiracy under § 1962(d) requires only that the defendant was aware of the essential nature and scope of the enterprise and intended to participate in it." (internal quotation marks omitted)).

The government introduced evidence that Gordon "claimed CDP," referred to himself with numbers associated with CDP, and associated on social media with CDP members. The government also presented evidence from which the jury could reasonably infer that Gordon committed robberies with CDP members, and it presented evidence that he shot at members of a rival gang. Notably, there was evidence of his involvement in the attempted murder of Patrick McCree, as associate of a rival gang. This evidence was sufficient for a rational jury to find that Gordon was aware of the essential nature and scope of the enterprise and intended to participate in it. *Christensen*, 828 F.3d at 780.

Gordon challenges the sufficiency of the evidence to establish that Patrick McCree was shot "for the purpose of" maintaining or increasing Gordon's position in the enterprise, as required to support his convictions for attempted murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5) (Count 9), and assault with a dangerous weapon in aid of racketeering in violation of § 1959(a)(3) (Count 10) (VICAR convictions). A rational jury could have concluded that the purpose element of the VICAR statutes was demonstrated by testimony that CDP members earned "respect" by "[k]illing a rival gang member," and by text messages showing that McCree was associated with CDP's rival gang, KOP, and that there was friction between the gangs. *See United States v. Banks*, 514 F.3d 959, 969–70 (9th Cir. 2008) (as amended) (holding that the "purpose element of the VICAR statute" is satisfied

when the defendant's motivation was, in part, to enhance his position in the enterprise "or if the violent act was committed as an integral aspect of his membership with the gang"); *see also United States v. Rodriguez*, 971 F.3d 1005, 1009–10 (9th Cir. 2020).

5. *Jury Instructions*. Ferdinand, Young, Gordon, and Harding challenge the instruction on the elements of a conspiracy to violate RICO, 18 U.S.C. § 1962(d). Appellants concede that plain error review applies, and we find no such error. The RICO instructions, when viewed "as a whole in the context of the entire trial," *United States v. Moore*, 109 F.3d 1456, 1465 (9th Cir. 1997) (en banc) (internal quotation marks omitted), adequately advised the jury of the need to prove each defendant's agreement. *See Fernandez*, 388 F.3d at 1246–47.

We also reject Gordon's and Young's challenges to the *Pinkerton* jury instructions. *See United States v. Gonzalez*, 906 F.3d 784, 791 (9th Cir. 2018) (discussing *Pinkerton* liability). There was sufficient evidence to support giving these instructions. *See id.* The district court did not abuse its discretion in giving the instructions and doing so did not violate due process. *See United States v. Bingham*, 653 F.3d 983, 997–98 (9th Cir. 2011).

6. *Young's and Heard's Motions for a Mistrial*. The district court did not abuse its discretion in admitting evidence of Young's past pimping of two minors, and denying Young's motion for a mistrial on Count 22, attempting to entice a minor

under the age of eighteen to engage in prostitution in violation of 18 U.S.C. § 2422(b). *See* Fed. R. Evid. 404(b)(2) (other act evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

Officer Angalet testified extensively about the facts supporting Count 22, including telling Young that her undercover persona was sixteen, and the government presented evidence that Young thought Angalet was under eighteen. *See United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008) (explaining that when a defendant "has targeted an adult decoy rather than an actual minor," the government must prove that "the defendant . . . believed the target was a minor"); *see also* 18 U.S.C. § 2422(b).

We also reject Young's argument that the district court erred by admitting impermissibly inflammatory evidence and denying his motion for a mistrial.[3] Young claims that it was error to allow his girlfriend, who worked for him as a prostitute, to testify that she had an abortion. The government introduced testimony and text messages that Young's girlfriend became pregnant with his child, she worked as a prostitute for him, and he told her to get an abortion, and she did so. This evidence

[3] Young, through his attorney, admitted guilt on Count 21, attempting to entice and persuade an individual to travel for prostitution in violation of 18 U.S.C. § 2242(a) and argues that the admission of inflammatory evidence and a witness's emotional outburst warranted a mistrial.

was relevant to Young's manipulative and coercive conduct and does not rise to the level of evidence we have identified as inappropriately inflammatory. *See United States v. Lynch*, 903 F.3d 1061, 1073 (9th Cir. 2018) (collecting cases); *see also United States v. Walker*, 993 F.2d 196, 199 (9th Cir. 1993) (as amended) (finding evidence relevant when it "corroborated the testimony of the special agent regarding" suspected criminal activity). Additionally, the court redacted the most inflammatory evidence and gave curative instructions to avoid prejudicing Young. *See Lynch*, 903 F.3d at 1073 (redactions are an "appropriate step[] . . . to avoid any unnecessary prejudice"); *see also Trillo v. Biter*, 769 F.3d 995, 1000 (9th Cir. 2014) (as amended) (juries are presumed to "listen to and follow curative instructions from judges").

Young objects to the denial of a mistrial after a witness's emotional outburst on the stand. The outburst was brief, and the court properly struck the testimony, admonished the jury to disregard the outburst, and reminded the jury to decide the case solely on evidence and the law. *See United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016) ("A cautionary instruction from the judge . . . is the preferred alternative to declaring mistrial when a witness makes inappropriate or prejudicial remarks; mistrial is appropriate only where there has been so much prejudice that an instruction is unlikely to cure it." (internal quotation marks omitted)). When viewed

in the context of the entire trial, the outburst did not "more likely than not materially affect[] the verdict." *Id.*

Heard argues that the government knowingly presented false testimony at trial when Brown testified about the robbery of City Shine, and when Francis Darnell testified about witnessing the Barrett murder. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that a due process violation occurs where the state uses false evidence to obtain a criminal conviction); *United States v. Renzi*, 769 F.3d 731, 751 (9th Cir. 2014) (listing elements of a *Napue* violation). When the prosecution is "put on notice of the real possibility of false testimony," it must make "a diligent and good faith attempt" to determine if the witness is being truthful. *N. Mar. I. v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) (as amended). Heard has not shown that the government failed to investigate or that Brown and Darnell gave testimony that was actually false. *See Bingham*, 653 F.3d at 995 (inconsistent statements are "not enough for a *Napue* violation"); *see also Renzi*, 769 F.3d at752 (rejecting *Napue* claim due to lack of materiality while also "doubt[ing]" that the testimony was actually false when the defendant "provided no evidence that [the witnesses] knew their testimony was inaccurate").

7. *Cumulative Error.* Because the district court committed no reversible error, the cumulative error argument advanced by several Appellants fails as well. *See United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007) (as amended).

8. *18 U.S.C. § 924*. In his initial briefing, Gordon argued that conspiracy offenses do not satisfy the elements clause of 18 U.S.C. § 924(c)(3)(A) and, because his convictions in Counts 9 and 10—which were the alleged predicate crimes of violence in Count 11—could be based on a conspiracy, his conviction in Count 11 is invalid. We do not decide whether conspiracy offenses satisfy the elements clause of § 924(c)(3)(A). Count 9 charged Gordon with "attempt[ing] to murder" McCree in violation of California Penal Code §§ 187, 188, and 189, and Count 10 charged him with "assault[ing McCree] with a dangerous weapon." Thus, the § 924 count was based on substantive crimes, not the RICO conspiracy and, thus, Gordon's claim fails. *Cf. United States v. Jones*, 935 F.3d 266, 269, 273–74 (5th Cir. 2019) (per curiam) (concluding that § 924(c) conviction was invalid when it was specifically predicated on a RICO conspiracy).

In a post-argument filing, Gordon argues for the first time that attempted murder under California law does not constitute a crime of violence and, thus, cannot support his conviction under § 924(c). Gordon relies on *United States v. Taylor*, __ S. Ct. ___, No. 20-1459, 2022 WL 2203334 (June 21, 2022), in which the Supreme Court held that attempted Hobbs Act robbery is not a crime of violence under the elements clause of 18 U.S.C. § 924(c). *Id.* at *4. Although *Taylor* was unavailable at the time of the initial briefing, the argument that attempted murder under California law does not constitute a crime of violence was

available to Gordon and he did not raise it.[4] *Id.* at *3 (describing arguments raised in initial federal habeas petition). We conclude that Gordon waived his argument that attempted murder under California law does not constitute a crime of violence. *See United States v. Briones*, 35 F.4th 1150, 1157–59 (9th Cir. 2022) (reiterating that an issue not raised in an opening brief is not properly raised for the first time in a supplemental brief).

Moreover, even if Gordon did not waive this argument, he fails to acknowledge that the § 924(c) count, Count 11, was based on Count 9 (attempted murder of McCree) and on Count 10 (assaulting McCree with a dangerous weapon), and that the jury convicted him of both counts. Thus, even if Gordon's conviction of Count 9 does not validly support his § 924(c) conviction, that conviction is still lawful because the other predicate offense, assault with a dangerous weapon, qualifies as a crime of violence. *See United States v. Gobert*, 943 F.3d 878, 880 n.2 (9th Cir. 2019) (explaining that when two counts "served as predicate crimes of violence for [the] § 924(c) conviction[, the] §924(c) conviction

[4] Gordon did not make and thus waived any argument that *United States v. Dominguez*, 954 F.3d 1251, 1261–62 (9th Cir. 2020) (holding that attempted Hobbs Act robbery is a crime of violence), *vacated*, 2022 WL 2295921 (June 27, 2022), foreclosed the argument that attempted murder under California law was not a crime of violence.

[was] lawful so long as either offense . . . qualifie[d] as a crime of violence" and concluding that "assault with a dangerous weapon is a crime of violence").

In their initial briefing, Heard and Young also argued that their convictions under § 924(c) are infirm because they were predicated on the crime of murder in aid of racketeering ("VICAR murder"), which, they argue, does not constitute a crime of violence under § 924(c)(3)(A), as murder includes both intentional first-degree murder and second-degree reckless murder. They relied on the panel decision in *United States v. Begay*, 934 F.3d 1033 (9th Cir 2019), *reh'g en banc granted, vacated*, 15 F.4th 1254 (9th Cir. 2021), which addressed the federal murder statute. On rehearing en banc, we held that second-degree murder requires extreme recklessness reflecting an "extreme disregard for human life" and, thus, involves the use of force against the person of another and constitutes a crime of violence under § 924(c)(c)(A). *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc). Considering that holding, we reject Heard's and Young's challenges to their § 924(c) convictions.

In post-argument briefing, Heard and Young for the first time argue that second-degree murder *under California law* is not a crime of violence. They did not brief this specific issue in their initial briefing. Instead, relying solely on the panel decision in *Begay*, they argued that their § 924 convictions were invalid because, the predicate crime of violence, "murder in violation of 18 U.S.C.

§ 1959(a)(1), can be grounded in a conviction/finding of second-degree murder," and "second-degree murder is not a crime of violence under the elements clause of § 924(c) because it can be committed recklessly." Neither Heard nor Young asserts that he was precluded from making the alternative argument regarding implied malice murder under California law they each belatedly assert in their supplemental briefing, and therefore they waived these arguments. *See Briones*, 35 F.4th at 1158–59. Heard and Young advance new and expansive arguments for the first time in simultaneous briefing and, thus, deprived the government of the opportunity to respond. *See id.* And they do not show good cause for failing to present the arguments sooner.

9. *Double Jeopardy*. Young argues that his convictions and sentences on Counts 19 and 20 violate the Double Jeopardy Clause because § 924(c) is a lesser-included offense of § 924(j). The government agrees. Accordingly, because we affirm Young's conviction on Count 20, we vacate his conviction on Count 19 and remand for resentencing. *See United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir. 2005) ("[W]hen a jury convicts on both the greater and lesser included offenses . . . the district court should enter a final judgment of conviction on the greater offense and vacate the conviction on the lesser offense.").

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

FILED

OCT 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES HEARD, AKA Cheese, Defendant-Appellant.	No. 18-10218 D.C. No. 3:13-cr-00764-WHO-7 Northern District of California, San Francisco ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAQUAIN YOUNG, AKA Loc, Defendant-Appellant.	No. 18-10228 D.C. No. 3:13-cr-00764-WHO-11
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ESAU FERDINAND, AKA Sauce, Defendant-Appellant.	No. 18-10239 D.C. No. 3:13-cr-00764-WHO-8
UNITED STATES OF AMERICA,	No. 18-10248

Plaintiff-Appellee, v. MONZELL HARDING, Jr., Defendant-Appellant.	D.C. No. 3:13-cr-00764-WHO-10

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADRIAN GORDON, AKA Tit, Defendant-Appellant.	No. 18-10258 D.C. No. 3:13-cr-00764-WHO-5

Before: BADE and BUMATAY, Circuit Judges, and BERMAN,* District Judge.

The panel has voted to deny the petitions for panel rehearing filed by Appellants Heard, Young, Ferdinand, Harding, and Gordon. Judges Bade and Bumatay have voted to deny the petitions for rehearing en banc filed by Appellants Heard, Young, Ferdinand, Harding, and Gordon. Judge Berman so recommends. The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and the petitions for rehearing en banc are

* The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	Nos. 18-10228, consolidated
	)	with 18-10218, 18-10239
Plaintiff-Appellee	)	18-10248, 18-10258
	)	
	)	DC # 13-CR-764-WHO
v.	)	
	)	
JAQUAIN YOUNG, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WILLIAM H. ORRICK
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone: (707) 789-0516
E-mail: sslubliner@comcast.net
Attorney for Defendant-Appellant
Jaquain Young

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I. INTRODUCTION AND RULE 35 STATEMENT

Pursuant to Fed. R. App. P. 35(b), 40 and Ninth Cir. R. 35-1, appellant Jaquain Young petitions for panel rehearing and *en banc* review of the memorandum decision of July 11, 2022 on the points set out below. The panel granted all parties until September 23, 2022 to file a petition.

Shortly after the murder at the heart of Young's trial, Tierra Lewis went to the police, circled codefendant Esau Ferdinand's picture on a lineup card, and wrote that she saw Ferdinand shoot the victim. She then recanted on the stand. Lewis recanted in another case after being threatened.

Under Federal Rule of Evidence 801(d)(1)(C), out-of-court identifications are admissible for their truth. The district court would not so admit Lewis's identification of Ferdinand. Young was convicted of VICAR murder and related crimes on the strength of an alleged confession testified to by jailhouse informant and inveterate fraudster Bruce Lee Marshall.

"Only the *en banc* court can overturn a prior panel precedent." *United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011). "[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court." *Ibid.* (citation omitted).

What the panel casts as permissible discretionary rulings masks and disregards precedent holding the district court could not do what it did. The upholding of other purported exercises of discretion masks legal interpretations that are incorrect.

- The district court may exclude a prior identification admissible for its truth under FRE 801(d)(1)(C) if it is not also admissible as a prior inconsistent statement under FRE 801(d)(1)(A).[1] Mem. at 3-4[2]: Contradicts FRE 801(d)(1), which is written in the disjunctive. The government conceded this. AB 93.
- Under FRE 403, the district court may exclude a prior exculpatory identification, admissible under FRE 801(d)(1)(C), if it believes the identifying witness's later recantation. Mem. at 3-4: Contrary to *United States v. Evans*, 728 F.3d 953, 963-966 (9th Cir. 2013). Contrary to FRE 801(d)(1)(C), which exists to address recantations. *United States v. Elemy*, 656 F.2d 507, 508 (9th Cir. 1981).

[1] This holding is not apparent from the memorandum. As will be shown, it is what the district court ruled, and it is what the panel affirmed.
[2] Mem.=Memorandum Decision; ER=Excerpts of Record in 43 volumes. YSER=Young's Supplemental Excerpts of Record in two volumes. AOB=Young's Opening Brief; AB=Government's Answering Brief; ARB=Young's Reply Brief.

- Erroneous exclusion of key third party culpability evidence does not violate the Constitution if the defendant got to cross-examine witnesses and argue weakness in the government's case. Mem. at 4: Contrary to *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324-325 (2006). The Constitutional right at issue is "a meaningful opportunity to present a *complete* defense." Contrary to *United States v. Evans*, *supra*, 728 F.3d at 959; *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) on the constitutional right to a complete defense grounded in third-party culpability. Contrary to *Frost v. Van Boening*, 757 F.3d 910, 915-918 (9th Cir.) (*en banc*), rev'd on other grounds, *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014), *United States v. Brown*, 859 F.3d 730, 734-737 (9th Cir. 2017), and other Ninth Circuit cases holding that preclusion of argument on a valid, supported defense is structural error. Additionally, the panel's suggestion that Young got to argue Lewis's identification of Ferdinand for its truth contradicts the record. 34-ER-9461-9462.
- Severance turned on whether Young and Ferdinand's defenses were mutually exclusive under *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991). Mem. at 2-3: Factually contrary to the

record. Legally contrary to *Zafiro v. United States*, 506 U.S. 534, 539 (1993) and *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980) which hold that severance is required when, as here, a joint trial seriously impairs one defendant's defense, such as by requiring exclusion of key exculpatory evidence.

- Speculation that coconspirators could have committed the substantive offense the defendant was charged with justifies a *Pinkerton* instruction on liability for the foreseeable crimes of coconspirators. Mem. at 13: Contrary to *United States v. Ruiz*, 462 F.3d 1082 (9th Cir. 2006) and *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal 2011), both of which required affirmative government proof of the guilty coconspirators.

The panel should grant rehearing to reconsider each of the above conclusions affecting Young's claims under the correct, binding Supreme Court and/or Ninth Circuit precedent. It should address Young's claim about FRE 801(d)(1)(C) in light of the plain language of FRE 801(d)(1).

Alternatively, the panel's incorrect legal conclusions all bear on important and common rules of evidence, the test for constitutional violations in cases of evidentiary error that impairs a defense, common severance procedure, and the scope of discretion under the commonly

employed *Pinkerton* doctrine. Thus, they present legal questions of exceptional importance meriting *en banc* review to settle.

Young joins codefendant Ferdinand and Heard's petitions for rehearing and *en banc* review on, respectively, 1) the correctness of the RICO conspiracy instruction and 2) whether Young's VICAR murder conviction was a crime of violence to sustain his firearms convictions under 18 U.S.C. § 924(c) and (j).

II. STATEMENT OF FACTS

A. The Murder of Jelvon Helton

1. The Crime Scene

Around midnight on November 1, 2010, someone shot Jelvon Helton at the Gravity Bar in San Francisco. 12-ER-2992, 13-ER-2978-2980, 3268-3269, 3288-3289. No eyewitness identified Young as the shooter. The gun was not found. No DNA evidence incriminated him.

Four black men ran from the bar and sped away in a metallic burgundy Chrysler 300. 32-ER-8921-8945. A responding officer followed but lost a silver Acura near the area speeding and weaving through traffic. There were four or five black men in the car. The last two numbers of its license plate were 59. 13-ER-3143, 3147-3149, 3155-3160.

2. The Tierra Lewis Evidence

On November 17, 2010, Inspector Cunningham of SFPD met with Tierra Lewis. 29-ER-7911-7912, 8029-8030. Helton's family asked her to come forward. 30-ER-8114-8116, 8238.

Lewis told Cunningham that on the night of the murder, the shooter called her friend, Tiffany, asking to be picked up at different places. They drove Lewis's brother's Acura. Eventually, the shooter said they should meet at the Gravity Bar. 29-ER-8030-8033. Cunningham agreed Lewis's brother owned a silver Acura. 29-ER-8098-8100; 30-ER-8101, 8103.

At the bar, Lewis saw Helton, whom she knew as Pooh Bear. The shooter walked up and shot him. There were ten shots. The shooter left Lewis and her friend because they were slow leaving. Lewis identified the shooter in a photo lineup. 29-ER-8033-8038; 1-YSER-157-164. He killed Helton because his friend, Julius Hughes, had died. 29-ER-8050, 8052.

The shooter called Tiffany and asked to be picked up in Emeryville. The women drove there. The shooter drove up in a BMW with Nut Cake. They had driven across the Golden Gate Bridge. Lewis and Tiffany took the shooter to the Oaks Card Club. Nut Cake left in the BMW. Then, Lewis and Tiffany drove the shooter to San Francisco so he could get a Bay Bridge

receipt. The shooter wanted to say he was with them if investigated. Lewis objected to that. 29-ER-8038-8046.

Lewis had grown up with the shooter and dated him. Tiffany texted with him repeatedly. Tiffany told Lewis before her interview that the shooter wanted to know if they were talking. Lewis told Cunningham she did not want to testify. 29-ER-8045-8050. She received threatening texts after the interview. 29-ER-8088-8089.

Lewis testified under immunity. 32-ER-8998-9000; 33-ER-9021. She knew Ferdinand. His nickname was Sauce. She only knew Helton as Pooh Bear. She had grown up with Ferdinand. 33-ER-9029-9030.

Lewis acknowledged telling Cunningham Ferdinand shot Helton. 33-ER-9023-9024, 9039-9041, 9048-9049, 9054-9055, 9069, 9074-9082. She had identified Ferdinand in a photo lineup as "E. Sauce," who "pulled out his gun" and killed Pooh Bear." 33-ER 9086-9089; 1-YSER-157-164. She admitted providing substantial detail about the crime scene. 33-ER-9111.

Helton's family insisted she go to the police with this story. 33-ER-9083-9084. They were convinced Ferdinand had committed the murder and needed an eye-witness. 33-ER-9106-9107.

After receiving threats, Lewis contacted SFPD and said she had lied. 33-ER 9024-9028, 9054-9055, 9086. She insisted the threats and a beating

she got after talking to Cunningham related to her cousin's case, not Young's. Lewis had recanted in her cousin's murder case, lying on the stand that he had not asked her to hide a gun after having told the police he had. 33-ER 9049-9052, 9085, 9103-9105, 9109-9110.

The initial call from Ferdinand never happened. Tiffany was a name she made up for her cousin Tanisha, whom she was with. They later got a call from Ferdinand who wanted to be picked up in the East Bay. They met him at the Emeryville card club. Ferdinand was with Young in a white car. She could not say if it was a BMW. Ferdinand got in the car with them. They drove back to San Francisco. Lewis was dropped off at home. She was never at the Gravity Bar. 33-ER-9039-9047, 9073, 9095.

3. Other Evidence

The Acura with the plate ending in 59 belonged to Young's girlfriend, Taylor Norry. He borrowed it to go to the funeral of his murdered friend, Julius Hughes, where it was photographed by law enforcement. 14-ER-3322-3331, 3331-3332, 3365; 28 ER 7612-7614. Young also borrowed it on November 1, 2010. Later, Young asked Norry to clean it inside and out. 14-ER-3332-3335. He said nothing had happened. The car was seized by SFPD in 2010 and by the FBI in 2014. 14-ER-3350-3351. Norry knew Ferdinand as Young's "cousin." 14 ER 3341-3349.

Jailhouse informant Bruce Lee Marshall was a self-taught software engineer. Lacking credentials, he created the identity, Francois Delacroix, who had prestigious degrees. 14-ER3505-3508. He maintained this deception in his personal life. 15-ER-3696-3701. Marshall had a history of fraud, convictions, and supervised release violations. 14-ER-3507-3526.

In 2013, while awaiting trial on mail fraud charges, Marshall was housed with Young. 14-ER-3526. Young asked him to look at a motion in his pimping case. The pimping complaint said Young was a member of CDP and a RICO target. 28-ER-7644-7650. Marshall wrote down the case number and the U.S. Attorney's name. 14-ER-3558-3560.

Marshall wrote the government offering information about a murder for benefits in his case. It was agreed Marshall would record conversations with Young. 14-ER-3560-3563. Marshall tried unsuccessfully to record Young several times. 14-ER-3591-3599; 15-ER-3825-3826.

Marshall testified Young had told him about his friend being murdered. Young and his cousin were at a bar when his cousin pointed out the killer. Young said, "I'm going to go get him." Young simulated how he pulled the trigger about four times from point blank range while backing up. 14-ER-3543-3545.

Young and his cousin ran to his girlfriend's Acura and sped off. They eluded the police. Young later cleaned the car with lye. 14-ER-3546-3547. The police interviewed his girlfriend, showing her pictures of his cousin. She had lied at Young's request. 14-ER-3547-3548, 3554.

Young said he was part of a clique or gang. People did different things. He was a pimp. Most everybody "had a body." 14-ER-3548-3550.

A later successful recording and notes Marshall made of their talks were introduced. Topics included the girlfriend's loyalty, the government's ongoing interest in her car, him seeing no need for her to dump it, not yielding to the police because he was drunk and high while on probation, the foolish behavior of young criminals, Young's dissociation from problematic people, and whether Young was snitching. Young never admitted killing Helton. He said a RICO prosecution premised on local criminals sharing proceeds of their crimes was ridiculous. 15-ER-3612-3615; 3648-3660; 3662-3663, 3672; 3830-3857; 16-ER-3931; 1-YSER-147-156.

A text from Ferdinand to Young on November 2, 2010 read "wipe em down he's gone." 16-ER-3960.

B. The CDP Enterprise

Cooperating witness Johnnie Brown identified most defendants, including Young, as CDP members. ER 4424; 18-ER-4763-4764. He

identified photos of Young and others throwing hand signs. 18-ER-4505-4506, 4530-4536, 4661-4666. Brown agreed some of these were taken with local rappers who rapped about the neighborhood. 21-ER-5420-5426. In his cooperation interview in May 2010, Brown did not mention Young until two hours in and only at police prompting. He said CDP no longer dealt with Young. 21 ER 5426-5430.

III. ARGUMENT

A. A Prior Identification Supporting a Third-Party Culpability Defense is Admissible under FRE 801(d)(1)(C) Without Regard to FRE 801(d)(1)(A). The District Court may not Exclude this Evidence Because it Believes a Later Recantation. Such Exclusion and Preclusion of Argument Violates a Defendant's Constitutional Rights.

1. Procedural History

The court ruled Young could only elicit through Cunningham that Lewis identified someone else. 1-ER-A174-190. If Lewis testified, it would be "a different story." 1-ER-A174. During immunity talks, Young's counsel said he would introduce her identification for its truth. 32-ER-8858-8862.

During closing argument, the court addressed Lewis's identifications. Young argued for admissibility under FRE 801(d)(1)(C). Credibility was a jury question. 1-ER-A129-A133, A137-140; 34-ER-9363-9367, 9371-9374, 9376-9377. The government argued that under FRE 403, the recanted identification had no probative value and that Ferdinand had to be protected.

It asked for a limiting instruction. Ferdinand joined that request. 1-ER-A133-A137; A140-A142; 34-ER-9367-9371, 9374-9376.

The court gave the instruction because Lewis's identification would "be prejudicial . . . to Mr. Ferdinand. . .. [T]here was very clear testimony from Ms. Lewis that she was lying at the time." 1-ER A143-A144; 34-ER-9377-9378. Young could only argue that exhibit 779 showed Lewis knew who Ferdinand was. 1-ER-A146-A148; 34-ER-9380-9384.

Prior to defense arguments, the court instructed, "During the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be considered as substantive evidence for the truth of the matters asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility." (34 ER 9461-9462.)

In denying Young's motion for new trial, the court agreed the identification was a non-hearsay prior identification under FRE 801(d)(1)(C), though not a non-hearsay prior inconsistent statement under FRE 801(d)(1)(A). The limiting instruction had been "an attempt to draw a difficult line between the convergence of two rules of evidence . . .. To the extent that this delicate balance reflected any error, it did not rise to the level in which the interests of justice requires a new trial." 1-ER-A32. The

instruction was also grounded in FRE 403 due to the potential for misleading and confusing the jury. 1-ER-A32, fn. 17.

2. Discussion

a. Tierra Lewis's Identification of Ferdinand as Jelvon Helton's Killer was Admissible for its Truth under FRE 801(d)(1)(c) Without Regard to FRE 801(d)(1)(A).

Not every out-of-court statement offered for its truth is inadmissible hearsay.

> "(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
> . . .
> or
> (C) identifies a person as someone the declarant perceived earlier." Fed. R. Evid. 801(d).

Under FRE 801(d)(1)(C), identifications at in-person lineups and photo spreads are admissible. *United States v. Elemy*, 656 F.2d 507, 508-509 (9th Cir. 1981); accord, *United States v. Owens*, 484 U.S. 554, 556, 560-564 (1988).

Lewis's identification of Ferdinand as Helton's killer was admissible for its truth. Its inadmissibility as a prior inconsistent statement is irrelevant. FRE 801(d)(1) is written disjunctively. Few cases have even addressed this.

See *Johnson v. United States* 820 A.2d 551, 558-559 (D.C. App. 2003); *United States v. Parker*, 2020 U.S. Dist. LEXIS 114054 (Nor. Dist. Ill. June 29, 2020) (unpub.) at *8. The government conceded the point. AB 93. The contrary conclusion is insupportable.

b. Under FRE 403, the District Court Could Not Prevent the Jury from Considering Lewis's Identification of Ferdinand as Jelvon Helton's Killer for its Truth Because it Believed her Recantation.

Lewis's recantation did not require extreme measures. FRE 801(d)(1)(C) was enacted to address recantation, "the instance where before trial the witness identifies the defendant and then because of fear refuses to acknowledge his previous identification." *United States v. Elemy*, *supra*, 656 F.2d at 508.

Under FRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The panel disregarded a precedential limitation on the court's discretion.

"Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable." *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013) (citation omitted). The truth of

exculpatory evidence "is a question of fact that should be decided by a jury, not a trial judge." *Id.* at 963-964. The court's disbelief does not equate to potential jury confusion. *Id.* at 965-966. "It is the jury, not the trial judge, that must decide how much weight to give to Evans's delayed birth certificate in light of the government's evidence suggesting that the birth certificate is fraudulent[.]" *Id.* at 966. Under *Evans*, the district court abused its discretion.

c. Young's Constitutional Rights to Present a Complete Defense were not Satisfied by Just Being Allowed to Cross-Examine Witnesses and Argue Weaknesses in the Government's Case.

A defendant's right to a meaningful opportunity to present a complete defense is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments as well as the Compulsory Process Clause of the Sixth Amendment. *Holmes v. South Carolina*, 547 U.S. 319, 324-325 (2006); *United States v. Stever*, *supra*, 603 F.3d at 755. The erroneous exclusion of exculpatory evidence violates the Constitution if it involves "(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical element of the government's case." *United States v. Evans*, *supra*, 728 F.3d at 967. Accord, *Stever*, *supra*, 603 F.3d at 755.

In *Stever*, excluding evidence that drug traffickers had marijuana grows near the isolated part of the defendant's property where he was

accused of growing marijuana violated his constitutional rights to present a defense. *Id.* at 755-757. "[F]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." *Id.* at 756, *quoting United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1996).

Thus, the Constitution is not automatically satisfied when defense counsel gets to cross-examine witnesses and argue the prosecution's case is inconclusive. Further, in this Circuit, preclusion of argument on a legitimate defense theory is structural error under *Herring v. New York*, 422 U.S. 853, 862-865 (1975). See, *Frost v. Van Boening*, 757 F.3d 910, 915-918 (9th Cir. 2014) (*en banc*), rev'd on other grounds, *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014).[3] Accord, *United States v. Brown*, *supra*, 859 F.3d at 734-737; *United States v. Smith-Baltiher*, 424 F.3d 913, 920-922 (9th Cir. 2005); *United States v. Miguel*, 338 F.3d 995, 1003 (9th Cir. 2003); *Conde v. Henry*, 198 F.3d 734, 739-741 (9th Cir. 1999). The district court's evidentiary errors were of constitutional magnitude.

[3] The "other grounds" were that this Circuit's rule was not clearly established Supreme Court law justifying habeas relief under 28 U.S.C. § 2254(d)(1).

B. Severance is Required to Avoid Materially Restricting a Party's Defense, not just when Defenses are Mutually Exclusive.

1. Procedural History

Young first unsuccessfully moved to sever his case from Ferdinand's on the theory their defenses were antagonistic given Lewis's identification. The court ruled the defenses were not mutually exclusive because other people could have shot Helton. 1-ER-A71-A83; 37-ER-10401-10413; 38-ER-10755-10759.

Subsequent motions focused on prejudice to Young's defense from restrictions placed on the Lewis evidence to protect Ferdinand. 1-ER-A1155-176, A189-A190; 1-ER-A30-A31. Young sought a new trial on this ground. 1-YSER-34, 39-46. It was denied because the defenses were not mutually exclusive and because a jury believing Ferdinand shot Helton would have convicted Young under *Pinkerton*. 1-ER-A29-A31.

2. Discussion

"If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Cr.Proc. 14(a). "[T]he trial judge has a continuing duty at all stages of

the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

Severance should be granted if joinder was "so manifestly prejudicial that it outweighed the dominant judicial concern with judicial economy[.]" *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980). "Manifest prejudice" includes violation of the "right to present an individual defense." *Id.* at 563. "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Mutual exclusivity of defenses under *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) is not the sole justification for severance. The restrictions on the Lewis evidence were manifestly prejudicial under *Zafiro* and *Seifert*.

C. A *Pinkerton* Instruction may not be Given when the Government has not Proven that One or More Coconspirators, Other than the Defendant, Committed the Charged Crime.

1. Procedural History

Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a charged defendant is liable for the criminal acts of his coconspirators if 1) the crime was committed in furtherance of the conspiracy; 2) it was within the scope of the conspiracy; and 3) the defendant reasonably could have foreseen the

crime being committed pursuant to the conspiracy. *United States v. Douglass*, 780 F.2d 1472, 1475-1476 (9th Cir. 1986).

Discussions about a *Pinkerton* instruction focused on *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal 2011) and whether the government would prove or had proved alternative scenarios justifying the instruction. 38-ER-10681-10685. The government argued that acquitting Young as a direct perpetrator based on the Lewis identification would require convicting under *Pinkerton*. 2-ER-A281-A282. It expected to "tie up" its *Pinkerton* case "in very specific ways" at trial. 2-ER-A284. However, entitlement to the instruction turned only on general foreseeability. 37-ER-10462-10466.

At the instructions conference, Young argued the government had presented no alternative scenario. 32-ER-8837. The court replied, "[J]ust because the theory wasn't particularly expressed in the way that the Government may end up arguing it in closing, I think that is not grounds for saying that they can't have the instruction." 32-ER-8840-8841. It gave it. 33-ER-9294.

The government argued Young killed Helton. 34-ER-9414-9422. Guilt under *Pinkerton* assumed some unnamed CDP member foreseeably killed Helton. 34-ER-9447. Addressing the idea Ferdinand killed Helton, the

government said if so, Young was guilty under *Pinkerton*. 36-ER-9913. It cited no prosecution evidence proving Ferdinand's guilt. It never "tied up" its *Pinkerton* case as it promised to do.

2. Discussion

In *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal. 2011), the court refused to give a *Pinkerton* instruction in a complex RICO conspiracy case. The actual perpetrator of the murder had not been identified. *Id.* at *7. In cases that allowed the *Pinkerton* instruction, the perpetrators and their roles were identified. *Id.* at *11. The court refused the instruction on this basis. *Id.* at *12. *Carcamo* should have controlled.

General foreseeability does not justify a *Pinkerton* instruction. The government cited many *Pinkerton* cases, both below and in this Court. 37-ER-10462-10466; AB 206, 212-214. In all of them, the government proved coconspirators committed the crime. The government cited no case holding that a *Pinkerton* instruction is proper based on speculative foreseeability.

The government surprisingly cited *United States v. Ruiz*, 462 F.3d 1082 (9th Cir. 2006) where the defendants' convictions for possessing firearms furthering a drug crime were reversed. AB 212. Possession was foreseeable, but the government proved only mere access. *Id.* at 1088-1089. "[V]icarious liability is predicated upon proof that someone among the co-

conspirators committed the substantive crime at issue." *Id.* at 1088. "[T]he government failed to meet its burden of proving possession[.]" This Court refused to "leap to [the] conclusion" that "somebody in that laboratory must have possessed the firearms[.]" *Id.* at 1088-1089.

The instruction here worked considerable mischief. "The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor." *Zafiro v. United States*, *supra*, 506 U.S. at 543 (Stevens, J., concurring). The instruction let the government evade its burden.

Although the jurors could not consider Lewis's identification for its truth, the government asked them to turn theoretical *reasonable doubt* into proof *beyond a reasonable doubt* under *Pinkerton* without any government proof of or belief in Ferdinand's guilt. That should not have happened.

IV. CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Dated: September 23, 2022

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Defendant-Appellant
Jaquain Young

FILED

JUL 12 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES HEARD, AKA Cheese, Defendant-Appellant.	No. 18-10218 No. 18-10228 No. 18-10239 No. 18-10248 No. 18-10258 D.C. Nos. 3:13-cr-00764-WHO-7 3:13-cr-00764-WHO-11 3:13-cr-00764-WHO-8 3:13-cr-00764-WHO-10 3:13-cr-00764-WHO-5 ORDER

Before: BADE and BUMATAY, Circuit Judges, and BERMAN,* District Judge.

Appellant Adrian Gordon's motion to extend the deadline to file a petition for rehearing and/or a petition for rehearing en banc to September 23, 2022 is **GRANTED.** The deadline for any party to this consolidated appeal to file a petition for panel rehearing and/or rehearing en banc is extended to September 23, 2022. *See* Fed. R. App. 26(b), 35(c), and 40(c).

* The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
Northern District of California

UNITED STATES OF AMERICA
v.
Jaquain Young
a/k/a "Loc"

) **JUDGMENT IN A CRIMINAL CASE**
)
) USDC Case Number: CR-13-00764-011 WHO
) BOP Case Number: DCAN313CR00764-011
) USM Number: 18061-111
) Defendant's Attorney: Amy Craig and Ismail Ramsey (Appointed)

THE DEFENDANT:

☐ pleaded guilty to count(s):

☐ pleaded nolo contendere to count(s): which was accepted by the court.

☑ was found guilty on counts: 1, 18, 19, 20, 21, and 22 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Racketeering Conspiracy	March 11, 2013	1
18 U.S.C. § 1959(a)(1)	Violent Crimes in Aid of Racketeering-Murder of Jelvon Helton	November 1, 2010	18
18 U.S.C. § 924(c)	Use/Possession/Discharge of a Firearm in Furtherance of a Crime of Violence	November 1, 2010	19
18 U.S.C. § 924(j)	Use/Possession of a Firearm in Murder	November 1, 2010	20
18 U.S.C. § 2422(a)	Attempt to Entice and Persuade an Individual to Travel for Prostitution	March 11, 2013	21
18 U.S.C. § 2422(b)	Attempt to Persuade a Minor to Engage in Prostitution	March 11, 2013	22

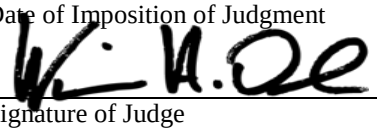
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s):

☐ Count(s) dismissed on the motion of the United States.

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

6/8/2018
Date of Imposition of Judgment



Signature of Judge
The Honorable William H. Orrick III
United States District Judge
Name & Title of Judge

June 14, 2018
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Life. This term consists of terms of Life on each of Counts 1, 18, 20, and 22 and 20 years on Count 21, all counts to be served concurrently; and a term of ten years on Count 19, to be served consecutively.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

☑ The Court makes the following recommendations to the Bureau of Prisons:
To be designated to a facility as close to the San Francisco Bay Area in California as possible.

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

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on (no later than 2:00 pm).
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ at on (no later than 2:00 pm).
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 600	N/A	Waived	None

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

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

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the .
- ☐ the interest requirement is waived for the is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows*:

A ☑ Lump sum payment of _____$600_____ due immediately, balance due

☐ not later than , or
☑ in accordance with ☐ C, ☐ D, or ☐ E, and/or ☑ F below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of _ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of _ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
When incarcerated, payment of criminal monetary penalties are due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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

☐ The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.

* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee v. JAQUAIN YOUNG, et al., Defendants-Appellants.	)	Nos. 18-10228, consolidated with 18-10218, 18-10239 18-10248, 18-10258 DC # 13-CR-764-WHO

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WILLIAM H. ORRICK
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone (707) 789-0516
E-mail: sslubliner@comcast.net
Attorney for Defendant-Appellant
Jaquain Young

VII. ARGUMENT

A. The District Court Violated Young's Sixth Amendment Right to Present a Defense and the Federal Rules of Evidence When it Refused to Admit Tierra Lewis's Prior Identification of Esau Ferdinand as the Killer of Jelvon Helton for its Truth Because it was Convinced she had Lied.

1. Standard of Review

Barring a defendant from introducing exculpatory evidence and arguing his defense to the jury denies due process, violates the Sixth Amendment right to counsel, effectively directs a verdict for the jury, and rises to the level of structural error, requiring reversal without a showing of prejudice. *Frost v. Van Boening*, 757 F.3d 910, 915-918 (9th Cir. 2014) (*en banc*), *rev'd on other grounds*, *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014); *United States v. Brown*, 859 F.3d 730, 734-734 (9th Cir. 2017).

Alternatively, a defendant is entitled to relief on appeal for federal constitutional error unless the government can show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Whether constitutional error occurred because a proffered defense was precluded is reviewed *de novo*. *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010).

Whether the district court correctly construed a hearsay rule is reviewed *de novo*. *United States v. Olafson*, 213 F.3d 435, 441 (9th Cir.

2000). Evidentiary rulings are reviewed for abuse of discretion. *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007). Reversal is required if there is a reasonable probability that an error affected the outcome of the trial. *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1227 (9th Cir. 2018). The denial of a motion for new trial is reviewed for abuse of discretion. *United States v. King*, 660 F.2d 1071, 1076 (9th Cir. 2011).

2. Procedural History

While Inspector Cunningham was on the stand, the government objected to Young's questioning him about statements by Tierra Lewis. (29 ER 7912.) Young's counsel represented that Lewis's statements to Cunningham were being introduced to probe the integrity of the investigation and were not necessarily admitted for their truth. The district court suggested that any identification of Ferdinand as the shooter properly should come when Lewis testified. Young's counsel said it was not yet clear that she would testify. (29 ER 7916-7922.) The next day, the court confirmed that Young could only elicit from Cunningham that someone else had been identified as the shooter but not that the shooter was Ferdinand. (1 ER A174-190.) If Lewis testified, it would be "a different story." (1 ER A174.)

When the prospect of Lewis being granted immunity was being discussed, Young's counsel said he would be introducing Lewis's identification of Ferdinand for its truth (32 ER 8858-8862.) Ultimately, Lewis testified under a grant of immunity, acknowledged her prior identification of Ferdinand as the shooter, and recanted it.

In the middle of the government's closing argument, the court addressed how Lewis's statements could be considered by the jury. Its initial ruling was that her statements testified to by Inspector Cunningham had not been offered for their truth and could not be argued at such. However, her testimony on the stand could. Young argued that all of her identifications of Ferdinand as the shooter, particularly on the photo lineup admitted as exhibit 779, were admissible for their truth under FRE 801(d)(1)(C). He noted there had been no objection when the exhibit was admitted. The court said it would distinguish between Lewis's direct testimony and what was elicited through Cunningham. (1 ER A129-A133; 34 ER 9363-9367.)

The government argued that it had not objected to exhibit 779 because it interpreted the exhibit as only being offered to document that Lewis knew who Ferdinand was, not that she knew who the shooter was. It argued that evidence she had recanted about should not come in for its truth but only as impeachment. It raised the need to protect Ferdinand from undue prejudice.

It asked the court to give a limiting instruction that none of the evidence implicating Ferdinand could be considered for its truth. Ferdinand joined in the request for a limiting instruction. (1 ER A133-A137; 34 ER 9367-9371.)

Young argued that he had always made it clear that exhibit 779 was being offered under the Rules of Evidence to establish Lewis's identification of Ferdinand as the shooter. This was a separate issue from the non-hearsay purpose of testing the thoroughness of the investigation. It was not for the government to say that evidence should not be considered because Lewis's recantation, not her original identification, was true. That was a jury question. (1 ER A137-A140; 34 ER 9371-9374, 9376-9377.)

The government argued that even if Lewis's identification of Ferdinand as the shooter was non-hearsay, it should be excluded under Rule 403 because it had no probative value given her recantation. The government asked the court to give a limiting instruction about the evidence. Ferdinand joined the request. (1 ER A140-A142; 34 ER 9374-9376.)

The court said it would do so. Young objected.

> "MR. RAMSEY [Young's counsel]: I would emphasize, Your Honor, we are interested in 779 for the truth of the matter. The rest I would agree, but the – that identification and what it is, I think it's for the truth of the matter."
>
> THE COURT: I don't think so. I think you could argue that she went to – when she went to speak with Inspector Cunningham, she identified somebody else. She did not identify Mr. Young.

> You can say that she identified Mr. Ferdinand in the six-pack, but to assert beyond that, that he was the shooter, I think that just goes – is contrary to not only what the evidence is and I think it would be prejudicial to Mr. Waggener [Ferdinand's counsel] and he also – to Mr. Ferdinand, and he also had witnesses lined up if it was necessary to rebut what I think was a very clear – and did not in part because there was very clear testimony from Ms. Lewis that she was lying at the time." (1 ER A143-A144; 34 ER 9377-9378.)

The court reiterated that Young could only argue that exhibit 779 reflected Lewis's identification of who Ferdinand was, not an identification of him as the shooter, even though Lewis's identification was accompanied by her written recitation that Ferdinand was the shooter. (1 ER A146-A148; 34 ER 9380-9384.)

Prior to the start of defense closing arguments, the court instructed the jury, "During the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be considered as substantive evidence for the truth of the matters asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility." (34 ER 9461-9462.)

Young filed a motion for new trial, arguing that Lewis's identification of Ferdinand should have been considered for its truth. (1 YSER 34, 39-46.) Whether the document was or was not hearsay could not depend on the

circumstances of the case. The jury should have been allowed to determine which time Lewis was lying. (36 ER 9965-9969.)

The government argued that exhibit 779 had been admitted in its entirety. The question then became whether, given Lewis's recantation, Rule 403 barred Young from arguing the truth of the identification to the jury given the potential for prejudice to Ferdinand. Admitting the statement for its truth could not have helped Young because of *Pinkerton* coconspirator liability. (36 ER 9971-9973.) Young replied Rule 403 was a *post hoc* rationalization. The government insisted that the issue had been Rule 403 all along. (36 ER 9974-9975.)

The Court denied the motion. It said exhibit 779 had been admitted in its entirety, and it agreed that the entire identification qualified as a non-hearsay prior identification under Rule 801(d)(1)(C), though not as a non-hearsay prior inconsistent statement under Rule 801(d)(1)(A). Admitting it with a limiting instruction had been "an attempt to draw a difficult line between the convergence of two rules of evidence . . . . To the extent that this delicate balance reflected any error, it did not rise to the level in which the interests of justice requires a new trial." (1 ER A32.) The court did not elaborate on this latter point. It confirmed that, though not perfectly expressed at the time, its limitation on exhibit 779 was also grounded in

Rule 403 considerations due to the potential for the evidence misleading and confusing the jury. (1 ER A32, fn. 17.)

3. Discussion

A defendant's right to a meaningful opportunity to present a complete defense is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments as well as the Compulsory Process Clause of the Sixth Amendment. *Holmes v. South Carolina*, 547 U.S. 319, 324-325 (2006); *United States v. Stever*, *supra*, 603 F.3d at 755. Erroneous application of the Rules of Evidence can rise to the level of a constitutional violation if evidence important to the defense is excluded. *United States v. Stever*, *supra*, 603 F.3d at 755. *Stever* held that excluding evidence that drug trafficking organizations had marijuana growing operations near the isolated part of the defendant's property where he was accused of growing marijuana violated the defendant's constitutional rights to present a defense. *Id.* at 755-757. "[F]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." *Id.* at 756, *quoting United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1996). The erroneous exclusion of the exculpatory evidence violates the Constitution if it involves "(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical

element of the government's case." *United States v. Evans*, 728 F.3d 953, 967 (9th Cir. 2013).

A critical part of Young's defense was showing that Ferdinand had shot Jelvon Helton. The district court's misapplication of the hearsay rules and FRE 403 violated the Rules of Evidence and denied Young his constitutional right to present a complete defense.

Hearsay evidence is inadmissible unless an exception applies. Fed. R. Ev. 802. Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. Fed. R. Ev. 801(c). Not every such statement is inadmissible hearsay.

> "(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> . . .
> (C) identifies a person as someone the declarant perceived earlier." Fed. R. Evid. 801(d).

Under FRE 801(d)(1)(C), prior identifications of perpetrators at in-person lineups and in response to photo spreads are admissible. *United States v. Elemy*, 656 F.2d 507, 508-509 (9th Cir. 1981); *United States v. King*, 590 F.2d 253, 257 (8th Cir. 1978); *United States v. Lewis*, 565 F.2d 1248, 1252 (2d Cir. 1977). *See also, United States v. Owens*, 484 U.S. 554, 556, 560-

564 (1988) (construing FRE 801(d)(1)(C) in case involving prior identification from a photo spread).

Because section 801(d)(C) is not limited to prior identifications of the defendant, Lewis's identification of Ferdinand as Jelvon Helton's killer was admissible for its truth under Rule 801(d)(1)(C). Further, a witness's testimony about a third party's out-of-court identification of someone as a perpetrator is admissible for its truth if that third party is available for cross-examination on the identification. *United States v. Elemy*, *supra*, 656 F.2d at 508-509. Thus, once Lewis testified, the jury should have been allowed to consider Inspector Cunningham's testimony about Lewis's identification for its truth.

The district court apparently believed that Lewis's identification of Ferdinand was admissible under Rule 801(d)(1)(C) to prove Ferdinand's identity as the shooter. It abused its discretion by not letting Young argue that identification to the jury for its truth because it believed her subsequent recantation rather than her initial identification.

Section 801(d)(1)(C) was enacted in part to address recantations. *United States v. Elemy*, *supra*, 656 F.2d at 508. Prior identifications are admissible as substantive evidence regardless of whether the witness can repeat the identification, or is uncertain, or recants the prior identification at

trial. That is the point of the statute. Indeed, the drafters recognized that prior identifications are often more reliable than in-court identifications. *United States v. Owens*, *supra*, 484 U.S. at 562-563. *See also, United States v. Anglin*, 169 F.3d 154, 159 (2d Cir. 1999); *United States v. Salameh*, 152 F.3d 88, 125 (2d Cir. 1998); *Samuels v. Mann*, 13 F.3d 522, 527 (2d Cir. 1993); *United States v. O'Malley*, 796 F.2d 891, 899 (7th Cir. 1986); *United States v. Lewis*, 565 F.2d 1248, 1252 (2d Cir. 1977); *Johnson v. United States* 820 A.2d 551, 557-559 (D.C. App. 2003) (construing analogous provision of D.C. Code to find admissible prior statement identifying defendants as shooters after witness recanted).

In addition to misapplying FRE 801(d)(1)(C) by deeming Lewis's identification unworthy of belief, the district court misapplied FRE 403 to the same effect. "'Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable.'" *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013), quoting *Bowden v. McKenna*, 760 F.2d 282, 284-285 (1st Cir. 1979). The truth or falsity of exculpatory evidence "is a question of fact that should be decided by a jury, not a trial judge." *Id.* at 963-964. The district court's belief that exculpatory evidence is untrue is not grounds for excluding it under FRE 403 on the

grounds that it would confuse the jury. *Id.* at 965-966. "It is the jury, not the trial judge, that must decide how much weight to give to Evans's delayed birth certificate in light of the government's evidence suggesting that the birth certificate is fraudulent[.]" *Id.* at 966.

The jury instructions covered this. "In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it." The jury was instructed to consider each witness's demeanor, the possibility of witness deception, interest in the outcome of the case, bias, prejudice, whether other evidence contradicted the witness's testimony, and prior inconsistent statements. (33 ER 9246-9248.)

The district court here also erred in believing there was a conflict between the fact that Lewis's identification of Ferdinand was admissible for its truth as a prior identification under FRE 801(d)(1)(C) but not as a prior inconsistent statement under FRE 801(d)(1)(A) because it was not given under oath. FRE 801(d)(1)(C) has independent significance. *See Johnson v. United States, supra*, 820 A.2d at 558-559.

If a prior identification can be excluded under FRE 403, this was not the case to do so. Lewis's identification of Ferdinand was not contradicted by physical, video, or other incontrovertible evidence. To borrow from

substantial evidence cases, it was not facially incredible or inherently improbable. *United States v. Bingham*, 653 F.3d 983, 995-996 (9th Cir. 2011). Indeed, as the court knew, Lewis identified the person whom the police first suspected. This was a typical case where someone implicates an alleged gang member in a serious crime and then apparently recants out of fear. Neither the facts, the law, nor the desire to protect Ferdinand at the expense of Young's defense justified the court's actions under FRE 403.

The jury should have been allowed to decide which of Tierra Lewis's versions was true. Instead, both because it believed Lewis's recantation and, one must assume, other evidence adduced at trial, the district court restricted Young's ability to create reasonable doubt on the question of whether he shot Jelvon Helton. This error violated Young's due process and Sixth Amendment rights to present a defense and not have the district court direct a verdict on an element. It also violated his Sixth Amendment right to have counsel argue his defense to the jury.

In *Herring v. New York*, 422 U.S. 853 (1975), the Supreme Court held that a complete restriction on defense closing argument violates the Sixth Amendment right to assistance of counsel. The Court reversed without a discussion of prejudice. *Id.* at 862-865. It later confirmed that *Herring* error is structural. *Bell v. Cone*, 535 U.S. 685, 696 n.3 (2002).

This Court has found *Herring* error in circumstances other than complete preclusion of closing argument. In *Frost v. Van Boening*, 757 F.3d 910 (9th Cir. 2014) (*en banc*), the trial court would not let defense counsel argue in the alternative for reasonable doubt that the defendant committed the crime and an affirmative defense of duress. Defense counsel chose duress. *Id.* at 913. The state supreme court held that the trial court's either/or ruling was state law error that under the circumstances violated the defendant's constitutional rights but was harmless. *Id.* at 914.

On *en banc* review in federal habeas proceedings, this Court held that the error was structural. *Id.* at 915-918. It violated the Sixth Amendment by precluding defense counsel "from arguing a legitimate defense theory." *Id.* at 916. It also denied due process by effectively directing a verdict on the prosecution's case-in-chief. *Ibid*. This Court has reached similar conclusions in cases before and after *Frost*, none of which involve complete preclusion of argument. *See United States v. Brown*, *supra*, 859 F.3d at 734-737 (court bars legal argument on key element of charge based on misunderstanding of law); *United States v. Smith-Baltiher*, 424 F.3d 913, 920-922 (9th Cir. 2005) (erroneous exclusion of evidence challenging alienage status in immigration prosecution); *United States v. Miguel*, 338 F.3d 995, 1003 (9th Cir. 2003) (precluding argument on defense theory that someone else was the shooter

and telling jury that no evidence supports it); *Conde v. Henry*, 198 F.3d 734, 739-741 (9th Cir. 1999) (preventing counsel from arguing defense theory and contesting elements of charge relieves prosecution of its burden).

Young's case is similar to those above. The district court's misapplication of the Rules of Evidence deprived Young of critical defense evidence and the ability to argue that defense to the jury, violating his constitutional rights. The error was structural.

Young's VICAR murder conviction in count 18 must be reversed. The related firearm counts of counts 19 and 20 must also be reversed. Reversal of these counts requires reversal of the RICO conspiracy conviction in count one. The fact that Young may have killed Jelvon Helton as part of a series of retribution killings provided the strongest evidence that Young was connected to CDP, knowing it to be a conspiracy that contemplated murder. Young's pimping was not a gang activity; even the district court recognized that the government had failed to prove that. (1 ER A33.) Everything else was inconclusive evidence of association.

Alternatively, preventing the jury from believing Lewis's identification was not harmless beyond a reasonable doubt. Lewis may have gotten the number of shots wrong, but witnesses get things like duration, distance, height, weight, and other measurable details wrong all the time.

Defendants don't get their convictions reversed because of it. If the jury could have believed Lewis, it more readily could have concluded that Marshall lied on the stand and had lied to the government just as he had lied all his adult life. No physical evidence proved Young's guilt. The prejudice is so great that reversal is also required under the test for ordinary error.

B. Young's Convictions on Counts 1 and 18-20 Must be Reversed Because the District Court Refused to Sever Young's Case from Ferdinand's, Leading it to Make Prejudicially Erroneous Rulings Like the One in the Preceding Claim to Protect Ferdinand's Interests.

1. Standard of Review

Denial of a motion to sever a case from a codefendant's case is reviewed for abuse of discretion. *United States v. Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016). The denial of a motion for new trial is reviewed for abuse of discretion. *United States v. King*, 660 F.2d 1071, 1076 (9th Cir. 2011).

2. Procedural History

On September 12, 2017, Young moved to sever his case from Ferdinand's. He asked to be moved to the second trial group. **(**38 ER 10776). Severance was required because, given Tierra Lewis's identification of Ferdinand as the killer of Jelvon Helton, DNA evidence possibly linking Ferdinand to a cap found at the crime scene, and the San Francisco Police

Department's initial focus on Ferdinand, Young's and Ferdinand's defenses were antagonistic. This was so even though Ferdinand was not charged with the murder because both were charged with RICO murder conspiracy to which such a crime would be relevant.[8] Young said Lewis would feel more comfortable testifying if Ferdinand was not present. (38 ER 10776-10882.)

Trying Young with Ferdinand risked possible jury confusion because if the jury was given a *Pinkerton* instruction on coconspirator liability, it might use Young's attempt to establish reasonable doubt to convict him of a killing by Ferdinand that the government never sought to prove.[9] This would be less likely to happen if Young was not tried with Ferdinand. Young argued that moving him to the second trial group would serve judicial economy because codefendant Paul Robeson also had a pimping charge involving Julia Angalet. (38 ER 10783-10785.)

The government responded that Young's and Ferdinand's defenses were not mutually exclusive, both because Ferdinand had not been charged with the murder and Young's defense of innocence could be premised on there having been many other people at the Gravity Bar who could have killed Jelvon Helton. The government claimed that judicial economy would

[8] Ferdinand also moved to sever.
[9] As set out in the next claim on the *Pinkerton* instruction, the government ultimately asked the jury to do just that.

be disserved by moving Young to the second trial group because the "theme" of the first trial group was to be the cycle of gang revenge killings. At this point, however, Reginald Elmore was still in the first trial group. (38 ER 10755-10759.)[10]

Young replied that the government initially wanted to try Young in the second trial group, where all the charges had aspects of pimping. Assessment of antagonistic positions had to be grounded in the reality of what the available evidence showed. Young reiterated the potential for jury confusion. (38 ER 10745-10748.)

At the hearing. Young said he should not have to contend with two sets of attorneys trying to poke holes in his defense. Conversely, Ferdinand argued that he should not have to contend with two sets of attorneys trying to link him to a RICO conspiracy via commission of a murder. The court denied severance, reasoning that the two parties' defenses were not mutually exclusive because many other people in the bar could have shot Helton besides Ferdinand. (1 ER A71-A83; 37 ER 10401-10413.)

Young renewed his motion for severance after the district court ruled that he could not elicit from Inspector Cunningham that Ferdinand was the person Tierra Lewis identified as the shooter. Young argued that the district

[10] Elmore allegedly committed the double murder with Charles Heard.

court was making rulings to protect Ferdinand at his expense. The court denied severance. (1 ER A167, A174-A176, A189-A190.) Subsequent motions for severance as the Tierra Lewis situation was navigated were denied as well despite Young's insistence that his defense was being compromised. (1 ER A163-A173; A155-A162.)

Young filed a motion for new trial on the severance issue. (1 YSER 34, 39-46.) The Court denied the motion for the previously articulated reasons. (1 ER A30-A31.)

3. Discussion

"If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Cr.Proc. 14(a). Denial of severance is an abuse of discretion if joinder was "so manifestly prejudicial that it outweighed the dominant judicial concern with judicial economy[.]" *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980). "Manifest prejudice" to the defendant includes "violation of one of his substantive rights such as his right to present an individual defense." *United States v. Seifert, supra*, 648 F.2d at 563. "[A] defendant might suffer prejudice if essential exculpatory evidence that

would be available to a defendant tried alone were unavailable in a joint trial." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Young's initial motion should have been granted. Even if the potential for harm to Young's defense was not apparent when the district court initially denied the motion for severance, it became apparent as proceedings developed. "[T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). The argument about exhibit 779 shifted from whether or not it was hearsay to whether the court should take it upon itself to decide that Lewis was lying to avoid prejudicing Ferdinand. Indeed, the dominant theme of the government's opposition to Young's motion for new trial was how it properly protected Ferdinand. This was all to Young's prejudice, and none of it would have happened if severance had been granted.

Young's assumptions about how the government would turn his use of Tierra Lewis's identification of Ferdinand as reasonable doubt into an affirmative case of *Pinkerton* liability proved prescient. The government's firm commitment to Ferdinand not being the shooter evaporated. It argued that it didn't matter if the jury thought Ferdinand might have shot Jelvon Helton; Young was still guilty under *Pinkerton*.[11] (36 ER 9913.) The

[11] As discussed in the next claim, this was not an accurate statement of law.

government adhered to this position in opposing Young's motion for new trial. (36 ER 9973.)

The district court's concern with protecting Ferdinand prevented Young from giving full effect to the exculpatory evidence provided by Tierra Lewis. In a trial separate from Ferdinand where the jury could consider Lewis's identification of Ferdinand for its truth, the jury could have credited her exculpatory evidence—even if the district court did not—and rejected her arguably coerced recantation. Accepting that Lewis's identification of Ferdinand was reasonably credible would have counseled in favor of doubting the highly self-interested testimony of the admitted conman and liar, Bruce Lee Marshall.

The motion for new trial should have been granted. This Court should reverse Young's convictions on counts 18-20. As explained in the preceding claim, this requires reversal of the conviction on count one as well.

C. Young's Convictions on Counts 1 and 18-20 Must be Reversed Because the District Court Denied Young Due Process and Erred in Giving a *Pinkerton* Instruction on Co-conspirator Liability That Was Not Supported by the Evidence.

1. Standard of Review

A defendant is entitled to relief on appeal for federal constitutional error unless the government can show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). For ordinary trial error, reversal is required if there is a reasonable probability it affected the outcome of the trial. *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1227 (9th Cir. 2018).

2. Procedural History

The government charged only Young with the murder of Jelvon Helton. It did not charge Ferdinand or anyone else with this murder on a *Pinkerton* theory of liability. It did not introduce evidence that another CDP member had killed Helton.

The government notified the parties that it would be seeking a global instruction on coconspirator liability pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946). The district court ordered the parties to address the propriety of raising *Pinkerton* in opening statement and whether under *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal 2011), it might be inappropriate to give a *Pinkerton* instruction. (1 ER A38.) Young

filed a response relying on *Carcamo* and arguing that the government had not specified the alternative scenarios that would justify an instruction, such an instruction could confuse the jury, such an instruction was in the discretion of the court in light of the evidence, and the government should be precluded from referring to *Pinkerton* in opening statement. (38 ER 10681-10685).

The government used Young's case as an example of why a *Pinkerton* instruction was appropriate.

> "[I]f, in fact, *the jury were to find* that Mr. Young, defendant Young did not pull the trigger to murder Jelvon Helton in the Gravity Bar, and that actually it was Mr. Ferdinand who did it, but that they were there together and they were out looking for folks that they wanted to retaliate against because of something that had recently happened between CDP and KOP, and that was reasonably foreseeable, and that was in general a part of this conspiracy, then Mr. Young would be good for that homicide one way or the other." (2 ER A281-A282 [emphasis added].)

It added, "And then we expect we're going to be able to tie that up in very specific ways at the conclusion of the trial to say for these substantive acts." (2 ER A284.) The district court issued a preliminary order requiring the government to specify what acts justified the instruction. (2 ER A292-A295.)

The government responded that the district court had no discretion not to instruct on *Pinkerton* where it was factually supported. It said it was

committed to the view that Young had killed Jelvon Helton but expected the evidence to show that some other CDP member, whom the government did not name, had killed Helton. By contrast, the government specified in reference to the Heard charges that Reginald Elmore was the alternative shooter. (38 ER 10673-10680.) Young filed a response complaining again of the government's lack of specificity and arguing that *Pinkerton* instructions are not appropriate when the government is committed to the view that the person charged with the murder actually committed it. (38 ER 10664-10666, 10672.)

The court allowed the government to refer generally to *Pinkerton* liability in its opening statement. (1 YSER 21.) The government did so. (3 ER 75.)

Towards the end of trial, the government argued that the only consideration for the court in deciding to give a *Pinkerton* instruction was whether it was reasonably foreseeable that a member of the charged conspiracy might commit the substantive crime that a given coconspirator was charged with. The government did not address whether it had proved that that this actually happened. (37 ER 10462-10466.)

At the instructions conference, Young argued that the government had presented no evidence to support convicting him on a *Pinkerton* theory. (32

ER 8837.) The court ruled that a *Pinkerton* instruction on the Young counts was appropriate. "[J]ust because the theory wasn't particularly expressed in the way that the Government may end up arguing it in closing, I think that is not grounds for saying that they can't have the instruction." (32 ER 8840-8841.)

As to Young, the jury was instructed:

> "Each member of a conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime. Therefore, you may find defendant JAQUAIN YOUNG guilty of the crimes charged in Counts Eighteen, Nineteen, and Twenty, which relate to the murder of Jelvon Helton, if, for each of those counts, the government has proved each of the following elements beyond a reasonable doubt:
> 1: a person committed the crime charged in question, whether Eighteen, Nineteen, or Twenty; 2: the person was a member of the conspiracy charged in Count One; 3: the person committed the crime in furtherance of a charged conspiracy; 4: defendant JAQUAIN YOUNG was a member of the same conspiracy at the time the crime was committed; and 5: the crime fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." (33 ER 9294.)

The government argued that Young killed Jelvon Helton. (34 ER 9414-9422.) Addressing *Pinkerton* liability, the government argued that if a CDP member had foreseeably killed Helton believing he was avenging Julius Hughes's death, Young would be guilty "even if he never was in the

Gravity Bar." (34 ER 9447.) The government did not suggest whom it had established that other CDP member might have been. Responding in rebuttal to the notion that Ferdinand had killed Jelvon Helton, the government argued that even if that were true, Young would still be guilty under *Pinkerton*. (36 ER 9913.) Here again, the government did not cite prosecution evidence proving that Ferdinand was the shooter. The government never "tied up" its *Pinkerton* proof, as it promised it would.

3. Discussion

In *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal. 2011), the district court refused to allow a *Pinkerton* instruction in another complex RICO conspiracy case in the Northern District. The court was concerned about giving the instruction because the actual perpetrator of the murder was not identified. *Id.* at *7. In the cases that allowed the *Pinkerton* instruction, the perpetrators of the VICAR murders were identified as well as their roles in the murder. *Id.* at *11. It refused the instruction on this basis. *Id.* at *12. The district court in Young's case should have followed *Carcamo*.

The government's argument that reasonable foreseeability that a coconspirator might commit a crime is all that is required to justify an alternative *Pinkerton* instruction is incorrect. In all the cases it cited, (37 ER

10462-10466,) it was clear that coconspirators had committed the crime on which the defendant had been convicted on a *Pinkerton* theory. See *United States v. Gadson*, 763 F.3d 1189, 1196-1197, 1216-1217 (9th Cir. 2014) (coconspirators possession of firearm in furtherance of drug trafficking established by evidence and not disputed by defendant); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203-1204 (9th Cir. 2000) (defendant contests only evidence of foreseeability of undisputed gun possession by coconspirators); *United States v. Carter*, 560 F.3d 1107, 1112-1113 (9th Cir. 2009) (same); *United States v. Moreland*, 622 F.3d 1147, 1169-1170 (9th Cir. 2010) (defendant challenges only evidence of foreseeability on three counts of massive money laundering conspiracy in which he was not directly involved); *United States v. Bingham*, 653 F.3d 983, 990, 996-998 (9th Cir. 2011) (Aryan Brotherhood member argues unsuccessfully that grant of motion for acquittal on aiding and abetting theory required same relief under *Pinkerton*. No dispute that other identified gang member conspirators committed predicate murders); *United States v. Houston*, 648 F.3d 806, 811, 818 (9th Cir. 2011) (technical *Pinkerton* instruction issue in Aryan Brotherhood case. No dispute that other identified gang members committed predicate murders).

None of these cases holds that a *Pinkerton* instruction is proper even though the government has made no effort to prove who the coconspirator was that actually committed the crime simply because an alternative reality is reasonably foreseeable in the abstract. The government's cases are not inconsistent with *Carcamo*. A *Pinkerton* instruction should not have been given in Young's case.

A jury instruction denies a defendant due process of law if it undermines his right to have the charges against him proven beyond a reasonable doubt. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). On this record, the *Pinkerton* instruction was fatally confusing and denied Young due process. It allowed the government to argue: 1) Young committed the murder; 2) because Young committed the murder, it had to be a gang crime, and 3) because it was a gang crime, even if Young did not commit the murder, he's still guilty of it under *Pinkerton*. The government so argued without ever showing that some other CDP member actually committed the murder as opposed to a disgruntled KOP member, the four men in the Chrysler 300, a disturbed lone wolf, or, as the government suggested when the subject of antagonistic defenses came up, any of the hundred other people in the bar.

The instruction denied due process even if one narrows in on Esau Ferdinand as the potential alternative shooter. In a case with multiple defendants, "[t]he burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor." *Zafiro v. United States*, *supra*, 506 U.S. at 543 (Stevens, J., concurring). The government did not prove beyond a reasonable doubt that Ferdinand killed Jelvon Helton.

Neither did Young. The Tierra Lewis evidence was introduced to create reasonable doubt in Young's favor. It was not introduced to prove Ferdinand's guilt *beyond* a reasonable doubt and hand the government an alternative theory of conviction that it did not believe in and had repeatedly disavowed. Nonetheless, that is how the jury could have understood it. Given this prejudice and the general weakness in the case that Young was the actual shooter, including the lack of credibility of Bruce Lee Marshall, Young's convictions on counts 1 and 18-22 should be reversed. For the same reasons, reversal is required even if the instructional error is not deemed one of constitutional magnitude.

strongest evidence against Young, the error affected the outcome on counts 18-20. This requires reversal of the conviction on count one as well.

F. Young's Conviction on Count One Must be Reversed Because the District Court Gave a Defective Instruction Defining Liability for RICO Conspiracy.

Pursuant to Federal Rules of Appellate Procedure, Rule 28(i), Young joins in and incorporates by reference this argument presented by codefendant Ferdinand in Appeal No. 18-10239 at pages 55-70 of his opening brief. Young joined in this argument in codefendants' motion for new trial. (1 YSER 38, fn. 2.) Review is for plain error.

As discussed in Ferdinand's argument, the error was plain. It prejudiced Young and affected the fairness of the proceedings against him. It is questionable that there was a RICO enterprise. It is even more questionable that Young agreed to personally participate in that enterprise as opposed to just doing his own thing—legal and otherwise—and hanging out with people in the neighborhood. The most Johnnie Brown could muster up about Young was that nobody did much of anything with him anymore.

This error prejudiced Young's defense. In closing argument, Young's counsel discussed how Young hung out in the neighborhood designated as CDP territory and was friends with Ferdinand and other people from the

neighborhood. While Young hung out with them, he was not part of the enterprise. (35 ER 9682-9683.)

The prosecution's strongest evidence that Young was part of the alleged conspiracy was the killing of Jelvon Helton, a conviction about which there are many problems. Pimping was Young's own thing. He had laughed at the thought that it could be otherwise.

The error allowed the jury to convict Young of the conspiracy count based only on his friendship and interactions with the other people connected to CDP and any knowledge or tacit approval of *their* participation in the alleged conspiracy. But for the error, it is reasonably probable Young would not have been convicted.

G. Young's Convictions on Counts 21 and 22 Must be Reversed Because the District Court Denied His Motion to Suppress Information Found on Cell Phones Seized in Violation of the Fourth Amendment.

1. Standard of Review

The denial of a suppression motion on Fourth Amendment grounds and whether a warrantless search was reasonable are reviewed *de novo*. *United States v. Sullivan*, 797 F.3d 623, 632-633 (9th Cir. 2015. Reversal is required unless the government can show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

L. Young's Convictions on Counts 19 and 20 Must be Reversed Because the Record Does Not Prove Young was Convicted of an Underlying Crime of Violence.

1. Standard of Review

Whether the judgment reflects a conviction of a predicate "crime of violence" to which charges under 18 U.S.C. § 924(c)(1)(A) and 18 U.S.C. § 924(j)(1) may attach is reviewed *de novo* even though Young did not raise the issue in the district court. *United States v. Begay*, 934 F.3d 1033, 1037-1038 (9th Cir. 2019).

2. Procedural History

Count 18 charged Young with VICAR murder in violation of 18 U.S.C. § 1959(a)(1). It alleged that to gain gang benefits and/or status, Young "unlawfully and knowingly did murder Jelvon Helton, in violation of California Penal Code sections 187, 188, 189, and 31-33." (40 ER 11287-11288.) The indictment did not specify the degree of the murder Young was alleged to have committed.

The referenced California statutes do not establish that first-degree murder was charged. California Penal Code section 187 defines murder generally. Section 188 defines malice aforethought. Section 189 defines first and second-degree murder. Pertinent here, a "willful, deliberate, and premeditated killing" is first-degree murder. Cal. Pen. Code § 189(a).

Section 31 defines a principal to a crime. Sections 32 and 33 address accessories.

Count 19 charged Young with using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), the crime of violence being the crime charged in count 18. Count 20 charged Young with violating 18 U.S.C. § 924(j)(1) by committing murder as defined in 18 U.S.C. § 1111 with a firearm during a crime of violence. (40 ER 11288.) That section makes, *inter alia*, a "willful, deliberate, malicious, and premeditated killing" first-degree murder. Such language appears nowhere in the indictment.

The jury instructions defined murder as follows.

> "Murder means unlawfully killing a person with malice aforethought. There are two kinds of malice aforethought: express malice aforethought and implied malice aforethought. Proof of either is sufficient to establish the state of mind required for murder. A person acts with express malice aforethought if he has a specific intent to unlawfully kill. A person acts with implied malice aforethought if (i) the killing results from an intentional act; (ii) the natural and probable consequences are dangerous to human life; and (iii) the act was performed with knowledge of the danger and with conscious disregard to human life. Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before committing the act that causes the victim's death. It does not require deliberation or the passage of any particular period of time." (33 ER 9262-9263.)

The instructions for count 18 referred to this definition. "*Third*, the defendant committed the crime of murdering the victim charged in each

count.[12] The elements the government must prove beyond a reasonable doubt to establish murder were previously explained to you in my discussion of Count One." (33 ER 9289-9290.) The instructions did not ask the jury to find a degree of murder.

The instructions for counts 19 and 20 referred to the murder charged in count 18, which the court expressly instructed was a crime of violence. Degree of murder is not discussed in these instructions, either. (33 ER 9291-9294.) The verdicts do not specify a degree of murder. (2 ER A467-A468.)

3. Discussion

Under federal law, consecutive punishment is imposed on anyone who carries, brandishes, or discharges a firearm during a "crime of violence." 18 U.S.C. § 924(c)(1)(A). If the violation of section 924(c) results in a murder, the defendant can be sentenced to death or imprisoned for life. 18 U.S.C. § 924(j)(1). Because section 924(j)(1) presupposes a violation of section 924(c), conviction and punishment on both counts requires a predicate "crime of violence."

A crime of violence is "(3) . . . 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

[12] The reference to "each count" seems attributable to copying the instructions for Charles Heard, who was charged with two murders.

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). In *United States v. Davis*, 139 S.Ct. 2319 (2019), the U.S. Supreme Court held that the "residual clause" definition in section 924(c)(3)(B) was unconstitutionally vague. *Id.* at pp. 2325-2336.

For the convictions to stand, the undifferentiated crime of "murder," charged and found under count 18, must be a crime of violence under the elements clause. VICAR murder in violation of 18 U.S.C. § 1959(a)(1) can be grounded in a conviction/finding of second-degree murder. *United States v. Houston*, 648 F.3d 806, 819 (9th Cir. 2011); *United States v. Mapp*, 170 F.3d 328, 335-336 (2nd Cir. 1999). However, second-degree murder is not a crime of violence under the elements clause of section 924(c) because it can be committed recklessly. *United States v. Begay*, 934 F.3d 1033, 1038-1041 (9th Cir. 2019).[13] Because the judgment does not reflect a conviction for first-degree murder, Young's convictions and sentence on counts 19 and 20 must be reversed.

[13] Rehearing proceedings in *Begay* and similar cases are presently stayed pending the decision in *Borden v. United States*, Supreme Court No. 19-5410. The issue on review is whether crimes with a *mens rea* of recklessness satisfy the "use of force" clause in the Armed Career Criminal Act. *See Broncheau v. United States*, 2020 U.S.Dist.LEXIS 102309 at **4-5 (June 10, 2020).

Nos. 18-10218, 18-10228, 18-10239, 18-10248 & 18-10258

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES HEARD, aka CHEESE;
JAQUAIN YOUNG, aka J-LOC;
ESAU FERDINAND aka SAUCE;
MONZELL HARDING, JR.; and
ADRIAN GORDON, aka TIT,
Defendants-Appellants.

On Appeals from the United States District Court
for the Northern District of California
D.C. No. 13-cr-00764 (The Honorable William H. Orrick, J.)

CONSOLIDATED ANSWERING BRIEF FOR THE UNITED STATES

STEPHANIE HINDS
Acting United States Attorney
Northern District of California

WILLIAM FRENTZEN
SCOTT D. JOINER
KEVIN J. BARRY
Assistant United States Attorneys
Northern District of California

NICHOLAS L. MCQUAID
Acting Assistant Attorney General
Criminal Division

MICHAEL A. ROTKER
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, NW, Suite 1264
Washington, DC 20530
(202) 514-3308
michael.rotker@usdoj.gov

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Denying Young's And Ferdinand's Motions To Sever.

Young (Br. 58-63) and Ferdinand (Br. 29-54) each contend that the district court erred in denying their motions to sever their trials from one another. Severance was not warranted. Their joint trial, along with their codefendants, was fair and served as a reliable vehicle for adjudicating their guilt, and neither defendant suffered the sort of manifest prejudice necessary to justify the extreme remedy of severance.

A. Background.

The indictment charged Young with the November 1, 2010, VICAR murder of Jelvon Helton inside the Gravity Bar. 40-ER-11287-11288; see pp. 25-31, *supra*. On November 16, 2010, in the midst of the ongoing investigation into that murder, a woman named Tierra Lewis contacted the police and said she had information about the murder. 29-ER-7910-7911; 33-ER-9023, 9033. The next day, Lewis met with Inspector Dan Cunningham and told him – falsely, as she later admitted under oath at trial, 33-ER-9054-9055, 9075-9079, 9101 – that she was at the bar on the night Helton was killed and that she saw Esau Ferdinand (whom she has known for years) shoot Helton. 29-ER-7911; 33-ER-9023, 9095. During the interview, Inspector Cunningham showed Lewis a photo array to see if she could identify the shooter, and she circled the image

of person number 3, and wrote "Number 3. Pull out hes gun & killed Poo Bear Nov. 2, 2010 = ESauce - kid." Ex. 779 (photo array); 33-ER-9086-9089. ("Poo Bear" was a nickname for Jelvon Helton, 18-ER-4528, and "E Sauce" and "kid" were nicknames for Ferdinand. 8-ER-1615; 18-ER-4727; see also 16-ER-3960 (text messages from Ferdinand's phone referring to himself as "da kid").)

1. **The Pre-Trial Motions**.

Prior to trial, Young and Ferdinand moved to sever their cases from each other under Fed. R. Crim. P. 14(a), alleging that Lewis's statements rendered their defenses mutually antagonistic: Young would use those statements to pin the murder on Ferdinand, while Ferdinand would try to discredit Lewis and blame Young. 38-ER-10762-10787. Ferdinand also sought a severance due to his inability to cross-examine Young about certain incriminating statements Young made to a confidential informant that allegedly implicated Ferdinand in the murder of Jelvon Helton and the broader RICO conspiracy. 38-ER-10773-10775; see *Bruton* v. *United States*, 391 U.S. 123 (1968).

The district court denied the motions. Although it recognized that Lewis' statements provided some fodder for Young and Ferdinand to deflect the blame to the other person, it recognized that this sort of finger-pointing is common in large multi-defendant cases and does not, without more, mandate a severance. Rather, severance is warranted only when two codefendants' defenses are

"mutually exclusive" – that is, when the jury's acquittal of one would "necessarily call for" the conviction of the other. 1-ER-A071-083; see *United States* v. *Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991). Here, however, the court held that the jury's acquittal of Young would not – indeed, could not – necessarily call for Ferdinand's conviction because Ferdinand had not been charged with Helton's murder; only Young was charged with it. Nor, the court held (1-ER-A076), was severance necessary to avoid a potential *Bruton* problem because Young's recorded statements never mentioned Ferdinand by name and at most incriminated Ferdinand inferentially. See *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987); see also *Gray* v. *Maryland*, 523 U.S. 185, 195 (1998) ("*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially.").

2. The Evidence At Trial.

As the evidence unfolded at trial, Young and Ferdinand renewed their severance motions. Ferdinand claimed that Young's counsel's cross-examination of a few government witnesses showed that counsel was acting as a second prosecutor by implying that Ferdinand shot Helton, 8-ER-1695-1696, and he also re-asserted his *Bruton*-based arguments. 15-ER-3636-3637. Young, for his part, argued that the court's evidentiary rulings regarding Tierra Lewis' statements and testimony were biased in favor of Ferdinand and deprived

Young of his ability to present his defense. 29-ER-7936-7937, 7950, 8084; 30-ER-8183.

a. The Evidence Against Young On Count 18.

The government sought to prove that Young murdered Helton as alleged in Count 18 by presenting testimony from law enforcement officers and individuals present at the scene of the murder; forensic evidence and related testimony from the medical examiner; and evidence placing the murder within the larger CDP-KOP feud. See pp. 25-31, *supra*. The government also presented testimony from Bruce Marshall, a prisoner who became an informant, to whom Young made a series of incriminating statements (some of which were recorded) concerning the Helton murder as well as CDP and its members and activities.

(i.) Young Meets Marshall. On March 11, 2013, Young was arrested and charged with two pimping-related crimes. 10-ER-2347, 2360; 40-ER-11289; see p. 35, *supra*. He was detained pending trial and housed at the same jail, and in the same jail pod, as Marshall. 14-ER-3526-3534. Marshall was a self-taught and self-described software engineer and convicted felon who had lived and worked for nearly a decade under a fictitious identity. 14-ER-3505-3518. The two men became friends, talking to each other, working out together, and playing chess. 14-ER-3535. During their conversations, Marshall told Young he was in jail because he had been charged with fraud. 14-ER-3538-3539. And

Young told Marshall that he was a member of a gang in which different people "did different things." 14-ER-3550. Young said that "pimping" was his "thing," 14-ER-3543, that other people in his gang dealt drugs and committed robberies, and that "almost everyone in his gang has done murders." 14-ER-3550; see also 15-ER-3612 (Young bragged that his gang was responsible for between 10 and 30 "bodies"). As the two men continued hanging out together, Young became taken with Marshall's technical savvy and computer expertise, and nicknamed him "the scientist." 14-ER-3540. At one point, Young even told Marshall that his technical skills could help his gang locate snitches and allow them to commit identity theft and credit card fraud, all of which would make his gang "invincible." 15-ER-3676-3677.

(ii.) Young Admits To Murdering Jelvon Helton. On one occasion, Young told Marshall that, soon after one of his "homies that was part of his gang * * * had just got killed," 14-ER-3543, he (Young) was at a bar with his "cousin" when his cousin spotted the person who they believed had killed Young's "homie." 14-ER-3543-3544. Young told his cousin, "yeah, that's that fool," and said he was "going to go get him." 14-ER-3543-3544. According to Marshall, Young said that he and his cousin walked over to this person, at which point Young pulled out a gun and fired "four times" at "point-blank range." 14-ER-3544-3545. In recounting the shooting, Young reenacted his physical

movements for Marshall by, for example, extending his arm to mimic the shooting and "making a sound, pop, pop, pop, while he was backing up" after pulling the trigger. 14-ER-3545. Young also told Marshall that, immediately after the shooting, he and his cousin ran out of the bar and "smashed off" in Young's girlfriend's Acura, and that they managed to evade the police, who had been in hot pursuit. 14-ER-3546-3547; 15-ER-3609-3610.

(iii.) Marshall Becomes A Government Informant. In the fall of 2013, Young asked Marshall if he would review a motion that Young's lawyer was going to file in Young's pimping case concerning certain cell phone evidence. 14-ER-3556-3558. Marshall agreed, but unbeknownst to Young, Marshall had since decided that he was going to try to use Young's confession to the Helton murder to become an informant. 14-ER-3559, 3562.

On October 19, 2013, Marshall wrote a letter to Assistant United States Attorney Damali Taylor stating that he knew Taylor was prosecuting Jaquain Young in his "pimping case" (from having reviewed the motion) and alerting her that he had information about Young's role in a "murder case," and that he was interested in "becoming a government informant." Def. Ex. 8036; 14-ER-3561; 15-ER-3649; 16-ER-3923. On November 8, 2013, the government arranged a meeting with Marshall in response to his letter, 14-ER-3561, and Marshall thereafter agreed that he would plead guilty in his fraud case and

cooperate with the government by acting as an informant in exchange for which the government would consider a favorable sentencing recommendation. 14-ER-3561-3562; 16-ER-3936. On seven different occasions in early 2014, Marshall surreptitiously recorded his jailhouse conversations with Young using a government-provided recording device, 14-ER-3585, but none were usable: a few times, the device malfunctioned and even when it functioned properly, the jail noise and poor acoustics made the recordings inaudible. 14-ER-3588-3592.

(iv.) Young's Unrecorded Admissions To Marshall. Although the recordings were inaudible, Marshall recounted a number of statements Young made to him concerning the Helton murder as well as Young's gang and its activities and members. For example, Marshall recalled one conversation where, after he commented on a heavily-tattooed inmate in the adjacent jail pod, Young told him that that person owned a pot club and sold weed to his gang. 14-ER-3594; 15-ER-3650. Young also told Marshall that the daughter of a member of his gang worked for this "Cannabis Club guy" in Los Angeles, and that, when the girl's father found out his daughter was being pimped out in Los Angeles, he and the girl's mother and son went to Los Angeles and tried to kill the pimp. 14-ER-3595-3598. Although the attempt to kill the pimp in Los

Angeles failed, Young told Marshall that "the gang" later "succeeded" in killing the pimp in San Francisco. 14-ER-3595-3598.[6/]

Marshall also recounted conversations with Young in early 2014 in which Young expressed concern that he had not been named in what Young called the "RICO case," 14-ER-3539 – that is, the January 2014 first superseding indictment in this case. According to Marshall, Young was worried because members of his "family" told him that people were wondering if the reason Young had not been charged in that case was because he was "snitching." 15-ER-3611. Young shared with Marshall that he was concerned that he might become part of that RICO case, 15-ER-3649, and he said that, "if law enforcement knew all of the things" he knew, then the indictment "would go from 27 counts to 127 counts" because "there would be way more bodies that would be discovered." 15-ER-3611.[7/]

[6/] The murdered pimp was Calvin Sneed, and the girl he was pimping was Leticia Gilton, whose father was CDP member Barry Gilton and whose mother was Lupe Mercado. Gilton, his cousin Antonio Gilton, Alfonzo Williams, and Mercado were arrested for Sneed's murder, 25-ER-6832, 6851, 6856, 6867-6868, and the indictment charged those four individuals with Sneed's killing as a VICAR murder in aid of racketeering and as a predicate racketeering act. 40-ER-11350-11359; see generally *United States* v. *Williams*, 842 F.3d 1143, 1145-1146 (9th Cir. 2016) (government appeal of suppression order relating to statements by Antonio Gilton concerning the Sneed murder).

[7/] The first superseding indictment had seventeen, not twenty seven, counts. 40-ER-11296-11349.

(v.) Young's June 18, 2014 Recorded Statements To Marshall. On June 10, 2014, a few months after Marshall had been relocated to a new jail, 16-ER-4166, he pleaded guilty to a charge of mail fraud. 14-ER-3563.

Eight days later, the FBI arranged to have Marshall wired and placed in the federal courthouse lockup at the same time that Young was scheduled to be there for a hearing in his pimping case. 15-ER-3613-3614. The government gave Marshall a phony indictment to use as a cover story to explain his presence in the lockup that day to Young. 15-ER-3614. Young and Marshall spent more than six hours in the lockup together that day, and this time, Marshall's recording of his conversations with Young was audible and produced usable information. 15-ER-3614.

At trial, the government introduced the recording into evidence through Marshall, Ex. 832; 15-ER-3616, and played for the jury twenty separate audio clips from the recording totaling approximately 65 minutes, which were interspersed with questioning of Marshall. 15-ER-3648-3672. The court permitted the government to give the jury written transcripts of the audio clips "as an aid to help [them] understand what's being said," 15-ER-3616, 3672, and instructed the jury that "the recording is what is in evidence, not the transcript." 15-ER-3616.

Both the audio clips and related questioning included statements by Young on topics that included (1) the RICO case, whether Young would be added to it, whether people thought he was a snitch, and whether the government had any evidence against him, 15-ER-3648-3651; (2) the person who was with him at the bar on the night Jelvon Helton was killed was his "cousin," 15-ER-3652; (3) the fact that members of his gang were sloppy and careless with their drugs and guns, 15-ER-3653-3654, 3658; and (4) the gang's responsibility for many "bodies," including Calvin Sneed. 15-ER-3656-3657, 3670-3671. Young also refers to the fact that a person he calls his "cousin" once committed a robbery and, on another occasion, was caught with a gun or drugs. Ex. 832, BLM002, 5:28-5:30, 6:18-6:30 (reprinted at 41-ER-11383-11384); see also Ex. 832, BLM010, 0:01-0:22 (reprinted at 41-ER-11397).[8/]

During a recess in Marshall's testimony, Ferdinand's counsel asked the court to again remind the jury that the transcripts of the recording were not evidence; at the same time, counsel also asked the government to clarify whether it was seeking to admit Young's statements against Young alone or against all

[8/] Ferdinand refers to these statements, see Br. 43, but his brief cites to the transcripts of the recordings, Ex. 857 (reprinted in 40-ER-11380-11424), rather than Marshall's testimony or the recordings themselves. The transcripts are not evidence, however, but were merely provided to the jury as an aid. 15-ER-3616; see *United States* v. *Armijo*, 5 F.3d 1229, 1234 (9th Cir. 1993) (court has discretion to provide the jury with transcripts of recordings as an aid).

of the defendants. 15-ER-3664. The government stated that Young's statements were admissible against all of the defendants: as to Young, the statements were party admissions, see Fed. R. Evid. 801(d)(2)(A), and as to the other defendants, the statements were conspirator statements, see Fed. R. Evid. 801(d)(2)(E). 15-ER-3664-3665. But because the government had not completed the foundation necessary to support a finding that the co-conspirator exception applied, the court agreed to Ferdinand's counsel's request to instruct the jury that Young's statements were "admissible as admissions now with Mr. Young" and that the court will instruct the jury "further as to the way that they should treat it with respect to everybody else." 15-ER-3669. Ferdinand's counsel "[t]hank[ed]" the court for proceeding in this manner. 15-ER-3669.

At the conclusion of Marshall's direct examination, the court instructed the jury that, "with respect to Exhibit 832" – the June 18, 2014, recording of Young's conversations with Marshall – "the statements of Mr. Young are admissible. The statements of Mr. Young as – related to the other defendants I'm going to instruct you on further. But the statements were admissible directly against Mr. Young." 15-ER-3677.

b. Young's Defense.

Young, in his defense, called Inspector Dan Cunningham, Tierra Lewis, as well as Dan Logan and Jeff Collins.

(i.) Inspector Cunningham testified that, in the immediate aftermath of the murder, the police were searching for two cars of interest that were seen leaving the bar – a silver Acura and a Chrysler 300. 29-ER-7898-7911. Cunningham testified that, on November 16, 2010, Tierra Lewis contacted him and told him she could identify the shooter, and that he arranged an in-person meeting with Lewis for the next day. 29-ER-7911-7912.

During a recess, counsel for Young, Ferdinand, and the government addressed the extent to which Inspector Cunningham would be permitted to testify about his conversations with Lewis, and, more specifically, recount the fact that Lewis had identified Ferdinand as the shooter. 29-ER-7935-7963. The district court ruled that Young could question Cunningham on whether Lewis had identified someone else as the shooter but could not mention that person (Ferdinand) by name. 29-ER-7935, 7949, 7963. Young renewed his request for a severance, arguing that the court's ruling impinged on his right to present his defense, but the court declined to sever the cases, explaining that it was allowing Young to present his defense, though "maybe not to the full measure at this point," because of the hearsay problems with allowing Cunningham to recount Lewis' out-of-court statements to him. 29-ER-7950. At the same time, the court allowed Young to question Cunningham for the non-hearsay purposes of exposing perceived inadequacies in the police investigation of the murder, and

explaining why the police did or did not take certain investigatory steps. 29-ER-7950.

Young's counsel then proceeded to walk Cunningham through his November 17, 2010 interview with Lewis. Cunningham testified that Lewis told him she was at the Gravity Bar with her friend "Tiffany Smith" (whom she later admitted was not a real person, 33-ER-9040) on the night of the murder and that she saw the victim get shot. 29-ER-8029-8036, 8086. Cunningham testified that he showed Lewis a six-pack photo lineup and that she circled the picture of Ferdinand and identified him as the shooter. 29-ER-8036. When the government objected to Young's questioning of Inspector Cunningham regarding Lewis' statements to him, 29-ER-7912, Young emphasized that Lewis' statements to Cunningham were being offered to probe the integrity of the investigation, and not for their truth. 29-ER-7916. The district court suggested that any identification of Ferdinand as the shooter should occur if and when Lewis herself testified, but Young's counsel indicated that it was not yet clear if she would testify. 29-ER-7916-7922. The court then reiterated that Young was free to elicit from Cunningham the fact that Lewis had identified someone else as the shooter, but not that the person she identified was Ferdinand. 1-ER-A174-190. If Lewis were to testify, however, then the court stated that it would be "a different story." 1-ER-A174. The court then instructed

the jury that Cunningham's testimony regarding his interview of Lewis was "not admitted for any of the truth of what Ms. Lewis said," but only to lay the groundwork for further questioning concerning the course of the subsequent police investigation. 29-ER-8069; see also 29-ER-8084. At other points in his testimony, Cunningham stated that the police had "other information" pointing to the person she had identified as the shooter. 29-ER-8050; see also 14-ER-3369 (Taylor Norry testified that the police told her that "Sauce" was a "focus" of their investigation)

On cross-examination by the government, Cunningham revealed that the victim's family, with whom he had met previously, was "adamant about the person who did it," and they demanded to know why that person had not yet been arrested. 30-ER-8114. Cunningham told the family that he needed additional information, such as "an eyewitness," to corroborate their belief, and that, shortly after this meeting, Tierra Lewis came forward claiming to have information about the murder. 30-ER-8114-8115; see also 30-ER-8115 ("Q: So you tell the victim's family *I need an eyewitness* and the next day Tierra Lewis calls you? A: It was very close, yes.") (emphasis added). Cunningham also testified that the district attorney's office had expressed concerns to him about Lewis' veracity based on their prior interactions with her, and that those

concerns influenced the extent to which the police pursued the information she later provided. 30-ER-8115-8116, 8210-8220.

During a recess, Ferdinand's counsel again moved for a severance, arguing that Young was attempting to use Cunningham's testimony to blame his client for Helton's murder. 30-ER-8179-8180. Young also moved for a severance, renewing his claim that the court's rulings regarding Lewis' testimony prevented him from mounting his defense. 30-ER-8183-8184. The court denied the motions. 30-ER-8189. After some additional back-and-forth, Young's counsel stated that, while he wanted Lewis to testify, she was unwilling to do so, in response to which the issued a warrant for her arrest and appointed a lawyer for her. 30-ER-8254, 8315. Lewis' lawyer thereafter advised the court that Lewis was willing to testify, 31-ER-8572, but indicated that Lewis would invoke her Fifth Amendment privilege with respect to any questions about the Gravity Bar murder. 32-ER-8767. At a hearing, Lewis formally invoked her privilege, 32-ER-8776-8780, and, after additional discussions, the district court found that Lewis had a valid basis to invoke her Fifth Amendment rights; the government then agreed to immunize Lewis. 32-ER-8999-9000.

(ii.) Tierra Lewis then testified that, on November 17, 2010, she went to the police station with Jelvon Helton's aunt Taletha and gave Inspector Cunningham information about Helton's murder as well as a separate murder

involving her cousin Joshua Pitman. 33-ER-9023-9024, 9033-9034, 9049. Lewis told Cunningham that, on the night of the murder, Ferdinand texted her and asked her to pick him up at the Gravity Bar; that Lewis and "Tiffany Smith" drove to the bar; that Lewis went inside the bar to find Ferdinand; that Lewis saw a person she knew as Michael Jefferson as well as Jelvon "Pooh Bear" Helton inside the bar; and that Lewis then saw Ferdinand shoot Helton ten times. 30-ER-8210-8213. She also testified that, following this meeting, she received several threatening text messages. 33-ER-9024-9025.

Lewis then acknowledged that her entire story to Inspector Cunningham was false – that nothing she told him regarding what she knew or saw regarding Helton's murder was true. 33-ER-9075-9079, 9095. According to Lewis, on the night of the murder, she was at home with her cousin Tanisha Frasier but then went to Walgreens. 33-ER-9032; see also 30-ER-8221-8222. While there, Ferdinand texted Tanisha – the person she was actually with, not the fake "Tiffany Smith," 33-ER-9040 – and asked her to pick him up at the Pak N' Save in Emeryville. 33-ER-9044, 9079. Lewis and Tanisha drove there and met Ferdinand, who was with a person she did not know but who was later identified as Young, 33-ER-9045, 9072, at a card club across the street from the Pak N' Save. 33-ER-9032, 9038-9045. Ferdinand got in the car with Lewis and Tanisha, and then she went home. 33-ER-9046-9048.

Lewis testified that, during her November 17, 2010 meeting, Inspector Cunningham showed her a six-pack photo lineup, Ex. 779, and she circled the image of Ferdinand and identified him as the person who shot and killed Helton. 33-ER-9089. The district court admitted Exhibit 779 into evidence in unredacted form and allowed Young to publish it to the jury, 33-ER-9087; however, in view of Lewis' unequivocal testimony that she lied when she told Cunningham that Ferdinand was the shooter, 33-ER-9054, 9095, the government argued that her recantation should be admitted not for its truth but only as impeachment, and asked the court to give a limiting instruction that none of her statements implicating Ferdinand be considered for its truth – a request in which Ferdinand joined. 1-ER-A133-137; 34-ER-9367-9371. The district court agreed and allowed Young to argue that "when Inspector Cunningham showed her the six-pack, that she circled Mr. Ferdinand's photo. The exhibit has the statement that it has, and you can argue that she never identified Mr. Young, but you just can't argue the truth of the identification of Mr. Ferdinand as the shooter." 1-ER-A146-148; 34-ER-9380-9384.

On cross-examination, Lewis admitted once again that the story she told Inspector Cunningham on November 17, 2010, was a lie. 33-ER-9095. She also testified that Jelvon Helton's aunt pressured her to implicate Ferdinand because the police had told the family that they needed an eyewitness before they could

charge the person the family suspected was responsible. 33-ER-9095-9100, 9107-9108. Lewis further testified that Helton's aunt told her to say that she (Lewis) saw Helton get shot ten times. 30-ER-8210, 8212; 33-ER-9107-9108. Lewis acknowledged that her prior statements that she saw Ferdinand hours after the murder in Emeryville were true, 33-ER-9108, and she testified that the threatening text messages she received after meeting with the police had nothing to do with Ferdinand or the Helton murder, but were related to her discussions with the police about the separate Pitman homicide investigation. 33-ER-9100.

(iii.) Following Lewis' testimony, Young called Dan Logan and Jeff Collins, both of whom testified that they told the police they saw several men hurriedly leave the Gravity Bar right after the shooting and speed off in a Chrysler 300 vehicle. 32-ER-8921-8931, 8932-8948.

c. Ferdinand's Defense.

Ferdinand did not call any witnesses in his defense; instead, he attempted to sow reasonable doubt by suggesting that Johnnie Brown was not credible, 20-ER-5174-5290, and that, even though he had assaulted Truong, it was not a CDP-related crime and therefore his actions did not violate the VICAR statute. 1-ER-129 (opening statement)

3. The Closing Arguments And Jury Instructions.

a. The Government's Closing Arguments.

The government argued that the evidence at trial proved that Young and Ferdinand were CDP members who were aware of the gang's violent activities and who committed violent crimes in furtherance of the enterprise.

With respect to Young: the government highlighted the evidence showing his membership in CDP, his involvement and association with other CDP members, his pimping and prostitution-related activities, his text messages and other social media posts, and his confession to Bruce Marshall (which was corroborated by physical and forensic evidence) that he shot and killed Jelvon Helton in the Gravity Bar in retaliation for Helton having allegedly killed CDP member Julius Hughes. 34-ER-9315. And, consistent with the district court's ruling, the government alternatively argued that the jury could find Young guilty of Helton's murder even if it was unsure whether he pulled the trigger based on a *Pinkerton* theory of vicarious co-conspirator liability – that is, the jury could convict Young if it found that he was a member of the CDP conspiracy and that Helton's killing by another co-conspirator was reasonably foreseeable and in furtherance of CDP's activities. 34-ER-9447.

With respect to Ferdinand: the government argued that he assaulted Truong "to get money" for CDP, 34-ER-9414, and that he was tied to CDP and

aware of its violent criminal acts based on (1) his participation in CDP's concerted effort to intimidate Francis Darnell, 34-ER-9330; (2) his statements to Johnnie Brown following Brown's arrest after the Darnell witness intimidation incident in which he told Brown not to take the gang restriction and to tell the police that his CDP tattoo stood for "City of Desperate People," 34-ER-9330-9331; and (3) his text messages (a) taunting KOP member Robert Huntley after the murder of Donte Levexier, 34-ER-9331-9334, (b) celebrating the death of Jelvon Helton, 34-ER-9334-9335, and (c) alerting others that McCree and Levexier were seen driving together in CDP's territory, 34-ER-9335.

b. The Defendants' Closing Arguments.

Prior to the defendants' closing arguments, the court instructed the jury that "[d]uring the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be considered as substantive evidence for the truth of the matters asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility." 34-ER-9461-9462.

In his closing argument, Young's counsel conceded Young's guilt on Count 21, 35-ER-9610, but argued that Young was not guilty of the remaining charges. With respect to the Helton murder, counsel raised a multi-tiered reasonable-doubt defense that emphasized (1) the absence of physical or forensic

evidence, or eyewitness testimony, tying Young to the murder, 35-ER-9612-9613; (2) Bruce Marshall's lack of credibility, 35-ER-9614-9634; (3) the possibility that a third party committed the murder based on the testimony of Logan and Collins that they saw a Chrysler 300 speed away from the crime scene, 35-ER-9634-9636; and (4) the police's failure to investigate various leads and pieces of information they received from Tierra Lewis, thereby casting doubt on the integrity of the investigation, 35-ER-9642-9658. And, in consistent with the district court's ruling, counsel argued that, when Tierra Lewis was shown the six-pack photo array by the police and asked if she could identify the shooter, she said "Jaquain Young didn't do it." 35-ER-9645.

Ferdinand attempted to sow reasonable doubt. He argued that Johnnie Brown was "an admitted liar," 35-ER-9748; that even though Ferdinand assaulted and shot Truong, 35-ER-9715-9716, 9723, he did not do so with the requisite enterprise-related motive required by the VICAR statute, 35-ER-9727-9730, and that he had not been charged with Helton's murder, and that Tierra Lewis was a liar in any event. 35-ER-9755-9758. Ferdinand also asserted that the allegedly threatening text messages Lewis received, which were raised by Young's counsel during his questioning, 33-ER-9100, were unrelated to him or the Helton murder. 35-ER-9757.

c. The Jury Instructions.

The district court's final charge included several instructions relevant to the severance issue. First, the court instructed the jury that "[t]he evidence you are to consider in deciding what the facts are consists of the sworn testimony of any witness, the exhibits received in evidence, and any facts to which the parties have agreed," 33-ER-9244, and that "[q]uestions, statements, objections and arguments by the lawyers are not evidence." 33-ER-9245. Second, the court instructed the jury that "some evidence was received only for a limited purpose," and that "when I instructed you to consider certain evidence in a limited way, you must do so." 33-ER-9245. In a related vein, the court told the jury that, "[d]uring the trial, you heard evidence that Tierra Lewis made prior inconsistent statements," and that "[t]hose statements cannot be considered as substantive evidence for the truth of the matters asserted in those statements," but could instead only be considered in "evaluating her credibility." 34-ER-9461-9462; see also 35-ER-9649 (repeating this instruction during Young's closing argument); 35-ER-9658 (repeating this instruction again during Young's closing argument). Third, the court reminded the jury that its role was to decide "whether each defendant is guilty or not guilty of the charges in the indictment" and that "[n]o defendant is on trial for any conduct or offense not charged in the indictment." 33-ER-9248. And, although multiple charges against the

defendants had been joined together for trial, "[y]ou must decide the case of each defendant on each crime charged against that defendant separately." 33-ER-9249. And fourth, the court instructed the jury under *Pinkerton* that "[e]ach member of a conspiracy is responsible for the actions of other conspirators performed during the course and in furtherance of the conspiracy" and that, "[i]f one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime." 33-ER-9294. Accordingly, the court explained, Young could be convicted of Jelvon Helton's murder if the jury finds that the murder was committed by a member of the conspiracy and was "in furtherance of" the conspiracy, and that Young was a member of the conspiracy at the time of the murder and that the murder was "within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." 33-ER-9294.

4. The Jury Verdicts.

The jury convicted Young on all six counts against him, including the Helton murder, and it convicted Ferdinand of the RICO conspiracy but acquitted him of the Truong-related charges. 2-ER-A462-469.

5. Young's Motion For A New Trial.

Young moved for a new trial, arguing that his joint trial with Ferdinand was prejudicial and that the court erred in excluding Exhibit 779 (Lewis' identification of Ferdinand) for the truth of the matter asserted. 1-YSER-34, 39-46. Ferdinand joined the motion. 37-ER-10343-10345.

The district court denied the motions. The court adhered to its earlier rulings that Young's defense was not mutually exclusive with Ferdinand's because "Ferdinand was not charged with the crime at all, so Young's acquittal 'would not necessarily call for [Ferdinand's] conviction,'" 1-ER-A031 (quoting *Tootick*, 952 F.2d at 1081), and that "their joinder was not so prejudicial that the interest of justice requires a new trial." 1-ER-A031. Furthermore, the court concluded, "Young knew that the jury would be instructed on *Pinkerton* liability, so even if the jury believed that Ferdinand shot Helton, other evidence would allow it to convict Young of the crime under *Pinkerton*." 1-ER-A031. The district court also concluded that the "delicate balance" it struck in regard to Exhibit 779 – namely, admitting the exhibit into evidence in unredacted form and allowing it to be published to the jury, but limiting Young's ability to argue the truth of the prior inconsistent statements therein – was proper and that, even if it was not, "any error * * * did not rise to the level in which the interest of justice requires a new trial." 1-ER-A032. Lastly, the court determined that

even if this ruling was in error, it "still would have excluded" Exhibit 779 for its truth under Rule 403 based on the court's perceived concerns about "misleading and confusing the jury with this evidence." 1-ER-A032 n.17.

B. Standard of Review.

"The denial of a motion to sever pursuant to Rule 14 will be reversed only for abuse of * * * discretion." *United States* v. *Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999). This is a "difficult" standard to meet, and, in practice, it is rarely met. See *United States* v. *Campanale*, 518 F.2d 352, 359 (9th Cir. 1975); see also *United States* v. *Buena-Lopez*, 987 F.2d 657, 660 (9th Cir. 1993). The standard requires a defendant to show "a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States* v. *Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011); see also *United States* v. *Mikhel*, 889 F.3d 1003, 1046 (9th Cir. 2018) (emphasizing that appellate review of orders denying severance is "extremely narrow").

C. Analysis.

The district court acted well within its discretion in denying Young's and Ferdinand's motions for a severance.

1. Background Legal Principles.

The indictment properly joined Young and Ferdinand (and their codefendants) together. See Fed. R. Crim. P. 8(b). As a result, the presumption

is that they would be tried together. See *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). Indeed, joint trials play a "vital role" (*id.*) in the criminal justice system: they serve efficiency interests by avoiding duplicative litigation, conserving scarce prosecutorial and judicial resources, "diminish[ing] inconvenience to witnesses and public authorities, and avoid[ing] delays in bringing those accused of crime to trial," *United States* v. *Lane*, 474 U.S. 438, 449 (1986); *United States* v. *Sears*, 663 F.2d 896, 900 (9th Cir. 1981), while also "serv[ing] the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Richardson*, 481 U.S. at 209-210. "For obvious reasons," moreover, a joint trial "is particularly appropriate where conspiracy is charged," *United States* v. *Polizzi*, 500 F.2d 856, 901 (9th Cir. 1974), as "the concern for judicial efficiency is less likely to be outweighed by possible prejudice to the defendants when much of the same evidence would be admissible against each of them in separate trials." *United States* v. *Fernandez*, 388 F.3d 1199, 1242 (2004), modified, 425 F.3d 1248 (9th Cir. 2005).

The presumption favoring joint trials, while strong, is not inviolable. In rare cases, the benefits of a joint trial may be outweighed by the risk that "a defendant or the government [will be] prejudiced" by a joint trial, in which case the court "may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

"Prejudice" under Rule 14(a) requires a case-specific showing that there is "a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539; see also *id.* (prejudice determination "var[ies] with the facts in each case" and is not susceptible to "bright-line rule[s]"). And even if prejudice is shown, severance is not mandatory. Rule 14(a)'s use of the permissive "may" leaves the "tailoring of the relief to be granted, if any, to the district court's sound discretion." *Id.* at 538-539; see *United States* v. *Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999). In many cases, "less drastic measures, such as limiting instructions * * * will suffice to cure any risk of prejudice," *Zafiro*, 506 U.S. at 539, though the "extraordinary remedy" of severance remains available where the risk of prejudice is unacceptably high. See *id.*; see also *United States* v. *Neal*, 36 F.3d 1190, 1207 (1st Cir. 1994) ("Severance is only one remedy – and certainly the most extreme – in the federal courts' remedial arsenal.").

2. Young's And Ferdinand's Joint Trial Was Fair, And Neither Suffered Manifest Prejudice.

The district court properly applied the governing law to conclude that Young and Ferdinand could be tried together fairly and that their joint trial was not manifestly prejudicial. Neither Young nor Ferdinand has shown that the court abused its discretion in so ruling.

a. Young's And Ferdinand's Defenses Were Not Mutually Exclusive And No *Bruton* Issue Existed.

Below, Young and Ferdinand sought severance on the ground that their defenses to the Helton murder in Count 18 were mutually antagonistic. Although mutually antagonistic defenses can create prejudice warranting a severance, see *Zafiro*, 506 U.S. at 538, Young's and Ferdinand's defenses did not rise to this level.

(i). Tierra Lewis' statements provided fodder for Young and Ferdinand to point the finger at each other, but, as this Court has long recognized, "[t]he mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating the other does not generate the kind of prejudice that mandates severance." *United States* v. *Sherlock*, 962 F.2d 1349, 1363 (1989); see also *Tootick*, 952 F.2d at 1081 ("Mere inconsistency in defense positions is insufficient to find codefendants' defenses antagonistic."). Defenses become mutually antagonistic only when they are "mutually exclusive," which occurs when "'the acquittal of one codefendant would necessarily call for the conviction of the other.'" *United States* v. *Hernandez-Orellana*, 539 F.3d 994, 1002 (9th Cir. 2008) (quoting *Tootick*, 952 F.2d at 1081); see also *United States* v. *Adler*, 879 F.2d 491, 497 (9th Cir. 1988).

Tootick is one of the rare cases where two defenses were in fact mutually exclusive. See *Zafiro*, 506 U.S. at 538 (noting that the courts of appeals "have

reversed relatively few convictions for failure to grant a severance" on this basis). In *Tootick*, the victim, Aaron Hart, was stabbed in a remote location on an Indian reservation following a night of drinking with Moses Tootick and Charles Frank. No evidence suggested that Hart injured himself or that anyone other than Tootick or Frank was the assailant. Tootick and Frank were jointly charged with the assault on Hart, and at their joint trial, each claimed the other was responsible. Both men were convicted, but this Court reversed and remanded for separate trials, holding that "the jury could not acquit Tootick without disbelieving Frank. Each defense theory contradicted the other in such a way that the acquittal of one necessitates the conviction of the other," thus rendering their defenses mutually exclusive. *Id*. at 1081.

This case is nothing like the "extraordinary" situation presented in *Tootick*, see *Gillam*, 167 F.3d at 1277, for the obvious reason that Young's acquittal would not – indeed, could not – have necessitated Ferdinand's conviction because Ferdinand was not named as a defendant in Count 18: he was not charged with Helton's murder. See *United States* v. *Shipsey*, 190 F.3d 1081, 1085-1087 (9th Cir. 1999) (defendant cannot be convicted of an uncharged offense); 32-ER-8989; see also 40-ER-11288 (Count 18 named Young as the only defendant). Although Ferdinand and Young were indicted together in the same

indictment, they were not "codefendants" on Count 18 in the way that Tootick and Frank were codefendants in relation to the assault of Hart.

Tootick is also distinguishable in a second respect. The Court's determination that the acquittal of Tootick or Frank would have necessarily required the jury to convict the other was rooted in the fact that Tootick and Frank were the only two possible suspects: there was no evidence Hart injured himself or that anyone else committed the assault. Here, however, the jury did not face any such binary choice: Helton was murdered in a crowded city bar and there was affirmative evidence suggesting possible third-party involvement. 28-ER-7663; 29-ER-7899-7900, 7906-7909; 30-ER-8106 (testimony from two defense witnesses who saw several men hurriedly leave the bar and speed off in a Chrysler 300). Indeed, Young presented this third-party-perpetrator evidence, and argued that the "real" killers were the occupants of the Chrysler and that shoddy police work allowed them to escape. And if the jury had accepted that theory, it would have acquitted Young and agreed that some unidentified third party – someone other than Ferdinand – was the perpetrator. Thus, the possibility that the jury could find that neither Young nor Ferdinand killed Helton bolsters the conclusion that their defenses were not mutually exclusive. See *Sherlock*, 962 F.2d at 1363 (defenses held not to be mutually exclusive where "[t]he defense of one did not necessarily indicate the guilt of the other" because

"the jury could have believed that * * * neither * * * of the men had committed the alleged acts").

(ii.) The district court also correctly rejected Ferdinand's *Bruton*-based severance argument.

A criminal defendant has the right "to be confronted with the witnesses against him," U.S. Const. amend. VI, but "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U.S. at 206. In *Bruton*, the Supreme Court recognized a "narrow exception" to this rule – and to the general assumption that "jurors follow their instructions," *id.* – and held that a defendant is denied his confrontation rights "when a facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *United States* v. *Peterson*, 140 F.3d 819, 821 (9th Cir. 1998) (discussing *Bruton*, 391 U.S. at 126).

Bruton problems can justify a severance, see *Zafiro*, 506 U.S. at 539, but Young's recorded statements to Marshall did not implicate *Bruton* for two reasons. To begin with, Young's statements were not "incriminating on [their] face" because they did not "expressly implicat[e]" Ferdinand. *Richardson*, 481

U.S. at 208; see also *United States* v. *Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993). Young's statements to Marshall never mentioned Ferdinand by name; instead, Young simply referred to the person who was with him at the bar on the night of the murder as his "cousin." The statements became inculpatory only if and when the jury linked Young's references to his "cousin" to other evidence in the record (29-ER-7809, 7834-7835) that Young referred to Ferdinand as his "cousin." See *Mason* v. *Yarborough*, 447 F.3d 693, 695 (9th Cir. 2006) ("*Richardson* * * * specifically exempts [from *Bruton*] a statement, not incriminating on its face, that implicates the defendant only in connection to other admitted evidence.").

Bruton also does not apply because Young's statements were not "testimonial" under *Crawford* v. *Washington*, 541 U.S. 36, 51-52 (2004). Though *Bruton* predates *Crawford*, "the *Bruton* limitation on the introduction of codefendants' out-of-court statements is necessarily subject to *Crawford*'s holding that the Confrontation Clause is concerned only with testimonial out-of-court statements." *Lucero* v. *Holland*, 902 F.3d 979, 987-988 (9th Cir. 2018). Accordingly, a nontestifying codefendant's hearsay statements do not implicate *Bruton* if the statements are non-testimonial. And statements, like Young's, that are "made unwittingly to a Government informant" (here, Marshall) are "clearly nontestimonial." *Davis* v. *Washington*, 547 U.S. 813, 825 (2006)

(reaffirming *Bourjaily* v. *United States*, 483 U.S. 171, 181-184 (1987)); *United States* v. *Saget*, 377 F.3d 223, 228-229 (2d Cir. 2004) (Sotomayor, J.); see also *United States* v. *Dale*, 614 F.3d 942, 956 (8th Cir. 2010) (collecting cases). For this reason as well, there was no *Bruton* issue.

b. The District Court Did Not Err In Denying The Renewed Motions To Sever At Trial.

Alternatively, Young (Br. 61-63) and Ferdinand (Br. 29-30) argue, the district court abused its discretion in denying their renewed severance motions made as the evidence unfolded at trial. See *United States* v. *Kaplan*, 554 F.2d 958, 965-966 (9th Cir. 1977) (per curiam) ("Motions to sever must be timely made *and properly maintained*, or the right to severance will be deemed waived.") (emphasis added). They are mistaken.

i. Young's Arguments Lack Merit.

Young's primary argument revolves around the district court's handling of Tierra Lewis' testimony. He claims that the court's ruling barring him from arguing the truth of Lewis' prior identification of Ferdinand from the photo lineup "protected Ferdinand" at his expense, Br. 63, thereby depriving him of "a meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). Br. 44-47, 58-63; see *Zafiro*, 506 U.S. at 539; *United States* v. *Escalante*, 637 F.23d 1197, 1201 (9th Cir. 1980). For multiple reasons, he is wrong.

(A). As an initial matter, the fact that the court gave a *Pinkerton* instruction given with respect to Count 18 obviates this argument. As noted, the "defense" Young claims he was deprived of the ability to present – that Ferdinand was the shooter – is not a "defense" at all: even if Young had been permitted to argue the truth of Lewis' prior identification of Ferdinand in order to blame Ferdinand for the murder, and even if the jury agreed that Ferdinand was the shooter, it remains the case that "other evidence would allow [the jury] to convict Young of the crime under *Pinkerton*." 1-ER-A031. Young's attempt to shift the blame to Ferdinand would not have absolved him of guilt; it merely would have shifted the theory of his culpability away from being a principal and to that of being vicariously liable for the acts of his co-conspirator. And, as discussed more fully below, see pp. 206-217, *infra*, there was ample evidence to support the *Pinkerton* instruction on this count. Consistent with this Circuit's *Pinkerton* precedent, see, *e.g.*, *United States* v. *Bingham*, 653 F.3d 983, 997 (9th Cir. 2011); *United States* v. *Alvarez-Valenzuela*, 231 F.3d 1198, 1202-1203 (9th Cir. 2000), the district court instructed the jury that Young could be vicariously liable for Helton's murder if it found that (1) Helton was murdered (he was); (2) the person who committed the murder (in Young's telling, Ferdinand) was a member of the same conspiracy as Young (he was); (3) the murder was committed in furtherance of the conspiracy (it was, as it retaliation for the killing of CDP member Julius

Hughes); (4) Young was a member of the conspiracy at the time of the murder (he was); and (5) the murder was within the scope of the conspiratorial agreement and could reasonably have been foreseen to be a necessary or natural consequence of the agreement (it was). 33-ER-9294. The *Pinkerton* backstop thus renders irrelevant Young's evidentiary protestations.[9/]

(B.) In any event, the district court's handling of Exhibit 779 was a reasonable exercise of its discretion. In explaining why this is so, it is important to differentiate between (1) Lewis' prior statements to Inspector Cunningham, and (2) Exhibit 779, Lewis' prior identification of Ferdinand as the shooter. Young does not dispute the district court's ruling that Lewis' prior statements to Inspector Cunningham were not admissible as substantive evidence for their truth. Prior inconsistent statements are non-hearsay, admissible for their truth, but only if the statements were "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." Fed. R. Evid. 801(d)(1)(A). Lewis' prior statements were not under oath, so they were only admissible to attack the adequacy of the investigation and her credibility. See *United States* v. *Hale*, 422 U.S. 171, 176 (1975).

[9/] Young asserts that the court erred in giving the *Pinkerton* instruction. Br. 62 & n.11, 64-71. As discussed *infra*, he is wrong: the evidence supported the giving of this instruction, and the instruction itself correctly stated the law.

Instead, Young focuses on Exhibit 779, which was a non-hearsay statement of prior identification because Lewis, the declarant, testified under oath and was subject to cross-examination concerning the identification. See Fed. R. Evid. 801(d)(1)(C). Accordingly, the exhibit was admitted in unredacted form, 33-ER-9087, which meant that it included Lewis' handwritten statement identifying Ferdinand as the shooter, and was published to the jury in unredacted form. 33-ER-9087. Prior to closing argument, the district court ruled that Young was free to argue that Lewis "circled Mr. Ferdinand's photo" and that her handwritten statement "never identified Mr. Young," but the court did not allow Young to argue "the truth of the identification of Mr. Ferdinand as the shooter." 34-ER-9380; see also 1-ER-A146-148. Young contends that this ruling was improper: Lewis' prior identification was non-hearsay, so, he argues, it was admissible for its truth. Br. 44-47. But even if Young was correct, the non-hearsay nature of the statement is necessary for it to be admissible, but it is not sufficient. The district court, as it recognized, 1-ER-A032 n.17, still retained discretion to limit the use of that evidence based on Rule 403 concerns, such as the risk of prejudice to Ferdinand and the risk of confusing or misleading the jury. See, *e.g.*, *United States* v. *Bradshaw*, 281 F.3d 278, 284 (1st Cir. 2002) (upholding the exclusion of non-hearsay co-conspirator statements under Rule 403); *McAlinney* v. *Marion Merrell Dow, Inc.*, 992 F.2d 839, 843 (8th Cir. 1993)

(same as to party admissions). Thus, as the Seventh Circuit has explained, the rules classifying certain statements as non-hearsay "do not stand for the proposition that Rule 801(d)(2) trumps all other Federal Rules of Evidence," and, because "Rule 403 clearly applies to admissions, * * * a trial judge can exclude admission evidence if its probative value is substantially outweighed by the danger of unfair prejudice." *Aliotta* v. *National R.R. Pass. Corp.*, 315 F.3d 756, 763 (2003). Here, the district court strove to find a balance between the competing interests of Young and Ferdinand: it allowed Young to use Lewis' prior identification of Ferdinand, and her handwritten statement identifying Ferdinand, but did not allow Young to name Ferdinand by name based on countervailing Rule 403 concerns. The balance the court struck is reasonable and certainly within the broad range of permissible choices for the court to make.

Young asserts (Br. 53-55) that the district court "misapplied" Rule 403 by excluding Exhibit 779 for its truth because the court based its ruling on its *own* personal belief that Lewis' prior identification was "untrue." Br. 53. That is incorrect. It was not *the court* that deemed Lewis' testimony untrue; it was *Lewis herself* who "unequivocal[ly] testi[fied] that she had been lying" when she told Inspector Cunningham that Ferdinand was the shooter. 1-ER-A032; see also 33-ER-9075, 9077-9078, 9092, 9103-9104, 9110. And in any case, the court did

not exclude this evidence *because* it was untrue: it excluded the evidence because it had the potential to "mislead[] and confus[e] the jury." 1-ER-A032 n.17.

(C.) Separately, Young contends (Br. 55-57) that the court's evidentiary ruling concerning Exhibit 779 infringed his constitutional rights to present a defense and to present a closing argument. Here again, he is wrong.

Right To Present A Defense. The Constitution guarantees a defendant "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690. And, while a defense that a third party committed the crime is a valid defense, see *Holmes* v. *South Carolina*, 547 U.S. 319, 327 (2006), that does not mean that a defendant has "'an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence'" in support of that defense. *Montana* v. *Egelhoff*, 518 U.S. 37, 41-43 (1996) (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988)). The constitutional right to present a defense is a bulwark against "the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 326; see also *Nevada* v. *Jackson*, 569 U.S. 505, 409 (2013) (per curiam) (right to present a defense precludes the exclusion of defense evidence for arbitrary or irrational reasons). Routine applications of evidentiary rules to exclude defense evidence for legitimate reasons thus do not impinge on this right. *Id*. As noted above, the district court's

exclusion of Exhibit 779 in this case for its truth was neither arbitrary nor irrational but was rooted in legitimate Rule 403 concerns. 1-ER-A032 n.17. The district court expressed repeatedly, both on the record and in written rulings, the basis for its conclusions; there was nothing arbitrary about its handling of the matter.

Right To Present Closing Argument. Young contends that the exclusion of Exhibit 779 for its truth impinged on "his Sixth Amendment right to have counsel argue his defense to the jury," Br. 55 (citing *Herring* v. *New York*, 422 U.S. 853 (1975)), and that this error is automatically reversible. Br. 55-57. He is doubly mistaken. *Herring* involved a challenge to a New York state statute that permitted judges in certain nonjury criminal trials to deny defense counsel the opportunity to present any closing argument at all. 422 U.S. at 853-854. In invalidating the statute, the Court held that the Sixth Amendment right to counsel "necessarily includes [the defendant's] right to have his counsel make a proper argument on the evidence and the applicable law in his favor." *Id*. While reaffirming that trial courts have "great latitude in controlling the duration and limiting the scope of closing summations," the Court found no justification "for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all." *Id*. at 862-863. Unlike *Herring*, Young's counsel was not "den[ied] absolutely" the right to present a closing argument. 35-ER-9606-

9707 (counsel's 100-page closing). As Young notes, however, this Court has construed *Herring* to extends not only to the complete denial of any opportunity for closing argument but also to situations where the trial court allows counsel to make a closing argument but prevents argument on an otherwise-valid theory of the defense. See, *e.g.*, *United States* v. *Brown*, 859 F.3d 730, 734 (9th Cir. 2017); *Frost* v. *Van Boening*, 757 F.3d 910, 916 (9th Cir.) (en banc), rev'd, 574 U.S. 21 (2014); *United States* v. *Miguel*, 338 F.3d 995, 1000-1002 (9th Cir. 2003); *Conde* v. *Henry*, 198 F.3d 734, 739 (9th Cir. 1999). These so-called "summation restriction" cases are inapposite because the district court did not preclude Young's counsel from arguing his theory of his defense – that Young did not shoot and killed Jelvon Helton; indeed, counsel vigorously argued this defense in his closing. 35-ER-9612-9630. In fact, the court's ruling concerning the use of Exhibit 779 did not even prevent Young from arguing that someone else committed the crime; it simply prevented Young from identifying that person by their name. That is qualitatively different from barring him from arguing this defense at all.

In any event, even if there had been a summation-restriction error, it would be subject to harmless error analysis and would not be automatically reversible. Br. 55. "Most constitutional errors can be harmless," *Neder* v. *United States*, 527 U.S. 1, 8 (1999), and *Herring* errors are not among the small list of

errors that the Supreme Court has deemed to be "structural," and thus automatically reversible. See *Washington* v. *Recuenco*, 548 U.S. 212, 218 n.2 (2006). To be clear, Young has not argued that such errors *should be* deemed structural; instead, he argues that both the Supreme Court and this Court have already treated them as structural. Not so.

As to the Supreme Court: Young asserts that *Herring* itself treats such errors as automatically reversible because the Court in that case reversed the judgment "without a discussion of prejudice." Br. 55. But the absence of a discussion of prejudice in *Herring* is not an affirmative holding that such errors are structural, and should not be understood as such given the State's failure to argue harmless error. See Resp. Br., *Herring* v. *New York*, No. 73-6587 (filed Feb. 26, 1975); see generally *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 570 (2001) (reiterating the Supreme Court's traditional practice of "declin[ing] to address an issue that was not sufficiently briefed and argued"). Nor does *Bell* v. *Cone*, 535 U.S. 685 (2002), on which Young relies (Br. 55), support this view. A footnote in *Bell* cited to a footnote in *United States* v. *Cronic*, 466 U.S. 648 (1984), which, in turn, included *Herring* within a string cite as an example of a case where it is proper to presume prejudice in connection with an ineffective-assistance-of-counsel claim "when counsel was * * * prevented from assisting the accused during a critical stage of the proceeding." *Bell*, 535 U.S. at 696 n.3.

Even if *Bell* were read to deem *Herring* error structural, this case, as noted, does not involve a true *Herring* error: Young's counsel was not "prevented from assisting" Young at trial in closing argument.

As to this Court: Young contends that this Court, in *Frost*, classified summation-restriction errors as structural. Br. 56. Although *Frost* held that "[p]recluding defense counsel from arguing a legitimate defense theory would, by itself, constitute structural error," 757 F.3d at 916, Young neglects to mention that the Supreme Court reversed this Court's judgment in *Frost*, holding that "even assuming that *Herring* established that *complete denial* of summation amounts to structural error, it did not clearly establish that the *restriction* of summation also amounts to structural error." *Glebe* v. *Frost*, 574 U.S. 21, 24 (2014) (per curiam) (emphasis in original). And, on remand in *Frost*, this Court found that the summation-restriction error in that case was indeed harmless. See *Frost* v. *Gilbert*, 835 F.3d 883, 886-887 (9th Cir. 2016) (en banc).

* * *

In sum, the district court's ruling regarding Exhibit 779, while inconsequential in light of the *Pinkerton* instruction, nevertheless reflected a reasonable exercise of the court's discretion. Nor did this ruling infringe Young's constitutional rights to present a defense or a closing argument: Young presented a third-party-perpetrator defense and argued that theory in closing.

Accordingly, and for the same reasons, Young has failed to show that his joint trial with Ferdinand was manifestly unfair or otherwise prejudicial so as to have necessitated a severance.

ii. Ferdinand's Arguments Lack Merit.

Ferdinand, for his part, argues that his joint trial with Young was unfair because it (a) permitted Young's counsel to act as a *de facto* second prosecutor who, unlike the government, was not bound by the same rules and limitations, and (b) allowed the government to admit certain evidence against him that would not have been admissible had he been tried separately. Br. 29-30, 35-45; see also *Tootick*, 952 F.2d at 1082 (recognizing concerns about a codefendant acting as a second prosecutor); *Zafiro*, 506 U.S. at 539 (recognizing concerns "when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant"). Ferdinand's complaints are both exaggerated and overblown: Young's counsel's actions and the evidence about which he complains were simply "inconsequential in the grand scheme of things." *United States* v. *Johnson*, 297 F.3d 845, 856 (9th Cir. 2002). As the record shows, his joint trial with

Young was fair and the jury's determination that he was guilty of RICO conspiracy was reliable and based on abundant record evidence.[10/]

Young's Counsel's Actions. Ferdinand complains that Young's counsel assumed the role of a co-prosecutor at trial by focusing his questioning of several witnesses on Ferdinand's alleged role in the Helton murder, rather than defending his client against the charge. Br. 34-41. This re-hashed antagonism argument lacks merit. It is common in large multi-defendant cases for defendants to shift the attention to each other, but "courts have consistently held that finger-pointing and blame-shifting among co-conspirators do not support a finding of mutually antagonistic defenses." *United States* v. *Voigt*, 89 F.3d 1050, 1095 (3d Cir. 1996). So long as those defenses are not mutually exclusive, these sorts of concerns are better addressed through less drastic measures such as

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[10/] Ferdinand contends the district court "applied the wrong legal standard" in denying severance by "focusing only" on whether the defenses were mutually exclusive. Br. 33. Of course, Ferdinand himself phrased his objections in those very terms. For example, Ferdinand's counsel moved for a severance based on Young's counsel's cross-examination of a government witness, claiming counsel was "essentially acting as a prosecutor." 8-ER-1695. Ferdinand's counsel did not raise this "*de facto* second prosecutor argument" as a freestanding basis for prejudice, but instead asserted that it was a "clear example of the antagonistic defenses of these two men." 8-ER-1695; see also, *e.g.*, *Tootick*, 952 F.2d at 1082 (discussing how a second defense counsel's actions can heighten the risk of prejudice when defenses are antagonistic). In any case, regardless of the label, the point is that the district court entertained his arguments and concluded that there had not been a sufficient showing of prejudice to warrant severance – the governing legal standard. 8-ER-1695-1696.

curative instructions. Such is the case here, where Young had an incentive to deflect blame for Helton's murder away from himself, but not necessarily onto Ferdinand because of the evidence suggesting possible third-party involvement. As such, their defenses were not mutually exclusive.[11/]

Ferdinand also identifies a handful of instances where Young's counsel's cross-examination of government witnesses elicited responses arguably implying that Ferdinand was involved in Helton's murder. Br. 35-39. Some such attacks are an inevitable byproduct of a joint trial, and, as this Court has held, "isolated attacks" made over the course of a lengthy trial such as this "d[o] not create the compelling prejudice necessary to mandate a severance." *Sherlock*,

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[11/] Ferdinand criticizes the district court for speculating about "the mere possibility of a third-party perpetrator," rather than focusing on how the case was actually "presented to the jury." Br. 33 (discussing *United States* v. *Mayfield*, 189 F.3d 895, 900 (9th Cir. 1999)). This criticism is misplaced. In *Mayfield*, there was "no evidence to support" a third-party-perpetrator defense, 189 F.3d at 300, so the suggestion of that defense was nothing more than a "mere possibility." Here, in contrast, the case, as "presented to the jury," included direct evidence of possible third-party involvement. 32-ER-8924-8927 (Collins); 32-ER-8936-8941 (Logan). And, while Ferdinand says that Young's "defense was that Ferdinand committed the murder, not merely some third-party perpetrator," Br. 34, the evidence presented at trial – as Young's counsel argued in closing – included the possibility that unknown third parties perpetrated the crime. 35-ER-9635-9636 ("There were other cars that were seen speeding away. You heard from the two witnesses that we called. The interview of Mr. Collins * * *. We called him. We found him. We wanted to make sure you heard the whole story. And you heard from Mr. Collins. He testified during the defense case. [¶] You heard from Mr. Logan. * * * Jaquain Young wasn't the only person speeding away from that scene.").

962 F.2d at 1363; see also, *e.g.*, *Johnson*, 297 F.3d at 856 (affirming denial of severance where the disputed evidence "constituted but one minor piece of evidence in the course of a 17-week trial in which the government presented significant proof of [the defendant's] guilt"). The record here confirms that the attacks about which Ferdinand complains are small and isolated.

Ferdinand starts with Tierra Lewis' testimony, characterizing it as the "most damaging evidence" Young presented against him and focusing on "[h]er identification of [him] as the shooter" and her portrayal of him as a "menacing threat" to her and her children. Br. 35-37. Yet Lewis' testimony – specifically, her identification of Ferdinand as the shooter – was hardly "damaging" because the district court "did not permit Young to argue the truth of the matter asserted in that prior identification." 1-ER-A032. The prior identification thus was not substantive evidence against Ferdinand but was admitted as a prior inconsistent statement of Lewis' that the jury could consider in assessing her credibility. 1-ER-A032. And, while Young's counsel stated in closing (consistent with the court's rulings) that Lewis had not identified Young as the shooter when shown the six-pack photo array, 35-ER-9645, this singular statement was hardly the "centerpiece" of Young's defense. Ferdinand Br. 37. As noted, Young's defense emphasized at length the numerous perceived weaknesses in the government's proof against him. See pp. 68-75, *supra*. This case is wholly unlike *Mayfield*, on

which Ferdinand relies, because the closing argument by counsel for Gilbert, Mayfield's codefendant (whose defenses were later deemed mutually exclusive) "barely even addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client." 189 F.3d at 900.

The government, for its part, did not mention Lewis' testimony in urging the jury to convict Ferdinand of the RICO conspiracy charge, which weakens Ferdinand's claim (Br. 42-43) that the jury relied on this evidence to convict him. And Ferdinand's arguments regarding Young's counsel's questioning of Lewis regarding the "menacing" (Br. 37) text messages that she received fares no better. As with Lewis' prior identification testimony, the district court did not admit those messages for the truth of the matter asserted, 33-ER-9026, 9094, so there is no basis for Ferdinand to claim that these messages improperly colored the jury's decision to convict him of the RICO conspiracy – particularly when Lewis herself admitted that those messages "ha[d] nothing to do with" the Helton murder, 33-ER-9025, and were instead related to the Pitman murder investigation. 33-ER-9100.

Ferdinand next complains about Young's counsel's effort to "bolster[]" Lewis' account of Ferdinand being "the shooter" by eliciting testimony from two government witnesses to the effect that the police considered Ferdinand a

suspect in that shooting. Br. 37-38. Here again, however, the government did not mention these snippets of testimony in urging the jury to convict Ferdinand of the RICO conspiracy charge, so the evidence was hardly so overwhelmingly prejudicial that it warranted a severance.

Ferdinand also complains about Young's counsel's supposedly improper attempt to tie Ferdinand to the uncharged murder of Donte Levexier, the evidence of which was presented by the government to prove the enterprise. Br. 38-40. According to Ferdinand, the government introduced his celebratory day-after-the-murder text messages to demonstrate his knowledge and support of CDP's goal of murdering its rivals, but Young's counsel went further: he asked the officer who recovered the phone that contained those messages a few leading questions about whether the officer personally interpreted those messages as a threat, a taunt, or possibly even "a gloat about having committed murder." Br. 38-41. (Ferdinand's counsel objected to the "threat" question as calling for an improper opinion, but the objection was overruled, see 8-ER-1618-1620, and counsel did not object or move to strike the "gloat" question or the witness' "could be" response to it. 8-ER-1620.) Allowing Young's counsel to lead the witness in this manner, which the government could not have done, see Fed. R. Evid. 611(c), shows that Young was acting as a prosecutor, unconstrained by the same limitations that apply to the government. Br. 39-41. Young's counsel's

few leading questions of this one witness did not tarnish the overall fairness of Ferdinand's trial, however. Nor did the witness' answers: the witness merely offered his own view as to the meaning of those messages, and, as with much of the other evidence, neither Young nor the government ever used those answers to try to tie Ferdinand to the Levexier murder, or to suggest (as Ferdinand does, Br. 38-39) that his claimed involvement in this murder showed he had a propensity to kill, thus making it more likely that he killed Helton.

The Government's Actions. Ferdinand also complains that the government used his joint trial with Young to admit certain prejudicial evidence against him that would not have been admissible if he had not been tried with Young. Br. 42-45. Specifically, Ferdinand focuses on Young's jailhouse statements to Marshall describing the actions of Young's "cousin" in connection with both the murder of Jelvon Helton and other criminal activity. Although he admits he "was not charged with murdering Jelvon," Br. 34, he nonetheless maintains that the statements were prejudicial because they linked him to the enterprise and proved his knowledge of its violent activities, and would not have been admissible had he been tried separately. Br. 42-45. Once again, Ferdinand exaggerates the import of these statements. For one thing, Young never referred to Ferdinand by name, so, as even Ferdinand concedes, "it's not clear that Young was actually referring to Ferdinand in all of these statements." Br. 43.

Ferdinand tries to bridge that gap by asserting that Young's references to his "cousin" created an "automatic association to Ferdinand" because Ferdinand was "the only cousin that the jury knew about," Br. 43, but that is not correct: Young also referred to other people as his "cousin." See, *e.g.*, 15-ER-3868-3870, Ex. 832 (BLM010, at 0:01-0:03) (Young's recorded statement to Marshall referred to a group of people selling dope as "me, my cousin, and my other cousin"). Ferdinand also points out that, while the district court admitted these statements against Young as party admissions, see Fed. R. Evid. 801(d)(2)(A), the court never circled back and addressed whether these statements were also admissible against the other codefendants, including Ferdinand, as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). Br. 43-45.

Ferdinand is correct that the district court never ruled on whether Young's statements were admissible under Rule 801(d)(2)(E), but this is another instance where the government did not rely on this evidence – the statements – in urging the jury to convict Ferdinand of the RICO conspiracy. Instead, the government focused on the abundant other evidence independent of these statements tying Ferdinand to the RICO conspiracy and showing his knowledge of its violent objectives. 34-ER-9330-9331 (witness intimidation incident); 34-ER-9331-9332 (text messages with KOP member Robert Huntley after the Levexier murder); 34-ER-9333-9334 (text messages with Kia Horace celebrating the Levexier

murder); 34-ER-9334-9335 (text messages celebrating Jelvon Helton's murder); 34-ER-9335-9336 (text messages regarding McCree and the motive for the assault on him); 34-ER-9335 (photographs at the pit); 34-ER-9335-9336 (participation with other CDP members in robberies and related shootings).

Ferdinand makes much of the fact that these statements were admitted "without a proper limiting instruction," Br. 44, but he omits some important context. The district court agreed to give a limiting instruction, but Ferdinand's counsel asked the court to defer the giving of that instruction until after the court ruled on whether the statements were admissible as co-conspirator statements. 15-ER-3664-3669. Thus, although the district court failed to return to that issue, Ferdinand was responsible for renewing his request for the limiting instruction that the court previously agreed to give. See Fed. R. Evid. 105 (district court's obligation to give a limiting instruction is conditioned on a "timely request"); 21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5065, at 329-330 (2d ed. 2005) ("[W]ithout a request, the trial court does not err in not giving [a limiting] instruction.").

II. The District Court Correctly Denied Young's Motion To Suppress His Cell Phones And Their Contents.

A. Background.

1. On March 11, 2013, Young and Ogbuagu drove to a location in San Francisco intending to pick up "Kate," a 16-year-old girl who Young was

Finally, Gordon's reliance on *United States* v. *Ledbetter*, 929 F.3d 338 (6th Cir. 2019), Br. 54-55, is misplaced. In that case, the court found insufficient evidence to support a drug gang member's VICAR murder conviction of a drug user because "there was no evidence the gang members were expected or encouraged to unilaterally rob and murder low-level drug users who otherwise supported the gang by purchasing its drugs." *Id.* at 358. But the court pointedly noted that "[t]his would be a different case entirely" if the victim "was somehow a target of the gang," in which case "a reasonable jury could infer that [the defendant] carried out [the murder] because it was expected of him as a member." *Id.* at 358-359. Here, of course, McCree was a "target" of CDP because of his association with KOP member Donte Levexier, and Gordon knew that shooting and killing KOP members and their associates was expected of him by virtue of being a CDP member.

V. The Jury Instructions Were Proper.

In an argument joined by the remaining appellants, Ferdinand argues (Br. 55-70) that the RICO conspiracy instruction was plainly erroneous because it misstated to the jury what the government must prove before a defendant could be convicted of being a co-conspirator. Young (Br. 64-71) and Gordon (Br. 56-61) also argue that the district court erred in instructing the jury on *Pinkerton* liability.

A. The RICO Conspiracy Instruction Was Correct.

1. Background.

Prior to trial, the parties jointly submitted their proposed jury instructions. Dkt. 1329. Titled "Racketeering Conspiracy Elements," Proposed Jury Instruction No. 27 set forth the specific elements of the charge, and stated that, to convict, the government had to prove beyond a reasonable doubt (1) the existence of the CDP enterprise; (2) that the enterprise affected interstate or foreign commerce; (3) that the defendant agreed "that either the defendant or another person would be associated with the enterprise"; and (4) that the defendant agreed "that either he or another person" would conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. *Id*. at 33. The defense registered no objections to this portion of the instruction.

In its final charge, the district court restated these four elements of the offense, 33-ER-9257, and went on to explain that, "to convict a defendant of RICO conspiracy, the Government must prove beyond a reasonable doubt that the defendant agreed to participate in the enterprise with the knowledge and intent that at least one member of the racketeering conspiracy would intentionally commit or cause or aid and abet the commission of two or more racketeering acts." 33-ER-9257-9258. The instructions further explained that,

"[i]n order to find a defendant guilty of racketeering conspiracy, the Government must prove beyond a reasonable doubt that the defendant joined the conspiracy knowing the conspiracy's purpose and intending to facilitate it. The defendant must also know the essential nature and scope of the enterprise." 33-ER-9258. The defendants raised no objection to the instructions.

Gordon, in his motion for a new trial, argued that the RICO conspiracy instruction was erroneous because the "or another person" language in the third and fourth elements of the court's RICO conspiracy instruction incorrectly stated the "culpability required for a criminal conviction." Dkt. 1780, at 11-12 (citing *United States* v. *Young*, 720 F. App'x 846 (9th Cir. Dec. 27, 2017) (unpub.)). The district court denied the motion. 1-ER-A020-022. Recognizing that *Young* was "unpublished and lacks precedential value," 1-ER-A020, the court nonetheless held that *Young* was distinguishable. In *Young*, "[t]he district court instructed the jury that the government must prove that Young 'conspired and agreed' that he 'or a co-conspirator, would conduct or participate, either directly or indirectly, the conduct of the affairs of the enterprise through a pattern of racketeering activity.'" 1-ER-A020 (quoting *Young*, 720 F. App'x at 849). This Court concluded that this instruction was "contrary to *Fernandez*," and therefore plainly erroneous, because it "d[id] not explain what the *defendant*, not a *co-conspirator*, needed to agree to do in order to be found criminally culpable as

a conspirator." *Id.* at 850 (emphases added). In this case, the court held, the jury instructions, read as a whole, correctly conveyed "what a defendant, not a co-conspirator, needed to do agree to do in order to be found criminally culpable as a co-conspirator." 1-ER-A021.

2. Standard of Review.

As the appellants concede, see Ferdinand Br. 55, they forfeited their challenge to the adequacy of the RICO instructions by failing to object to them before they were given to the jury. Accordingly, they must prove plain error – that is, "(1) an error that is (2) plain and (3) affects substantial rights," and that "[4] seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Peterson*, 538 F.3d 1064, 1071-1072 (9th Cir. 2008); see Fed. R. Crim. P. 52(b).

3. Analysis.

The jury instructions on the RICO conspiracy charge correctly set forth the requirements for RICO conspiracy liability. Unlike the defective instruction in *Young*, the jury instructions here, read (as they must be) in context and "as a whole," *Hamling* v. *United States*, 418 U.S. 87, 107-108 (1974), properly conveyed to the jury the necessary legal requirements for what an individual defendant must be shown to have done before he could be convicted on Count 1. At the outset, the court instructed the jury that RICO conspiracy liability

requires the government to prove beyond a reasonable doubt that "the defendant agreed to participate in the enterprise" knowing and intending that at least one co-conspirator would intentionally commit two or more predicate acts of racketeering. Dkt. 1768, at 32. The jury was further told that, before it could convict, it had to find beyond a reasonable doubt "that the defendant joined the conspiracy knowing the conspiracy's purpose and intending to facilitate" it, and that "[t]he defendant must also know the essential nature and scope of the enterprise." *Id*. at 33; see *United States* v. *Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) ("RICO conspiracy under Section 1962(d) requires only that the defendant was 'aware of the essential nature and scope of the enterprise and intended to participate in it.'").

Other instructions emphasized the personal nature of conspiracy liability, explaining that an individual "becomes a member of a conspiracy by willfully participating in the unlawful plan," 33-ER-9255, and that merely associating with someone who is a member of a conspiracy is not sufficient. 33-ER-9256. As the district court found, taken together, these instructions accurately conveyed "what a defendant, not a co-conspirator, needed to do agree to do in order to be found criminally culpable as a co-conspirator," 1-ER-A021 – namely, agree to participate in an enterprise knowing and intending to facilitate it and knowing its essential nature and purpose. See *Salinas* v. *United States*, 522 U.S.

52, 61-63 (1997). Accordingly, and on this record, there was no error, and certainly no clear or obvious error. See *United States* v. *Tavakkoly*, 238 F.3d 1062, 1066 (9th Cir. 2001) ("Improper jury instructions will rarely justify a finding of plain error.").

B. The *Pinkerton* Instructions Were Appropriate.

1. Background.

"The *Pinkerton* doctrine is a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy." *United States* v. *Long*, 301 F.3d 1095, 1103 (9th Cir. 2002). A *Pinkerton* instruction is appropriate when the evidence would permit a jury to find that "(1) the offense was committed during the course and in furtherance of the conspiracy, (2) the defendant was a member of the conspiracy at the time the offense was committed, and (3) the offense fell within the scope of the unlawful agreement and could be 'reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" *United States* v. *Gonzalez*, 906 F.3d 784, 791 (9th Cir. 2018); see also *Smith* v. *United States*, 568 U.S. 106, 111 (2013).

a. Before trial, the government requested *Pinkerton* instructions on Counts 6 and 7 (the USF double murder), Count 11 (the McCree attempted murder), Count 12 through 15 (the Truong assault charges) and Count 20 (the Jelvon

Helton murder). The government's theory was that, even if the jury did not believe that the specific defendants named in those charges committed the crimes, the evidence showed, at the very least, that those crimes were committed by another CDP member during and in furtherance of the conspiracy. Dkt. 1329, at 57.

Following a hearing, the district court entered an order noting that, while the government's proposed instruction, as written, would have applied *Pinkerton* liability to all substantive counts, "[t]he government represented [at the hearing] that it is not going to argue that 'everyone who is in the conspiracy is good for everything.'" 2-ER-A294; see 2-ER-A280-281 (government's oral statements at the hearing). And, in response to the court's request to te government to "list[] the acts/defendants it intends to reference in its opening as having *Pinkerton* liability," 2-ER-A295, the government reiterated that it was not using *Pinkerton* to hold all defendants accountable for all substantive crimes committed by any co-conspirator, and identified the following substantive crimes as ones where *Pinkerton* liability might apply: Young's role in the Jelvon Helton murder, Gordon's role in the McCree shooting, Heard's role in the Isiah Turner and Andre Helton double murders, Ferdinand's role in the Truong assaults, and all related firearms offenses. 38-ER-10678-10679. With respect to Young and Gordon, the government emphasized that the evidence, in its view, would prove

that they were the perpetrators of the charged VICAR offenses against them but that if the jury disagreed and found the crimes were committed by a different CDP member, the jury could still hold those individuals responsible under *Pinkerton*.

b. At trial, the government presented extensive evidence that Young shot and killed Jelvon Helton inside the Gravity Bar in retaliation for Helton having allegedly killed CDP member Julius Hughes. The evidence included (1) Officer Boes' testimony regarding a silver Acura that sped away from the bar and engaged in a high-speed chase; (2) Taylor Norry's testimony that she let Young borrow her silver Acura in general and on the night of the murder; (3) photographic evidence of Young exiting the same silver Acura at Julius Hughes' funeral several months earlier; (4) Bruce Marshall's testimony regarding Young's admission to the murder and his reenactment of it; (5) the medical examiner's testimony as to the nature of the wounds and the cause of death, which were consistent with Marshall's testimony about Young's admissions; and (6) Tierra Lewis' testimony that she was told by a KOP member's family to lie to the police and falsely implicate Ferdinand as the shooter. 34-ER-9414-9422 (government's closing argument summarizing evidence). And there was also evidence that Young's "cousin," who, the jury could find was Ferdinand, was present at the bar, that Ferdinand identified the victim, that the police

considered Ferdinand a suspect, and that Ferdinand sent text messages hours later celebrating the killing.

The government also presented extensive evidence that Gordon was involved in the attempted murder of Patrick McCree. The evidence included testimony from a witness who heard gunshots outside his apartment complex and then saw an individual toss a gun on the rooftop of the building before jumping over the fence to the railroad tracks, as well as a police officer who was approached by Gordon himself minutes after the shooting asking if he had been shot. Numerous shell casings recovered at the scene, a number of which matched the gun that was later recovered from the roof, which itself had Gordon's DNA on it. See p. 41, *supra*; 34-ER-9400-9407 (closing argument). The physical evidence recovered from the scene – principally the two separate clusters of two different caliber bullets in two different locations relative to the apartment complex – created a strong inference that Gordon did not act alone.

c. During the charging conference, the district court ruled that "the Government's theory of the gang rivalry I think makes *Pinkerton* applicable for [1] the Gravity Bar and [2] USF double murder and [3] the McCree attempted murder. * * * So that's how I look at it." 32-ER-8835-8836. "[T]here is one conspiracy and a unified theory that I think ties the three acts together – the three

acts that I'm allowing the instruction." 32-ER-8842. The court declined to give a *Pinkerton* instruction as to the Truong assault charges. 32-ER-8835-8836.

d. In its rebuttal closing, the government responded to Young's counsel's insinuation that Ferdinand shot and killed Jelvon Helton by telling the jury that the identity of the shooter did not matter because Young would still be vicariously liable for the murder under *Pinkerton*. 36-ER-9913 ("What is the alternate theory that [Young's counsel] presented to you? That it was Esau Ferdinand that did it? Liability for a co-conspirator's actions. This is called *Pinkerton* liability. Under either theory, Jaquain Young is still guilty of that murder."). The government likewise emphasized that, even if the jury was not persuaded that Gordon shot McCree attempting to kill him, Gordon could still be convicted under *Pinkerton*. 34-ER-9445 ("If someone from CDP tried to kill Patrick McCree, if Adrian Gordon was a member of CDP at the time, if Patrick McCree were – somebody did actually try to kill him and if that crime of attempted murder was within the umbrella of what could be reasonably foreseeable as a CDP crime, then he's liable for it even if his DNA wasn't on the firearm, even if he didn't talk to Officer Price at the scene.").

e. In its final charge, the district court instructed the jury that "[e]ach member of a conspiracy is responsible for the actions of other conspirators performed during the course and in furtherance of the conspiracy. If one

member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime." 33-ER-9280 (charge pertaining to Counts 9-11 against Gordon); 33-ER-9294 (identical instruction for Counts 18-20 against Young). The court further instructed the jury that, in order for this doctrine to apply, it had to find that (1) a person committed the substantive crime charged; (2) the person was a member of the conspiracy charged in Count 1; (3) the person committed the crime in furtherance of the conspiracy; (4) the relevant defendant (Young or Gordon) was a member of the same conspiracy at the time the crime was committed; and (5) the crime was within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or logical consequence of that agreement. 330ER-9280-9281, 9294. The jury convicted Young on Counts 18-20 and Gordon on Counts 9-11. 2-ER-A462-469.

2. Standard of Review.

The district court's decision to give a *Pinkerton* instruction is reviewed for an abuse of discretion. See, *e.g.*, *Long*, 301 F.3d at 1104.

3. Analysis.

Contrary to Young's (Br. 64-71) and Gordon's (Br. 56-61) assertions, the district court did not err in instructing the jury on *Pinkerton* liability with respect to the respective VICAR charges against them.

a. The Evidence Warranted *Pinkerton* Instructions As To The VICAR Charges Against Young And Gordon.

(i.) Young argues (Br. 64-71) that the *Pinkerton* instructions on Counts 18, 19 and 20 were improper because "the government has made no effort to prove who the co-conspirator was that actually committed the crime." Br. 70. The government must prove that the substantive crime was committed by "*someone* among the co-conspirators," *United States* v. *Ruiz*, 462 F.3d 1082, 1088 (9th Cir. 2006) (emphasis added), but "it is not necessary to establish the identity of the conspirator who personally committed the substantive offense. It is sufficient to show that this individual was a co-conspirator." *United States* v. *Ramos*, 147 F.3d 281, 287 (3d Cir. 1998). Put differently, it is the perpetrator's *status* as a co-conspirator, not their *name*, that matters.

The proof here was more than sufficient to meet this requirement and allow the jury to consider whether Young was guilty under a *Pinkerton* theory. The jury heard extensive from which it could infer that Young's cousin, Ferdinand, was present at the Gravity Bar on the night of the murder and, if the jury did not believe the evidence that Young was the triggerman (as he admitted to Bruce Marshall), then the jury could still convict Young based on a finding that Ferdinand pulled the trigger. The fact that the jury also heard evidence of the possibility that a third party might have committed the murder does not

negate the propriety of *Pinkerton*. The jury heard the evidence and was entitled to decide whether Young was guilty as a principal or under a *Pinkerton* theory if Ferdinand was the shooter, just as it was entitled to consider whether to acquit Young if a third party unrelated to the conspiracy was the shooter.

(ii.) Gordon asserts that the *Pinkerton* instruction as to Counts 9 and 10 – the McCree VICAR shooting charges – was improper because "[t]he indictment did not specifically allege a separate VICAR conspiracy." Br. 57. But that is not the law. A *Pinkerton* instruction is permissible if the indictment alleges "*a* conspiracy," *United States* v. *Nakai*, 413 F.3d 1019, 1023 (9th Cir. 2005) (emphasis added); it need not charge any specific type of conspiracy. Cf. *United States* v. *Houston*, 648 F.3d 806, 818 (9th Cir. 2011) (*Pinkerton* instruction need not "specify the predicate conspiracy"). Here, Count 1 charged a racketeering conspiracy under Section 1962(d), 40-ER-11271-11279, and listed the McCree shooting as both a substantive charge and an act of racketeering. Nothing more was required. See *Bingham*, 653 F.3d at 997 (upholding *Pinkerton* instruction in relation to VICAR murder charges based on a RICO conspiracy charge).

As a fallback, Gordon argues that the *Pinkerton* instruction was improper because "there was no evidence the shooting was in furtherance of a CDP conspiracy." Br. 59. The record, however, contains ample evidence that that the McCree shooting was indeed in furtherance of CDP's ongoing feud with KOP.

See *United States* v. *Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007) ("[T]he natural meaning of 'in furtherance of' is 'furthering, advancing or helping forward.'"). McCree was dating Tatiana Levexier's sister and, as shown by Ferdinand's text messages, was connected with Levexier himself and was considered by CDP to be a KOP associate. The physical evidence at the scene established that there were two shooters, one of whom was positively identified by his DNA on the rooftop gun as Gordon. Following the shooting, Gordon ran to a nearby officer and asked if he had been shot, and then told the officer that the "shooter" was wearing a Cincinnati Reds hat with the letter "C," as CDP members often did. 25-ER-6676-6677; see also 17-ER-4422 (Brown testifies that CDP members often made a "C" gesture signifying "Central"). This evidence provided a solid evidentiary foundation for the court to instruct the jury that, if it did not believe Gordon shot McCree, it could nonetheless convict McCree because the shooting was carried out by another CDP member in furtherance of the CDP-KOP feud.

b. None Of The Concerns In *Carcamo* Exist Here.

Both Young (Br. 64-71) and Gordon (Br. 59-61) assert that the court should have refused the government's request for *Pinkerton* instructions here for the same reasons that the court declined to give *Pinkerton* instructions in *United States* v. *Carcamo*, No. CR 08-0730 WHA (N.D. Cal. Aug. 15, 2011). *Carcamo*, however, is readily distinguishable.

In *Carcamo*, thirty-one individuals associated with the MS-13 street gang were indicted on RICO and VICAR conspiracy charges and associated substantive crimes. The defendants were severed into separate groups, after which seven defendants, including Marvin Carcamo, stood trial on three conspiracy charges and nineteen substantive counts. See *Carcamo*, 2011 U.S. Dist. LEXIS 90504, at *4. "At 12:34 a.m. on the day of the third and final charging conference" following a five-month trial, *id*. at *5, the government, for the first time, submitted a proposed *Pinkerton* instruction. 2-ER-A279-280. The district court declined to give the instruction based on four concerns: (1) the instruction was submitted too late in the day to afford the court and the defendants adequate time to assess its full implications; (2) the instruction was "universal in scope" in that it applied "generically to all nineteen substantive counts," rather than "zeroing in on a specific substantive count"; (3) the jury was already responsible for considering three separate conspiracy charges so the addition of a *Pinkerton* theory would create a risk of jury confusion by "layer[ing] on yet another conspiracy inquiry"; and (4) the proposed instruction was not accompanied by an adequate showing of the evidence that established the prerequisites for *Pinkerton* liability. *Carcamo*, 2011 U.S. Dist. LEXIS 90504, at *9-*12.

None of the concerns identified in *Carcamo* is present here. First, the government timely notified the court and counsel of its intent to rely on a *Pinkerton* theory before trial, and not, as in *Carcamo*, at the tail end of a lengthy trial. Indeed, Young's counsel advised the court that defense counsel "appreciate[d]" the government's notice and that timeliness was "not [an] issue here." 2-ER-A284. Second, Young, with no citation to the record, says the government requested "a global [*Pinkerton*] instruction," Br. 64, when, in fact, the government repeatedly disavowed any such request, emphasized that it was "not going to say everyone is good for everything," 2-ER-A284; see also 2-ER-A280-281 (same), and limited its *Pinkerton* requests to some of the counts against some of the defendants, unlike the across-the-board request in *Carcamo*. Third, *Carcamo* expressed concern about the jury's ability to apply the *Pinkerton* doctrine because the indictment had charged three separate conspiracies. See *Carcamo*, 2011 U.S. Dist. LEXIS 90504, at *11. Here, by contrast, the *Pinkerton* theory was tethered to a single conspiracy count. 2-ER-A293. And fourth, in *Carcamo*, the government failed to provide "an adequate summary of proof for each *Pinkerton* element," 2011 U.S. Dist. LEXIS 90504, at *12, but here, the government, consistent with the court's order (2-ER-A295), provided the defendants and the court with a detailed list of the specific acts and defendants as to which it believed *Pinkerton* liability was appropriate. 38-ER-10673-10680.

c. The *Pinkerton* Instructions, Even If Erroneous, Were Harmless.

In any event, even if any of the *Pinkerton* instructions were erroneous, any error would have been harmless because the record makes clear, beyond a reasonable doubt, that Young and Gordon were guilty as principals. See *Nakai*, 413 F.3d at 1023 (erroneous *Pinkerton* instruction harmless when it is clear "beyond reasonable doubt that the jury convicted or would have convicted Nakai as either an aider and abettor or as a principal"); see also *United States* v. *Olano*, 62 F.3d 1180, 1199-1200 (9th Cir. 1995). As noted above, there was abundant evidence, both direct and circumstantial, establishing that Young and Gordon were principals in the shootings of Jelvon Helton and Patrick McCree; the *Pinkerton* instructions served as a legally-justified backstop to provide the jury with an alternative theory of liability if they viewed the evidence differently, but the evidence still convincingly established that Young and Gordon pulled the triggers in connection with the charges against them.

VI. The District Court Did Not Abuse Its Discretion In Denying Young's Motion For A Mistrial.

A. Background.

Count 22 of the indictment charged Young with attempting to entice and persuade a minor to engage in prostitution, in violation of 18 U.S.C. § 2422(b).

that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it." *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987). There is, therefore, "no reason to conclude the limiting instruction was insufficient." *United States* v. *Johnson*, 767 F.3d 815, 824 (9th Cir. 2014).

VII. Young's And Gordon's VICAR Offenses Are Predicate "Crimes Of Violence" Under Section 924(c)(3)(A)'s Elements Clause, But Young's Section 924(c) Conviction Is A Lesser-Included Offense Of His Section 924(j) Conviction.

Gordon argues (Br. 62-68) that his firearms conviction on Count 11 is infirm because it is predicated on a conspiracy to commit VICAR offenses, which do not have, as an element, the use of force within the meaning of 18 U.S.C. § 924(c)(3)(A). Young argues (Br. 102-106) that the VICAR offense of murder is not a predicate "crime of violence" supporting his firearms convictions on Count 19 and 20 because it can be committed recklessly, and thus does not categorically require the "use" of force. Young also asserts that (Br. 106-108) his convictions and sentences on Counts 19 and 20 violate double jeopardy.

A. Background.

Gordon was charged and convicted of three crimes stemming from his participation in the enterprise-related McCree shooting: attempted VICAR murder, VICAR assault with a dangerous weapon; and using a firearm during and in relation thereto. 40-ER-11283-11285. Young was charged and convicted of three crimes stemming from his participation in the enterprise-related Jelvon

Helton shooting: murder in aid of racketeering (Count 18), using and discharging a firearm during and in relation thereto (Count 19), and firearm murder (Count 20). 40-ER-11287-11289. Neither Young nor Gordon raised the arguments that they now press concerning their Section 924(c) convictions.

B. Standard of Review.

Neither Young nor Gordon argued below that the predicate offenses supporting their Section 924(c) convictions are not "crimes of violence." Nor did Young argue below that his convictions on Counts 19 and 20 violate double jeopardy. These forfeited claims are therefore reviewed for plain error. See Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 135 (2009).

C. Analysis.

1. The Charged VICAR Offenses Are Section 924(c) "Crimes Of Violence."

Federal law makes it a crime for "any person who, during and in relation to any crime of violence * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" includes a felony that "(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, involved 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). Subsections (A) and (B)

are known as the "elements" and "residual" clauses, respectively. See *United States* v. *Watson*, 881 F.3d 782, 784 (9th Cir. 2018) (per curiam). Since the Supreme Court held that Section 924(c)(3)(B) is unconstitutionally vague, see *United States* v. *Davis*, 139 S. Ct. 2319, 2336 (2019), an offense qualifies as a predicate "crime of violence" under Section 924(c) only if it satisfies Section 924(c)(3)(A)'s elements clause. See, *e.g.*, *United States* v. *Fultz*, 923 F.3d 1192, 1197 (9th Cir. 2019).

a. Counts 9 And 10 Charged Gordon With Substantive VICAR Offenses That Constitute "Crimes Of Violence" Under Section 924(c)(3)(A).

Gordon asserts that his conviction on Count 11 is infirm because Counts 9 and 10 charged him, not with the *substantive* VICAR crimes of assault and attempted murder, but with *conspiracy* to violate VICAR, Br. 65, and conspiracy offenses do not satisfy the elements clause of Section 924(c)(3)(A). Br. 62-64. Although Gordon may be correct that VICAR conspiracies would not satisfy Section 924(c)(3)(A), cf. *United States* v. *Brown*, 942 F.3d 1069, 1075-1076 (11th Cir. 2019) (conspiracy to commit Hobbs Act robbery does not satisfy Section 924(c)(3)(A)), this case does not present that issue: Gordon was not charged with agreeing to shoot McCree – he charged with shooting McCree. 40-ER-11283-11284; see also 37-ER-10258 (Gordon's sentencing memorandum states

he was convicted of "attempted murder in aid of racketeering" and "assault with a dangerous weapon in aid of racketeering").[21/]

Contrary to Gordon, the "others known and unknown" language in the indictment did not transform these substantive VICAR offenses into conspiracies. Instead, that language was included to reflect the fact that Gordon did not act alone. Nor is it relevant that the RICO conspiracy count charged Gordon's conduct underlying Counts 9 and 10 as a racketeering act, see 40-ER-11278 Over Act aa: charging a substantive crime as a racketeering act does not transform the substantive crime into a conspiracy.

b. VICAR Murder Is Categorically A "Crime Of Violence."

The VICAR statute proscribes certain violent crimes, one of which is "murder[] * * * in violation of the laws of any State or the United States" if committed for a specified prohibited purpose. 18 U.S.C. § 1959(a). The statute's broad and undifferentiated reference to "murder" reflects Congress'

[21/] The two cases Gordon cites (Br. 65-67) are inapposite as the indictments in those cases – unlike the indictment here – predicated the Section 924(c) offense on a conspiracy. See *United States* v. *Jones*, 935 F.3d 266, 269 (5th Cir. 2019) (per curiam) ("For each Section 924 offense, the indictment charged a * * * RICO conspiracy * * * as a predicate crime of violence, and a controlled-substance conspiracy * * * as a predicate drug trafficking crime."); *McCall* v. *United States*, 2019 WL 4675762, at *4 (E.D. Va. Sept. 25, 2019) (explaining that the underlying offenses "were clearly charged as substantive offenses and as conspiracy offenses").

intent to reach homicidal conduct that constitutes "'murder,' however defined" under the applicable law. See, *e.g.*, *United States* v. *Delgado*, 972 F.3d 63, 73 n.8 (2d Cir. 2020). Here, the applicable law is that of California. Under California law, murder is "the unlawful killing of a human being * * * with malice aforethought." Cal. Penal Code § 187(a). "Malice aforethought" may be express or implied. Express malice exists when there is "a deliberate intention to unlawfully take away * * * life," Cal. Penal Code § 188(a)(1), while implied malice exists "when the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188(a)(2). Murder that is "willful, deliberate, and premeditated" is first-degree murder, see Cal. Penal Code § 189(a), while all other murder is second-degree murder, see Cal. Penal Code § 189(b).

Young argues (Br. 102-105) that VICAR murder does not categorically (that is, in all cases) require the "use of physical force," and thus is not a predicate Section 924(c) "crime of violence." He contends that force is "used" only when it is applied intentionally, see *Castleman* v. *United States*, 572 U.S. 157, 170 (2014), but that VICAR murder encompasses all forms of murder, including second-degree murder, cf. *United States* v. *Jones*, 873 F.3d 482, 492 (5th Cir. 2017) (second-degree murder under Louisiana law violates VICAR), which, under California law, can be committed with an "abandoned and malignant heart" –

a state of mind tantamount to "wanton recklessness." *People* v. *Doyell*, 48 Cal. 85, 96 (1874); *People* v. *Watson*, 30 Cal.3d 290, 300-301, 637 P.2d 279, 285-286 (1981); see also Amanda Gamer, *Developments in California Homicide Law*, 36 Loy. L.A. L. Rev. 1425, 1425-1426 (2003) ("[M]alice is implied when the defendant's conduct is wanton and reckless and suggests an 'abandoned and malignant heart.'"). Because the statute can be violated unintentionally – that is, recklessly – he concludes that VICAR murder is not categorically a "crime of violence."

Although the record evidence shows that Young specifically intended to murder Jelvon Helton, "[u]nder the categorical approach, that is beside the point." *Pereida* v. *Wilkinson*, --- S. Ct. ---, 2021 WL 815351, at *5 (Mar. 4, 2021). The relevant inquiry focuses solely "on the elements, rather than the facts, of [the] crime." *Descamps* v. *United States*, 570 U.S. 254, 264 (2013); *United States* v. *Dominguez*, 954 F.3d 1251, 1259 (9th Cir. 2020) ("Under [the categorical] approach, the sole focus is on the elements of the relevant statutory offense, not on the facts underlying the convictions."). In the government's view, offenses that can be committed recklessly involve the "use" of force. See *United States* v. *Orona*, 923 F.3d 1197, 1199-1203 (2019) (discussing conflicting decisions on the issue), vacated on grant of reh'g en banc, 942 F.3d 1159 (2019), dismissed, 987 F.3d 892, 893 (9th Cir. 2021). The Supreme Court is currently considering this

issue in a case arising under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (ACCA). See Pet. Br. i, *United States* v. *Borden*, No. 19-5410 (filed Apr. 27, 2020). Although *Borden* is likely to inform the interpretation of Section 924(c)(3)(A)'s "similarly worded force clause," *Watson*, 881 F.3d at 784, this case does not require the Court to address this issue or wait for *Borden* because, as discussed below, Young's conviction on Count 19 should be vacated for the separate reason that it is a lesser-included offense of Count 20.

2. Young's Conviction On Count 19 For Violating Section 924(c) Is A Lesser-Included Offense Of His Conviction On Count 20 For Violating Section 924(j)(1).

Young argues that the district court's entry of judgment against him on Counts 19 and 20 subjected him to "multiple criminal punishments for the same offense," *Monge* v. *California*, 524 U.S. 721, 728 (1998), in violation of the Double Jeopardy Clause, because Count 19 (the Section 924(c) offense) is a lesser-included offense of Count 20 (the Section 924(j) offense). Br. 106-108; see generally *Currier* v. *Virginia*, 138 S. Ct. 2144, 2150 (2018) ("Historically, courts have treated greater and lesser-included offenses as the same 'offense' for double jeopardy purposes."). We agree that Section 924(c) is a lesser-included offense of Section 924(j)(1). See *United States* v. *Cruz-Ramirez*, 782 Fed. Appx. 531, 538 (9th Cir. July 19, 2019); see also *United States* v. *Palacios*, 982 F.3d 920, 924-926 (4th Cir. 2020). And because there is no indication that Congress intended to

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	Nos. 18-10228, consolidated
	)	with 18-10218, 18-10239
Plaintiff-Appellee	)	18-10248, 18-10258
	)	
	)	DC # 13-CR-764-WHO
v.	)	
	)	
JAQUAIN YOUNG, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WILLIAM H. ORRICK
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone (707) 789-0516
E-mail: sslubliner@comcast.net
Attorney for Defendant-Appellant
Jaquain Young

I. STATEMENT OF FACTS

The government incorrectly states that AW was the alleged victim in count 21. (AB 31-32, 166.)[1] It was the undercover officer, Julia Angalet. While the indictment did not name the victims in counts 21 and 22, it alleged that both offenses occurred from August 9, 2012 to March 11, 2013. (40 ER 11289.) This runs from Angalet's first contact with Young to his arrest. (10 ER 2238-2239, 2257, 2340-2358; 1 YSER 226-232.) The government's opening statement, closing argument, and other remarks show that Angalet was the focus of both counts. (3 ER 14-15, 67-74, 78, 34 ER 9448-9449.)

II. ARGUMENT

A. The District Court Violated Young's Sixth Amendment Right to Present a Defense and the Federal Rules of Evidence When it Refused to Admit Tierra Lewis's Prior Identification of Esau Ferdinand as the Killer of Jelvon Helton for its Truth Because it was Convinced she had Lied.

This was Young's first claim, but one would not know that from the answering brief. It is not listed in the Table of Contents. It appears neither under the headings "Rulings Under Review" nor "Summary of Argument." (AB 51-58.) It is only addressed in response to Young's second claim on the denial of severance. (AB 90-100.) It appears beneath the subheading, "The

[1] AB=Answering Brief; AOB=Appellant's Opening Brief; ER=Excerpts of Record in 43 volumes. YSER=Young's Supplemental Excerpts of Record in two volumes.

District Court Did Not Err in Denying the Renewed Motions to Sever at Trial," under the further subheading, "Young's Arguments Lack Merit." (AB 90.) Young disagrees.

The government does not contest that exhibit 779, the photo lineup showing Tierra Lewis's identification of Ferdinand as Helton's killer was admissible for its truth under Rule 801(d)(1)(C). (AB 93.) It does not defend the district court's belief that it had to "draw a difficult line between the convergence of two rules of evidence," the admissibility of Lewis's prior identification under Rule 801(d)(1)(C) and its inadmissibility as a prior inconsistent statement under Rule 801(d)(1)(A). (1 ER A32.) These subsections have independent significance. See *Johnson v. United States* 820 A.2d 551, 558-559 (D.C. App. 2003); *United States v. Parker*, 2020 U.S. Dist. LEXIS 114054 (Nor. Dist. Ill. June 29, 2020) (unpub.) at *8.

The government is wrong that Lewis's identification of Ferdinand to Inspector Cunningham could only come in as a prior inconsistent statement under Rule 801(d)(1)(A) to impeach the credibility of her recantation at trial. (AB 92.) A witness's testimony about a third party's out-of-court identification of someone as a perpetrator is admissible for its truth if that third party is available for cross-examination. *United States v. Elemy*, 656

F.2d 507, 508-509 (9th Cir. 1981). Once Lewis testified, the jury could consider Cunningham's testimony about Lewis's identification for its truth.

Lewis's identification of Ferdinand was not subject to exclusion under Rule 403 because the court did not believe Lewis. *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013). The truth or falsity of exculpatory evidence is for the jury. *Id.* at 963-964. The government's suggestion that the evidence was not excluded because the court did not believe it but because Lewis's recantation was so persuasive is hard to fathom. (AB 94-95.) The evidence did not exclude itself.

It also was not properly excluded as confusing or misleading. (1 ER A32, n. 17; AB 81-82, 93.) Evidence that will confuse or mislead under Rule 403 is evidence that leads to litigation on a collateral matter. *Douglas v. Anderson*, 656 F.2d 528, 535 (9th Cir. 1981); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980). Whether or not Ferdinand killed Helton was not collateral. Further, a court may not exclude exculpatory evidence as confusing because it does not believe it. *United States v. Evans*, *supra*, 728 F.3d at 965-966.

The government does not address *Evans* or Young's cases observing that Rule 801(d)(1)(C) was enacted to address recantations. (AOB 52-53.) The cases it cites are inapt. (AB 93-94.) See *United States v. Bradshaw*, 281

F.3d 278, 284 (1st Cir. 2002) (prejudicial coconspirator statements about tangential matters excluded under Rule 403); *McAlinney v. Marion Merrell Dow, Inc.*, 992 F.2d 839, 841-843 (8th Cir. 1993) (admissions on nine hours of garbled recordings excluded under Rule 403 where testifying witness did not deny substance of statements); *Aliotta v. AMTRAK*, 315 F.3d 756, 759-763 (7th Cir. 2003) (admissions of defendant employee excluded because his non-expert opinions on scientific matters violated Rule 701(c)'s exclusion of lay opinion on matters requiring expert testimony). This Court should hold that the district court misapplied the Rules of Evidence in excluding Lewis's identification of Ferdinand for its truth.

Citing *Nevada v. Jackson*, 569 U.S. 505, 509-512 (2013) and *Montana v. Egelhoff*, 518 U.S. 37, 45-55 (1996), where the defendants challenged rules of evidence as facially arbitrary, the government implies that an evidentiary ruling only unconstitutionally impairs a defense if the rule itself denies due process. (AB 95-96.) As explained in the opening brief, erroneous application of a valid rule violates the Constitution if the ruling involves "(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical element of the government's case." *United States v. Evans*, *supra*, 728 F.3d at 967. Accord, *United States v. Stever*, 603 F.3d 747, 755-757 (9th Cir. 2010). *Stever*, like this case, involved evidence of

third-party culpability. *Id.* at 756. The government neither discusses *Evans* and *Stever* nor explains why barring Young from creating reasonable doubt via Lewis's identification of Ferdinand did not deny Young due process and violate the Sixth Amendment.

The district court also violated Young's Sixth Amendment right to have counsel argue his defense to the jury. The government agrees that under *Herring v. New York*, 422 U.S. 853 (1975), a complete restriction on closing argument violates the Sixth Amendment right to assistance of counsel and that this Court has extended that rule to partial restrictions that impair argument on a valid defense theory. *Frost v. Van Boening*, 757 F.3d 910, 915-918 (9th Cir.) (*en banc*), rev'd on other grounds, *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014); *United States v. Brown*, 859 F.3d 730, 734-737 (9th Cir. 2017); *United States v. Smith-Baltiher*, 424 F.3d 913, 920-922 (9th Cir. 2005); *United States v. Miguel*, 338 F.3d 995, 1003 (9th Cir. 2003); *Conde v. Henry*, 198 F.3d 734, 739-741 (9th Cir. 1999). (AB 96-97.)

The government suggests Young's rights were not violated because he argued his theory that he did not kill Helton. (AB 97.) Young's defense was more than holes in the prosecution's case. A key part of creating reasonable doubt was Lewis's identification of Ferdinand.

The government suggests *Herring* error is not structural because the Supreme Court has only said so in two footnotes of its own opinions. (AB 98.) "[T]here is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). The Court knows what its opinions held. It meant what it said in its footnotes.

Focusing solely on *Frost* among Ninth Circuit cases holding partial *Herring* error structural, the government says Young "neglects to mention" that the Supreme Court reversed the judgment. (AB 99.) Young neglected nothing. In first citing *Frost*, Young noted that *Frost* had been reversed on other grounds in *Glebe*. (AOB 44.) The government neglects to mention that *Frost* was a federal habeas case in which relief could only be granted under AEDPA if the state court decision was unreasonable in light of clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1); *Glebe v. Frost*, *supra*, 574 U.S. at 23-24. Because the Court had never held that an unconstitutional *partial* restriction of summation was structural error, Frost could not get habeas relief on that basis. *Ibid*.

Nothing in *Glebe* undermines *Frost's* value as circuit precedent in this direct appeal nor the precedential value of the above-cited cases, *Brown*,

Smith-Baltiher, *Miguel*, and *Conde*[2], which also so held both before and, in the case of *Brown*, after the reversal in *Glebe*. Just as Young did, *Brown* cites *Frost's* holding on structural error and notes that the reversal in *Glebe* was "on other grounds[.]" *United States v. Brown*, *supra*, 859 F.3d at 737.

The government suggests this is all an idle exercise because the court gave a *Pinkerton* instruction on coconspirator liability.

> "[E]ven if the jury agreed that Ferdinand was the shooter, . . . Young's attempt to shift the blame to Ferdinand would not have absolved him of guilt; it merely would have shifted the theory of his culpability away from being a principal and to that of being vicariously liable for the acts of his coconspirator." (AB 91.)

This misstates the relevant burdens. "The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor." *Zafiro v. United States*, 506 U.S. 534, 543 (1993) (Stevens, J., concurring). The government did not prove that Ferdinand killed Helton.

Neither did Young. The Lewis evidence was not introduced to prove Ferdinand's guilt *beyond* a reasonable doubt and hand the government a conviction on an alternative theory that it had not endeavored to prove. It

[2] *Conde*, a habeas case, arose pre-AEDPA, so review was *de novo*. *Conde v. Henry*, *supra*, 198 F.3d at 738. It is also circuit precedent on this issue.

was introduced to *create* reasonable doubt in Young's favor. The district court's rulings denied him this opportunity. *Pinkerton* is irrelevant.

Despite insisting that harmless error review applies, the government makes no such argument. It "has failed to address prejudice in his answering brief, declining to advance any argument or identify any evidence to support a harmless error finding. [It] has therefore waived the argument." *Clem v. Lomelli*, 566 F.3d 1177, 1182 (9th Cir. 2009). Alternatively, for the reasons stated in the opening brief, the errors were not harmless.

B. Young's Convictions on Counts 1 and 18-20 Must be Reversed Because the District Court Refused to Sever Young's Case from Ferdinand's, Leading it to Make Prejudicially Erroneous Rulings Like the One in the Preceding Claim to Protect Ferdinand's Interests.

The government urged the district court to limit the use of Lewis's testimony to protect Ferdinand. (1 ER A134-135.) The court did so to protect Ferdinand. (1 ER A143-144.) Opposing Young's motion for new trial, the government argued that it was right to protect Ferdinand. (36 ER 9972-9973.) It now agrees that the court properly considered "prejudice to Ferdinand" (AB 93) and "the competing interests of Young and Ferdinand[.]" (AB 94.) It dismisses Ferdinand's claim of prejudice from the joint trial because the court protected him. (AB 103.)

If severance had been granted, there would have been no Ferdinand to protect. The government never suggests the court would have restricted Young's use of Lewis's testimony without Ferdinand to protect. This is why severance should have been granted.

The government focuses on whether there were completely antagonistic defenses. (AB 85-88.) This misses the mark. Mutually antagonistic defenses are but one example of circumstances requiring severance. As the government recognizes, (AB 84,) the overarching inquiry is whether "there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, *supra*, 506 U.S. at 539.

"[A] defendant might suffer prejudice [from denial of severance] if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Ibid*. "Manifest prejudice" to the defendant includes "violation of one of his substantive rights such as his right to present an individual defense." *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980). Accord, *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980).

The government does not dispute that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). In *Escalante*, this Court observed that prejudice from joint trials can often be dissipated by active trial management and limiting instructions. *United States v. Escalante*, *supra*, 637 F.2d at 1201-1202. Here, for all the reasons discussed in the previous claim, the district court's zealous management and limiting instruction violated Young's constitutional rights. The constitutional right to present an individual defense cannot be written off as a mere "competing interest." (AB 94.) Young and Ferdinand's trials should have been severed.

C. Young's Convictions on Counts 1 and 18-20 Must be Reversed Because the District Court Denied Young Due Process and Erred in Giving a *Pinkerton* Instruction on Co-conspirator Liability That Was Not Supported by the Evidence.

The government's own language undermines its argument: "*The government must prove* . . ." (AB 212.) As pointed out above, the government, not Young, bore the burden of convicting Young on a *Pinkerton* theory. *Zafiro v. United States*, *supra*, 506 U.S. at 543 (Stevens, J., concurring). The *Pinkerton* instruction was inappropriate because the government neither proved nor undertook to prove that Ferdinand killed Helton.

The government proved only that Ferdinand celebrated the murder. It did not attempt to prove beyond a reasonable doubt that Ferdinand shot Helton. That came in via Lewis to establish reasonable doubt for Young. The government did not argue that the jury could or should find beyond a reasonable doubt that Ferdinand killed Helton. It did not argue that Ferdinand's status as Helton's killer was further evidence of his CDP membership. (34 ER 9330-9336; 35 ER 9888-9900; 36 ER 9901-9902.)

Averring to *Pinkerton* generally in Young's case, the government argued that if *any* CDP member foreseeably killed Helton, Young would be guilty "even if he was never in the Gravity Bar." (34 ER 9447.)[3] In rebuttal, it argued that if Lewis's testimony caused it to harbor reasonable doubt about Young's guilt as the shooter, it should translate that into a beyond a reasonable doubt finding of guilt under *Pinkerton*. (36 ER 9913-9916.) The district court recognized that the government had not lived up to its promises to prove a case for *Pinkerton* liability, but it gave the instruction anyway. (2 ER A284; 32 ER 8840-8841.)

[3] The government emphasizes its restraint in not seeking an instruction that all the defendants were "good for everything" under *Pinkerton*. (AB 207.) Conceding the possibility that Young might not have been at the murder scene but still urging a conviction under *Pinkerton* sounds like Young should be "good for everything."

The district court should have followed *United States v. Carcamo*, 2011 U.S. Dist. LEXIS 90504 (N.D. Cal. 2011). There, the court refused to allow a *Pinkerton* instruction in another complex RICO conspiracy case because the perpetrator of a murder among a sea of potential "homies" and unindicted co-conspirators was not identified. *Id.* at *7. *Carcamo* cited *United States v. Houston*, 648 F.3d 806, 811 (9th Cir. 2011) and *United States v. Bingham*, 653 F.3d 983, 990 (9th Cir. 2011) as two cases in which the government affirmatively proved that co-conspirators committed the substantive crime. *Carcamo* at *11. Young cited these cases in the opening brief. (AOB 69.) The government itself cites *Bingham* and *United States v. Alvarez-Valenzuela*, 231 F.3d 1198 (9th Cir. 2000), another case Young cited, as good law on *Pinkerton* liability. (AB 91, 213.) It fails to acknowledge that in the cases it cited below, the government proved that co-conspirators had committed the crime on which the defendant had been convicted on a *Pinkerton* theory. (37 ER 10462-10466; AOB 68-69.)

Citing *United States v. Ruiz*, 462 F.3d 1082, 1088 (9th Cir. 2006) and *United States v. Ramos*, 147 F.3d 281, 287 (9th Cir. 1998), the government argues that it is not required to name the particular conspirator who committed a substantive offense before *Pinkerton* liability can attach. (AB 212.) Young agrees that, depending on the circumstances, a particular

perpetrator need not necessarily be named. However, before a *Pinkerton* instruction can be given, the government must have committed to proving beyond a reasonable doubt that a co-conspirator committed the substantive offense if the named defendant did not. *Ramos* and *Ruiz* bear this out.

In *Ramos*, the government proved that the named defendants rented two apartments for their drug business. They kept guns in the third-floor apartment, and a witness drug-buyer bought drugs in the other apartment in the presence of other unknown conspirators and, possibly, Ramos, all of whom had guns on the table. In this narrow universe, *Pinkerton* liability was appropriate. *United States v. Ramos*, *supra*, 147 F.3d at 285-286. Similarly, in *United States v. Gonzalez*, 906 F.3d 784 (9th Cir. 2018), which the government cites for instructional language, (AB 206,) the named defendant officers were charged with conspiring to deny a beating victim of his civil rights. The victim had been visiting a jail. *Id.* at 790. Unnamed officers were involved in the group beating and coverup. *Id.* at 792. There was no suggestion that the uncharged officers' names had been introduced at trial or needed to be. The government proved that those who did the beating were among the conspirators rather than inmates or unknown third parties in the wider world. The government proved no such case here. It did not even try.

Ruiz is an odd case for the government to rely on. There, the defendants' convictions for violating 18 U.S.C. § 924(c) by possessing firearms in furtherance of a drug crime was reversed. *United States v. Ruiz*, *supra*, 462 F.3d at 1090. Although *Ruiz* involved a drug manufacturing conspiracy in which firearm possession was foreseeable, the evidence failed to prove that either the defendants or any of the conspirators actually possessed the firearms as opposed to merely having had access to them. *Id.* at 1088-1089. This Court refused to "leap to [the] conclusion" suggested by the government that "somebody in that laboratory must have possessed the firearms[.]" *Id.* at 1089.

The government asked the jury and now asks this Court to leap to a similar conclusion, *i.e.*, that reasonable doubt in favor of a named defendant translates to *Pinkerton* liability because somebody in CDP must have killed Helton, despite the lack of competent proof by the government on that point. This Court should decline that invitation. It should hold that on this record, the instruction denied Young due process by confusing the jury about its duty to find facts underlying *Pinkerton* liability beyond a reasonable doubt. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

should not have admitted an undercover informant's notes of conversations because the payment he expected from the F.B.I. was a preexisting motive to fabricate). Marshall was not getting paid in cash, but he, too, expected valuable benefits.

The government also fails to explain how the *contents* of Marshall's notes rebutted any inference of tampering. The recordings were inaudible, so it cannot be said they were consistent with Marshall's testimony or that the notes were consistent with the recordings. The government seems to be backdooring its way to the district court's invalid rationale about whether Marshall would have thought it made sense to fabricate notes.

The error was prejudicial. No witness is entitled to "a false aura of veracity." *United States v. Portillo*, 633 F.2d 1313, 1322 (9th Cir. 1980). Though Marshall's credibility was thoroughly impeached, the notes bolstered him in the eyes of the jury even though they contained untrustworthy evidence full of biased comments and editorializing.

F. Young's Conviction on Count One Must be Reversed Because the District Court Gave a Defective Instruction Defining Liability for RICO Conspiracy.

Pursuant to Federal Rules of Appellate Procedure, Rule 28(i), Young again joins in and incorporates by reference the argument presented by codefendant Ferdinand in Appeal No. 18-10239 at pages 55-70 of his

opening brief. Young also joins the argument on this claim in Ferdinand's forthcoming reply brief.

The government insists that the challenged instruction was accurate and not fatally confusing. (AB 204-206.) This is bold given that it confused the jury in the second trial group in this case. (Ferdinand AOB at 65-66.) The government says nothing about this.

The instructional language cited by the government did not cure the problems with the challenged instruction. It contains the problematic phrases "agreed to participate in the enterprise" and "joined the conspiracy." (AB 202-203.) This language necessarily relates back to the challenged instruction, which defines "agreeing" and "joining" and which permits liability based on knowledge of the actions of others.

The third prong of the challenged instruction is particularly problematic. "[T]he defendant knowingly agreed that either the defendant or another person would be associated with the enterprise[.]" (Ferdinand AOB 57.) This describes, at best, an ephemeral connection. It is perilously close if not practically identical to instructional language on what *is not* joining a conspiracy. "[A] person does not become a conspirator merely by associating with one or more persons who are conspirators nor merely by knowing that a conspiracy exists." (33 ER 9256.) This Court should follow

United States v. Young, 720 Fed. Appx. 846 (9th Cir. 2017) and hold that the challenged instruction was plain error.

The government does not explain why any error could not have prejudiced Young on count one. (AB 202-206.) As stated in the opening brief, the record showed that Young did his own thing, legal or otherwise, and hung out with people in the neighborhood, some of whom were tied to CDP. (15 ER 3841-3844; 35 ER 9682-9683.) The most Johnnie Brown could muster up about Young was that nobody did anything with him anymore. (21 ER 5426-5430.) The Helton convictions must fall and cannot sustain the conviction on count one. The district court recognized that the government failed to connect Young's pimping to CDP. (1 ER A33.) The challenged instruction allowed the jury to convict Young on count one based only on his friendship and interactions with other people and any knowledge or tacit approval of *their* participation in CDP.

G. Young's Convictions on Counts 21 and 22 Must be Reversed Because the District Court Denied His Motion to Suppress Information Found on Cell Phones Seized in Violation of the Fourth Amendment.

The government does not dispute that if the phones should have been suppressed, reversal is required. It does not urge affirmance on grounds the district court did not reach. Its sole argument that the search was justified

K. Young is Entitled to a New Trial on All Counts Due to Cumulative Error.

The government incorrectly argues that the cumulative error doctrine does not apply because the district court did not commit multiple errors. (AB 261.) It does not argue that the cumulative effect of the claimed errors was harmless beyond a reasonable doubt. Thus, it has waived the point. *Clem v. Lomelli, supra*, 566 F.3d at 1182. Alternatively, this Court should find cumulative prejudice for the reasons previously stated. (AB 100-101.)

L. Young's Convictions on Counts 19 and 20 Must be Reversed Because the Record Does Not Prove Young was Convicted of an Underlying Crime of Violence.

1. Standard of Review

The government incorrectly argues that review is for plain error because this issue was not raised below. (AB 223.) Whether the judgment reflects a conviction of a predicate "crime of violence" to which charges under 18 U.S.C. § 924 (c)(1)(A) and 18 U.S.C. § 924(j)(1) may attach is reviewed *de novo* even if not raised below because it is strictly a legal question. *United States v. Begay*, 934 F.3d 1033, 1037-1038 (9th Cir. 2019).

2. Discussion

The government agrees that an offense qualifies as a "crime of violence" under 18 U.S.C. § 924(c) only if it satisfies the elements clause of section 924(c)(3)(A). (AB 224.) It does not dispute that both section 924(c)

(count 19) and 924(j) (count 20) require a predicate crime of violence to convict. It also does not dispute that VICAR murder (count 18) can be grounded in a conviction of second-degree murder. (AB 226-227.)

The government attributes to Young the argument that because second-degree VICAR murder can be committed recklessly, it is not categorically a crime of violence. (AB 226-227.) That is not just Young's idea. This Court has so held. *United States v. Begay*, *supra* 934 F.3d at 1038-1041. Because second-degree murder can be VICAR murder and because the government does not contend that it charged or the jury found first-degree murder, Young's convictions on counts 19 and 20 fail for want of a predicate crime.

The government is correct that guidance may come from *United States v. Borden*, Supreme Court No. 19-5410. Now, however, *Begay*, which the government ignores, is controlling law.[4] It dictates reversal.

The government suggests this Court need not await *Borden* or address this issue because it concedes that the conviction under section 924(c) on count 19 must be reversed because section 924(c) is a lesser-included offense of section 924(j). (Count 20.) (AB 227-228.) This ignores the fact

[4] As detailed in the government's letter of March 23, 2021 to the *Begay* panel, two cases other than *Borden* for which *Begay* rehearing proceedings had been holding have been dismissed because of the death of the separate defendants. See *United States v. Begay*, 9th Cir. No. 14-10080, dkt. 122.

that section 924(j) requires a predicate crime of violence. Because the judgment does not reflect a conviction for first-degree murder on count 18, the convictions and sentence on counts 19 and 20 must be reversed.

M. The District Court Erred by Entering Judgment Against Young on both the section 924(j) Charge and the Lesser-Included section 924(c) Charge.

The government concedes the merits of this claim. (AB 228-232.) Young agrees that if this Court does not invalidate both convictions under the preceding claim, the appropriate remedy is to vacate his conviction on count 19. *United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir. 2005); *United States v. Cruz-Ramirez*, 782 Fed. Appx. 531, 538 (9th Cir. 2019).

III. CONCLUSION

For the foregoing reasons, Young is entitled to a new trial, separate from any retrial of Ferdinand, on all charges. If this Court affirms Young's principal convictions, it should strike the judgment on counts 19 and 20 or, alternatively, strike the judgment on count 19.

Respectfully submitted,

Dated: May 5, 2021

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Defendant-Appellant
Jaquain Young

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ALFONZO WILLIAMS, et al. Defendants.	Case No. 3:13-cr-00764-WHO-1 **ORDER ON POST-TRIAL MOTIONS** Re: Dkt. Nos. 1760, 1780, 1781, 1782, 1784, 1787

INTRODUCTION

On June 1, 2018, I heard argument on motions for acquittal and new trial filed by the five defendants convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) in violation of 18 U.S.C. § 1962(d). Three of the defendants were also convicted of additional substantive counts. . The motions are DENIED for the reasons discussed below.

BACKGROUND

On August 14, 2014, the government filed the Second Superseding Indictment ("SSI"), which charged twenty-two counts against various defendants. Count One charges ten of eleven defendants with conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity under 18 U.S.C. § 1962(d),[1] and includes a special sentencing factor of conspiracy to commit murder. SSI ¶¶ 1–17; *id.* ¶ 64. Counts two, three, and four, brought against defendants Alfonzo Williams, Antonio Gilton, Barry Gilton, and Lupe Mercado, pertain to the June 2012 murder of Calvin Sneed. SSI ¶¶ 18–25. Count five charges Lupe Mercado with accessory after the fact related to the offenses charges in counts two, three, and four. SSI ¶¶ 26–

[1] Lupe Mercado is not charged with count one.

cross-examine Young's witnesses, which was "confusing, harmful, and overly prejudicial for the jury… ." Gordon's Mot. at 11. But Gordon offers no cases in support of his position, and he fails to convince me that I improperly denied the repeated requests to sever Young from the first trial group. Below, I address and reject Young's argument that the denial of his severance prevented him from presenting a full defense, and Ferdinand's argument that Young's strategy "damned" him. *See infra* section IV.A. My ruling had no effect on the trials of Gordon, Harding or Heard.

4. RICO Conspiracy Jury Instruction

Gordon cites to the Ninth Circuit's recent unpublished decision in *United States v. Young*, 720 F. App'x 846 (9th Cir. 2017), to argue that the RICO Conspiracy jury instruction "did not accurately state the culpability required for a criminal conviction under this statute."[11] Gordon's Mot. at 11. In *Young*, "[t]he district court instructed the jury that the government must prove that Young 'conspired and agreed' that he 'or a co-conspirator, would conduct or participate, either directly or indirectly, the conduct of the affairs of the enterprise through a pattern of racketeering activity.'" *Id*. at 849. The Ninth Circuit concluded that this instruction was "contrary to *Fernandez*," and therefore plainly erroneous because "they do not explain what the defendant, not a co-conspirator, needed to agree to do in order to be found criminally culpable as a conspirator." *Id*. at 850 (citing *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) (internal quotation marks omitted)). While *Young* is unpublished and lacks precedential value, I will consider the arguments Gordon raises.

I instructed, in part,

> In order for a defendant to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:
> First, the charged enterprise—which is CDP—was or would be

[11] The government's argument that this issue is unreviewable on appeal because none of the defendants "made this claim" during charging conferences is not well taken. *See* U.S. Response at 14. Neither the government, nor the defendants cited to *Young* in their proposed jury instructions, and I was unaware of the decision; thus, there is no basis for finding that defendants waived their right to challenge this instruction. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)("Waiver occurred in each of these cases because the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction."). As in *Perez*, defendants here forfeited—but did not waive— their challenge to this instruction because they failed to object, in which case the potential error is reviewed for plain error on appeal. *Id*. at 846.

established;
Second, the enterprise or its activities would affect interstate or foreign commerce;
Third, the defendant knowingly agreed that either the defendant or another person would be associated with the enterprise; and
Fourth, the defendant knowingly agreed that either he or another person would conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

Final Jury Instructions, Jury Instruction No. 28, Count 1: Racketeering Conspiracy—Elements (Dkt. No. 1768 at 32). Gordon initially focuses on this portion of the instruction enumerating the requisite elements. Only in Reply does he acknowledge the rest of the instruction:

> In order for you to convict a defendant of RICO conspiracy, the government must prove beyond a reasonable doubt that the defendant agreed to participate in the enterprise with the knowledge and intent that at least one member of the racketeering conspiracy would intentionally commit, or cause, or aid and abet the commission of, two or more racketeering acts. That one member could be the defendant himself, or another person. You must unanimously agree on at least two racketeering acts the defendant understood would be committed. The government is not required to prove that defendant personally committed, or agreed to personally commit, two or more racketeering acts.
>
> In order to find a defendant guilty of racketeering conspiracy, the government must prove beyond a reasonable doubt that the defendant joined the conspiracy knowing the conspiracy's purpose and intending to facilitate it. The defendant must also know the essential nature and scope of the enterprise.

Id. These last two sentences adequately "explain what a defendant, not a coconspirator needed to agree to do in order to be found criminally culpable as a coconspirator." *Young*, 720 F. App'x at 849–50.

Gordon insists that the "intending to facilitate it" language does not accurately encompass *Fernandez*'s mandate that "[a] defendant is guilty of conspiracy to violate RICO only if the evidence shows that the defendant knowingly and personally 'agreed to facilitate a scheme which includes the operation or management of a RICO enterprise.'" *Id.* at 850 (quoting *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004)). According to Gordon, "[o]ne's intent that a particular thing should occur is not the same as taking *action* to support or facilitate those who are operating the enterprise." Reply at 10. But a section 1962(d) violation does not require action, it requires agreement. *Salinas*, 522 U.S. at 65 ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it

suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion."); *see also Christensen*, 828 F.3d at 780 ("[A] RICO conspiracy under § 1962(d) requires only that the defendant was 'aware of the essential nature and scope of the enterprise and intended to participate in it.'")(quoting *Fernandez*, 388 F.3d at 1230). The RICO conspiracy charge adequately instructed the jury as to the mental culpability required to convict each defendant.

Even if the instruction was not erroneous, Gordon contends that a new trial is warranted because it was "fatally ambiguous." An ambiguous jury instruction may rise to the level of a due process violation if it allows the government to convict a defendant for an offense without proving every element of the offense. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* (internal quotation marks omitted). Gordon urges that "[t]he Court should act at this opportunity and juncture and correct the error by granting Mr. Gordon's motion for a new trial... ." Gordon Mot. at 13. I do not think that the instruction was ambiguous. Moreover, a motion for a new trial should only be granted under "exceptional circumstances in which the evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). Those circumstances do not exist here.

II. OTHER COUNTS AGAINST GORDON (COUNTS 9, 10, 11)

Gordon argues that the evidence at trial was insufficient to establish that the Patrick McCree shooting was "an act for purpose of gaining entrance to/maintain or increase position in CDP." Gordon's Mot. at 7. He highlights that "it was *never* established who the alleged second shooter was or whether that person had *any* connection to CDP." *Id.* (emphasis in original). He also emphasizes that it was this second shooter who actually shot McCree.

The government counters with evidence that the shooting was an orchestrated component of the gang rivalry between KOP and CDP. Specifically, it highlights McCree's connection to Levexier (through his presence at Levexier's mother's house the night Levexier was murdered, the

United States v. Inzunza, 638 F.3d 1006, 1021 (9th Cir. 2011)(rejecting *Bowie* claim where witness's "memory failure and pro-prosecution bias gave rise to credibility problems," but "the prosecution did seek out and find evidence to corroborate the testimony."); *United States v. Munoz*, 2009 WL 10700741, at *7 (C.D. Cal. Aug. 19, 2009) ("*Bowie* does not require that the government conduct an investigation simply because there are inconsistencies in a witness's pretrial statements.").

Defense counsel cross-examined JB for five days, repeatedly attacking his credibility on many matters, the City Shine robbery chief among them. The jury was able to evaluate the reliability of his testimony and clearly found him credible. Since Heard is unable to establish that either JB's or Darnell's testimony was "actually false," he cannot demonstrate that he is entitled to a new trial based on *Napue*.

IV. COUNTS AGAINST YOUNG

A. RICO Conspiracy (Count 1), VICAR Murder of Jelvon Helton and Related Counts (Counts 18, 19, 20)

As previously addressed on many occasions, I denied Young's motion to sever because his defense to the murder charge was not mutually exclusive to Ferdinand's defense. *See, e.g.*, Dkt. No. 1409. Young argues that he was prevented from presenting a complete defense to the RICO conspiracy and murder charges because I did not sever him from Ferdinand and because I limited his use of Tierra Lewis's prior inconsistent statements identifying Ferdinand as the shooter.

Two weeks after Jelvon Helton's murder in November 2010, Ms. Lewis went to the police station and relayed a story to Inspector Cunningham in which she was present at the Gravity Bar the night of the murder, and she saw Ferdinand pull out his gun and shoot Jelvon Helton. Ms. Lewis testified that she went to SFPD at the behest of Jelvon Helton's aunt, who wanted her to report that she knew who shot Jelvon. RT at 9034; RT at 9106–07. She also testified that everything she told Inspector Cunningham at SFPD was a lie, and she told Young's counsel when they met in October 2017 that she had been lying. RT at 9074–79; *see also* RT at 9102. Young

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aspect" were corroborated by other evidence. For instance, Heard was recorded on a July 16, 2008 wire intercept discussing a fight involving "Reg" (Elmore), and the possibility that he might sell jewelry back to the person he got it from.

chose to defend himself against the murder charge by relying on her initial police identification.

During Young's examination of Ms. Lewis, she testified that she was never at The Gravity Bar; she was in Walgreen's with her cousin, who received a phone call from Ferdinand saying to pick him up in East Bay. RT 9040–9044. In 2010, she told Inspector Cunningham that she saw someone named "Nut Cake" with Ferdinand that evening, and she knew him from the neighborhood. RT 9048:2–12. At trial, however, she testified that Ferdinand arrived in Oakland in a car with another individual that she identified as "[y]our client." RT at 9044–45. When Young pressed that she had not previously relayed this information to SFPD or the defense investigator, she responded, "It's not my fault that at that time when y'all showed me a picture of your client I didn't know who he was because y'all showed me an old picture, and when I got here, I know him." RT at 9045–46. She claimed that she had seen him "[t]wo--two minutes, the longest[,]" and had never seen him previously.[13] RT 9047:15–9048:1.

As she testified, her "anger," as Young calls it, *see* Mot. at 7, was palpable. He urges that this anger stemmed from her fear at having to testify in a proceeding with Ferdinand present; there are other possibilities.[14] She expressed frustration because Young's counsel "never called back[,]" she suggested that he "didn't care about [her] health issue[,]" and repeated that her November 2010 statements were not true. RT 9062–64.

Ms. Lewis's story changed dramatically between 2010 when she went to SFPD and 2018, when she took the stand. But not all of it was a surprise to Young. In 2017, Ms. Lewis relayed to

[13] She later testified that she "remember his face from growing up in the neighborhood." RT at 9072:20–21. And still later, that "[h]e had his back turned" in reference to seeing Young in the car with Ferdinand when she went with her cousin to meet Ferdinand in the East Bay. RT at 9107:24–9108:5. The jury heard this conflicting testimony, and it saw the photographs of Young that she claimed were too old for her to recognize him.

[14] Young spends much time discussing Ms. Lewis's reluctance to testify at trial, and specifically, at a trial with Ferdinand present. Young's Mot. at 6–7. I had to issue an order authorizing her arrest for her to comply with the subpoena to appear. RT at 9023:13–16. She admitted to being "upset" and having "no choice" about testifying. RT at 9023:11–12, 9054:2–4, 9064:17–23, 9086:12–13. The jury heard this testimony, and it saw the threatening text messages that she received the day after she reported to police that Ferdinand shot Helton. *See* Ex. 783. But it also heard her explain that "[t]hese messages don't have nothing to do with this." RT 9025:8. She testified that the messages were related to a murder investigation involving her cousin and that they had no connection to Ferdinand. RT 9100. The jury had the opportunity to examine Ms. Lewis on the witness stand, listen to her testimony, and decide which version of events to believe.

Young's investigator that she would deny her 2010 statement and that she "was going to tell the truth." RT 9052:12–22; *see also* RT 9054 (relaying to Young's defense team in November 2017 that part of the November 2010 story was a lie); RT 9057 (reiterating in February 2018 that she was not at the Gravity Bar in November 2010). Armed with this knowledge, Young proceeded to call Ms. Lewis to testify at trial. Yet he argues that the presentation of her testimony at a trial with Ferdinand severely prejudiced him.

In his motion for a new trial, Young does not explicitly argue that his defense was mutually exclusive to Ferdinand's, which was the basis for his initial severance motion. This is because his defense was not mutually exclusive. "Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other." *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991). First, Ferdinand was not charged with the crime at all, so Young's acquittal "would not necessarily call for the conviction of the other." Second, Young knew that the jury would be instructed on *Pinkerton* liability, so even if the jury believed that Ferdinand shot Helton, other evidence would allow it to convict Young of the crime under *Pinkerton*. Young contends that in the absence of insight into the basis for the jury's decision to convict him for the Jelvon Helton murder, there are no grounds to find any error harmless due to *Pinkerton*. I disagree. Under these circumstances, Young's defense was not mutually exclusive with Ferdinand's, and their joinder was not so prejudicial that the interest of justice requires a new trial. *See Pimentel*, 654 F.2d at 545 (noting that a motion for a new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'").[15]

As for my evidentiary rulings, Young takes particular issue with exhibit 779, the six-pack photo lineup in which Ms. Lewis circled Ferdinand's photo and identified him as the person who

[15] Ferdinand's claim that he was prejudiced by Young's defense also lacks merit. I previously held that "the defenses of Young and Ferdinand to the Jelvon Helton murder are antagonistic but not mutually exclusive because of the number of people at the bar and the fact that Ferdinand is not charged with the murder … and the murder is only part, albeit an important part, of the evidence of RICO conspiracy put on by the government." Dkt. No. 1409. In short, the situation "d[id] not amount to the type of manifest prejudice that requires severance." *Id*. As with Young, nothing that occurred at trial alters my analysis or conclusion.

shot "Poo bear," the nickname of Jelvon Helton.[16] Young insists that the out of court identification was not hearsay and should have been admitted for its truth. Under Federal Rule of Evidence 801(d)(1)(C), a declarant-witness's prior statement identifying a person as someone the declarant perceived earlier is not hearsay. But Ms. Lewis repeatedly testified that she was not telling the truth in this written statement and her statements to the inspectors during the interview and that she had falsely accused Ferdinand of committing murder. RT at 9075, 9103–04. I admitted exhibit 779 into evidence unredacted and allowed Young to publish it to the jury. RT at 9087. But given Ms. Lewis's unequivocal testimony that she had been lying, I did not permit Young to argue the truth of the matter asserted in that prior identification. This ruling reflected an attempt to draw a difficult line between the convergence of two rules of evidence—on one hand, the prior identification was admissible as non-hearsay; on the other, the prior inconsistent statement was hearsay because it did not meet the prerequisites of Rule 801(d)(1)(A). I therefore admitted the exhibit into evidence, allowed it to be published to the jury, but limited Young's ability to argue the truth of the prior inconsistent statements contained in the exhibit. To the extent that this delicate balance reflected any error, it did not rise to the level in which the interest of justice requires a new trial.[17]

B. Counts 21 and 22 and Evidence Related to Prior Acts of Pimping

Young argues that the denial of his motions to exclude the testimony of three women he allegedly prostituted more than 15 years ago unfairly prejudiced him. Mot. at 13. In the SSI, the government alleged that Young and other members of CDP "agreed … to engage in pimping, including the pimping of minors… ." SSI ¶ 14. When I denied Young's motions to exclude the testimony of these three witnesses (Omnibus Order on Mots. in Limine at 17), I hinged those

[16] In the recorded police interview, Ms. Lewis indicates that she saw Esau "pull out his gun" and "kill Pooh bear." The officer asked her to circle his picture and write out what she saw this person do and who it is. She then wrote, "Number 3 pull out hes [sic] gun & killed Poo Bear Nov 2, 2010 = Esauce – kid." She circled Ferdinand's photograph.

[17] If this ruling was in error, I still would have excluded it under a Federal Rule of Evidence 403 analysis. Young disparages this as a "post hoc rationalization." While I may not have articulated this at the time, I was concerned about the threat of misleading and confusing the jury with this evidence.

Ismail Ramsey (CSB 189820)
izzy@ramsey-ehrlich.com
Amy E. Craig (CSB 269339)
amy@ramsey-ehrlich.com
RAMSEY & EHRLICH LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 548-3600
(510) 291-3060 fax

Attorneys for Defendant Jaquain Young

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES, Plaintiff; vs. JAQUAIN YOUNG, Defendant.	Case No.: CR-13-00764 WHO **DEFENDANT JAQUAIN YOUNG'S MOTION FOR JUDGMENT OF ACQUITTAL [RULE 29]; MOTION FOR A NEW TRIAL [RULE 33]; and JOINDER** Hearing Date: June 1, 2018 Time: 1:00 pm Judge: William H. Orrick

Introduction

Defendant Jaquain Young moves the Court under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on Count One. At the close of trial, the jury found Mr. Young guilty of Count One, being a member of a Racketeering Enterprise whose purpose was murder. But the government failed to offer evidence at trial sufficient to prove that Mr. Young was guilty beyond a reasonable doubt of this count. Essential to a finding of a conspiracy is that the defendant agreed with the other alleged members to join the RICO conspiracy. Here, the government failed to present any evidence to the jury that Mr. Young entered into any such agreement with anyone else. As a result, this Court should set aside the verdict and enter a judgment of acquittal

for Mr. Young on Count One. In the alternative, the Court should grant Mr. Young a new trial under Federal Rule of Criminal Procedure 33 for Count One.

Mr. Young also moves the Court for a new trial under Federal Rule of Criminal Procedure 33 due to the Court's 1) failure to sever Mr. Young's trial from that of his co-defendant Esau Ferdinand; 2) refusal to allow Mr. Young to present Tierra Lewis's identification of Esau Ferdinand as the individual who shot Jelvon Helton for the truth of the matter asserted; and 3) decision to allow the introduction of prior bad acts testimony untethered to the charged RICO conspiracy. Each of these holdings prejudiced Mr. Young both with respect to the substantive counts and the overlying RICO conspiracy charge, and prevented him from fully defending the charges against him. Accordingly, the Court should grant Mr. Young a new trial for Counts 1, 18, 19, 20, and 22.

Legal Standard

A. Federal Rule of Criminal Procedure 29

Federal Rule of Criminal Procedure 29 provides that the court may set aside a jury verdict of guilty and enter an acquittal. Fed R. Crim. P. 29(c).[1] Indeed, upon a defendant's motion, the court "**must** enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a) (emphasis added).

A Rule 29 motion is essentially a challenge to the sufficiency of the evidence. "In ruling on a Rule 29 motion, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002) (quoting *United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072-1073 (9th Cir.1995)).

[1] The parties agreed by stipulation to extend the deadline for defendants to file their Rule 29 and Rule 33 motions to April 16, 2018. The Court issued an order approving the stipulation. Dkt. #1775.

In short, the government fell far short of providing any evidence that Mr. Young knowingly and intentionally agreed to join a conspiracy that included murder. Accordingly, the Court should grant Mr. Young a judgment of acquittal on Count One under Rule 29, or in the alternative, grant a new trial under Rule 33.

II. Mr. Young Was Prohibited from Presenting A Complete Defense to the Murder Charges Against Him

A. The Court's refusal to sever Mr. Young's trial from that of his co-defendant Esau Ferdinand significantly prejudiced Mr. Young.

Prior to, and throughout the course of, the trial, Mr. Young moved the court to sever his trial from that of his co-defendant Esau Ferdinand. *See, e.g.*, Dkt. # 1311; 1366; Transcript Vol. 46 at 8084:1-4; Vol. 49 at 8856:20 -8857:22; Vol. 50 at 8981. The Court repeatedly denied his motion for severance. *See, e.g.*, Dkt. 1409 at 2. The Court's decision to try Mr. Young with Mr. Ferdinand significantly prejudiced Mr. Young and ultimately deprived him of a fair trial.

As Mr. Young predicated in his motion for severance, the inclusion of Mr. Ferdinand had a significant impact on the testimony of Tierra Lewis, the woman who identified Mr. Ferdinand as the shooter of Jelvon Helton two weeks after Mr. Helton's murder. Prior to trial, Ms. Lewis indicated that she would be more comfortable testifying for Mr. Young's defense if Mr. Ferdinand was not in the courtroom. *See* Declaration of Jake Bergman, dated September 13, 2017, filed under seal with Mr. Young's motion to sever (Dkt. #1311). However, given the Court's decision to try Mr. Young with Mr. Ferdinand, Ms. Lewis was called to testify in open court with Mr. Ferdinand in attendance. Faced with this prospect, Ms. Lewis greatly resisted testifying. She only appeared in court after the Court issued an arrest warrant for her. And even then she obtained counsel through whom she asserted her Fifth Amendment right not to testify on the grounds that doing so could lead to charges of accessory to murder. Transcript, Vol. 49 at 8770:4-11. As a result, Mr. Young sought immunity for Ms. Lewis in order to secure her testimony. *See, e.g.*, Dkt. #1719. The government ultimately immunized Ms. Lewis clearing the way for her testimony. Transcript Vol. 51 at 9021:3-12.

When Ms. Lewis finally testified she admitted that she was "upset" about having been served a subpoena and "upset" that a warrant was issued for her arrest. Vol. 51 at 9054:2-4, 9064:17-23. She testified that she did not want to testify, but was given "no choice." Vol. 51 at 9023:11-12, 9086:12-13. She also confirmed that she was beaten and received text messages threatening the lives of her children in 2010, the day after she identified Mr. Ferdinand to the police as the person who shot and killed Jelvon Helton. Vol. 51 at 9025:1-12, 19-22, 9026:2-7, 9085:11-9086:11.

Ms. Lewis's anger and fear manifested in her testimony. She recanted her prior testimony that she saw Mr. Ferdinand shoot and kill Mr. Helton. Vol. 51 at 9076:24-25, 9077:1-2. She also claimed, for the first time, that she saw Mr. Young with Mr. Ferdinand in Emeryville on the night of the murder of Jelvon Helton. Vol. 51 at 9044:18-25, 9045:1-5. In short, the court's decision to try Mr. Young and Mr. Ferdinand together deprived Mr. Young of the opportunity to have the jury hear Ms. Lewis's trial testimony without that testimony being impacted by the presence in the courtroom of the man Ms. Lewis told the police shot and killed Jelvon Helton.

Further, the inclusion of Mr. Ferdinand in Mr. Young's trial unfairly subjected Mr. Young's defense to two opponents: the federal prosecutors and Mr. Ferdinand's counsel. The antagonistic nature of Mr. Young's and Mr. Ferdinand's defenses was most acute with respect to Ms. Lewis's identification of Mr. Ferdinand as the person who shot and killed Jelvon Helton. At trial, both the government and Mr. Ferdinand vigorously fought to prevent Mr. Young from presenting Ms. Lewis's identification, two weeks after the murder, of Mr. Ferdinand as the shooter. In Mr. Ferdinand's closing argument he twice criticized Mr. Young efforts to introduce Ms. Lewis's prior identification. Transcript Vol. 55 at 9755:18-21. The prejudice to Mr. Young from these dual attacks was significant, particularly given the Court's refusal to allow Mr. Young to introduce Ms. Lewis's identification for the truth of the matter asserted. As described below, in yielding to the government's and Mr. Ferdinand's efforts to keep Mr. Young from arguing the

truth of Ms. Lewis's identification of Esau Ferdinand as the individual who shot and killed Jelvon Helton to the jury was in error and significantly prejudiced Mr. Young.

In its denial of Mr. Young's motion for severance from Mr. Ferdinand, the Court acknowledged "the defenses of Young and Ferdinand to the Jelvon Helton murder are antagonistic . . . ," but nevertheless held that "jury instructions can protect against evidence introduced concerning Ferdinand being applied to claims against Young." Dkt. 1409 at 2, paragraph 2. Yet despite its earlier pronouncement, at trial the Court heeded Mr. Ferdinand's cries to prevent Mr. Young from presenting his antagonistic defense, namely, the fact that Ms. Lewis identified Esau Ferdinand as the person who shot and killed Jelvon Helton.

As described above, Mr. Young went to great lengths to introduce Ms. Lewis's testimony at trial. The key import of Ms. Lewis's testimony, as Mr. Young set forth in multiple motions in advance of her testimony, including his motion for severance, was her identification of Mr. Ferdinand, not Mr. Young, as the person who shot Jelvon Helton. *See e.g.*, Dkt. 1311; *see also* Dkt. #1719. But after Ms. Lewis testified on the stand, the Court prevented Mr. Young from introducing and arguing her prior identification of Mr. Ferdinand for the truth of the matter asserted. Vol. 54, Transcript at 9380:11-22. Rather, the Court explicitly instructed the jury to disregard the defense. At Mr. Ferdinand's urging, the Court during Mr. Young's closing argument repeatedly instructed the jury that it must not consider Ms. Lewis's identification for the truth of the matter asserted. *See e.g.*, Transcript Vol. 55 at 9649:20-9650:5; 9650:13-15; 9654:21-9655:1; 9656:20-23; 9657:4-5; 9658:9-18; 9659:3-13. The Court's ruling was in error.

At Mr. Ferdinand's and the government's urging, the Court erroneously held that Ms. Lewis's prior identification of Mr. Ferdinand as the shooter constituted hearsay. *See* Trial Transcript Vol. 54, 9364:4 through 9384:14. But that holding runs counter the Federal Rules of Evidence.

Federal Rule of Evidence 801(d)(1)(C) expressly provides that out of court identifications are **not hearsay** as long as "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement: … (C) Identifies a person as someone the declarant perceived

earlier." *See also United States v. Owens*, 484 U.S. 554, 562 (1988) (acknowledging that out-of-court identifications are admissible for their substantive truth). It is indisputable that Ms. Lewis's prior identification of Mr. Ferdinand met these requirements: 1) Ms. Lewis testified and was subject to cross examination about her prior statements to police the shooter at Gravity Bar and 2) in her statement on November 17, 2010, Ms. Lewis identified the person she "perceived earlier" shoot and kill Jelvon Helton, also known as Pooh Bear. The recording of Ms. Lewis's statement to the police on November 17, 2010 bears this out. Throughout that interview Ms. Lewis identified Esau Ferdinand as the individual she witnessed shooting Jelvon Helton two weeks earlier:

> TIERRA LEWIS: Nothing. We said hi, and I turned my back, I heard a gunshot, then I turned around.
>
> INSPECTOR CUNNINGHAM: **What did you see?**
>
> TIERRA LEWIS: Pooh Bear was on the floor. And he just kept shooting him. And I was just in a state of shock, like - -
>
> INSPECTOR CUNNINGHAM: And when you say he, who are you talking about?
>
> TIERRA LEWIS: Esau.
>
> INSPECTOR CUNNINGHAM: The person you know as Kid. You call him Kid, correct?
>
> TIERRA LEWIS: Uh-huh.
>
> INSPECTOR CUNNINGHAM: **Did you see** anybody else shooting at him?
>
> TIERRA LEWIS: No.
>
> INSPECTOR MARTIN: When you said he kept shooting him, Pooh Bear, was Pooh Bear on the ground?
>
> TIERRA LEWIS: Uh-huh.
>
> INSPECTOR MARTIN: Was he standing over him and shooting him some more?
>
> TIERRA LEWIS: Uh-huh.
>
> INSPECTOR MARTIN: How many times do you think he shot him as Pooh Bear lay on the ground?
>
> TIERRA LEWIS: He shot him once, Pooh Bear fell. He shot him once, Pooh Bear fell, and then the rest of the shots, I say like ten times. I counted ten.

> . . . .
> INSPECTOR MARTIN: And you said – excuse me, Tierra. **You saw him** pull the gun out?
>
> TIERRA LEWIS: Uh-huh.
>
> INSPECTOR MARTIN: Okay. And where did he – where did Ferdinand pull the gun out from?
>
> TIERRA LEWIS: From under his waistband.
>
> INSPECTOR MARTIN: Okay. So you're indicating his waistband.
>
> TIERRA LEWIS: Uh-huh.
>
> INSPECTOR MARTIN: He pulled it out with his right hand?
>
> TIERRA LEWIS: With his right hand.
>
> . . . .
> INSPECTOR CUNNINGHAM: Okay. So – but you have not doubt **about what you saw?**
>
> TIERRA LEWIS: I don't have no doubt.
>
> . . . .
> INSPECTOR CUNNINGHAM: Right. Now, today's date is the 17th of November. This incident happened a little over two weeks ago. And you're totally positive **that you saw what you saw** even though you told me you had a little bit to drink.
>
> TIERRA LEWIS: Uh-huh.

Recording and Transcript of Tierra Lewis's Statement to Police on November 17, 2010, attached as Exhibit A to Declaration of Amy Craig in support of this motion, at WTR-0529:12-WTR-0545:2 (emphasis added).

At the end of the recorded interview, the police also asked Ms. Lewis to review a six-person photo-spread line-up and asked her to identify the person she witnessed shooting Jelvon Helton (aka Pooh Bear) on the night of November 1, 2010. Again, Ms. Lewis identified the shooter of Jelvon Helton two weeks earlier, picking Esau Ferdinand:

> INSPECTOR MARTIN: Okay. So just all we need to do, if you understand that, just sign your name there. Okay. And then we're going to show you a group of photographs, **see if you can identify anybody.**
>
> Oh. Okay. You pointed to number 3. Who is number 3?

TIERRA LEWIS: Esau.

INSPECTOR MARTIN: Huh?

TIERRA LEWIS: Esau.

INSPECTOR MARTIN: Esau?

TIERRA LEWIS: Uh-huh.

INSPECTOR CUNNINGHAM: Esau.

INSPECTOR MARTIN: And that's the person –

INSPECTOR CUNNINGHAM: Esau.

INSPECTOR MARTIN: -- **you saw this person do what**?

TIERRA LEWIS: Pull out his gun.

INSPECTOR MARTIN: Pull out a gun and do what?

TIERRA LEWIS: Kill Pooh Bear.

. . . .

INSPECTOR CUNNINGHAM: Is this the person -- is this the same person you saw - -

TIERRA LEWIS: Uh-huh.

INSPECTOR CUNNINGHAM: -- in close proximity, shot at him one time, and then when he went to the ground, he fired on him numerous other times?

TIERRA LEWIS: Uh-huh.

INSPECTOR MARTIN: Okay. So what we're going to do is, why don't you just circle his picture and then write out **what you saw this person do and who it is**.

[Tierra Lewis then wrote, "Number 3 pull out hes [sic] gun & killed Poo Bear Nov 2, 2010 = Esauce - kid" on the photo line-up in which she circled the photograph of Esau Ferdinand.]

Id. WTR-0561:9-WTR-0563 (emphasis added); Trial Exhibit 779.

Despite its earlier holding that expressly recognized that Mr. Young's defense would be antagonistic to Mr. Ferdinand, the court precluded Mr. Young from substantively introducing

this evidence of Ms. Lewis's prior identifications of Mr. Ferdinand as the person she perceived shooting Jelvon Helton. Instead, the Court declared those identifications as "hearsay.":

> THE COURT: So for [Exhibit] 779, you can argue, I think, that when Inspector Cunningham showed her the six-pack, that she circled Mr. Ferdinand's photo. The exhibit has the statement that it has, and you can argue that she never identified Mr. Young, but you just can't argue the truth of the identification of Mr. Ferdinand as the shooter. So that's a fact -- you have 779 in evidence, it's there, but you can't argue further from that.
>
> MR. RAMSEY: I can't. So 779 is considered to be hearsay?
>
> THE COURT: It is -- I guess it is considered to be hearsay in light of the circumstances of this case.

Vol. 54 Transcript at 9380:11-22.

As a result, Mr. Young was allowed to introduce only Exhibit 779, the photograph line-up in which Ms. Lewis identified Mr. Ferdinand as described above. But despite allowing Mr. Young to introduce that exhibit, the Court prohibited Mr. Young from arguing the truth of Ms. Lewis's photo identification of Mr. Ferdinand as the shooter and allowed it only for the purpose of questioning the integrity of the police investigation into the murder. *Id*. The Court also prohibited Mr. Young from introducing evidence that supported the veracity of Ms. Lewis's identification. *See,. e.g.*, Vol. 46 at 8082-8084; Vol. 55 at 9659:14-9661:19 (Court granting Mr. Ferdinand's objection and thereby preventing Mr. Ramsey from highlighting for the jury evidence that corroborated Tierra Lewis's identification). The unfairness of this ruling was compounded by the fact that both the government and Mr. Ferdinand were permitted to attack Ms. Lewis's credibility in their closing arguments, while Mr. Young was expressly prohibited from introducing evidence that supported Ms. Lewis's identification. *Id*.; Vol. 56 at 9909:16-9911:20 (government attacking Ms. Lewis's credibility in its rebuttal argument); Vol 55 at 9756:12-19 (Mr. Ferdinand attacking Ms. Lewis's credibility).

Further, at Mr. Ferdinand's urging, the Court interrupted Mr. Young's closing argument at least seven times to reiterate to the jury that it was barred from considering Ms. Lewis's identification of Mr. Ferdinand in the photo line-up as the shooter for the truth of the matter asserted, namely that someone else, not Mr. Young, killed Jelvon Helton. *See e.g.*, Transcript

Vol. 55 at 9649:20-9650:5; 9650:13-15; 9654:21-9655:1; 9656:20-23; 9657:4-5; 9658:9-18; 9659:3-13.

The jury ultimately convicted Mr. Young of the murder of Jelvon Helton.

The court's erroneous ruling deprived Mr. Young of his ability to fully defend the charges against him. It was the very heart of his defense—that he didn't do it, someone else did. He thus was deprived of his right to a fair trial with respect to the charges stemming from the murder of Jelvon Helton, Counts 18, 19, and 20. This error also infected the jury's evaluation of Mr. Young's culpability with respect to Count One, the RICO conspiracy. The murder of Jelvon Helton at the Gravity Bar was the only conduct in which Mr. Young was alleged to have engaged out of a desire "to maintain or increase" his position in CDP. Other than its allegations that Mr. Young shot and killed Jelvon Helton, the government produced no evidence that Mr. Young engaged in any other illicit activity with any other members of CDP. Therefore, the prejudice that resulted from the Court's refusal to allow Mr. Young to fully defend the charge that he shot and killed Jelvon Helton equally prejudiced him with respect to the jury's evaluation of the RICO conspiracy charge.

In light of the prejudicial impact of the Court's erroneous ruling, the Court should exercise its discretion to order a new trial for Mr. Young with respect to Counts 1, 18, 19 and 20.

III. The Court's Denial of Mr. Young's Motions to Exclude the Testimony of Women Mr. Young was Alleged to Have Prostituted More than Fifteen Years Ago Unfairly Prejudiced Mr. Young and Warrants a New Trial

At trial, the government presented the testimony of multiple women it alleged Mr. Young prostituted in the past, including: AW, CW, and TW.[5] Mr. Young moved to exclude the testimony of each of these witnesses on the ground that the prejudicial nature of their testimony far outweighed its limited probative value given that Mr. Young did not stand charged of

[5] The government has stated that some of these witnesses would prefer their names not be in public filings. In consideration of that request, Mr. Young refers to these women by their initials. For avoidance of doubt, these witnesses testified at trial on the following dates: November 28, 2017, December 6, 2017, and January 31, 2018.

LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
email: sslubliner@comcast.net

June 14, 2021

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Jaquain Young, et al*, 18-10228: Rule 28(j) Letter

Dear Ms. Dwyer,

This letter discusses *Borden v. United States*, 2021 U.S. LEXIS 2990 (June 10, 2021), decided after Young's reply brief. *Borden* bears on whether Young's convictions under 18 U.S.C. §§ 924(c) and (j) (counts 19 and 20) must be reversed because the predicate homicide was not a "crime of violence." *See* Opening Brief at 102-105; Reply Brief at 29-31.

Borden held that "violent felony" in the Armed Career Criminal Act, defined in 18 U.S.C. § 924(e)(2)(B)(i) as "the use, attempted use, or threatened use of physical force against the person of another," does not include reckless conduct. This holding applies equally to "crime of violence" in 18 U.S.C. § 924(c)(3)(A), which is defined nearly identically as "the use, attempted use, or threatened use of physical force against the person or property of another."

Citing *United States v. Begay*, 934 F.3d 1033, 1038-1041 (9th Cir. 2019) and other cases, Young argued that because VICAR murder can be second-degree murder, which can be committed recklessly, the government failed to prove a predicate crime of violence because it did not convict

Young of first-degree murder. The government's rehearing petition in *Begay* has been held pending *Borden*. *See Begay*, 9th Cir. No. 14-10080, dkt. 122. *Borden* did not address whether the definition at issue included the extreme recklessness that was at issue in *Begay*. *Borden*, 2021 U.S. LEXIS at *15 n.4; *Begay*, 934 F.3d at 1040. Nonetheless, *Begay* remains binding because *Borden's* rationale is consistent with it.

The four-justice plurality held that "[t]he 'against' phrase indeed sets out a *mens rea* requirement—of purposeful or knowing conduct." *Borden*, 2021 U.S. LEXIS at *22. It "excludes conduct, like recklessness, that is not directed or targeted at another." *Id.* at *35. Justice Thomas based his concurrence on the phrase "use of physical force," which "has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at *38 (Thomas, J., concurring in the judgment). As *Begay* made clear, even acts of extreme recklessness are not designed to cause harm. "Reckless conduct, no matter how extreme, is not intentional." *Begay*, 934 F.3d at 1040.

Very truly yours,

s/Steven S. Lubliner

LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
email: sslubliner@comcast.net

October 5, 2021

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Jaquain Young, et al*, 18-10228; Consolidated with 18-10218, 18-10239, 18-10248, & 18-10258. Oral Argument Scheduled October 19, 2021: Rule 28(j) Letter

Dear Ms. Dwyer,

This letter discusses *United States v. Mejia-Quintanilla*, 2021 U.S. App. LEXIS 26077 (9th Cir. August 30, 2021), amended by *United States v. Mejia-Quintanilla*, 2021 U.S. App. LEXIS 28632 (9th Cir. September 21, 2021), which were decided after the filing of Young's reply brief. This memorandum disposition bears on whether Young's convictions under 18 U.S.C. §§ 924(c) and (j) (counts 19 and 20) must be reversed because the predicate homicide in which a firearm was used was not a "crime of violence." *See* Opening Brief at 102-105; Reply Brief at 29-31.

Citing *United States v. Begay*, 934 F.3d 1033, 1038-1041 (9th Cir. 2019) and other cases, Young argued that because VICAR murder can be second-degree murder, which can be committed recklessly, the government failed to prove a predicate crime of violence because it did not convict Young of first-degree murder. The government's petition for *en banc* review in *Begay* is pending. In a prior Rule 28(j) letter, Young argued that *Borden v. United States*, 141 S. Ct. 1817 (2021) was consistent with *Begay*.

In its first memorandum in *Mejia-Quintanilla*, this Court reversed the defendant's conviction under 18 U.S.C. § 924(j). *Mejia-Quintanilla*, 2021 U.S. App. LEXIS 26077 at *3. Citing *Begay* and *Borden*, this Court held that a conviction for generic murder under California Penal Code section 187 is not categorically a crime of violence under section 924 because it can be committed recklessly. *Id.* at **2-3. Young was charged with VICAR murder under California law with no degree of murder specified. (40 ER 11287-11288.) The jury was instructed that the charged murder could have been committed recklessly. (33 ER 9262-9263.)

In the September amendment, the *Mejia-Quintanilla* panel deleted the reference to *Begay*, leaving *Borden*, the Supreme Court case, as the supporting authority. *Mejia-Quintanilla*, 2021 U.S. App. LEXIS 28632 at *1. The docket shows that the panel took this action to deny the government's motion to stay the mandate and rehearing deadlines until the *en banc* petition in *Begay* was resolved. Thus, *Mejia-Quintanilla* is persuasive authority that *Borden* dictates reversal of counts 19 and 20.

Very truly yours,

s/Steven S. Lubliner

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

October 6, 2021

VIA CM/ECF

The Honorable Molly C. Dwyer
Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *United States* v. *Heard et al.*, Nos. 18-10218, 18-10228, 18-10239, 18-10248 & 18-10258
To be argued Oct. 19, 2021

Dear Ms. Dwyer:

This letter responds to two Rule 28(j) letters submitted by Young.

Young was convicted of VICAR murder, in violation of 18 U.S.C. 1959(a); using a firearm during and in relation thereto, in violation of 18 U.S.C. 924(c); and firearm murder, in violation of 18 U.S.C. 924(j). The VICAR murder offense was the predicate "crime of violence" for the two firearm charges. Young argues that VICAR murder is not a "crime of violence" because it can be committed recklessly, citing *Borden* v. *United States*, 141 S. Ct. 1817 (2021), *United States* v. *Mejia-Quintanilla*, --- Fed. Appx. ---, 2021 WL 4282628 (9th Cir. Sept. 21, 2021) (unpub.), and *United States* v. *Begay*, 934 F.3d 1033 (9th Cir. 2019).

1. *Borden* held that crimes with a mens rea of recklessness are not categorically crimes of violence under 18 U.S.C. 924(e), but it explicitly reserved whether crimes that involve a mens rea between recklessness and knowledge, "often called 'depraved heart' or 'extreme recklessness,'" were crimes of violence. 141 S. Ct. at 1825 n.4. And VICAR murder under California law is an extreme recklessness offense. See Cal. Penal Code 188(a)(2) (implied malice based on "abandoned and malignant heart"); Gov't Br. 225-226. *Borden*, having expressly reserved the issue posed here, thus is not dispositive.

2. Nor is *Mejia-Quintanilla*: it cites *Borden* as authority for the proposition that "an offense with a mens rea of recklessness does not constitute a crime of violence," but did not address the status of crimes with a mens rea of extreme recklessness. (The government's petition for rehearing in that case is also currently pending.)

3. And, while the pre-*Borden* decision in *Begay* held that offenses with a mens rea of extreme recklessness are not crimes of violence, 934 F.3d at 1040, the Court recently directed the parties to address whether the case should be reheard en banc. The government supported rehearing en banc because offenses with a mens rea of extreme recklessness are crimes of violence. See *United States* v. *Baez-Martinez*, 950 F.3d 119, 129-130 (1st Cir. 2020) (so holding).

Respectfully submitted,

/s *Michael A. Rotker*

Michael A. Rotker

Attorney, Appellate Section, Criminal Division
United States Department of Justice

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	Nos. 18-10228, consolidated
	)	with 18-10218, 18-10239
Plaintiff-Appellee	)	18-10248, 18-10258
	)	
	)	DC # 13-CR-764-WHO
v.	)	
	)	
JAQUAIN YOUNG, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT
ON *UNITED STATES V. BEGAY*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WILLIAM H. ORRICK
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone (707) 789-0516
E-mail: sslubliner@comcast.net
Attorney for Defendant-Appellant
Jaquain Young

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I. INTRODUCTION

Pursuant to the panel's order of May 13, 2022, appellant Jaquain Young ("Young") respectfully submits his supplemental brief on the implications of this Court's opinion in *United States v. Begay*, 2022 U.S. App. LEXIS 12153 (9th Cir. May 5, 2022) (en banc). In the principal briefing, Young argued that his convictions under 18 U.S.C. § 924(c)(1)(A) and 924(j)(1) in counts 19 and 20 must be reversed for want of a predicate crime of violence. The Supreme Court had previously held the "residual clause" definition of "crime of violence" in section 924 unconstitutionally vague. Young argued that because second-degree murder in California is not categorically a crime of violence under the "elements clause" definition and the jury did not find that Young committed first-degree murder, the convictions under section 924 must be reversed.

The majority in *Begay* held that second-degree murder under 18 U.S.C. § 1111, committed with extreme recklessness, was a crime of violence under the elements clause. This conclusion was deemed consistent with *Borden v. United States*, 141 S.Ct. 1817 (2021), which had held generally that crimes committed with a *mens rea* of recklessness were not crimes of violence but had reserved deciding the question of extreme

recklessness. Judge Ikuta dissented, writing that however appealing this conclusion was a matter of common sense, it was inconsistent with *Borden*.

This case involves California's law of second-degree murder, not 18 U.S.C. § 1111. Facially, the recklessness required to convict of implied malice murder is not as extreme and does not readily equate to knowledge and intent for all practical purposes as the *Begay* majority held was the case for section 1111. California routinely permits convictions for second-degree where the recklessness involved falls well short of the targeted application of force upon another that *Borden* requires for a crime to satisfy the elements clause. Therefore, it cannot categorically be said that second-degree murder in California is a crime of violence. Young's convictions on counts 19 and 20 should be reversed.[1]

II. ARGUMENT

A. Young's Convictions on Counts 19 and 20 Must be Reversed Because Young was not Convicted of an Underlying Crime of Violence.

1. Standard of Review

Whether the judgment reflects a conviction of a "crime of violence" to which charges under 18 U.S.C. § 924(c)(1)(A) and 18 U.S.C. § 924(j)(1) may attach is reviewed *de novo* because the issue is one of law and the

[1] To preserve the issue for Supreme Court review, Young also argues that the *Begay* en banc majority reached the wrong result.

government cannot be prejudiced by Young's not having raised it in district court. *United States v. Begay*, 2022 U.S. App. LEXIS 12153 (9th Cir. May 5, 2022) (en banc) at **15-17; *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009).

2. Procedural History

Count 18 charged Young with VICAR murder in violation of 18 U.S.C. § 1959(a)(1). It alleged that to gain gang benefits and/or status, Young "unlawfully and knowingly did murder Jelvon Helton, in violation of California Penal Code sections 187, 188, 189, and 31-33." 40-ER-11287-11288.[2] The indictment did not specify the degree of the murder Young was alleged to have committed.

Count 19 charged Young with using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), the crime of violence being the crime charged in count 18. Count 20 charged Young with violating 18 U.S.C. § 924(j)(1) by committing murder as defined in 18 U.S.C. § 1111 with a firearm during a crime of violence. 40-ER-11288. That section makes, *inter alia*, a "willful, deliberate, malicious, and premeditated killing" first-degree murder. Such language appears nowhere in the indictment.

The jury instructions defined murder as a racketeering act as follows.

[2] ER=Excerpts of Record in 43 volumes.

> "Murder means unlawfully killing a person with malice aforethought. There are two kinds of malice aforethought: express malice aforethought and implied malice aforethought. Proof of either is sufficient to establish the state of mind required for murder. A person acts with express malice aforethought if he has a specific intent to unlawfully kill. A person acts with implied malice aforethought if (i) the killing results from an intentional act; (ii) the natural and probable consequences are dangerous to human life; and (iii) the act was performed with knowledge of the danger and with conscious disregard to human life. Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before committing the act that causes the victim's death. It does not require deliberation or the passage of any particular period of time." 33-ER-9262-9263.

As discussed below, this language tracks California's law on murder. The district court gave this instruction rather than Ninth Circuit Model Instruction 8.107 because the federal charge incorporated state law. 32-ER-8831-8832. The court had instructed that some of the alleged racketeering acts were federal crimes, and some were state crimes. 33-ER-9261.

The instructions for count 18 referred to the above instruction on murder. "*Third*, the defendant committed the crime of murdering the victim charged in each count.[3] The elements the government must prove beyond a reasonable doubt to establish murder were previously explained to you in my discussion of Count One." 33-ER-9289-9290. The instructions did not ask the jury to find a degree of murder.

[3] The reference to "each count" seems due to copying the instructions for codefendant Charles Heard, who was charged with two murders.

The instructions for counts 19 and 20 referred to the murder charged in count 18, which the court expressly instructed was a crime of violence. Degree of murder is not discussed in these instructions, either. 33-ER-9291-9294. The verdicts do not specify a degree of murder. 2-ER-A467-A468.

3. Discussion

a. Implied Malice Second-Degree Murder in California Does Not Involve a Degree of Recklessness that Effectively Equates to Targeted Force.

Under federal law, consecutive punishment is imposed on anyone who carries, brandishes, or discharges a firearm during a "crime of violence." 18 U.S.C. § 924(c)(1)(A). If the violation of section 924(c) results in a murder, the defendant can be sentenced to death or imprisoned for life. 18 U.S.C. § 924(j)(1). Because section 924(j)(1) presupposes a violation of section 924(c), conviction and punishment on both counts requires a predicate "crime of violence."

A crime of violence is "(3) . . . 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). In *United States v. Davis*, 139 S.Ct. 2319 (2019), the Supreme Court held that the "residual

clause" definition in section 924(c)(3)(B) was unconstitutionally vague. *Id.* at pp. 2325-2336.

VICAR murder in violation of 18 U.S.C. § 1959(a)(1) can be grounded in a conviction/finding of second-degree murder. *United States v. Houston*, 648 F.3d 806, 819 (9th Cir. 2011); *United States v. Mapp*, 170 F.3d 328, 335-336 (2nd Cir. 1999). Thus, for the challenged convictions to stand, the undifferentiated crime of "murder" under California law, which was charged and found under count 18, must be a crime of violence under the elements clause. This Court should hold that it is not. The analysis properly begins with *Borden v. United States*, 141 S.Ct. 1817 (2021).

In *Borden*, the question was whether a prior Tennessee conviction for "reckless aggravated assault" was a crime of violence under the Armed Career Criminal Act ("ACCA"). *Id.* at 1822-1823. Citing the Model Penal Code, *Borden* described recklessness as conscious disregard of a substantial and unjustifiable risk attached to conduct in gross deviation from accepted standards. *Id.* at 1824. To assess whether this crime qualified under the elements clause, *Borden* applied the "categorical approach" under which:

> "the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard. . .. If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate." *Id.* at 1822.

Borden held that "violent felony" in the ACCA, defined in 18 U.S.C. § 924(e)(2)(B)(i), the ACCA's "elements clause," as "the use, attempted use, or threatened use of physical force against the person of another,"[4] does not include reckless conduct. *Id.* at 1821-1822, 1834. The four-justice plurality held that "[t]he 'against' phrase indeed sets out a *mens rea* requirement—of purposeful or knowing conduct." *Id.* at 1827-1828. It "excludes conduct, like recklessness, that is not directed or targeted at another." *Id.* at 1833. Justice Thomas based his concurrence on the phrase "use of physical force," which "has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at 1834-1835 (Thomas, J., concurring in the judgment).

The core question of statutory construction was whether the word "against" in the elements clause referred, as Borden argued, to "the conscious object (not the mere recipient) of the force[.]" *Id.* at 1826. The Court sided with Borden. "The critical context here is the language that 'against another' modifies—the 'use of physical force.' As just explained, 'use of force' denotes volitional conduct. And the pairing of volitional action with the word 'against' supports that word's oppositional, or targeted, definition." *Ibid.*

[4] The only difference between the ACCA definition and the definition at issue here in section 924(c)(3) is that the latter speaks of force used "against the person *or property* of another."

Under *Borden*, a driver who runs a red light and hits an unseen pedestrian has not committed a violent crime because he "has not used force 'against' another person in the targeted way that clause requires." *Id.* at 1827. Rather, crimes qualifying under the elements clause "are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830. This is consistent with Congress's intent of imposing increased punishment on offenders whose record suggests their possession of firearms poses an extreme risk. *Id.* at 1830-1831.

In a footnote, *Borden* stated, "Some States recognize mental states (often called 'depraved heart' or 'extreme recklessness') between recklessness and knowledge. We have no occasion to address whether offenses with those mental states fall within the elements clause." *Id.* at 1825, fn. 4. The en banc Court in *Begay* addressed that issue.

In *United States v. Begay*, 2022 U.S. App. LEXIS 12153 (May 5, 2022) (en banc), the defendant shot a perceived romantic rival in the head while in a car with his girlfriend and the victim. *Id.* at **8-9. This crime was prosecuted federally because Begay was an Indian who committed his crime in "Indian country." *Id.* at **11-12. Begay was convicted of second-degree

murder in violation of 18 U.S.C. § 1111. The jury found that he personally discharged a firearm during a crime of violence under 18 U.S.C. § 924(c). *Id.* at *6.

Begay received a 120-month consecutive sentence on the section 924(c) conviction. *Id.* at **10-11. He argued that it had to be reversed because second-degree murder under section 1111 was not categorically a "crime of violence" under the elements clause because it could be committed recklessly. *Id.* at **6-7. The en banc majority disagreed. *Id.* at *8.

Under section 1111, murder "is the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). Section 1111 sets out the types of crimes that qualify as first-degree murder. Any other murder is second-degree murder. *Ibid.*

Neither section 1111 nor any related statute defines "malice aforethought." Under Ninth Circuit Model Jury Instruction 8.108, "To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life." *Begay*, *supra*, 2022 U.S. App. LEXIS at **18-19 (emphases omitted). *Begay* cited other case law formulations, including "a callous and wanton disregard of human life," and "extreme indifference to the value of human life." It also described the mens rea of reckless indifference as depraved heart. *Id.* at *19.

Begay acknowledged the *Borden* plurality's[5] holding that crimes committed with a mens rea of recklessness do not qualify as crimes of violence under section 924(c) because they do not involve use of force actively targeted against another. *Id.* at *22. It noted footnote 4 in *Borden* where the Court said it was not opining on cases involving a mens rea "between recklessness and knowledge." It deemed the construction of section 1111 to present such a middle ground. *Id.* at **22-23.

Begay held:

> "A 1111(a) conviction qualifies as a crime of violence because a defendant who acts with the requisite mens rea to commit second-degree murder necessarily employs force 'against the person or property of another,' and rather than acting with ordinary recklessness, the defendant acts with recklessness that rises to the level of extreme disregard for human life." *Id.* at *24.

Begay described "extreme disregard for human life" as conduct involving "a quantum of risk [of injury to others] that is very high[.]" *Ibid.* This "depraved heart" murder involved behavior distinct from "ordinary" recklessness. *Id.* at *25. "The difference between th[e] recklessness [that] displays depravity and such extreme and wanton disregard for human life as

[5] The *Begay* majority treated the *Borden* plurality as binding precedent without discussion. In concurring, Chief Judge Murguia assumed that the opinion was binding because the parties had not argued otherwise. *Id.* at *35, fn. 1 (Murguia, C.J., concurring). Judge Ikuta, dissenting, explained that because the plurality's ruling was narrower than Justice Thomas's concurrence, it created a binding precedent. *Id.* at *40 (Ikuta, J., dissenting).

to constitute 'malice' and th[e] recklessness that amounts only to manslaughter lies in the quality of awareness of the risk." *Id.* at **25-26, quoting *United States v. Lesina*, 833 F.2d 156, 159 (9th Cir. 1987).

Discussing the Model Penal Code, *Lesina* explained that "disregard for human life becomes more callous, wanton or reckless, and more probative of malice aforethought, as it approaches a mental state comparable to deliberation and intent." *United States v. Lesina*, *supra*, 833 F.2d at 159. This is essentially the rationale that animated *Begay's* conclusion about section 1111. The extreme disregard of risk and the high probability of death attendant upon the defendant's conduct meant that, for all practical purposes, the defendant directed deadly force "against the person of another" even if that potential victim was unknown. *Id.* at **27-28.

Chief Judge Murguia set out this conclusion more explicitly in concurring:

> "[T]wo considerations strike me as particularly important. First, someone who commits second-degree murder certainly must be aware of the presence of potential victims. Second, someone who commits second-degree murder must be aware that his conduct creates a very high degree of risk of injury to these potential victims. In light of these considerations, I am persuaded that someone who commits second-degree murder necessarily directs his action at, or targets, another individual: if the perpetrator is aware of both the presence of potential victims and the very high risk of hitting them, then it is fair to say that the perpetrator has directed his actions against, or targeted, other individuals, even if he neither aims at nor

> consciously desires to harm them." *Id.* at **35-36 (citations & internal quotes omitted) (Murguia, C.J., concurring).

Begay buttressed its conclusion about the elements clause of section 924(c) with the observation that extreme disregard of human life is simply "a highly culpable mental state." *Id.* at **29-30. It dismissed concerns about whether vehicular and drunk-driving homicides would qualify under the elements clause as technically relevant to the categorical inquiry but, nonetheless, practically irrelevant because such cases would rarely involve use of a firearm. *Id.* at *30. Citing a First Circuit case, it agreed that the decision to charge a drunk-driving homicide as murder is "unusual." *Id.* at **30-31. It concluded:

> "Nothing in our opinion should be read to suggest that a drunk driving case that results in a death necessarily represents conduct evidencing the use of force directed at another with extreme disregard for human life. But consideration of context reinforces the conclusion that second-degree murder qualifies as a crime of violence pursuant to the elements clause of § 924(c)(3). *Id.* at **31.

This case involves California law, not section 1111, and *Begay* does not compel affirmance here. In California, "murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Pen. Code § 187, subd. (a). Malice may be express or implied. Cal. Pen. Code § 188, subd. (a). "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." Cal. Pen. Code §

188(a)(1). "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Cal. Pen. Code § 188(a)(2). Willful, deliberate, and premeditated murder, murder committed by certain methods, and murder committed during the commission of certain felonies with the appropriate level of culpability are murders in the first-degree. Cal. Pen. Code § 189(a), (e). All other murders are second-degree murder. Cal. Pen. Code § 189(b).

The issue here is whether California's law of implied malice second-degree murder grounded in recklessness is a crime of violence under the elements clause. This Court is bound by how California courts have determined the elements of a particular offense. *Olea-Serefina v. Garland*, 2022 U.S. App. LEXIS 13524 (May 19, 2022) at **13-14. Applying this authority in light of *Borden* and *Begay*, this Court should reverse.

While California's florid reference to "an abandoned and malignant heart" might suggest a conclusion similar to *Begay*, "[t]he statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms." *People v. Dellinger*, 49 Cal. 3d 1212, 1217 (1989). The language "is far from clear in its meaning." *People v. Knoller*, 41 Cal. 4th 139, 151 (2007). It is flawed because it could lead the jury to convict based on evidence of the defendant's evil disposition or bad

character. *Id.* at 151-152. Instructions grounded in the statute were rejected over time as "too cryptic." *People v. Nieto Benitez*, 4 Cal. 4th 91, 103 (1992).

The California Supreme Court ultimately held that the jury should be instructed that implied malice exists when "the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." *People v. Knoller*, *supra*, 41 Cal. 4th at 152 (citations and internal quotations omitted). This holding is reflected in CALCRIM No. 520, which instructs the jury that implied malice exists when death results from committing an act, the natural and probable consequences of which are dangerous to human life, in conscious disregard of that danger. Malice aforethought "does not require hatred or ill will towards the victim." *Ibid.*

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." *Ibid.* The evidence need not show that the defendant's conduct "has a *high probability* of causing death." *People v. Knoller*, *supra*, 41 Cal. 4th at 157. All that must be shown is actions taken in conscious disregard for human life. *Ibid*. "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." *Id.* at 143.

This standard is no different from ordinary recklessness as defined in *Borden*. It simply defines a crime with a *mens rea* of recklessness in circumstances where the stakes are higher. The higher stakes may make the defendant's recklessness more blameworthy, but that does not translate into *extreme disregard* under *Begay*. It does not turn a recklessness crime into the functional equivalent of knowing and purposeful conduct, it does not establish a high probability or practical certainty that death will ensue, and it certainly does not turn a recklessness crime into targeted conduct against, or in opposition to, a victim, which is what *Borden* requires.

Consideration of the contexts in which implied malice murder has been approved confirms this. In *People v. Watson*, 30 Cal. 3d 290, 300-301 (1981), the defendant got drunk knowing he would have to drive again and then drove dangerously through city streets, avoiding one accident, before causing a fatal accident. The California Supreme Court held that this was sufficient to charge second-degree murder. *Id.* at 300-301. The Court emphasized that it "neither contemplate[d] nor encourage[d] the routine charging of second degree murder in vehicular homicide cases." *Id.* at 301.

Despite this caveat and contrary to the assumptions of *Begay*, "*Watson* murder" convictions are commonly pursued, and "appellate courts have upheld numerous murder convictions in cases where defendants have

committed homicides while driving under the influence of alcohol." *People v. Wolfe*, 20 Cal. App. 5th 673, 677, 682 (2018). In *Wolfe*, there was no evidence of belligerent driving. The conviction was affirmed where the driver lost control of her vehicle on a curve, veered into a bike lane, and killed a pedestrian. *Id.* at 678-679, 683. This does not differ from the reckless killing of a pedestrian that *Borden* said was not a violent crime. *Borden*, *supra*, 141 S.Ct. at 1827. The same can be said for *People v. Roldan*, 196 Cal. App. 4th 920 (2011), where the drunk driver fell asleep or blacked out and caused a fatal accident in oncoming traffic. *Id.* at 922-923.

Perhaps, as *Begay* assumed, none of these drivers were armed. However, second-degree murder liability can also attach in cases involving reckless driving during an attempt to evade the police, where an armed defendant is more likely. *See People v DeHuff*, 63 Cal. App. 5th 428, 431-432, 442 (2021). This is so even though impliedly targeting other motorists or pedestrians for harm is inconsistent with the overarching goal of evasion.

Under *Borden*, on its own and as applied in *Begay*, the judgment does not reflect a murder conviction grounded, at the very least, in conduct amounting to targeted force. Thus, Young's conviction on count 18 is not a predicate crime of violence for purposes of sections 924(c) and (j). His convictions on counts 19 and 20 must be reversed.

b. As Judge Ikuta explained in dissent, the *En Banc* Majority Opinion in *Begay* is Inconsistent with the U.S. Supreme Court Opinion in *Borden* and Reaches the Wrong Result.

Judge Ikuta believed that second-degree murder is a crime of violence. *Begay*, *supra*, 2022 U.S. App. LEXIS 12153 at *39. Congress had achieved this result through the invalidated residual clause, not the elements clause. *Id.* at **41, 55-56. Judge Ikuta dissented from "the majority's effort to reach a common sense result that is contrary to the Supreme Court's clear direction" in *Borden*. *Id.* at *39. "Because the offense of depraved heart murder under § 1111(a) does not require proof of conduct directed 'against another,' we must hold that it criminalizes conduct outside the scope of the elements clause." *Id.* at **46-47. *Begay* was wrongly decided.

III. CONCLUSION

For the foregoing reasons, this Court should reverse Young's convictions on counts 19 and 20.

Respectfully submitted,

Dated: June 3, 2022

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Defendant-Appellant
Jaquain Young

Nos. 18-10218, 18-10228, 18-10239, 18-10248 & 18-10258

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES HEARD, aka CHEESE; JAQUAIN YOUNG, aka J-LOC; ESAU FERDINAND aka SAUCE; MONZEL HARDING, JR.; and ADRIAN GORDON, aka TIT,
Defendants-Appellants.

On Appeals from the United States District Court
for the Northern District of California
D.C. No. 13-cr-00764 (The Honorable William H. Orrick, J.)

COURT-ORDERED SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STEPHANIE M. HINDS
United States Attorney
Northern District of California

KEVIN J. BARRY
Assistant United States Attorney
Northern District of California

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division

LISA H. MILLER
Deputy Assistant Attorney General
Criminal Division

MICHAEL A. ROTKER
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, NW, Suite 1264
Washington, DC 20530
(202) 514-3308
michael.rotker@usdoj.gov

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Defendants-Appellants.

COURT-ORDERED SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION

Defendants Heard and Young argued that their respective firearms convictions were infirm because they were predicated on the crime of murder in aid of racketeering, which, in their view, was not a crime of violence under 18 U.S.C. § 924(c)(3)(A) because murder includes both qualifying intentional first-degree murder as well as nonqualifying second-degree reckless murder. Young Br. 102-105 (citing *United States* v. *Begay*, 934 F.3d 1033, 1038-1039 (9th Cir. 2019)). Following the completion of briefing in this case, the Court granted

rehearing en banc in *Begay* and vacated the panel decision on which the defendants had relied, see 12 F.4th 1254 (9th Cir. 2021), and the en banc Court has now held that second-degree murder – which requires extreme recklessness reflecting depraved indifference to human life – involves the use of force against the person of another and is therefore a crime of violence under Section 924(c)(3)(A). *United States* v. *Begay*, 33 F.4th 1081, slip op. at 8 (9th Cir. May 5, 2022) (en banc). The en banc decision in *Begay* is controlling and forecloses the defendants' challenges to their firearms convictions.[1/]

BACKGROUND

A. The Legal Framework.

The legal issue presented here arises at the intersection of multiple important and oft-used federal statutes designed to combat serious gun-related violent crime: 18 U.S.C. § 924(c) (and its companion, 18 U.S.C. § 924(j)), and 18 U.S.C. § 1959(a).

1. 18 U.S.C. § 1959(a).

Colloquially known as the VICAR statute, Section 1959 proscribes the commission of certain violent crimes in aid of racketeering, including "murder[] * * * in violation of the laws of any State or the United States." 18

[1/] Pinpoint cites to the *Begay* en banc decision are not presently available, so we cite to the slip opinion instead.

U.S.C. § 1959(a); see *United States* v. *Banks*, 541 F.3d 959, 969 (9th Cir. 2008). The statute's broad and undifferentiated reference to "murder" has been understood to reflect Congress's intent to reach homicidal conduct that constitutes "'murder,' however that crime is defined" under the applicable substantive law. See *United States* v. *Mapp*, 170 F.3d 328, 335 (2d Cir. 1999).

As relevant here, federal law and California law define "murder" as "the unlawful killing of a human being * * * with malice aforethought." 18 U.S.C. § 1111(a); Cal. Penal Code § 187(a). And, although the verbiage differs, federal law and California law both employ a definition of "malice aforethought" that is substantively the same: killings committed with "a callous and wanton disregard of human life," *United States* v. *Houser*, 130 F.3d 867, 871 (9th Cir. 1997) (federal law), or, in the more colorful common-law parlance used in many States, including California, killings that evincing a depraved, malignant, or abandoned heart (so-called implied malice). See Cal. Penal Code § 188(a)(2); *People* v. *Satchell*, 6 Cal.3d 28, 33 n.11, 489 P.2d 1361, 1365 n.11 (1971) ("Under California's interpretation of the implied malice provision of the Penal Code (§ 188), proof of conduct evidencing extreme or wanton recklessness establishes the element of malice aforethought required for a second degree murder conviction."), overruled on other grounds, *People* v. *Flood*, 18 Cal.4th 470, 490, n.12, 957 P.2d 869, 882 n.12 (1998); see also *People* v. *Dellinger*,

49 Cal.3d 1212, 1217-1221, 783 P.2d 200, 202-205 (1989) (canvassing prior case law and reaffirming that second-degree implied malice murder requires proof that the defendant acted with "wanton disregard for human life"); *People* v. *Doyell*, 48 Cal. 85, 96 (1874) ("Malice aforethought is implied from * * * wanton recklessness."); see also *People* v. *Benitez*, 4 Cal.4th 91, 113, 840 P.2d 969, 982 (1992) (Mosk, J., concurring) (agreeing that California's pattern instructions requiring "wanton disregard for human life" properly defined "Section 188's cryptic 'abandoned and malignant heart' language").

2. 18 U.S.C. § 924(c) and (j).

Section 924(c) makes it a crime for "any person who, during and in relation to any crime of violence * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm," 18 U.S.C. § 924(c)(1)(A), and mandates a consecutive ten-year minimum sentence if the firearm is "discharged." 18 U.S.C. § 924(c)(1)(A)(i). A companion provision makes it a crime for "[a] person [to], in the course of a violation of subsection (c), cause[] the death of a person through the use of a firearm," 18 U.S.C. § 924(j), and permits a sentence of death or imprisonment for any term of years or for life if the killing constitutes "murder (as defined in [18 U.S.C. §] 1111)." 18 U.S.C. § 924(j)(1). A "crime of violence" for purposes of Section 924(c)(1)(A) – and, by incorporation, Section 924(j)(1) – is defined as a felony

that "has as an element the use attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).[2/]

In determining whether a crime is a "crime of violence" under Section 924(c)(3)(A) (or other similarly-worded statutes), courts apply a categorical approach that focuses on the elements of the offense, rather than the defendant's actual conduct, and asks if the least culpable conduct proscribed by the offense-defining statute entails the requisite use of force. See, *e.g.*, *Shular* v. *United States*, 140 S. Ct. 779, 783-784 (2020); *Stokeling* v. *United States*, 139 S. Ct. 544, 555 (2019). In many cases, whether an offense qualifies as a crime of violence will turn on the mental state required for its commission. Though the common law typically classified crimes as involving either "general" or "specific" intent, modern authorities have replaced this dichotomy with a more precise "hierarchy of four levels of culpable states of mind." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000); see also *Dixon* v. *United States*, 548 U.S. 1, 7 (2006). Under the modern taxonomy, crimes that can be committed either "purposefully" (*i.e.*, specific intent crimes) or "knowingly" (*i.e.*, general intent crimes) generally involve the use of force against the person of another and thus

[2/] Congress included a second definition of the term "crime of violence" in 18 U.S.C. § 924(c)(3)(B), but that provision was struck down as unconstitutionally vague. See *United States* v. *Davis*, 139 S. Ct. 2319, 2336 (2019).

are crimes of violence under Section 924(c)(3)(A) and other similarly-worded provisions, see *Castleman* v. *United States*, 572 U.S. 157, 170 (2014), while crimes that can be committed "negligently" generally do not involve the use of force against the person of another, and thus are not "crimes of violence," see *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004).

Yet in between the mental states of purpose and knowledge, on the one hand, and negligence on the other lies the mental state of recklessness. This Court, for many years, has grappled with the proper classification of recklessness offenses under various use-of-force clauses, see *Begay*, 934 F.3d at 1043-1044 (N.R. Smith, J., dissenting) (tracing the evolution of the Court's recklessness precedents), but the Supreme Court's recent decision in *Borden* v. *United States*, 141 S. Ct. 1817 (2021), and this Circuit's recent en banc decision in *Begay* have refined the analysis and clarified that, while offenses involving *ordinary* recklessness are not crimes of violence, offenses involving *extreme* recklessness, like second-degree murder, are crimes of violence.

In *Borden*, the Supreme Court held that crimes involving a *mens rea* of ordinary recklessness – in that case, Tennessee reckless assault – do not involve the "use" of force "against the person of another." 141 S. Ct. at 1825 (plurality opinion of Kagan, J.); see also *id*. at 1835 (Thomas, J., concurring in the

judgment).[3/] But the *Borden* plurality recognized that recklessness does not have a single fixed meaning when, in a footnote, the plurality explicitly reserved the question of whether crimes with a mental state lying somewhere "between recklessness and knowledge," often referred to as "'depraved heart' or 'extreme recklessness,'" involve the use of force against the person of another. *Id*. at 1825 n.4. Indeed, this Court has long recognized that degrees of recklessness in the course of differentiating second-degree murder, which requires extreme recklessness, from involuntary manslaughter, which requires simple recklessness. See, *e.g.*, *United States* v. *Pineda-Doval*, 614 F.3d 1019, 1039-1040 (9th Cir. 2010); *Houser*, 130 F.3d at 872; *United States* v. *Lesina*, 833 F.2d 156, 158-161 (9th Cir. 1987).

Prior to *Borden*, a divided three-judge panel of this Court held that second-degree murder was not a crime of violence because it could be committed

[3/] Both Justice Kagan's plurality opinion (for herself and three other Justices) and Justice Thomas' separate concurring opinion agreed that recklessness offenses are outside the reach of the definition of a "violent crime" in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B), which is virtually identical to the definition of a "crime of violence" in Section 924(c)(3)(A), see *United States* v. *Fultz*, 923 F.3d 1192, 1194 n.1 (9th Cir. 2019), but they took different interpretive paths to reach that conclusion. The plurality rested its view on the phrase "against the person of another," while Justice Thomas rested his view on the phrase "use of force." Despite these differences in reasoning, five Justices voted to reverse the judgment on the ground that ordinary recklessness offenses do not qualify. See, *e.g.*, *United States* v. *Gomez Gomez*, 23 F.4th 575, 577 n.1 (5th Cir. 2022).

recklessly, see *Begay*, 934 F.3d at 1038-1039, but after *Borden*, the en banc Court, having the benefit of the Supreme Court's decision, held that "a defendant who acts with the requisite *mens rea* to commit second-degree murder necessarily employs force 'against the person or property of another,' and rather than acting with ordinary recklessness, the defendant acts with recklessness that rises to the level of extreme disregard for human life." *Begay*, slip op. at 22-23. In so holding, *Begay* noted prior cases suggesting that an offense could be a crime of violence only if it was committed intentionally, but held that "*Borden* sufficiently undermine[d]" the proposition that "anything less than intentional conduct does not qualify as a crime of violence." *Id*. at 25.

3. The Indictment and Convictions.

On August 14, 2014, a grand jury in the Northern District of California returned a twenty-two count second superseding indictment against eleven individuals, including the five appellants herein – Charles Heard, Adrian Gordon, Esau Ferdinand, Jaquain Young, and Monzell Harding. 40-ER-11271-11294 – charging them with being members of a violent association-in-fact criminal enterprise and committing related violent crimes in furtherance of the enterprise's affairs, in violation of 18 U.S.C. § 1959.

As relevant to this supplemental brief, Heard was convicted of murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2, and Cal. Penal

Code §§ 187-189 (Counts 6 and 7), and using and carrying a firearm to "cause the death of a person through the use of a firearm, which killing is murder as defined in [18 U.S.C.] § 1111," all in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2(a) (Count 8). Counts 6, 7, and 8 related to Heard's role in the August 14, 2008, firearm murders of Andre Helton and Isaiah Turner. Heard was sentenced to concurrent terms of life imprisonment on each count. 2-ER-A470. As relevant here, Young was convicted of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Count 18), discharging a firearm during and in relation to the crime of violence charged in Count 18, in violation of 18 U.S.C. § 924(c) (Count 19), and using and carrying a firearm to "cause the death of a person through the use of a firearm, which killing is murder as defined in [18 U.S.C.] § 1111," all in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2(a) (Count 20). 2-ER-A474. Counts 18, 19, and 20 related to Young's role in the November 1, 2010, firearm murder of Jelvon Helton. Young was sentenced to life imprisonment on Counts 1, 18, 20, and to 10 years' imprisonment on Count 19 to run consecutively. 2-ER-A475.

4. The Appeals.

On appeal, Young argued, for the first time, that the VICAR murder of Jelvon Helton alleged in Count 18 was not a "crime of violence." In his view, a crime of violence requires proof of intentional conduct, but VICAR murder

encompasses second-degree non-intentional murder; thus, he concluded that, for this reason, his firearms convictions on Count 19 and 20 were infirm. Br. 102-105. (Prior to oral argument, Heard adopted this argument with respect to his firearm-murder conviction on Count 8.) Young cited the *Begay* panel decision holding that second-degree murder, in violation of Section 1111(a), is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). The government noted its disagreement with *Begay* and asserted that recklessness offenses satisfy Section 924(c)(3)(A). U.S. Br. 227-229.

B. Subsequent Developments.

On July 19, 2021, following the completion of briefing in these cases and shortly after the issuance of the decision in *Borden*, the *Begay* panel directed the parties in that case to file briefs addressing whether the case should be reheard en banc. The government urged the Court to grant rehearing en banc because the panel decision was wrong and conflicted with *United States* v. *Báez-Martínez*, 950 F.3d 119, 127 (1st Cir. 2020).

On October 27, 2021, eight days after the oral argument in these cases, the Court granted rehearing en banc in *Begay*. Later that same day, the panel in this case entered an order staying these appeals pending the en banc decision in *Begay*. On May 5, 2022, the en banc Court issued its decision in *Begay*. And, on May 13, 2022, the panel in this case directed the government, along with Heard

and Young, to file simultaneous supplemental briefs addressing the impact of *Begay*.[4/]

SUMMARY OF ARGUMENT

Young and Heard argued that their Section 924(c) and (j) firearms convictions are invalid because the underlying predicate offense – VICAR murder – is not a "crime of violence" inasmuch as it encompasses second-degree reckless (*i.e.*, non-intentional) murder. Young Br. 105 ("VICAR murder in violation of 18 U.S.C. § 1959(a)(1) can be grounded in a conviction/finding of second-degree murder. * * * However, second-degree murder is not a crime of violence under the elements clause of section 924(c) because it can be committed recklessly."). *Begay* compels rejection of this argument.

[4/] The order also permitted (but did not require) the other appellants to file a brief addressing *Begay* "if relevant to that Appellant's claims already asserted in this appeal." *Begay* has no relevance to Ferdinand and Harding because they were not convicted of any firearms-related offenses. And, while Gordon was convicted of a Section 924(c) offense (Count 11) predicated on VICAR assault and attempted-murder offenses, he did not raise any challenge to Count 11 in his opening brief, and therefore, *Begay* is not relevant to any claim he "already asserted in this appeal." Cf. *United States* v. *Briones*, 18 F.4th 1170, 1178 (9th Cir. 2021) ("As a general matter, we review only issues which are argued specifically and distinctly in a party's opening brief * * * and as a corollary, an issue will * * * be deemed waived if it is raised for the first time in a supplemental brief") (cleaned up). In any event, nothing in *Begay*'s holding that second-degree murder is a crime of violence calls into question Gordon's conviction on Count 11.

ARGUMENT

Begay Compels Rejection Of Young's And Heard's Challenges To Their Firearms Convictions.

In 2013, Randly Begay and his girlfriend Meghan Williams, along with Roderick Ben and Lionel Begay (Randly's nephew), were drinking and smoking methamphetamine in a parked van outside Begay's parents' home on the Navajo Nation Indian Reservation in Tuba City, Arizona. Begay and Williams got into an argument, and Begay accused Williams of cheating on him with Ben. When Begay pulled out a gun, Williams ducked down and covered her head. Moments later, she heard a gunshot, looked up and saw that Ben had been shot and killed. A grand jury indicted Begay for second-degree murder in Indian country, in violation of 18 U.S.C. §§ 1111 and 1153(a), and discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), and he was convicted. A panel of this Court reversed Begay's firearms conviction on the ground that second-degree murder is not a crime of violence because it can be committed recklessly, *Begay*, 934 F.3d at 1038, but the en banc Court disagreed, and held that second-degree murder under Section 1111 is a crime of violence. Slip op. at 8.

1. The en banc Court explained that Section 1111(a) defines murder as "the unlawful killing of a human being with malice aforethought," and noted

that "the *mens rea* of 'malice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (*i.e.*, reckless indifference); and (4) intent to commit a felony." Slip op. at 18. Applying the categorical approach, the Court "focus[ed] on the mental state of depraved heart (*i.e.*, reckless indifference) because it encompasses the least culpable conduct criminalized by Section 1111(a)," *id.*, and concluded that the requisite *mens rea* for second-degree murder – depraved indifference to human life – involves the "use" of force against the person of another so as to render such offenses predicate "crimes of violence." Slip op. at 22-26; see also *Borden*, 141 S. Ct. at 1856 n.21 (Kavanaugh, J., dissenting) ("In my view, crimes committed with extreme recklessness, such as depraved-heart murder, should obviously still qualify as predicate offenses under ACCA, even after today's decision.").

Begay's holding that second-degree murder is a crime of violence under Section 924(c)(3)(A) disposes of Heard's and Young's challenge. As noted, their argument was based solely on the fact that murder in the second-degree encompasses non-intentional depraved-indifference murder, but *Begay* authoritatively held that intentional conduct is not the *sine qua non* of a crime of violence and that extreme recklessness of the sort required to prove second-degree murder can suffice. And because second-degree depraved heart murder

involves that form of heightened recklessness, it is a crime of violence. Accordingly, there is no basis for disturbing Heard's or Young's Section 924(j) convictions on Counts 8 and 20.[5/]

2. Two final points bear mention.

First, as noted, the sole ground advanced by Young in his opening brief (and later adopted by Heard) as to why his firearms convictions are invalid related to the *mens rea* requirement for second-degree murder. See Young Br. 105 ("VICAR murder in violation of 18 U.S.C. § 1959(a)(1) can be grounded in a conviction/finding of second-degree murder. * * * However, second-degree murder is not a crime of violence under the elements clause of section 924(c) because it can be committed recklessly."). Thus, any other arguments that could conceivably have been raised as to why second-degree murder is not a crime of violence would not only exceed the scope of the Court's May 13, 2022, order, but would also have been waived. See *Briones*, 18 F.4th at 1178 (reiterating that issues not raised in an opening brief are waived and that new issues cannot first be raised in a supplemental brief).

[5/] Young was convicted of violating both Section 924(c) and (j) based on the same use of a gun. Assuming the Court agrees that Young's Section 924(j) conviction is sound, it should vacate his Section 924(c) conviction on double jeopardy grounds. See U.S. Br. 228-233 (explaining why Section 924(c) is a lesser-included offense of Section 924(j)).

Second, the VICAR murders in Counts 6-7 (Heard) and 18 (Young) were charged as violations of California law, see Cal. Penal Code § 187, while the firearm-murder charges (Counts 8 and 20) alleged that the killings constituted murder under federal law, see 18 U.S.C. § 1111. See 40-ER-11282-11289. On appeal, Young asserted that second-degree murder does not qualify as a crime of violence by simply citing the panel decision in *Begay*, which, as noted, involved federal murder under Section 1111. Young Br. 105. In response, the government asserted that Young's Section 924(j) conviction was predicated on a crime of violence because California law recognizes depraved-heart (*i.e.*, wanton or extreme reckless) murder. See U.S. Br. 225-227.

To clarify, our position is that, where a Section 924(j) charge is predicated on a VICAR murder that is itself based on state law, the relevant question is one of federal law, rather than state, law. That is because all Section 924(j) offenses require as an element that a murder as defined in Section 1111 has occurred, and therefore, the question whether the predicate murder qualifies as a crime of violence turns on whether murder under Section 1111 is a "crime of violence," not the outer bounds of any particular state murder that would not have satisfied the elements of Section 924(j). In one unpublished decision, this Court rejected this argument, see *United States* v. *Mejia-Quintanilla*, 857 Fed. Appx. 956, 957

(9th Cir. Aug. 30, 2021) (unpub.), but that opinion is not precedential, and it also is not final as the government's petition for rehearing remains pending.

In any event, this case does not require the Court to resolve the state-versus-federal-law issue because the result here would be the same: as explained, both Section 1111(a) and Cal. Penal Code § 187 define second-degree murder to include depraved-heart/reckless indifference murder, which, under *Begay*, is sufficient for that murder to qualify as a crime of violence.

CONCLUSION

The judgments in Nos. 18-10218, 18-10239, 18-10248 and 18-10258 should be affirmed in all respects. The judgment in No. 18-10228 should be remanded with instructions to dismiss Count 19 on double jeopardy grounds and otherwise affirmed.

Respectfully submitted,

STEPHANIE M. HINDS
United States Attorney
Northern District of California

KEVIN J. BARRY
Assistant United States Attorney
Northern District of California

KENNETH A. POLITE, JR.
Assistant Attorney General
Criminal Division

LISA H. MILLER
Deputy Assistant Attorney General
Criminal Division

/s Michael A. Rotker
By: _____
MICHAEL A. ROTKER
Attorney
U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, NW
Suite 1264
Washington, DC 20530
(202) 514-3308
michael.rotker@usdoj.gov

be left for the jury to speculate that the victim of being -- being a victim of gun violence was in any way connected to this alleged RICO enterprise, given that that was not proven or even -- there was no evidence on that issue at trial whatsoever. And so I was surprised to see the slide because it hadn't come up.

THE COURT: All right. So it sounds like the Government and you are sort of in alignment with respect to that and statements there.

So then Tierra Lewis' statements to Inspector Cunningham. So they weren't -- they were explicitly not offered or admitted for their truth. So to me -- and I wouldn't look so quizzical because the record is pretty straightforward on that, Mr. Ramsey.

So the question is with respect to her testimony on the stand, what use can be made of that and there -- I'll listen to people, but I think she testified as a witness and people can argue about what she said. She was fairly straightforward about what she said about those statements. But that I think is fair game.

MR. JOINER: Here is my concern --

THE COURT: We will let Mr. Ramsey go first.

MR. RAMSEY: And my concern is not about what was said to Mr. Cunning -- sort of all things that were said to Inspector Cunningham. And this is something that we actually

briefed. It's not something that anybody responded to because the Government actually did what we requested in granting immunity.

But in our last trial memo where we set out the various reasons we were trying to get Tierra Lewis' trial or her testimony -- to get her on the stand and to introduce evidence of what she had said to Inspector Cunningham, we very specifically referred to -- and it's Document 1719. So this was not a mystery.

We very much set out the identification of the shooter is not hearsay. This is where we first referred to *Owens* and the basis for which we were seeking to introduce ultimately 779, Exhibit 779, which was the identification of Tierra Lewis as -- excuse me. Which was the identification by Tierra Lewis of Esau Ferdinand as the shooter in that photo lineup. And so that is what I'm focused on because that is not hearsay. That is specifically what Rule 801(d)(1)(C) is designed to address.

And the basis for us trying -- well, what it says is if you have a prior identification and the -- and all parties have an opportunity to fully cross-examine the person, that that's not considered hearsay. And so it is admissible for the truth of the matter asserted. And that's the basis in which we tried to introduce it, which I thought we were introducing it.

When we introduced the 779 photo identification, the Court asked whether there was an objection and actually the

Government didn't say anything and Mr. Waggener said there was no objection to its admission. And so that is what I'm focused on.

And that, I think the rule is pretty clear -- says that that's admissible for the truth of the matter asserted and it's specifically to address these sorts of circumstances in which there is a recantation of an identification, and so in -- the real question is whether the Government has -- not the Government. Whoever. Another party. In this case Mr. Waggener or the Government has an opportunity to cross-examine the person on that issue.

Now, my brief -- what I was talking about was whether the Government had an opportunity to cross-examine the person when they had the power to immunize but were choosing not to exercise it. And so here ultimately we were saying that the Government, because they had the power to immunize, had the power to cross-examine, and they overnight after we filed this brief did choose to immunize her.

Once she had been immunized, it removed any question about whether she was available for cross-examination on this issue and this is the very issue that the Supreme Court addressed in *Owens*.

THE COURT: I think *Owens* is a very different case.

MR. RAMSEY: But the issue in *Owens* -- this is -- I think this is really the crux of the matter. That in *Owens*

what happened was the witness got on the stand and testified about a prior identification and lost memory, and so the issue before the Supreme Court was if someone gets up there and says *Hey, I don't remember about the prior identification,* is that a situation in which there has been an opportunity to cross-examine?

And so the Supreme Court in *Owens* said even when someone has lost memory and can't sort of actively be engaged in telling you sort of the surroundings of that prior identification, they said in that situation, it's still admissible. It's still admissible because you still have the opportunity to cross-examine the person and either -- either party can explore the effect of their memory on the weight and credibility that is to be assigned to that previous identification.

But here we have a situation where there is not even a memory loss. There was a full opportunity to cross-examine fully on the prior identification, and so in this situation, it's even more clear than in *Owens*, but like I said, it's distinguishable, but it's distinguishable in a way that is actually favorable to the defense because what the Supreme Court made clear in *Owens* was as long as the parties have an opportunity -- an opportunity to cross-examine the person about the prior identification, it's admissible and it's admissible in a non -- as not hearsay. So it's admissible for the truth

of the matter.

Here there is no -- there's no concern about Tierra having not had memory. There was a concern about her not testifying about it, but the Government removed that problem when they immunized her, and so Mr. Waggener, on behalf of Mr. Ferdinand, and Mr. Joiner, on behalf of the Government, had a full opportunity to cross-examine Ms. Lewis about that identification, and what the court, the Supreme Court said in *Owens* is that Congress has said these out-of-court identifications have these guarantees of trustworthiness that are present in other areas of the --

THE COURT: Okay. I understand --

MR. RAMSEY: -- rules.

THE COURT: I understand what your argument is and I do draw a distinction between the testimony of Inspector Cunningham and the testimony that she gave on the stand.

Mr. Joiner.

MR. JOINER: *Owens* is a completely different case, Your Honor, number one.

Number two, what Mr. Ramsey is trying to do is use 801(d)(1)(C) to backdoor all of her testimony about what happened at Gravity Bar and say *this is a statement of prior identification so I can argue that she identified Esau Ferdinand as the shooter that night.*

We didn't object to the photograph coming in and the

identification of the individual depicted in that photograph as Mr. Ferdinand. That is appropriate under the rule which allows it to come in if it identifies a person as someone the declarant received earlier.

So if he wants to talk about the fact that she recognized Esau Ferdinand in that photo lineup, that's fine. She said as much.

She also testified that she saw Esau Ferdinand that night. That is evidence. That's in evidence for the truth of matter asserted.

What cannot come into evidence is everything she told Inspector Cunningham that was a lie. That only came in, and Mr. Ramsey was very clear about this on the record, as impeachment, as prior inconsistent statements.

The other issue that we have here, the guerilla in the room, is that Mr. Waggener has renewed his motion for severance many, many times at this point and has identified a risk of prejudice to his client, and so in looking back at the *Zafiro* case, one of the reasons why the Supreme Court said joint trials can be effective is the use of limiting instructions.

So looking at this, I don't know if this is going to be reviewed by an appellate court. The Government certainly hopes so. But looking at this just in terms of protecting the record and eliminating any claim of privilege that Mr. Ferdinand -- not privilege -- prejudice that Mr. Ferdinand may have, we

think a limiting instruction is appropriate.

And the Ninth Circuit has said that if prior inconsistent statements come in and there is no admonishment or limiting instruction, then they're in evidence as substantive evidence, which is improper. There should be a limiting instruction. So that's why we think a limiting instruction should be given that the prior inconsistent statements of Ms. Lewis to Inspector Cunningham are not in evidence. They're not being offered for the truth of the matter asserted. You may consider their inconsistency when deciding whether or not to believe her, but her statements to Inspector Cunningham are not evidence.

If Mr. Waggener doesn't want that instruction and makes it very clear on the record that he doesn't think that the limiting instruction is appropriate, then we're okay with that, too.

So that's -- those are the two issues we see. One, the statement of prior identification which now does not have circumstantial guarantees of trustworthiness because Ms. Lewis said she lied about everything, it can only come in to the extent that she recognized Esau Ferdinand in that picture. It cannot be argued that she recognized Esau Ferdinand in that picture as the shooter that night.

And number two, all the other inconsistent statements which Mr. Ramsey doesn't dispute were only offered as prior inconsistent statements. Those should all be subject to a

limiting instruction as well.

THE COURT: All right. Mr. Waggener.

MR. WAGGENER: Thank you, Your Honor.

I haven't had a chance to see whatever was filed at 7:00 this morning, but nothing magically converted those statements of Tierra Lewis that were admitted to the truth of the matter. The Court recognized it was very clear why they came in and that never changed.

And now I do want the limiting instruction. Of course I want the limiting instruction because the danger is here, and what I foresee and the guerilla is Mr. Ramsey arguing the truth of those statements to the detriment and prejudice to my client.

I noted in what I filed last night, there is -- there is extreme prejudice that didn't convert to the truth. I had a witness I could have called. I could have called Tanisha Frasier if they were admitted for the truth. Then I could really rebut the truth, and now I'm in a situation where in closing arguments they want to be argued for the truth. That just doesn't work under the law.

Owens is absolutely a different case. Prior inconsistent statements in terms of the testimony of Ms. Lewis can come in, but not for the truth, and if it comes out and that argument is made, you know, I'm going to object because it's just not right.

THE COURT: All right. Mr. Ramsey.

MR. RAMSEY: I just want to make clear, I just -- we were -- because this was in writing in terms of the record, we wrote, "This Court should admit Exhibit 779, Ms. Lewis' identification of the shooter through a six-person lineup, as it does not constitute hearsay under Rule 801." It is the rule that we're relying on. And the rule says that that identification, 779, is not hearsay and should be admissible for the truth.

Now, the other things have to do with follow-up, whether -- the nature of the investigation, so when I say the other things, I'm talking about what she may have said about, you know, being in Walgreens or in -- over in the Pak N Save area, but in terms of the identification of the shooter, that is what we're talking about and that's the core. That's 779. That was offered not for the truth of the matter. I didn't -- there were no objections at the time that it came in and we had made very clear, like I said in writing, that that was our purpose for it.

As far as what Mr. Joiner is saying in terms of she says now that she was -- lied about that and that that identification was not correct, that's something that the jury should be able to evaluate. They've got both sides of the story. So they -- the Government should be able to argue *she got up the stand and she told you she lied.* Mr. Waggener

should be able to say *she can't be trusted because of X, Y and* Z. But we should have the opportunity to put what is a core aspect of Mr. Young's defense before the jury.

The fact that we're now not severed and in a -- in a trial with Mr. Ferdinand should not -- should not preclude that. And this is a core rebuttal to what the Government is saying happened and there's a rule, Rule 801, that allows for introduction of that identification.

THE COURT: So where do you go with that? Once you make the identification, then don't you have to go to the course of the investigation arguments to try to tie things up? And didn't you specifically say that that stuff would not be coming in for the truth? It would only come in to show -- to test the integrity of the investigation? How do you -- you can't make that argument.

MR. RAMSEY: Here's why -- first of all, we got put in a bit of a bind because of the immunization issue. But I do agree that the 779 is accurate. That it was an accurate identification and she recanted it for the various reasons we're talking about.

The other aspects of the argument go to the integrity of the investigation to follow up on what she says. We don't necessarily need to argue and -- even -- I can tell you, I'm going to say you know, we -- we can't -- but it raises reasonable doubt. It raises reasonable doubt. And the fact

that they lost videos, didn't ask for videos for the right days, for things that may or may not have corroborated her, they did not look for particular cell tower data, cell phone information, that all goes for the integrity of the investigation to follow up on something that's offered for the truth of the matter asserted.

And so that's the core of -- that's the core of our argument. That this is the identification that was made and that the investigation that followed through on it was flawed. And that's what the jury should consider.

And the Government has the opportunity to then argue well, that identification was from a liar or someone who recanted and she said that it's no longer true and they can argue to the jury. The jury can disregard that.

But I think the rules allow the jury to hear the fact of the identification and decide whether or not they want to give weight to it. If they decide that they don't want to give weight to it, they will disregard it, and they will convict Mr. Young if they feel that the other evidence establishes it beyond a reasonable doubt.

But we should be able to make that defense, and I think the rules provide for it, and it may have been things that people didn't realize that we were planning to argue, but it wasn't because we were hiding it. We put it in writing. We put it in writing.

So it's -- there was a lot of stuff flurrying around surrounding that, but it was something that I was very focused on, and like I said, you know, we established that identification, argued hard about that -- and argued hard about that and encouraged the Government to immunize her because it would remove that barrier, and that's what it did and that's the spirit in which we introduced it.

Now, I agree that the rules don't allow for you to introduce other aspects of the truth of the matter asserted, but the core is there. And that's what we're building our argument on. It does allow you to introduce the identification for the truth of matter asserted.

MR. JOINER: If I could be heard, Your Honor.

The core of their argument -- they want to argue that Tierra Lewis identified Esau Ferdinand as the shooter that night. That's the core of their argument. They're using that section of 801 to backdoor hearsay evidence and argue it for the truth of the matter asserted.

They cannot do that. There is a big difference between saying Tierra Lewis identified this individual as Esau Ferdinand in a six-pack lineup and saying Tierra Lewis identified this individual, Esau Ferdinand, as the shooter that night. They cannot be allowed to make that argument because it's not in evidence. That's a prior inconsistent statement. It cannot be considered for its truth.

The other piece that occurs to me is Mr. Ramsey is arguing that the statement of identification is not hearsay and therefore it should come in. It's still going to be subject to 403, so what we've got here now is somebody who admitted lying to the police about what happened because the victim's family put her up to it, and the probative value of that identification is very, very low, if any, but the risk of undue confusion for the jury, the risk of unfair prejudice substantially outweighs any probative value for Mr. Ramsey being able to argue that Tierra Lewis identified Esau Ferdinand as the shooter that night. He cannot be allowed to argue that.

He can say you shouldn't believe her because initially she said Esau Ferdinand was the shooter, but he cannot argue that statement that Esau Ferdinand was the shooter that night for the truth of the matter asserted, and the jury needs to be instructed on that.

We got a limiting instruction when those statements came in through Inspector Cunningham. Unfortunately, we did not stand up and ask for that limiting instruction while Ms. Lewis was on the stand. It's not too late to give that limiting instruction, and I think it will appropriately instruct the jury and protect the record.

THE COURT: All right.

MR. WAGGENER: I'm in the odd position of wholeheartedly agreeing with the Government, not something I'm

used to. But I do agree with the Government. I mean, Mr. Ramsey created his own bind here, and if it's allowed in for the truth and he argues about the details of this identification, then I'm in a situation of having to argue against that, so I'm arguing against the truth of that.

That's not why it was admitted, and that was clear. Nothing, as I said earlier, transformed this for the truth of the matter asserted, and I relied on that as I should and as I can and I think is fair under the circumstances.

MR. RAMSEY: I will just say also, Your Honor, it's not a backdoor admission trying to swing around hearsay. This is something that in the Rules of Evidence defines is not hearsay.

So we're trying to introduce it through the front door of the 801 definition of what is and what is not hearsay. And 801 defines this as not hearsay. So we're not trying to backdoor in hearsay. This is something that is not hearsay.

And in terms of the probative value, it's incredibly probative. It goes to the core of the charge. The charge is whether Mr. Young was the shooter, and this is evidence that directly contradicts that. And so, again, if it goes to weight, the Government should be able to argue that. And Mr. Waggener should be able to argue that as well.

I mean, this was a prejudice to Mr. Waggener that we recognized. Mr. Ferdinand -- I should say Mr. Waggener's

client, and we recognized and we asked for a severance as well. And we recently, even on this issue, asked for a severance for Mr. Ferdinand where he be moved to the second trial. But that's water under the bridge.

I understand the situation that we have and that we have to -- we should be allowed to present the core of our defense which contradicts the Government's core theory, and the jury should be able to accept or reject that.

And, again, this is not a backdoor around hearsay or trying to get hearsay in. This is a reliance on the definition of what is hearsay and what is not hearsay. And this is defined as not hearsay and thus should be admissible for truth of the matter.

THE COURT: All right. I am going to give this two minutes of thought, but I'm inclined to give the Government's instruction, proposed instruction.

Do you have that written out, Mr. Joiner?

MR. JOINER: I do not, but we can probably adapt it from the last paragraph of our.

THE COURT: That's what I would recommend.

MR. RAMSEY: I would emphasize, Your Honor, we are interested in 779 for the truth of the matter. The rest I would agree, but the -- that identification and what it is, I think it's for the truth of the matter.

THE COURT: I don't think so. I think you could argue

that she went to -- when she went to speak with Inspector Cunningham, she identified somebody else. She did not identify Mr. Young. You can say that she identified Mr. Ferdinand in the six-pack, but to assert beyond that, that he was the shooter, I think just goes -- is contrary to not only what the evidence is and I think it would be prejudicial to Mr. Waggener and he also -- to Mr. Ferdinand and he also had witnesses lined up if it was necessary to rebut what I think was a very clear -- and did not in part because there was very clear testimony from Ms. Lewis that she was lying at the time.

Mr. Joiner.

MR. JOINER: In terms of the limiting instruction, Your Honor, I'm looking at -- it's page 3 and 4 of ECF 1744 and I think the jury can be instructed that, "During the trial, you heard" --

THE COURT: Hang on just a second. Let me get it.

MR. JOINER: Sorry. "During the trial, you" --

THE COURT: Okay. So here I am.

MR. JOINER: "During the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Ms. Lewis' prior inconsistent statements cannot be considered as substantive evidence for the truth of the matter asserted in those statements, although you may properly consider any inconsistencies when evaluating her credibility." I think that would cover it, Your Honor.

THE COURT: All right.

MR. RAMSEY: I don't want to run afoul of the rule. I'm not trying to belabor this, but I want to understand what I'm allowed to do and not allowed to do.

THE COURT: Give me two minutes. I'm going to take two minutes, without looking at any of you, to think through this and then I will come back and tell you precisely what you're allowed to do and what you're not.

MR. RAMSEY: And whether this covers 779 --

THE COURT: Say that again.

MR. RAMSEY: Exhibit 779, that's what I'm most interested in which is the six-pack.

THE COURT: The six-pack.

MR. RAMSEY: The six-pack photo identification that's in evidence.

(Recess taken at 8:00 a.m.)

(Proceedings resumed at 8:11 a.m.)

THE COURT: So I am going to give the Government's proposed instruction which will be, "During trial, you have heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be considered as substantive evidence for the truth of the matter asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility."

So the question is when do I give that instruction?

What's the best timing?

MR. JOINER: From the Government's perspective, Your Honor, the timing doesn't really matter as long as they get it before they go back to the jury. I understand that counsel for Mr. Young may be sensitive to the timing, so I would defer to him on when he wants that instruction to go in.

THE COURT: Maybe that is the right timing, is at the end.

MR. RAMSEY: That's fine, Your Honor. I just have a question. Does this apply to 779?

THE COURT: So for 779, you can argue, I think, that when Inspector Cunningham showed her the six-pack, that she circled Mr. Ferdinand's photo. The exhibit has the statement that it has, and you can argue that she never identified Mr. Young, but you just can't argue the truth of the identification of Mr. Ferdinand as the shooter. So that's a fact -- you have 779 in evidence, it's there, but you can't argue further from that.

MR. RAMSEY: I can't. So 779 is considered to be hearsay?

THE COURT: It is -- I guess it is considered to be hearsay in light of the circumstances of this case.

MR. RAMSEY: And so I can argue that she identified it -- identified him and then I can talk about -- and I can argue about the integrity of the investigation in terms of

follow-up for other potential shooters?

THE COURT: Yes.

MR. WAGGENER: To the extent that that doesn't cross over to the identification of Mr. Ferdinand as the shooter. I think that's the difficult line there.

THE COURT: Exactly.

MR. RAMSEY: Although if evidence can be explained by another theory, that that constitutes a reasonable doubt and if there is a theory present that Mr. Ferdinand could potentially be another shooter, am I precluded from arguing that?

MR. JOINER: So she did testify that she was with Mr. Ferdinand that night. It seems to me Mr. Ramsey could probably argue inferences from the fact that they were together. I think it was in the parking lot in Emeryville. If he wants to argue that. That to me seems to be different than arguing the truth of the prior inconsistent statements. He is now arguing based off of what she said in court.

THE COURT: I do think what she said in court is open for you to argue.

MR. RAMSEY: There are also are text messages that were sent to Mr. Ferdinand's phone that are in evidence.

THE COURT: They are in evidence.

MR. RAMSEY: Okay. Like I said, thank you. I appreciate the clarification, Your Honor. The only reason I'm asking is to make sure that I'm not running afoul of the

Court's order.

THE COURT: I understand.

MR. WAGGENER: In terms of the timing of the --

MR. RAMSEY: Instruction? I would say at the end.

THE COURT: I'll do that. And unless we get into a place where I have to give it sooner, that's exactly what we'll do.

MR. WAGGENER: I would ask that it be given at the beginning of the defense openings so that is clear. Because that -- it -- I'm not asking it go right before Mr. Ramsey's argument, but I think that that is an important admonition that should be given and the jury should have that in mind during the course of the arguments. So I would ask it be given after Mr. Barry finishes -- either given now or give it after Mr. Barry finishes his presentation.

THE COURT: All right.

MR. JOINER: I don't have a view on this, Your Honor. I think the instruction will be effective no matter when the Court gives it, as long as it's given before they deliberate.

THE COURT: So I think I will give it earlier. What's the best from your perspective? Do you want me to do it now?

MR. RAMSEY: Before Mr. Vermeulen's statement is given.

Just to be clear, for the record, if there does end up being an appeal, I just want to make clear we are objecting to

the Court's finding that 779 is hearsay. And the limitation -- well, it's hearsay and that it does not fall within under 801(d)(1)(C) and the limitations that flow from that -- from the Court's ruling on what I'm able to argue with respect to 779. I think that it is -- falls outside of hearsay under the definitions of 801 and that we should be able to argue it fully for the truth of the matter asserted.

MR. JOINER: If I understand the Court's ruling correctly, Your Honor, the fact that she circled Esau Ferdinand and identified in that document, that's not hearsay, but the writing underneath it about *that's who murdered Jelvon Helton on such and such a night and his name is Esau, also known as the Kid,* or whatever is written on that document, that portion is hearsay and inconsistent statement based on what she testified to.

THE COURT: Exactly.

MR. RAMSEY: I just would add that I think the entirety of 779 constitutes the identification. The identification is -- the question of what was posed to her and what she was asked to identify was not who Esau Ferdinand is or is one of these people in the picture Esau Ferdinand. The question of the identification was who was the shooter. And -- and she was given that six-pack lineup. And that statement about her writing that Esau was the shooter is in the context of that entire identification. It's part of it. And only with

that do you actually have the context of what the identification is itself.

I also would ask the Court make as part of the permanent record the recorded interview between Ms. Lewis and Inspector Cunningham, which includes all of the discussions surrounding the identification in 779 and provides the full context for it. So I would ask that that be made part of the permanent record. I know that is not in evidence, but I think it should be available for any panel on a review, if necessary.

MR. JOINER: That seems fine, Your Honor. If we just want to have that exhibit marked for identification and appended to the record, I guess if we get there, I have no objection to that.

MR. RAMSEY: Thank you, Your Honor.

MR. VERMEULEN: Two minor matters both in terms of -- both involving timing.

When I'm about to get up, I might need five or ten minutes to set up, so if we are at a point of breaking, that might be a point to break.

THE COURT: We will do that.

MR. VERMEULEN: I can't recall if we are going to be in session this Friday or not. I know you asked the jurors. I can't recall.

THE COURT: I asked the jurors. I'm assuming they will be, in the beginnings, anyway, of their deliberations and

doesn't seem like the right thing. I think we should be -- I think tomorrow will get us at least as far -- at least as far as we need to be, hopefully further.

MR. JOINER: I'm just wondering if the defense has an estimate in the aggregate how long they think their argument is going to go.

MR. VERMEULEN: I'm hoping to finish today. My target was two hours, but my target is now maybe slightly less than two hours. If you might indulge me if I get close to the end.

THE COURT: Yes. I definitely will. You can talk about the other things later on. We'll get the jury.

(Proceedings were heard in the presence of the jury:)

THE COURT: So, Ladies and Gentlemen, thank you very much for your flexibility, and I understand that going long today is not in the cards, so we won't go long today. We may be a couple minutes over, but not a very long period of time over.

Then tomorrow, we'll start at 7:30 in the morning and we'll run until about 4:00 in the afternoon or wherever we are. And then I understand that Friday just doesn't work for the jury, so we'll hopefully get -- we'll see where we are.

Before I turn the floor over to Mr. Vermeulen, I wanted to give you one limiting instruction.

During the trial, you heard evidence that Tierra Lewis made prior inconsistent statements. Those statements cannot be

considered as substantive evidence for the truth of the matters asserted in those statements, although the jury may properly consider any inconsistencies when evaluating her credibility.

So with that, Mr. Vermeulen, please proceed.

MR. VERMEULEN: Thank you.

CLOSING ARGUMENT

MR. VERMEULEN: You've got the toughest job in this building. You might have one of the toughest jobs for the last four months in the coming days or weeks. You came in here, you dedicated your service, you dedicated your time, you dedicated your attention to something that you knew nothing about. You knew about the legal system, but you didn't know anything about this case.

We've been living this case for years. But you came in knowing nothing, and you've got to work from nothing to a final decision. Actually, to a number of final decisions that are critical to the prostitution, that are critical to our clients, that are critical to society.

You're going to have to determine whether the Government has proved beyond a reasonable doubt each of the elements of each of the crimes that they've alleged against each of the defendants.

In doing that, you're going to have to look at everything, as the instructions direct you to, and I know that you will.

I'm not going to cover everything, partly because you

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA **Appellee,** **vs** **JAQUAIN YOUNG** **Appellant.**	**U.S.C.A. No.: 18-10228** **U.S.D.C. No.: CR-13-00764-WHO** **ORDER RE: CJA APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL ON APPEAL**

The individual named above as appellant, having testified under oath or having otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and, because the interests of justice so require, the Court finds that the appellant is indigent, therefore;

IT IS ORDERED that the attorney whose name and contact information are listed below is appointed to represent the above appellant.

Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
707-789-0516
sslubliner@comcast.net

Appointing Judge: Hon. Judge Orrick

July 12, 2018
Date of Order

July 6, 2018
Nunc Pro Tunc Date