

## APPENDICES

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2025 WL 3310468

Only the Westlaw citation is currently available.  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ismael CAMACHO, Defendant-Appellant.

No. 24-12503

|

Non-Argument Calendar

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Filed: 11/28/2025

Appeal from the United States District Court for the Southern  
District of Florida, D.C. Docket No. 1:96-cr-00443-JEM-6

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Before [Jill Pryor](#), [Newsom](#), and [Branch](#), Circuit Judges.

### Opinion

PER CURIAM:

\*1 Ismael Camacho appeals his sentence of 535 months' imprisonment, which was imposed after one of his convictions, Count 8, was vacated. He argues that the fact that his recalculated offense level was higher than it was prior to the vacatur of Count 8 gives rise to a presumption of vindictiveness on the part of the sentencing court, in violation of his due process rights. After careful review, we disagree and **AFFIRM** Camacho's sentence.

## I

We ordinarily “review constitutional challenges to a sentence de novo.” [United States v. Bowers](#), 811 F.3d 412, 430 (11th Cir. 2016) (citation modified). But “[w]hen a defendant fails

to object to an error before the district court, we review the argument for plain error.” [United States v. Raad](#), 406 F.3d 1322, 1323 (11th Cir. 2005). “To preserve an issue for appeal, one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought.” [United States v. Straub](#), 508 F.3d 1003, 1011 (11th Cir. 2007) (citation modified).

Thus, when a constitutional challenge to a sentence is raised for the first time on appeal, we review it for plain error. [United States v. Henderson](#), 409 F.3d 1293, 1307 (11th Cir. 2005). “Plain error occurs where (1) there is an error; (2) that is plain or obvious; (3) affecting the defendant's substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” [United States v. Hall](#), 314 F.3d 565, 566 (11th Cir. 2002). The error must be “plain” at the time of appellate consideration. [United States v. Shelton](#), 400 F.3d 1325, 1331 (11th Cir. 2005). A plain error affects a defendant's substantial rights if the defendant can “show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” [Rosales-Mireles v. United States](#), 585 U.S. 129, 134–35 (2018) (citation modified).

Here, Camacho did not object to the sentencing decision or its factual basis at his sentencing hearing. Quite the opposite—at Camacho's resentencing, his attorney stated that he “[d]id not have any objections to the PSR” and that “[t]he guidelines are correct.” Tr. of Resentencing at 5, Dkt. No. 927. We accordingly review his sentence for plain error. [Henderson](#), 409 F.3d at 11307.<sup>1</sup>

## II

\*2 To satisfy due process, “vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” [North Carolina v. Pearce](#), 395 U.S. 711, 725 (1969), *overruled in part on other grounds by* [Alabama v. Smith](#), 490 U.S. 794 (1989). This principle, first articulated in [Pearce](#), has been refined through decades of Supreme Court and Eleventh Circuit caselaw.

Five years after [Pearce](#), in [Blackledge v. Perry](#), 417 U.S. 21 (1974), the Supreme Court held that a defendant “is entitled to pursue his statutory right to a trial de novo, without

apprehension that the State will retaliate by substituting a more serious charge for the original one.” *Id.* at 28. The holdings in *Pearce* and *Blackledge* were later clarified in *United States v. Goodwin*, 457 U.S. 368 (1982), in which the Supreme Court noted that, “in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to ‘presume’ an improper vindictive motive,” but the Court emphasized that it had “done so only in cases in which a reasonable likelihood of vindictiveness exists.” *Id.* at 373. Subsequently, in *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court held that *Pearce*’s holding applied only to “circumstances ... in which there is a ‘reasonable likelihood’ that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.” *Id.* at 799 (citation omitted). In circumstances “[w]here there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.” *Id.*

In *United States v. Fowler*, 749 F.3d 1010 (11th Cir. 2014), we applied the Supreme Court’s vindictiveness caselaw to the reimposition of a sentence after a defendant successfully challenged one of his original counts. We observed that a multi-count sentence is “a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines and with the § 3553(a) factors.” *Id.* at 1015 (citation modified). Thus, a “sentence package that has been unpackaged by a reversal is to be repackaged at resentencing using the guidelines and the § 3553(a) factors.” *Id.* at 1016. Under this sentencing-package approach, “whether a defendant’s sentence has become ‘more severe’ for purposes of invoking the *Pearce* rule should depend on whether his *total punishment* has increased upon resentencing, not whether his *punishment on a single surviving count* of conviction has increased.” *Id.* at 1022 (emphasis added).

Applying this logic to the facts there, we concluded that the defendant’s revised sentence—imposed after he successfully appealed his conviction on an underlying count—was not vindictive even though his sentence on the sole surviving count arguably leaped from ten years to life. *See id.* at 1013–15, 1023. What mattered to the vindictiveness inquiry was that his total aggregate sentence did not increase. *See id.* at 1023. Because his initial sentence of life plus ten years actually decreased to life imprisonment, no presumption of vindictiveness arose. *Id.*

Here, *Fowler*’s sentencing-package doctrine forecloses Camacho’s argument that his sentence is presumptively vindictive. At his resentencing, the district court imposed a sentence of 535 months imprisonment—identical to his previous sentence. Camacho contends that this sentence is an “increase[ ]” from his prior sentence. Appellant’s Br. at 4. In making this claim, he highlights the fact that his total offense level rose from 35 to 38 because of the addition of certain firearm brandishing enhancements. Because of this, Camacho asserts, the recalculation of his offense level and Guidelines range “paradoxically increased the severity of his punishment.” *Id.* at 9. But Camacho’s conclusion—that his new sentence was more severe—does not follow from his premise—that his offense level rose. When we look at his *total* sentence, as we must under the sentencing-package doctrine, *see Fowler*, 749 F.3d at 1022, it’s clear that his sentence did not increase. The district court merely reimposed the same 535-month sentence; it did not mete out a greater punishment. Accordingly, under *Fowler*, there is no presumption of vindictiveness.

\*3 In the absence of such a presumption, “the burden remains upon [Camacho] to prove actual vindictiveness.” *Smith*, 490 U.S. at 799. Camacho, however, does not present any evidence that the court imposed the 535-month sentence as a means to punish him for exercising his right to challenge his conviction. To the contrary, the sentencing transcript reveals *non-vindictive* reasons for Camacho’s above-Guidelines sentence. The district court highlighted the gruesome nature of Camacho’s crimes—including the fact that he tortured victims with a blowtorch—and ultimately decided that a sentence above the Guidelines range was merited to “provide sufficient punishment and deterrence.” Tr. of Resentencing at 19. These on-the-record statements provide a legitimate basis for the district court’s reimposition of Camacho’s sentence, and Camacho has mustered no evidence that the court’s decision was actually animated by vindictiveness.

Because Camacho has not established that his 535-month sentence was vindictive, he has failed to meet the first element of the plain-error test—namely, that the district court erred at all. *See-Hall*, 314 F.3d at 566. We therefore **AFFIRM** his sentence.

#### All Citations

Not Reported in Fed. Rptr., 2025 WL 3310468

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## Footnotes

- 1 The parties dispute the appropriate standard of review. Camacho contends that we should review his sentence de novo because he raises a due process claim. But as explained in text, the fact that Camacho did not object to his sentence means that we review it for only plain error. See [Henderson, 409 F.3d at 1307](#). The government, for its part, does not clearly identify the standard we should apply. In the “Standards of Review” section of its brief, the government correctly observes that we review unpreserved due process claims for plain error. But later, in arguing that the district court did not err in applying five-level firearm enhancements, the government claims that the standard of review for that question “is either plain error or invited error,” because Camacho “agreed that the guidelines range had been correctly calculated.” Appellee’s Br. at 28. Because we conclude that the district court did not err in reimposing a 535-month sentence, we do not need to decide whether Camacho invited any error in the court’s Guidelines calculations, in which case we would forego review of the calculations entirely. See [United States v. Boone, 97 F.4th 1331, 1339 \(11th Cir. 2024\)](#) (discussing how the invited error doctrine precludes appellate review).

B

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-12503-GG  
L.T. CASE NO. 1:96-00443-CR-MARTINEZ

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ISMAEL CAMACHO,  
Defendant/Appellant,

v.

UNITED STATES OF AMERICA,  
Plaintiff/Appellee.

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Appeal from the United States District Court  
for the Southern District of Florida

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**APPELLANT ISMAEL CAMACHO'S  
PETITION FOR PANEL REHEARING**

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THIS CASE IS ENTITLED TO PREFERENCE  
(CRIMINAL APPEAL)

***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT PURSUANT TO FRAP 26.1  
AND 11TH CIR. R. 26.1-1**

Appellant Ismael Camacho, by and through undersigned court-appointed counsel, and pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1-1, hereby certifies that the following additional persons or entities may have an interest in the outcome of this case.

Acosta, R. Alexander

Anderson, Rhonda Anne

Arias, Anthony

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Arian, Jose

Arias, Joseph

Bandstra, Hon. Ted E.

Becerra, Hon. Jacqueline

Brown, Hon. Stephen T.

Cahn, Reuben Camper

Camacho, Ismael

***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

**Certificate of Interested Persons (cont'd)**

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***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

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Hernandez, Orestes

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Hodge, David Paul

Hoffman, Andrea G.

Izaguirre, Alfredo A.

Jimenez, Marcos Daniel

Johnson, Hon. Linnea R.

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***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

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Malone, Todd Omar

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Martinez, Hon., Jose E.

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***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

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***Ismael Camacho v. United States of America***  
**Case No. 24-12503-GG**

**Certificate of Interested Persons (cont'd)**

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Smachetti, Emily

Turnoff, Hon. William C.

Ungaro, Hon. Ursula

Vereen, Roderick Darrell

White, Hon. Patrick A.

Wu, Jason

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### **ISSUES MERITING REHEARING REVIEW**

The Court's panel held that a district court may raise a defendant's Guidelines offense level from 35 to 38 after he successfully vacates a conviction, so long as the court reimposes the same total sentence. The Court's holding in the case at bar conflicts with *North Carolina v. Pearce*, 395 U.S. 711 (1969), and misapplies its decision in *United States v. Fowler*, 749 F.3d 1010 (11th Cir. 2014).

The panel's reasoning permits district courts to manipulate Guidelines calculations to nullify the sentencing benefits of successful appeals, undermining both the constitutional protection against vindictive sentencing and the integrity of the Guidelines system itself.

Three errors warrant rehearing. First, the panel treated *Fowler* as establishing blanket immunity for any resentencing that produces the same total sentence, regardless of how that total was reached. *Fowler* assumes that after a defendant is successful in appealing some part of his sentence, the trial court will then recalculate a defendant's sentence based on surviving counts; *Fowler* does not permit a trial court to reverse-engineer a Guidelines range to reach a

predetermined sentence. Second, the panel failed to require a strong, objective, post-sentencing justification for the trial court's using unchanged historical facts to offset the defendant's appellate success. Third, the panel treated the increased Guidelines range as irrelevant because the final sentence remained identical, even though the range itself carries independent legal force and constitutes a meaningful increase in punishment.

After twenty years and two prior re-sentencings (in 2001 and 2021), neither the probation office nor the government applied brandishing enhancements to Mr. Camacho's case. Those enhancements appeared for the first time in 2024, immediately after Count 8 was vacated. The factual record did not change; the only intervening event was Mr. Camacho's success in eliminating a conviction. The trial court had no new evidence that would justify altering its calculation for the remaining counts so that the total sentence was unchanged, despite the defendant having successfully eliminated one count against him.

**ARGUMENTS SUPPORTING REHEARING**

**I. THE PANEL MISAPPLIED *FOWLER* BY PERMITTING THE DISTRICT COURT TO MANIPULATE THE GUIDELINES TO RESTORE A PREDETERMINED SENTENCE**

The panel concluded that *Fowler* forecloses any presumption of vindictiveness because “his total aggregate sentence did not increase.” Op. at 5 (citing *Fowler*, 749 F.3d at 1023). The panel thus failed to take all of *Fowler* into account, as *Fowler* established that when a court resentences a defendant after one count is vacated, the court must “repackage” the sentence “using the guidelines and the § 3553(a) factors.” 749 F.3d at 1016. The court begins with the surviving counts, calculates the correct offense level and Guidelines range for those counts, and then determines an appropriate sentence within or outside that range based on the statutory sentencing factors. *Id.* at 1015–16. The vindictiveness inquiry focuses on whether “his total punishment has increased upon resentencing, not whether his punishment on a single surviving count of conviction has increased.” *Id.* at 1022.

All of the foregoing assumes that the district court actually performs the recalculation that *Fowler* describes. The court begins

anew, determines the correct Guidelines range based on the facts and the law, and then exercises sentencing discretion within that framework. *Fowler* does not authorize a sentencing court to begin with a fixed number in mind for a sentence, only then to adjust the Guidelines upward to reach that number again - even though an entire count was eliminated, and no new evidence was introduced to augment the sentence.

In the present case, the district court did not conduct a neutral reevaluation of Mr. Camacho's culpability based on his remaining convictions. Instead, the court, together with the probation office, discovered brandishing enhancements that no prior presentence report had ever included. Op. at 6 (acknowledging that "his total offense level rose from 35 to 38 because of the addition of certain firearm brandishing enhancements"). Neither the factual record nor the Guidelines themselves had changed in the intervening time between the defendant's first sentence and his last; the only change was Mr. Camacho's success in vacating Count 8.

Under *Fowler*, the district court should follow the Guidelines methodology to reach a new sentence through a lawful process. Where the court instead begins with a predetermined total and works

backward to engineer a Guidelines range that supports it, the court denies the defendant due process.

The record demonstrates that the district court did not engage in a genuine recalculation. Mr. Camacho was originally sentenced in 2001. He was re-sentenced in 2021 after a count against him was vacated. See Appellant's Br. at 3–5. Neither the 2001 presentence report nor the 2021 presentence report applied firearm-brandishing enhancements under U.S.S.G. § 2B3.1(b)(2)(A) or (b)(2)(C). The government did not seek those enhancements. The district court did not impose them.

The enhancements instead appeared for the first time in the 2024 presentence report, immediately after Count 8 was vacated. The probation office applied them even though the underlying facts had been in the record since 1996. The government endorsed them even though it had never pursued them in the prior two decades. The district court adopted them without identifying any new conduct, any new evidence, or any legal development that would explain why enhancements appropriate in 2024 were inappropriate in 2001 and 2021.

If the facts justified a level 38 in 2024, they had to have justified a level 38 in 2001 and 2021, because the underlying facts have not changed. If, to the contrary, the facts did not justify that level earlier, when Mr. Camacho had more counts of conviction, not fewer, then they cannot justify it now, after he succeeded in eliminating one of those counts. The only variable in the facts was the loss of the eighth count; yet, paradoxically, successfully eliminating an entire count against a defendant resulted in an enhancement of his conduct level on the PSR.

If *Fowler* means what the panel says it means - that any resentencing producing the same total months is immune from *Pearce* scrutiny - then district courts may nullify every successful collateral or direct appeal that results in the vacatur of a count. A court need only locate unused enhancements in the Guidelines, apply them to offset the loss of the vacated count, and reimpose the original sentence. Because the total months remain the same, the misreading of *Fowler* would shield the sentence from challenge, regardless of how transparently the court manipulated the Guidelines to preserve the original term.

Such an outcome cannot be reconciled with the principle that “vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives” afterward. *Pearce*, 395 U.S. at 725. Defendants lose any practical benefit from vacating a count if a court may simply reclassify their conduct at a higher level to reach the same sentence. The right to challenge a conviction becomes an empty formality.

**II. THE PANEL FAILED TO REQUIRE THE OBJECTIVE, POST-SENTENCING JUSTIFICATION THAT *PEARCE* DEMANDS**

*Pearce* holds that when a defendant’s sentence increases after he successfully challenges a conviction, the increase must be affirmatively justified by objective information concerning identifiable conduct on the part of the defendant from *after* the time of the original sentencing. 395 U.S. at 726.

The resentencing record at bar contains no objective information about conduct occurring after the 2021 sentencing. The district court did not cite any disciplinary infractions, any new charges, any change in Mr. Camacho’s circumstances, or any legal development. The court relied on the same facts that have been in

the record since 1996: that Mr. Camacho participated in violent criminal conduct. Tr. of Resentencing at 19.

Those facts are undeniably serious. Appellant received a severe sentence in 2001 and again in 2021. But the facts cannot justify a harsher Guidelines calculation in 2024, after Mr. Camacho eliminated a count against him. Circumstances that existed at the original sentencing cannot support increased punishment following a defendant's successful appeal. 395 U.S. at 726. The trial court must point to something new in order to arrive at a more punitive calculation of the points against a defendant for his total conduct; that information must have emerged after the earlier proceeding to justify escalating the defendant's total point calculation.

Here, nothing changed except Mr. Camacho's appellate victory. Count 8 was vacated. The factual basis for the enhancements remained exactly as it had been in 2001 and 2021, when neither the probation office nor the government pursued those enhancements. If the historical facts did not warrant a level 38 then, they cannot warrant it now, absent some new development. The record contains no such development.

The panel’s reasoning permits a court to “rediscover” aggravating details from the defendant’s conduct and use them to raise the Guidelines range after the defendant vacates a count. The court need only assert that those facts justify the harsher calculation, even though the same facts were known and considered at every prior sentencing. Under such a misreading of *Pearce* and *Fowler*, Courts would retain unlimited discretion to preserve prior sentences by reclassifying historical conduct at higher levels. Yet *Pearce* forecloses that approach: the Supreme Court insisted that a defendant’s punishment may be augmented only by a trial court relying on objective information about new identifiable conduct. 395 U.S. at 726. The panel did not apply that requirement, and the resentencing record does not satisfy it.

The panel concluded that no vindictiveness claim arises because while the Guidelines range increased, Appellant’s sentence did not. Op. at 6. That conclusion treats the final number of months as the only measure of punishment, disregarding the independent legal significance of the Guidelines range itself. The range is not merely a technical step in the sentencing calculation. It is a formal determination of the defendant’s culpability that carries real

consequences and shapes the structure of the sentence in multiple ways.

However, the heightened Guidelines range is not an academic concern. It has real effects that extend beyond the district court's initial sentencing decision. It affects future re-sentencings; it affects the bureau of prisons classification of the defendant; it affects supervised release analyses.

Allowing district courts to raise Guidelines ranges to maintain sentence totals after defendants eliminate counts establishes a framework that other courts will follow. Defendants across the circuit lose the practical benefit of successful appeals, because district courts may offset those victories by escalating Guidelines calculations.

The panel reviewed Mr. Camacho's claim for plain error because his counsel stated at resentencing that he had no objections to the presentence report and that "the guidelines are correct." Op. at 3. Even if counsel's statement constituted a failure to preserve the issue, Appellant meets the requirement for plain error. The plain error standard in the Eleventh Circuit requires a defendant to demonstrate four elements for relief: an error must occur that was

clear and obvious, that impacted the defendant's substantial rights, and that affected the fairness, integrity, or reputation of a judicial proceeding. *United States v. Tovar*, 146 F.4th 1318, 1325 (11th Cir. 2025).

All four elements attain here. The district court erred: it violated *Pearce* by raising Mr. Camacho's Guidelines range to offset the vacatur of Count 8, without pointing to sufficient, objective post-sentencing conduct that would justify the increase. Second, the error was obvious: the district court's reliance on unchanged historical facts to support a harsher Guidelines calculation directly conflicts with *Pearce*. Third, the error affected Mr. Camacho's substantial rights: he received a sentence based on a Guidelines range that was unlawfully inflated to offset his appellate success. That inflated range carries real consequences: it affects his Bureau of Prisons classification, his exposure at any future resentencing, and his Guidelines range in the event of a supervised release violation. Fourth, the error affects the fairness, integrity, and public reputation of the judicial proceedings: allowing district courts to manipulate Guidelines ranges to preserve sentences after defendants eliminate counts undermines the legitimacy of both the sentencing system and

the appellate process. It signals that appellate victories are hollow, and that defendants may remove convictions without receiving any corresponding reduction in their Guidelines exposure, because district courts will simply recalibrate the Guidelines to reach the same result.

**III. THE PANEL INCORRECTLY TREATED COUNSEL'S CONCESSION ABOUT GUIDELINE ARITHMETIC AS A WAIVER OF THE CONSTITUTIONAL CHALLENGE TO THE SENTENCING PROCESS**

The panel stated that at resentencing, defense counsel “stated that he ‘d[id] not have any objections to the PSR’ and that ‘[t]he guidelines are correct.’” Op. at 3 (quoting Tr. of Resentencing at 5). The panel treated that statement as a concession that foreclosed review of the due process claim. But the attorney’s statement merely addressed the accuracy of the guideline calculation within the presentence report – that is, whether the probation office had correctly applied the enhancements it chose to apply and had performed the arithmetic correctly. It did not address the constitutional question of whether the district court could lawfully raise the Guidelines range after Count 8 was vacated.

Defense counsel's statement that "the guidelines are correct" addressed the internal consistency of the presentence report. Tr. of Resentencing at 5. It meant that if the brandishing enhancements applied, then the resulting offense level of 38 was arithmetically correct. The statement did not concede that the enhancements *should* apply, that their sudden appearance after twenty years was constitutionally permissible, or that the district court could lawfully raise the Guidelines range to offset the vacatur of Count 8.

**CONCLUSION**

For all these reasons, Appellant Ismael Camacho respectfully request that this Court grant rehearing.

Dated: December 17, 2025.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned attorney hereby certifies that this petition complies with the type-volume limitations of Fed. R. App. P. 40(b)(1) and Eleventh Circuit Rule 28-1 because, excluding the parts of the petition exempted by Fed. R. App. P. 32(f), this petition contains 2231 words.

The undersigned attorney further certifies that this petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Bookman Old Style 14 point font.

By: /s/ Sonia Escobio O'Donnell  
Sonia Escobio O'Donnell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 17, 2025, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF system which will serve a copy on:

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By: /s/ Sonia Escobio O'Donnell  
Sonia Escobio O'Donnell

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In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 24-12503

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

ISMAEL CAMACHO,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Florida  
D.C. Docket No. 1:96-cr-00443-JEM-6

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Before JILL PRYOR, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is  
DENIED.

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Vacated September 23, 2022

2022 WL 4392447

Only the Westlaw citation is currently available.  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ismael CAMACHO, Defendant-Appellant.

Ismael Camacho, Petitioner-Appellant,

v.

United States of America, Respondent-Appellee.

No. 21-10943, No. 21-11753

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Non-Argument Calendar

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Filed: 09/22/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:96-cr-00443-JEM-6, D.C. Docket No. 1:19-cv-24658-JEM

**Attorneys and Law Firms**

U.S. Attorney Service - Southern District of Florida, [Alix I. Cohen](#), Emily M. Smachetti, [Lisa A. Hirsch](#), [Daniel Matzkin](#), U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

[Alfredo A. Izaguirre](#), [Alfredo A. Izaguirre](#), PA, Coral Gables, FL, for Defendant-Appellant.

Before [Rosenbaum](#), [Newsom](#), and [Grant](#), Circuit Judges.

**Opinion**

PER CURIAM:

\*1 Ismael Camacho was convicted in 1998 for his part in a string of brutal kidnappings. The jury convicted him on ten Counts and he was sentenced to just under 85 years in prison.

On the heels of a 2019 Supreme Court decision, Camacho filed a successive 28 U.S.C. § 2255 motion in which he sought to vacate three of his ten convictions. The district court granted the motion in part and denied it in part, vacating two of the convictions but upholding the third. Camacho was resentenced, and the district court imposed a reduced term of just under 45 years in prison. He then filed two appeals, which

we consolidated. First, he challenges the district court's partial denial of his 28 U.S.C. § 2255(a) motion. Second, he argues that the district court erred when it failed to apply Section 403 of the First Step Act at resentencing. We affirm.

**I**

We begin with Camacho's 28 U.S.C. § 2255 motion, in which he contends that his conviction for the use of a firearm during a crime of violence is unconstitutional. See 18 U.S.C. § 924(c). We disagree.<sup>1</sup>

Section 924(c) imposes stiff penalties for anyone who uses a firearm in connection with a “crime of violence.” It defines a “crime of violence” as either: (1) a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or (2) a felony “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). But the Supreme Court recently held that the latter of those two definitions—the so-called “residual” clause—is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). That is the basis of Camacho's § 2255 motion.

The conviction that Camacho challenges contained two predicate crimes (*i.e.*, two crimes of violence)—Hobbs Act extortion (Count 9) and carjacking (Count 10). Camacho argues that his conviction is unconstitutional, and should thus be vacated, because *Davis*'s vagueness holding renders Hobbs Act extortion no longer a crime of violence. And because the jury returned a general verdict, Camacho argues, it is impossible to determine whether the jury's verdict was founded on a valid basis.

But because Camacho did not argue in the district court or on direct appeal that his conviction was invalid due to vagueness, he has procedurally defaulted that claim. See *United States v. Diaz*, 248 F.3d 1065, 1083 (11th Cir. 2001) (summarizing Camacho's arguments on appeal); see also *Granda v. United States*, 990 F.3d 1272, 1285–86 (11th Cir. 2021). “[A] defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding.” *Fordham v. United States*, 706 F.3d 1345, 1349 (11th Cir. 2013). Accordingly, he “cannot succeed on collateral review unless he can either (1) show cause to excuse the default and

actual prejudice from the claimed error, or (2) show that he is actually innocent.” *Granda*, 990 F.3d at 1286.

\*2 To be sure, *Davis* “announced [a] new constitutional rule[ ].” *Id.* It is therefore conceivable that Camacho’s vagueness claim was not “available” to him when he was convicted, excusing his default. See *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004) (explaining that a claim’s “novelty” can “meet the cause requirement” to excuse a procedural default). But novelty will excuse a default only when “a constitutional claim is so novel that its legal basis is not reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984). And we’ve previously held—notwithstanding *Davis*’s “new” rule—that “the tools existed to challenge ... [§ 924(c)’s] residual clause” on vagueness grounds even before *Davis* was decided. *Granda*, 990 F.3d at 1288. Consequently, Camacho cannot “show cause to excuse the default.” *Id.* at 1286.

Neither can Camacho satisfy the “actual innocence” exception, which “is exceedingly narrow in scope as it concerns a petitioner’s ‘actual’ innocence rather than his ‘legal’ innocence.” *Lynn v. United States*, 365 F.3d 1225, 1235 n.18 (11th Cir. 2004) (per curiam) (quotation omitted). Simply put, there is no evidence to indicate that Camacho is actually innocent, nor does he argue as much.<sup>2</sup>

\* \* \*

Camacho has procedurally defaulted his § 2255 claim. Accordingly, we affirm the district court’s denial.

## II

Next, Camacho argues that Section 403 of the First Step Act—which was passed in 2018 and, if applicable, would reduce the mandatory minimum sentence for his § 924(c) convictions—should apply.<sup>3</sup> Whether the First Step Act applies to a defendant whose initial sentence was imposed and became final *before* the Act’s enactment, but whose prior sentence is vacated *after* enactment, is an open question in this Circuit. But because any error was harmless, we need not address it.<sup>4</sup>

\*3 A sentencing error is harmless if it does not “affect the district court’s selection of the sentence imposed.” *Williams v. United States*, 503 U.S. 193, 203 (1992). Here, the district court stated that “even if” the First Step Act “did apply,” it would have imposed the same sentence. The district court first noted—even if the First Step Act applied—that it was within its discretion to impose up to life in prison. In light of that discretion, and because of “the seriousness of the offenses”—which, the court observed, were “particularly egregious and depraved”—the court plainly stated that a lower statutory minimum would not have affected the sentence it imposed. Thus, whether the First Step Act applies or not, “the district court has already told us that it would impose exactly the same sentence.” *United States v. Keene*, 470 F.3d 1347, 1350 (11th Cir. 2006). Accordingly, any error was harmless. *Id.*

\* \* \*

We **AFFIRM** the district court’s denial of Camacho’s § 2255 motion. We likewise **AFFIRM** the sentence that the court imposed. We **DENY** Camacho’s motion to stay appellate proceedings.

### All Citations

Not Reported in Fed. Rptr., 2022 WL 4392447

## Footnotes

- 1 “In a Section 2255 proceeding, we review legal issues *de novo* and factual findings under a clear error standard.” *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam) (quotation omitted).
- 2 Even if Camacho had not procedurally defaulted his claim, we would nonetheless affirm because any error was harmless. See *Granda*, 990 F.3d at 1292. Camacho concedes that the carjacking offense is a valid “crime of violence.” And the carjacked vehicle was taken in the course of the attempted Hobbs Act extortion.

Thus, “[t]he inextricability of the alternative predicate crimes compels the conclusion that ... instructing the jury on a constitutionally invalid predicate as one ... alternative predicate[ ] ... was harmless” error. *Id.*

- 3 “We review questions of statutory interpretation *de novo*.” [United States v. Segarra](#), 582 F.3d 1269, 1271 (11th Cir. 2009).
- 4 Camacho moved to stay appellate proceedings in this case pending the resolution of *United States v. Beneby*, No. 19-13387, and we carried Camacho's motion with the case. The *Beneby* panel heard oral argument on February 10, 2021 and will resolve a nearly identical question. But because we need not reach the question, we need not wait on *Beneby* to resolve it. Accordingly, we deny Camacho's stay motion.

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2020 WL 13846007

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United States District Court, S.D. Florida,  
Miami Division.

Ismael CAMACHO, Movant,

v.

UNITED STATES of America, Respondent.

Case Number: 19-24658-CIV-  
MARTINEZ/OTAZO-REYES

|

Case No. 96-00443-CR-JEM

|

Signed June 25, 2020

#### Attorneys and Law Firms

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Sean Paul Cronin, United States Attorney's Office, Miami,  
FL, for Respondent.

#### **ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

JOSE E. MARTINEZ, UNITED STATES DISTRICT  
JUDGE

\*1 Before the Court is Magistrate Judge Otazo-Reyes' recommendation that the Court grant, in part, Ismael Camacho's successive 28 U.S.C. § 2255 motion, resentencing him, and grant him a certificate of appealability on the partial denial. [ECF No. 16]. Camacho has filed objections to the report and recommendations [ECF No. 17], the United States filed a response [ECF No. 18], and Camacho filed a reply [ECF No. 19]. After careful consideration, the Court **overrules** Camacho's objections and **adopts** Judge Otazo-Reyes' recommendations.

As the Eleventh Circuit explained in Camacho's direct appeal, the underlying criminal case involved three "episodes" of robbery, extortion, kidnapping, and carjacking:

Three separate episodes underlie the charges in this case. First was the

robbery and extortion of Nelson and Mercedes Gomez Martin on June 26, 1995. The second episode included the kidnapping and extortion of Jose and Idania Arias and their children on January 11, 1996. The final episode involved the November 4, 1996 attempted robbery of Rosa Gonzalez, Armando Gonzalez's housekeeper and the kidnapping and extortion of Armando Gonzalez on November 13, 1996. The Arias and Gonzalez episodes also involved carjacking, and firearms were used in all three episodes.

*United States v. Diaz*, 248 F.3d 1065, 1075 (11th Cir. 2001).

A grand jury charged Camacho with 11 counts: **(1)** conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. § 1951(b); **(2)** Hobbs Act extortion based on the Martin episode; **(3)** using and carrying a firearm during and in relation to the Hobbs Act extortion offense in count 2, in violation of 18 U.S.C. § 924(c); **(4)** attempted Hobbs Act extortion based on the Arias episode; **(5)** carjacking based on the Arias episode, in violation of 18 U.S.C. § 2119; **(6)** using and carrying a firearm during and in relation to the attempted Hobbs Act extortion and carjacking offenses in counts 4 and 5; **(7)** Hobbs Act robbery based on the Gonzalez episode; **(8)** using and carrying a firearm during and in relation to the Hobbs Act robbery offense in count 7; **(9)** attempted Hobbs Act extortion based on the Gonzalez episode; **(10)** carjacking based on the Gonzalez episode; and **(11)** using and carrying a firearm during and in relation to the attempted Hobbs Act extortion and carjacking offenses in counts 9 and 10. A jury found Camacho guilty of all counts except number 5 (the carjacking based on the Arias episode).

The Eleventh Circuit affirmed the convictions but remanded the matter for a recalculation of the sentence. On remand, the Court sentenced Camacho to 1015-months' imprisonment. The Bureau of Prisons calculates his release date as February 25, 2069.

After an initial, unsuccessful § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Eleventh Circuit granted Camacho leave to file a successive § 2255 motion based on *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis*

held that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. Section 924(c) criminalizes the use or carrying of a firearm “during and in relation to any crime of violence.” § 924(c)(1)(A). The statute defines a “crime of violence” as a felony that either “(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or “(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” § 924(c)(3)(A)–(B). Subsection (A) is called the “elements clause,” and subsection (B) is the now-invalid “residual clause.”

\*2 *Davis* does not affect convictions for offenses that qualify as “crimes of violence” under the elements clause. *E.g.*, *Steiner v. United States*, 940 F.3d 1282, 1285 (11th Cir. 2019).

In the present motion, Camacho moves to vacate his § 924(c) convictions under counts 3, 6, and 11. [ECF No. 13]. Camacho argues that those convictions were predicated on substantive and attempted Hobbs Act extortion, which fall outside of § 924(c)’s elements clause. [ECF No. 13].

The United States concedes that Hobbs Act extortion does not meet § 924(c)’s elements clause and that the Court should vacate the convictions under counts 3 and 6 because their sole predicate was substantive and attempted Hobbs Act extortion. [ECF No. 14]. But the government argues that, for count 11, Camacho has not met his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), and *In re Cannon*, 931 F.3d 1236 (11th Cir. 2019), of showing that it is more likely than not that the jury convicted him based on the attempted Hobbs Act extortion predicate, as opposed to the carjacking predicate.

The Eleventh Circuit succinctly explained the present issue when it granted leave to file the successive § 2255 motion:

Camacho's third § 924(c) conviction in Count 11 referenced two distinct predicate offenses: carjacking and attempted Hobbs Act extortion. The jury returned a general guilty verdict convicting Camacho of this offense. This Court has held that carjacking is a crime of violence under § 924(c)’s elements clause. *See Ovalles v. United States*, 905 F.3d 1300, 1304 (11th

Cir. 2018). But ... this Court has not addressed whether attempted Hobbs Act extortion is a crime of violence under the elements clause. As in *Cannon*, it is unclear from Camacho's general guilty verdict whether the jury convicted Camacho based on his attempted extortion charge or his carjacking charge. *See Cannon*, 931 F.3d at 1243. It is thus possible that Camacho was convicted based on § 924(c)’s unconstitutional residual clause, so Camacho has made the *prima facie* showing required by § 2255 to challenge his third § 924(c) conviction.

[ECF No. 1 at 5]

Judge Otazo-Reyes recommends that the Court vacate the convictions under counts 3 and 6 (and resentence Camacho accordingly) given the submissions and the government's concessions. [ECF No. 16 at 10]. The Court agrees.

But as to count 11, Judge Otazo-Reyes recommends denial because Camacho “has not shown that it is more likely than not that the jury based his § 924(c) conviction ... on his conviction for attempted Hobbs Act extortion.” *Id.* Judge Otazo-Reyes also concluded that the convictions for carjacking and attempted Hobbs Act extortion “seem inextricably intertwined” because “[t]he carjacking conviction in [count 11] was based on the Gonzalez episode, and the Eleventh Circuit found in affirming movant's convictions that ‘the theft of Gonzalez's vehicle was an essential part of the extortion and robbery plan from the beginning.’” *Id.* at 11 (quoting *Diaz*, 248 F.3d at 1097–98). In other words, it is unlikely that the jury found that Camacho used and carried a firearm in relation to the attempt to commit Hobbs Act extortion without also finding that Camacho used and carried a firearm in relation to the related carjacking. *Id.*

\*3 Camacho objects only to the rulings related to count 11. [ECF No. 17]. Camacho raises several arguments, but, at bottom, this decision rests on whether the Court agrees with Camacho's position that the *Beeman* standard does not apply to *Davis* challenges, or, if it does apply, that he met his burden under *Beeman*. The Court rules that *Beeman* does apply to *Davis* claims and finds that Camacho has not met his burden.

First, *Beeman* is binding on this Court. See, e.g., *Franklin v. United States*, No. 19-13422, 2020 WL 1867910, at \*4 (11th Cir. Apr. 14, 2020). And two published Eleventh Circuit opinions have relied on *Beeman* when noting that movants seeking relief under a *Davis* claim “will have to show that his [or her] § 924(c) conviction resulted from application of solely the residual clause.” *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019); see also *In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019) (“Cannon, as the movant, still bears the burden of proving the likelihood that the jury based its verdict of guilty in Count 3 solely on the Hobbs Act conspiracy, and not also on one of the other valid predicate offenses identified in the count (four drug crimes and two carjackings).”). In light of those cases, and for the additional reasons set forth by Judge Otazo-Reyes, *Beeman* controls here.

Second, Camacho admits that “it is impossible to determine which predicate the jury actually relied on when it found Mr. Camacho guilty on count 11.” [ECF No. 19 at 6]. That being the case, he cannot show that it is more likely than not that his conviction rests on the now-defunct residual clause of § 924(c). Moreover, the Court agrees with Judge Otazo-Reyes that, given the inextricable nature of the offenses in this particular case, it is unlikely that the jury found Camacho guilty of using and carrying a firearm in relation to the attempted Hobbs Act extortion involving the Gonzalez incident but not of also using and carrying a firearm in relation to the carjacking of Gonzalez's vehicle, which “was an essential part of the extortion and robbery plan from the beginning.” [ECF No. 16 at 11].

Accordingly, after careful consideration, it is:

**ORDERED AND ADJUDGED** as follows:

1. The Magistrate Judge's Report and Recommendation [ECF No. 16] is **AFFIRMED** and **ADOPTED**.
2. Movant's successive 28 U.S.C. § 2255 motion [ECF No. 13] is **DENIED IN PART AND GRANTED IN PART** as set forth here. The Court will set a resentencing hearing via a separate order.
3. A certificate of appealability **SHALL ISSUE** as to the following issue: whether a § 2255 movant raising a *Davis* claim bears the burden to show that it is more likely than not that his § 924(c) conviction resulted solely from the application of § 924(c)'s unconstitutional residual clause and, if not, whether movant is entitled to relief on his *Davis* challenge to his § 924(c) conviction in Count XI.
4. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of June, 2020.

#### All Citations

Not Reported in Fed. Supp., 2020 WL 13846007

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United States District Court, S.D. Florida.

Ismael CAMACHO, Movant,

v.

UNITED STATES of America, Respondent.

CASE NO. 19-24658-CV-  
MARTINEZ, 96-00443-CR-MARTINEZ

I

Signed May 11, 2020

### Attorneys and Law Firms

[Alfredo A. Izaguirre](#), [Alfredo Izaguirre PA](#), Coral Gables, FL, for Movant.

[Sean Paul Cronin](#), United States Attorney's Office, Miami, FL, for Respondent.

## REPORT OF MAGISTRATE JUDGE

[Lisette M. Reid](#), UNITED STATES MAGISTRATE JUDGE

\*1 Through counsel, movant has filed a motion to vacate under [28 U.S.C. § 2255](#). [Cv-ECF No. 13]. The undersigned has reviewed all pertinent portions of the records in both this case and the underlying criminal case. For the following reasons, movant's motion should be **GRANTED IN PART AND DENIED IN PART**.

### I. Introduction

The Eleventh Circuit has granted in part movant's application for leave to file a successive motion to vacate. [Cv-ECF No. 1]. Movant argued in his application that his convictions for using and carrying a firearm during and in relation to a crime of violence are invalid after [United States v. Davis](#), [139 S. Ct. 2319 \(2019\)](#). [*Id.* at 2]. *Davis* held that the “residual clause” in [18 U.S.C. § 924\(c\)\(3\)\(B\)](#) is “unconstitutionally vague.” [139 S. Ct. at 2336](#). The Eleventh Circuit allowed movant to file a successive motion to vacate raising *Davis* challenges to his [§ 924\(c\)](#) convictions in Counts III, VI, and XI of the operative indictment. [Cv-ECF No. 1 at 6]. As discussed below, movant's convictions and sentences on Counts III

and VI should be vacated. However, movant's conviction on Count XI should not be vacated.

## II. Background

### A. Factual Background

“Three separate episodes underlie the charges in [the underlying criminal] case.” [United States v. Diaz](#), [248 F.3d 1065, 1075 \(11th Cir. 2001\)](#), *cert. granted, judgment vacated on other grounds sub nom. Echevarria v. United States*, [543 U.S. 1106 \(2005\)](#). “First was the robbery and extortion of Nelson and Mercedes Gomez Martin on June 26, 1995.” *Id.* “The second episode included the kidnapping and extortion of Jose and Idania Arias and their children on January 11, 1996.” *Id.* “The final episode involved the November 4, 1996 attempted robbery of Rosa Gonzalez, Armando Gonzalez's housekeeper and the kidnapping and extortion of Armando Gonzalez on November 13, 1996.” *Id.* “The Arias and Gonzalez episodes also involved carjacking, and firearms were used in all three episodes.” *Id.*

### B. Procedural Background

In a fourth superseding indictment, the grand jury charged movant with: (1) Count I--conspiracy to commit Hobbs Act extortion, in violation of [18 U.S.C. § 1951\(b\)](#); (2) Count II--Hobbs Act extortion based on the Martin episode, in violation of [18 U.S.C. § 1951\(b\)](#); (3) Count III--using and carrying a firearm during and in relation to the Hobbs Act extortion offense in Count II, in violation of [18 U.S.C. § 924\(c\)](#); (4) Count IV--attempted Hobbs Act extortion based on the Arias episode, in violation of [18 U.S.C. § 1951\(b\)](#); (5) Count V--carjacking based on the Arias episode, in violation of [18 U.S.C. § 2119](#); <sup>1</sup> (6) Count VI--using and carrying a firearm during and in relation to the attempted Hobbs Act extortion and carjacking offenses in Counts IV and V, in violation of [18 U.S.C. § 924\(c\)](#); (7) Count VII--Hobbs Act robbery based on the Gonzalez episode, in violation of [18 U.S.C. § 1951\(b\)](#); (8) Count VIII--using and carrying a firearm during and in relation to the Hobbs Act robbery offense in Count VII, in violation of [18 U.S.C. § 924\(c\)](#); (9) Count IX--attempted Hobbs Act extortion based on the Gonzalez episode, in violation of [18 U.S.C. § 924\(c\)](#); (10) Count X--carjacking based on the Gonzalez episode, in violation of [18 U.S.C. § 2119](#); and (11) Count XI--using and carrying a firearm during and in relation to the attempted Hobbs Act extortion and carjacking offenses in Counts IX and X, in

violation of 18 U.S.C. § 924(c). [Cr-ECF No. 330]; *see also Diaz*, 248 F.3d at 1081-82.

\*2 A jury convicted movant on all Counts except Count V. [Cr-ECF No. 442]; *see also Diaz*, 248 F.3d at 1081-82. The court sentenced movant to 1145 months' imprisonment. [Cr-ECF No. 547 at 3].

Movant appealed. The Eleventh Circuit affirmed movant's convictions but vacated and remanded his sentences on "Counts I, II, IV, VII, IX, and X ... for recalculation and reconsideration in accordance with [certain provisions in the U.S. Sentencing Guidelines]." *See Diaz*, 248 F.3d at 1106-09.

On remand, the court sentenced movant to **1015 months' imprisonment**. [Cr-ECF No. 661 at 3]. This sentence consisted of a term of **235 months** on Counts I (conspiracy to commit Hobbs Act extortion), II (Hobbs Act extortion), IV (attempted Hobbs Act extortion), VII (Hobbs Act robbery), and IX (attempted Hobbs Act extortion), to run concurrently; **180 months** on Count X (carjacking) to run concurrently to the 235-month sentence; **60 months** on Count III (§ 924(c)), to run consecutively; and **240 months** on each of Count VI (§ 924(c)), Count VIII (§ 924(c)), and Count XI (§ 924(c)), to run consecutively. Petitioner did not appeal the new sentence. [Cr-ECF No. 723 at 1].

In 2010, movant filed his first § 2255 motion, which the court dismissed as untimely. [Cr-ECF Nos. 738-39]. In 2013, movant filed a second motion to vacate, [Cr-ECF No. 744], which the court dismissed as successive, Order at 2-3, *Camacho v. United States*, No. 13-23247-CV-GOLD (S.D. Fla. June 10, 2014), ECF No. 16. Movant did not appeal.

In 2016, the Eleventh Circuit granted movant's application to file a successive § 2255 based on the U.S. Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). [Cr-ECF No. 750]. *Johnson* invalidated the Armed Career Criminal Act ("ACCA")'s residual clause on the ground that it was unconstitutionally vague. 135 S. Ct. at 2557-60; *see also* 18 U.S.C. § 924(e)(2)(A)(ii). For reasons irrelevant here, the court dismissed this motion. [Cr-ECF No. 764]. Movant did not appeal.

On November 7, 2019, the Eleventh Circuit granted in part movant's application to file a successive § 2255 motion based on *Davis*. [Cv-ECF No. 1]. The Eleventh Circuit granted the application as to movant's § 924(c) convictions in Counts III, VI, and XI. [*Id.* at 6]. In support, the Eleventh Circuit

noted that, in *Davis*, the Supreme Court "struck down as unconstitutionally vague ... the § 924(c) residual clause." [*Id.* at 4 (citing 139 S. Ct. at 2336)]. Further, the Eleventh Circuit noted that movant's convictions for Counts III and VI were predicated on, respectively, Hobbs Act extortion and attempted Hobbs Act extortion and that the Eleventh Circuit has not decided whether these crimes "categorically qualify as crimes of violence under the elements clause of § 924(c)(3)(A)." [Cv-ECF No. 1 at 5]; *see also* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" under § 924(c)(1)(A) as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Therefore, the Eleventh Circuit ruled that movant "made a *prima facie* showing under [28 U.S.C.] § 2255(h)(2) that these two § 924(c) convictions may be unconstitutional under *Davis*." [Cv-ECF No. 1 at 5 (citation omitted)].

\*3 Likewise, the Eleventh Circuit noted that movant's conviction on Count XI "referenced two distinct predicate offenses: carjacking and attempted Hobbs Act extortion." [*Id.*] Further, the Eleventh Circuit noted that it had held that carjacking is categorically a crime of violence under § 924(c)'s elements clause. [*Id.* (citing *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018))]; *accord In re Smith*, 829 F.3d 1276, 1280-81 (11th Cir. 2016). The Eleventh Circuit also noted that the jury rendered a "general guilty verdict" that did not specify whether attempted Hobbs Act extortion, carjacking, or both, was the predicate offense for the conviction on Count XI. [Cv-ECF No. 1 at 5]. Thus, the Eleventh Circuit concluded that movant "made [a] *prima facie* showing" that the jury convicted him "based on § 924(c)'s unconstitutional residual clause." [*Id.*]

However, the Eleventh Circuit denied the application as to the § 924(c) conviction in Count VIII because Hobbs Act robbery, which is categorically a crime of violence, served as its predicate offense. [*Id.* at 5-6 (citing *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018))].

The undersigned appointed counsel and set a briefing schedule. [Cv-ECF No. 3]. On January 29, 2020, movant timely filed this § 2255 motion. [Cv-ECF No. 15]. He argues that substantive and attempted Hobbs Act extortion are not crimes of violence under § 924(c)'s elements clause. [*Id.* at 9-15]. Thus, movant contends that his § 924(c) conviction in Count III is invalid because Hobbs Act extortion served as its predicate offense. [*Id.* at 15].

Further, movant argues that his § 924(c) conviction in Count VI is invalid because the record showed that the jury could have based this conviction solely on attempted Hobbs Act extortion. [*Id.* at 16]. In support, movant notes that the government dismissed at trial Count V (carjacking) as to movant. [*Id.*] Movant also notes that the government stated on record at a hearing under Federal Rule of Criminal Procedure 29 that it was not dismissing the § 924(c) offense charged in Count VI because it is “attache[d] to the Hobbs Act extortion count [i.e., Count IV].” [*Id.*] Therefore, movant concludes that movant’s “§ 924(c) conviction in Count [VI] was clearly predicated on the attempted Hobbs Act extortion offense in Count [IV], alone.” [*Id.*]; *see also* [Cv-ECF No. 1 at 5].

Additionally, movant argues that Hobbs Act extortion, not carjacking, “is the operative predicate” for movant’s § 924(c) conviction in Count XI. [Cv-ECF No. 13 at 17-20].

The government filed a response. [Cv-ECF No. 14]. The government concedes that “substantive and attempted Hobbs Act extortion are not crimes of violence under the elements clause of [§] 924(c)(3)(A).” [*Id.* at 3]. Because Counts III and VI were predicated solely on, respectively, Hobbs Act and attempted Hobbs Act extortion, movant is “actually innocent” of his § 924(c) conviction in these Counts. [*Id.* at 3-4]. The government concedes that the court “should vacate his convictions and sentences as to those [C]ounts.” [*Id.* at 4].

By contrast, the government notes that carjacking is a crime of violence and that Count XI “was predicated on both attempted Hobbs Act extortion and carjacking.” [*Id.*] Thus, the government contends that movant “cannot satisfy his burden of showing that there is a reasonable likelihood that the jury based its [§] 924(c) verdict on Count [XI] solely on the predicate attempted Hobbs Act extortion offen[s]e rather than on the predicate carjacking offense.” [*Id.*] Thus, the government concludes that movant’s § 2255 motion “should be denied with respect to that [C]ount.” [*Id.*]

Movant’s reply is substantially the same as his motion. [Cv-ECF No. 15].

### III. Standard of Review

\*4 Generally, a movant may collaterally attack his sentence when it violates the Constitution or federal law, exceeds the maximum authorized by law, is imposed without jurisdiction, or is otherwise subject to collateral attack. 28 U.S.C. §

2255(a). “Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.” *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations, internal quotation marks, and bracket omitted). Conviction of “an act that the law does not make criminal [i.e., actual innocence]” “inherently results in a complete miscarriage of justice.” *See Davis v. United States*, 417 U.S. 333, 346 (1974); *Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc).

### IV. Legal Analysis

A § 2255 movant “bear[s] the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he [must] show that his § 924(c) conviction resulted from application of *solely* the [now defunct] residual clause [in § 924(c)(3)(B)].” *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019) (emphasis added) (citing *Beeman v. United States*, 871 F.3d 1215, 1222-25 (11th Cir. 2017); *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016)). Specifically, movant must show “that it was more likely than not [that] he in fact was sentenced ... [solely] under [§ 924(c)’s] residual clause.” *See Beeman*, 871 F.3d at 1225. “If it is just as likely that the [jury] relied on [§ 924(c)’s] elements ... clause, solely or as an alternative basis for the [conviction], then [ ] movant has failed to show that his [§ 924(c) conviction in Count XI] was due to use of the residual clause.” *See id.* at 1222; *see also In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019) (“[T]he [§ 2255] movant ... bears the burden of proving the likelihood that the jury based its verdict of guilty ... solely on the [offense that is not a crime of violence under § 924(c)’s residual clause], and not also on one of the other valid predicate offenses identified in the count ....” (citing *Beeman*, 871 F.3d at 1222; *Moore*, 830 F.3d at 1272)).

Here, based on his arguments, the government’s concessions, and review of the record, movant has demonstrated that he is actually innocent of his § 924(c) convictions in Counts III and VI. These convictions were predicated on offenses that could have been crimes of violence solely under § 924(c)’s unconstitutional residual clause. Therefore, these convictions should be vacated and movant should be resentenced.

On the other hand, movant has not shown that it is more likely than not that the jury based his § 924(c) conviction in Count XI solely on his conviction for attempted Hobbs

Act extortion. The indictment alleged both attempted Hobbs Act extortion in Count IX and carjacking in Count X as the predicate offenses for the § 924(c) charge in Count XI. Furthermore, the court instructed the jury that it could not convict movant of the § 924(c) offense in Count XI unless the prosecution proved beyond a reasonable doubt that movant “committed the ... extortion or car jacking offense as alleged in the indictment.” [Cr-ECF No. 445 at 23]. Additionally, the jury convicted movant of both attempted Hobbs Act extortion in Count IX and carjacking in Count X. Moreover, in affirming movant's convictions, the Eleventh Circuit found that the evidence was sufficient to support movant's convictions for both carjacking in Count X and using and carrying a firearm during and in relation to a crime of violence in Count XI. *Diaz*, 248 F.3d at 1097-1100. And, again, the Eleventh Circuit has held that carjacking is categorically a crime of violence under § 924(c)'s elements clause, which “*Davis* did not undermine.” *United States v. Dugas*, No. 5:03-CR-29/MCR/MJF, 2020 WL 535696, at \*2 (N.D. Fla. Jan. 31, 2020). These facts, in and of themselves, suggest that the jury based movant's § 924(c) offense at least in part on his conviction for carjacking in Count X. *Cf. Beeman*, 871 F.3d at 1221 (a movant cannot show a *Johnson* violation if he fails to prove that he would not have been classified as an armed career criminal if the ACCA's residual clause did not exist, which he cannot do if he had enough valid predicate offenses under the ACCA's elements and/or enumerated offenses clauses).

\*5 The fact that movant's convictions for attempted Hobbs Act extortion (Count IX) and carjacking (Count X) “seem inextricably intertwined” supports this finding. *See Cannon*, 931 F.3d at 1243. The carjacking conviction in Count X was based on the Gonzalez episode, and the Eleventh Circuit found in affirming movant's convictions that “the theft of Gonzalez's vehicle was an essential part of the extortion and robbery plan from the beginning.” *Diaz*, 248 F.3d at 1097-98. Thus, “it is difficult to see how a jury would have concluded that [movant] was guilty of using [and carrying] a firearm during and in [relation to] the underlying [attempted] Hobbs Act [extortion] predicate[ ] without at the same time [ ] concluding that he did so during and in [relation to] the underlying ... carjacking predicate[ ].” *See Cannon*, 931 F.3d at 1243.

For these reasons, movant has not shown that it is more likely than not that the jury based his § 924(c) conviction in Count XI solely on the attempted Hobbs Act extortion conviction in Count IX. Rather, the record indicates that the jury based said

§ 924(c) conviction partly on his conviction for carjacking in Count X. Consequently, he has not met his burden of proof under § 2255 on this *Davis* claim.

Movant contends that this court must conclude that his conviction for attempted Hobbs Act extortion (Count IX) is the “operative predicate” for his § 924(c) conviction in Count XI. He cites *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016).

In *Gomez*, the Court granted the movant's application to file a successive § 2255 motion based on *Johnson*. 830 F.3d at 1228. In reaching this disposition, *Gomez* stated that the applicant's indictment was “duplicious” inasmuch as it listed multiple predicate offenses for his § 924(c) conviction. *See id.* at 1226-27. *Gomez* expressed concern that that “general verdict of guilty [did] not reveal any unanimous finding by the jury that the [applicant] was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others.” *Id.* at 1227. *Gomez* reasoned:

It is certainly possible that the government may have presented evidence that [the applicant] “possessed” a firearm at some point during the ongoing Hobbs Act conspiracy. But, the evidence may likewise have shown that he left that firearm at home for the drug trafficking crimes, or the attempted robbery. And we can't know what, if anything, the jury found with regard to [the applicant's] connection to a gun and these crimes.

*Id.*

Further, *Gomez* suggested that “[a]n indictment that lists multiple predicates in a single § 924(c) count allows for a defendant's mandatory minimum to be increased” in a way that violates the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). *Id.* *Alleyne* held that “facts that increase mandatory minimum sentences must be submitted to the jury” “and found beyond a reasonable doubt.” 570 U.S. at 116. *Gomez* expressed concern that a duplicious indictment could require the court to “guess which predicate the jury relied on” and engage in unconstitutional “‘judicial

factfinding’ when it comes to increasing a defendant’s mandatory minimum sentence.” 830 F.3d at 1227-28.

However, in granting the applicant’s application, *Gomez* stated that “the question of whether *Johnson* invalidate[d] [his] sentence must be decided in the first instance by the [d]istrict [c]ourt” and that “[i]t is the job of the district court to decide every aspect of [his] motion ... *de novo*.” *Id.* at 1228. Thus, *Gomez* did not determine that the applicant’s § 924(c) conviction was invalid in light of *Davis*. It merely determined that the applicant was entitled to file a successive § 2255 motion because he had alleged a potentially valid claim under *Johnson*.

\*6 Notably, *Gomez* does not address the burden of proof under § 2255. Even before *Gomez* was decided, the Eleventh Circuit had held that “a movant has the burden of showing that he is entitled to relief in a § 2255 motion[.]” *Moore*, 830 F.3d at 1272 (citing *Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015); *LeCroy v. United States*, 739 F.3d 1297, 1321 (11th Cir. 2014)); *see also Beeman*, 871 F.3d at 1222 (noting “a long line of [binding] authority [dating to the 1970s] holding that a § 2255 movant bears the burden to prove the claims in his § 2255 motion” (citing cases)). This long line of cases -- which led to the Eleventh Circuit’s decisions in *Moore* and *Beeman* holding that a § 2255 movant bears the burden of proving a *Johnson* claim -- bind this court.

Movant contends that *Beeman* is inapplicable because it “was a *Johnson*-based decision regarding application of the ACCA’s recidivist sentencing enhancement.” [Cv-ECF No. 15 at 4-5 n.3]. Again, however, this contention disregards *Hammoud* and *Cannon*, which apply *Moore* and *Beeman* to a § 2255 movant’s *Davis* claim. This contention also disregards the similarities between *Johnson* and *Davis* claims. *See In re Pollard*, 931 F.3d 1318, 1320-21 (11th Cir. 2019) (noting similarity of *Johnson* and *Davis* claims and stating that caselaw governing *Johnson* claims may apply to *Davis* claims).

Movant contends that *Hammoud*’s and *Cannon*’s discussion of the burden of proof for *Davis* claims is dicta. *See* [Cv-ECF No. 15 at 5]. Assuming this were true, there remains a long line of controlling cases holding that a § 2255 movant bears the burden to prove his claims. Therefore, even if *Hammoud*’s and *Cannon*’s discussion of the burden of proof for *Davis* claims were dicta, the undersigned would still conclude that a *Davis* movant must prove that it is more likely than not that his § 924(c) conviction was based solely on the residual clause.

*See Beeman*, 871 F.3d at 1221-22 (“[L]ike any other § 2255 movant, a *Johnson* § 2255 claimant ... must show that--more likely than not--it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.”). And, again, *Gomez* does not address a § 2255’s movant burden of proof on a *Davis* claim.

*Alleyne* is also inapplicable. For starters, “*Alleyne* does not apply retroactively on collateral review.” *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (per curiam) (citation omitted); *see also Cannon*, 931 F.3d at 1241 n.3.

Furthermore, *Alleyne* is distinguishable. *Alleyne* held that “facts that increase mandatory minimum sentences must be submitted to the jury” “and found beyond a reasonable doubt.” 570 U.S. at 116. Currently, § 924(c) prescribes a 5-year mandatory minimum sentence for using or carrying a firearm during and in relation to a crime of violence. *Id.* at 103; *see also* 18 U.S.C. § 924(c)(1)(A)(i). The mandatory minimum increases to seven years “if the firearm is brandished” and ten years “if the firearm is discharged.” 570 U.S. at 104; *see also* 18 U.S.C. § 924(c)(1)(A)(ii)-(iii).

But here, when movant committed his § 924(c) offenses, “the statutorily mandated term of imprisonment [was] five years for the first conviction and 20 years for the second or subsequent conviction.” PSI ¶ 129; *see also* 18 U.S.C. § 924(c) (1994). In accordance with the statute and its “binding interpretation ... at that time,” the district court “stacked” movant’s § 924(c) convictions such that he received a 5-year sentence on his first conviction and consecutive 20-year sentences on each remaining one. [Cv-ECF No. 13 at 3 (internal quotation marks omitted)]. In stark contrast to *Alleyne*, the district court did not impose a sentence exceeding 20 years on Count XI based on judicial factfinding (e.g., the firearm was brandished or discharged). Indeed, § 924(c) did not prescribe increased mandatory minimum sentences for brandishing or discharging a firearm when movant committed his offenses. *See Act to Throttle the Criminal Use of Guns*, Pub. L. No. 105-386, 112 Stat. 3469 (1998); *see also Lomeli v. United States*, No. 1:15-CV-00347-JHH, 2015 WL 1854885, at \*4 n.3 (N.D. Ala. Apr. 22, 2015) (“In 1998, Congress amended § 924(c) to establish three levels of mandatory minimum punishments: five years for possession of a firearm, seven years for brandishing a firearm, and ten years for discharging a firearm ....”).

\*7 In short, the district court did not increase, through “judicial factfinding” or otherwise, movant’s 20-year mandatory sentence on his § 924(c) conviction in Count XI. Thus, even if *Alleyne* applied in this § 2255 proceeding, movant has not shown that it would invalidate his conviction on Count XI or otherwise entitle him to relief. See *United States v. Hatten*, 646 F. App’x 916, 918 (11th Cir. 2016) (per curiam) (“*Alleyne* [is] irrelevant because [the defendant’s] mandatory minimum sentence was unchanged.”).

Movant’s next contention is that the modified categorical approach shows that this court must conclude that only attempted Hobbs Act extortion underlay movant’s § 924(c) conviction in Count XI. This contention fails.

Courts “apply the categorical approach when determining whether an offense constitutes a ‘crime of violence’ under the elements clause [of § 924(c)].” *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (citing *St. Hubert*, 909 F.3d at 348-49). “In doing so, ‘[courts] must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts’ qualify as crimes of violence.” *St. Hubert*, 909 F.3d at 349 (first alteration added) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)).

Under the modified categorical approach, when a statute is “divisible” (i.e., defines multiple crimes), courts may consider a limited class of judicial documents to determine “‘what crime, with what elements, a defendant was convicted of.’” *United States v. Gandy*, 917 F.3d 1333, 1339 (11th Cir. 2019) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)). Courts may then presume that that conviction rested on the least criminalized acts and determine whether that crime is a crime of violence under § 924(c)’s elements clause. See *Gandy*, 917 F.3d at 1339-40.

Here, however, the issue is not whether the predicates for movant’s § 924(c) conviction in Count XI (attempted Hobbs Act extortion and carjacking) are crimes of violence under its elements clause. The government has conceded that attempted Hobbs Act extortion is not, and the Eleventh Circuit has held that carjacking is. Rather, the dispositive issue is whether movant has shown that it is more likely than not that the jury based his § 924(c) conviction in Count XI solely on his conviction for Hobbs Act extortion. On this record, this question of “historical fact” does not further depend on the categorical or modified categorical approach. See *Beeman*, 871 F.3d at 1224 n.5.

Movant next contends that he is entitled to relief under *Stromberg v. California*, 283 U.S. 359 (1931). *Stromberg* held that, “where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” *Griffin v. United States*, 502 U.S. 46, 53 (1991); see also *Stromberg*, 283 U.S. at 367-68.

But *Stromberg* was decided on direct review, not collateral review. 283 U.S. at 361. Thus, unlike movant here, the defendant in *Stromberg* was not constrained by *Beeman*’s burden of proof. See *Moore*, 830 F.3d at 1272 (“When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence.” (ellipsis in original) (citations and internal quotation marks omitted)). *Beeman* instructs that the burden of proof and persuasion is “critical” to the court’s decision in § 2255 action. *Beeman*, 871 F.3d at 1221-22.

\*8 As applied here, a *Stromberg* claim contends that a general verdict that “may have rested” on § 924(c)’s residual clause violates due process and warrants vacatur of the conviction. Cf. *Griffin*, 502 U.S. at 53 (emphasis added). But, to prevail on his *Davis* claim, movant must show that it is more likely than not that his conviction in Count XI was, as a matter of “historical fact,” based solely on § 924(c)’s residual clause. See *Beeman*, 871 F.3d at 1224-25 & n.5. Indeed, as movant seems to acknowledge, the mere possibility that his conviction in Count XI “could have *theoretically* been based on” § 924(c)’s residual clause is not a basis under § 2255 “to set aside [this conviction].” See [Cv-ECF No. 13 at 19-20 (emphasis added)]. This understanding comports with *Beeman*, and AEDPA’s “fundamental purpose ... to establish finality in post-conviction proceedings.” *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002); see also *Dimott v. United States*, 881 F.3d 232, 241-42 (1st Cir. 2018) (holding that § 2255 movants must prove *Johnson* claims by a preponderance of the evidence and reasoning that allocating the burden of proof in “federal post-conviction petitions ... [is] an issue not implicated at all by *Stromberg*”). In short, *Stromberg* does not entitle movant to relief on his *Davis* claim in this § 2255 proceeding.

Accordingly, movant has not shown that it is more likely than not that the jury based his conviction in Count XI solely on his conviction for attempted Hobbs Act extortion. Consequently, he has not shown actual innocence of this § 924(c) offense and is not entitled to vacatur of it.

In sum, movant's § 2255 motion should be granted in part and denied in part. Movant's convictions and sentences in Counts III and VI should be vacated.<sup>2</sup> However, movant's conviction in Count XI should not be vacated.

#### V. Evidentiary Hearing

The court need not hold an evidentiary hearing. The undersigned resolved the claims in the motion based on the “files and records of the case.” See generally 28 U.S.C. § 2255(b); see also *Franklin v. United States*, 227 F. App'x 856, 860 (11th Cir. 2007) (per curiam) (district court did not abuse its discretion in failing to hold hearing under § 2255 when record was sufficient for court to resolve claim). Notably, movant has not asked for an evidentiary hearing.

#### VI. Certificate of Appealability

“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rule 11(a), Rules Governing § 2255 Proceedings. “If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” *Id.* “If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” *Id.* “A timely notice of appeal must be filed even if the district court issues a certificate of appealability.” Rule 11(b), Rules Governing § 2255 Proceedings.

“A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court rejects a § 2255 movant's constitutional claims on the merits, the movant “must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citation and internal quotation marks omitted).

Here, because reasonable jurists could find the court's assessment debatable, a certificate of appealability should be granted on the following issue:

Whether a § 2255 movant raising a *Davis* claim bears the burden to show that it is more likely than not that his § 924(c) conviction resulted solely from the application of § 924(c)'s unconstitutional residual clause and, if not, whether movant is entitled to relief on his *Davis* challenge to his § 924(c) conviction in Count XI.

#### VII. Recommendations

\*9 Based on the foregoing, it is recommended that movant's motion to vacate [Cv-ECF No. 13] be **GRANTED IN PART AND DENIED IN PART**, with the following results:

1. Movant's convictions and sentences in Counts III and VI should be vacated; and
2. Movant's motion should be denied as to his *Davis* challenge to his § 924(c) conviction in Count XI.

It is further recommended that a certificate of appealability be GRANTED as specified above.

It is further recommended that final judgment be entered and that this case be closed.

Objections to this report may be filed with the district judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar movant from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. See 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985).

#### All Citations

Not Reported in Fed. Supp., 2020 WL 13846010

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**Footnotes**

- 1 The court granted the government's motion to dismiss Count V as to movant. [Diaz, 248 F.3d at 1082 n.12.](#)
- 2 Movant contends that he is entitled to a resentencing hearing, [Cv-ECF No. 13 at 22], and the government has not argued otherwise, *see generally* [Cv-ECF No. 14].

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Post-Conviction Relief Granted in Part, Denied in Part by [Munoz v. United States](#), S.D.Fla., March 25, 2021

248 F.3d 1065

United States Court of Appeals,  
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Gloria Maria DIAZ, Sergio Echevarria, a.k.a.

[Papo](#), a.k.a. Sylvio, et al., Defendants–Appellants.

No. 99–4166.

|

April 17, 2001.

**Synopsis**

Following joint trial, six defendants were convicted in the United States District Court for the Southern District of Florida, No. 96-00443-1-CR-10-ASG, [Alan S. Gold](#), J., of conspiracy to violate Hobbs Act, substantive Hobbs Act violations, carjacking, and weapons offenses, based on scheme involving three separate kidnapping and extortion episodes. Defendants appealed. The Court of Appeals, Dowd, District Judge, sitting by designation, held that: (1) evidence supported convictions for conspiracy to violate Hobbs Act, and substantive Hobbs Act violations, as to five defendants; (2) evidence did not support Hobbs Act convictions of sixth defendant; (3) carjacking convictions were supported by evidence; (4) evidence supported weapons conviction of defendant as to kidnapping incident during which he was not present, based on foreseeable use of weapon during kidnapping by his accomplices; (5) refusal to sever charges did not result in prejudice; (6) denial of mistrial was within district court's discretion; (7) government's violation of witness sequestration order was not prejudicial; and (8) court could not make five-level weapons enhancements under Sentencing Guidelines based on the brandishing or possession of a firearm by a codefendant.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (66)

**[1] Criminal Law** **Review De Novo**

Whether sufficient evidence was presented at trial to support defendant's conviction is a question of law subject to de novo review.

[7 Cases that cite this headnote](#)

**[2] Criminal Law** **Reasonable doubt**

Court of Appeals reviews the sufficiency of the evidence to support a conviction to determine whether a reasonable jury could have concluded that the evidence established defendant's guilt beyond a reasonable doubt.

[9 Cases that cite this headnote](#)

**[3] Criminal Law** **Construction in favor of government, state, or prosecution**

**Criminal Law** **Inferences or deductions from evidence**

**Criminal Law** **Credibility of Witnesses**

In reviewing sufficiency of evidence to support a conviction, evidence is viewed in the light most favorable to the government and all reasonable inferences and credibility choices are made in the government's favor.

[18 Cases that cite this headnote](#)

**[4] Extortion** **Federal Offenses**

**Robbery** **Nature and elements in general**

Hobbs Act prohibits robbery or extortion, and attempts or conspiracies to commit robbery or extortion, that in any way or degree obstruct, delay, or affect commerce or the movement of any article or commodity in commerce. [18 U.S.C.A. § 1951\(a\)](#).

[14 Cases that cite this headnote](#)

**[5] Conspiracy** **Particular Subjects of Criminal Conspiracy**

**Robbery** 🔑 Nature and elements in general

To prove a Hobbs Act conspiracy, government must prove that (1) two or more persons agreed to commit a robbery or extortion encompassed within the Hobbs Act, (2) the defendant knew of the conspiratorial goal, and (3) the defendant voluntarily participated in helping to accomplish the goal. 18 U.S.C.A. § 1951(a), (b)(1).

12 Cases that cite this headnote

**[6] Commerce** 🔑 Federal Offenses and Prosecutions

**Conspiracy** 🔑 Extortion, threats, stalking, and harassment

**Extortion** 🔑 Interstate commerce

Hobbs Act applies to extortion wherein the perpetrator in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity of commerce; only a de minimis nexus with interstate commerce is required, and where attempted extortion or conspiracy to extort are charged, the interstate nexus may be demonstrated by evidence of potential impact on interstate commerce, or by evidence of actual, de minimis impact. 18 U.S.C.A. § 1951.

15 Cases that cite this headnote

**[7] Extortion** 🔑 Interstate commerce

Potential impact on interstate commerce as result of defendant's extortionate conduct, for purposes of determining whether conduct will support charge under Hobbs Act, is measured at the time of the attempt, i.e., when the extortion demand is made, based on the assumed success of the intended scheme, and a sufficient potential impact exists when there is evidence of a plan to embark upon a course of extortionate behavior likely to have the natural effect of obstructing commerce. 18 U.S.C.A. § 1951.

1 Case that cites this headnote

**[8] Extortion** 🔑 Interstate commerce

Unlike a conspiracy charged under the Hobbs Act, which only requires proof that defendants' scheme would have affected interstate commerce, a substantive Hobbs Act violation requires an actual effect on interstate commerce; however, requisite effect on interstate commerce need not be substantial, as all that is required is minimal impact, and the effect on interstate commerce is not limited to only adverse effects. 18 U.S.C.A. § 1951.

17 Cases that cite this headnote

**[9] Robbery** 🔑 Nature and elements in general

While Hobbs Act usually is applied to robberies of businesses, criminal acts directed toward individuals also may violate Hobbs Act. 18 U.S.C.A. § 1951.

3 Cases that cite this headnote

**[10] Extortion** 🔑 Interstate commerce

**Robbery** 🔑 Nature and elements in general

Robberies or extortions perpetrated upon individuals are prosecutable under the Hobbs Act when any one of the following three conditions is met: (1) the crime depletes the assets of an individual who is directly engaged in interstate commerce, (2) the crime causes the individual to deplete the assets of an entity engaged in interstate commerce, or (3) the number of individuals victimized or the sums involved are so large that there will be a cumulative impact on interstate commerce. 18 U.S.C.A. § 1951.

25 Cases that cite this headnote

**[11] Conspiracy** 🔑 Extortion, threats, stalking, and harassment

Evidence was sufficient to establish that five members of alleged plot to extort money from individuals identified as targets through various tips knew goal of conspiracy, and had voluntarily joined conspiracy, and thus supported their convictions for conspiracy to violate Hobbs Act; four members of plot invested a substantial amount of time targeting each individual victim, beginning with tips provided by fifth member,

and there was no indication that any members did not participate voluntarily, were forced to participate, or indicated a desire to disengage from conspiracy. 18 U.S.C.A. § 1951.

1 Case that cites this headnote

**[12] Conspiracy** 🔑 Active participation; mere presence

Mere presence is insufficient to prove membership in a conspiracy.

**[13] Criminal Law** 🔑 Purpose and effect of evidence; excluding evidence from consideration

Any error by district court in failing to give limiting instruction in connection with use of extrinsic evidence of uncharged misconduct was harmless in Hobbs Act prosecution, in light of overwhelming evidence against defendant. 18 U.S.C.A. § 1951.

2 Cases that cite this headnote

**[14] Criminal Law** 🔑 Furtherance or Execution of Common Purpose

Statements of coconspirators of a party made during the course and in furtherance of the conspiracy are, by definition, not hearsay. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[15] Criminal Law** 🔑 Furtherance or Execution of Common Purpose

Testimony of prosecution witness, who had participated along with others in kidnapping, regarding statements made by other participants in scheme, were made in furtherance of a conspiracy, and thus were admissible under coconspirator exception to hearsay rule in Hobbs Act prosecution of other participants. 18 U.S.C.A. § 1951; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[16] Criminal Law** 🔑 Furtherance or Execution of Common Purpose

**Criminal Law** 🔑 In general; existence of conspiracy

For statement to be admissible under coconspirator exception to hearsay rule, court must be satisfied that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made in furtherance of the conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[17] Criminal Law** 🔑 Weight and sufficiency

When the preliminary facts relevant to determining applicability of coconspirator exception to hearsay rule are in dispute, the offering party must prove them by a preponderance of the evidence; in making this preliminary factual determination, court may examine the hearsay statements sought to be admitted. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[18] Criminal Law** 🔑 Coconspirators' statements

Confrontation clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy requirements of coconspirator exception to hearsay rule. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[19] Extortion** 🔑 Federal offenses

Evidence was sufficient to establish that episode in which defendants kidnapped husband and wife who jointly owned medical treatment facility, and extorted funds from them, had an effect on interstate commerce, and thus to support defendants' convictions for substantive violations of Hobbs Act; while husband and wife were not directly engaged in interstate commerce, they operated facility through corporation that was so engaged, through its

billing of private insurance companies located in other states for payment, and extortion resulted in actual effect on interstate commerce, as facility was shut down for several days. 18 U.S.C.A. § 1951.

**[20] Extortion** 🔑 Federal offenses

Evidence was sufficient to establish that defendants' attempt to extort \$250,000 from victims, if successful, would have had effect on interstate commerce, by depleting assets of three businesses owned by victims that were engaged in interstate commerce, or causing victims to divert assets that would otherwise be expended in interstate commerce, and thus to support defendants' substantive convictions under Hobbs Act for attempting to interfere or affect commerce by extortion. 18 U.S.C.A. § 1951(a).

9 Cases that cite this headnote

**[21] Extortion** 🔑 Federal offenses

Evidence was sufficient to establish that defendants' attempted robbery of housekeeper employed by business owner who was their intended victim would have depleted assets used by owner in his business, which was engaged in interstate commerce, and that subsequent extortion of assets did deplete owner's assets, and thus, could establish jurisdictional basis sufficient to support defendants' convictions for substantive violations of Hobbs Act. 18 U.S.C.A. § 1951.

8 Cases that cite this headnote

**[22] Robbery** 🔑 Weight and Sufficiency of Evidence

Evidence supported Hobbs Act conviction for attempted robbery, even though victim, after identifying defendant in a composite lineup, was unable to identify him at trial, where prosecution's case did not rely solely on victim's identification, and other witnesses gave testimony tying defendant to robbery in question. 18 U.S.C.A. § 1951.

**[23] Extortion** 🔑 Federal offenses

**Kidnapping** 🔑 Weight and sufficiency

Evidence was sufficient to establish that defendant had participated in kidnapping and extortion of victim, which had impact on interstate commerce, and thus to support his conviction for substantive violation of Hobbs Act. 18 U.S.C.A. § 1951.

**[24] Criminal Law** 🔑 Reasonable doubt

Evidence will be deemed sufficient to sustain a conviction unless Court of Appeals finds that no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

4 Cases that cite this headnote

**[25] Conspiracy** 🔑 Knowledge and intent as to combination, agreement, and participation

Mere knowledge of a conspiracy in association with the conspirators is insufficient evidence to support a conspiracy conviction.

2 Cases that cite this headnote

**[26] Criminal Law** 🔑 Necessity

Uncorroborated accomplice testimony is sufficient to support a conviction if it is not, on its face, incredible or otherwise insubstantial.

4 Cases that cite this headnote

**[27] Criminal Law** 🔑 Furtherance or Execution of Common Purpose

Statements made by participant in conspiracy to commit acts of kidnapping and extortion which identified possible targets for kidnapping and extortion purposes were made during and in furtherance of the conspiracy, so that testimony of coconspirator regarding statements was admissible under coconspirator exception to hearsay rule. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Case that cites this headnote

**[28] Conspiracy** 🔑 Extortion, threats, stalking, and harassment

Evidence was insufficient to establish that a successful surveillance by defendant and his accomplices of any of four proposed targets would have resulted in an extortion, robbery, or kidnapping that had an effect on interstate commerce, so that it would be encompassed within Hobbs Act, and thus could not support conviction for Hobbs Act conspiracy; testimony that targets operated bars or medical clinics could not establish sufficient nexus to support charge. 18 U.S.C.A. § 1951.

2 Cases that cite this headnote

**[29] Conspiracy** 🔑 Extortion, threats, stalking, and harassment

Evidence was insufficient to establish involvement on part of defendant in conspiracy to kidnap and extort victims, as required to support conspiracy conviction under Hobbs Act. 18 U.S.C.A. § 1951.

**[30] Kidnapping** 🔑 Weight and sufficiency

Evidence was insufficient to establish that defendant was involved as a “tipster” in kidnapping by his associates which resulted in an effect on interstate commerce, as required to support conviction of defendant for a substantive violation of Hobbs Act. 18 U.S.C.A. § 1951.

**[31] Robbery** 🔑 Intent

**Robbery** 🔑 Taking in general

**Robbery** 🔑 Force

In order for defendant to be convicted of carjacking, government must prove that the defendant (1) with intent to cause death or serious bodily harm (2) took a motor vehicle (3) that had been transported, shipped or received in interstate or foreign commerce (4) from the

person or presence of another (5) by force and violence or intimidation. 18 U.S.C.A. § 2119.

21 Cases that cite this headnote

**[32] Robbery** 🔑 Intent

Intent requirement of federal carjacking statute is satisfied when the government proves that at the moment the defendant demanded or took control over the driver's automobile, the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the automobile. 18 U.S.C.A. § 2119.

6 Cases that cite this headnote

**[33] Robbery** 🔑 Weight and Sufficiency of Evidence

Evidence was sufficient to establish that defendants took victim's automobile by force and violence or intimidation, and that at time automobile was taken defendants possessed the intent to seriously harm or kill the driver if necessary to effectuate taking, and thus to support their convictions for carjacking; theft of vehicle was part of scheme, which included kidnapping, to extort money or rob victims, and defendants brandished weapons and took victim and her children by force. 18 U.S.C.A. § 2119.

8 Cases that cite this headnote

**[34] Robbery** 🔑 Weight and Sufficiency of Evidence

Evidence was sufficient to establish that defendants, who stole vehicle after they impersonated police and used a flashing light to pull its driver over, possessed the intent to seriously harm or kill the driver if necessary to effectuate taking, and thus to support their convictions for carjacking; primary objective of defendants was not taking vehicle, but to kidnap driver for purposes of extortion, and defendants approached driver with weapons drawn, threw him to the ground, blindfolded and handcuffed him, and threw him in back of vehicle. 18 U.S.C.A. § 2119.

5 Cases that cite this headnote

[35] **Weapons** 🔑 Use and manner of use

Conviction for using a firearm in furtherance of a crime of violence requires proof of active employment of a weapon, and proof of mere possession was insufficient. 18 U.S.C.A. § 924(c).

1 Case that cites this headnote

[36] **Weapons** 🔑 Furtherance; nexus

**Weapons** 🔑 Using, carrying, brandishing, or discharge

**Weapons** 🔑 Parties to crime; aiding and abetting

Decision by Supreme Court in *Bailey* that conviction for using a firearm in furtherance of a crime of violence requires proof of active employment of a weapon, and that proof of mere possession is insufficient, did not negate applicability of *Pinkerton* doctrine to such cases, and accordingly, defendants remain criminally liable for the reasonably foreseeable actions of their coconspirators in using or carrying a firearm during the commission of a crime of violence. 18 U.S.C.A. § 924(c).

10 Cases that cite this headnote

[37] **Criminal Law** 🔑 Aiding, abetting, or other participation in offense

Statute making any person who aids or abets in the commission of a crime punishable as a principal does not establish a separate offense of aiding and abetting, but only abolishes the common law distinction between principals and accessories. 18 U.S.C.A. § 2.

1 Case that cites this headnote

[38] **Conspiracy** 🔑 Liability for acts of coconspirators; *Pinkerton* doctrine

**Conspiracy** 🔑 Aiding and abetting

**Weapons** 🔑 Parties to crime; aiding and abetting

Because *Pinkerton* doctrine may apply to establish a substantive violation of statute which makes it a crime to use a weapon in furtherance of a crime of violence, a person not present when the offense was committed need not be an aider and abetter in order to be found guilty of such an offense; rather, an absent conspirator may be found guilty of offense if the carrying or using of a firearm by a coconspirator is a reasonably foreseeable action of the conspiracy. 18 U.S.C.A. § 924(c).

11 Cases that cite this headnote

[39] **Weapons** 🔑 Parties to crime; aiding and abetting

Evidence was sufficient to establish that it was reasonably foreseeable to defendant, who participated in first and last of series of three kidnappings which were part of single conspiracy, and in each of which weapons were used, that weapons would be used during second kidnapping, during which he was not present, and thus, to support his conviction for using or carrying a firearm during commission of a crime of violence with respect to second kidnapping; *Pinkerton* doctrine allowed defendant to be convicted as a principal of weapons offense even though he was not present during second kidnapping. 18 U.S.C.A. § 924(c).

3 Cases that cite this headnote

[40] **Criminal Law** 🔑 Joint or Separate Trials of Codefendants

Prevailing attitude is that persons who are charged together should be tried together.

1 Case that cites this headnote

[41] **Criminal Law** 🔑 Discretion in general  
**Criminal Law** 🔑 Preliminary proceedings

Granting or denial of a severance is within the discretion of trial judge, and will be overturned only for abuse of discretion.

**[42] Criminal Law** 🔑 Preliminary proceedings

To show that the trial judge abused his discretion in failing to grant a severance of charges against multiple defendants, the appellant must demonstrate that the denial of a severance resulted in specific and compelling prejudice against which the trial court was unable to afford protection.

[2 Cases that cite this headnote](#)

**[43] Criminal Law** 🔑 Evidence admissible only against codefendant; spillover or compartmentalization

Only if the jury could not separate the evidence relevant to each defendant and render a fair and impartial verdict as to each should severance of charges against multiple defendants be granted.

[5 Cases that cite this headnote](#)

**[44] Criminal Law** 🔑 Evidence admissible only against codefendant; spillover or compartmentalization

Jury's ability to reach different verdicts as to different defendants is one factor that signifies that jury had ability to make individualized determinations, and thus, that denial of motion for severance was within district court's discretion.

[3 Cases that cite this headnote](#)

**[45] Criminal Law** 🔑 Preliminary proceedings

In evaluating district court's denial of severance, Court of Appeals is mindful of the fact that Constitution does not guarantee a trial free from the prejudice that inevitably accompanies any charge of heinous group crime, but demands only that the potential for transference of guilt be minimized to the extent possible under the circumstances.

[2 Cases that cite this headnote](#)

**[46] Criminal Law** 🔑 Evidence admissible only against codefendant; spillover or compartmentalization

Refusal to sever charges against defendant, who was charged along with five other defendants with violations of Hobbs Act and other crimes, did not result in prejudice to defendant, and thus was not an abuse of discretion by district court, even though defendant argued that evidence relating to counts for which he was not charged had impermissible "spillover" effect, where evidence as to counts for which defendant was charged was overwhelming, and court issued limiting instruction with regard to counts for which defendant was not charged. [18 U.S.C.A. § 1951](#).

[2 Cases that cite this headnote](#)

**[47] Criminal Law** 🔑 Issues related to jury trial

Court of Appeals reviews district court's refusal to grant a mistrial for abuse of discretion.

[2 Cases that cite this headnote](#)

**[48] Criminal Law** 🔑 Curing Error by Withdrawal, Striking Out, or Instructions to Jury

If the district court issued a curative instruction, Court of Appeals will reverse its refusal to grant of mistrial only if the evidence is so highly prejudicial as to be incurable by the district court's admonition.

[5 Cases that cite this headnote](#)

**[49] Criminal Law** 🔑 Issues relating to multiple charges or defendants**Criminal Law** 🔑 Acts done or omitted by defense

District court did not abuse its discretion by refusing to grant mistrial in prosecution of multiple defendants on Hobbs Act and other charges, based on introduction of evidence regarding the type of ammunition recovered from home of one of defendants, and testimony that it is illegal for a convicted felon to possess

ammunition, where court found that testimony was relevant, and it was defense counsel that opened door to discussion of question of whether it was illegal to possess ammunition. 18 U.S.C.A. § 1951.

1 Case that cites this headnote

[50] **Criminal Law** 🔑 Demonstrative conduct by counsel

Actions of prosecutors in laughing after defense counsel, who did not speak Spanish, nonetheless objected to answer given by witness in Spanish as nonresponsive, did not warrant mistrial, as district court's admonishment was sufficient to cure any prejudice to defendant.

[51] **Criminal Law** 🔑 Joinder or severance of counts or codefendants

Reversal based on improper joinder is only required if it results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

2 Cases that cite this headnote

[52] **Criminal Law** 🔑 Joint or Separate Trial of Separate Charges

Question of whether initial joinder of offenses is proper is determined by the trial court before trial, based on an examination of allegations stated on face of indictment. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

2 Cases that cite this headnote

[53] **Criminal Law** 🔑 Conspiracy cases

Joinder of six defendants in single indictment, which charged conspiracy to commit Hobbs Act violation, substantive Hobbs Act violation, carjacking, and weapons offenses, was proper, where specific offenses charged constituted a series of acts committed in furtherance of overall conspiracy, and offenses charged were factually similar and involved a substantial

overlap of participants. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

7 Cases that cite this headnote

[54] **Criminal Law** 🔑 Identity of Accused

Court of Appeals employs a two-step analysis in assessing the constitutionality of a trial court's decision to admit an out-of-court identification; court first must determine whether the original identification procedure was unduly suggestive, and if it was suggestive, court then must consider whether, under the totality of the circumstances, the identification was nonetheless reliable.

97 Cases that cite this headnote

[55] **Criminal Law** 🔑 Identity of Accused

Factors to be considered in determining whether an out-of-court identification was reliable, and thus is admissible, include (1) opportunity to view, (2) degree of attention, (3) accuracy of the description, (4) level of certainty, and (5) length of time between the crime and the identification.

59 Cases that cite this headnote

[56] **Criminal Law** 🔑 Identification

Determination by district court concluded that out-of-court identification procedure was not impermissibly suggestive is subject to a clearly erroneous standard of review.

61 Cases that cite this headnote

[57] **Criminal Law** 🔑 Photographs and Drawings

Determination by district court that procedure used to obtain out-of-court identification of defendant made by kidnapping victim was not impermissibly suggestive, so that evidence of identification was admissible, was not clearly erroneous; while victim was unable to identify defendant from initial photographic lineup, her husband, who was also kidnapped, did identify defendant, victim later identified defendant after police obtained a new photograph of him, and victim was able to identify defendant in court.

6 Cases that cite this headnote

**[58] Criminal Law** 🔑 Arrest and identification, evidence relating to

Any due process violation resulting from kidnapping victim's allegedly unreliable in-court identification of defendant was harmless, where evidence against defendant was overwhelming, so that there was no doubt that jury would have convicted him even absent in-court identification. *U.S.C.A. Const.Amend. 5*.

1 Case that cites this headnote

**[59] Criminal Law** 🔑 Power and duty of court

Trial judge's power to control the progress and the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.

1 Case that cites this headnote

**[60] Criminal Law** 🔑 Power and duty of court

When a violation of sequestration rule occurs, court may respond in one of three ways: (1) it may cite the guilty party for contempt, (2) it may allow opposing counsel to cross-examine the witnesses as to the nature of the violation, or (3) where counsel or the witness violate the rule intentionally, the court may strike testimony already given or disallow further testimony.

6 Cases that cite this headnote

**[61] Criminal Law** 🔑 Issues related to jury trial

District court's denial of a request for mistrial based on a violation of sequestration rule is a matter of discretion, and is reversible only on a showing of prejudice.

8 Cases that cite this headnote

**[62] Criminal Law** 🔑 Reception of evidence

Violation of witness sequestration order which occurred when prosecution was allowed to speak with victim just before he was recalled to stand

to clarify his initial testimony two weeks earlier, in which he stated that he had been physically taken by "armed" men, was not prejudicial to kidnapping defendant, and thus did not require reversal, where violation was not in bad faith, since witness had been called only for a specific purpose of clarifying meaning of "armed," and defense was allowed to cross-examine witness and bring out fact that he never referenced guns in his initial testimony.

2 Cases that cite this headnote

**[63] Jury** 🔑 Sentencing Matters  
**Sentencing and Punishment** 🔑 Factors enhancing sentence

Sentencing Guidelines issues are not subject to *Apprendi* rule and, thus, there is no requirement that sentencing facts relied on under Guidelines be submitted to a jury and found beyond a reasonable doubt. *U.S.S.G. § 1B1.1 et seq.*, 18 U.S.C.A.

24 Cases that cite this headnote

**[64] Sentencing and Punishment** 🔑 Use of weapon or destructive device

District court could not make five-level weapons enhancements under Sentencing Guidelines with respect to defendants' convictions for Hobbs Act conspiracy, substantive Hobbs Act violations, and carjacking, based on the brandishing or possession of a firearm by a codefendant. *18 U.S.C.A. §§ 924(c), 1951; U.S.S.G. § 2K2.4*, 18 U.S.C.A.

26 Cases that cite this headnote

**[65] Sentencing and Punishment** 🔑 Factor inherent in or element of offense in general

When a defendant is convicted of both using or carrying a weapon in connection with a drug-related crime or a crime of violence, and an underlying offense, defendant's possession of a weapon cannot be used under Sentencing Guidelines to enhance the level of the underlying offense. *18 U.S.C.A. § 924(c); U.S.S.G. § 2K2.4*, 18 U.S.C.A.

22 Cases that cite this headnote

**[66] Sentencing and Punishment** 🔑 Value of loss or benefit

Amount of ransom money initially demanded by defendant and his accomplices after kidnapping victim was properly considered in determining amount of loss, for purposes of Sentencing Guidelines, following defendant's Hobbs Act convictions, even though no money was actually obtained. 18 U.S.C.A. § 1951; U.S.S.G. §§ 2B1.1, 2B3.1(b)(7), 2X1.1, 18 U.S.C.A.

1 Case that cites this headnote

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Appeals from the United States District Court for the Southern District of Florida.

Before BARKETT and WILSON, Circuit Judges, and DOWD\*, District Judge.

DOWD, District Judge:

*I. Introduction*

This appeal follows the conviction of the six appellants, Gloria Diaz (“Diaz”), Jose \*1074 Blas Lopez (“Lopez”), Sergio Echevarria (“Echevarria”), Eladio Munoz (“Munoz”), Orestes Hernandez (“Orestes Hernandez”) and Ismael Camacho (“Camacho”) in a single jury trial that focused on three separate terrifying kidnapping and extortion episodes in the Miami area spread over a seventeen month period. The ensuing sentences ranged from a low of 188 months for Lopez to a high of 1145 months for Camacho.

The trial was based on the fourth superseding indictment. The eleven counts included the crime of conspiracy to commit a Hobbs Act violation, a series of substantive Hobbs Act violations, a series of carjackings in violation of 18 U.S.C. §

2119, and a series of 18 U.S.C. § 924(c) violations (hereinafter § 924(c)).<sup>1</sup>

The pivotal event from a prosecutorial standpoint was the arrest of Ilvigio Hernandez (“Ilvigio”) on January 12, 1996 following the failed attempt by Echevarria, Munoz, Orestes Hernandez and Camacho to extort money from the family of Jose and Idania Arias by the method of kidnapping. Ilvigio was an active additional participant in the Arias kidnapping and was to become the primary witness for the government in its successful prosecution. As the law enforcement effort continued after the Arias kidnapping, the authorities learned of an earlier, unreported kidnapping of Nelson and Mercedes Martin on June 26, 1995.

The investigation of the Arias kidnapping eventually led to the arrest of Echevarria and Munoz. The remaining active members of the kidnapping gang—Orestes Hernandez and Camacho—then joined with two other persons, Vlademir Negrin (“Negrin”) and Carlos Escandell (“Escandell”), and engaged in a similar episode involving Rosa and Armando Gonzalez in November of 1996. After many months, arrestee Ilvigio broke his silence and became the government's primary witness as to the January 1996 Arias crime. His cooperation included the disclosure that the remaining two appellants, Diaz and her husband Lopez, had served as “tipsters” in identifying targets for robbery and extortion plots.

The testimony of Ilvigio, bolstered by the vivid descriptions of the victims Idania Arias, Jose Arias, Joseph Arias, Nelson Martin, Mercedes Gomez Martin, and Armando Gonzalez, and aided by cellular telephone records, served to corroborate the identifications and testimony of Ilvigio as to the Arias and Martin crimes. All six appellants—the alleged “tipsters” Diaz and Lopez and the remaining four, Echevarria, Munoz, Orestes Hernandez, and Camacho—were tried jointly and convicted of a series of charges, which featured Hobbs Act violations.<sup>2</sup>

\*1075 *II. The Kidnapping Episodes*

Three separate episodes underlie the charges in this case.<sup>3</sup> First was the robbery and extortion of Nelson and Mercedes Gomez Martin on June 26, 1995. The second episode included the kidnapping and extortion of Jose and Idania Arias and their children on January 11, 1996. The final episode involved the November 4, 1996 attempted robbery of Rosa Gonzalez, Armando Gonzalez's housekeeper and the kidnapping and

extortion of Armando Gonzalez on November 13, 1996. The Arias and Gonzalez episodes also involved carjacking, and firearms were used in all three episodes.

Although not physically involved in the robberies and extortions, Lopez and Diaz served as “tipsters.”<sup>4</sup> They were Santeria priests and used their positions to gain confidential information regarding the financial status of their followers, called “godchildren.”<sup>5</sup> This information was then passed on to Orestes Hernandez who in turn, along with Echevarria, Camacho, Munoz, and Ilvigio, targeted the individuals beginning in December 1994. Both the Martins and the Ariases were godchildren of Lopez and Diaz.

#### *A. The Nelson and Mercedes Martin Episode*

Munoz, Echevarria, Orestes Hernandez, and Camacho kidnapped Nelson Martin on June 26, 1995. Munoz owned and drove the car used to kidnap Nelson, while Echevarria was one of two or three men who pulled Martin from his car.

Nelson Martin and his wife Mercedes Gomez Martin owned Rosa Medical Center and Family Assistance Network. (R.378, at 1005 & 1008). Nelson Martin had gone to the mall to get his hair cut when, upon returning to his car, he was approached by two or three men who were wearing badges, carrying guns, and screaming “FBI, FBI.” (R.370, at 853–54). Martin was dragged from his car at gunpoint and thrown in the back of a green Cadillac where duct tape was wrapped around his eyes, mouth, head, hands, and ankles. (*Id.*).

When they got Martin in the car, Munoz punched Martin in the face twice and told him that he had “a lot of fucking problem with [him], that he had been after [him] for a long time.” (R.370, at 856–57). The \*1076 kidnappers took Martin's watch and money while driving for about half an hour. (R.370, at 868–69). Although Martin's eyes were taped, his profuse sweating had created a little space from which he could see. (R.370, at 867). Upon arriving at their destination, the kidnappers carried Martin up a flight of stairs and threw him on a bed. (R.370, at 869–70). Martin was unable to walk because his feet were still bound. (R.370, at 869). A few minutes later, Martin heard a blow torch being ignited and then felt the heat and was burned on his face, ears, and scalp. (R.370, at 870). The kidnappers continued to beat Martin even while he was being burned and demanded to know the whereabouts of his money. (R.370, at 871). After about five minutes, the kidnappers took the tape off his mouth, and Martin lied to them and told them he had money in his wife's

closet at his house so they would stop torturing him. (R.370, at 871–72).

After obtaining Martin's alarm code and keys to his house, three of the kidnappers went to Martin's house and ransacked it looking for the money. (R.370, at 873). They stole everything from his closet but did not find any money. Upon their return, Martin was hit for lying. (*Id.*). While this was going on, Martin's wife, Mercedes Gomez Martin, and daughter arrived at home. Upon seeing the ransacked house, Mercedes began to page her husband. (R.378, at 991–92). The kidnappers returned her page sometime later, and they demanded \$75,000 in return for her husband. (R.378, at 993). The kidnappers mentioned that Mercedes had a clinic, told her they knew about her businesses, and stated that this was their “job.” (R.378, at 996). They threatened Mercedes to keep her from going to the police, saying her daughter would be next if she did, and it would be worse.

Mercedes worked over the next sixteen hours to come up with \$75,000. Martin was moved several times during this period of time. Mercedes was given a drop-off site the next day, which the kidnappers moved several times. (R.378, at 996–98). While Mercedes waited in the empty lot to drop off the money as instructed, a green Cadillac appeared. Echevarria, Camacho, and Martin got out of the back. Mercedes later identified Echevarria as the person to whom she gave the money. (R.378, at 1020–21). She also identified Camacho as the person “fiddling with the trunk” of the green Cadillac. (R.378, at 1021–22). The Martins did not report the kidnapping and extortion to the police for fear of their children's lives. (R.370, at 877). They did, however, report the stolen car and guns. (R.370, at 878).

During the two years prior to the kidnapping, Mercedes Gomez Martin had been visiting Gloria Diaz. (R.378, at 1011). This relationship continued up until about a month or a month and a half before the kidnapping when Mrs. Martin and Diaz had a falling out over the presence of an old girlfriend of Nelson Martin's at Diaz's home. (R.378, at 1016–17). During their relationship, however, Mrs. Martin advised Diaz about her multiple businesses, including her health care businesses and health care clinics. Diaz then passed this information on to Orestes Hernandez and instructed him to rob Mrs. Martin. (R.382, at 1235–39).

#### *B. The Jose and Idania Arias Episode*

Idania Arias also was a client/follower of Diaz and Lopez. In October 1995, Idania Arias met Diaz for the first time.

Beginning with their first meeting, at which Diaz was going to read Idania Arias's tarot cards, Diaz made reference to her financial status and her businesses. (R.392, at 1765–66). As their relationship progressed, \*1077 Idania Arias told Diaz about her medical supply business, her billing service, and the medical center. (R.392, at 1766). In December 1995, Diaz again read Idania Arias's tarot cards and said that Arias's house needed a “cleansing.” (R.392, at 1769). Lopez and Diaz then went to the Arias home, sacrificed a rooster and a hen, and then spread herbs in the rooms to cleanse them of evil spirits. (R.392, at 1770). During this cleansing, Lopez and Diaz commented on how nice Idania Arias's house was and that she must be making very good money. (R.382, at 1251–52; R.392, at 1770). Idania Arias was questioned as to the location of her valuables, to which she responded they were everywhere. (R.382, at 1251–52).

Diaz then passed this information on to Orestes Hernandez who shared the information with Munoz. (R.378, at 1180–81). On January 11, 1996, Munoz, Echevarria, Orestes Hernandez, and Ilvigio began stalking the Arias family again. (R.382, at 1248–49). They called Diaz to try and locate Idania Arias. (See GX:216 A–C). After calling Idania Arias's billing service business and going to her clinic, they finally located her after going to her home where they observed her leaving with her four-year-old son Anthony. (R.382, at 1254–55). They followed her to the library, where she picked up her eight-year-old son Joseph, and then back to her house. As she pulled into her driveway, Echevarria's white Jaguar pulled up behind her. (R.382, at 1255). Echevarria, Ilvigio, Orestes Hernandez, and Munoz got out and approached her with guns drawn. (R.388, at 1671). Idania Arias handed them her keys and told them to take what they wanted to which they responded that they wanted her and her children. Idania Arias and her two children were forced into the white Jaguar. (R.388, at 1672). Munoz stayed behind in order to steal Idania Arias's black Lexus. (R.382, at 1255).

Idania Arias's eyes, hands, and ankles were duct taped. Duct tape was also placed on the eight-year-old Joseph. Echevarria, who was driving, took them to International Alignment—a paint and body shop. (R.382, at 1260–61; R.388, at 1678; R.392, at 1895). When they got there, they drove inside to wait for Munoz. Idania Arias continually asked why she was being kidnapped, but they did not answer and told her to quit asking questions. She was told that “El Negro” (Munoz) would tell her why she was there when he arrived. (R.382, at 1261–62).

The kidnapers asked about Mr. Arias's whereabouts. (R.388, at 1682). According to Idania Arias, the kidnapers appeared to know everything about her clinic, her billing company, and her medical supply business. (*Id.*). After about forty-five minutes, there was another cellular telephone call from Orestes Hernandez's telephone to Lopez and Diaz's home telephone. (GX:216 A–C). Ilvigio then beeped Camacho. When Camacho returned the call, he was instructed to come to the shop because they had some kidnapping victims. (R.382, at 1262).

Cellular telephone records from the time period when the Arias family was in the body shop revealed the multiple telephone calls and also revealed that the kidnapers tried to reach Mr. Arias at the medical clinic. (GX:216 A–C). The men forced Idania Arias to call her husband and tell him that she and the children had been kidnapped, and if he ever wanted to see them alive, he would have to meet the kidnapers at the clinic with \$500,000. (R.388, at 1683–84). Jose Arias was warned not to call the police. (*Id.*). The kidnapers intended on also seizing Jose Arias to insure that he did not go to the police. (R.382, at 1268). On his way to the clinic, \*1078 however, Jose Arias called the police and never made it to the clinic. (R.402, at 1999).

The kidnapers returned from the clinic empty-handed. Munoz told Idania Arias they wanted \$500,000 ransom. (R.388, at 1688). They explained to her that this was “their job” and that usually they burn, torture, and shock their victims. (R.388, at 1680, 1688–89). Idania Arias was hit, and the kidnapers threatened to kill her children if she did not raise the money. Idania Arias then was released to raise the ransom.

The children were kept at the warehouse over night and then were taken to the Jamaica Inn around 5:00 a.m. the next morning. Ilvigio rented a room at the motel, and he and Munoz took the children there to wait for the ransom. (R.382, at 1274.1280). Ilvigio kept Idania Arias's beeper so she could maintain contact with him regarding her progress in raising the \$500,000. (R.388, at 1690–91).

Following her release, Idania Arias went to her parents' home where she was met by the Metro Dade Police. (R.388, at 1698–99). Upon meeting them, she was so terrorized that she did not believe they were really police officers. (R.388, at 1699). After she accepted that her husband had contacted the police, she cooperated and went to the police station where an undercover telephone was set up for Idania Arias to phone

the kidnapers. (R.388, at 1699–1701). Idania Arias would page her beeper and Ilvigio would call her back immediately. The cellular telephone records for January 11 and 12, 1996 reflect multiple calls between Orestes Hernandez's cellular telephone, Ilvigio's cellular telephone, and the undercover telephone. (R.388, at 1703–04).

Following the advice of the police, Idania Arias told the kidnapers that she could raise only \$250,000. (*Id.*) Ilvigio and Munoz agreed to accept this amount, and Idania Arias arranged for a controlled delivery to the kidnapers of a package purporting to be the ransom money. (R.382, at 1274; R.388, at 1704–05). The drop-off site was changed a number of times until the kidnapers finally decided on the cemetery, where Idania Arias was told to drop the money behind a white and red car. (R.388, at 1705–08). Both Ilvigio and Idania Arias testified that, while driving to the drop off site, Idania demanded to know the location of her children. (R.382, at 1290; R.388, at 1708–09). Ilvigio informed her that they were in Room 43 at the Jamaica Inn. (R.382, at 1290).

Ilvigio, Munoz, Echevarria, Orestes Hernandez, and Camacho waited in two separate vehicles parked across the street from the cemetery. (R.382, at 1288–89). The men saw Arias approach the area as instructed and drop the purported money behind the white and red car. (R.382, at 1289). However, at that point they also saw the police converge upon the occupant of the car, Humberto Munoz (no relation to Eladio Munoz). (*Id.*). Realizing that Idania Arias had gone to the authorities, the kidnapers left the area.

Later, Munoz drove Ilvigio home where, approximately five minutes after Ilvigio arrived, he was arrested. (R.382, at 1291). When Ilvigio was arrested, he still had Arias's beeper in his possession as well as the cellular phone used during the ransom negotiations. (R.402, at 2061–69). After Ilvigio confirmed to the police that the kids were in the Jamaica Inn, the children were safely recovered. (R.402, at 2066–67).

Following the arrest of Ilvigio, the FBI spent weeks examining telephone records from Ilvigio's cellular phone. (R.403, at 2284). They discovered that Ilvigio, Echevarria, Orestes Hernandez, Munoz, and Camacho were communicating constantly \*1079 with each other during the period of time spanning Idania Arias's kidnapping. (GX:216 A–C). For each one of the suspects, investigating agents created a photo spread of six people to show Idania Arias and her oldest son, Joseph. (22:2298). Idania Arias ultimately identified Echevarria, Munoz, and Camacho. (R.392, at

1747, 1748, 1750–51). Joseph Arias identified Munoz and Camacho. While Ilvigio was arrested immediately, he was the only kidnapper in custody until late May 1996 when Munoz and Echevarria were arrested. Although he initially denied the charges, Ilvigio later decided to cooperate with the government.

Idania Arias later told Diaz and Lopez about the kidnapping and extortion. (R.392, at 1771–73). Diaz's reaction was strange according to Idania Arias. Instead of crying with Arias, like most people who heard the story, Diaz kept asking if the kidnapers got any money. (R.392, at 1771). Diaz told Arias not to worry about the incident because many people who came to their home were invaded and kidnapped. (R.402, at 1945–46). Arias explained that “they,” presumably referring to Diaz and Lopez, questioned her about the arrests and investigation in the case. (R.392, at 1771–74).

Approximately five months after the first kidnapping, on June 15, 1995, a second home invasion of Jose and Idania Arias took place. (R.392, at 1796). Jose and Idania Arias described an entry of four Latin males into their home by climbing over a locked gate on the west side of the house. The entire Arias family, including the children, were in the kitchen having pizza. The masked men armed with guns confronted them. (R.402, at 2001). They said to Jose that they “finally caught him.” (*Id.*).

The men separated Jose Arias from his wife and sons. (*Id.*). The men demanded to know where the safe was located in the residence and threatened to kill the victims if they did not reveal the location. (R.392, at 1797). The kidnapers stated that the Ariases owned a medical supply company and there must be a safe. (R.392, at 1798). When the Ariases replied that there was no safe, the men began moving furniture, pictures, and other articles looking for one. (*Id.*). Finally, when they could not find money, the men directed Joseph Arias to go with his father to the bedroom. (R.392, at 1797). As they grabbed Joseph, one man stated, “Give me the older one because he's the one who's talking and identifying people.” (*Id.*).

Idania and Anthony Arias were held at gunpoint in the Florida room and were told that Jose Arias was being killed. (R.392, at 1800; R.402, at 2001). Jose and Joseph Arias were in the back bedroom where one of the men threatened to kill the child. (R.402, at 2004–05). Jose Arias was told that his wife was being raped by the kidnapers in the Florida room. (R.402, at 2006).

Jose Arias was beaten with the butt of a gun, handcuffed, and tied at his ankles and knees. (R.402, at 2002). The men tied an electrical cord around Joseph's neck saying that they were going to kill him. (R.402, at 2004–05). They then took the electrical cord they had tied around Joseph's neck and hung him from a ceiling fan in the bedroom. Joseph Arias was placed on his father's shoulders underneath the ceiling fan, in an apparent attempt to get Jose Arias to reveal the location of the safe. (*Id.*). Jose Arias could not move because Joseph would fall and hang. (*Id.*). At one point, the men actually shoved Jose down so that Joseph hung but did not strangle. While Joseph was standing on his father's shoulders, he overheard one of the invaders say, “Gloria said not to kill them, just hurt them because \*1080 then we can get more money out of the family.” (R.402, at 2103).<sup>6</sup>

At some point during the robbery, Idania managed to flee with Anthony to a neighbor's house where the police were contacted. (R.392, at 1800–01). The men fled before the police arrived. The circumstantial evidence suggested that two of the men involved in this home invasion were Camacho and Orestes Hernandez.<sup>7</sup> When Idania told Gloria Diaz about this second home invasion, Gloria again responded, “Did they steal a lot of money?” (R.392, at 1802).

### C. The Gonzalez Episode

The final target was Armando Gonzalez who, along with his wife from whom he was separated, owned a gas station and a day care in Miami. (R.427, at 2632). Orestes Hernandez apparently received a “tip” from a “mechanic” who knew Armando Gonzalez and said that he would have a lot of money in a safe in his house. (R.428, at 2802–05, 2868–69, & 2872). Echevarria and Munoz had been arrested following the Arias kidnapping; therefore, Orestes Hernandez and Camacho recruited Vlademir Negrin to join their gang.

Orestes Hernandez, Camacho, and Negrin initially targeted Gonzalez on November 4, 1996, but he was not home—only his housekeeper, Rosa Gonzalez was home.<sup>8</sup> (R.427, at 2599–2600). When Rosa answered the door, Camacho said he had a package for Armando. (R.427, at 2600). Camacho then produced a handgun, pointed it at Rosa, and ordered her into the living room. (R.427, at 2602). Camacho and Negrin went inside the house. Negrin also produced a handgun and pointed it at Rosa Gonzalez. Again, duct tape was used to bind her hands. (*Id.*).

Camacho questioned Rosa Gonzalez about the location of the safe. (R.427, at 2603). Rosa denied having any knowledge of a safe, but the men ransacked the house searching for its location. (R.427, at 2603–04). Unsuccessful in locating a safe, the men fled and instructed Rosa not to call the authorities for ten minutes. (R.427, at 2604). Rosa Gonzalez was able to identify Camacho in a composite lineup.<sup>9</sup> (R.427, at 2606–07).

Negrin, Orestes Hernandez, and Camacho then decided to kidnap Armando Gonzalez and recruited a friend of Vlademir Negrin, Carlos Escandell, to help. (R.428, at 2798–2800). About nine days after the episode involving Rosa Gonzalez, the four men set out to abduct Armando. They conducted surveillance on Gonzalez and received information from the “mechanic.” (R.428, at 2807–12).

At approximately 6:00 a.m. on November 13, 1996, Armando Gonzalez exited his girlfriend's house and got in his Dodge Ram truck. (R.427, at 2634; R.428, at 2812). Gonzalez was stopped immediately by a white Caprice Chevrolet with flashing blue lights, which he believed to be a police car. Behind the “police car” was a Ford Explorer leased by Orestes Hernandez. \*1081 (R.427, at 2634–35; R.428, at 2813). Gonzalez pulled his vehicle over and saw several men dressed as police officers jump out of the white Chevrolet. (R.427, at 2634–35). The “police officers” were later identified as Escandell, Camacho, Orestes Hernandez, and Negrin. (R.428, at 2812). The men approached Gonzalez's car with guns drawn and told him he was under arrest. (R.427, at 2634). Gonzalez was removed from his vehicle, handcuffed, duct-taped, and thrown into the back seat of the Caprice. (R.427, at 2635). Armando Gonzalez was blindfolded with duct tape so he could not see. Negrin took Gonzalez's truck, and Orestes Hernandez drove behind in his own vehicle. (R.428, at 2814). The kidnappers stole Gonzalez's wallet, cash, jewelry (including a gold Star of David), and watch. (R.428, at 2820–21).

Gonzalez was driven to Camacho's house where his truck was parked inside the garage. (R.428, at 2815–16, & 2818). He was severely beaten, and his pants were lowered so that the men could use a blow torch on his genitals. (R.428, at 2822). Both his buttocks and thighs were burned. Several times the men inserted the blow torch in Gonzalez's rectum and lit it. (*Id.*). The kidnappers also used a stun gun on Gonzalez's arms. (*Id.*). They applied the torch to Gonzalez's eyes, actually burning the duct tape that covered them. (*Id.*).

The kidnapers demanded the alarm code to the house that Gonzalez was sharing with his girlfriend. (R.427, at 2639). Gonzalez gave the men the code, and they ransacked the house stealing jewelry, men's clothing and \$30,000 in cash receipts from his gas station. (R.427, at 2639 & 2642). The kidnapers told Gonzalez many things about his family and his business, including where his girlfriend worked, that one of his sons drove a black jeep, and where his other son attended school. (R.427, at 2638; R.428, at 2820). When the men returned, they placed Gonzalez in the back of his Dodge truck and dropped him at an unknown location. (R.427, at 2642). Gonzalez was left tied in the back seat of his truck and told not to contact the police because they would be watching his family. (R.427, at 2638 & 2642). Gonzalez did not go to the police. (R.427, at 2669). Only when Escandell was arrested in connection with another kidnapping attempt did Gonzalez's kidnapping get reported by Escandell.<sup>10</sup>

On January 10, 1997, Gonzalez was interviewed and shown a photo lineup by Detective LeFebvre. (R.427, at 2715–16). Gonzalez positively identified Negrin. (R.427, at 2716–17). Photographs of Orestes Hernandez and Camacho were not shown to Gonzalez, but Gonzalez did state that the man who did most of the talking had a stutter, and Orestes Hernandez has a stutter. (R.427, at 2637, 2717 & 2723; R.428, at 2801 & 2898). On January 11, 1997, Negrin was arrested at his home. (R.427, at 2717). He gave consent to have his apartment searched. (R.427, at 2718). Gonzalez's Star of David medal, as well as a large amount of other jewelry and walkie talkies, were found in his apartment. (R.427, at 2718–22). A stun gun was found in his car. (R.427, at 2721).

### III. The Counts, Verdicts, and Sentences

The fourth superseding indictment did not list Ilvigio and Escandell as they had already entered guilty pleas to an earlier indictment. Count I charged all six appellants with engaging in a conspiracy from June 26, 1995 until November 18, 1996 to interfere with commerce by extortion in \*1082 violation of the Hobbs Act. All six appellants were convicted on Count I.

Count II charged all appellants, except Lopez, with a substantive Hobbs Act violation in connection with Nelson Martin. The remaining five appellants were convicted on Count Two.<sup>11</sup>

Count III charged the four appellants—Echevarria, Munoz, Camacho and Orestes Hernandez—with a § 924(c) violation

in connection with the Nelson Martin abduction. All four were convicted.

Count IV charged all six appellants with a substantive Hobbs Act violation in connection with the kidnapping and attempted extortion of Idania Arias and her two children. All six appellants were convicted.

Count V charged all six appellants with carjacking as it related to Idania Arias. Diaz and Lopez were acquitted. Appellants Echevarria, Munoz, and Orestes Hernandez were convicted.<sup>12</sup>

Count VI charged appellants Echevarria, Munoz, Camacho and Orestes Hernandez with a § 924(c) violation in relation to the Arias abduction and each was convicted.<sup>13</sup>

Count VII charged appellants Camacho and Orestes Hernandez with a substantive Hobbs Act violation by engaging in a robbery as it related to the home invasion of the Gonzalez house on November 4, 1996. Both were convicted.

Count VIII charged appellants Camacho and Orestes Hernandez with a § 924(c) violation as it related to the invasion of the Gonzalez home on November 4, 1996. Camacho was convicted and Orestes Hernandez was acquitted.

Count IX charged appellants Camacho and Orestes Hernandez with a substantive Hobbs Act violation as it related to the abduction of Armando Gonzalez on November 13, 1996. Both were convicted.

Count X charged appellants Camacho and Orestes Hernandez with carjacking as it related to the Dodge Ram driven by Armando Gonzalez. Both were convicted.

Count XI charged appellants Camacho and Orestes Hernandez with a § 924(c) violation as it related to the abduction and carjacking of Armando Gonzalez. Both were convicted.

Echevarria was sentenced to a total of 465 months, a three-year period of supervised release, and \$146,250 in restitution.<sup>14</sup> Munoz was sentenced to a total of 705 months, a three-year period of supervised release, and \$146,250 in restitution.<sup>15</sup> Camacho was sentenced to a total of 1145 \*1083 months, a three-year period of supervised release, and

\$192,050 in restitution.<sup>16</sup> Orestes Hernandez was sentenced to a total of 665 months, a three-year period of supervised release, and \$45,800 in restitution.<sup>17</sup> Lopez was sentenced to 188 months, a three-year period of supervised release, and \$5,200 in restitution.<sup>18</sup> Finally, Diaz was sentenced to a total of 293 months, a three-year period of supervised release, and \$5,200 in restitution.<sup>19</sup>

Appellants timely appealed their convictions and sentences. In sum, appellants challenge the following: (1) the application of the Hobbs Act and the sufficiency of the evidence as to their culpability for the Hobbs Act conspiracy and the four substantive Hobbs Act counts dealing with the kidnappings, extortion, and robberies as set forth in Counts II, IV, VII, and IX; (2) the sufficiency of the evidence as to the carjacking counts; (3) the sufficiency of the evidence as to the carrying and use of a firearm counts; (4) procedural and pretrial issues including denial of a severance, mistrial, in-court and out-of-court identifications, and enforcement of the district court's sequestration order; and (5) the sentences with respect to Echevarria, Orestes Hernandez, and Lopez. The Court will address these issues separately, paying careful attention to distinguish which appellants appeal on which grounds.

#### *IV. Application of the Hobbs Act and Sufficiency of the Evidence as to the Conspiracy and Hobbs Act Convictions*

All six appellants, either by virtue of their own brief or adoption of the briefs of their co-appellants, challenge the sufficiency of the evidence as to their culpability for the conspiracy to violate the Hobbs Act and the four substantive Hobbs Act violations. The Court will address both the conspiracy to violate the Hobbs Act and the substantive violations as they relate to Echevarria, Munoz, Camacho, Orestes Hernandez, and Diaz collectively. Both the conspiracy conviction and the substantive \*1084 Hobbs Act conviction of Jose Blas Lopez will be addressed separately as the Court finds that his role in the commission of these crimes raises issues not shared by the other co-appellants.

##### *A. Standard of Review and Law Applicable to all Six Appellants*

[1] [2] [3] Whether sufficient evidence was presented at trial to support appellants' convictions is a question of law subject to *de novo* review. *U.S. v. Keller*, 916 F.2d 628, 633 (11th Cir.1990). The Court reviews the sufficiency of the evidence to determine whether a reasonable jury could have concluded that the evidence established appellants'

guilt beyond a reasonable doubt. The evidence is viewed in the light most favorable to the government and all reasonable inferences and credibility choices are made in the government's favor. *U.S. v. Lyons*, 53 F.3d 1198, 1200 (11th Cir.1995); *U.S. v. Johnson*, 713 F.2d 654, 661 (11th Cir.1983).

[4] [5] [6] [7] The Hobbs Act prohibits robbery or extortion, and attempts or conspiracies to commit robbery or extortion, that “in any way or degree obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce.” *U.S. v. Kaplan*, 171 F.3d 1351, 1354 (11th Cir.) (quoting 18 U.S.C. § 1951(a)), *cert. denied*, 528 U.S. 928, 120 S.Ct. 323, 145 L.Ed.2d 252 (1999). To prove a Hobbs Act conspiracy under 18 U.S.C. §§ 1951(a) & (b)(1), the government must prove that: (1) two or more persons agreed to commit a robbery or extortion encompassed within the Hobbs Act; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in helping to accomplish the goal. *U.S. v. To*, 144 F.3d 737, 747–48 (11th Cir.1998); *U.S. v. Thomas*, 8 F.3d 1552, 1556 (11th Cir.1993). A Hobbs Act conspiracy was established in *U.S. v. Farrell*, 877 F.2d 870 (11th Cir.1989), by proof of a potential impact on interstate commerce in an extortion-kidnapping plot. The *Farrell* court, in discussing the interstate commerce nexus, opined:

The Hobbs Act applies to extortion wherein the perpetrator “... in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity of commerce...” *Only a de minimis nexus with interstate commerce is required.* Where attempted extortion or conspiracy to extort are charged, the interstate nexus may be demonstrated by evidence of potential impact on interstate commerce, or by evidence of actual, de minimis impact[.] Potential impact is measured at the time of the attempt, *i.e.*, when the extortion demand is made, based on the assumed success of the intended scheme. A sufficient potential impact exists when there is evidence of “a plan to embark upon a course of extortionate behavior likely to have the natural effect of obstructing commerce.”

*Farrell*, 877 F.2d at 875 (internal citations omitted) (emphases added).

[8] Unlike a conspiracy charged under the Hobbs Act, which only requires proof that defendants' scheme *would have* affected interstate commerce, a substantive Hobbs Act violation requires an actual effect on interstate commerce. See *Kaplan*, 171 F.3d at 1354. However, the requisite effect on interstate commerce need not be substantial—all that is

required is minimal impact. *See id.* Moreover, the effect on interstate commerce is not limited to only adverse effects. *See id.* at 1357.

[9] [10] While the Hobbs Act usually is applied to robberies of businesses, criminal acts directed toward individuals also may violate the Hobbs Act. Robberies or extortions perpetrated upon individuals are prosecutable \*1085 under the Hobbs Act when any one of the following three conditions are met: (1) the crime depletes the assets of an individual who is directly engaged in interstate commerce; (2) the crime causes the individual to deplete the assets of an entity engaged in interstate commerce; or (3) the number of individuals victimized or the sums involved are so large that there will be a cumulative impact on interstate commerce. *See, e.g., U.S. v. Stephens*, 964 F.2d 424 (5th Cir.1992); *U.S. v. DeParias*, 805 F.2d 1447 (11th Cir.1986), *overruled on other grounds, U.S. v. Kaplan*, 171 F.3d 1351 (11th Cir.), *cert. denied*, 528 U.S. 928, 120 S.Ct. 323, 145 L.Ed.2d 252 (1999); *U.S. v. Farrell*, 877 F.2d 870 (11th Cir.1989); *U.S. v. Collins*, 40 F.3d 95 (5th Cir.1994).

*B. Conspiracy to Violate the Hobbs Act Involving Camacho, Orestes Hernandez, Munoz, Echevarria, and Diaz*

[11] Both Diaz and Camacho appeal their convictions of conspiracy to commit Hobbs Act extortions from June 26, 1995 to November 13, 1996; Echevarria, Orestes Hernandez, and Munoz adopt their arguments pursuant to F.R.App. P. 28(i). Specifically, appellants argue there was insufficient evidence for a reasonable jury to find beyond a reasonable doubt that the appellants had any knowledge of the goal of the conspiracy or that they voluntarily joined the conspiracy. (*See Camacho Br.*, at pp. 17–23; *Diaz Br.*, at pp. 9–12). The Court disagrees.

The record lacks any evidence supporting a finding that these two elements were not met. The goal of the conspiracy was to extort money from individuals identified as targets through various tips. The evidence reveals that Echevarria, Camacho, Munoz, and Orestes Hernandez invested a substantial amount of time in targeting each individual victim beginning with the initial tips provided by Diaz. Diaz relayed the tips to Orestes Hernandez who, in turn, shared the information with Echevarria, Camacho, and Munoz. In addition, there is no evidence that appellants did not participate voluntarily. There is no evidence that any appellant was forced to participate. Further, at no time did any appellant indicate a desire to disengage from the conspiracy.

[12] Although mere presence is insufficient to prove membership in a conspiracy, the Court disagrees with appellants' argument that they were merely present at various times throughout the course of the conspiracy. Appellants cite *U.S. v. Thomas*, 8 F.3d 1552 (11th Cir.1993), as support for their argument that mere presence or knowledge does not support the conclusion that they voluntarily participated in the agreement or the accomplishments of its goals. *See id.* at 1558.

The conspiracy in *Thomas* involved an alleged scheme to rob a bank and to dynamite the sheriff's office in Danielsville, Georgia. Johnny and Lisa Reese were convicted of conspiracy under the Hobbs Act. On appeal, they argued there was insufficient evidence to support their convictions. The evidence against Johnny Reese amounted to the following: Johnny Reese was in the car on March 5, 1991 when it broke down near the bank; he stood in front of the hardware store while two others entered the bank; when everyone came out of the bank, they all walked to a restaurant; Johnny Reese was present while another person disclosed the plan; and, according to one of the members of the conspiracy, he was never identified as a participant in the conspiracy during any of the conversations among the conspirators. The evidence against Lisa Reese revealed the following: Lisa Reese was in the car on March 5, 1991 when it \*1086 broke down; she went into the bank and requested information about opening an account, asked if the bank had a public restroom, and picked up some bank brochures; and, one member of the conspiracy testified that "the girls" made sketches of the bank and that this statement referenced Lisa Reese and another woman. In taped conversations, Lisa Reese's statements reflected her distaste for the planned bank robbery. Lisa Reese testified at trial that she did not take the plans to rob the bank seriously, and she denied making any sketches. *Thomas*, 8 F.3d at 1556–60.

Unlike the evidence in *Thomas*, the evidence regarding participation in the case before the Court is substantial. Ilvigio's testimony is rife with information regarding each appellant's role in the various kidnappings and attempted kidnappings. Ilvigio first became a part of the conspiracy through a coworker—Munoz. During a trip in December 1995 for the trucking company they worked for, Munoz and Ilvigio discussed both the kidnappings and robberies Munoz had done in the past and future "jobs." (R.378, at 1187–88). It was during this trip that Ilvigio agreed to join the conspiracy. Upon arrival back in Miami, he and Munoz planned to contact

Munoz's friends in order to do a "job" together. (R.378, at 1196). Munoz's friends were Echevarria (a.k.a.Tatico) and Camacho (a.k.a.Pepe). On December 24, 1995, after arriving in Miami on the 23rd, Munoz picked up Ilvigio to meet with Camacho. (R.378, at 1197). Camacho, Munoz, and Ilvigio went to Echevarria's home where they discussed the robberies and kidnappings. They then met up with Orestes Hernandez (a.k.a. Orestico or El Gago). (R.382, at 1223).

[13] Ilvigio's involvement began with the attempted robberies and kidnappings of four individuals. They targeted individuals by the name of Tony, Alex, Orestes, and an unnamed woman. These incidents occurred toward the end of 1995 and the beginning of 1996. Two of these individuals—Tony and Orestes—previously had been robbed by Munoz, Orestes Hernandez, Echevarria, and Camacho.<sup>20</sup> (R.382, at 1230–31). It was during this same period of time that Mercedes Gomez Martin was targeted for the second time.

The evidence presented at trial revealed that Diaz provided tips to Orestes Hernandez regarding both the Martins and the Ariases. (R.378, at 1180–81; R.382, at 1235–36, 1239–40). In return, Diaz received a good sum of money. (R.382, at 1239). In addition, on January 11, 1996 when Mercedes Gomez Martin was targeted, Orestes Hernandez, Echevarria, Munoz, and Ilvigio went to see Diaz at her house to get addresses for Mrs. Martin. (R.382, at 1244). Finally, Ilvigio was able to identify Diaz in court. (R.382, at 1247).

Although Ilvigio did not participate in the original robbery and extortion of the Martins, he was an active member of the conspiracy along with Orestes Hernandez, Munoz, Echevarria, and Camacho, when Mercedes Gomez Martin was targeted the second time on January 11, 1996. They used Camacho's car and, while in the car, \*1087 Camacho discussed mistakes made during the prior kidnapping of Nelson Martin back in June of 1995. (R.382, at 1237).

[14] [15] [16] [17] [18] Diaz argues on appeal that there was no evidence supporting the jury's finding that she voluntarily participated in the conspiracy because the only evidence against her came from Ilvigio's testimony, which appellants claim constituted double hearsay. The Court disagrees. Ilvigio's testimony regarding the four unsuccessful surveillances, the second attempt involving Mercedes Gomez Martin, and the statements made by individual members of the conspiracy was not hearsay. Pursuant to [Fed.R.Evid. 801\(d\)\(2\)\(E\)](#), statements of coconspirators of a party made during the course and in furtherance of the conspiracy are,

by definition, not hearsay.<sup>21</sup> The district court determined that a conspiracy existed and that these statements were made in furtherance of that conspiracy.<sup>22</sup> (R.428, at 3369). Accordingly, Ilvigio was not precluded from testifying about what a coconspirator told him regarding a conversation with another coconspirator. *See U.S. v. Sharpe*, 193 F.3d 852, 869 (5th Cir.1999) (citing *U.S. v. Gironda*, 758 F.2d 1201, 1216–19 (7th Cir.1985)).

In sum, contrary to appellants' arguments, a reasonable jury could find beyond a reasonable doubt that the appellants knew of the conspiratorial goal and that they participated voluntarily. Accordingly, appellants' convictions for conspiracy to commit Hobbs Act extortions are affirmed.

*C. Substantive Violations of the Hobbs Act Involving Camacho, Orestes Hernandez, Munoz, Echevarria, and Diaz*

Appellants argue that the government failed to adduce sufficient evidence to show that the kidnappings, extortions, and robberies affected interstate commerce, and, as a result, their Hobbs Act convictions must be reversed.<sup>23</sup> The main argument advanced by appellants is that the robberies were of three individuals—not businesses. Accordingly, they argue that the requisite effect upon interstate commerce was not demonstrated. Whether or not the extortions and robberies affected interstate commerce requires an individual analysis of the three episodes.

**\*1088** *1. The Martin Episode*

[19] To find a substantive Hobbs Act violation with regard to the kidnapping and extortion of Nelson and Mercedes Gomez Martin, the Court must find that an extortion occurred and that there was an effect on interstate commerce. Appellants do not dispute that an extortion occurred. Rather, they argue that the extortion of the Martins had no effect on interstate commerce. The Court disagrees.

At the time of the extortion, the Martins owned Rosa Medical Center (R.378, at 1005). The Martins were licensed to run the center, which was a corporation designed to address the general medicine needs of its patients. Rosa Medical Center had physicians on staff who cared for private patients. Following service of treatment, the Martins would bill private insurance companies located out-of-state for payment.<sup>24</sup> The

insurance companies would pay the Martins who, in turn, would pay the physicians.

According to Mrs. Martin, the physicians of Rosa Medical Center had on hand various equipment to treat their patients. Specifically, Rosa Medical Center had equipment for [electrocardiograms](#), ultrasound, and physical therapy. (R.378, at 1006). Mrs. Martin testified that she purchased all of the equipment and that some of the equipment was purchased from outside the state of Florida. (R.378, at 1007). As a result of the extortion, the Martins were forced to close the clinic for several days. (R.378, at 1112–13). As a result, seven to ten patients could not be seen, which was unusual. (R.378, at 1114). In addition, billings decreased and less work was accomplished. (R.378, at 1117).

Although the Martins were not directly engaged in interstate commerce, Mr. Martin was the president and Mrs. Martin was the administrator of a corporation, Rosa Medical Center, which was directly engaged in interstate commerce. Moreover, the extortion of the Martins resulted in an actual effect on interstate commerce in that the center was shut down for several days, during which time no patients were seen, resulting in no billing to or payment from the out-of-state insurance companies. The inability to see patients, which would generate income for Rosa Medical Center, establishes that the extortion of the Martins (individuals) caused them to deplete the assets of an entity engaged in interstate commerce.<sup>25</sup> Although Rosa Medical Center was only closed for several days, the Court concludes that such closing is sufficient to satisfy the jurisdictional requirement for a Hobbs Act violation given that the effect on interstate commerce need only be minimal so long as it is actual.

The Court cautions that its decision should not be interpreted to mean that any extortion of an individual who is an officer of a corporation that results in the closing of the corporation will be sufficient to establish a substantive Hobbs Act violation. Even proof that the corporation was directly engaged in interstate commerce, like Rosa Medical Center, is not enough on its own. What sets this case apart is the fact that the role of the Martins with regard to their business, which was directly engaged in interstate commerce, was not **\*1089** coincidental. Rather, the Court is convinced by the evidence presented at trial that appellants targeted the Martins *because of* their interest in Rosa Medical Center.

In reaching this conclusion, the Court notes that this case is distinguishable from [U.S. v. Collins, 40 F.3d 95 \(5th](#)

[Cir.1994\)](#), which, although not controlling, is relied upon by appellants for the proposition that the extortion of the Martins amounted to the extortion of individuals with only a speculative, indirect nexus to interstate commerce. The defendant in *Collins* robbed an individual at gunpoint in the victim's home. Items taken by the defendant included cash, jewelry, clothes, and a Mercedes–Benz with its cellular phone. The defendant was convicted of a substantive Hobbs Act violation in connection with this robbery and appealed arguing that the evidence was insufficient to support a finding that the robbery obstructed interstate commerce. [U.S. v. Collins, 40 F.3d 95, 98 \(5th Cir.1994\)](#).

The government in *Collins* argued that the victim, an employee of a national computer company, was prevented from attending a business meeting and from making business calls on his cellular phone as a result of the robbery.<sup>26</sup> On appeal, the court found no actual direct affect on a business caused by the robbery of the individual employee. The victim's linkage to his business, which was directly engaged in interstate commerce, was much too indirect to present a sufficient nexus to interstate commerce to justify federal jurisdiction. *Id.* at 100.

Whereas the robbery of the individual in *Collins* caused only a speculative, indirect effect on a business engaged in interstate commerce, the extortion of the Martins caused an actual, direct effect on a business engaged in interstate commerce. This, coupled with the fact that appellants directly targeted the Martin because of their business, establishes the requisite nexus to interstate commerce. Accordingly, the Court finds there was sufficient evidence for a reasonable jury to conclude that the evidence established appellants' guilt beyond a reasonable doubt.

## 2. The Arias Episode

[20] The substantive Hobbs Act violation with regard to the Ariases occurred as a result of appellants' attempted extortion of \$250,000. The fact that no money actually changed hands is immaterial because the Hobbs Act also proscribes an attempt to interfere or affect commerce by extortion. [See 18 U.S.C. § 1951\(a\)](#). Accordingly, to prove a Hobbs Act violation with regard to the Ariases, the Court must find that the attempted extortion would have depleted the assets of the Ariases, assuming they are directly engaged in interstate commerce, or caused the Ariases to divert assets that would otherwise be expended in interstate commerce.

At the time of the kidnapping and attempted extortion, the Ariases owned three businesses—Arias Medical Equipment, J&A Electronic Billing Services, and First Option Medical Center. Arias Medical Equipment was a provider of medical services to people who were sick at home. It sold and rented medical supplies including, *inter alia*, walkers, canes, bathing devices, bandages, and hospital beds—some of which were purchased from out-of-state or out-of-country. J&A Electronic Billing Services provided electronic billing for clinics and doctors. Equipment used in \*1090 this business included computers, printers, and telephones. All of the computers and printers were manufactured out-of-country. Finally, First Option Medical Center was a clinic that utilized medical equipment, some of which, was made out-of-country. The clinic received payments both from private national insurance companies located outside of Florida and from Medicare and Medicaid.

Compared to the Martins' businesses, the nexus between the Ariases' businesses and interstate commerce is much more substantial. A significant amount of equipment used in the billing services business and the medical supplies business was purchased or manufactured outside of Florida. In addition, the clinic received payments from private insurance companies and the federal government that originated outside the state of Florida. Given this strong connection to interstate commerce, the Court finds that the Ariases were directly engaged in interstate commerce. As a result, to uphold the Hobbs Act convictions, the Court must find that the attempted extortion would have depleted the Ariases' assets.

Appellants argue that there was no testimony that payment of \$250,000 would deplete the assets of the Ariases. This argument relies on a definition of “deplete” that is limited to “eliminate.” The Court's interpretation of “deplete,” however, is not so narrow. According to Webster's Third New International Dictionary, the definition of “deplete” encompasses appellants' definition of “to eliminate or exhaust,” but also includes “to lessen in number, quantity, content, or force or in vital power or value as a result of such lessening.” Webster's Third New International Dictionary 605 (1981). Based on this definition of deplete, a payment of \$250,000 would serve to deplete or lessen in number the Ariases' assets. Accordingly, the Court finds there was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that appellants violated the Hobbs Act in attempting to extort \$250,000 from the Ariases.

### 3. The Gonzalez Episode

[21] Camacho and Orestes Hernandez were convicted on Count VII for Hobbs Act attempted robbery of Rosa Gonzalez on November 4, 1996 and on Count IX for extortion of Armando Gonzalez on November 13, 1996.<sup>27</sup> The crime that occurred on November 4, 1996 was attempted robbery because no money was received. Camacho and Orestes Hernandez argue on appeal that there was no Hobbs Act attempted robbery of Rosa Gonzalez because there was no evidence that interstate commerce was potentially affected and appellants never demanded money. With regard to the extortion of Armando Gonzalez, they argue that there was no effect on interstate commerce.

The evidence produced at trial indicated that Camacho and Negrin made their way into the Gonzalez house armed with guns. Although they did not demand money, they did question Rosa Gonzalez about the location of the safe. (R.427, at 2603). After she denied any knowledge of a safe, Camacho and Negrin ransacked the house searching for one. (R.427, at 2603–04). It follows logically that they were searching for the safe to get to the money. Regardless, the Hobbs Act applies to extortion of property in general; therefore, it is immaterial that no money was demanded because the safe constitutes property. \*1091 Accordingly, Camacho's and Orestes Hernandez's convictions will be upheld so long as there was a potential effect on interstate commerce.

The money appellants were after was not the money of Rosa Gonzalez. Rather, appellants sought the location of Armando Gonzalez's safe. Determining whether there was an effect on interstate commerce requires an examination of Armando Gonzalez and his businesses and their nexus, if any, to interstate commerce. This analysis also applies to determine whether the extortion of Armando Gonzalez on November 13, 1996 constituted a Hobbs Act violation. Accordingly, the Court will examine the remaining two counts together.

The evidence at trial revealed that Armando Gonzalez was part owner of West Star Oil—a gas station with a convenience store. Both the gasoline used at the station and the grocery items sold at the convenience store were shipped from out-of-state. (R.427, at 2644–45). In addition, Gonzalez and his wife owned Dolphin Day Care, which purchased many of its supplies from out-of-state (R.427, at 2647). Appellants originally demanded \$250,000 from Gonzalez. However,

after raiding his girlfriend's house, they recovered only \$30,000 in receipts from West Star Oil.

Like the Ariases, Gonzalez's business made regular and systematic purchases from out-of-state thereby establishing a greater connection to interstate commerce. The Court finds that a reasonable jury could conclude that, as part owner of West Star Oil, Gonzalez was directly engaged in interstate commerce through his business. The fact that Gonzalez was not sole owner is immaterial. Accordingly, to find a Hobbs Act violation, the Court must conclude that the attempted robbery on November 4, 1996 would have depleted, and that the extortion on November 13, 1996 did deplete, Armando Gonzalez's assets. The broad definition of "deplete" discussed previously with regard to the Ariases, again, supports this finding.

Based on appellants' original demand after kidnapping Gonzalez, they were seeking \$250,000 in ransom. It is unquestionable that this amount would lessen in quantity or number Gonzalez's assets. Moreover, because there was no testimony that appellants were seeking a different amount when they first ransacked Armando Gonzalez's house on November 4, 1996, the jury could infer that this was the amount appellants were searching for as they ransacked the house looking for the safe.

Although appellants originally demanded \$250,000 for Gonzalez's release, they ultimately settled on \$30,000 in garage receipts, which they stole from Gonzalez's girlfriend's house. This provides an additional effect on interstate commerce. Even if there was insufficient evidence for a jury to conclude that Gonzalez was directly involved in interstate commerce, the extortion of \$30,000 in garage receipts constitutes a diversion of assets of a business engaged in interstate commerce.

[22] Finally, Camacho and Orestes Hernandez appeal on individual grounds. First, Camacho challenges his Hobbs Act conviction for attempted robbery on November 4, 1996 based on the lack of an identification at trial. Although Rosa Gonzalez was able to identify Camacho in a composite lineup, she was unable to identify him at trial. This failure, however, does not result in insufficient evidence because it does not negate the remaining evidence against him. The failed attempt to identify Camacho was made in the jury's presence, and the jury was able to consider this when determining Camacho's guilt or innocence. Regardless, the government's case did not rely solely on the identification \*1092 of

Camacho by Rosa Gonzalez. At trial, Escandell testified about the attempted extortion involving Rosa Gonzalez because Camacho, Negrin, and Orestes Hernandez carried on conversations regarding the failure of the extortion in the presence of Escandell after he had joined the conspiracy. (R.428, at 2804–06).

[23] Second, Orestes Hernandez argues that the government failed to prove that he participated in the extortion of Armando Gonzalez. The Court disagrees. Based on the testimony of Escandell and Armando Gonzalez, a reasonable jury could find beyond a reasonable doubt that Orestes Hernandez participated in the kidnapping and extortion of Armando Gonzalez on November 13, 1996. (R.427, at 2634–49; R.428, at 2813–28).

In conclusion, based on the foregoing, the Court finds, after a *de novo* review of the record, that there was sufficient evidence to convict appellants of the four substantive Hobbs Act extortion violations. The required nexus to interstate commerce only needs to be minimal and, in all four instances, the extortion or attempted extortion affected interstate commerce either by depleting assets of an individual directly engaged in interstate commerce or by diverting assets that would otherwise be expended in interstate commerce.

Accordingly, the convictions of Echevarria, Munoz, Camacho, Orestes Hernandez, and Diaz for Hobbs Act robbery and extortion of the Martins on June 25, 1995, and of the Ariases from January 11, 1996 to January 12, 1996, are upheld. The convictions of Camacho and Orestes Hernandez for Hobbs Act attempted robbery of Rosa Gonzalez on November 4, 1996, and Hobbs Act extortion of Armando Gonzalez on November 13, 1996, also are upheld.

*D. The Sufficiency of the Evidence as to the Lopez Convictions for Conspiracy and the Hobbs Act Conviction as to the Arias Kidnapping*

Lopez's counsel moved for acquittal based on [Fed.R.Crim.P. 29](#) as to Counts I, IV, and V.<sup>28</sup> The district court demonstrated a concern as to the proper ruling on the motion<sup>29</sup> as it is apparent from a review of the record that the prosecution's case against Lopez was less compelling than its case against the other five appellants. The district court reserved its ruling and asked for briefs. The government filed its brief on May 18, 1996 shortly before oral argument, and the district court denied Lopez's [Rule 29](#) motion without any explanation.<sup>30</sup>

Lopez was found guilty of Counts I and IV and not guilty of Count V.<sup>31</sup>

Ilvigio provided the most damaging testimony against Lopez, although his association with the conspiracy was short lived as he was arrested on January 12, 1996 following the bungled Arias kidnapping. Ilvigio's knowledge of Lopez stems from his involvement in the conspiracy beginning in December of 1995. Upon return from his and Munoz's trucking trip, Munoz \*1093 introduced Ilvigio to Camacho, Echevarria and Orestes Hernandez.<sup>32</sup> During the process of meeting Orestes Hernandez, Ilvigio was introduced to his godfather, Jose Blas Lopez, on December 24, 1995.<sup>33</sup> Ilvigio and the other active members of the gang began to engage in surveillance of potential targets for kidnapping and robbery on December 26, 1995. The first four targets identified as Alex, Tony, a woman on Mango Hill, and a person named Orestes were the subjects of unsuccessful surveillance.<sup>34</sup> Ilvigio testified that the "tipster" as to each of these targets was Lopez but that the information came through Orestes Hernandez who would on several occasions place a call to Lopez to confirm locations of the targets.<sup>35</sup>

The government contends that Ilvigio's testimony was sufficient to connect Lopez to the conspiracy as charged in Count I. The government's case in support of Lopez's conviction on Count IV charging the Hobbs Act violation as to the Arias family relies primarily on *Pinkerton* liability. See *Pinkerton v. U.S.*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).<sup>36</sup>

[24] [25] [26] We begin our analysis of the sufficiency of the evidence issue mindful of the instruction of *Jackson v. Virginia*, 443 U.S. 307, 322—25, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) that the evidence will be deemed sufficient to sustain a conviction unless we find that no rational trier of fact could have found proof of guilt beyond a reasonable doubt and further mindful of the admonition that "[m]ere knowledge of a conspiracy in association with the conspirators is insufficient evidence to support a conspiracy conviction[ ]" as enunciated in *U.S. v. Russo*, 717 F.2d 545, 549 (11th Cir.), *reh'g denied*, 720 F.2d 1294 (11th Cir.1983). The analysis also involves the provisions of Fed.R.Evid. 801(d)(2)(E) dealing with admissibility of coconspirator statements, as well as the teachings of *U.S. v. Iacovetti*, 466 F.2d 1147, 1153 (5th Cir.1972), indicating that the uncorroborated \*1094 testimony of an accomplice is sufficient to support

a conviction if it is not, on its face, incredible or otherwise insubstantial.<sup>37</sup>

[27] [28] The district court found, and we agree, that the declarations of Orestes Hernandez concerning the identification of possible targets for kidnapping and extortion purposes, as set forth in Ilvigio's testimony, were made during and in furtherance of the conspiracy.<sup>38</sup> Thus, the declarations did not constitute hearsay.<sup>39</sup> *U.S. v. To*, 144 F.3d 737, 747–48 (11th Cir.1998) sets forth the three elements required to prove a Hobbs Act conspiracy. The first critical element is that two or more persons agreed to commit a robbery "encompassed within the Hobbs Act." *Id.* at 748 (emphasis added). As indicated, Ilvigio described the four surveillances of targets suggested by Lopez and conducted by Orestes Hernandez, Camacho, Munoz, Echevarria and Ilvigio during the short span of time between late December of 1995 and early January of 1996. However, no evidence was introduced by the prosecution that would enable a rational juror to conclude that a successful surveillance of any of the four targets would have resulted in an extortion, or a robbery, or a kidnapping "encompassed within the Hobbs Act."

The first target "Alex" was described as owning a Santeria botanica with 100 kilos of cocaine. (R.382, at 1226–27). The second target "Tony" was described as owning a clinic. (R.382, at 1229). The third target "Orestes" was described as owning a bar in Hialeah and as having drugs; this person had been robbed before of four kilos of cocaine. (R.382, at 1230–31). The fourth target, the unnamed woman who lived in the Mango Hill section of Hialeah, was described as owning a medical clinic. (R.382, at 1232).

Even assuming that Lopez was the source of the information regarding the four targets, Ilvigio's testimony that the targets operated a bar or owned a clinic, is insufficient to establish the nexus to interstate commerce. Ilvigio provides no testimony to support a finding that a successful extortion or robbery of the four targets would have involved the necessary nexus with interstate commerce to establish a conspiracy within the requirements of the Hobbs Act. See *Farrell*, 877 F.2d at 875.

[29] The remaining evidence upon which the government relies to establish proof of Lopez's involvement with the conspiracy as alleged in Count I is, at best, ambiguous or speculative regarding any involvement of Lopez in the charged conspiracy. The visits of Lopez to the residence of the Arias family do not establish involvement in the conspiracy. The telephone calls to the Diaz/Lopez residence on the day

of the Idania Arias kidnapping are not directly connected to Lopez. The fact that Lopez is married to Diaz does not establish criminal culpability. The fact that Lopez, along with Diaz, was involved in the Santeria religion and was a godparent in the practice of that religion to Orestes Hernandez or victims of the kidnapping does not establish guilt. The remaining issue is whether a combination of the above factors, including the evidence that Lopez directed the active gang \*1095 members to targets lacking a nexus to interstate commerce, is sufficient to justify a Hobbs Act conspiracy violation. It is our conclusion, applying the *de novo* review function, that the evidence, when combined, fails to support the Lopez conviction for Count I.<sup>40</sup>

[30] The predicate for the conviction of Lopez as to Count IV charging him with a substantive Hobbs Act violation is application of *Pinkerton* liability.<sup>41</sup> The *Pinkerton* analysis does not apply if the conviction of the underlying Hobbs Act conspiracy is set aside. There was no testimony or evidence before the jury that was sufficient to enable a rational jury to find that Lopez was involved as a “tipster” with the Arias episode.<sup>42</sup> Consequently, following the dictates of *Jackson*, we conclude that there is insufficient evidence to support the conviction of Lopez for Count IV relating to the Arias kidnapping.

*V. Sufficiency of the Evidence as to the Carjacking Convictions of Orestes Hernandez, Echevarria, Camacho, and Munoz*

Orestes Hernandez, Echevarria, Camacho, and Munoz challenge their carjacking convictions under 18 U.S.C. § 2119. Echevarria, Munoz, and Orestes Hernandez were convicted of the January 11, 1996 carjacking involving Idania Arias. Orestes Hernandez also was convicted, along with Camacho, of the November 13, 1996 carjacking in the Gonzalez episode. All four appellants argue the evidence was insufficient to convict them. More particularly, they argue the intent element of 18 U.S.C. § 2119 was lacking, and they challenge the finding that the vehicles were taken by force and violence or by intimidation. In addition, Orestes Hernandez and Echevarria challenge the finding that they participated in taking the vehicles. As with appellants' insufficient evidence \*1096 claim involving the Hobbs Act violations, the issue of whether sufficient evidence was presented at trial to support appellants' convictions is a question of law subject to *de novo* review. See *U.S. v. Keller*, 916 F.2d 628, 633 (11th Cir.1990).

[31] [32] “In order to be convicted of carjacking under 18 U.S.C. § 2119, the government must prove that the defendant (1) with intent to cause death or serious bodily harm (2) took a motor vehicle (3) that had been transported, shipped or received in interstate or foreign commerce (4) from the person or presence of another (5) by force and violence or intimidation.” *U.S. v. Applewhaite*, 195 F.3d 679, 684–85 (3d Cir.1999) (internal quotation marks, citation and footnote omitted). The required mens rea for carjacking was later clarified by the Supreme Court in *Holloway v. U.S.*, 526 U.S. 1, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999): “The intent requirement of [18 U.S.C. § ] 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car[.]” *Id.* at 12, 119 S.Ct. 966. To uphold the convictions, the Court must conclude that there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Echevarria, Camacho, Munoz, and Orestes Hernandez intended to seriously harm or kill the driver if necessary to steal the car.

Appellants' primary argument is that the intent element is lacking. Appellants rely on *Applewhaite*, *supra* to support this argument. Appellants claim that, as in *Applewhaite*, their primary objective was to kidnap and rob their victims—not to steal their vehicles—and that they simply took their vehicles as a means of facilitating the kidnapping.

In *Applewhaite*, the evidence showed that the defendants' primary objective was simply to do serious harm to the victim and that the defendants took the victim's van as an afterthought in an attempt to get the victim's body away from the crime scene. Accordingly, we held that scienter was not established because, although the defendants clearly intended to seriously harm or kill the victim, their intent had no nexus to the taking of the victim's vehicle. *Applewhaite*, *supra* at 685. The Court, however, finds the present case clearly distinguishable from *Applewhaite*.

The evidence in this case shows that gaining control of the victims' vehicles was an important step in the extortion scheme and not a mere afterthought. In addition, the evidence reveals that resistance on the part of the victims exposed them to more harm. The evidence presented at trial with regard to the carjackings primarily came from Idania Arias, Armando Gonzalez, Ilvigio, and Escandell. Accordingly, the Court will review this evidence.

*A. The Arias Episode*

[33] The evidence surrounding the carjacking of Idania Arias's Lexus establishes that both the intent element and the requirement of taking by force and violence or intimidation were established. Idania Arias testified that she and her children were at their front door trying to unlock it when appellants approached her with guns drawn. The car sat parked in the driveway with the doors locked. (R.382, at 1255; R.388, at 1670–71). Ilvigio testified that Munoz and Echevarria got out with guns drawn and kidnapped Idania Arias while Ilvigio and Orestes Hernandez, also with guns drawn, kidnapped the children. (R.382, at 1255). After kidnapping Idania Arias and her children and putting them in the back of Echevarria's Jaguar, Munoz asked her which key went to her car. \*1097 (R.382, at 1255; R.388, at 1673). Munoz drove out with Idania Arias's Lexus. (R.382, at 1255).

The fact that Idania Arias was not in her car refutes appellants' argument that her car primarily served as a means to effectuate her kidnap. In addition, no argument can be made that her vehicle impeded the kidnap because Echevarria's Jaguar was parked *behind* Idania Arias's Lexus in the driveway. To convict appellants of carjacking, a rational jury must conclude beyond a reasonable doubt that appellants intended to seriously harm the victim if necessary to steal the car. The evidence before the jury included the torture of Nelson Martin, a prior victim within this same conspiracy scheme, and the fact that appellants had put duct tape on Idania Arias's eyes, wrists, and ankles and on Joseph Arias. This evidence is sufficient for a jury to conclude that the theft of the vehicle and the kidnapping were part of the same plan to extort money or rob the victims from which the jury could conclude that appellants would seriously harm the victims if necessary to steal their vehicles. The weapons brandished by appellants along with the fact that Idania Arias and her children were taken by force support a jury's finding that the vehicle was taken by force and violence. Orestes Hernandez's and Echevarria's arguments that the evidence was insufficient to show they participated in taking the vehicles is entirely lacking in merit. Although only Munoz drove away with Idania Arias's Lexus, force was exerted by all of them in order to steal her car. Accordingly, the carjacking convictions of Orestes Hernandez, Munoz, and Echevarria are upheld.

*B. The Gonzalez Episode*

[34] In the Gonzalez episode, appellants impersonated police by driving a white Chevrolet Caprice and using a blue flashing light to pull Armando Gonzalez over. Gonzalez

testified that, after he was pulled over, he was approached by a gentleman in a police uniform who was pointing a revolver at him. (R.427, at 2634). Gonzalez was told he was under arrest and told to get out of the car. Gonzalez was thrown to the ground and blindfolded. His mouth was covered and he was handcuffed. Negrin then drove off with Gonzalez's truck.

Escandell's testimony reveals that all of these events were meticulously calculated by appellants. On direct, Escandell provided vivid details of the kidnapping plan. Negrin and Escandell were in the Caprice and Camacho and Orestes Hernandez followed behind them in Orestes Hernandez's Ford Explorer. When Gonzalez pulled out of the driveway, Escandell and Negrin put the light on top of the car and pulled him over. Camacho put Gonzalez in the back seat of the Caprice, which Escandell was driving. Orestes Hernandez drove his Ford Explorer and Negrin drove Gonzalez's truck. Camacho rode in the back seat of the Caprice with Gonzalez. From there, the appellants drove to Camacho's house in a particular order—Escandell was in front in the Caprice, followed by Negrin in Gonzalez's truck and Orestes Hernandez in his Explorer. Escandell testified that there was a reason for this order:

Since Mr. Gonzalez was in the first car, there was less possibility for a real police officer to stop us. So, it was us, then ... Mr. Gonzalez's car was second so, then again, there was less possibility for him to get stopped and Vladimir [Negrin] get a ticket under the victim's car. And then the Ford Explorer was last so if by any chance it got stopped by a police officer, the car was fine and Hernandez had a license and everything was fine.

(R.428, at 2815–16).

Escandell's testimony reveals that the theft of Gonzalez's vehicle was an essential \*1098 part of the extortion and robbery plan from the beginning. As with Idania Arias, there was no need for appellants to steal Gonzalez's vehicle. At the time the vehicle was taken, appellants already had control over Gonzalez. Appellants took Gonzalez by force and subsequently tortured him.

The question before the Court is whether a rational jury could conclude beyond a reasonable doubt that appellants, at the moment they demanded or took control over the driver's automobile, possessed the intent to seriously harm or kill Gonzalez if necessary to steal the car. Although not controlling, the Court finds instructive, as based on similar facts, the case of *U.S. v. Brown*, 200 F.3d 700 (10th Cir.1999), cert. denied, 528 U.S. 1178, 120 S.Ct. 1213, 145 L.Ed.2d 1114 (2000).

There were three defendants in *Brown*—Dixon, Brown, and McClelland. Their primary objective was to rob someone. After locating a target, they followed the victim who pulled into a driveway to drop his passengers off. The victim got out of his vehicle and said goodbye to his passengers. When he returned to his vehicle, the defendants had parked directly behind him. Before the victim could get into his vehicle, Brown cut him off, pointed a gun at him, and demanded his money and wallet. The victim complied. Brown then demanded his jewelry. Dixon then instructed McClelland to get into the victim's vehicle. As the victim removed his jewelry, Dixon began hitting him on the right side of his face.

One of the issues before the *Brown* court was whether there was sufficient evidence to support the finding that defendants intended to cause death or serious bodily harm if necessary to steal the vehicle (*i.e.*, whether the intent element was met). In response, the court stated, “Mr. McClelland testified that part of the robbery plan was to take the victim's car, and, indeed, Mr. Dixon told Mr. McClelland to drive it away after Mr. Dixon struck the victim. This in itself is sufficient evidence of Defendants' state of mind for a rational jury to find intent.” *Brown*, 200 F.3d at 705 (internal citations omitted).

Similarly, the taking of Gonzalez's vehicle was not appellants' primary objective. Rather, their primary objective was to kidnap him for purposes of extortion. The evidence before the jury reveals that appellants came at Gonzalez with weapons drawn, threw him to the ground, blindfolded him, handcuffed him, and then threw him into the back of the car. Negrin then drove off with Gonzalez's vehicle. Based on this evidence, the Court is satisfied that a rational jury could conclude beyond a reasonable doubt that appellants intended to cause serious bodily harm to Gonzalez if necessary to steal his vehicle.

#### VI. Sufficiency of the Evidence as to the § 924(c) Convictions

Echevarria, Munoz, Camacho, and Orestes Hernandez were convicted of carrying and using a firearm during a crime of

violence in connection with the Martin and Arias episodes. Camacho and Orestes Hernandez also were convicted of carrying and using a firearm during a crime of violence in connection with the Gonzalez episode. Only Camacho directly challenges these convictions.<sup>43</sup> Camacho argues the evidence was insufficient because the government did not charge him with aiding and abetting and the government provided no proof that Camacho used or \*1099 carried any firearms. Neither argument has any merit.

The indictment charged a violation of 18 U.S.C. § 924(c) in Counts III, VI, VIII, and XI. Echevarria, Munoz, Camacho, Orestes Hernandez, Lopez, and Diaz were charged under Counts III (for the Martin episode) and VI (for the Arias episode). Camacho, Orestes Hernandez, and Negrin were charged under Count XI (for the Gonzalez episode).<sup>44</sup> In addition, aiding and abetting was charged in conjunction with the § 924(c) violations.

[35] [36] Pursuant to 18 U.S.C. § 924(c), it is unlawful 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” to use or carry a firearm or for any person “in furtherance of any such crime,” to possess a firearm. See 18 U.S.C. § 924(c). In *Bailey v. U.S.*, 516 U.S. 137, 142, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the Supreme Court held that a conviction for “using” a firearm required proof of active employment of a weapon and that proof of mere possession was insufficient. The Court, however, made clear that its decision was intended to give new life to the “carry” prong of § 924(c). This intent was recognized by this Court in *Bazemore v. U.S.*, 138 F.3d 947, 950 (11th Cir.1998). The decision in *Bailey*, however, did not negate the applicability of the *Pinkerton* doctrine to § 924(c) cases. *U.S. v. Bell*, 137 F.3d 1274, 1275 (11th Cir.1998) (per curiam). Accordingly, criminal defendants remain liable for the reasonably foreseeable actions of their coconspirators—including the using or carrying of a firearm during the commission of a crime of violence. See *U.S. v. Bell*, 137 F.3d 1274, 1275 (11th Cir.1998) (holding that coconspirator liability for a § 924(c) offense may be established under *Pinkerton* liability).

[37] At the close of evidence but before the jury was charged, the government amended the indictment, over Camacho's objection, removing the aiding and abetting language and relying solely on the *Pinkerton* instruction.<sup>45</sup> The district court noted that the government could withdraw its request to proceed on an aiding and abetting theory and that

such withdrawal would not preclude the government from considering the § 924(c) charge under the *Pinkerton* theory. (R.432, at 3632).<sup>46</sup> We agree.

[38] It does not follow that, because the government could not prove that appellants aided and abetted in the commission of a § 924(c) violation, no such violation occurred. On the contrary, because this Court, along with a number of other courts, recognizes the application of the *Pinkerton* doctrine to establish a substantive \*1100 violation of § 924(c), a person not present when the offense was committed need not be an aider and abetter in order to be found guilty of carrying or using a firearm during the commission of a violent crime. Rather, an absent conspirator may be found guilty of violating § 924(c) if the carrying or using of a firearm by a coconspirator is a reasonably foreseeable action of the conspiracy. Camacho's objections to the dismissal of the aiding and abetting charges and to the government's sole reliance on *Pinkerton* liability for the § 924(c) charge are groundless. There was no error on the part of the district court in its instruction of the jury regarding *Pinkerton* and aiding and abetting. Accordingly, Camacho's convictions for carrying and using a firearm during the three episodes will be upheld absent proof that such use during the Arias episode was not foreseeable.

[39] Camacho was present during the kidnappings of both Nelson Martin and Armando Gonzalez. The Arias kidnapping fell in between these two episodes. There is no dispute that Camacho was not present during the Arias kidnapping. He was called after Idania Arias and her children had been kidnapped, and he went to the garage where Idania and her children were taken. From that point on, Camacho fully participated.

As discussed previously, Camacho can be found guilty of carrying or using a firearm during the commission of a violent crime with respect to the Arias kidnapping if it is reasonably foreseeable that his coconspirators would carry or use a firearm. The evidence before the jury established that weapons were used during both the Martin and Gonzalez kidnappings establishing that such use was part of the scheme. In fact, there is no evidence to support Camacho's argument that he did not foresee that his coconspirators would commit such offenses and use firearms during their commission.

Camacho's final argument is that he was not a member of the conspiracy and, hence, cannot be found guilty of the acts of the other appellants. The Court, however, has

determined that Camacho knew of the conspiracy and was a voluntary participant. Accordingly, this is a losing argument and appellants' § 924(c) convictions are affirmed.

## VII. Procedural and Pretrial Issues

### A. Severance, Mistrial, and Improper Joinder Issues

#### 1. Severance

Echevarria argues that the district court abused its discretion in denying his motion for severance.<sup>47</sup> He contends that the jury was unable to sift through the evidence and make an individualized determination as to each defendant. Echevarria adds that severance was necessary due to the improper joinder of defendants and offenses.

[40] [41] [42] [43] [44] [45] The Court has placed a heavy burden on a defendant who seeks to obtain a reversal on the basis of the denial of a severance motion.

The prevailing attitude is that persons who are charged together should be tried together. This is based largely on the desire to avoid multiple litigation and to conserve judicial resources. The granting or denial of a severance is within the discretion of the trial judge, and will be overturned only for abuse of discretion. In order to show that the \*1101 trial judge abused his discretion in failing to grant a severance, the appellant must demonstrate that the denial of a severance resulted in specific and compelling prejudice against which the trial court was unable to afford protection. Only if the jury could not separate the evidence relevant to each appellant and render a fair and impartial verdict as to each should severance be granted.

*U.S. v. Butler*, 792 F.2d 1528, 1534 (11th Cir.1986) (internal citations omitted). The jury's ability to reach different verdicts as to different defendants is one factor that signifies the jury's

ability to make individualized determinations. *See, e.g., U.S. v. Starrett*, 55 F.3d 1525, 1553 (11th Cir.1995). In evaluating the district court's denial of severance, we are mindful of the fact that “the Constitution does not guarantee a trial free from the prejudice that inevitably accompanies any charge of heinous group crime; it demands only that the potential for transference of guilt be minimized to the extent possible under the circumstances ....” *Id.* (quoting *U.S. v. Elliott*, 571 F.2d 880, 905 (5th Cir.1978)).

[46] Echevarria also alleged prejudice resulting from a “spill-over” effect. Accordingly, he must demonstrate the jury's inability to make an individualized determination as to each defendant. *See Butler*, 792 F.2d at 1534. Echevarria's main argument is that evidence relating to Counts VII through XI for acts that occurred after Echevarria had been arrested, resulted in compelling prejudice. This argument is unconvincing. Echevarria was not charged with any of those counts, and the evidence against him relating to Counts I through VI was more than overwhelming. In addition, the court ordered the government to announce against whom the evidence was offered, and the court issued a limiting instruction with regard to the evidence on Counts VII through XI stating that Echevarria, Munoz, Diaz, and Lopez had not been charged in those counts. (R. 427 at 2628–30). Under these circumstances, Echevarria has not made a sufficient showing of compelling prejudice.

## 2. Mistrial

Echevarria argues that the following events warranted a mistrial: (1) the introduction of evidence regarding the type of ammunition recovered from coconspirator Munoz's home; (2) testimony that it is illegal for a convicted felon to possess ammunition; (3) prosecutorial misconduct; and (4) the inclusion of facts not in evidence in the government's closing argument.

[47] [48] We review the district court's refusal to grant a mistrial for abuse of discretion. If a district court issues a curative instruction, we will reverse only if the evidence “is so highly prejudicial as to be incurable by the trial court's admonition.” *U.S. v. Trujillo*, 146 F.3d 838, 845 (11th Cir.1998) (quoting *U.S. v. Funt*, 896 F.2d 1288, 1295 (11th Cir.1990)).

[49] Echevarria argues that the testimony regarding the type of ammunition found in Munoz's home and the fact

that convicted felons cannot possess ammunition was elicited for the improper purpose of prejudicing the appellants. We disagree. The district court heard arguments from both the government and defense counsel and found that such testimony was relevant to issues in the case. In addition, it was defense counsel that opened the door to the question of whether it was illegal to possess ammunition.

[50] Echevarria's final argument for mistrial relates to the government's actions. Echevarria claims a mistrial should have been granted when the government started to laugh at the defense when a \*1102 witness stood up and began to gesture in response to a defense question. An examination of the record reveals that on cross-examination, Idania Arias was questioned about her identity of Sergio Echevarria as “cat eyes.” This question apparently triggered something inside of her and she stood up gesturing towards Echevarria and speaking in Spanish. Before an interpretation was given, counsel for Echevarria objected that her answer was nonresponsive—although he was unable to understand what the answer was since he did not speak Spanish. The government did not understand what her answer was and began to laugh when counsel for Echevarria objected because they knew he did not know what had been said. The district court issued an admonishment, which was sufficient in curing any prejudice to appellant.

## 3. Misjoinder

[51] [52] Echevarria argues that his convictions should be reversed because the district court improperly permitted joinder of defendants and unrelated offenses in the same indictment. Reversal based on improper joinder is only required if “it results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict.” *U.S. v. Dominguez*, 226 F.3d 1235, 1238 (11th Cir.2000). The question of whether initial joinder of offenses is proper under Fed.R.Crim.P. 8 is to be determined by the trial court before trial. This determination is made by examination of the allegations stated on the face of the indictment. *See id.*

[53] Based on a review of the indictment, it is apparent that there was no misjoinder of offenses. The offenses charged include the conspiracy and the substantive Hobbs Act violations. In addition, the counts relating to the carjackings and the use of firearms are included. The offenses charged in Counts II through XI constitute a series of acts committed in furtherance of the overall conspiracy as charged in Count I

and, hence, were properly joined under [Rule 8\(a\)](#). Moreover, because the offenses as alleged in the fourth superseding indictment were factually similar and those allegations show a substantial overlap of participants, the joinder of parties also was proper under [Rule 8\(b\)](#).

#### *B. In-Court and Out-of-Court Identifications*

Munoz challenges his conviction based on the in-court and out-of-court identifications made by Idania Arias. Munoz claims that the district court violated his constitutional rights when it admitted evidence of an out-of-court identification and allowed an in-court identification allegedly based on unduly suggestive government procedures.

[54] [55] This Court employs a two-step analysis in assessing the constitutionality of a trial court's decision to admit an out-of-court identification. [Cikora v. Dugger](#), 840 F.2d 893, 895 (11th Cir.1988). First, we must determine whether the original identification procedure was unduly suggestive. If we conclude that it was suggestive, we then must consider whether, under the totality of the circumstances, the identification was nonetheless reliable. *Id.* (citing [Neil v. Biggers](#), 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); [Dobbs v. Kemp](#), 790 F.2d 1499, 1506 (11th Cir.1986)). Factors to be considered in determining whether the identification was reliable include: (1) opportunity to view; (2) degree of attention; (3) accuracy of the description; (4) level of certainty; and (5) length of time between the crime and the identification. [Neil v. Biggers](#), 409 U.S. at 199, 93 S.Ct. 375.

\*1103 [56] The district court concluded that the identification procedure was not impermissibly suggestive. This conclusion is subject to a clearly erroneous standard. *See Cikora*, 840 F.2d at 896; *cf. id.* at 895 (stating that “[t]he district court's *ultimate* conclusion, taking into consideration the five factors of the *Neil v. Biggers* test, that [the defendant] was not deprived of due process by the admission of the out-of-court identification, is subject to plenary review as a mixed question of fact and law.”).

[57] We cannot conclude that the district court was clearly erroneous when it held that the pretrial identification procedure was not impermissibly suggestive. First, we disagree that the facts surrounding the out-of-court identification by Idania Arias are similar to the facts in [Foster v. California](#), 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). The identification procedure in *Foster* consisted of an initial lineup in which the petitioner stood out from the other

two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. Since no identification was made, the police permitted a one-to-one confrontation between the petitioner and the witness, which resulted in a tentative identification. A final lineup was arranged in which the petitioner was the only person who had appeared in the first lineup.

In this case, the initial lineup prepared by the FBI was shown to both Idania Arias and Joseph Arias, but it was shown to them separately. Joseph Arias was able to make a positive identification, but Idania Arias did not. Approximately two weeks later, police visited Idania Arias and showed her another lineup. Again Joseph Arias and Idania Arias were shown the lineup separately and, again, Joseph Arias made a positive identification while Idania Arias did not. Almost six months later, based on a new photograph the FBI obtained of Munoz, Idania Arias was shown another lineup. This time she was able to positively identify Munoz. In addition, she was able to identify Munoz in court.

[58] Based on the foregoing, we do not find the district court's decision that the identification procedures were not impermissibly suggestive to be clearly erroneous.<sup>48</sup>

#### *C. Enforcement of the District Court's Sequestration Order*

Echevarria maintains that the district court erred in failing to grant a mistrial or, alternatively, to strike the testimony of the government's witnesses following violations of the court's sequestration order. According to Echevarria, the government met and spoke with Ilvigio, allowing him to help guide its case, and, after being admonished for doing so, the government later improperly spoke with Nelson Martin.<sup>49</sup> The alleged violation of \*1104 the sequestration order with regard to Martin occurred when the government was permitted to reopen its case to insure that Nelson would testify that Echevarria had a gun in his possession as described in Count III. The government's response to Echevarria's argument is that there was no showing of prejudice because both witnesses were available for cross-examination.

[59] [60] [61] The Supreme Court in [Geders v. U.S.](#), 425 U.S. 80, 87, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) stated that the judge's power to control the progress and the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony. When a violation of the sequestration rule occurs, the court may respond in one of

three ways: (1) it may cite the guilty party for contempt; (2) it may allow opposing counsel to cross-examine the witnesses as to the nature of the violation; or (3) where counsel or the witness violate the rule intentionally, the court may strike testimony already given or disallow further testimony. *U.S. v. Lattimore*, 902 F.2d 902, 904 (11th Cir.1990). “The district court’s denial of a mistrial for violation of the sequestration rule is ... a matter of discretion and reversible only on a showing of prejudice.” *Id.* (quoting *U.S. v. Jimenez*, 780 F.2d 975, 978 (11th Cir.1986) (citing *U.S. v. Womack*, 654 F.2d 1034 (5th Cir.1981))).

[62] We find that the violation of the sequestration order resulted in no prejudice. Echevarria argues that the district court erred by allowing Nelson Martin to be recalled to the stand more than two weeks after his initial testimony to clarify what he meant by his testimony that he was physically taken by “armed” men. Just prior to Martin’s being called to the stand, the government spoke with Martin and asked him what the kidnappers had held in their hands. Martin responded “guns.” Counsel for Echevarria then moved to exclude the testimony of Martin. (R.430, at 3133). The court determined that the violation of the order was not in bad faith, particularly since Nelson was recalled for only a specific purpose—to clarify the meaning of “armed.” Following the direct examination of Martin regarding the meaning of “armed,” defense counsel were able to cross examine Martin. During cross examination, defense counsel brought out the fact that, although the pistols existed two weeks ago when Martin originally testified, he never explicitly referenced them. Accordingly, we find no prejudice.

### VIII. Sentencing Issues

#### A. Introduction

The sentences were imposed by the district court and briefs filed by the appellants prior to the issuance of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). As a consequence, several of the appellants have raised *Apprendi* issues by way of supplemental briefs. Initially, we observe that the government, in its supplemental brief filed on January 3, 2001,<sup>50</sup> has identified an error as to the sentencing of Orestes Hernandez and Camacho with respect to their carjacking convictions as alleged in Count X. The court imposed twenty-five year sentences on both Orestes Hernandez and Camacho for these convictions. Although the fourth superseding indictment charged Orestes Hernandez and Camacho with simple carjacking under \*1105 18 U.S.C. § 2119(1), they were sentenced under 18 U.S.C. §

2119(2), which requires the additional statutory element that serious bodily injury resulted from the carjacking.<sup>51</sup> As the indictment failed to allege that required element under 18 U.S.C. § 2119(2), the sentences for Orestes Hernandez and Camacho must be vacated and remanded for resentencing under the provisions of 18 U.S.C. § 2119(1).

[63] Because we vacate and remand the sentences of Orestes Hernandez and Camacho for resentencing without reference to serious bodily injury, their *Apprendi* argument is moot. Moreover, contrary to the appellants’ claims, Sentencing Guideline issues are not subject to the *Apprendi* rule and, thus, there is no requirement that sentencing facts be submitted to a jury and found beyond a reasonable doubt. See *U.S. v. Harris*, 244 F.3d 828 (11th Cir.2001). Thus, Echevarria’s *Apprendi* argument likewise has no merit.

#### B. Guideline Issues Raised by the Appellants<sup>52</sup>

[64] Echevarria, Munoz,<sup>53</sup> Orestes Hernandez,<sup>54</sup> and Camacho<sup>55</sup> object to the five-level weapon enhancements taken with respect to counts charging robbery, Hobbs Act violations, and carjacking. The district court, in calculating the offense level for the appellants’ respective convictions on counts charging a Hobbs Act conspiracy, substantive Hobbs Act violations, and carjacking, applied a five-level enhancement for the brandishing or possession of a firearm by a codefendant, which was consistent with its finding that another defendant also wielded a firearm and with the teaching of *U.S. v. Kimmons*, 965 F.2d 1001 (11th Cir.1992), cert. denied, 506 U.S. 1086, 113 S.Ct. 1065, 122 L.Ed.2d 370 (1993), cert. granted, vacated by, 508 U.S. 902, 113 S.Ct. 2326, 124 L.Ed.2d 239 (1993). However, in light of the November 1, 2000 Amendment No. 599 to the Sentencing Guidelines, Orestes Hernandez, Camacho, Echevarria, and Munoz claim their sentences on these counts should be remanded.<sup>56</sup> The Court agrees.

The Presentence Investigation Report (“PSI”) of Echevarria illustrates the double counting issue raised by all four appellants. In determining the offense level for the Hobbs Act conspiracy charged in Count I and the substantive Hobbs Act violation charged in Count II, the PSI provides as follows:

\*1106 [N]o enhancement for the gun carried by Sergio Echevarria will be made. However, Sergio Echevarria

was one of two defendants who carried a gun during this crime of violence. Since a coconspirator and codefendant carried a firearm that was brandished, displayed, or possessed, the offense level is increased by five levels in accordance with § 2B3.2(b)(3)(A)(iii).

(PSI of Echevarria, ¶ 69). Although the language may vary, the same reasoning was used with regard to all counts charging Echevarria, Camacho, Munoz, and Orestes Hernandez with either Hobbs Act conspiracy, substantive Hobbs Act violations, or carjacking.

[65] Amendment 599 to the Sentencing Guidelines affects the Commentary to U.S.S.G. § 2K2.4<sup>57</sup> captioned “Application Notes.” Note 2 of the Application Notes, as amended, provides as follows:

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

U.S.S.G. § 2K2.4, cmt. n. 2.<sup>58</sup> The first sentence of the new application note reinforces what courts have always known— \*1107 when a defendant is convicted of a § 924(c) violation and an underlying offense, the *defendant's* possession of a weapon cannot be used to enhance the level

of the underlying offense. A review of the PSIs for Orestes Hernandez, Munoz, Camacho, and Echevarria reveals that no enhancement was applied to the underlying offense level as a result of the individual defendant's possession of a firearm. Accordingly, no error was made.

The second sentence of Application Note 2 as amended by Amendment 599 deals with the effect of Relevant Conduct. Pursuant to U.S.S.G. § 1B1.3, relevant conduct includes, in the case of a jointly undertaken criminal activity (whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. Accordingly, in the case at bar, relevant conduct of one appellant would include all reasonably foreseeable acts and omissions of every co-appellant found to be involved in the conspiracy. Courts have inconsistently applied U.S.S.G. § 1B1.3, which provides for a five level enhancement where a firearm is brandished or possessed, in conjunction with U.S.S.G. § 2K2.4.<sup>59</sup> More particularly, there has not been uniformity in regard to how the possession of a firearm by a codefendant affects the computation of the offense level for the underlying offense for which the defendant was convicted. The second sentence of Application Note 2, as amended by Amendment 599, addresses this issue.

The Commentary to § 2K2.4, as amended, states that a sentence under U.S.S.G. § 2K2.4 accounts for any weapon enhancement for the underlying offense of conviction *including* any enhancement based on conduct for which the defendant is accountable under U.S.S.G. § 1B1.3. Accordingly, relevant conduct cannot be used to enhance the offense level of the underlying offense. In the case at bar, the district court could not enhance the offense level for the Hobbs Act conspiracy, substantive Hobbs Act violations, and carjacking convictions of one appellant based on the fact that a co-appellant brandished or possessed a weapon. However, the PSIs called for appellants Orestes Hernandez, Camacho, Echevarria, and Munoz to receive the five level enhancement for the underlying offense conduct, and the district court properly denied the objections for the so-called “double counting” based on *Kimmons, supra*. However, by virtue of Amendment 599, the appellants are no longer subject to “double counting” or the teaching of *Kimmons, supra*, as Amendment 599 has been given retroactive status.<sup>60</sup>

With the retroactivity of Amendment 599 established, the provisions of U.S.S.G. § 1B1.10 and 18 U.S.C. § 3582(c) (2) apply, resulting in a possible reduction of appellants'

previously properly imposed sentence. \*1108 Section 1B1.10 of the Sentencing Guidelines provides:

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2).....

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

U.S.S.G. § 1B1.10(a) & (b). The procedure for bringing the issue of a possible reduction of a previously properly imposed sentence before the district court is provided by 18 U.S.C. § 3582(c)(2):

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, *the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.*

18 U.S.C. § 3582(c)(2) (emphasis added).

The Court has already concluded that the sentences of Orestes Hernandez and Camacho must be vacated and this case be remanded as to those appellants. Moreover, we construe the brief of Echevarria raising the issue of the application of

Amendment 599 as a motion for the district court to revisit the sentences of Echevarria pursuant to 18 U.S.C. § 3582(c)(2). In addition, by adoption of each other's motions, the Court recognizes similar motions on behalf of Orestes Hernandez, Camacho, and Munoz. Accordingly, the district court must determine whether, and to what extent, a reduction in the term of imprisonment is warranted for these four appellants.

Consequently, the previously imposed sentences affected by the provisions of Amendment 599 are vacated and remanded for consideration in light of the amendment. In determining to what extent a reduction in the term of imprisonment is warranted, the district court should consider the term of imprisonment it would have imposed had Amendment 599 been in effect at the time the appellants were sentenced along with the discretion vested in the district court by Application Note 3 to U.S.S.G. § 1B1.10.<sup>61</sup>

\*1109 [66] In light of the recent amendments to the Sentencing Guidelines, Echevarria's sentences as to Counts I, II, IV, and V, Orestes Hernandez's sentences as to Counts I, II, IV, V, VII, IX, and X, Camacho's sentences as to Counts I, II, IV, VII, IX, and X, Munoz's sentences as to Counts I, II, IV, and V are vacated and remanded for recalculation and reconsideration in accordance with Application Note 2 of U.S.S.G. § 2K2.4 and Application Note 3 to U.S.S.G. § 1B1.10.<sup>62</sup>

#### IX. Conclusion

The conviction and sentence for Gloria Diaz is AFFIRMED. The convictions of Sergio Echevarria, Eladio Munoz, Orestes Hernandez, and Ismael Camacho are AFFIRMED. The sentences of Orestes Hernandez and Camacho for their convictions of Count X are vacated and remanded for resentencing as directed by this opinion. The sentences of Orestes Hernandez for Counts I, II, IV, V, VII, IX, and X, the sentences of Camacho for Counts I, II, IV, VII, IX, and X and the sentences of Echevarria and Munoz for Counts I, II, IV, and V are vacated for resentencing consistent with Application Note 2 of U.S.S.G. § 2K2.4 as amended by Amendment 599 and Application Note 3 to U.S.S.G. § 1B1.10. The remaining sentences of Camacho for Counts III, VI, VIII, and XI are AFFIRMED. The remaining sentences of Orestes Hernandez for Counts III, VI, and XI are AFFIRMED. The remaining sentence of Echevarria for Count III is AFFIRMED. The remaining sentences of Munoz for Counts III and VI are AFFIRMED.

The convictions of Jose Blas Lopez are REVERSED, Lopez's sentence is VACATED, and this case is REMANDED to the district court to enter a judgment of ACQUITTAL and an order for the DISCHARGE of Jose Blas Lopez.<sup>63</sup>

#### All Citations

248 F.3d 1065, 56 Fed. R. Evid. Serv. 1226, 14 Fla. L. Weekly Fed. C 613

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### Footnotes

- \* Honorable [David D. Dowd, Jr.](#), U.S. District Judge for the Northern District of Ohio, sitting by designation.
- 1 The first indictment (R.15) was filed on April 22, 1996 and named only Ilvigio Hernandez, Humberto Munoz and John Does. Humberto Munoz was arrested on January 12, 1996 and mistakenly identified by Idania Arias as one of the kidnappers. After many months in jail, the mistake as to Humberto Munoz was determined and he was released. A superseding indictment (R.34) was filed on May 28, 1996 and named Ilvigio Hernandez, Humberto Munoz, Sergio Echevarria and Eladio Munoz. The second superseding indictment (R.57) was filed on June 18, 1996 and added as a new defendant Ismael Camacho. The third superseding indictment (R.160) was filed on April 22, 1997 and added Vlademir Negrin, Carlos Escandell, Jose Blas Lopez, Gloria Diaz and Orestes Hernandez. By the time the fourth superseding indictment (R.330) was filed on April 1, 1998, Ilvigio Hernandez and Carlos Escandell had entered pleas of guilty and, thus, were not named in the fourth superseding indictment. Vlademir Negrin was named in the indictment, but pled guilty before the trial of the six appellants began in May of 1998.
- 2 Ilvigio, Vladmir Negrin, and Carlos Escandell were also indicted in the district court case. All three entered pleas of guilty and have been sentenced. Ilvigio received a sentence of 122 months, Negrin a sentence of 390 months, and Escandell a sentence of 71 months. Escandell, like Ilvigio, testified as a government witness and described his participation along with Negrin, Orestes Hernandez, and Ismael Camacho in the Gonzalez episode in November of 1996.
- 3 A detailed description of each incident is provided *infra* Parts II.A, B & C.
- 4 Neither Lopez nor Diaz was implicated in the Gonzalez episode that took place in November of 1996. Rather, Escandell, a cooperating defendant in the Gonzalez episode, identified an anonymous mechanic as the "tipster" for those crimes.
- 5 Santeria is a syncretistic religion of Caribbean origin in that it represents a compromise of conflicting religious beliefs. Its origins date back to the slave trade when African natives were forcibly transported to the Caribbean. The religion is currently concentrated in Cuba and other Caribbean islands, and among Hispanics in Florida, New York City, and Los Angeles. Ritual sacrifices form an integral part of many Santerian religious rituals. Very little is known about the beliefs, rituals, symbolism, and practices of the Santerian religion. Like most Aboriginal religions, it is preserved by an oral tradition. There are priests and priestesses who are trained for many years in the oral tradition of the faith. This is followed by a period of solitude before being initiated. They learn dance, songs, and healing methods. Their followers or clients are called "godchildren." See <http://www.seanet.com/~efunmoyiwa/ochanetold.html> (last visited February 20, 2001).
- 6 The Court notes that the impact of this statement arguably was lessened by defense counsel's questioning of Joseph Arias whereby Joseph admitted that he first remembered this statement a few weeks before trial. (R.402, at 2120–21).

- 7 Ilvigio and Munoz had already been incarcerated and the kidnapers made multiple references to the prior kidnapping of Idania and the children and referred to Gloria Diaz within earshot of Joseph Arias.
- 8 Rosa Gonzalez was of no relation to Armando Gonzalez.
- 9 Only Camacho and Orestes Hernandez were charged with the November 4th crimes in Counts VII and VIII of the fourth superseding indictment.
- 10 On December 18, 1996, Escandell was arrested in connection with a subsequent kidnapping attempt. (R.428, at 2831). Once arrested, he told the detective about everything in which he had been involved—including the Armando Gonzalez kidnapping. (*Id.*).
- 11 The government dismissed Counts II and III as to Lopez during the Rule 29 process. See R.430, at 3289–90.
- 12 The government moved to dismiss as to Camacho; its motion was granted. (R.430, at 3368).
- 13 Lopez and Diaz were charged in Count VI, but the government dismissed as to both. See R.430, at 3341.
- 14 Echevarria was sentenced to three concurrent terms of 240 months imprisonment for the Hobbs Act violations charged in Counts I, II, and IV; a consecutive term of 165 months for the carjacking violation charged in Count V; and a consecutive term of 60 months imprisonment for the single § 924(c) violation charged in Count III for a total of 465 months, plus restitution in the sum of \$146,250.00.
- 15 Munoz was sentenced to three concurrent terms of 240 months for the Hobbs Act violations charged in Counts I, II, and IV; a consecutive term of 165 months for the carjacking violation charged in Count V; a consecutive term of 60 months for the first § 924(c) violation charged in Count III; and a consecutive term of 240 months for the second § 924(c) violation charged in Count VI for a total of 705 months, plus restitution in the sum of \$146,250.00.
- 16 Camacho was sentenced to a term of 300 months for his single carjacking conviction as charged in Count X; concurrent terms of 240 months for the Hobbs Act violations as charged in Counts I, II, IV, and VII, to be served concurrently with the 300 month sentence for Count Ten; a term of 65 months for the Hobbs Act violation charged in Count IX, to be served consecutively to the sentences imposed for Counts I, II, IV, VII, and X; a term of 60 months for the first § 924(c) violation as charged in Count III, to be served consecutively to the other sentences; and, finally, an additional 720 months to be served consecutively to all other sentences for the second, third, and fourth § 924(c) violations as charged in Counts VI, VIII, and XI, for a total of 1145 months, plus restitution in the sum of \$192,050.00.
- 17 Orestes Hernandez was sentenced to concurrent terms of 240 months for the Hobbs Act violations charged in Counts I, II, IV, and VII; a term of 300 months for the carjacking violation charged in Count X and a term of 180 months for the carjacking violation charged in Count V, with both carjacking sentences to be served concurrently with the terms for Counts I, II, IV, and VII; a term of 65 months for the Hobbs Act violation charged in Count IX, to be served consecutively to the sentences for Counts I, II, IV, and VII; a term of 60 months for the first § 924(c) violation as charged in Count III, to be served consecutively to the other sentences, and an additional 480 months for the second and third § 924(c) violations as charged in Counts VI and XI, for a total of 905 months, plus restitution in the sum of \$45,800.00.
- 18 Lopez was sentenced to 188 months imprisonment for the two Hobbs Act violations as charged in Counts I and IV, plus restitution in the sum of \$5,200.00.
- 19 Diaz was sentenced to concurrent terms of 293 months for the three Hobbs Act violations as charged in Counts I, II, and IV, plus restitution in the sum of \$5,200.00.

- 20 In Echevarria's factual analysis of matters at issue, he discusses the government's use of evidence of the uncharged misconduct through Ilvigio's testimony. Echevarria argues that this evidence constituted extrinsic evidence, and its use was impermissible. Relying on *U.S. v. Martin*, 794 F.2d 1531 (11th Cir.1986), the court determined that the evidence was intrinsic—not extrinsic. Accordingly, the court stated that no limiting instruction was necessary. See R.382, at 1212–16; R.388, at 1666. Assuming, *arguendo*, that the evidence was extrinsic and no limiting instruction was given, such error was harmless in light of the overwhelming evidence against Echevarria.
- 21 Fed.R.Evid. 801(d)(2)(E) provides:
- A statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish ... the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).
- 22 The court must be satisfied that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made in furtherance of the conspiracy. The Supreme Court in *Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), made three relevant holdings: (1) when the preliminary facts relevant to Rule 801(d)(2)(E) are in dispute, the offering party must prove them by a preponderance of the evidence; (2) when making this preliminary factual determination under Rule 801(d)(2)(E), the court may examine the hearsay statements sought to be admitted; and, (3) the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E). *Id.* at 176, 181, & 183, 107 S.Ct. 2775.
- 23 A finding that the requisite nexus to interstate commerce was lacking would require a reversal of the conviction for Hobbs Act conspiracy. However, because the substantive charges cover the same episodes as the conspiracy charge, a separate discussion of the interstate nexus for the conspiracy charge is not warranted.
- 24 These companies included, *inter alia*, Aetna, Ladd Corp., and Unisys.
- 25 The Court notes that, in reaching this conclusion, it is guided by the definition of “deplete” in Webster's Third International Dictionary, which defines the term as follows: “to empty (as the blood vessels) of a principle substance ... to lessen in number, quantity, significant content, or force in vital power or value as a result of such lessening ....” Webster's Third Int'l Dict. 605 (1981).
- 26 Alternatively, the government contended that because the stolen vehicle had traveled in interstate commerce, its theft somehow affected it. However this argument was never seriously addressed.
- 27 Although Negrin was indicted on Counts VII and IX, he pled guilty before the trial for appellants began.
- 28 Fed.R.Crim.P. 29 provides the procedure for motions of acquittal whereby “the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.”
- 29 See R.430, at 3368; R.432, at 3642.
- 30 See R.457, at 3693.
- 31 Lopez was named in the fourth superseding indictment as to Count II (the substantive Hobbs Act count as to the June 26, 1995 Martin episode) and in Count III (the § 924(c) gun count of June 26, 1995). The government moved to dismiss those counts at the end of its case in chief. See *supra* note 11.

- 32 See R.382, at 1193–1222.
- 33 As a part of that testimony, Ilvigio identified Lopez in open court. See R.382, at 1224.
- 34 See R.382, at 1226–34.
- 35 See R.382, at 1227 (ln.18)–1228 (ln.1), 1230 (ln.10–13), & 1232 (ln.23)–1233 (ln.16).
- 36 Counts I and IV charged as follows:

From on or about June 26, 1995, to on or about November 13, 1996 ... the defendants ... did knowingly and unlawfully combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury, to obstruct, delay and affect commerce and the movement of articles and commodities in commerce by extortion, as the terms “commerce” and “extortion” are defined in [Title 18, United States Code, Section 1951\(b\)](#), in that the defendants did attempt to obtain property ... *from individuals engaged in purchasing and selling articles and commodities in interstate commerce*, with their consent, induced by wrongful use of actual and threatened force, violence and fear; in violation of [Title 18, United States Code, Section 1951](#).

R.330 (Count I) (emphasis added).

On or about January 11, 1996, to on or about January 12, 1996 ... the defendants ... did knowingly and unlawfully attempt to obstruct and affect commerce and the movement of articles and commodities in commerce by extortion, as the terms “commerce” and “extortion” are defined in [Title 18, United States Code, Section 1951\(b\)](#), in that the defendant did attempt to obtain property ... from Jose Arias and Idania Arias, owners of companies engaged in purchasing and selling articles and commodities in interstate commerce, with their consent, induced by wrongful use of actual and threatened force, violence and fear, in that the defendants kidnapped and threatened to kill Idania Arias and the children of Jose Arias and Idania Arias in order to obtain \$500,000.00 ... which the defendants demanded as ransom ....

*Id.* (Count IV).

- 37 In [Bonner v. City of Prichard, 661 F.2d 1206, 1209 \(11th Cir.1981\)](#), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit rendered before October 1, 1981.
- 38 See R.430, at 3369.
- 39 However, such judicial declaration does not constitute a substitute for proof of the required interstate commerce nexus.
- 40 Since the uncorroborated testimony of Ilvigio does not establish the necessary nexus to interstate commerce, the Lopez appellate attack on the testimony of Ilvigio as being incredible or otherwise insubstantial, (see [Iacovetti, supra](#)), need not be addressed. However, we note that Lopez, in his own defense, introduced testimony by way of a stipulation tending to demonstrate that he was in New York City on December 24, 1995, the day Ilvigio recalled that he met Lopez.
- 41 The district court's *Pinkerton* liability jury instruction follows:

In some instances, a conspirator may be held responsible, under the law, for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.

So, in this case, if you have first found a defendant guilty of the conspiracy offense as charged in Count 1 of the Indictment, you may also find such defendant guilty of any of the other offenses with which that defendant is charged, even if you find that such defendant did not personally participate in such offense if you find beyond a reasonable doubt three things:

1. That the offense charged in such count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects.
2. That the defendant under consideration *was a knowing and willful member of a conspiracy* at the time of the commission of such offense and;
3. That the commission of such offense by a coconspirator was a reasonable foreseeable consequence of the conspiracy.

R.458, at 4074–75 (emphasis added).

- 42 The presentence report for Lopez sets forth a description of the criminal conduct and provides it was based on information supplied by the U.S. Attorney's office and agents of the FBI. Paragraph thirty-nine of the Lopez presentence report describes alleged admissions by Lopez to FBI agents in January of 1997 regarding the Arias episode. However, to avoid a defense motion for severance, the government agreed, prior to the trial, not to introduce testimony concerning the alleged admissions. Consequently, the jury had no such evidence before it.
- 43 The Court notes, however, that all appellants adopted the arguments raised by their co-appellants.
- 44 Lopez and Diaz were not present for any of the kidnappings and Camacho was not present for the Arias kidnapping. The government originally believed the only way it could convict appellants who were absent was by proving they aided and abetted in the commission of the crime. Realizing it was unable to prove this with regard to Lopez and Diaz, the government dismissed the counts against them. Subsequently, the government became aware of the availability of *Pinkerton* liability. At the close of evidence, the government moved to dismiss aiding and abetting from the § 924(c) charges. Camacho's trial counsel objected. See R.432, at 3628–41.
- 45 Camacho's argument appears to be based on the incorrect belief that aiding and abetting is a separate offense. On the contrary, 18 U.S.C. § 2 only abolishes the common law distinction between principals and accessories. See *U.S. v. Scroger*, 98 F.3d 1256 (10th Cir.1996).
- 46 The district court conducted a lengthy hearing discussing the relinquishment of aiding and abetting as a theory for prosecution. (R.432, at 3628–41).
- 47 Lopez also makes a similar argument. In view of our decision vacating the Lopez convictions, we need not address Lopez's claim.
- 48 Munoz also contends that Idania Arias's in-court identification of him violated his due process rights. Assuming for the sake of argument that the in-court identification violated due process, Munoz's contention is not a sufficient ground for reversal of his conviction. The admission of unreliable identification is subject to harmless error analysis. *Marsden v. Moore*, 847 F.2d 1536, 1546 (11th Cir.1988). After reviewing the overwhelming evidence against Munoz, we are left with no doubt that the jury would have convicted him even absent the purportedly unreliable in-court identification.
- 49 The violation that occurred involving Ilvigio will not be addressed. In response to the violation of the sequestration order, the court allowed defense counsel to inquire of Ilvigio about the contact in front of the jury and to argue it during closing. In addition, the court gave the government a strong admonishment. (R.388, at

1448–49). When asked if any additional relief was requested, no one responded. (*Id.*) A mistrial was never requested. Accordingly, there is no denial of a motion for mistrial for this Court to review.

50 Oral argument was conducted in this case on November 7, 2000.

51 The maximum sentence under 18 U.S.C. § 2119(2) is twenty-five years while the maximum under 18 U.S.C. § 2119(1) is fifteen years.

52 Although only Echevarria and Orestes Hernandez raise issues regarding the Sentencing Guidelines in their supplemental briefs, these issues were also raised in their original briefs, which, pursuant to Fed. R.App. P. 28(i), were adopted by Camacho and Munoz. Accordingly, the Court addresses this matter as it relates to all four appellants.

53 Echevarria and Munoz were convicted of two violations of 18 U.S.C. § 924(c) arising from the Martin and Arias episodes, which resulted in consecutive sentences totaling 25 years.

54 Orestes Hernandez was convicted of three § 924(c) violations arising from the Martin, Arias, and Armando Gonzalez episodes, which resulted in consecutive sentences totaling 45 years.

55 Camacho was convicted of four § 924(c) violations arising from the Martin, Arias, Rosa Gonzalez, and Armando Gonzalez episodes, which resulted in consecutive sentences totaling 65 years.

56 The government's response to appellants' discussion of the impact of the new Sentencing Guideline amendments was to ask the Court to strike that portion of appellants' briefs.

57 U.S.S.G. § 2K2.4 addresses the offense conduct for the use of a firearm, armor-piercing ammunition, or an explosive during or in relation to certain crimes.

58 Prior to the November 1, 2000 amendment, Application Note 2 to U.S.S.G. § 2K2.4 provided as follows:

Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm (e.g., § 2B3.1(b)(2)(A)-(F) (Robbery)) is not to be applied in respect to the guideline for the underlying offense.

In a few cases, the offense level for the underlying offense determined under the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancement for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted to that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in total punishment. An upward departure under this paragraph shall not exceed the maximum guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

59 See *U.S. v. Gonzalez*, 183 F.3d 1315, 1325–26 (11th Cir.), *cert. denied*, 528 U.S. 1144, 120 S.Ct. 996, 145 L.Ed.2d 943 (2000) (stating both statutory and guideline increases may be imposed if defendant and accomplice used different weapons as part of joint undertaking); *U.S. v. Willett*, 90 F.3d 404, 407–08 (9th Cir.1996) (finding no double counting in applying both increases for separate weapons possessed by defendant). *But see U.S. v. Knobloch*, 131 F.3d 366, 372 (3d Cir.1997) (stating it an error to apply guideline enhancement in addition to statutory penalty “even if the section 924(c)(1) sentence is for a different weapon than the weapon upon which the enhancement is predicated.”).

60 U.S.S.G. § 1B1.10 instructs the Court as to whether or not a reduction in the defendant's term of imprisonment is authorized as a result of an amendment to the Guidelines Manual. If the amendment is listed in subsection (c) of § 1B1.10, a reduction is authorized. Amendment 599 is so listed.

61 Application Note 3 provides:

Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant will limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

U.S.S.G. § 1B1.10, cmt. n. 3.

62 Echevarria also argues that his offense level was incorrectly increased by three based on the court's finding that the loss was more than \$250,000 but less than \$800,000. The amount of money demanded initially by the Arias kidnapers was \$500,000. U.S.S.G. § 2B3.1(b)(7) adds three levels where the "loss" is more than \$250,000 but less than \$800,000. No money was obtained in the Arias episode. However, we find that the "loss" was correctly determined by applying Application Note 3 to U.S.S.G. § 2B3.1(b)(7), which notes that valuation of loss is discussed in Commentary to § 2B1.1 (Larceny, Embezzlement and Other Forms of Theft). U.S.S.G. § 2B1.1 references § 2X1.1 (Attempts...or Conspiracy), which states: "In an attempted theft, the value of the items that the defendant attempted to steal would be considered." U.S.S.G. § 2X1.1, cmt. n. 2. There is no dispute that the amount of ransom initially demanded was \$500,000. Accordingly, we find no error in the calculation of the loss.

63 See *Burks v. U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (holding that the Double Jeopardy Clause precludes a second trial once the reviewing court finds the evidence legally insufficient and that the only just remedy is the direction of a judgment of acquittal).

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 1:96-cr-00443-JEM-6

UNITED STATES OF AMERICA, Miami, Florida  
Plaintiff, July 30, 2024

vs.

ISMAEL CAMACHO, 11:35 a.m. - 12:15 p.m.  
Defendant. Pages 1 to 23

TRANSCRIPT OF RE-SENTENCING  
BEFORE THE HONORABLE JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: SEAN PAUL CRONIN, ESQ.  
UNITED STATES ATTORNEY'S OFFICE  
99 NE 4th Street  
Miami, Florida 33132

FOR THE DEFENDANT: BRUCE HARRIS FLEISHER, ESQ.  
BRUCE H. FLEISHER, P.A.  
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Coconut Grove, Florida 33133

*STENOGRAPHICALLY REPORTED BY:*  
*MARY ANN CASALE, RDR, FPR-C, CLR, CSR-IL*  
*Official Court Reporter*  
*United States District Court*  
*Southern District of Florida*  
*400 North Miami Avenue*  
*Miami, Florida 33128*  
*MaryAnn\_Casale@flsd.uscourts.gov*

1 (Call to the Order of the Court.)

2 COURTRROOM DEPUTY: Calling Case 96, criminal,  
3 00443, *USA versus Ishmael Camacho*.

4 Counsel, announce your names for the record,  
5 starting with the Government.

6 MR. CRONIN: Good afternoon, your Honor. Sean  
7 Cronin for the United States.

8 THE COURT: Good afternoon.

9 MR. FLEISHER: Good afternoon, your Honor.  
10 Bruce Fleisher, CJA counsel for Mr. Camacho who is  
11 standing to my right, accompanied by his family in the  
12 back of the courtroom.

13 THE COURT: Good morning Mr. Fleisher.  
14 You all may be seated.

15 Please swear in the interpreter.

16 (Interpreter sworn).

17 THE INTERPRETER: Yes, I do, your Honor.  
18 Consuelo Burranca.

19 THE COURT: Good morning Ms. Burranca.

20 All right. Can I get an appearance from  
21 Probation.

22 PROBATION OFFICER: Good morning, your Honor.  
23 Clara Lyons with probation.

24 THE COURT: Good morning Ms. Lyons.

25 All right. We're here on the resentencing of

1 Ishmael Camacho. I have reviewed the four superseding  
2 indictment; the jury verdict; the revised PSI; the six  
3 previous addendums; the judgment in the criminal case;  
4 the amended judgment; the second amended judgment; the  
5 motion to vacate, set aside, or correct the sentence; the  
6 order granting that 2255 motion; the seventh addendum,  
7 the Government's sentencing memorandum and notice of  
8 intent to seek an upward departure; the defendant's  
9 sentencing memorandum. And I'm ready to proceed at this  
10 time. I have, obviously, reviewed this case carefully.  
11 It was originally Judge Gold case, I believe. And I'm  
12 ready to proceed at this time.

13 I will be happy to hear from both sides as to  
14 what an appropriate sentence should be, starting with the  
15 Government.

16 MR. CRONIN: Thank you, your Honor.

17 As set forth in my sentencing memorandum, I  
18 believe reimposing a sentence of 335 months would be the  
19 appropriate sentence in this case. I believe at the last  
20 time he we had a resentencing hearing in this matter,  
21 your Honor really suggested that that was the appropriate  
22 sense under the 3553(a) factors, even if a subsequent  
23 change in law would have the effect of either reducing  
24 one of the mandatory minimums or reducing the advisory  
25 guideline range. I believe it remains true today that

1 under the 3553(a) factors, given the horrendous nature of  
2 this offense and the horrible treatment of the victims,  
3 both minor victims and adult victims, by this defendant,  
4 that the sentence of 355 -- 335 months remains  
5 appropriate.

6 I do want to briefly respond to one of the  
7 arguments made in the defendant's sentencing memorandum  
8 where they suggest that the vacating of Count 8 had the  
9 effect of greatly increasing the defendant's advisory  
10 guideline range. Actually, would have the effect of  
11 increasing the defendant's advisory guideline range is we  
12 did not correctly calculate his guideline range the last  
13 time we were before the Court for a resentencing hearing.  
14 At that time the defendant should have received the  
15 five-point enhancements for brandishing a firearm for  
16 both Group 1 and Group 2 offenses. Unfortunately, the  
17 PSI was not updated to reflect that those enhancements  
18 should have applied when the counts of conviction for the  
19 firearm offenses were vacated.

20 If we had correctly calculated the defendant's  
21 advisory guideline range the last time we were here, I  
22 believe the defendant would have had a base offense level  
23 of 37, a criminal history category of 4, and a guideline  
24 range of 292 to 365 months. As we sit here today, the  
25 PSI calculates an offense level of 38, a criminal history

1 category of 3, and advisory guideline range of 292 to 365  
2 months. So really the guideline range, if it had been  
3 properly calculated the last time, would be the same  
4 guideline range we have here today.

5 Once again, I suggest that based upon that  
6 guideline range and the nature of the offenses, this  
7 should be an above-guideline range sentence of 535  
8 months.

9 THE COURT: All right. Mr. Fleisher.

10 MR. FLEISHER: Judge, may I use the --

11 THE COURT: Of course.

12 MR. FLEISHER: Judge, we do not have any  
13 objections to the current PSR. The guidelines are  
14 correct. This is basically our request at sentencing for  
15 a variance under 18 United States Code 3553 and the  
16 current case law, which permits a downward departure by  
17 the Court.

18 In the past prior sentencings, the defendant  
19 always received low-end guidelines, and there was never  
20 an upward departure by the Government or request for  
21 that. Nothing has changed.

22 He has been in custody since December the 20th,  
23 1996, approximately 27-1/2 years. Ismael is 62 years  
24 old. His low-end guidelines are 292 plus 60, which  
25 equates to 352 months. His high-end guidelines are 365

1 plus 60, which is 425 months. As of the end of May 2024,  
2 he is in for 374.81 months. And if we add June and July,  
3 there's another 2 months taking us to approximately 376,  
4 377.

5 He has amassed gain time for approximately  
6 44. -- 44.81 months. So if you add the gain time to what  
7 he has served, it's approximately 31-1/4 years or 375  
8 months. A true low-end sentence would be 352 months, and  
9 he's almost two years above the lowest guideline  
10 sentence. If the Court granted no variable at all, if a  
11 low-end sentence is imposed as on March 19th, 2021, it  
12 would be a lower sentence than what the defendant has  
13 already served.

14 In looking at the 3553 factors, we have to look  
15 at the age of the defendant and his health. He's 63  
16 years old. At age 63, statistics tell us that he's not  
17 likely to re-offend as a criminal. His health history  
18 states that he has a 1987 stroke or aneurysm brain  
19 hemorrhage. He suffered memory lapse. He suffers from  
20 high blood pressure, headaches, an enlarged prostate,  
21 glaucoma. He has high cholesterol, chronic pain, anemia,  
22 diabetes. He's on a special diet. He has a kidney  
23 disease. And, you know, if you look back at how he grew  
24 up, he lost his mother at age 14. The case law supports  
25 the variance for health reasons and for his age.

1 THE COURT: Do the facts of the case do that?  
2 I mean, it's not very many cases that I have where the  
3 allegations and proof was that he burned the mustache off  
4 a victim with a blowtorch or he applied a blowtorch to  
5 the genitalia and anus of one the victims. That's a  
6 pretty horrible crime.

7 MR. FLEISHER: Judge --

8 THE COURT: And does that -- Does the  
9 recidivism rate include that kind of information?

10 MR. FLEISHER: Well, Judge, you know me from  
11 trying difficult violent crimes in this court. I have  
12 tried federal capital cases. I have tried 37 capital  
13 cases to verdict. They're ugly cases. Fortunately, no  
14 one died in this case.

15 THE COURT: No, nobody did die, but they did  
16 suffer, and he scared the hell out of them.

17 MR. FLEISHER: They did, Judge.

18 THE COURT: I think that was the plan.

19 MR. FLEISHER: But, Judge, let me continue a  
20 little bit more about Mr. Camacho.

21 THE COURT: Also bear in mind that, unlike many  
22 cases, he is in line to be deported, but he cannot be  
23 deported back to Cuba. So we're going to have him here  
24 for as long as he lives, which is miserable. We don't --

25 MR. FLEISHER: Well, Judge, I --

1 (Simultaneous crosstalk.)

2 THE COURT: -- people walking around that do  
3 things like this.

4 MR. FLEISHER: Judge, I made an inquiry with  
5 immigration counsel about that issue, and the answer to  
6 my question was will he be deported. And I received, a,  
7 you know, We don't know answer. When he finishes his  
8 sentence, whenever that is, he will be taken into  
9 immigration custody, the decision will be made on what's  
10 going to --

11 THE COURT: Then they'll let him out and give  
12 him food stamps. I know. I know how it works.

13 MR. FLEISHER: You know, will Cuba take him  
14 back?

15 THE COURT: Of course not.

16 MR. FLEISHER: I don't know.

17 But, Judge, we have a man who's gone through  
18 drug education, anger management two times, Spanish  
19 growth classes four times, personal mastery two times,  
20 self-improvement courses. And he has embraced Buddhism,  
21 which, of course, the Court knows, is being a peaceful  
22 person.

23 He has family support. And at the last  
24 sentencing there were several people who spoke on his  
25 behalf. Two of them are here again. His sister, Yudith,

1 who is a nurse practitioner, who lives with her family  
2 and her husband who is a truck driver. They live in  
3 Homestead; and his brother Yoel who owns a construction  
4 company, Yoel Camacho, who said that if and when Ismael  
5 is released, he will have a place to live and he will  
6 have an occupation working for his construction company,  
7 which has been in business for -- since 2013. So he has  
8 tremendous family support. And they have advised me,  
9 judge, that over the past 27 years that Ismael has been  
10 in custody, they visited him at least 20 times at these  
11 institutions.

12 And I know it's an ugly case, Judge. And I was  
13 looking for a common denominator to reach the court. And  
14 I was thinking, you know, what was I doing 27 years ago,  
15 and in the late '90s, I remember there was a case I was  
16 involved in where a young man who served in Desert Storm  
17 who was a law student was in a Bronco II rollover  
18 accident, and we sued Ford Motor Company. Ford Motor  
19 Company was represented by counsel in Tampa and counsel  
20 in Arizona.

21 Your Honor was a local counsel in this case.  
22 And I met you, Judge, when you were in private practice.  
23 And there were discovery depositions taken in the case  
24 and the case is mediated and settled. And, you know, I  
25 don't know even know if you remember that case, Judge, or

1 you remember me being involved in the case.

2 THE COURT: I don't remember you. I remember  
3 you being involved in many cases before me, but that's  
4 one that escapes me.

5 MR. FLEISHER: Yes. But, in any event --

6 THE COURT: But I don't deny it because I  
7 represented Ford in a lot of cases.

8 MR. FLEISHER: Right.

9 And I also remember, Judge -- and I know you  
10 were the Hispanic voice of the Hurricanes. And back  
11 then -- and I was trying to think about this -- I think  
12 Miami played Oklahoma in the Orange Bowl, and Oklahoma  
13 won. And I don't know if you were the voice of the  
14 Hurricanes back then --

15 THE COURT: I don't remember that at all. I  
16 don't remember any losses.

17 MR. FLEISHER: I was trying to check the  
18 statistics, Judge. But the point is, Judge --

19 THE COURT: As a matter of fact, I did not do  
20 that game. I remember I got in on a media pass and stood  
21 in the end zone during the entire game.

22 MR. FLEISHER: It was very cold that night,  
23 Judge. I remember that. And I was there with the  
24 plaintiff's lawyers who represented this plaintiff  
25 Mitchell Viegas (ph.) in this case.

1 But the point, Judge, is that he has been in a  
2 long time.

3 THE COURT: He has.

4 MR. FLEISHER: And if you do the calculations,  
5 he's been in -- he has about 32 years under his belt.  
6 And we're asking the Court to set aside, at least, you  
7 know, for a moment to...

8 THE COURT: How did we get to 32? When did he  
9 go in?

10 MR. FLEISHER: He went in on December --

11 THE COURT: '96.

12 MR. FLEISHER: December 20th, 1996.

13 THE COURT: Okay. So that's four years and 24,  
14 is 28.

15 MR. FLEISHER: Right. So I told the court  
16 27-1/2 years.

17 THE COURT: Okay.

18 MR. FLEISHER: Maybe a little bit more. His  
19 gain time is about 44 months. So if you combine the gain  
20 that time he has with the 27.5, he's at about 31 and a  
21 quarter years. And despite what the crime was, Judge --  
22 and he's definitely a changed man. You know, back then  
23 when he was -- got involved with these people, his PSR  
24 talks about how he used marijuana every day, the drugs  
25 compromise his mental and moral compass. I don't know.

1 I can't even remember representing a client that long ago  
2 where I can remember what happened to that client, Judge.

3 So, you know, I have people here who are  
4 willing to give him a job, give him a place to go. You  
5 know, he's still going to be on supervised release if he  
6 remains here. And I'm asking the Court to temper justice  
7 with mercy and give Mr. Camacho a reasonable sentence  
8 based upon the circumstances of the case and based upon  
9 how long he has been in custody.

10 THE COURT: All right, sir. Anything further?

11 MR. FLEISHER: No, Judge. I have members of  
12 the family who would testify, his sister and brother, if  
13 the court wants to hear from them about their willingness  
14 to give him a place to live and employment.

15 THE COURT: I believe you. You've never lied  
16 to me that I know of, and I don't suspect you'll start  
17 now. I don't think it's necessary, but I don't have a  
18 problem with whatever you want to present.

19 MR. FLEISHER: Okay. Let me call them briefly.  
20 Yoel, please come up.

21 THE COURT: Yes, sir. Please stand there at  
22 the lectern. I don't know how we're going to do this.  
23 Does he speak English?

24 MR. FLEISHER: No, Judge.

25 THE COURT: Kind of difficult. Get him a

1 headset.

2 MR. FLEISHER: May I proceed, Judge?

3 THE COURT: Yes, sir.

4 Please come forward to the microphone. Please  
5 tell us your name.

6 MR. CAMACHO: Yoel Camacho.

7 THE COURT: What would you like to say to us?

8 MR. CAMACHO: What I would like to tell you is  
9 that I am willing to support my brother. I am willing to  
10 support him. He wants to be a free man. He wants to be  
11 a man of good will. I would like to help him. I would  
12 like for him to work -- to work with me. I would like  
13 for him be given an opportunity, for the Judge to give  
14 him an opportunity, and for him to be given an  
15 opportunity, an opportunity to show everyone that he made  
16 a mistake. He wants to be a man of good will, to help  
17 contribute in this society. And we, the family members,  
18 we're willing to help him for him to be a man that does  
19 good deeds.

20 Since I was a child, I learned from my  
21 grandparents, my aunts and uncles, and my parents and  
22 grandparents that he was always a man that had good  
23 feelings. Currently there are friends of his from Cuba  
24 that call me asking me about him. And to all the family,  
25 always he has shown us that he has a good heart. And I

1 ask you as a favor to -- I ask the Judge to please give  
2 him an opportunity. We're not able to bring my mother  
3 that raised him since he was a child because his own  
4 mother, she passed away because she suffers -- always has  
5 suffered with high blood pressure, but he has always --  
6 but they always -- he always grew with her as if she were  
7 his mother and him her child.

8 And if the Judge could give us an opportunity,  
9 we would really be very thankful from the bottom of our  
10 hearts to him.

11 THE COURT: Thank you, sir.

12 Government, do you have any questions?

13 MR. CRONIN: No, your Honor.

14 THE COURT: Mr. Fleisher, do you have anything  
15 you would like to add?

16 MR. FLEISHER: Tell the Judge about your  
17 business what type of work you do.

18 MR. CAMACHO: My work is I have a construction  
19 company -- this is heavy equipment -- since 2013. I do  
20 very well. I have very good clients. I get very good  
21 recommendations. And I want for him to be a great  
22 operator so that he can be a man of good will that does  
23 good things together. We can then contribute and  
24 cooperate in this country so that we can be there to  
25 create a society where good deeds are done.

1           Since I arrived to this country, I started  
2 working nine days after I arrived at Bon Trade  
3 International. And then I started my business. And to  
4 this day, I have been a man that has done good deeds, and  
5 I have worked and I have struggled in this country  
6 together with my whole family. Please, your Honor, if  
7 you can give us an opportunity to have our brother next  
8 to us to work and to come ahead, if that is possible, I  
9 would thank you from the bottom of my heart.

10           THE COURT: Thank you, sir. I have no doubt  
11 the vast majority of Cuban immigrants that came to this  
12 country are hard-working people that have worked very,  
13 very hard that are assets to our community.  
14 Unfortunately, your brother went the wrong way and did  
15 some very terrible, terrible things. But thank you.

16           Anything further, Mr. Fleisher?

17           MR. FLEISHER: I would like to call the sister,  
18 Judge.

19           THE COURT: Go right ahead.

20           Yes, ma'am. Please tell us your name.

21           MS. CAMACHO: Yudith Camacho.

22           THE COURT: What would you like to say to me?

23           MS. CAMACHO: I would like to say that we need  
24 our brother at home. We have lost many years of having  
25 to live without him. We are willing to help him be a man

1 that does good deeds. My husband and I, we are going to  
2 have him -- we are going to receive him at our house.  
3 We're going to give him the support that he needs. We  
4 see him as a family -- as the family that we are. My mom  
5 also needs him. She is 73 years old, and she would like  
6 to spend her last days enjoying his company.

7 Three years ago we lost a sister due to an  
8 aneurysm. We would like to be able to spend as much time  
9 as we can as a family together work in this country, come  
10 ahead. We have always been a family that has been a  
11 united family. We were set apart at the beginning  
12 because there were some of us that came to this country  
13 first, but now we are all here, and we want to continue  
14 being together. And to be, once again, the family that  
15 we always were in Cuba.

16 My brother came to this country. We were very  
17 small. We really wasted a lot of time that we had to do  
18 without him. If it were possible, your Honor, for you to  
19 free him so that we can enjoy his company, teach him and  
20 to help him again, to continue helping him, and so that  
21 he can show society that he has changed, that he is -- he  
22 can show society that he is a man that does good deeds,  
23 that he has changed, and that he wants to contribute with  
24 society. He has nieces and nephews that he still hasn't  
25 met and who need to spend time with their uncle.

1 THE COURT: Thank you, ma'am.

2 Anything further, Mr. Fleisher?

3 MR. FLEISHER: No, Judge. Just a few closing  
4 remarks.

5 THE COURT: Government, do you have any  
6 questions of the --

7 MR. CRONIN: No, your Honor.

8 THE COURT: All right.

9 MR. CAMACHO: Thank you.

10 THE COURT: Thank you.

11 MR. FLEISHER: So, your Honor, we have a man  
12 who has done a lot of time, and that's 27-1/2 years. And  
13 as I say, with the gain time he served about 31.4 years.  
14 The family wants to make up for lost time. I don't think  
15 I can find better family members or witnesses to address  
16 the Court to tell the Court about their feelings about  
17 their brother. Obviously, he was a different person in  
18 2019 and 2020, and I just ask -- and there's really no  
19 reason for the Government to ask for high-end guidelines  
20 in this case. They didn't ask for it before. And we're  
21 just asking the Court to sentence him for reasonable time  
22 based upon his guidelines as they exist now. I have  
23 given the Court the high end and the low end of -- 352 is  
24 the low end, and 425 is the high end, without any upward  
25 departure.

1 THE COURT: Thank you, sir.

2 MR. FLEISHER: Thank you for your time, Judge.

3 THE COURT: Mr. Camacho, you may address me if  
4 you wish, but please stay stated and speak into the  
5 microphone and speak in phrases so the interpreter can  
6 translate it. If you go on too long it makes it very  
7 difficult. I'd be happy to hear from you.

8 THE DEFENDANT: Okay. I give you -- I thank  
9 you for giving me this opportunity for me to talk to you.  
10 I, again, state what I said in 2021; that I really  
11 apologize, that I really remorseful of the conduct that I  
12 had in the past. I ask for -- to my family, the victims,  
13 to you, I -- I ask you to please forgive me, to you and  
14 to the society. And I would like to tell you that I have  
15 changed.

16 If I did things in '21, '22, and I was forced  
17 to get -- for instance, to get two telephone chats  
18 because I was forced to because the -- the gangs in jail  
19 that you're forced to keep them because otherwise they  
20 come at you and they hit you. They hurt you. And then  
21 you're going to be taken out of prison. What can I do?  
22 After 2021 I got two telephone chats, two reports.

23 THE COURT: I'm sorry. I lost track. What's  
24 going on here? I don't understand these telephone chats.  
25 What is that about? What are you telling me?

1 THE DEFENDANT: It's a disciplinary chat.

2 THE COURT: I'm not taking into consideration  
3 any disciplinary chat. I'm talking about the original  
4 crime, the nature of the original crime, the heinous  
5 nature of the original crime.

6 THE DEFENDANT: I apologize very much for my  
7 behavior, and I do find that I'm guilty of a minimal or  
8 maximum participation, I am guilty, and I -- ignorance  
9 kills people.

10 Thank you for giving me this opportunity.

11 THE COURT: Thank you, sir.

12 Government, do you have any further comment?

13 MR. CRONIN: No, your Honor?

14 THE COURT: Mr. Fleisher?

15 MR. FLEISHER: No, your Honor.

16 THE COURT: I've considered the statements of  
17 all the parties, the presentence report, which contains  
18 the advisory guidelines, and the statutory factors as set  
19 forth in 18 U.S.C. Section 3553(a). The sentence will be  
20 imposed above the advisory guideline range, as this will  
21 provide sufficient punishment and deterrence. It is the  
22 finding of the Court the defendant is not able to pay a  
23 fine as well as restitution. It is the judgment of the  
24 Court that defendant, Ishmael Camacho, is committed to  
25 the Bureau of Prisons to be imprisoned for 535 months.

1 This term consists of terms of 235 months imprisonment  
2 for 1, 2, 4, and 7; 180 months concurrent with Count 10;  
3 240 months consecutive with Count 9; consecutive to  
4 Counts 1, 2, 4, and 7; and 60 months consecutive on  
5 Count 11 to all of the other previous counts. It's  
6 further ordered defendant shall pay restitution in the  
7 amount \$192,050 jointly and severally with his  
8 co-defendants.

9           During the period of incarceration, payment  
10 shall be made as follows: If the defendant earns wages  
11 in a federal prison industry's Unicort job, the defendant  
12 must pay 50 percent of wages earned toward the financial  
13 obligations imposed by this judgment in a criminal case.  
14 If the defendant does not earn work in a Unicort job, he  
15 must pay a minimum of \$25 per quarter toward the  
16 financial obligations imposed in this order. Upon  
17 release from incarceration the defendant shall pay  
18 restitution at the rate of 10 percent of monthly gross  
19 earnings until such time as the Court may alter that  
20 payment schedule in the interest of justice. U.S. Bureau  
21 of Prisons, U.S. Probation Office, and U.S. Attorney's  
22 Office should monitor the payment of restitution, report  
23 to the Court any material change in the defendant's  
24 ability to pay. These payments do not preclude the  
25 Government from using any other anticipated or unexpected

1 financial gains, assets, or income of the defendant to  
2 satisfy the restitution obligation. The restitution  
3 shall be made payable to the Clerk of the United States  
4 Court and forwarded to U.S. Clerk's Office, attention  
5 financial section, 400 North Miami Avenue, Room 8N09,  
6 Miami, Florida, 33128. Restitution will be forwarded by  
7 the Clerk of the Court to the victims on the attached  
8 list.

9           Upon release from imprisonment, the defendant  
10 shall be placed on supervised release for a term of three  
11 years as to each of Counts 1, 2, 4, 7, 9, 10, and 11; all  
12 such terms to run concurrently. Within 72 hours of  
13 release from the custody of the Bureau of Prisons, the  
14 defendant shall report in person to the Probation Office  
15 in the district where released. While on supervised  
16 release, the defendant shall comply with the mandatory  
17 and standard conditions of supervision as referenced in  
18 Part F of the revised presentence report. The defendant  
19 shall also comply with the following special conditions:  
20 Surrendering to immigration for removal after  
21 imprisonment and fines or special assessments as noted in  
22 Part F of the presentence report. Defendant shall  
23 immediately pay the United States a special assessment of  
24 \$100 as to each of Counts 1, 7, 9, 10 and 11 and a  
25 special assessment of \$50 as to Counts 2 and 4. Total

1 amount of special assessment, \$600.

2 Total sentence: 535 months imprisonment, 3  
3 years supervised release, \$192,050 in restitution, and  
4 \$600 in special assessment.

5 Now that sentence has been imposed, does the  
6 defendant or its counsel object to the Court's finding of  
7 fact or the manner in which sentence was pronounced?

8 MR. FLEISHER: No, your Honor.

9 THE COURT: There are no additional counts to  
10 be dismissed, correct.

11 You have the right to appeal the conviction and  
12 sentence imposed. Any notice to appeal must be filed  
13 within 14 days after the entry of the judgment. If you  
14 are unable to pay the cost of appeal, you may apply for  
15 leave to appeal in forma pauperis.

16 Good luck to you. Mr. Camacho.

17 We'll be in recess on this matter.

18 (Proceedings concluded at 12:15 p.m.)

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C E R T I F I C A T E

I certify that the foregoing pages represent a true and correct transcript of the above-styled proceedings as reported on the date, time, and location listed.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was reported, and further that I am not financially nor otherwise interested in the outcome of the above-entitled matter.

DATE: 9/26/24 /s/Mary Ann Casale, RDR, FPR-C, CLR, CSR-IL  
Official Court Reporter  
United States District Court  
Southern District of Florida  
400 North Miami Avenue  
Miami, Florida 33128  
MaryAnn\_Casale@flsd.uscourts.gov

I

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

UNITED STATES OF AMERICA

v.

ISMAEL CAMACHO

§ **JUDGMENT IN A CRIMINAL CASE**  
 § **(Re-Sentencing Hearing)**  
 §  
 § Case Number: **1:96-CR-00443-MARTINEZ**  
 § USM Number: **52269-004**  
 §  
 § Counsel for Defendant: **Bruce Harris Fleisher**  
 § Counsel for United States: **Sean Paul Cronin**

**THE DEFENDANT:**

<input type="checkbox"/>	pleaded guilty to count(s)	
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input checked="" type="checkbox"/>	was found guilty on the counts after a plea of not guilty.	<b>Counts 1, 2, 4, 7, 9, 10 &amp; 11 of the Fourth Superseding Indictment</b>

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951 / Conspiracy to Obstruct, Delay and Affect Commerce by Robbery, Force or Extortion	11/13/1996	1
18 U.S.C. § 1951 / Robbery by Force or Extortion	06/26/1995	2
18 U.S.C. § 1951 / Attempted Robbery by Force or Extortion	01/12/1996	4
18 U.S.C. § 1951 / Attempted Robbery by Force	11/04/1996	7
18 U.S.C. § 1951 / Attempted Robbery by Force or Extortion	11/13/1996	9
18 U.S.C. §§ 2119 and 2 / Carjacking	11/13/1996	10
18 U.S.C. § 924(c)(1) / Use of a Firearm During a Crime of Violence	11/13/1996	11

The defendant is sentenced as provided in pages 2 through 7 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)  is  are 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.

**July 30, 2024**

Date of Imposition of Judgment (Re-Sentencing)

Signature of Judge

**JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

Date

7/30/2024

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

### IMPRISONMENT

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

**535 Months. (This term consists of concurrent terms of 235 Months as to each of Counts 1, 2, 4, and 7; 240 Months consecutive as to Count 9; 180 Months concurrent as to Count 10; and 60 Months consecutive as to Count 11.)**

The court makes the following recommendations to the Bureau of Prisons:

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  a.m.  p.m. on

as notified by the United States Marshal.

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

before 2 p.m. on

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

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three Years as to each of Counts 1, 2, 4, 7, 9, 10, and 11. All such terms to run concurrently.**

### MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

### STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at [www.flsp.uscourts.gov](http://www.flsp.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

AO 245B (Rev. FLSD 2/20) Judgment in a Criminal Case  
(Re-Sentencing)

Judgment -- Page 5 of 7

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

### **SPECIAL CONDITIONS OF SUPERVISION**

**Surrendering to Immigration for Removal After Imprisonment:** At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not re-enter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant re-enters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

**Unpaid Restitution, Fines, or Special Assessments:** If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

**CRIMINAL MONETARY PENALTIES**

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

	<b>Assessment</b>	<b>Restitution</b>	<b>Fine</b>	<b>AVAA Assessment*</b>	<b>JVTA Assessment**</b>
<b>TOTALS</b>	\$600.00	\$192,050.00	\$0.00		

- The determination of restitution is deferred.
- 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

**Defendant is ordered to pay restitution in the amount of \$192,050.00 jointly and severally with the co-defendants in Case No. 1:96-CR-00443-MARTINEZ.**

- 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 the schedule of payments page 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  fine  restitution
  - the interest requirement for the  fine  restitution is modified as follows:

**Restitution with Imprisonment** - It is further ordered that the defendant shall pay restitution in the amount of **\$192,050.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney’s Office shall monitor the payment of restitution and report to the court any material change in the defendant’s ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.  
 \*\* Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.  
 \*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ISMAEL CAMACHO  
CASE NUMBER: 1:96-CR-00443-MARTINEZ

### 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 \$600.00 due immediately.

**It is ordered that the Defendant shall pay to the United States a special assessment of \$600.00 for Counts 1, 2, 4, 7, 9, 10, and 11 of the Fourth Superseding Indictment, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:**

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
400 NORTH MIAMI AVENUE, ROOM 8N09  
MIAMI, FLORIDA 33128-7716**

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

**Defendant is ordered to pay restitution in the amount of \$192,050.00 jointly and severally with the co-defendants in Case No. 1:96-CR-00443-MARTINEZ.**

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

**FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

J

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

**Case Number: 23-23651-CIV-MARTINEZ**  
(Case Number: 96-00443-CR-MARTINEZ)

ISMAEL CAMACHO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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**ORDER GRANTING 28 U.S.C. § 2255 MOTION TO VACATE**

**THIS CAUSE** is before this Court on Movant Ismael Camacho's *pro se* Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 1) ("Motion"). The Government agrees that Movant's conviction and sentence under 18 U.S.C. § 924(c) must be vacated in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022). Accordingly, the Motion is **GRANTED**.

**I. PROCEDURAL HISTORY**

In 1998, following a jury trial, Movant was convicted of ten counts of Hobbs Act, carjacking, and firearms offenses, stemming from three separate kidnapping and extortion episodes in the Miami area from 1995 to 1996. (ECF-Cr. No. 442)<sup>1</sup>; *see also United States v. Diaz*, 248 F.3d 1065, 1074 (11th Cir. 2001). Movant was sentenced to 1145 months' imprisonment. (ECF-Cr. No. 547.) Relevant here, that sentence included a 240-month consecutive sentence on Count

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<sup>1</sup> Citations to "ECF-Cr." refer to the docket in Movant's underlying criminal case, Case No. 96-cr-00443.

8 of the Fourth Superseding Indictment, which charged Movant with using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). (ECF-Cr. No. 330 at 9; ECF-Cr. No. 547 at 4.) The crime of violence on which Count 8 was predicated was Count 7 of the Fourth Superseding Indictment, attempted Hobbs Act robbery. (ECF-Cr. No. 330 at 8.)

On April 17, 2001, the Eleventh Circuit affirmed Movant's convictions but remanded for resentencing. *Diaz*, 248 F.3d at 1109. On remand, the Court resentenced Movant to 1015 months' imprisonment. (ECF-Cr. No. 661.) The Court reimposed the 240-month consecutive sentence on Count 8.

On November 7, 2019, the Eleventh Circuit granted Movant authorization to file a successive motion to vacate under section 2255 challenging his section 924(c) convictions and sentences on Counts 3, 6, and 11 under *United States v. Davis*, 139 S. Ct. 2319 (2019). (ECF-Cr. No. 783); *see also Camacho v. United States*, Case No. 19-cv-24658-JEM (S.D. Fla. Nov. 7, 2019). The Eleventh Circuit denied authorization, however, for Movant to challenge his section 924(c) conviction and sentence on Count 8, as that conviction was predicated on attempted Hobbs Act robbery, which at the time still qualified as a crime of violence in the Eleventh Circuit. (*See* ECF-Cr. No. 783 (citing *United States v. St. Hubert*, 909 F.3d 335, 351–52 (11th Cir. 2018.)))

On June 25, 2020, this Court granted the motion to vacate in part and vacated Movant's convictions on Counts 3 and 6. (ECF-Cr. No. 794); *Camacho*, No. 19-cv-24658-JEM. On March 22, 2021, this Court resentenced Movant to 535 months' imprisonment. (ECF-Cr. No. 826.) That sentence consisted of a 60-month consecutive sentence on Count 8. (*Id.* at 2.)

On May 12, 2023, the Eleventh Circuit affirmed Movant's new sentence and denied a certificate of appealability ("COA") as to Movant's challenge to Count 11. (*See* ECF-Cr. No. 897); *see also United States v. Camacho*, No. 21-10943, 2023 WL 3404900 (11th Cir. May 12,

2023). The Eleventh Circuit also dismissed for lack of jurisdiction Movant's supplemental claim, raised for the first time on appeal, that the Supreme Court's recent decision in *Taylor*, 142 S. Ct. 2015, rendered his section 924(c) conviction and sentence on Count 8 invalid. *Camacho*, 2023 WL 3404900, at \*5.

On September 17, 2023, Movant filed the instant *pro se* Motion to Vacate, asserting that his conviction and sentence on Count 8 are unconstitutional in light of *Taylor*, 142 S. Ct. 2015. (ECF No. 1 at 4.) The Government responded, agreeing that the Motion should be granted. (ECF No. 4.)

## **II. LEGAL STANDARD**

A federal prisoner claiming that his or her sentence is unlawful may move the court that imposed the sentence to vacate, set aside, or correct it. § 2255(a). A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* § 2255(a); *see also McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). If a court finds a claim under section 2255 to be valid, the court “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” § 2255(b).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner who has filed a section 2255 motion to vacate is limited in his ability to file a “second or successive” § 2255 motion. *Boyd v. United States*, 754 F.3d 1298, 1301 (11th Cir. 2014). Under 28 U.S.C. §§ 2244(b)(3)(A) and 2255(h), a second or successive § 2255 motion “must be certified by the court of appeals before the district court may reach the merits of the motion.” *Id.* Without such authorization, “the district court lacks jurisdiction to consider a second or successive

petition.” *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

### III. DISCUSSION

As an initial matter, Movant did not need to obtain authorization from the Eleventh Circuit to file the instant Motion because it is not successive. Movant received a new judgment following this Court’s partial grant of his previous section 2255 motion. (*See* ECF-Cr. No. 826); *see also Patterson v. Sec’y, Fla. Dep’t of Corr.*, 849 F.3d 1321, 1325 (11th Cir. 2017) (“A [motion to vacate] is not second or successive if it challenges a ‘new judgment’ issued after the prisoner filed his first [motion to vacate]”). Therefore, this Court has jurisdiction over the Motion. *See Farris*, 333 F.3d at 1216; *see also Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) (“a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking”).

Turning to the merits of the Motion, the Government concedes—and this Court agrees—that Movant’s conviction and sentence under 18 U.S.C. § 924(c) in Count 8 must be vacated in light of *Taylor*, 142 S. Ct. 2015. (*See* ECF No. 4 at 1.) *Taylor* held that attempted Hobbs Act robbery does not qualify as a “crime of violence” under section 924(c)(3)(A). Section 924(c) prohibits using or carrying a firearm “during and in relation to any crime of violence or drug trafficking crime . . .” 18 U.S.C. § 924(c)(1). At the time of Movant’s conviction, “crime of violence” was defined in section 924(c)(3) as an offense that is a felony and:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). In *Davis*, 139 S. Ct. 2319, the Supreme Court held that the residual clause

of section 924(c)(3)(B) was unconstitutionally vague. Following *Davis*, however, the Eleventh Circuit continued to hold that attempted Hobbs Act robbery “categorically qualifies as a crime of violence under the § 924(c)(3) elements clause and is, therefore, a valid predicate for [a § 924(c)] conviction.” *Granda v. United States*, 990 F.3d 1272, 1285 (11th Cir. 2021) (citing *St. Hubert*, 909 F.3d at 351–53).

The Supreme Court abrogated that precedent in *Taylor* and held that attempted Hobbs Act robbery does not qualify as a “crime of violence” under the elements clause of section 924(c)(3)(A) because “no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.” 142 S. Ct. at 2021. Accordingly, Movant’s section 924(c) conviction on Count 8 for using and carrying a firearm during a crime of violence must be vacated because the only predicate for that offense is attempted Hobbs Act robbery.

Furthermore, this Court must vacate Movant’s entire sentence and conduct a *de novo* sentencing hearing. Although Movant’s 60-month sentence on Count 8 was to run consecutive to his other sentences, this Court fashioned a “sentencing package” when it imposed a total sentence of 535 months. *See United States v. Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014) (“sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence.”). Therefore, “the error[] requiring the grant of habeas relief” in this case “undermine[d] the sentence as a whole.” *United States v. Brown*, 879 F.3d 1231, 1238 (11th Cir. 2018). Accordingly, this Court must vacate “the entire sentencing package” and remand for a *de novo* resentencing with the defendant present. *Id.*

#### **IV. CONCLUSION**

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Movant’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §

2255 (ECF No. 1) is **GRANTED**. Movant's sentence as to Count 8 is hereby **VACATED**.

2. This Court will refer the appointment of counsel for Movant to the Magistrate Judge by separate order.
3. The Clerk is **DIRECTED** to mark this case as **CLOSED**.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 12 day of January, 2024.



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JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE

Copies provided to:  
Ismael Camacho, *pro se*  
counsel of record via CM/ECF

K

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District U.S. Dist. Ct. Southern Dist. Fla	
Name <i>(under which you were convicted)</i> : Ismael Camacho		Docket or Case No.: 1:96-cr-00443-JEM-6	
Place of Confinement: Federal Correctional Institute Talladega		Prisoner No.: 52269-004	
UNITED STATES OF AMERICA		Movant <i>(include name under which convicted)</i> Ismael Camacho	

MOTION

FILED BY MC D.C.  
SEP 25 2023  
ANGELA E. NOBLE  
CLERK U.S. DIST. CT.  
S.D. OF FLA. - MIAMI

- (a) Name and location of court which entered the judgment of conviction you are challenging: United States District Court for the Southern District of Florida

(b) Criminal docket or case number (if you know): 1:96-cr-00443-JEM-6
- (a) Date of the judgment of conviction (if you know): \_\_\_\_\_

(b) Date of sentencing: March 19, 2021
- Length of sentence: 534 months
- Nature of crime (all counts):  
Attempted Hobbs Act extortion, carjacking (18 U.S.C. § 1951 and 2119; and possession of a firearm during a crime of violence (18 U.S.C. § 924(c)).
- (a) What was your plea? (Check one)

(1) Not guilty  (2) Guilty  (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
- If you went to trial, what kind of trial did you have? (Check one)

Jury  Judge only
- Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes  No

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8. Did you appeal from the judgment of conviction? Yes  No

9. If you did appeal, answer the following:

- (a) Name of court: Eleventh Circuit Court of Appeals
- (b) Docket or case number (if you know): 21-10943
- (c) Result: Sentence affirmed
- (d) Date of result (if you know): April 10, 2023
- (e) Citation to the case (if you know): United States v. Camacho, 2023 U.S. App. LEXIS 11650 (11th Cir. 2023)
- (f) Grounds raised:

- 1. § 924(c) conviction in Count 11 is unconstitutional because it is predicated on attempted Hobbs Act extortion, which is not a crime of violence post-Davis. Despite that conviction also being predicated on carjacking.
- 2. The 535-month total term of imprisonment sentence imposed following the partial grant of his § 2255 motion and vacatur of two other § 924(c) convictions is error because the district court refused to apply the First Step Act of 2018 at resentencing.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes  No

If "Yes," answer the following:

- (1) Docket or case number (if you know): \_\_\_\_\_
- (2) Result: \_\_\_\_\_
- (3) Date of result (if you know): \_\_\_\_\_
- (4) Citation to the case (if you know): \_\_\_\_\_
- (5) Grounds raised: \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: \_\_\_\_\_
- (2) Docket or case number (if you know): \_\_\_\_\_
- (3) Date of filing (if you know): \_\_\_\_\_

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- (4) Nature of the proceeding: \_\_\_\_\_
- (5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?  
 Yes  No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket of case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?  
 Yes  No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes  No

(2) Second petition: Yes  No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

**GROUND ONE:** Mr. Camacho's conviction for possession of a firearm during a crime of violence pursuant to 18 U.S.C. § 924(c) contained in Count 8 is invalid in light of United States v. Taylor, 142 S. Ct. 2015 (2022).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**SEE MEMORANDUM OF LAW IN SUPPORT OF 2255 MOTION**

**(b) Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

**GROUND TWO:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

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(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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**GROUND THREE:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes  No

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(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

**GROUND FOUR:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If you answer to Question (c)(1) is "Yes," state:

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Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:

(c) At the trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes  No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes  No

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Therefore, movant asks that the Court grant the following relief:

or any other relief to which movant may be entitled.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_

\_\_\_\_\_  
(month, date, year)

Executed (signed) on \_\_\_\_\_ 9/17/23 (date).



\_\_\_\_\_  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

⇒52269-004⇒

Ismael Camacho  
52569-004  
Federal Correctional Institution  
Pmb1000  
Talladega, AL 35160  
United States



⇔52269-004⇔

Us District Court  
Officeoftheclerkroom8n09  
400 N Miami AVE  
Southern District of FL  
Miami, FL 33128-7716  
United States

LEGAL MAIL\*\*\*\*\*

