15-2675

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JORGE LAFONTAINE, JOSE LAFONTAINE, JOSE ISMAEL VENTURA, AKA MAELO,

Defendants,

KEVIN VENTURA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

OPENING BRIEF OF APPELLANT & SPECIAL APPENDIX

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JURISDICTIONAL STATEMENT

Appellant Kevin Ventura appeals from a final judgment disposing of all charges against him entered by the United States District Court for the Southern District of New York on August 20, 2015 (Koeltl, J.). SA-1.[1]

Ventura filed a timely notice of appeal on August 20, 2015. SA-6. The district court had jurisdiction pursuant to 18 U.S.C. §§3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Ventura's conviction on Count One should be vacated because the federal crime of arson, 18 U.S.C. §844(i), which can be committed recklessly, is not a crime of violence after *Johnson v. United States*, 135 S.Ct. 2551 (2015).

II. Whether Ventura's conviction on Counts One, Four, and Five should be vacated because both the Indictment and the jury charge contained language added to the statute of conviction in a 1998 amendment that violated the *ex post facto* clause of the United States Constitution as to Ventura, whose offenses occurred in 1995 and 1996.

[1] "SA-" citations refer to the Special Appendix appended hereto. "JA-" citations refer to the Joint Appendix filed with Appellant's brief.

III. Whether Ventura's conviction on Counts One, Four, and Five should be vacated because the district court's instruction on aiding and abetting liability was insufficient under *Rosemond v. United States*, 134 S.Ct. 1240 (2014).

IV. Whether the case should be remanded for resentencing because the district court erred in imposing two 20-year consecutive sentences on Counts Four and Five pursuant to 18 U.S.C. §924(j) where the two discharges occurred in one continuous incident.

V. Whether the case should be remanded for resentencing because the district court erred in concluding that §924(j) incorporates the mandatory minimum sentences and consecutive penalty scheme of §924(c) and because the record indicated that the district court would not have imposed the same sentence if it had properly understood its discretion to impose a sentence of "any term of years" under §924(j).

VI. Whether the case should be remanded for resentencing on Counts Two and Three because the jury did not make a specific finding that "death result[ed]" and therefore the maximum term of imprisonment to which Ventura was exposed under 18 U.S.C. §1958(a) was 10 years on each count.

VII. Whether the evidence was insufficient to convict Ventura of all counts beyond a reasonable doubt.

STATEMENT OF THE CASE

On April 11, 1995, firefighters responded to the scene of a fire at a 99-cent store on 10th Avenue in upper Manhattan. JA-71. After the fire was extinguished, Noel Montanez's body was found, with a single gunshot wound to the shoulder, inside the store. JA-72. On August 19, 1996, police responded to a 911 call and found Eugene Garrido, dead from a gunshot to the head, inside the lobby of 34 Bogardus Place. JA-72. His friend, Carlos Penzo, was also lying in the lobby, shot in the torso. Penzo died a week later from his injuries. JA-72.

In a five-count Superseding Indictment filed on November 17, 2010, the government charged that Ventura[2] had caused the deaths of Montanez, Garrido, and Penzo, all arising out of disputes surrounding a marijuana business in the vicinity of 207th Street and Sherman Avenue in upper Manhattan, in violation of 18 U.S.C. §§924(j) and 2 (Counts One, Four, and Five) and that he had conspired to commit and committed murder-for-hire in violation of 18 U.S.C.§§1958 and 2 with respect to the deaths of Garrido and Penzo (Counts Two and Three). *See* JA-44-48. The defense conceded that Ventura had sold marijuana in the mid-1990s in his neighborhood "in the Bronx," but denied that the murders had had anything to do with competition in a marijuana business. JA-82-83.

[2] Ventura was charged with Jose Lafontaine, who pled guilty before trial and testified against Ventura.

During the 12 days of trial, nineteen witnesses, including four cooperating witnesses for the government-- Jose Alejandro Arias De Los Santos a/k/a Balaguer ("Arias") (JA-198-397); Edwin Torrado a/k/a Bori ("Torrado") (JA-588-868), Jorge or George Lafontaine a/k/a Shorty ("Jorge") (JA-956-1116); and Jose Lafontaine ("Jose") (JA-1129-1246)[3]-- testified against Ventura. The defense called two witnesses, including Ventura (JA-1368-1469), and introduced exhibits and stipulations. The jury convicted Ventura of all five counts on December 3, 2013. JA-1716-17.

On August 13, 2015, after protracted litigation concerning whether Ventura's two convictions under 18 U.S.C. §1958 required the imposition of mandatory life sentences and whether the mandatory minimum terms of imprisonment in 18 U.S.C. §924(c) should be applied to Ventura's three 18 U.S.C. §924(j) convictions, the district court ruled in the affirmative. JA-1733-35. The district court then imposed concurrent sentences of life imprisonment on Counts Two and Three and consecutive sentences of five years on Count One, 20 years on Count Four, and 20 years on Count Five (applying the statutory penalties in effect as of 1995 and 1996), resulting in a total sentence of life plus 45 years. JA-1742. Mr. Ventura is presently serving that sentence.

[3] For clarity, Jorge Lafontaine and Jose Lafontaine are referred to by first name. The spelling of "Lafontaine" alternates throughout the transcript with "LaFontaine." The former spelling has been used consistently herein for uniformity.

I. The Evidence At Trial

A. The Marijuana Conspiracy

The existence of the marijuana "spot" at 241-251 Sherman Avenue in Washington Heights owned by Ventura's father Jose Ismael Ventura (a/k/a Maelo), and Ventura's involvement in managing the spot in the early- to mid-1990s, was not disputed. *See*, *e.g.*, JA-201-04; JA-603; JA-1540-41. Torrado and Ventura took over management of the spot in the winter of 1993. JA-597-98. Jorge started working at the spot in late 1994 after Torrado introduced him to Ventura. JA-966; JA-962-63.

In April 1995, the members of the marijuana conspiracy included Ventura, Torrado, and Jorge Lafontaine (JA-213), but they all left the marijuana conspiracy in the summer of 1995. JA-1431-32; JA-676; JA-989. There was no testimony that Jose was involved in the marijuana conspiracy.

B. The Arson and Felony Murder of Noel Montanez

Noel Montanez worked at a "home supply store" on 207th Street and 10th Avenue in upper Manhattan. JA-94-95. Marijuana supplied by the store's owner (JA-554-55; JA-557) was sold from the store (JA-97-98; JA-557-58) and kept under the cash register behind the counter (JA-98) and in the ceiling (JA-558). *See also* JA-545-48. Customers were known and "had to be buzzed in" to enter the store. JA-98; JA-569.

On April 11, 1995, Montanez died in a "second alarm" fire at the store that investigators determined had been intentionally started by use of an accelerant. JA-133; JA-113; JA-119-20; *see also* JA-128-29 (fire originated at the front of the store); *but see* JA-138 (no detectable accelerant smell). Montanez' body was found in the area behind the counter underneath the rubble near the front of the store "just inside the window display." JA-122; JA-134; JA-137. Montanez died from the gunshot wound to his shoulder, not from the fire. JA-899-901; JA-906; JA-909. *See also* JA-127. The gun would have been six to eight inches from him when discharged. JA-905; JA-921-22.

In testimony replete with inconsistencies, Arias, Torrado, and Jorge described the events of April 11, 1995. *See* JA-1527-37 (defense summation, discussing discrepancies). Although Torrado testified that all five of the participants knew there was a plan to burn down the store, which was initiated after Ventura's cousin Juan told them that marijuana was being sold there (JA-632-33; JA-831; JA-866-67), Jorge and Arias denied prior knowledge, albeit on different grounds. JA-979-81; JA-1045-46; JA-228; JA-234-35.

In preparation for the arson, they either donned ski masks and bulletproof vests inside an apartment in 251 Sherman (JA-232; JA-359; JA-374-78) or put on the vests and a second layer of clothing in the apartment but donned nylon stockings (as masks) inside the van (JA-636-37; JA-640; JA-818-20; JA-827), or

just wore bulletproof vests, which they donned inside an unknown apartment (JA-980-81; JA-1113). *Cf.* JA-1046-47 (Jorge didn't remember what they were wearing, but he had no bulletproof vest or mask and saw none in the apartment).

Concerning the weapons, Torrado had a .38 in his bulletproof vest pocket (JA-233; JA-373-74) or a .357 (JA-638-39; JA-822; JA-982). Ventura had a Glock (JA-233; JA-378) or a .357 (JA-638-39; JA-822) or an unidentified gun (JA-982). Jorge and Juan had unspecified guns (JA-233-34; *but see* JA-361-62) or Jorge had a revolver (JA-376) or a pistol (JA-638), an "automatic weapon" (JA-823), or no gun at all (JA-982). *But see* JA-1113-14 (Jorge saw that Torrado had a gun but did not see whether Ventura had one).

Similarly, they bought the gasoline either the day of the fire (JA-230; JA-233; JA-358), or the day before the fire (JA-821). They either drove (JA-641; JA-824-26; JA-982-83; JA-1048-50) or walked (JA-235 [Arias was told to drive to 204th and Nagle and wait for them]; JA-379-80) to the store. Either Juan (JA-641-42; JA-827-28) or Jorge (JA-983-84; JA-1050-51) rang the buzzer to gain entrance to the store.

Concerning the shooting itself, Torrado testified that he had entered the store after Juan was admitted (JA-642; JA-827-28), and had pointed his gun at the counter and "told him not to move." JA-642. There was about "a foot or two" between the end of his gun and where the person was standing. JA-643. The clerk

"made a gesture to go get something underneath the counter, and that's when [Torrado] shot him in the shoulder." JA-643; JA-828-29; *but see* JA-1052 (Torrado "shot the guy" as soon as he went into the store). Meanwhile, Ventura "was trying to set the place on fire" and Jorge was "[h]olding the door open so that it wouldn't lock behind us." JA-644-45. Ventura started the fire on his second attempt and told them "let's go." JA-645. Torrado jumped back over the counter and "told the guy, Let's go. And I just jumped out and just ran out into the van." JA-645.

Afterwards, they either got in the van (JA-237-39; JA-388-90; JA-645; JA-832-33) and were driven to the cabstand (JA-240; JA-647 [with the exception of Juan, who either walked back (JA-393) or stayed with Arias in the van (JA-837)]), or ran back to the "spot" after the incident (JA-985-86; JA-1057-58).

They discarded their clothing by putting it in a box inside Arias' van (JA-239-40; JA-390-91) that Arias gave to Juan (JA-242-43; JA-394), or took off and left the clothes, vests, masks, and guns but not in any container (JA-646; JA-833-36) that Teresa then disposed of (JA-648; JA-837), or took off their clothes in the apartment and gave the bag to Arias (JA-986; JA-1059-62). Jorge threw the gun off the 207th Street bridge, either at Maelo's instruction (JA-247), at Ventura's instruction (JA-647-48; JA-836), or at Torrado and Ventura's instruction (JA-986; JA-1063-64). Torrado was either upset that it had been done so close to the scene (JA-648) or told Jorge to do it (JA-986; JA-1064).

But Ventura testified that he had known nothing about the fire and only "heard rumors in the area" afterwards. JA-1379. He maintained his innocence. JA-406; JA-1442.

In the summer of 1995, Ventura and Torrado were arrested after a tip from Arias. JA-292-93; JA-403-04; JA-465-66; JA-1369. They were not identified in any of the six post-arrest line-ups. JA-470; JA-472; JA-1434; JA-1379-80. The indictment was dismissed in the spring of 1996. JA-471; JA-668-69; JA-1369.

C. The Conspiracy and Murder-for-Hire of Eugene Garrido and Carlos Penzo

After Ventura's and Torrado's arrest following the Montanez felony murder, Ventura's cousin Eugene Garrido took over management and brought daily receipts of the activity to Ventura. JA-673-74. When Ventura and then Torrado were released, Garrido did not want to cede control, upsetting Maelo, who decided to have Garrido killed. JA-674-75; JA-677. *See also* JA-1264; JA-1270; JA-1272 (Maelo ordered Garrido killed if he didn't "hand over the business"); JA-1298 (Garrido's mother told Detective Baquero that Maelo had told her he was going to kill Garrido). *But see* JA-1333 (Baquero's file contains no notes of such a conversation).

But Ventura explained that both Torrado and Jorge had been threatened by Garrido, who had "mental problems" and was, at times, "erratic, irrational" and very powerful. JA-1381. *See also* JA-680-82; JA-842-43; JA-1385-92 (describing

threats to Torrado); JA-998-99; JA-1076-80; JA-1392-95 (describing threats to Jorge). *See also* JA-1244 (Jose is afraid of his brother); JA-1290; JA-1306-07.

According to Torrado, Ventura determined that Jorge should kill Garrido as compensation for having sold guns belonging to Ventura that Maelo had asked him to hold during Ventura's incarceration. JA-677; JA-861-62 (Lafontaine sold the guns). *See also* JA-666-67; JA-990-91. *But see* JA-1444 (Ventura never spoke with Jorge about the guns). Torrado asked Jose to participate in the scheme because "Eugene would recognize George Lafontaine, not Jose Lafontaine." JA-677-78.

During a meeting with Torrado and Ventura at a McDonald's on White Plains Road, the Lafontaines agreed to kill Garrido for $10,000. JA-679. *But see* JA-996-1002 (Jorge: murder and terms of compensation were not discussed until a second meeting at the McDonald's); JA-1072-73; JA-1080-83 (Jorge: discussing two meetings); JA-1000-01 and JA-1083 (Jorge: it was decided that Jose would be the shooter after the second meeting at McDonald's; during that meeting, Ventura told them that he had 10,000 dollars in a black box to kill Eugene.); JA-1176-77 (Jose first heard about the plan during a discussion with Jorge in their apartment); JA-1138-39; JA-1177-79 (Jose: there was only one meeting in a restaurant; it was a Chinese restaurant; he, Torrado, Ventura, and Jorge attended, but murder was never discussed); JA-1140-42 and JA-1178-80 (Jose: the second meeting occurred in an apartment in Manhattan. Ventura asked him if he would do the job and he

agreed but no price was discussed or promised.); JA-1142-43 ("Possibly the same day," as that meeting, Jose met Garrido, in "the same place."). Jorge asked Jose to be the shooter and Jose agreed. JA-1164-65. *But see* JA-1400-02 (Ventura met Jose once in the South Bronx and never attended a meeting to discuss the possibility of anyone murdering Eugene, nor did he ever offer anyone money to murder Eugene.)

Tellingly, Jorge testified that he and Jose met with Ventura in an apartment for instructions "[w]ithin weeks" of the shooting and then again "[a] couple of days after" that. JA-1085; JA-1089-90. At these meetings, "Ed [Torrado] was telling me the plan – I mean Kevin [Ventura] was telling me the plan." JA-1092.

The details of how the murders occurred also varied considerably. For instance, either Ventura took the Lafontaines in a white station wagon to show them where Garrido lived (JA-1002), or Jose and Jorge did surveillance drives alone (JA-1145; JA-1167), or "[i]t's a possibility" that Torrado was there too (JA-1224).

Jorge claimed to have rented a car with Ventura either the day of, a couple of days before, or a couple of weeks before the shooting (JA-1005-06; JA-1093-94), but the names on the rental were Jorge Lafontaine and Jose's then-girlfriend Claudia Amanini. JA-1229-30; JA-1254. *See* JA-1402-03 (Ventura was not in the United States "days before the murder," and didn't give anyone a gun or rent a car

for anyone to use days before the murder.) "Right after" the murder, "[w]ithin a couple of days," Jorge gave the car back to Kevin. JA-1102. Kevin exchanged it for a green Geo Prizm for him. JA-1102-03. *But see* JA-1403. They went to Enterprise together. JA-1103. Jose was there too. JA-1103. *But see* JA-1140, JA-1144-45 (the green car was rented before the murder and exchanged "at some point" for a white car); JA-1227 ("it's possible" that they returned the car the same day).

Ventura gave Jorge a revolver a couple of days to a week before the murder. JA-1003; JA-1097 (Ventura had given it to them "[d]ays before" the shooting—"It could have been a week or something."); JA-1102 ("It was within a week."). Jose testified that Jorge gave him a revolver and then later gave him a second gun and told him to use that. JA-1146-47; *see also* JA-1230-31 (Jose used the second, smaller gun).

Concerning the murder itself, Jorge testified that Ventura called him and told him "today is the day." JA-1006. Jorge drove Jose to the building. JA-1007; JA-1095-96. They pulled up to the building but Jorge never left the car. JA-1007; JA-1098. But Jose testified that they both went into the building and Jorge told Jose where to stand and what to do. JA-1147-49; JA-1172.

Jose stood facing the elevator "on the right side staircase" with the gun in his right side pocket and latex gloves on his hands. JA-1149-50. Not long thereafter, the elevator door opened and Garrido came out. JA-1150. Jose recognized him,

"ran towards him and point, I shot, and I ran." JA-1150. As he started running towards the door, a second person (Penzo) grabbed Jose's arm and the gun "went off, you know unintentional." JA-1151. *See also* JA-1008-09; JA-1173.

Garrido died from a gunshot wound to his head above his left eyebrow. JA-910. Penzo died from complications of a gunshot wound to his torso. JA-916; JA-920. No ballistics evidence was recovered. JA-938.

Jorge testified that he received $2,000 from Teresa (JA-1009) and $4,000 from Ventura (JA-1011; JA-1103) after the murder. Ventura denied giving anyone money for Garrido's murder. JA-1403-04. But Jose remembered "telling the agents that" Jorge had met with Torrado "to receive a payment after the murder." JA-1235; JA-1241. Jose received only "[a] couple of hundred" dollars with which he bought a pair of boots. JA-1157.

Torrado asserted that, to create an alibi, he and Ventura planned a trip to the Dominican Republic and got new passports in July 1996. JA-682-85; JA-838-39. *But see* JA-1408 (Ventura went to the Dominican Republic on business and Torrado came later to visit him and celebrate his birthday). They had been there "about a week," when Torrado told Ventura that he was going to return to New York if Garrido was not dead by his birthday on August 19th "because I was having problems at the time with my wife and she was upset because I was in the Dominican Republic." JA-685; JA-840. *But see* JA-1402 (Ventura had been there

close to three weeks when Garrido was killed.); JA-1405-06 and JA-1563 (Ventura's passport showed that he had entered the Dominican Republic on August 6, 1996, and that he didn't leave the Dominican Republic until November 11, 1996).

Ventura changed Torrado's ticket to return on the 19th (JA-1409) but Torrado didn't tell his wife because he "was trying to surprise her." JA-686. While still at the airport after landing in New York, Torrado got a call from Ventura that "it was done." JA-687; JA-841-42. He later learned that Jose had killed Garrido. JA-687-88.

But Ventura stated that, while he was in the Dominican Republic, he called only his wife in the United States. JA-1406-07. He never called the Lafontaines, but Torrado did. JA-1409-10; JA-1454-55. *But see* JA-854-55.

Torrado came to see Rosalba Munoz on the day that Garrido was shot, and asked her if she would pawn a chain for him or loan him $3,000. JA-1341-43. She arranged a loan. JA-1343. Torrado told her that he was nervous because he believed he was going to be accused of the murder. JA-1347.

II. The Jury Charge

The defense raised no objection to the language of the §924(c) instruction or the aiding and abetting instruction at the charge conference on November 22, 2013. The instructions of which Ventura complains on appeal are discussed in the

appropriate argument sections, *infra*. *See* Point I (discussing the instruction that "destruction by fire of a building used in interstate commerce qualifies as a crime of violence" [JA-1609] and requires "malicious intent" [JA-1622]); Point II (discussing inclusion of alternative element that "the defendant knowingly possessed a firearm in furtherance of one or both of the predicate crimes, or that the defendant aided and abetted another in doing so." [JA-1609-10; JA-1622-23; JA-1637-38; JA-1711-12] and defining possession [JA-1626-1627]); Point III (discussing lack of advance knowledge of the use of a firearm in aiding and abetting instruction [JA-1633-34; JA-1638-39]); Point VI (discussing omission of the penalty enhancing elements "if personal injury results" and "if death results" from the murder-for-hire instruction [JA-1641]).

III. Sentencing

At the sentencing hearing on August 13, 2015, the government requested and the district court applied a two-point enhancement for obstruction of justice because Ventura's testimony had contradicted that of the cooperating witnesses, who the district court found to have testified credibly. JA-1726-27. The district court found that each of the murders should be treated as first degree murder under USSG §2A1.1. JA-1727-28. Ventura's resulting offense level of 48 (criminal

history category I) corresponds to a guidelines sentencing range of life imprisonment.[4] JA-1728.

The district court found that Ventura's conviction on Counts Two and Three mandated a life sentence under 18 U.S.C. §1958(a)'s "if death results" enhancement. JA-1728-33. The court explained that because conviction on Counts Four and Five (violations of 18 U.S.C. §924(j)) required the jury to have found "that the defendant's conduct was a 'but for' cause and 'a substantial factor in causing' the deaths of Garrido and Penzo," and "[t]he findings required to convict for Counts Four and Five are . . . identical to those needed for the 'death results' enhancement in Section 1958," "the jury necessarily found beyond a reasonable doubt that Garrido's and Penzo's 'deaths resulted' from the defendant's conduct and therefore the mandatory life sentence under Section 1958 applied to Counts Two and Three." JA-1732-33.

The district court then concluded that the penalty enhancements of §924(c) applied to the §924(j) convictions. JA-1734-35 (referencing *United States v. Young*, 561 Fed.Appx. 85 (2d Cir.2014)). Accordingly, the district court found that "the

[4] The 2012 Guidelines manual was used in the calculation of Ventura's Guidelines range (PSR-¶41), but the error was harmless because the district court determined that the Guideline for first degree murder §2A1.1 – base level 43 in the 1995, 1996, and 2012 manuals -- applied on Counts Two and Three and because the district court imposed statutory mandatory minimum sentences on Counts One, Four, and Five. JA-1742.

mandatory minimum sentence on Counts One, Four and Five is a total of 45 years which must run consecutively to any other sentence imposed." JA-1735.

The district court noted its displeasure that the mandatory minimums "effectively take away a Court's discretion to impose a sentence which is consistent with" the mandate of 18 U.S.C. §3553(a). JA-1736. As a result, "the Court has never been asked, applying all of the 3553(A) factors, what the appropriate sentence is in this case" and cautioned that, "I haven't been asked to arrive at exactly that conclusion whether life was appropriate or not in this case. And so there's nothing that I've said which the parties should take away from as indicating what my decision would be if I had to reach that decision." JA-1739-40.

SUMMARY OF THE ARGUMENT

Ventura asserts seven grounds of reversible error on appeal. First, Ventura's conviction on Count One should be vacated because, following *Johnson v. United States*, 135 S.Ct. 2551 (2015), arson as defined in 18 U.S.C. §844(i) is not a crime of violence.

Second, Ventura's conviction on the §924(j) offenses charged in Counts One, Four, and Five should be vacated because the jury charge as to the elements of §924(c) erroneously included the alternative that Ventura "knowingly possessed a firearm in furtherance of" the predicate crimes. This statutory language, which was

added in a 1998 amendment to §924(c), criminalized conduct that had not been illegal in 1995 and 1996, and substantially prejudiced Ventura.

Third, Ventura's conviction on Counts One, Four, and Five should be vacated because the district court's instruction on aiding and abetting omitted the requirement that the jury determine that Ventura had advance knowledge of his coconspirators' intention to use a firearm at a time when he could have chosen to walk away, in violation of *Rosemond v. United States*, 134 S.Ct. 1240 (2014).

Fourth, the case should be remanded for resentencing because the district court erred in imposing two separate 20-year consecutive sentences on Counts Four and Five where the two offenses occurred as part of a single course of conduct.

Fifth, the case should be remanded for resentencing because the district court erred in concluding that the language of §924(c) and §924(j) required mandatory minimum terms of imprisonment on Counts One, Four, and Five, and the court might not have imposed the same sentence in the absence of this requirement.

Sixth, the case should be remanded for resentencing because the jury did not find that "death result[ed]" from the offense conduct charged in Counts Two and Three; therefore the maximum term of imprisonment to which Ventura was exposed on those counts was 10 years.

Seventh, given the conflicting testimony of the cooperating witnesses and Ventura's own testimony, the evidence was insufficient to convict him of each element of each offense beyond a reasonable doubt.

ARGUMENT

I. Ventura's Conviction on Count One Should Be Vacated Because, Following *Johnson v. United States*, 135 S.Ct. 2551 (2015), Arson Is Not A Crime of Violence Within the Meaning of 18 U.S.C. §924(c)(3).

A. Standard of Review

This Court reviews claims that were not presented to the district court for plain error. *United States v. James*, 712 F.3d 79, 96 (2d Cir.2013). An error is "plain" if "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir.2013) (quoting *United States v. Marcus*, 130 S.Ct. 2159, 2164 (2010) (internal quotation marks and brackets omitted in *Vilar*)). Where a claim of error is based on a supervening legal decision, the Court "look[s] to the law as it exists at the time of review. . . . [A] decision of the trial court that was perfectly proper when issued may nonetheless be considered 'plainly erroneous' on appeal due to a supervening change in the law." *Vilar*, 729 F.3d at 70-71 (internal citation omitted).

There is some question in this Circuit whether a claim or error based on a supervening legal decision should employ a "modified plain error analysis," in which the burden of demonstrating error is removed from the defendant and, instead, placed "on the government to demonstrate that the error did not affect the defendant's substantial rights." *Vilar*, 729 F.3d at 71, n.5. However, the Court does not need to resolve this question in order to decide the matter of law raised below.

B. Applicable Law

Since *Johnson v. United States*, 135 S.Ct. 2551 (2015), invalidated the residual clause of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B), as void for vagueness[5], courts have considered challenges to the validity of similarly worded clauses in other statutes.[6] *Sessions v. Dimaya*, 15-1498, which challenges the language of 18 U.S.C. §16(b), will be re-argued before the Supreme Court in the October 2017 term. Section 16(b) is identical to the language of 18 U.S.C. §924(c)(3)(B), which was challenged before the Second Circuit in *United States v. Hill*, 832 F.3d 135 (2d Cir.2016) (motion for reconsideration stayed pending *Dimaya*) and in *United States v. Barrett*, 14-2641 (sub judice).

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[5] The "residual clause" defined a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another."

[6] *Johnson* must be applied to Appellant's case because direct review of his conviction is pending. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final . . .").

Title 18 §924(j) mandates a term of imprisonment "for any term of years or for life" for "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm . . . if the killing is a murder . . ." and subsection (c) imposes a mandatory consecutive term of imprisonment on "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, . . ." 18 U.S.C. §924(c)(1)(A) (emphasis supplied).[7] A "crime of violence" is "an offense that is a felony and--

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

18 U.S.C. §924(c)(3)(A)-(B).[8] For clarity, the first clause is referred to herein as the "elements" clause; the second is referred to as the "risk-of-force" clause.

Thus, for Ventura's conviction on Count One to stand, the jury must properly have found the existence of a predicate crime of violence or drug trafficking crime—either the arson or the marijuana conspiracy—proved beyond a reasonable doubt. The district court instructed the jury that, "You must all be unanimous that the government has proved that the defendant committed at least

[7] For purposes of this argument, the current version of 18 U.S.C. §924(c) is cited. Use of the pre-1998 version of the statute would not change the analysis.
[8] The language of 18 U.S.C. §16 is identical as to both clauses.

one of these two predicate crimes, and you must be unanimous as to which of these two predicate crimes or both of these predicate crimes the government has proved beyond a reasonable doubt." JA-1609. But without a special verdict sheet, the Court cannot be certain that Ventura's conviction on Count One was predicated on the marijuana conspiracy rather than the arson. *See* JA-1716. And, because arson is not a crime of violence, Ventura's conviction on Count One is legally inadequate.

C. Discussion

1. Arson Is Not A Crime of Violence Under the "Elements" Clause.

To determine whether a predicate offense qualifies as a "crime of violence" under §924(c), courts use the categorical approach. *See Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir.2006). In so doing, courts "look only to the statutory definitions -- i.e., the elements -- of a defendant's [] offense, and not to the particular facts underlying [the offense]." *Descamps*, 133 S.Ct. at 2283 (quotation marks and citation omitted). "Under this categorical approach, the question to be resolved is whether "the minimum criminal conduct necessary for conviction under [the] particular statute" is a crime of violence. *Acosta*, 470 F.3d at 135. The inquiry "focus[es] on the intrinsic nature of the offense rather than on the circumstances of the particular crime." *Id. See also Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 166 (2d Cir.2006) (internal citations omitted) ("Under th[e] categorical approach, a

reviewing court must focus on the intrinsic nature of the offense, rather than on the singular circumstances of an individual petitioner's crimes . . . and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.").

The elements of a federal arson are (1) that the defendant "maliciously" (2) damaged or destroyed (or attempted to damage or destroy) (3) by means of fire or an explosive (4) any building, vehicle, or other real or personal property that was (5) used in interstate or foreign commerce. 18 U.S.C. §844(i). *See United States v. Joyner*, 201 F.3d 61, 78 (2d Cir.2000), *decision clarified on denial of reh'g,* 313 F.3d 40 (2d Cir.2002) ("[T]o satisfy §844(i) the government need only prove that the arson in question destroyed or damaged property either 'used in' or 'used in any activity affecting' interstate commerce.") (internal citation omitted).

Consideration of the first element of §844(i) is sufficient to demonstrate that the arson statute does not satisfy the "elements" clause. As the Honorable Judge Sand explained, to find a defendant guilty under §844(i), the jury must find that the defendant acted with "malicious intent," meaning that he set the fire "with the intent to cause damage, *or that he did so recklessly* and without regard to the likelihood that damage would result." Hon. Leonard B. Sand, et al., Modern Federal Jury Instructions, 30–5 (emphasis added). Under §924(c)(3)(A) (the

"elements" clause), therefore, arson is not a crime of violence because it is satisfied by "malicious" force. The district court instructed the jury that:

> To act with malicious intent means to act either intentionally or with willful disregard of the likelihood that damage will result, and not mistakenly or carelessly. In order to find the defendant guilty you must find that the defendant set the fire or used an explosive with the intent to cause damage, *or that he did so recklessly and without regard to the likelihood that damage would result*.

JA-1622 (emphasis supplied); JA-1619 (using the federal definition of arson).

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court considered the elements clause of §16 (*i.e.*, 18 U.S.C. §16(a)), which is identical in language to the elements clause of §924(c)(3)(A). The Court explained that, "The critical aspect of §16(a) is that a crime of violence is one involving the 'use ... of physical force *against the person or property of another*.' . . . '[U]se' requires active employment. . . . The key phrase in §16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 10 (emphasis in original) (internal citations omitted). *See also Johnson v. United States*, 559 U.S. 133, 140 (2010) ("Physical force" means "*violent* force," that is, "strong physical force" "capable of causing physical pain or injury to another person.").

In *Jobson v. Ashcroft*, 326 F.3d 367, 272 (2d Cir.2003), this Court examined the identical statutory language in 18 U.S.C. §16(b) and concluded that "use[]" of

physical force under §16(b) "contemplates only *intentional* conduct and refers only to those offenses in which . . . the perpetrator [] *intentionally* employ[s] physical force." (emphases in original; internal quotations omitted). In *Garcia v. Gonzalez*, 455 F.3d 465, 468-69 (4th Cir.2006), the Fourth Circuit concluded that §16(a), which is identical to §924(c)(3)(A) requires that the offense have, as an element, the "intentional employment of physical force"). *See also United States v. Castleman*, 134 S.Ct. 1405, 1414 n.8 (2014) (noting that, "[a]lthough *Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force, the Courts of Appeals have almost uniformly held that recklessness is not sufficient"). An offense is not a "crime of violence" under §924(c)(3)(A), therefore, if it does not, even in its "most innocent" or "minimum" form, require the intentional use of violent physical force.

Because arson could be committed by the reckless dropping of a match when attempting to light (for example) an innocuous item such as a candle, resulting in damage to property used in interstate commerce, "the least of" the conduct criminalized by §844(i) does not satisfy every element of §924(c)(3)(A), and arson is therefore not a crime of violence under that provision. *See Acosta*, 470 F.3d at 135. Accordingly, the district court plainly erred in instructing the jury that "destruction by fire of a building used in interstate commerce qualifies as a crime of violence." JA-1619. Because that instruction affected Ventura's

substantial rights, and because prosecution on the basis of an erroneous interpretation of the law "seriously affected the fairness, integrity or public reputation" of the trial, his conviction on Count One should be vacated and the case should be remanded for further proceedings. *See Vilar*, 729 F.3d at 70.

2. Arson Is Not A Crime of Violence Under the "Risk-of-Force" Clause.

Although this Court has held the risk-of-force clause of §924(c)(3)(B) is not void for vagueness, *United States v. Hill*, 832 F.3d 135, 145-50 (2d Cir.2016) (motion for reconsideration and rehearing en banc pending), the issue is sub judice before the Supreme Court in *Dimaya*, which will resolve the Circuit split on this issue. *See*, *e.g.*, *United States v. Ponzo*, 2017 WL 1291183, at *16 (1st Cir. Apr. 7, 2017) (summarizing cases); *see also United States v. Cardena*, 842 F.3d 959, 996 (7th Cir.2016) (holding § 924(c)(3)(B) void for vagueness); *Baptiste v. Attorney Gen.*, 841 F.3d 601, 621 (3d Cir.2016) (same).

Appellant adopts the arguments of the appellant in *Hill* pending the Supreme Court's decision and in light of *Hill*'s pending motion for reconsideration and rehearing en banc. *See United States v. Hill*, 14-3872, Dkt. No. 66 at pp. 15-19. Like *Hill*, this case should be held pending the Supreme Court's anticipated guidance in *Dimaya*.

In the alternative, if this Court finds that the claim of error raised herein is best considered by the district court in the first instance, Appellant respectfully

asks the Court to decline to consider it so that Ventura may raise it in a 28 U.S.C. §2255 motion. *See Welch v. United States*, 136 S.Ct. 1257, 1265 (2016) (holding that *Johnson* created a new substantive rule, which applied retroactively on collateral review).

II. Ventura's Conviction on Counts One, Four, and Five Should Be Vacated Because the Jury Charge As to §924(c) Violated the Ex Post Facto Clauses of the United States Constitution.

A. Standard of Review

This Court "review[s] challenges to jury instructions *de novo* but will reverse only where the charge, viewed as a whole, demonstrates prejudicial error." *United States v. Prado*, 815 F.3d 93, 100 (2d Cir.2016). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id*. (citation omitted). In evaluating whether an instruction "adequately reflected the law and would have conveyed to a juror the relevant law," the reviewing court must look to the charge as a whole. *United States v. Mulder*, 273 F.3d 91, 105 (2d Cir.2001) (internal quotation marks and citation omitted).

"Generally speaking, if a defendant did not object to the instruction, a 'plain error standard of review applies.'" *Prado*, 815 F.3d at 100 (quoting *United States v. Botti*, 711 F.3d 299, 308 (2d Cir.2013)). That is, the Court "will only grant relief if there was (1) error, (2) that is plain, and (3) affects substantial rights, and (4) the

error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Bell*, 584 F.3d 478, 484 (2d Cir.2009) (citation omitted). This Court will vacate a conviction if, "viewing as a whole the charge actually given, [defendant] was prejudiced." *United States v. Dove,* 916 F.2d 41, 45 (2d Cir.1990) (internal quotation marks omitted).

B. Applicable Law

The *ex post facto* clause of the Constitution proscribes the enactment of any law that punishes behavior not illegal at the time the behavior was committed or increases punishment beyond that which was authorized at the time of the offense. U.S. CONST., art. I, §9 cl. 3. *See Garner v. Jones*, 529 U.S. 244, 249-50 (2000). The critical question "is whether the law changes the legal consequences of acts completed before its effective date." *Carmell v. Texas*, 529 U.S. 513, 520 (2000) (citing *Weaver v. Graham*, 450 U.S. 24, 31 (1981)); *see also Weaver*, 450 U.S. at 30 (describing the "lack of fair notice and governmental restraint" as "critical to relief").

"The prohibition is based on the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *United States v. Berg*, 710 F. Supp. 438, 443 (E.D.N.Y.1989), *aff'd in part, rev'd in part sub nom. United States v. Schwartz*, 924 F.2d 410 (2d Cir.1991) (citation omitted). In *Weaver*, the Supreme Court identified two necessary conditions for an *ex post facto*

finding. First, the law must be retrospective, applying to events that transpired prior to its enactment, and, second, the law must disadvantage the offender by being more onerous than the law in effect when the acts were committed. *Weaver*, 450 U.S. at 29 (citation omitted).

Similarly, the due process clause of the Fifth Amendment "generally does not permit the retroactive application of a statute if it has especially harsh and oppressive consequences, . . . or results in manifest injustice . . ." *Greenberg v. Comptroller of the Currency*, 938 F.2d 8, 11 (2d Cir.1991) (internal citations omitted).

C. Discussion

1. The 1998 Amendments to 18 U.S.C. §924(c) Broadened the Scope of the Statute to Include Conduct that Was Not Illegal in 1995 and 1996 When the Offenses of Conviction Occurred.

In 1995 and 1996, §924(c) provided that, "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment for . . . such crime, be sentenced to imprisonment . . ." 18 U.S.C. §924(c)(1). The Supreme Court construed the term "uses" narrowly, "hold[ing] that §924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey v. United States*, 516 U.S. 137, 143 (1995) (emphasis in original). Subsequently, the Court

construed "carries" to include the knowing possession and conveyance of firearms in a vehicle that the person accompanies. *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998).

In 1998, §924(c) was amended to impose consecutive statutory penalties on "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm*, . . ." 18 U.S.C. §924(c)(1)(A) (emphasis supplied). *See also United States v. Cox*, 324 F.3d 77, 84 n. 2 (2d Cir.2003) (citations omitted) (noting that the amendment responded to *Bailey*'s holding construing "use" as "active employment"); 2 Leonard B. Sand, et al., Modern Federal Jury Instructions- Criminal, 35-147 (2007) (noting that the 1998 revisions responded to *Bailey* and *Muscarello*).

The 1998 amendment broadened the scope of offense conduct. "Possession" requires only that the government establish "that the defendant 'knowingly [had] the power and the intention at a given time to exercise dominion and control over' the firearm' and "some nexus between the firearm" and the predicate crime. *United States v. Finley*, 245 F.3d 199, 203 (2d Cir.2001) (internal citations omitted) (alteration in *Finley*) (discussing §924(c) in relation to a drug trafficking crime). *See also United States v. Snow*, 462 F.3d 55, 62 (2d Cir.2006) ("[T]he mere presence of a weapon at the scene of a drug crime, *without more,* is

insufficient to prove that the gun was possessed 'in furtherance of' the drug crime.") (internal citations omitted).

2. Use of the Amended Statutory Language Prejudiced Ventura and Constituted an *Ex Post Facto* and a Due Process Violation.

The Indictment charged Ventura both as a principal and under 18 U.S.C. §2, with having caused the deaths of Montanez, Garrido, and Penzo in the course of a violation of . . . [§924](c) . . . through the use of a firearm," using the language in the 1998 statute. *See* JA-44-48; 18 U.S.C. §§924(j), 924(c)(1)(A).

On Count One, the Indictment alleges that Ventura "unlawfully, willfully, and knowingly, during and in relation to [the predicate offenses], did use and carry a firearm, and, in furtherance of such crimes, did possess a firearm, and did aid and abet the use, carrying, and possession of a firearm, and in the course thereof did cause the death of [Montanez' through the use of a firearm . . ." JA-44. On Counts Four and Five, the Indictment charged that Ventura, "unlawfully, willfully, and knowingly, during and in relation to a drug trafficking crime . . . did use and carry a firearm, and, in furtherance of such crime, did possess a firearm, and did aid and abet the use, carrying, and possession of a firearm, and in the course thereof did cause the death[s]" of Garrido and Penzo, respectively. JA-47.

The jury instruction likewise incorporated the "possession" language. *See* JA-1609-10; JA-1622-23; JA-1637-38. *See also* 1711-12 (supplemental

instruction). The district judge instructed the jury that the government must prove beyond a reasonable doubt either the use, carrying, or possession in furtherance "of one or both of the predicate crimes. In order to prove the defendant is guilty, the government must prove one of these circumstances beyond a reasonable doubt. It need not prove all three, but you must all be unanimous in finding at least one particular circumstance that the government has proven beyond a reasonable doubt." JA-1622-23. The jury instruction on "aiding and abetting" suffered from the same flaw, as the district judge charged the court that aiding and abetting another's "use, carrying, or possession of a firearm in violation of Section 924(j)" would also suffice for a determination of guilt. *See* JA-1633-34; JA-1638-39. The defense did not object to the indictment or charge language. JA-1519.[9]

The retroactive application of the amended §924(c) language prejudiced Ventura because there was no evidence the he used or carried a firearm during and in relation to the marijuana conspiracy within the meaning of *Bailey* and *Muscarello* in either 1995 or 1996 and because, although the jury could have found that Ventura used or carried a firearm in connection with the arson (as to Count One), without a special verdict sheet, it is impossible to say that the jury did not convict Ventura for possession alone, which was not a crime in 1995.

[9] The *ex post facto* violation was raised first before sentencing. *See* JA-34 (Dkt. Nos. 263, 265, 272). A *Curcio* hearing was held before sentencing on February 4, 2015, and the parties agreed that the district court did not need to decide the *ex post facto* issue before proceeding to sentence. JA-36 (unnumbered docket entry).

Three predicate crimes were alleged—the arson, the marijuana conspiracy in 1995, and the marijuana conspiracy in 1996. Testimony as to Ventura's involvement with weapons in relation to the marijuana conspiracy was scant and contradictory. *See*, *e.g.*, JA-613 (Q: Did you ever know Kevin to have a gun on his person while he was managing the spot? A: Yes); JA-1399 (Ventura rarely carried a gun); JA-628 (Torrado and Ventura had guns in 1994, "during the time that [they] were managing the spot"); JA-428-29 (guns stored in the closet).

In the light most favorable to the government, then, the jury could have found that Ventura possessed (but not that he used or carried) a gun in 1995 in furtherance of the marijuana conspiracy at the time of the Montanez felony murder. But possession was not a crime in 1995.

Similarly, on Counts Four and Five, Ventura did not use or carry a weapon during or in relation to the murders because he was in the Dominican Republic at the time. JA-1405-06. Nor, given Jose's testimony that he did not use the weapon Ventura had given him in the shooting (JA-1146-47), did Ventura aid and abet the use or carrying of a firearm "during and in relation to" the homicides of Garrido and Penzo. Even if Ventura aided the Lafontaines' possession of a firearm (albeit not the weapon used in the shooting) in furtherance of the murders, the jury could not have found beyond a reasonable doubt that he did so *in furtherance of* the then-nonexistent marijuana conspiracy. JA-1431-32; JA-676; JA-989. Nor, before 1998,

was aiding and abetting possession a crime. In short, there was no "nexus between the firearm," the drug trafficking operation, and the murders. *See Finley*, 245 F.3d at 203.

With the caveat that arson is not a crime of violence and that remand is required on that basis (see Point I, above), Ventura recognizes that the jury could have found him guilty of the §924(j) offenses charged in Count One based on the predicate crime of arson. *United States v. Giraldo*, 80 F.3d 667, 674 (2d Cir.1996) (Indictments that are "worded in the conjunctive, charging violations of statutes that are worded in the disjunctive, can be supported by proof of either of the conjoined means of violating the act...."). But the jury's verdict does not indicate that it did so. *See United States v. Agrawal*, 726 F.3d 235, 250 (2d Cir.2013) (noting that general verdict of guilty may manifest legal error under *Yates v. United States*, 354 U.S. 298 (1957), where (1) "disjunctive theories of culpability" were submitted to jury, (2) it is "impossible to tell which ground the jury selected," and (3) "[one] of the theories was legally insufficient" (alteration in original)).[10] Certainly, there was no evidence that the conspirators had planned to use firearms in connection with the arson, and Ventura denied involvement. JA-406; JA-1442. Rather, the evidence was that Torrado carried weapons regularly (see, e.g., JA-

[10] *But see United States v. Vasquez*, 672 Fed.Appx. 56, 61 (2d Cir.2016) (Summary Order) ("[W]here a challenged §924 verdict undoubtedly rests on a valid drug-trafficking predicate, no *Yates* concern arises from a possible defect in a related 'crime of violence' predicate.").

1399 [Torrado "always had a gun. He was a gun fanatic."]) and that he did not intend to shoot Montanez.

The error was plain because the evidence proved, at most, aiding and abetting possession as to Counts Four and Five, and as to Count One, the basis for the jury's verdict cannot be determined. *See Weaver*, 450 U.S. at 29; *Prado*, 815 F.3d at 100. But in 1995 and 1996, neither possession in furtherance nor the aiding and abetting thereof violated §924(c). Use of the post-1998 language, therefore, substantially prejudiced Ventura because there is a "reasonable probability that the error affected the outcome of the trial" and that but for the inclusion of the "possession in furtherance of" language and the corresponding instruction on constructive possession, Ventura would not have been convicted of these counts. *See United States v. Marcus*, 628 F.3d 36, 42 (2d Cir.2010) (internal citation omitted). Under the circumstances, the Court should consider this error, which "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" and vacate the convictions. *See* Fed.R.Crim.P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *United States v. Olano*, 507 U.S. 725, 736–37 (1993) ("An error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.").

III. Ventura's Conviction on Counts One, Four, and Five Should Be Vacated Because the District Court's Aiding and Abetting Instruction Was Insufficient Under *Rosemond v. United States*, 134 S.Ct. 1240 (2014).

A. Standard of Review

The standard of review discussed in Point II, *supra*, is applicable to Point III as well.

B. Applicable Law

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal" as is "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. §2. A defendant may be convicted of aiding and abetting a §924(c) violation if he "actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 134 S.Ct. 1240, 1243 (2014).[11] Thus, aiding and abetting a §924(c) violation "requires both an affirmative act furthering the underlying offense and an intent to facilitate that offense's commission." *United States v. Robinson*, 799 F.3d 196, 199-200 (2d Cir.2015) (citing *Rosemond*, 134 S.Ct. at 1245). "The intent requirement is

[11] *Rosemond*, like *Johnson* (see fn 6, *supra*), must be applied to Appellant's case because direct review of his conviction is pending.

satisfied when the defendant has advance knowledge that one of his confederates will carry a gun." *United States v. Babilonia*, 2017 WL 1382192, at *3 (2d Cir. Apr. 17, 2017) (citation omitted). However, the required prior knowledge that a firearm will be used "means knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Rosemond*, 134 S.Ct. at 1249–50.

Crucially, a defendant does not make a choice to participate in a violent crime knowing it will involve a firearm if "that knowledge comes too late for him to be reasonably able to act upon it." *Rosemond*, 134 S.Ct. at 1251. *See also Prado*, 815 F.3d at 102 (concluding that a jury instruction was erroneous because it "provide[d] no instruction that the jury must find that the defendants had *advance knowledge* of the gun at a time that they could have chosen not to participate in the crime.") (quoting *Rosemond*, 134 S.Ct. 1249); *United States v. Rivera*, 2017 WL 659940, at *2 (2d Cir. Feb. 15, 2017), *cert. denied*, (U.S. June 12, 2017) (in accepting a plea of aiding and abetting a §924 offense, "[a] factual basis exists for the requisite intent if the 'defendant has prior knowledge that a firearm will be used' and an opportunity to 'to walk away.'") (citation omitted).

C. Discussion

This Court should follow *Prado*, vacate Ventura's convictions on Counts One, Four and Five, and remand to the district court for further proceedings because the district court's instruction on aiding and abetting, which omitted an "advance knowledge" requirement (see JA-1630-34), was plainly erroneous under *Rosemond*. The court "caution[ed]" the jury only that, "you must find that the defendant performed some act that facilitated or encouraged the actual using, carrying of, or possession of the firearm in relation to one or both of the predicate crimes." JA-1633. This instruction was incorporated by reference to Counts Four and Five. Tr. JA-1638-39. As in *Rosemond*, the instruction contains no language about the timing of the knowledge. *Compare Rosemond*, 134 S.Ct. at 1244 (summarizing district court's instruction).

Because the jury instruction was plainly erroneous, and because the instruction affected Ventura's substantial rights, the case must be remanded for further proceedings. "In the ordinary case, an error is prejudicial where there is a 'reasonable probability that the error affected the outcome of the trial.'" *Prado*, 815 F.3d at 102 (citation omitted). *See also Bruno v. United States*, 383 F.3d 65, 79 (2d Cir.2004) (That the district court's instruction was an accurate statement of the law at the time of trial "is of no moment, . . . given that '[a]n error is 'plain' if it is

'clear' or 'obvious' at the time of *appellate consideration.*'"). (citations omitted) (emphasis in original)

There is a reasonable probability that, as to Counts Four and Five, the jury would not have convicted Ventura of aiding and abetting the discharge of the firearm that killed Garrido and Penzo if it had been properly instructed as to the advance knowledge requirement. Ventura disclaimed any knowledge of the plan. JA-1401-02. Ventura was in the Dominican Republic several weeks before the deaths, and the weapon that Jose used was not the one that Ventura had given him. JA-1405-06; JA-1146-47. Telephone records are lost to history but there was testimony that Torrado had been the one to call Jorge to set the plan in motion on August 19, 1996. JA-1146-47. In contrast to *United States v. Young*, 516 Fed.Appx. 85, 92 (2d Cir.2014), where the Court held that the defendant's encouraging of the "actual using, carrying of, or possession" of a firearm in the course of a robbery, indicated that "the jury necessarily also had to find that he had advance knowledge of the firearm-related conduct," the evidence here was insufficient to establish that Ventura necessarily knew that Jose would use a firearm on the date and time in question. At best, the evidence was inconclusive.

Additionally, the underlying crime charged in Counts Four and Five was the narcotics conspiracy, *not* the crime of violence/murder-for-hire of Garrido and Penzo. There was no evidence that, *as to the narcotics conspiracy*, Ventura ever

aided and abetted Jose's use, carrying, or possession of a gun because, at the time of the Garrido and Penzo homicides, neither Jorge, Jose, nor Ventura were involved in the charged marijuana conspiracy. *See*, *e.g.*, JA-1431-32; JA-676; JA-989. *See also* JA-1704-05 (jury's note asking whether a finding that Ventura had sold marijuana during the commission of the Montanez murder would suffice for a finding that he had sold marijuana during the Garrido/Penzo murders). Because, the individual who possessed the gun was not a member of the marijuana conspiracy, nor was he given that gun by a member of the conspiracy, and his actions were, therefore, not in furtherance of that conspiracy under any theory of law.

On Count One, testimony established that Torrado was frequently armed and that he put his gun on while preparing with Ventura on the morning of April 11, 1995. JA-1399; JA-373-74. Thus the weight of evidence as to *Rosemond* error is against Appellant. But the inadequacy of the aiding and abetting charge, combined with the erroneous instruction as to the elements of the §924(c) offense (see Point II, *supra*), make remand appropriate here. *See also Prado*, 815 F.3d 93, at 103 (quoting *Olano*, 507 U.S. at 736-37).

IV. Ventura's Case Should Be Remanded for Resentencing Because the District Court Erred in Imposing Two Consecutive 20-Year Sentences on Count Four and Five, Which Occurred As One Continuous Incident.

A. Standard of Review

Sentences are reviewed for reasonableness, which "involves consideration not only of the sentence itself, but also of the procedures employed in arriving at the sentence." *United States v. Gallagher*, 469 Fed.Appx. 3, 4 (2d Cir.2012) (citation omitted). This review has "two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir.2008) (en banc). This Court "review[s] sentences for procedural reasonableness under a deferential abuse-of-discretion standard." *Robinson*, 799 F.3d at 201. This standard "incorporates de novo review of questions of law . . . and clear-error review of questions of fact." *Cavera*, 550 F.3d at 189 (quotation omitted); *United States v. Wallace*, 447 F.3d 184, 186 (2d Cir.2006) (considering whether §924(c)(1) authorizes two convictions for two predicate offenses committed with a single use of a firearm).

If the Court finds no error in the sentencing procedure, the Court then examines the substantive reasonableness of the sentence in light of the "totality of the circumstances" (*United States v. Lee*, 653 F.3d 170, 173 (2d Cir.2011)) and "reverses only when the district court's sentence cannot be located within the range

of permissible decisions" (*United States v. Oehne*, 698 F.3d 119, 124 (2d Cir.2012) (citation omitted)).

B. Applicable Law

In *Finley*, 245 F.3d at 206, this Court considered the "wildly divergent interpretations" of §924(c)(1)'s "second or subsequent convictions" enhanced penalty provision in the context of two predicate offenses (possession of narcotics with intent to distribute, and distribution) and "a single firearm continually possessed." The *Finley* Court discussed the Circuits' "widely-shared view that the statute's text is ambiguous," and that the lack of a clear manifestation of statutory "intent[] to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct" counseled in favor of lenity. *Id.*, at 207 ("[I]f ambiguity, doubt will be resolved against turning a single transaction into multiple offenses") (internal citations omitted). The Court concluded that, "In our view, it was not Congress's intention in using the words, 'a second or subsequent conviction' to secure the imposition of a second, mandatory 25-year sentence where the two criminal transactions, as in this case, are so inseparably intertwined." *Id.*, at 208.

In *Wallace*, 447 F.3d at 187–89, this Court applied *Finley*'s reasoning to decide that a single firearm possessed in connection with a narcotics conspiracy and the firing of the same weapon into a crowd of two or more persons in

furtherance of that same narcotics conspiracy could only lead to imposition of a single sentence under §924(c) because "a defendant who commits two predicate offenses with a single use of a firearm may only be convicted of a single violation of §924(c)(1)." *Wallace*, 447 F.3d at 188.

C. Discussion

The death of Carlos Penzo was a tragic accident that occurred during Jose's flight from the Garrido murder, after Penzo attempted to wrest the firearm away from Jose. *See* JA-1008-09; JA-1151; JA-1173 ("I was not intending to shoot him; I was just trying to run out of the building."). Under *Finley* and *Wallace*, and the cases discussed therein, the district court erred in sentencing Ventura twice for having aided and abetted the "continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct." *Finley*, 245 F.3d at 207. The second 20-year term of imprisonment was procedurally and substantively unreasonable and the case should be remanded for resentencing accordingly.

V. Ventura's Case Should Be Remanded for Resentencing Because the District Court Erred in Concluding that 18 U.S.C. §924(j) Incorporates the Mandatory Minimum Sentences in 18 U.S.C. §924(c)

A. Standard of Review

The standard of review discussed in Point IV, *supra*, is applicable to Point V as well.

B. Applicable Law

"A person, who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall – (1) if the killing is a murder . . . be punished by death or by imprisonment for *any* term of years or for life . . . ." 18 U.S.C. §924(j)(1) (emphasis supplied). Section 924(c), in turn, contains mandatory minimum terms of imprisonment for the "use," "brandishing," or "discharge" of a firearm and for "second or subsequent conviction[s]" of such conduct, each of which must run consecutively to any other sentence imposed and to each other.

The Circuits are split on whether a conviction under §924(j) necessarily results in a mandatory minimum sentence under the penalty provisions of §924(c). In *Young*, 561 Fed.Appx. at 94, this Court, in a non-precedential summary order, ruled that §924(j) "incorporates the penalty enhancements of §924(c)." Circuits including the Third, Fourth, Eighth, Ninth, and Tenth agree. *See United States v. Berrios*, 676 F.3d 118, 143 (3d Cir.2012); *United States v. Bran*, 776 F.3d 276, 281-82 (4th Cir.2015), *cert. denied*, 136 S.Ct. 792 (2016); *United States v. Allen,* 247 F.3d 741, 769 (8th Cir.2001),*vacated on other grounds*, 536 U.S. 953 (2002); *United States* v. *Charley*, 417 Fed.Appx. 627, 629 (9th Cir.2011); *United States v. Battle,* 289 F.3d 661, 666 (10th Cir.2002).

In addition, the First Circuit has observed that "the statutory requirement that . . . [a sentence] run consecutively . . . arguably applies to section 924(j)." *United States* v. *García-Ortiz*, 657 F.3d 25, 31 (1st Cir.2011).

But the Eleventh Circuit has concluded that §924(c)'s prohibition on concurrent sentences "applies only to 'a term of imprisonment imposed on a person under this subsection,' which does not extend to Section 924(j)." *United States* v. *Julian*, 633 F.3d 1250, 1253 (11th Cir.2011) (quoting 18 U.S.C. §924(c)(1)(D)(ii)). Similarly, the Sixth Circuit noted, in a related context, that §924(j)(1) permits "the judge to sentence the defendant to a term of years." *United States v. Galan*, 436 Fed.Appx. 467, 471 (6th Cir.2011) (internal alternations omitted).

With respect to the honorable courts that have found the mandatory minimum penalty provisions of §924(c) are incorporated into §924(j), Appellant respectfully suggests that their reasoning is unpersuasive.

"[T]he starting point for interpreting a statute is the language of the statute itself.'" *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.*

(citation omitted). Similarly, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Robinson*, 702 F.3d 22, 31 (2d Cir.2012) (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001)) (internal quotation marks omitted).

Concurrently, it is a "cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted). Whether §924(j) by its language requires a mandatory minimum term of imprisonment or, instead, a sentence of imprisonment of "any term of years," therefore, turns on the purpose and meaning of the word "any."

Applying the foregoing principles, it may be presumed that Congress "intentionally and purposely" omitted mandatory minimum and consecutive sentence terms from §924(j) because incorporating the penalty provisions of §924(c) into §924(j) renders meaningless Congress's express grant of authority to impose imprisonment for "*any*" term of years. *See Williams*, 529 U.S. at 404.

C. Discussion

Here, the district court relied on the reasoning in *Young* to find that "the mandatory minimum sentence on Counts One, Four and Five is a total of 45 years which must run consecutively to any other sentence imposed." JA-1735. The

district court found that "the defendant's contention that a sentence imposed pursuant to Subsection J conviction is not 'imposed under'. . . Subsection C would apply Section 924(c)'s sentencing enhancements to a defendant who uses a firearm in a crime of violence . . . but not one who murders in such situations, an unlikely result we aim to avoid." JA-1734-35 (quoting *Young*, 561 Fed.Appx. at 93). But the district court erred because application of the statutory penalty scheme in §924(c) renders the "any term of years" instruction in §924(j) meaningless.

Unlike in *Young*, where the Court the record indicated that the district judge would have imposed the same sentence in any event, the error here was not harmless. *See Young*, 561 Fed.Appx. at 94; JA-1736 (noting displeasure that "mandatory minimums effectively take away a Court's discretion to impose a sentence which is consistent with the other congressional mandate which is to impose a sentence which is sufficient but no greater than necessary to comply with the sentencing factors set out in the statute which is an exceedingly wise standard."). Remand for resentencing without the application of the mandatory minimum sentences in §924(c) is warranted.

VI. The Case Should Be Remanded for Resentencing on Counts Two and Three Because the Jury Did Not Find Either of the Penalty Enhancing Elements of 18 U.S.C. §1958 Beyond a Reasonable Doubt and Ventura Could Therefore Be Sentenced to No More Than Ten Years on Each Count.

A. Standard of Review

The standard of review discussed in Point IV, *supra*, is applicable to Point VI as well.

B. Applicable Law

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thirteen years later, *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013) extended *Apprendi* to facts that increase the prescribed statutory minimum as well.

Title 18 U.S.C. §1958(a), provides distinct levels of culpability based on the severity of injury to the intended victim—a maximum of ten years for anyone who "travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to

do so," an enhanced maximum of twenty years "if personal injury results," and a sentence of "death or life imprisonment" "if death results." 18 U.S.C. §1958(a).

Statutes with similar penalty enhancements "if death results" have construed the "death results" language as an element that must be submitted to the jury and proved beyond a reasonable doubt. In *Burrage v. United States*, 134 S.Ct. 881, 884 (2014), the Supreme Court applied *Alleyne*, 133 S.Ct. at 2162-63, holding that, "[T]he 'death results' enhancement [in 21 U.S.C. §841]. . . is an element that must be submitted to the jury and found beyond a reasonable doubt." Similarly, in *Jones v. United States*, 526 U.S. 227, 252 (1999), the Court held that 18 U.S.C. §2119, which provides an enhanced penalty for the taking of a motor vehicle from another by force and violence "if death results" established "three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." This Court reached the same conclusion with respect to the "death results" provision of 18 U.S.C. §1952(a)(3)(B) in *United States v. Friedman*, 300 F.3d 111, 127 (2d Cir.2002).

C. Discussion

In its instruction to the jury on Counts Two and Three, the district court omitted the statute's penalty enhancing elements, "if personal injury results," and "if death results." *See* JA-1641. Although trial counsel did not object to the district

court's jury instruction, counsel argued before sentencing that the lack of a specific jury finding that death had resulted from the acts charged in Counts Two and Three meant that a statutory sentence of life imprisonment could not be imposed. (JA-43 at Dkt. No. 337). The district court agreed with the government's position (JA-43 at Dkt. No. 336) that the jury's finding that "the defendant's conduct was a 'but for' cause and 'a substantial factor in causing' the deaths of Garrido and Penzo," meant that "the jury necessarily found beyond a reasonable doubt that Garrido's and Penzo's 'deaths resulted' from the defendant's conduct and therefore the mandatory life sentence under Section 1958 applied to Counts Two and Three." JA-1732-33.

With respect, the district court erred. Counts Two and Three are based on separate statutory elements from Counts Four and Five and required proof of distinct facts not required for conviction on Counts Four and Five including that Ventura traveled in interstate or foreign commerce or used facilities of interstate or foreign commerce "with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value," or that he conspired to do so. *See* 18 U.S.C. §1958(a). Section 924(j), in contrast, provides for imposition of a sentence (as applicable here) "of imprisonment for any term of years or for life" for an individual who, in the course of a crime of violence

or drug trafficking crime, "causes the death of a person through the use of a firearm." *See* 18 U.S.C. §§924(c)(1)(A) and (j). Although it was logical to find that the same discharge that killed Garrido and Penzo in satisfaction of the elements of §924(j) necessarily also resulted in their deaths, logic alone does not satisfy §1958(a)'s separate statutory requirements.

Nor did the conviction on Counts Four and Five necessarily result from the jury's conclusion that Ventura's actions caused the deaths. Trial testimony established the existence of longstanding enmity between Torrado and Garrido (JA-680-82; JA-842-43; JA-1385-92) as well as between Jorge and Garrido (JA-998-99; JA-1076-80; JA-1392-95), and evidence that Jose was scared of his brother Jorge (JA-1244). And the defense, in summation, offered a powerful alternative explanation to the jury of the motives of Torrado and Jorge to have Garrido killed. JA-1555-64. It would certainly have been possible that the jury found that the discharge of the weapon killed Garrido and Penzo, without finding that Ventura's international phone calls or offer of payment (which he denied making in any case (JA-1406-07; JA-1404) caused the events leading to the discharge of the gun.

Without a specific finding that the allegations in Counts Two and Three resulted in death, it was, therefore, error to conclude that Ventura's convictions on

Counts Two and Three required imposition of enhanced sentences of life imprisonment rather than the otherwise applicable ten-year maximum.

The error was not harmless because the district court indicated its displeasure with the statutory mandatory minimums (JA-1736) and that neither party should take the sentence imposed as evidence that the district court viewed it as appropriate. JA-1739-40. It is not improbable that, but for its erroneous conclusion that the "death results" element was satisfied even without a jury finding on that point, the district court would, on this record, have imposed a sentence less than life imprisonment. Accordingly, the error was not harmless, the sentence was unreasonable, and the case should be remanded for resentencing with application of the ten-year maximum on Counts Two and Three.

VII. The Evidence Was Insufficient to Convict Ventura on Counts One Through Five Beyond a Reasonable Doubt.

A. Standard of Review

This Court reviews challenges to the sufficiency of the evidence *de novo*. *United States v. Naiman,* 211 F.3d 40, 46 (2d Cir.2000). The standard of review is deferential, and the conviction will not be disturbed for legally insufficient evidence "if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Ward*, 505 Fed.Appx. 18, 22 (2d Cir.2012) (citation omitted). In its evaluation, the Court "must view the evidence in the light most favorable to the government, crediting every inference

that could have been drawn in the government's favor and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir.2008) (internal citations, alterations, and quotation marks omitted).

B. Applicable Law[12]

As to the violations of 18 U.S.C. §924(j) charged in Counts One, Four, and Five, the jury was required to find beyond a reasonable doubt (1) that Ventura committed a crime of violence [on Count One only] or drug trafficking crime [on Counts One, Four, and Five]; (2) that he knowingly used or carried a firearm during and in relation to one or both the predicate crimes, or possessed a firearm in furtherance of one or both of the predicate crimes, or that he aided and abetted another in doing so; (3) that in the course of using or carrying the firearm during and in relation to one or both of the predicate crimes, or possessing it in furtherance of one or both of the predicate crimes, Ventura caused the death[s] of Montanez, Garrido, and Penzo; and (4) that the death[s] qualif[y] as murder. *See* JA-1609-10; JA-1637-38.

As to the violations of 18 U.S.C. §1958 charged in Counts Two and Three, the jury was required to find beyond a reasonable doubt (1) that Ventura traveled

[12] By summarizing the elements of each offense as charged to the jury in the following section, Appellant does not intend to waive his arguments in points I through VI herein, concerning the legal deficiencies of the charge and of the jury's findings.

in interstate or foreign commerce, or used a facility of interstate or foreign commerce, or caused another to travel in interstate or foreign commerce or to use a facility of interstate or foreign commerce; (2) that this interstate or foreign conduct was done with the intent to help bring about the murder of another person; and (3) that Ventura agreed to pay money or anything else of value to have this murder carried out, or that he conspired to do so. JA-1642-43.

As to each count, the district court also charged the jury on aiding and abetting liability. *See* JA-1630-31; JA-1638-39; JA-1643.

C. Discussion

As discussed at some length at pages 3 to 14, *supra*, and in the defense's summation at trial (JA-1527-37; JA-1543-1554) the inconsistencies in the trial testimony are notable. Taken together, the testimonial evidence was inconclusive, at best, that Ventura had had any role in the charges of conviction. Ventura denied any involvement in the offenses (JA-406; JA-1442; JA-1401-02), and the defense maintained that his passport, showing travel to the Dominican Republic from August 6, 1996 to November 11, 1996 called the credibility of the Lafontaines' testimony into serious doubt. JA-1405-06; JA-1563. Moreover, the defense, through cross examination and through the testimony of Rosalba Munoz (JA-1337-54), offered a compelling alternative explanation for the deaths of Garrido and Penzo, namely Garrido's confrontations with both Torrado (JA-680-82; JA-718-

22; JA-842-44; JA-1385-92) and Jorge (JA-1075-80; JA-1392-95), the longstanding friendship between Torrado and Jorge (JA-958-61; JA-1040), and the fact that Jose was scared of his brother (JA-1244). *See also* JA-1555-64 (summation).

In light of the witnesses' inconsistencies and the significant doubt raised as to Ventura's guilt, the high standard of "beyond a reasonable doubt" was not met. Ventura's convictions should be vacated and the case remanded for further proceedings accordingly.

CONCLUSION

Wherefore, for the reasons set forth above, Ventura's conviction should be vacated and the case remanded to the district court for further proceedings. In the alternative, the case should be remanded for resentencing without application of the mandatory minimum terms of imprisonment on Counts One, Four, and Five; with a 10-year maximum sentence on Counts Two and Three; and without imposition of a second 20-year consecutive term of imprisonment on Count Five in any event.

Dated: July 10, 2017
New York, New York

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,854 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

s/John Meringolo
John Meringolo, Esq.

Attorney for Defendant-Appellant
Kevin Ventura

SPECIAL APPENDIX

SPECIAL APPENIDIX TABLE OF CONTENTS

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.
KEVIN VENTURA

JUDGMENT IN A CRIMINAL CASE

Case Number: S3 1:09CR01015-001 (JGK)

USM Number: 70750-054

SETH GINSBERG and CHARLES CARNESI
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

X was found guilty on count(s) COUNTS ONE THROUGH FIVE OF THE SUPERSEDING INDICTMENT
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 924(j)	Death Through Use of a Firearm	4/11/2995	1
18 USC 1958	Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire	8/31/1996	2
18 USC 1958	Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire	8/19/1996	3
18 USC 924(j)	Death Through Use of a Firearm	8/19/1996	4 and 5

The defendant is sentenced as provided in pages 2 through 5 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) _____

X Count(s) ALL OPEN COUNTS ☐ is X are dismissed on the motion of the United States.

☐ Underlying _____ ☐ is ☐ are dismissed on the motion of the United States.

☐ Motion(s) _____ ☐ is ☐ are denied as moot.

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.

AUGUST 13, 2015
Date of Imposition of Judgment

Signature of Judge
JOHN G. KOELTL, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

8/14/15
Date

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/20/2015

DEFENDANT: KEVIN VENTURA
CASE NUMBER: S3 1:09CR01015-001 (JGK)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life plus 45 years consecutive.

–The sentence shall be imposed as follows: Life on Counts 2 and 3, each to run concurrently, and to be followed by 5 years on Count 1, 20 years on Count 4 and 20 years on Count 5, each to run consecutively with each other and consecutive to Counts 1 and 2.

X The court makes the following recommendations to the Bureau of Prisons:
–That the defendant be incarcerated in the New York City area, so that he may be close to his family.

☐ 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 _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KEVIN VENTURA
CASE NUMBER: S3 1:09CR01015-001 (JGK)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years.

–Supervised release shall run concurrently on Counts 1 through 5.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit *confiscation* of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KEVIN VENTURA
CASE NUMBER: S3 1:09CR01015-001 (JGK)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$	$

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

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

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

Name of Payee	Total Loss*	Restitntion Ordered	Priority or Percentage

TOTALS	$ $0.00	$ $0.00

☐ Restitution amount ordered pursuant to plea agreement _____

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

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

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* 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: KEVIN VENTURA
CASE NUMBER: S3 1:09CR01015-001 (JGK)

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $_____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

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

F X Special instructions regarding the payment of criminal monetary penalties:

–The special assessment shall be due immediately.

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 and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

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

Criminal Notice of Appeal - Form A

NOTICE OF APPEAL

United States District Court

Southern District of New York

Caption:

United States v.

Kevin Ventura

Docket No.: 09 Cr. 1015

Hon. John G. Koeltl
(District Court Judge)

Notice is hereby given that Kevin Ventura appeals to the United States Court of Appeals for the Second Circuit from the judgment ✓, other [ ] (specify)

entered in this action on August 14, 2015 (date).

This appeal concerns: Conviction only [ ] Sentence only [ ] Conviction & Sentence [✓] Other [ ]

Defendant found guilty by plea [ ] trial [✓] N/A [ ]

Offense occurred after November 1, 1987? Yes [✓] No [ ] N/A [ ]

Date of sentence: August 13, 2015 N/A [ ]

Bail/Jail Disposition: Committed [✓] Not committed [ ] N/A [ ]

Appellant is represented by counsel? Yes ✓ | No | If yes, provide the following information:

Defendant's Counsel: Roland R. Acevedo - Scoppetta, Seiff, Kretz & Abercrombie

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