UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee

v.

Damien Miguel Zepeda,
Defendant-Appellant

C.A. # 10-10131

D.C. #08-01329-ROS
Arizona (Phoenix)

ON APPEAL FROM JUDGMENT IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA, PHOENIX DIVISION,

HONORABLE ROSLYN O. SILVER, PRESIDING

OPENING BRIEF FOR APPELLANT

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I. ISSUES PRESENTED

A. Were defendant's Confrontation Rights violated when inculpatory, testimonial documents were introduced through agents who hadn't observed or performed the actual testing or certification?

B. Considering substantial intoxication evidence, was failure to instruct that voluntary intoxication may have negated requisite specific intent plain, error requiring reversal?

C. Did prosecutorial vouching, perjury allegations, substantial government interference with key witnesses' testimony, and an unchallenged sleeping juror warrant mistrial; and does plain error warrant reversal and remand where collective error remained uncured by instruction?

D. Did flagrant, repetitious misrepresentation of crucial evidence which remained uncured unfairly encourage the jury's retributive "blanket verdict"?

E. Was defendant deprived of his Sixth Amendment Right to Effective Assistance of Counsel?

F. Was defendant's Motion for Directed Verdict erroneously denied despite insufficient evidence to support the convictions?

G. Does cumulative trial error require reversal and remand?

H. Was imposition of an excessive 1083 month sentence procedurally and substantively unsound where parties misapprehended that the judge lacked any discretion to alter imposition of mandatory, consecutive sentences?

II. STATEMENT OF THE CASE

A. Nature of the Case

1. District Court Subject Matter Jurisdiction

Damien Zepeda appeals his conviction and sentence before the Honorable Roslyn Silver, U.S. District Court, District of Arizona, (Phoenix), on a nine count Indictment alleging Counts: **(1**) Conspiracy and Aid and Abet, 18 U.S.C. §1153, 371, and 2; **(2)** CIR - Assault Resulting in Serious Bodily Injury, Aid and Abet, 18 U.S.C.§1153, 113(a)(6), and 2; **(3**) Use of Firearm During Crime of Violence, Aid and Abet, 18 U.S.C.§ 924(c)(1)(a)and 2; **(4, 6, 8**) CIR – Assault with Dangerous Weapon, Aid and Abet 18 U.S.C.§ 1153, 113(a)(3) and 2; and **(5, 7, 9)** Use of Firearm During Crime of Violence, Aid and Abet, 18 U.S.C.§924(c)(1)(A) and 2. (CR3;ER-I-1) The District Court had jurisdiction pursuant to 18 U.S.C. §3231.

2. Court of Appeals Subject Matter Jurisdiction

This Court has appellate jurisdiction pursuant to 28 U.S.C.§1291 and 18 U.S.C. §3742.

3. Timely Filed Notice of Appeal

[1] Notice of Appeal was timely filed on March, 25, 2010 after Judgment

[1] "CR" refers to Clerk's Record; "ER" refers to Excerpts of Record; "RT[date]" refers to Reporter's Transcript. "PSR" refers to Presentence Investigation Report, submitted herewith under seal.

entered on March. 24, 2010. (CR167;ER-I-56a)

4. Bail Status

Mr. Zepeda remains in federal custody until September, 2087.

B. District Court Proceedings and Disposition

A November 12, 2008, Indictment charged brothers Damien, Matthew, and Jeremy Zepeda, age 23, 21, 22, respectively at the time of the offense, with the aforementioned violations. Matthew plead guilty to counts 2 and 3 and received 75 months imprisonment, plus restitution. Jeremy plead guilty to misprision of felony and received 3 years imprisonment. Jeremy's sentence was reduced to time served after testifying here. (PSR-1.a)

On October 29, 2009, following a six day jury trial, Damien was convicted of everything. (CR119;**ER-I**-88) On March 22, 2010, Damien was sentenced to a 1083 month prison term, ordered to remit $45,252.21 in restitution, and serve 5 years supervised release. (RT-3/23/10-pp.4-6);(**ER-I**-61-63)

III. STATEMENT OF FACTS

A. Background

October 25, 2008, after hours of drinking alcohol and smoking marijuana, Damien Zepeda and his brothers, Matthew and Jeremy Zepeda arrived at Dallas Peters' residence on the Ak–Chin Reservation in Arizona. Also present were Stephanie Aviles, Peters' wife, Jennifer Davis, XXX (a minor), Kassee Robles, Robles' two children (asleep indoors), and possibly another male.

Outside, Damien and Stephanie conversed, then argued. Damien struck Stephanie with his hand and turned to leave. Gunfire erupted. While fleeing, Damien encountered Peters. The men fought to control a handgun. Matthew admitted firing warning shots before hearing other gunfire. Peters was hospitalized with numerous gunshot wounds. No death resulted. Damien was convicted of everything and received a virtual life sentence, despite being only 24, with no prior felony or federal offenses.

B. Intoxication Evidence

Damien began smoking marijuana after arriving home from work at 3 PM. (**ER-IV**-RT10/27/09-pp.739;759) From 7:30 PM. he and Matthew played video games, drank alcohol, and smoked marijuana before leaving at 9:30 p.m. They visited relatives before Jeremy joined them. (RT10/27/09-

pp.741-745;766) They *continued* to drink alcohol, smoke pot, and "cruise" and therefore avoided being stopped by police. (**ER-IV**-RT10/27/09-pp.744-745;746;766;758;769,785) Damien continued smoking and drinking while riding, then returned home, retrieved *more* marijuana, and continued smoking. (**ER-IV**-RT10/27/09-pp.759;767-768;785)

Matthew testified that between 8 and 9 p.m., they drank beer until leaving. Damien continually smoked marijuana before Jeremy's arrival. While driving, they shared a "cigar size" marijuana cigarette. (**ER-II**-RT10/21/09-pp.210-213) With Jeremy, they purchased *more beer*, then drove, drank, and smoked marijuana for 35 minutes. They returned home for *more* marijuana. (RT10/21/09-pp.213-215) After leaving again, Damien "looked, like [he was] a little buzzing or something." (RT10/21/09-p.215) They continued drinking and smoking afterward. (RT10/21/09-pp.207-218);(**ER-II**-RT10/21/09-pp.210-218)

Jeremy testified that the men smoked marijuana for at least 30 min. before arriving at Ak-Chin and were concerned about avoiding police. (**ER-III**-RT10/22/09-pp.517;539-542)

During closing, Prosecutor 2 emphasized that defendants were "drunk and high." Damian stalked Peters' house, "going to shoot somebody that night *because* he's angry and he's high and he's drunk." (**ER-V**-

RT10/28/09-pp.838;844;873-874) No jury instruction suggested that voluntary intoxication may negate the existence of specific intent, which was a ubiquitously required element. (**ER-V**-RT10/28/09-pp.812-828)

C. Inculpatory statements and conspiratorial intent

The government inflammatorily urged that Damien "conspired" "with his brothers to commit [] assault resulting in serious bodily injury and assault with a dangerous weapon." "[L]ooking for trouble . . [Damien] sent his brothers out around the house as they readied themselves for an attack upon the occupants . . . ." (RT10/20/09-pp.79-80;86-87)

That day, Damien worked, slept, and showered before Matthew returned between 7:30 and 8:00 PM. Damien phoned ex-girlfriend Stephanie. XXX replied that Stephanie couldn't talk while receiving a tattoo at Peters' Ak-Chin residence. (**ER-IV**-RT10/27/09-pp.742-743)

Matthew testified that after supper, Damien suggested they "check out this party." They began drinking. Without weapons, they drove, meandered, and eventually met Jeremy. (**ER-II**-RT10/21/09-pp.207-210) Matthew sat in back and heard no conversation between Damien and the driver over radio noise. (RT10/21/09-p.210) Matthew didn't know what Damien told Jeremy about their destination. (**ER-II**-RT10/21/09-p.212)

They drove, drank, smoked marijuana, then returned home for *more* marijuana. (**ER-II**-RT10/21/09-p.214) The prosecutor asked, "[F]rom the time you picked up Jeremy until you got to the house . . . What were you guys talking about doing?" Matthew replied, "We were just talking about just drinking and smoking. That was about it." (**ER-II**-RT10/21/09-p.215) After departing again, Matthew continued drinking and smoking, remaining inattentive and unaware of their destination. Again, Matthew rode in back with Jeremy and heard no conversation over radio noise. (**ER-II**-RT10/21/09-p.218)

Jeremy testified Damien called, "after dark" suggesting they attend a party. (**ER-III**-RT10/22/09-pp.506-507;511;515;538) Jeremy dressed in new, clean clothes. Damien arrived with another driver. (RT10/22/09-pp.512;514) In the car, loud music prevented Jeremy from hearing conversation between them. Damien and the driver, in front, didn't talk to Matthew and Jeremy, in back. (**ER-III**-RT10/22/09-p.515) Jeremy purportedly heard Damien tell the driver to "slow down" because Damien had "heat", which Jeremy construed as "a gun", although they smoked ["weed"]. (RT10/22/09-p.515-517)

Earlier by phone, Damien asked Jeremy if he knew that "Goofy" [Dallas] Peters, "got out" [of prison]. "Goofy" was Peters' nickname. (**ER-III**-RT10/22/09-pp.507-508;510); (**ER-IV**-RT10/27/09-p.740) Jeremy knew

Peters, not the nickname. (**ER-III**-RT10/22/09-pp.508;510;543) Damien mentioned Peters, but said nothing specific. (**ER-III**-RT10/22/09-p.508) The prosecutor asked, "During this time did Damien make any other statements about what his intentions were?" Jeremy responded, "No." (**ER-III**-RT10/22/09-p.517) Jeremy informed investigators Damien said they'd attend a party. (**ER-III**-RT10/22/09-p.540)

During Damien's cross-examination, Prosecutor 1 suggested Damien specifically told the men he intended to "go do some dirt" that night, despite repeatedly failing to elicit such evidence. (**ER-IV**-RT10/27/09-pp.769-770) Prosecutor 2 repeated this specific "dirt" misstatement *five times* during closing and twice misattributed it as Jeremy's testimony, suggesting it evidenced conspiracy and intent. (**ER-V**-RT10/28/09-pp.837-839;848;865)

D. Arrival at Ak-Chin

Damien traveled to Ak-Chin so Damien could speak with a former girlfriend, Stephanie who was getting tattooed at Peters'. (**ER-II**-RT10/21/09-pp.285-287);(**ER-IV**-RT10/27/09-pp.747-748;759;762) During Stephanie's recent incarceration, Damien provided childcare.(**ER-IV** RT10/27/09-pp.738;759) They'd exchanged letters, visits, phone calls, and remained friends after breaking up.(**ER-II**-RT10/21/09-pp.281;282;284;307). Damien knew that tattooist "Goofy" [Dallas] Peters, was recently released

from prison. (**ER-III**-RT10/22/09-p.510) Peters, a five time adult felon and registered sex offender, was convicted of kidnapping, firearm violations, armed robbery, burglary, home invasion, aggravated assault, and narcotics possession. He served 7 years imprisonment and was on probation. (**ER-II**-RT10/21/09-p.290); (**ER-III**-RT10/22/09-pp.590-597)

Under the circumstances, Damien was concerned about Stephanie's young son, and Stephanie's probationer status. (**ER-IV**-RT10/27/09-p.747;764;779);(**ER-II**-RT10/21/09-p.289) Otherwise, Damien didn't know Peters, and had no quarrel with him. (**ER-IV**-RT10/27/09-p.765)

Matthew didn't know Peters. When disembarking at Ak-Chin, Matthew retrieved a 12 gauge shotgun from under a car seat. (**ER-II**-RT10/21/09-pp.219;325) Damien instructed Matthew how to open or close the gun. (**ER-II**-RT10/21/09-pp.221-222;326) Matthew didn't give it much thought, and loaded it. (RT10/21/09-p.220) Matthew testified Damien later said,"[L]ike if something happens, just like give off a shot, like to scare somebody or something like that." (**ER-II**-RT10/21/09-p.223)

E. <u>Vouching and perjury allegations</u>

Without provocation, prosecutors informed the jury that Matthew and Jeremy plead guilty and would testify against Damien for sentence

reductions (RT10/20/09-p.85); (**ER-II**-RT10/21/09-pp.226-228); (**ER-III**-RT10/22/09-p.504-506)

On direct, when Matthew's testimony favored Damien, Prosecutor 2 contradicted him, then elicited that Matthew's plea agreement required truthful testimony. The plea judge was also this presiding, sentencing judge. (**ER-II**-RT10/21/09-pp.223-224;226-227). Then, Prosecutor 2 questioned Matthew about perjury. (**ER-II**-RT10/21/09-pp.227-228) Later, she twice objected "in front of the jury" that Matthew committed perjury. The judge gave equivocal curative instructions but ultimately denied defendant's mistrial motion.(**ER-II**-RT10/21/09-pp.341-344);(**ER-IV**-RT10/27/09-p.731)

Afterward, Matthew concurred that *his plea agreement* averred that prior to reaching Peters', Damien said if Matthew heard shots he should fire something to scare people away. (**ER-II**-RT10/21/09-p.327) Contrary to prosecutorial misstatements, no evidence suggested Damien told Matthew to shoot in a particular direction (**ER-II**-RT10/21/09-pp.330-331), or that either man conspired or intended to injure anyone. (**ER-II**-RT10/21/09-pp.326-327;330;332;337);(**ER-III**-RT10/22/09-pp.423;424-426;432);(**ER-IV**-RT10/27/09-p.789)

The plea agreements weren't admitted into evidence.

F. Arrival at Peters'

Damien walked alone to Peter's front door. (RT10/27/09-p.755) He observed two men inside. (**ER-IV**-RT10/27/09-pp.751;755)

Peters answered the door. Damien asked for Stephanie. Peters complied. He saw no weapons, nor ever thought it necessary to call police. (**ER-IV**-RT10/27/09-pp.664-665;668) XXX testified that when Damien asked for Stephanie, he was crying and his arms were down by his side. XXX encouraged Stephanie to go outside and talk to him. (**ER-II-**10/21/09-pp.364-369) The men didn't argue, despite Damien's later request for privacy. Damien wasn't rude to Peters. (**ER-IV**-RT10/27/09-p.776);(**ER-III**-RT10/22/09-pp.606;609);(RT10/27/09-pp.680;751)

Matthew testified he and Jeremy remained aside the house: "We didn't even know what we were doing there . . . we were just talking . . .like, 'What are we doing? What is going on?'" Matthew thought nothing particular would occur and didn't know why he was there. (**ER-II**-RT10/21/09-pp.328;329) Matthew saw no other gun that evening. (**ER-III**-RT10/22/09-p.425)

Jeremy testified they'd disembarked in an unfamiliar desert location and began walking. (**ER-III**-RT10/22/09-pp.517-518). Once Jeremy recognized the neighborhood and realized Damien intended to speak to

Peters, he avoided involvement, considering family ties. (RT10/22/09-pp.519-520) Jeremy asked Matthew, "'Hey, what are we here for? We were supposed to be at a party?" Matthew didn't know. They remained aside the house. (RT10/22/09-pp.524;525) Contradicting himself and others, Jeremy testified Damien approached the front door carrying a pistol. (**ER-III**-RT10/22/09-pp.524;525;526;534-536;544-545)

G. <u>The Argument</u>

Damien testified Stephanie smelled of alcohol and became upset when he asked why she was there while on probation. Their argument "got out of hand." (**ER-IV**-RT10/27/09-pp.749-750;774;779;788)

XXX testified she and Peters went outside and observed the couple arguing. (**ER-II**-RT10/21/09-pp.369-370) Later, she saw them talking without arguing. XXX went inside, then heard louder conversation. (**ER-II**-RT10/21/09-p.372)

Peters testified observing the couple talking. (**ER-III**-RT10/22/09-p.609) Later, Peters told them to leave his property if they wanted to argue. They returned inside and didn't call police. (**ER-III**-RT10/22/09-pp.610); (**ER-I**-RT10/20/09-p.183); (**ER-IV**-RT10/27/09 pp.669;679)

H. Stephanie's Assault

Damien testified the argument escalated and Damien struck Stephanie with his hand, not a gun. (**ER-IV**-RT10/27/09-p.750)

Stephanie testified when she wouldn't leave with Damien, he grabbed her. She pushed back and in his pocket felt "something hard maybe – some kind of weapon – I know he didn't have one, but you never know what anybody is capable of having." (**ER-II**-RT10/21/09-pp.293-295) She turned to leave. He repeatedly hit her rear head with something hard (RT10/21/09-pp.295-296); however, Stephanie never saw Damien with a gun that evening. (**ER-II**-RT10/21/09-pp.297;306)

XXX returned outside, pulled Stephanie away, then fled. (**ER-II**-RT10/21/09-p.386). For some reason "she couldn't remember," they stopped and XXX saw Damien wave something "she couldn't see." Stephanie fell and XXX turned to see Damien pointing a gun toward her. Although XXX heard gunfire, she he didn't testify Damien fired then. (**ER-II**-RT10/21/09-p.388)

I. Gunfire

Matthew testified he heard gunfire, then thoughtlessly fired the shotgun. Next, Matthew testified he fired first, *before hearing any* gunfire, then fired again. (**ER-II**-RT10/21/09-pp.330-331) He fired both shots

aimlessly, "from the hip." He intended to scare people away and prevent further gunfire. Matthew neither saw nor expected to hit anyone. Darkness obfuscated his normally poor vision, rendering him "pretty much blind." (RT10/21/09-p.333) After being "reminded" of perjury, Matthew admitted firing the second shot despite seeing people on the patio. Remorseful, he hadn't intended to shoot or hurt, just scare someone. (**ER-III**-RT10/22/09-pp.426;428)

Damien heard gunfire as Stephanie ran, and sought cover in the backyard's darkness. (**ER-IV**-RT10/27/09-p.751)

Stephanie testified that after falling, she heard three gunshots "pop off . . .in the air . . .really fast." Then she saw Peters in the corner. (**ER-II**-RT10/21/09-p.298;299;314;315)

Peters testified that gunfire erupted while he urinated off the back patio. He saw no gunman. (**ER-III**-RT10/22/09-pp.611-612;615);(**ER-IV**-RT10/27/09-p.675) When he looked around the corner and saw XXX running, he grabbed and shielded her. He heard additional gunfire and bled, but felt no wound. Peters told XXX to go inside. (**ER-III**-RT10/22/09-pp.612-613;616-617) Supposedly locked out, Peters hid and viewed the approaching silhouette of an unidentified, armed man. (**ER-III**-RT10/22/09-pp.613;615;618-619)

During Peters' testimony, the judge acknowledged knowing that a juror was sleeping, but made no further inquiry. (**ER-III**-RT10/22/09-pp.620-621)

XXX heard gunfire while running, but didn't testify Damien was shooting then. Peters fell on her. (**ER-II**-RT10/21/09-pp.373-374;391) Although "completely pinned" under Peters, XXX somehow turned and saw Damien shooting from 40 feet away, in an unspecified direction. (**ER-II**-RT10/21/09-pp.380-381;393) Then, XXX saw *Jeremy - not Matthew* – holding a shotgun. He shot in an unspecified direction when she entered the house. (**ER-II**-RT10/21/09-p.374)

Before hearing gunfire, Jennifer Davis looked out and saw Stephanie run and trip. (**ER-I**-RT10/20/09-p.147) Damien stumbled, frantically searched for his pocket, then motioned as if inserting a gun magazine, which Jennifer heard click. (RT10/20/09-pp.159;184) Jennifer retreated, *then* heard gunfire, but didn't see Damien shoot. (**ER-I**-RT10/20/09-p.147) In back, she heard noise like "somebody was running through the street." Dallas and XXX stood against the house. (RT10/20/09-pp.147-149) She let XXX inside. (RT10/20/09-p.150) Later, Jennifer heard "little pellets hitting her living room window." (**ER-I**-RT10/20/09-pp.191;194)

Through blinds, Kassee Robles saw Damien pointing a gun toward the front door. Damien was "like walking backwards." She didn't hear or see

Damien fire. (**ER-II**-RT10/21/09-p.249;254;271;274) Kassee ran to another room, *then* heard gunfire. (**ER-II**-RT10/21/09-pp.250-251) Stephanie returned and said, "[t]hey shot in the air." (**ER-II**-RT10/21/09-p.274)

J. The Fight

Damien testified while fleeing gunfire, he encountered Peters, who was armed. (**ER-IV**-RT10/27/09-pp.751;753-754;782) Terrified, Damien battled him to control the weapon, and discharged it. (RT10/27/09-pp.753-754) Peters fell. Damien abandoned the gun and fled. (RT10/27/09-p.753) Damien heard more gunfire, hid, then fled. (RT10/27/09-p.754)

Peters testified hearing the second gunfire. Then he saw someone reloading a downward pointed weapon. Peters unsuccessfully tried to disarm him. (**ER-III**-RT10/22/09-pp.619;621) Peters ran back and saw another unidentifiable man with a downward pointed weapon. Peters rushed him and grabbed the gun. (**ER-III**-RT10/22/09-pp.622-623;624;627) Peters faced him and held the gun with both hands. (**ER-IV**-RT10/27/09-p.676) During a tug-of-war, Peters repeatedly triggered and discharged it, then fell. (**ER-III**-RT10/22/09-p.624) His opponent grabbed the gun and fled. (**ER-III**-RT10/22/09-p.625); (**ER-IV**-RT10/27/09-p.660)

Jeremy testified while walking away, he heard gunfire. Returning to check on his brothers, he saw Damien "having a tussle" with Peters. Jeremy

remained uninvolved since Damien apparently "had it under control." Jeremy observed no weapon. (**ER-III**-RT10/22/09-pp.527-528)

Matthew saw no other gun that night. (**ER-III**-RT10/22/09-p.425)

K. The Flight

Matthew testified after shooting again, Damien appeared, very frightened. Damien said "something like, 'I didn't do it; right?'" or, "'[a]re you all right?'" Matthew testified, "I'm not sure exactly what he said. . . . I was just too nervous, too scared to think of what exactly was going on." Matthew dropped the shotgun, ran, and heard additional gunfire. (**ER-II**-RT10/21/09-p.335); (**ER-III**-RT10/22/09-pp.529;546;547) Matthew met Jeremy. Damien met them five minutes later, without weapons. (**ER-II**-RT10/21/09-pp.335-336); (**ER-III**-RT10/22/09-pp.528;546;552)

L. Injuries

Peters sustained multiple small buckshot and other wounds to his upper torso and face. (RT0/22/09-pp.560;562;564;569;588); (RT10/27/09-pp.637-638) Two wrist and thigh were from larger caliber ammunition. (RT10/22/09-pp.568-569;584) It was undetermined whether the wrist and thigh wounds occurred from close contact, or which were exit or entrance wounds. Peters remained hospitalized for six weeks and required multiple surgeries. (**ER-III**-RT10/22/09-p.627) Peters denied being wounded during the gun "tussle." (**ER-IV**-RT10/27/09-p.663) Peters couldn't determine

which weapon caused which wound. (**ER-III**-RT10/22/09-pp.630); (**ER-IV** RT10/27/09-pp.662-663) Peters couldn't identify Damien in court. (RT10/27/09-pp.627;667)

Stephanie suffered head "bumps." She didn't testify seeking medical treatment or introduce medical records. (**ER-II**-RT10/21/09-pp.302;305) Kassee observed no injury to Stephanie. (**ER-II**-RT10/21/09-p.257) Aside from scraped elbows and knees, no other physical injuries were reportedly treated. (**ER-II**-RT10/21/09-pp.336;398;402); (**ER-IV**-RT10/27/09-p.784)

M. Jeremy's testimony

Jeremy testified against Damien hoping to further reduce his previously imposed 3 year sentence. (**ER-III**-RT10/22/09-pp.502-503;549-550;552) Although Damien supposedly carried a pistol while approaching Peters' front door, Jeremy couldn't see the gun from his vantage point. (RT10/22/09-pp.524-525) Jeremy testified: he saw nothing in Damien's hands or waistband but *thought* Damien had a gun because Damien brought *two* weapons from the car (RT10/22/09-p.526); Damien *didn't* display a gun while approaching Peters' door (RT10/22/09-p.534); Damien carried a gun which didn't point toward the door (**ER-III**-RT10/22/09-p.535); Jeremy couldn't see which it pointed. (RT10/22/09-p.536) Later Jeremy testified that until Damien knocked on the door, he didn't see Damien with a gun.

(**ER-III**-RT10/22/09-pp.545-544) Jeremy agreed with the prosecutor's leading question suggesting Damien carried a MAC pistol to the door. (RT10/22/09-pp.544-545) Jeremy repeatedly lied to investigators. After trial, Jeremy's 3 year sentence was reduced to time served. (PSR.1a)

N. Matthew's testimony

The prosecutor questioned whether, after returning home for more marijuana, Matthew saw anything suggesting Damien had a gun. Matthew replied, "[W]ell, I thought I saw…[l]ike a lump or something but I'm not quite sure. Just something that just caught my eye . . . " Matthew didn't know whether Damien had a gun. "[I]t was just a thought that I had." Matthew saw a bulge, "probably like in [Damien's] waist . . Like on his waist I guess." (**ER-II**-RT10/21/09-pp.215-216) Matthew previously told FBI agents he observed a lump in Damien's waistband that made him think of a gun, but wasn't sure if it was a gun because he didn't actually see it or know whether Damien owned one. (RT10/21/09-p.217) Darkness at Peters' prevented Matthew from seeing anything in Damien's waistband. (**ER-II**-RT10/21/09-pp.327;337) Nonetheless, the prosecutor argued, "[w]hat we know from Matthew, gun is in the waistband" although Matthew saw no other gun that night. (**ER-V**-RT10/28/09-p.865); (**ER-III**-RT10/22/09-p.425)

Very recently, Matthew informed prosecutors that he lied to get less jail time. He admitted firing the second shot. (**ER-II**-RT10/21/09-pp.333-344) He didn't know who fired first, but he didn't.

Defense counsel impeached Matthew with a letter he wrote to Damien before trial, suggestive of government coercion. (RT10/21/09-p.351); (**ER-I-31**) He wrote that his previous information to officials, including the plea agreement, was falsified. (**ER-III**-RT10/22/09-pp.433-434) He would testify falsely. Matthew warned "that the prosecutor wanted to put [Damien] away." (**ER-III**-RT10/22/09-pp.429;441); (**ER-I-32**)

Next day, Matthew testified that prosecutors recently "reminded" him that if he testified "against" his plea agreement, it could be rescinded and he risked a substantially longer sentence. This induced his testimony. (**ER-III**-RT10/22/09-pp.417-419) The *plea agreement averred* that Damien said to fire the shotgun if he heard shooting. (RT10/22/09-p.424) Matthew saw no other gun that night. (RT10/22/09-p.425) Matthew fired first, then fired again, despite seeing people on the patio. (RT10/22/09-p.426) He hadn't planned to shoot or hurt, rather, only scare someone. (**ER-III**-RT10/22/09-p.428) Prosecutor 2 later urged that Matthew's sentence be *substantially increased* after he provided some evidence favorable to Damien. (CR-145;**ER-1**-35-37)

IV. SUMMARY OF ARGUMENT

A. In Bullcoming v. New Mexico, the Supreme Court held that the Confrontation Clause prohibits introduction of testimonial forensic laboratory reports created to prove a fact at a criminal trial, through in-court testimony of an analyst who didn't sign the certification or personally perform or observe the test's performance. Retroactivity of Bullcoming's constitutional rule to Damien's pending appeal requires reversal.

Here, a ballistics expert's testimonial report was introduced through Agent Catey, who didn't observe or perform testing. The prosecutor relied on this report to support its theory and timeline of events that night.

The government "proved" Damien's "Indian" status, an essential element to convict, by introducing, through Detective Soliz, a certificate "confirming" Damien's tribal enrollment. It asserted that Damien met "blood quantum requirements." This "formalized, testimonial statement" was prepared by a non-testifying creator, and obtained to prove a fact for this criminal trial. The government substantially relied on these "second party" testimonial certifications to prove its case. Where the error wasn't harmless, reversal is required.

B. Omission of a voluntary intoxication instruction, even without defense counsel's request for it or objection to its omission, was plain error requiring reversal. Substantial evidence of defendants' intoxication warranted instruction that "voluntary intoxication may negate" specific intent, which the charges ubiquitously required.

Defective jury instructions, an inflammatory closing argument, and an ambiguous verdict form encouraged the jury's punitive "blanket verdict," suggesting it didn't find requisite specific intent, and possibly convicted Damien *even though* it could have believed defendants were too intoxicated to formulate that. Conviction without a finding of requisite specific intent results in a significant miscarriage of justice, requiring reversal.

C. The prosecutor's successive objections that Matthew committed perjury when testifying favorably to Damien was improper vouching. Prejudice was fortified by earlier vouching concerning witnesses' plea agreements, and during Matthew's direct examination when Prosecutor 2 impugned his credibility and comprehensively questioned him about perjury.

Matthew sometimes provided testimony *so favorable* to Damien that Prosecutor 2 later argued it justified Matthew's sentence *increase.* Matthew's testimony supported reasonable doubt and suggested *lack* of intent, plan, agreement, or conspiracy - highly contested issues that went to

the heart of the government's case - which depended largely on testimony of witnesses whom the prosecutor had repeatedly vouched.

Matthew's and Jeremy's testimony was influenced by substantial governmental interference. Their sentences' severity would be determined by their testimony. After the perjury allegations, Matthew's "rehabilitation" and consequent "impeachment" revealed such discrepant, confusing, and unreliable testimony that the trial's "truth-seeking" function was corrupted.

Additionally, although a juror slept during important witness testimony, no further inquiry was made. Only a mistrial declaration could have remedied these errors.

Specific and general jury instructions couldn't neutralize the irreparable, collective damage. The instruction contained unconfronted co-conspirators' "admissions" which misstated crucial evidence of intent, and relieved the government's burden of proving that essential, contested element. Collective government misconduct unfairly tipped the balance in the government's favor. Since it remained uncured by instruction and surely affected the "blanket" verdict, reversal is required.

D. Prosecutorial misrepresentation of critical evidence encouraged the retributive verdict. Prosecutor 1 improperly suggested that Damien told others he was "going to do some dirt" that night, after repeatedly *failing* to

obtain that evidence legitimately. Suggesting it was evidence of "conspiracy," Prosecutor 2 repeated the "doing dirt" misstatement *five times* in closing, and twice wrongly attributed it as Jeremy's testimony.

Inflammatory allegations that Damien specifically told Matthew *which direction* to shoot in, that Matthew knew Damien had a gun, and non-existent "*evidence . . . of defendant motioning towards someone else*," "evidenced" defendants' malicious "conspiracy" to perpetrate a "dirty," "three-on-one" "ambush" with "two fully loaded weapons against an unarmed man and women and children." The sensationalized fiction was calculated to inflame the jury's passions and bolster the government's fragile evidence of plan, agreement, and conspiracy.

The jury could have disbelieved Damien's factual denials, yet still believed either men acted recklessly, but without the premeditated malevolence urged by the incendiary argument. Grave prejudice from unjust prosecutorial tactics affected the verdict and requires reversal.

E. Ineffective Assistance of Counsel deprived Damien of an otherwise substantial defense and affected the trial's outcome. Defense counsel: didn't object to introduction of testimonial certificates despite relevant pending judicial decisions; didn't challenge a sleeping juror; didn't request voluntary intoxication or defense of another instructions; remained mute during faulty

jury instructions; stood silent throughout repeated government vouching; and ignored numerous, inflammatory misstatements of critical evidence during closing.

F. Damien's convictions were based on insufficient evidence. Specific intent remained unproven, although ubiquitously required. Insufficient evidence supported Assault with a Dangerous Weapon against Stephanie and XXX. Physical injuries to either woman were unsubstantiated. Nobody saw Damien strike Stephanie with a gun. No evidence showed Damien actually fired while pointing the gun in their direction; gunfire was simultaneously occurring elsewhere. Insufficient proof of the underlying substantive offenses also requires reversal of related 924(c) charges.

G. Cumulative plain legal error, government misconduct, and ineffective assistance of counsel denied Damien a fair trial where the evidence against Damien was hardly overwhelming.

H. Imposition of an excessive 1083 month sentence was procedurally and substantively unreasonable. The parties wrongly believed the judge lacked any discretion to alter imposition of consecutive mandatory sentences. She didn't consider 18 U.S.C.§3553(a)'s Sentencing Factors. Since recent judicial decisions have challenged that presumption, resentencing is required.

V. STANDARDS OF REVIEW

Confrontation Clause violations are reviewed *de novo*, for harmless error. Lilly v. Virginia, 527 U.S. 116, 136-37 (1999); United States v. Comito, 177 F.3d 1166, 1170 (9th.Cir.1999).

Plain error requires reversal "if clear error prejudiced the defendant's substantial rights so as to affect seriously the fairness or integrity of the judicial proceedings" and it's "highly probable that the error affected the verdict." United States v. Arreola, 467 F.3d 1153, 1161 (9th.Cir.2006).

Allegations of judicial misconduct are reviewed for plain error absent trial objection. United States v. Morgan, 376 F.3d 1002, 1007 (9th.Cir.2004). Formulation of jury instructions is reviewed for abuse of discretion. United States v. Dearing, 504 F.3d 897, 900 (9th.Cir.2007). Whether jury instructions omit or misstate statutory elements or adequately cover defendant's proffered defense, are questions of law reviewed *de novo*. United States v. Cherer, 513 F.3d 1150, 1155 (9th.Cir.2008).

Whether jury instructions violate due process by creating unconstitutional presumptions or inferences is reviewed *de novo*. Tapia v. Roe, 189 F.3d 1052, 1056 (9th.Cir.1999). Without objection, review is for plain error. Jones v. United States, 527 U.S. 373, 388, 180 L.Ed.2d 610 (1999).

Denial of mistrial motion is reviewed for abuse of discretion. United States v. Chapman, 524 F.3d 1073, 1081-82 (9th.Cir.2008). Factual findings regarding government conduct are reviewed for clear error. United States. v. Ziskin, 360 F.3d 934, 942 (9th.Cir.2003).

Whether prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed *de novo*. United States v. Santiago, 46 F.3d 885, 891 (9th.Cir.1995). Existence of improper prosecutorial vouching is determined *de novo* and subject to harmless error review. United States v. Sarkisian, 197 F.3d 966, 989-990 (9th.Cir.1999). Absent timely objection, plain error review applies. United States v. Brooks, 508 F.3d 1205, 1209 (9th.Cir.2007).

Improper prosecutorial comments generally, and during closing argument, are subject to harmless error review. Plain error standard applies absent objection. United States v. Brown, 327 F.3d 867, 871 (9th.Cir.2003).

Harmless error inquiry evaluates whether misconduct, "considered in the context of the entire trial . . . appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." United States v. Sullivan, 522 F.3d 967, 982 (9th.Cir.2008), and considers substance of curative instruction and closeness of the case. United States v. de Cruz, 82 F.3d 856,

862 (9th.Cir.1996); United States v. Kerr, 981 F.2d 1050, 1053-54 (9th.Cir.1992).

Under plain error, "prosecutorial misconduct invites reversal if it appears more probable than not that the alleged misconduct affected the jury's verdict," such as when trial courts fails to promptly, effectively neutralize misconduct's damage. United States v. Simtob, 901 F.2d 799, 806 (9th.Cir.1990) "Reversal is also appropriate if necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process." United States v. Laurens, 857 F.2d 529, 539 (9th.Cir.1988).

Whether substantial government interference occurred is a District Court's factual determination, reviewed for clear error, and demonstrated a preponderance of the evidence. United States v. Vavages, 151 F.3d 1185, 1188 (9th.Cir.1998).

Ineffective assistance of counsel determinations are reviewed *de novo*. United States v. Mack, 164 F.3d 467, 471 (9th.Cir.1999). IAC claims are reviewable on direct appeal when the appellate record is sufficiently developed, or when representation is so inadequate that defendant's Sixth Amendment right to counsel was denied. United States v. McKenna, 327 F.3d 830, 845 (9th.Cir.2003). Misconduct must exceed wide range of

professionally competent assistance, and prejudice defendant. United States v. Fry, 322 F.3d 1198, 1200 (9th.Cir.2003).

Defendant's motion for judgment of acquittal is reviewed *de novo*, and considers the same factors as challenges to sufficiency of evidence. United States v. Rocha, 598 F.3d 1144 (9th.Cir.2010). Evidence is sufficient if, "viewing the evidence in the light most favorable to the prosecution," a rational jury could have found the "essential elements of the crime beyond a reasonable doubt." United States v. Joseph, 209 F. App'x. 695, 696 (9th.Cir.2006).

A sentence's constitutionality is reviewed *de novo.* United States v. Leasure, 319 F.3d 1092, 1096 (9th.Cir.2003). Statutory construction or interpretation is reviewed *de novo*. United States v. Norbury, 492 F.3d 1012, 1014 (9th.Cir.2007). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. Rita v. United States, 127 S. Ct. 2456, 2459 (2007).

VI. ARGUMENT

A. DAMIEN'S CONFRONTATION RIGHTS WERE VIOLATED BY INTRODUCTION OF TESTIMONIAL DOCUMENTS THROUGH AGENTS WHO HADN'T OBSERVED OR PERFORMED THE ORIGINAL PROCEDURES, AND THE ERROR WASN'T HARMLESS.

1. Ballistics Report

Prior to Damien's trial, federal law clearly established that defendants' confrontation rights extended to makers of testimonial certificates. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). In Bullcoming v. New Mexico, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011), the Supreme Court clarified that the Confrontation Clause prohibits introduction of forensic laboratory reports containing testimonial certifications, created to prove facts at a criminal trial, through in-court testimony of analysts who didn't sign the certification or personally perform or observe the reported test's performance. Id. at 2317. Integrity of judicial review requires this Court to apply Bullcoming's holding to similar cases pending on direct review. Griffith v. Kentucky, 479 U.S. 314, 322, 107 S. Ct. 708, 713 (1987).

At trial, Agent Catey testified that Ex.41, "Report of Examination" was authored by John Webb, a firearms/toolmarks expert at FBI's Quantico, VA laboratory.(**ER-IV-**RT10/27/09-p.686);(EX-41;ER*) Although "clearly ballistics analysis [was] outside of [his] expertise" Catey assisted

interpreting the report. (RT10/27/09-p.687) Catey supposed that Webb examined ammunition recovered from Peters' and assessed whether certain specimens were linked to particular firearms. (**ER-IV**-RT10/27/09-p.690) Catey described procedures Webb probably used, and employed Webb's conclusions to match specimens to particular locations at Peters'. This evidence corroborated the government's theory and time line.(**ER-IV**-10/27/09-pp.691-694)

Webb concluded that: spent 9mm cartridges were associated with the same firearm; specimens Q-25-28 were live rounds of the same type, brand and caliber of specimens Q1-Q21 (**ER-IV**-RT10/27/09-pp.694;695;697;698); and that Winchester 12 gauge shells were fired by the same firearm. (RT10/27/09-p.686) Catey later located 9 mm. and 12 gauge shotgun ammunition at Damien's, most of which Catey observed were the type and caliber previously identified by Webb. (**ER-IV**-RT10/27/09-pp.700-702)

The error wasn't harmless. The government relied on Webb's reported conclusions to prove specific, inclupatory conclusions that Damien possessed a loaded gun, and fired first - toward Stephanie - a contested issue. The report was also used to corroborate other contestable government theories and testimony. (**ER-V**-RT10/28/09-pp.841;843;846;850;865;877-878) Webb's unavailability was never suggested. As in Bullcoming, the

report was testimonial and couldn't be introduced unless Webb was unavailable and defendant had prior opportunity to confront him. Id. Where the error wasn't harmless, reversal is required. Id.

2. Gila River Tribal Enrollment Certificate

The judge instructed that whether Damien was "an Indian" was an element of several charges, without defining "Indian."(**ER-V**-RT10/28/09-pp.845;826) Detective Soliz "determined" Damien was "in fact, a Native American" by obtaining a "certificate of Indian degree blood from the Gila River Indian Community confirming that he is an enrolled member of their tribe." (**ER-III**-RT10/22/09-pp.450-452). Through her, the government introduced "a piece of paper confirming through the tribe, obtained from the enrollment office, that confirms Damien was enrolled in the tribe and met the blood quantum." (**ER-III**-RT10/22/09-p.453) Nobody suggested the certifying party was unavailable to testify. The certificate constituted a "formalized, testimonial statement," obtained by Soliz for use at a criminal trial to prove the "fact" of Damien's "Indian" status and was therefore subject to Confrontation requirements. Bullcoming, supra.

The error was not harmless. Damien's "Indian" status was a material element in his prosecution. Damien didn't testify he was "Indian", "Native American", or that he was enrolled in a tribe. Damien didn't reside on a

Reservation. (**ER-II**-RT10/21/09-pp.200-203) LaPier v. McCormick, 986 F.2d 303, 304 (9th Cir. 1993) ("mbiguous definitions used [for determining "Indian" status] complicate what should be rather routine analysis."). No testimony established the tribe was recognized by the Bureau of Indian Affairs, which is the threshold, although not exclusive inquiry. McCormick, supra (federal tribal recognition is initial dispositive ***threshold, but not final*** inquiry). Mere tribal membership isn't an absolute federal jurisdictional requirement, United States v. Antelope, 430 U.S. 641, 647 n. 7 97 S.Ct.1395 (1977), nor the only or "necessarily determinative" means of establishing "Indian" status. United States v. Torres, 733 F.2d 449, 455 (7th Cir. 1984).

Proving "Indian" or "Native American" bloodline/ancestry is a complicated, controversial topic involving at least genealogy, and possibly biotechnology or genomics.[2] McCormick, supra. "To be considered an Indian, one generally has to have both "a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes. See,

[2] Paul Spruhan, The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation, Navajo Nation Department of Justice, Tribal Law Journal, Vol 8, No.1, note 1 (2007);(ADDENDUM)

e.g., United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846); Torres, supra; United States v. Broncheau, 597 F.2d 1260, 1263 (9th.Cir.1979).

Although Soliz testified the certificate purportedly represented that "Damien met Indian blood quantum requirements", nothing established its authenticity; that the conclusory "Indian blood quantum" recitation was scientifically sound and correctly calculated; or that Salt River tribal "enrollment" was necessarily concomitant with 18 U.S.C. §1153's "Indian" status requirement. (**ER-III**-RT10/22/09-pp.450-452) Antelope, supra.

The certificate conferred eligibility for tribal welfare and financial benefits. (**ER-III**-RT10/22/09-pp.452-453) Such "incentivization" encourages falsification and suggests inherent unreliability in the application/preparation processes. At minimum, a Bureau of Indian Affairs or tribal official should have testified regarding federal tribal recognition. The preparer should have authenticated the certificate's veracity and integrity of supporting scientific or genealogical conclusions - subject to cross-examination. Where testimonial documentary evidence of an essential criminal element prejudicially entered through a non-witnessing second party, violation of Damien's Confrontation rights requires reversal. Bullcoming, supra.

B. WHERE SUBSTANTIAL EVIDENCE SUGGESTED DEFENDANTS' INTOXICATION, OMITTING INSTRUCTION THAT VOLUNTARY INTOXICATION MAY HAVE NEGATED REQUISITE SPECIFIC INTENT TO COMMIT THE CRIMES, WAS PLAIN ERROR REQUIRING REVERSAL.

1. Overwhelming intoxication evidence warranted a voluntary intoxication instruction.

In United States v. Sayetsitty, 107 F.3d 1405 (9th.Cir.1997), this court clearly held that failure to instruct on voluntary intoxication, even without defense counsel's request for the instruction or objection to its omission, is plain error requiring reversal under United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770 (1993). As in Sayetsitty, the evidentiary foundation for a voluntary intoxication instruction was substantial. The government was required to prove beyond a reasonable doubt that defendants had the capacity to form the necessary specific intent, and the lower court was required to instruct the jury that "voluntary intoxication may negate" specific intent. Id. at 1413. The court's failure to so instruct the jury meets Olano's conditions for a finding of plain error. Failure to remedy this would result in a substantial risk of miscarriage of justice. Id.

The defense of intoxication, even if intoxication was voluntary, is a valid defense to the *mens rea* of specific intent. United States v. Martinez-Martinez, 369 F.3d 1076, 1083 (9th.Cir.2004), citing United States v. Echeverry, 759 F.2d 1451, 1454 (9th.Cir.1985). Once a defendant presents

sufficient evidence to raise the issue, "the capacity to form specific intent at the time of the offense becomes an element which . . . must be proved by the government beyond a reasonable doubt." Id; United States v. Lilly, 512 F.2d 1259, 1261 (9th.Cir.1975) (appellant entitled to intoxication instruction).

Since omission of this instruction was plain error which was clearly established at the time of Zepeda's instruction, the error was clear or obvious. Sayetsitty, supra, citing Echeverry, supra. Binding precedent required proof of specific intent for nearly every offense as charged in the Indictment. United States v. Alferahin, 433 F.3d 1148, 1157 (9th.Cir.2006) (Plain error where jury instructions failed to incorporate criminal element clearly established by Ninth Circuit precedent).

a. Intoxication Evidence

Both parties elicited substantial evidence of Damien's and Matthew's intoxication at the time of the offenses.[3] The men continuously drank alcohol and smoked marijuana for hours before and until the altercation. Matthew explicitly testified Damien "looked, like [he was] a little buzzing or something" as they traveled to the Reservation.(**ER-II**-RT10/21/09-p.215) Prosecutor 2 emphasized the men were "drunk and high" and later (wrongly)

[3]**(ER-IV**-RT10/27/09-pp.741-745;766;769;758;759;785;768;784-785) (**ER-II**-RT10/21/09-pp.207-218;215);(**ER-III**-RT10/22/09-p.517)(Matthew) (**ER-III**-RT10/22/09-pp.540-542)(Jeremy)

suggested that intoxication supplied requisite intent for conviction. (**ER-V**-RT10/28/09-pp.838;844;873-874)

> We heard about the defendant **drinking beer**. He's **smoking marijuana.** He's loaded with guns. He's looking for a fight. And, remember, this all pertains to what **we need to prove for an assault. Is this intentional** conduct at this point: Absolutely. Is this reckless conduct. Most assuredly. **Drunk and high with loaded guns**. (**ER-V**-RT10/28/09-pp.838)

She also suggested Damian stalked the house, "going to shoot somebody that night **because** he's angry and he's high and he's drunk." (**ER-V**-RT10/28/09-p.844)

Overwhelming intoxication evidence should have alerted the judge to the instruction's necessity. United States v. Bear, 439 F.3d 565, 568 (9th.Cir.2006). Defendant's self-defense theory wasn't inconsistent with a voluntary intoxication defense. United States v. Abeyta, 27 F.3d 470, 475 (10th.Cir.1994) (affirmative self defense doesn't preclude instruction that voluntary intoxication may negate specific intent to do bodily harm under §113(c)). The jury could have found that Damien acted in self-defense (or that Matthew acted in defense of another), despite being sufficiently intoxicated to negate requisite specific intent for the crimes. Id. A criminal defendant "is entitled to instructions on ***any*** defense, including inconsistent ones, that find support in the evidence and the law and '[f]ailure to so instruct is reversible error.'" United States v. Trujillo, 390 F.3d 1267, 1274

(10th.Cir.2004) (quoting Abeyta, supra; Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 887(1988) (same); Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839 (1896) ((reversing murder conviction occasioned by gunfight in Indian Territory where evidence entitled defendant to both manslaughter instruction plus inconsistent affirmative self defense instruction)).

b. Specific intent was required under every count as charged in the indictment. (CR-3;ER-I-1-6)

(i) Aiding and abetting, alleged on *each count,* contains an additional element of specific intent, beyond the mental state required by the principal crime. United States v. Bancalari, 110 F.3d 1425, 1430 (9th.Cir.1997). The government must prove, *inter alia*: **"that the accused had the specific *intent* to facilitate the commission of a crime by another"** [and] (2) that the accused had the requisite intent of the underlying substantive offense." Id.; Sayetsitty, supra at 1413.

(ii) Counts 1, 4, 5, 6, 7, and 8 charged substantive crimes which required proof of specific intent. Conviction as a Principal requires (1) that defendant committed all the acts as defined in the underlying substantive offense, and (2) that defendant committed these acts while possessing the requisite mental state. United States v. Gaskins, 849 F.2d 454, 459-60 (9th.Cir.1988).

(iii) Counts 3, 5, 7, and 9, Aiding and Abetting 18 U.S.C. §924(c)(1)(a) and 2, required *specific intent* to aid the firearms crime *plus* some act that facilitates or encourages that crime. Defendants must have aided and abetted "in each essential element" of the crime. Bancalari, supra.

(iv) Counts 4, 6, and 8, 18 U.S.C. §113(a)(3), Assault with a Dangerous Weapon, required proof that defendant intentionally struck or wounded the victim, acted with **specific intent** to do bodily harm, and used a dangerous weapon. United States v. Etsitty, 130 F.3d 420, 427 (9th.Cir.1997), opinion amended on denial of reh'g, 140 F.3d 1274 (9th.Cir. 1998).

(v) Counts 1 and 2 required specific intent to commit *either* of the underlying crimes. Count 1 (Conspiracy and Aid and Abet) 18 U.S.C.§§1153, 371, and 2 required **specific intent to facilitate another** committing the underlying crimes specified in Indictment.[4] Both allegations required specific intent and warranted a voluntary intoxication instruction. Sayetsitty, supra.

Count 2 (CIR - Assault Resulting in Serious Bodily Injury, Aid and Abet), 18 U.S.C. §§1153, 113(a)(6) ***and*** 2, was a general intent assault crime.

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[4] The indictment alleged "The method and means employed by the defendants and other, to effectuate the object of the conspiracy were" in pertinent part, "to 'go kick some ass' of Dallas Peters."(CR-3;ER-I-1-6)

United States v. McInnis, 976 F.2d 1226, 1233-34 (9th.Cir.1992). Since the Indictment charged Aid and Abet, the **specific intent to facilitate** the commission of assault by another warranted a voluntary intoxication instruction. Sayetsitty, supra.

(vi) Count 1, Conspiracy, 18 U.S.C. §371, is a separate, distinct offense from the underlying substantive offense contemplated by the conspiracy.United States v. Kubick, 205 F.3d 1117, 1129 (9th.Cir.1999). Conspiracy is a specific intent crime. Phillips, 577 F.2d 495, 503 (9th.Cir.1978); United States v. Feola, 420 U.S. 671, 688, 95 S.Ct. 1255, 1265 (1975) (Specific intent required for Conspiracy is **the intent to advance or further** unlawful object of conspiracy.) The government must also prove **at least** the degree of criminal intent necessary for the substantive offense. Id. Conspiracy to Commit Assault with a Dangerous Weapon requires proof of **both** specific intent to advance the conspiracy, **and** specific intent to commit Assault with a Dangerous Weapon.

Finally, Assault Resulting in Serious Bodily Injury is a general intent crime, McInnis, supra; however, proof of specific intent for **Conspiracy** to commit assault was required.

2. The plain error prejudiced Damien's substantial rights, seriously affected the trial's fairness and integrity, and affected the verdict.

In United States v. Paul, 37 F.3d 496, 500 (9th.Cir.1994), this Court found plain error where Model Jury Instructions failed to distinguish different *mens rea* requirements of voluntary and involuntary manslaughter. Id. Here, omission of a voluntary intoxication would have allowed the jury to convict Damien *even though* it could have believed he was too intoxicated to form specific intent where required by law. Sayetsitty, supra, citing Paul, supra (conviction without finding necessary intent makes plain error reversible).

a. "Intent" was pivotal to the charges and defense.

Surely the error affected the verdict. Absence of requisite intent was a crucial theme of defendant's defense. (**ER-V**-RT10/28/09-854-855) Specific intent was pivotal to the Conspiracy and Aid and Abet theories associated with each count, and was a required element of all but one substantive offense. Only malevolent, premeditated intent could justify the plethora of charges leveled against defendants. Otherwise, nothing suggested the regrettable events and outcome were anything but the spontaneous result of fear, youth, intoxication, panic and confusion. (**ER-II**-RT10/21/09-pp.334-335);(**ER-IV**RT10/22/09-pp.621-625);(**ER-V**-RT10/27/09-pp.751;753-754)

No legitimate evidence supported the government's incendiary, cold-blooded conspiracy allegations. The government *completely failed* to elicit evidence that Damien or anyone articulated ill-intentioned plans. [5] Nonetheless, prosecutors repeatedly misstated evidence to bolster its inflammatory conspiracy and ambush theories.[6] As defense counsel argued and the record shows, gunfire erupted in confused, panic-ridden sequence.[7]

b. The jury instructions omitted any mention of intoxication.

It's untrue that "other instructions, in their entirety, adequately cover[ed] that defense theory." United States v. Thomas, 612 F.3d 1107, 1122 (9th.Cir.2010). Nowhere was the jury informed it could consider factors bearing on defendants' ability to form requisite intent for the crimes. Incredibly, the word "intoxication" was never mentioned during the judge's final charge. (**ER-V**-RT10/28/09-pp.812-828) The jury should have been instructed that it could consider important evidence of defendants' mental state before and during the offenses.

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[5] (**ER-II**-RT10/21/09-pp.207-208;209 210;212;215;218;329);(**ER-III**-RT10/22/09-pp.507-508;510;517;543; [580])

[6] (**ER-V**-RT10/28/09-pp.837-839;840-841;847-848;865)

[7] (**ER-I**-RT10/20/09-p.183);(**ER-II**-RT10/21/09-pp.328;329;364-369;372); (**ER-III**-RT10/22/09-pp.606;609;610);(**ER-IV**-RT10/27/09 pp.668;680;755); (**ER-V**- RT10/28/09-pp.852;855)

3. The verdict was legally insufficient where defective instructions, arguments, and jury form permitted conviction without finding requisite specific intent.

The jury convicted Damien of *each and every* charge *and* weapon enhancement in a retributive, "blanket verdict" qualifying Damien for mandatory sentences totaling life in prison. (CR-113;**ER-I**-33-34) This suggests that any error affected the verdict. See de Cruz, 82 F.3d 856, at 862 (verdict acquitting defendant of some charges "is indicative of the jury's ability to weigh the evidence without prejudice."); United States v. Fazio, 487 F.3d 646, 656 (8th.Cir.2007) (jury carefully performed duty by *not* simply rendering blanket verdict on all counts.)

"Verdict forms are, in essence, instructions to the jury." United States v. Reed, 147 F.3d 1178, 1180 (9th.Cir.1998). However, Damien's form contained no indication of whether he was found guilty of Conspiracy to Commit Assault with a Dangerous Weapon or Conspiracy to Commit Assault Resulting in Serious Bodily Injury although the jury questioned this during deliberations.[8] (**ER-V**-RT10/28/09-pp.890-891)

[8] Although the indictment alleged Aid and Abet on each count, the form *omitted* Aid and Abet as to Counts 1, 2, and 3. Nor did it require the jury to specify whether it *actually found* defendant guilty as Principal, Aider/Abettor, or Co-conspirator.(CR-113;**ER-I**-33-34)

On Counts 3-9, the jury found "defendant criminally responsible, *either* as a principal, aider and abettor or co-conspirator" for the 924(c) weapon-related conduct with draconian penalties; however, the form was silent regarding **the** *degree of liability* for conviction, either for underlying predicate charges which required specific intent **or** the 924(c) charge. (CR-113;**ER-I**-33-34)

The plethora of charges and 924(c) violations as Principals, Conspirators, and/or Aiders and Abettors required a complicated evaluation of liability that was hindered by confusing Aid and Abet instructions

> [t]he government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted."(**ER-V**-RT10/28/09-pp.818)

If so, how could the jury determine whether particular defendants possessed requisite specific intent for Aiding/Abetting, and/or, as a Principal or Co-conspirator on related offenses? The prosecutor alleged that Matthew's shotgun and Damien's handgun caused bodily injury. Matthew admitted firing. (**ER-V**-RT10/28/09-pp.833) The jury possibly convicted Damien for Matthew's actions. C.f. United States v. Smith, 924 F.2d 889, 894 (9th.Cir.1991) (reversing where different guns were basis for two section 924(c)(1) counts, both based on same two predicate offenses); Dang v. Cross, 422 F.3d 800, 805 (9th.Cir.2005) (use of model jury instruction doesn't

preclude finding of error); United States v. Stein, 37 F.3d 1407, 1410 (9th.Cir.1994) (where two instructions conflict, reviewing court cannot presume jury followed correct one).

Additionally, the prosecutor suggested that defendants' intoxication supplied, not negated requisite intent. (**ER-V**-RT10/28/09-pp.838) Where Counts 4, 6, and 8, (Assault with Dangerous Weapon) clearly required proof of specific intent, the instruction's omission was especially pernicious. This jury possibly convicted Damien of Assault with a Dangerous Weapon, even though it could have believed that defendants were too intoxicated to form requisite specific intent under any level of responsibility. Sayetsitty, supra, citing Paul, 37 F.3d at 500.

Under the circumstances, it's "highly probable that the error affected the verdict." United States v. Arreola, 467 F.3d 1153, 1161 (9th.Cir.2006). It cannot be presumed that the convictions were based on legally adequate grounds. United States v. Fuchs, 218 F.3d 957, 962 (9th.Cir.2000) (Setting aside general verdict possibly based on legally inadequate grounds).

4. This court must reverse to avert a substantial risk of miscarriage of justice.

The jury's "blanket verdict" suggests it failed to find specific intent where required, and may have convicted Damien even though it could have believed he was too intoxicated to form requisite specific intent. Sayetsitty,

supra citing Paul, supra at 500. This plain error "seriously affect[ed] the fairness" of Damien's trial. Sayetsitty, supra citing Olano, 507 U.S. at 736-37, 113 S.Ct. at 1779. In similar cases, this Court has held that conviction on any charge without a finding of requisite specific intent results in a significant miscarriage of justice requiring reversal. Sayetsitty, supra at 1413.

C. IMPROPER GOVERNMENT VOUCHING, PERJURY ALLEGATIONS, SUBSTANTIAL GOVERNMENT INTERFERENCE WITH KEY WITNESSES' TESTIMONY, AND AN UNCHALLENGED SLEEPING JUROR, SERIOUSLY AFFECTED THE TRIAL'S INTEGRITY AND VERDICT AND REMAINED UNCURED BY INSTRUCTION.

1. Collective government vouching occasioned prejudice that was uncured by instruction.

Without provocation, Prosecutor 1 informed the jury that Matthew and Jeremy "plead guilty in this case and entered into agreements with the United States to testify against their own brother" hoping to receive a reduced sentence. [9] (RT10/20/09-p.85) On direct, when Matthew's testimony proved more favorable to Damien than anticipated, Prosecutor 2 contradicted him, then elicited that Matthew plead guilty to assault resulting in serious bodily injury and possession of a firearm during a violent crime, in this case, before this judge. The plea agreement required Matthew to "testify truthfully," hopefully in exchange for a shorter sentence. (**ER-II-**

[9] Defense counsel didn't refer to the plea agreements directly, or in response to this.(RT10/20/09-pp.87-91)

RT10/21/09-pp.223-227)[10] The prosecutor extensively questioned Matthew about perjury, before the jury. (**ER-II**-RT10/21/09-pp.227-228)

a. During direct examination, references to a plea agreement's truthfulness requirements are improper vouching suggesting that witnesses "who might otherwise seem unreliable, ha[ve] been compelled by the prosecutor's threats and the government's promises to reveal the bare truth, " and implies that "the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of its plea agreement." United States v. Brooks, 508 F.3d 1205, 1210 (9th.Cir.2007) (Improper vouching where witnesses testified they spoke truthfully and were living up to plea agreements' terms).

b. The prosecutor's "perjury" questioning was improper vouching implying that Matthew was lying and she knew of information not properly before the jury. It also unfairly suggested that any variance in Matthew's testimony would be obvious to the judge as perjury. Any perjury inquiry should have been conducted *outside* the jury's presence. United States v. Agee, 597 F.2d 350, 362 (3rd.Cir.1979) (questioning witness' knowledge of rights must be conducted outside jury's presence).

[10] On direct, the prosecutor elicited that Jeremy plead guilty; was sentenced to 3 years incarceration before this judge, and would testify against Damien, hoping for further sentence reduction.(**ER-III**-RT10/22/09-pp.502-503)

c. Informing the jury during opening, then on direct examination that witnesses testified hoping for a sentencing reduction was prejudicial vouching akin to the reversible error in United States v. Rudberg, 122 F.3d 1199, 1204; 1206 (9th.Cir.1997). "The award of a reduced sentence presented to the jury in the form of a sentence reduction order confirms that a judge has found the witness' testimony truthful." United States v. Harlow, 444 F.3d 1255, 1263-64 (10th.Cir.2006), citing Rudberg, supra at 1204-05. "The fact that the judge who authorized the sentence reduction is the same judge presiding at trial only underscores the problem" by implicating the judge in the verification process. Id. Collective government vouching materially affected the jury's ability to deliberate impartially and remained unaffected by curative instruction. Rudberg, supra at 1206 (reversing for plain error *despite cautionary instruction warning* that testimony of witnesses receiving government benefits warrants more cautious consideration than testimony of other witnesses).

2. The prosecutor's audible objections that Matthew committed perjury constituted improper vouching which warranted mistrial and requires reversal.

On cross-examination, Matthew admitted telling government agents he didn't want to testify and most of what he'd told them was false. (**ER-II-**RT10/21/09-p.340) He'd informed prosecutors he didn't want to testify

because he didn't want to have to lie, and he'd only testify to avoid a harsher sentence. (RT10/21/09-p.341)

> Q: You told them you didn't want to testify because you didn't want to have to lie; correct?
>
> A: Yes
>
> Q: And they threatened you, didn't they?
>
> A: Yeah. They like – if I didn't testify, it's basically I am –
>
> Q: They are going to charge you with perjury?
>
> A: Yes, because I'm not doing what my plea is and they could – my plea could be denied and I'll be looking at more time.
>
> Q: And so you changed your mind, then, and now you're coming to testify based on that threat? This has nothing to do with possibly being labeled a snitch; is that correct?
>
> [Prosecutor 2]: Objection. Your Honor, can we approach?
>
> THE COURT: What's the objection?
>
> [**Prosecutor 2**]: The objection is that he is committing perjury.
>
> THE COURT: I'm sorry?
>
> [**Prosecutor 2**]: The objection is he's committing perjury.
>
> *(At sidebar)*
>
> MR. MITCHELL: Judge, that's what we side-barred about the first time. He's got an attorney back there.
>
> THE COURT: So what's the problem here? I mean, I am going to hear a mistrial any minute now. You're saying the Mr.

> Mitchell is committing perjury or the witness is committing perjury?
>
> [Prosecutor 2]: That witness is.
>
> THE COURT: Why are you telling the jury that?
>
> [Prosecutor 2]: Well, Judge, I guess what I'm trying – this is why I asked for a sidebar.
>
> THE COURT: **But to say it in front of the jury, that he's committing perjury.**
>
> . . .
>
> THE COURT: . . . .I'm not going to stop him from testifying to it. . . . But whatever you do, don't be telling the jury that the witness that you called is committing perjury. Because if I'm asked for a mistrial, I'll tell you I'll have to think about whether or not I'm going to grant it. . . . It is not for me or for you to interfere with this witness's testimony . . . .(**ER-II-**RT10/21/09-p.341-343)
>
> *(End sidebar)*

a. Perjury allegations.

The prosecutor's "perjury" objections constituted an improper prosecutorial expression of personal belief which effectively asserted her knowledge that Matthew was lying when testifying favorably to the defense, and suggested knowledge of information not properly before the jury. United States v. McKoy, 771 F.2d 1207, 1210-11 (9th.Cir.1985).

A sidebar immediately followed, and defense counsel complained. (**ER-II-**RT10/21/09-p.341) Because the judge considered it and offered

curative instruction, "harmless error" review should apply. (**ER-II-**RT10/21/09-pp.341-343)

b. The trial court's clear error and abuse of discretion warrant reversal.

Concerned that the trial's integrity was jeopardized, the judge contemplated mistrial. [11] (**ER-II-**RT10/21/09-pp.341-344;351); (**ER-III-**RT10/22/09-pp.404-405) Ultimately, she denied defendant's mistrial motion, cursorily adopting the prosecutor's suggestion that the perjury comments were more damaging to the government then to Damien. (**ER-IV-**RT10/27/09-p.731) The judge abused her discretion. Subsequent curative instructions failed to ameliorate the damage that flowed from the misconduct. United States v. Charmley, 764 F.2d 675, 677 (9th.Cir.1985).

Additionally, "the trial judge abused her considerable discretion in this area" when, after observing a **sleeping juror** during important witness testimony, she failed to conduct a hearing or make any investigation. United States v. Barrett, 703 F.2d 1076, 1083; 1086 (9th.Cir.1983) (remanding for factual findings before appellate court considered whether resulting prejudice violated fifth amendment due-process or sixth amendment impartial-jury guarantees).

[11] Defense counsel moved for mistrial. (**ER-I-1-32);(ER-II-**RT10/21/09-pp.404-405) Later, the judge reviewed the relevant transcript but declined to rule without further briefing. (**ER-III-**RT10/22/09-pp.530-534)

Her findings were "clearly erroneous." United States v. Ziskin, 360 F.3d 934, 942 (9th.Cir.2003); United States v. Simtob, 901 F.2d 799, 805 (9th.Cir.1990) (prejudicial effect of improper vouching warranted reversal). Matthew was a key government witness who unexpectedly provided testimony so favorable to Damien that Prosecutor 2 later argued it warranted Matthew's ***sentence increase***. (CR-145;**ER-I**-35-37) Matthew's testimony supported reasonable doubt and suggested **lack** of intent, plan, agreement, or conspiracy - contested issues that went to the heart of the case and the thrust of the defense. (**ER-V**-RT10/28/09-pp.854-855)

Proving the Conspiracy, Aid and Abet and vicarious liability theories against Damien depended entirely on the testimony of witnesses whose testimony the prosecutor had repeatedly vouched. United States v. Rudberg, 122 F.3d 1199, 1205-06 (9th.Cir.1997). As in Rudberg, Damien flatly denied involvement in any conspiracy or plan. (**ER-IV**-RT10/27/09-p.789) There was no unvouched evidence showing or other corroborative evidence of Damien's intent. Id.[12] "The jury was left to balance his testimony against that of other witnesses who enjoyed a sort of [judicial] seal of approval." Id; Kerr, 981 F.2d at 1054 (plain error where "repeated instances of prosecutorial vouching affected the jury's verdict").

[12] (**ER-IV**-RT10/27/09-pp.769-770);(**ER-III**-RT10/22/09-pp.507-508;510;515;517;543); (**ER-II**-RT10/21/09-pp.207-208;210;212;329)

3. The cumulative effect of uncured government misconduct created a miscarriage of justice that warrants reversal.

Reversal for plain error is also warranted. United States v. Laurins, 857 F.2d 529, 539 (9th.Cir.1988). "Viewed in the context of the entire trial," the prosecutorial misconduct was especially pernicious. United States v. Weatherspoon, 410 F.3d 1142, 1151 (9th.Cir.2005). Audible perjury allegations were repeated twice. (**ER-II**-RT10/21/09-pp.341-342) Prejudice was fortified by earlier government vouching regarding witnesses' sentence reductions, and during Matthew's direct examination when Prosecutor 2 impugned Matthew's credibility and questioned him about perjury. (**ER-II** - RT10/21/09-pp.227-228)

The trial's integrity was nullified when Matthew's and Jeremy's testimonies were influenced by substantial governmental interference. United States v. Combs, 379 F.3d 564, 572 (9th.Cir.2004). On re-direct next day, Matthew testified prosecutors recently "reminded" him if he testified "against" his plea agreement, it could be rescinded and he risked a substantially longer sentence. He testified only because he felt "threatened" by this possibility. (**ER-III**-RT10/22/09-pp.414-419) United States v. Vavages, 151 F.3d 1185, 1191 (9th.Cir.1998) (threats to prosecute witness for perjury and withdraw plea agreement for supporting defendant's alibi

constituted substantial interference with witness's decision to testify resulting in prejudice that warranted reversal and remand).

During Jeremy's direct examination, the prosecutor elicited he plead guilty and was sentenced to 3 years before this judge. He testified against Damien, hoping for a further sentence reduction. (**ER-III**-RT10/22/09-pp.502-503) After trial, Matthew's 3 year sentence was reduced to time served. (PSR.1.a) C.f. United States v. Giraldo, 822 F.2d 205, 211 (2d.Cir.1987) (Court improperly used original sentence to coerce witness' to testify, subverting proper sentencing purposes when, following witness' testimony, court reduced his previously imposed sentence).

"Substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." Earp v. Ornoski, 431 F.3d 1158, 1170-71 (9th.Cir.2005), citing United States v. Vavages, 151 F.3d 1185, 1188 (9th.Cir.1998). "Warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify" or as appellant submits, coerce the witness into testifying when or how he does not wish to. United States v. Risken, 788 F.2d 1361, 1370 (8th.Cir.1986) (citations omitted).

a. Matthew's testimony became so compromised that it lacked reliability

After Prosecutor 2 "reminded" Matthew of the potential sentence increase, his testimony next day vacillated in the government's favor. (**ER-III-**RT10/22/09-pp.418;420;425-428) Consequently, defense counsel was forced to impeach Matthew with a letter he wrote to Damien on October 9, 2009 - *after* Matthew signed the plea agreement. (**ER-III-**RT10/22/09-pp.408;429;435;441) Paraphrased, in pertinent part, Matthew wrote:

> I had a meeting with my lawyer and the prosecutor about testifying. **I told them I wasn't [testifying]** and the prosecutor said that she is going do everything in her power to see that I get the **10 year max for perjury on my pleas. But I said I will [testify]**. What they're trying to find out is if you had a gun when we went back to the house to get some weed & blunts [marijuana]. If I saw a lump under your shirt that might be a gun? And that if you gave me the shot gun shells for the gun. I – the first time I said ya, but I told her I lied only so I could get out or get less time . . . **And that I was just lying** about all the other stuff but they don't want your lawyer to find out because they would throw me off the stand. But **I told my lawyer and the prosecutor I was lying about everything to get less time** or to get set free but they told me not to say that I was lying to get less time in the Court . . .. But let your lawyer know all this . . .because they told me that ***the prosecutor wanted to put you away***. (**ER-III-**RT10/22/09-pp.429;441); (**ER-I**-30-32)

Substantial governmental interference is clear from Matthew's testimony, and corroborated by Matthew's letter to Damien, the perjury allegations, and the perjury inquiry before the jury. (**ER-III**-RT10/22/09-pp.414-419) After Prosecutor 2's perjury "reminder," Matthew's testimony nonsensically vacillated as he attempted to "explain away" the letter. (**ER-III**-RT10/22/09-pp.443-445) Following the perjury allegations, Matthew's "rehabilitation" and consequent "impeachment" rendered his testimony so discrepant, confusing and untrustworthy that it became impossible to evaluate his veracity about anything. (**ER-II**-RT10/21/09-pp.327;337-338;343-345;351);(**ER-III**-RT10/22/09412;417-418;424-426;428;430-434;438;443-446)

The government must "act when put on notice of the real possibility of false testimony." Commonwealth of N. Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th.Cir.2001) ("plain language" in informant's letter should have alerted government to strong possibility that witnesses agreed to testify falsely). This trial's integrity was vanquished by "corruption of the truth-seeking function of the trial process." Morris v. Ylst, 447 F.3d 735, 744 (9th.Cir.2006) (citation omitted). This violated Damien's right to a fair trial. The judge should have taken "proper action" and granted the mistrial motion.

b. Curative instructions were inadequate to dispel the prejudice from collective government vouching.

(i) The curative instructions were inadequate.

Only a mistrial declaration could have afforded Damien adequate relief. B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1105-06 (9th.Cir.2002) (short curative instruction to disregard improper remark, and generic instruction that counsels' statements aren't evidence were insufficient to counteract irreparable damage from government's misconduct).

The presumption that jurors will follow timely curative instructions doesn't apply where evidence is "highly prejudicial or the instruction is clearly inadequate." Id. Only the perjury allegations were addressed by the judge's equivocal curative instruction. She failed to even acknowledge to the jury that an error, much less **such a serious error**, occurred

> THE COURT (to the jury): Ladies and gentlemen, you are to ignore the last comment made by [Prosecutor 2]. I'm not quite sure what she said, frankly, and what she meant by what she said. But we talked about it at the sidebar, and disregard anything that she said about this witness's testimony. (**ER-II-**RT10/21/09-p.344)

By underplaying the remarks' seriousness by suggesting she wasn't sure what the prosecutor said, or what she meant by it, the jury wasn't sufficiently apprised of the error's gravity or their need to adhere to the curative instruction. The instruction failed to convey "a sufficient sense of

judicial disapproval of both content and circumstance needed to dispel the harm" to Damien. Simtob, 901 F.2d at 806 (reversing under harmless error standard). The lack of specific, focused instruction constituted reversible error. Kerr, 981 F.2d at 1053-54 (reversing for plain error).

Also, the court's general instructions were too unspecific, untimely, and insufficiently tied to improper vouching to ameliorate the damage[13] Simtob, supra.

> Arguments and statements by lawyers are not evidence. The lawyers are not witnesses . . . . Testimony that has been excluded or stricken, or that you have been instructed to disregard is not evidence it must not be considered…. Where I have given a limiting instruction, you must follow it. (**ER-V-**RT10/28/09-pp.814-815)

Considering Matthew's importance to the government's case and the defendant's defense, "more substantial measures" were necessary. Kerr, 981 F.2d at 1053 (instruction that jurors were sole judges of witnesses' credibility and provision of "other routine directions for evaluating testimony," were insufficient to cure prejudicial remarks regarding witnesses' credibility).

General instructions issued a day too late to have a curative effect. Weatherspoon, supra, citing Kerr, at 1053 (instruction partly insufficient

[13] Faced with a "Hobson's choice" after the mistrial motion's denial, defense counsel declined additional curative instruction, stating, "There's no need to ring the bell a second time with respect to it." (**ER-IV-**RT10/27/09-p.730)

when "not contemporaneous with the error and was not given until the day following [day], long after the impermissible inference was implanted in the minds of the jury."). Any residual curative effect was dispelled when Prosecutor 2 declared argued "the brothers Zepeda tried to minimize some of what happened." (**ER-V-**RT10/28/09-p.839) This improper comment on the evidence and the witnesses' credibility only amplified prejudice of earlier government vouching.

(ii) Closing instructions implied that the witnesses' trial testimony had been sufficiently truthful to merit favored government treatment.

The judge instructed

> You have heard testimony from Matthew and Jeremy Zepeda, witnesses **who *received* benefits of favored treatment in connection with this case** . . . (**ER-V-**RT10/28/09-pp.817)

The cautionary instruction that Matthew and Jeremy "**received** benefits of favored treatment" issued the day *after* the parties rested. The jury could reasonably infer that additional government benefits were just conferred, merited by sufficiently truthful, pro-prosecution trial testimony. The instruction's timing and grammatical tense "placed the prestige of the government behind the witness" and nullified any residual curative effect. Simtob, supra.

(iii) The instruction misstated key evidence and impermissibly relieved the government's burden of proof on an essential criminal element.

The judge instructed

> **They also admitted being accomplices to the charge. An accomplice is one who voluntarily and intentionally joins with another person in committing a crime** []. (**ER-V-**RT10/28/09-p.817)

The judge misstated critical, highly prejudicial evidence. Although Matthew and Jeremy admitted pleading guilty to particular offenses, they *didn't admit* "being accomplices to the charge." Nor did they, as the judge legally defined "accomplice," "voluntarily and intentionally join[] with another person in committing a crime." This extra-judicial reference was wholly unsupported by the record.

Judicial misstatement of this critical evidence imputed to Matthew and Jeremy the requisite intent for **conspiracy or agreement** to commit the crimes, which was then inferentially attributable to Damien. This mandatory legal "instruction" closely tracked the judge's subsequent Conspiracy instruction:

> A conspiracy is a kind of criminal partnership – an agreement of two or more persons to commit one or more crimes . . . . Each member of the conspiracy is responsible or the acts of the other conspirators performed during the course and in furtherance of the conspiracy. (**ER-V-**RT10/28/09-pp.822-823)

The misstatement resembled a permissive inference instruction which "impermissibly intrude[d] upon a jury's exclusive role as fact finder . . ." United States v. Warren, 25 F.3d 890, 899 (9th.Cir.1994). It functionally relieved the government's burden of proof on key, contested issues at trial – the existence of a conspiracy or agreement, and Damien's requisite specific intent for principal or vicarious liability. See Dang v. Cross, 422 F.3d 800, 805 (9th.Cir.2005) (use of model jury instruction doesn't preclude finding of error). Even if accurate, the admission of the co-defendants' untested "admission" violated Damien's Confrontation rights. The instruction was provided *after* the parties rested, without further opportunity to examine the witnesses. Lilly v. Virginia, 527 U.S. 116, 139, 119 S. Ct. 1887, 1901 (1999); Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

4. The culminate miscarriage of justice requires reversal.

The jury deserved to evaluate key witnesses' testimony in its original candor, without governmental censure of testimony that was favorable to Damien, or the jury's exposure to testimony reluctantly provided only after substantial government interference. Matthew's testimony was rendered so inconsistent, unreliable, and confusing that the jury necessarily resorted to speculation and conjecture when deliberating. Collective government vouching and defective jury instructions unfairly tipped the balance in the

government's favor and encouraged the retributive "blanket verdict." Simtob, supra at 806 (where outcome "depended greatly" upon credibility of particular government witness, prosecutorial vouching on his behalf "could well have had critical influence"). This miscarriage of justice requires reversal and remand.

D. REVERSAL IS REQUIRED WHERE PROSECUTORS' FLAGRANT, REPETITOUS MISREPRESENTATION OF CRUCIAL EVIDENCE UNFAIRLY ENCOURGAGED THE JURY'S RETRIBUTIVE BLANKET VERDICT AND REMAINED UNCURED BY INSTRUCTION.

1. Prosecutor 1 wrongly informed the jury that Damien specifically told others he intended to "go do some dirt."

During Damien's cross-examination, Prosecutor 1 stated:

> Q: Also during that conversation you also told the driver and your brothers that you were going to ***go do some dirt*** that night isn't that also true?
>
> A: No
>
> Q: And you said that because you wanted to go beat up Goofy. Isn't that also true?
>
> A: No, it wasn't.

(**ER-IV-**RT10/27/09-pp.769-770)

A prosecutor commits misconduct when attempting to impress the jury with innuendoes in questions although no supporting evidence exists. United States v. Kojayan, 8 F.3d 1315, 1324 (9th.Cir.1993). Absolutely no evidence supported that anyone articulated, or heard Damien utter that

statement. Prosecutor 1's question *alone* exposed the jury to this specific inclupatory information - which Damien clearly denied. (**ER-IV-**RT10/27/09-pp.769-770) This innuendo occurred despite prosecutors' repeated, failed attempts to elicit evidence from Matthew and Jeremy about any inculpatory statement of a plan, intent, or conspiracy. Jeremy repeatedly denied that Damien said anything specific or voiced other intentions about Dallas.[14] Nor did Matthew's testimony provide support.[15]

This specific, inculpatory "doing dirt" "question" was an improper attempt "under the guise of 'artful cross-examination,' to tell the jury the substance of inadmissible evidence." United States v. Sanchez, 176 F.3d 1214, 1222 (9th.Cir.1999) (prosecutor may not present inadmissible evidence through "back door"). Its particularity and detail implied the government was aware that Damien actually made the inculpatory statement. United States v. Simtob, 901 F.2d 799, 805 (9th.Cir.1990) (prosecutors' reference to unadmitted statements implied government knowledge); United States v. Lester, 749 F.2d 1288, 1302 (9th.Cir.1984) (prosecutors have "special obligation" to avoid improper suggestions, insinuations, and especially assertions of personal knowledge). The detailed insinuation

[14] (**ER-III-**RT10/22/09-pp.507-508;510;517;543;580)
[15] (**ER-II-**RT10/21/09- pp.207-208;209-210;212;215;218;329)

wrongly bolstered the government's otherwise unconvincing proof of conspiracy, agreement, and intent.

2. <u>Prosecutor 2 repeatedly echoed Prosecutor's 1's misstatements</u>.

During closing argument, Prosecutor 2 repeatedly echoed the "doing dirt" misstatement, and twice misstated Jeremy's testimony on that critical point, while purporting to quote him

> He [Damien] really wanted to cause some hurt . . . ***And as testified to by Jeremy, he wanted to do some dirt.*** We're going to do some dirt. We wanted to cause some pain to these people…so he went for his brothers . . . He didn't want to talk to Dallas Peters. He was looking for a fight. He wasn't looking for a fist fight. He wasn't looking for a fair fight. ***He was looking to do some dirt.*** He was looking for a dirty fight . . . . (**ER-V**-RT10/28/09-pp.837-838)

The prosecutor reiterated that "Jeremy heard" the "do some dirt" statement, then gratuitously repeated it a **fourth** time, <u>explicitly informing the jury that this statement evidenced</u> Defendants' agreement and conspiracy to commit the crimes

> What the evidence did show is that there was an agreement to commit this crime. . . Jeremy heard the statements, "Hey, we've got the cops behind us. I have heat on me. I want to go do some dirt. ***We're going to do some dirt*** . . . . '" So the brothers were continuing to go along with the plan and this is the conspiracy. (**ER-V**-RT10/28/09-p.839)

A **fifth** repetition occurred during rebuttal closing when she informed the jury that the "doing dirt" statement evidenced Damien's culpability for **Matthew's** assaults with a dangerous weapon against Dallas and XXX:

> [a]nd the defendant was an aider and abettor and he was a conspirator in [Matthew's assault with a dangerous weapon against XXX and Dallas]. . . We know that the defendant was a principal . . . We know that seven people gave testimony that he, in fact, had a gun and **we know that he talked about doing some dirt that night**. (**ER-V-**RT10/28/09-p.865)

The prosecutor failed to confine her argument to properly admitted evidence or reasonable, good faith inferences drawn therefrom. United States v. Necoechea, 986 F.2d 1273, 1282 (9th.Cir.1993). These repeated misstatements factually asserted the existence of highly inculpatory information that was contradicted by the evidence, unproven by evidence, and *not presented* to the jury. United States v. Reyes, 577 F.3d 1069, 1076 (9th.Cir.2009).

3 The prejudice was magnified when Prosecutor 2 misstated that Damien "told Matthew which direction to shoot" and Matthew indicated that "a gun [was] in [Damien's] waistband."

As evidence of "conspiracy," the prosecutor misstated Matthew's testimony

> And it's important to remember what Matthew said, Matthew testified to on the stand. . .***The defendant even told Matthew which direction to shoot,*** and so Matthew knew what was going to happen and the defendant knew what was going to happen. Matthew was standing guard to ***complete the ambush***

> of the Peters' home. You heard from all of the witnesses in this case and there's no evidence to the contrary.(**ER-V-**RT10/28/09-p.840-841)

Absolutely no evidence suggested that Damien told Matthew **which direction to shoot in** (thus inferring Damien's specific, malevolent intent to injure). Again, prosecutors repeatedly tried to elicit evidence that Damien specificially instructed Matthew to harm someone. Matthew's testimony was consistently contrary.

(**ER-II-**RT10/21/09-pp.220;222;223;326;327;330;332;337); (**ER-III-**RT10/22/09-pp 423;424-426;432)

Later, she stated, "[w]hat we know from Matthew, gun is in the waistband." (**ER-V-**RT10/28/09-p.865) Contrary to this innuendo, Matthew never saw another gun anywhere that evening. (**ER-III-**RT10/22/09-p.425); (**ER-II-**RT10/21/09-pp.217;327;337)

These calculated misstatements were "powerfully incriminating extrajudicial statements of a codefendant [which were] deliberately spread before the jury at trial, but ultimately, not subject to confrontation." Bruton v. United States, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 1628 (1968) (inherent unreliability of accomplice's unconfronted statement violates Confrontation Clause and threatens fair trial.) ***Curative instruction would have been unavailing.*** Greer v. Miller, 483 U.S. 756, 767 (1987). Reversal is required

since the misconduct bolstered the government's otherwise weak proof of a conspiracy, plan, agreement, or requisite specific intent. United States v. Watson, 171 F.3d 695, 702 (D.C.Cir.1999) (Similar misquotation of repeated misstatements going to heart of government's circumstantial case warranted new trial).

4. The government's sensationalized closing argument was calculated to inflame the jury and encourage a retributive verdict.

During closing argument, Prosecutor 2 stated

> [As to] Count 1, conspiracy. . . . In this case, you have evidence about three co-conspirators. **You have evidence that Jennifer saw the defendant motioning towards someone else.** Dallas saw the defendant sort of yelling out orders. The sound to him was deafening. He couldn't actually hear what was being said but he remembers hearing (sic) the lips moving as if the defendant was talking to someone . . . . (**ER-V**-RT10/28/09-pp.848)

Absolutely no evidence *remotely* suggested that "Jennifer saw the defendant motioning towards someone else." (**ER-I**-RT10/20/09-pp.141-196) This fictitious ***"motioning"*** juxtaposed with Dallas' "hearing the lips moving" was desperately posited as evidence of the "conspiracy" to "ambush" with a "dirty," "three on one" attack using "two fully loaded weapons against an unarmed man and a house with women and children." (**ER-V**-RT10/28/09-pp.847-848)

This sensationalized mischaracterization purposely attributed to Damien a degree of malevolence calculated to inflame the jury, and exceeded the bounds of fair argument. This court has "consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury." Weatherspoon, 410 F.3d at 1149; United States v. Moore, 2011 WL 3211511 (DC.Cir.July 29, 2011) (prosecutor may not take artistic license by sensationalizing trial evidence, then defend against misconduct claim by maintaining statements are "fact-based.").

5. The court's generic cautionary instructions couldn't neutralize prejudice that went to the heart of the case from repeated, flagrant misstatements.

Prejudice from unconfronted co-conspirators' statements creates such "an overwhelming probability that the jury will be unable to follow the court's instructions," that a court may not presume that jurors will follow its instructions. Greer v. Miller, 483 U.S. 756, 767 (1987). Even absent objection, a "trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate." Weatherspoon, 410 F.3d at 1151. No corrective action followed any misstatement, although each misrepresented crucial evidence of conspiracy and intent, on which the government's otherwise anemic proof was repeatedly vouched. Inspecific, general jury instructions barely embellished boilerplate language that

"[a]rguments and statements by lawyers are not evidence. The lawyers are not witnesses;" and "questions and objections by lawyers are not evidence." Weatherspoon, supra, citing Kerr, supra at 1053. (**ER-V**-RT10/28/09-p.814)

General instructions were neither contemporaneous with nor explicitly tied to the inflammatory misstatements. Provided early in the final charge, they unlikely resonated in the jurors' minds long enough to neutralize damage from the ensuing prosecutorial onslaught. (**ER-V**-RT10/28/09-pp.814-815) United States v. Perlaza, 439 F.3d 1149, 1172 (9th.Cir.2006) (instruction insufficient where delayed and not explicitly tied to particular misconduct); Weatherspoon, supra. (same).

6. Collective prosecutorial misconduct undoubtedly encouraged the jury's retributive "blanket verdict."

Viewed in the context of this already troubled record, the flagrant and repetitious misconduct inevitably encouraged the jury's damming "blanket" verdict. Each misstatement wrongly bolstered the government's fragile evidence of a conspiracy, agreement, and requisite intent. The "doing dirt" statement was implanted by Prosecutor 1 and repeated by Prosecutor 2 *five times* in closing, and twice misattributed as Jeremy's testimony. United States v. Smith, 962 F.2d 923, 935 (9th.Cir.1992) ("[P]rosecutor's recurrent harping" on key issue warrants new trial).

Since Damien's complete lack of intent, plan or conspiracy was key to his defense (**ER-V**-RT10/28/09-p.865), the prejudice was grave and warrants reversal. The jury could have rejected Damien's factual denials, yet still believed the men acted recklessly, although without the premeditated malevolence urged by the government's inflammatory mischaracterization. *cf.* United States v. Vaglica, 720 F.2d 388 (5th.Cir.1983) (reversible error where prosecutor implied existence of evidence negating primary evidence in support of appellant's defense); Smith, supra at 935 (Repetitious misconduct presumed intentional).

That the misstatements occurred during closing argument enhanced their prejudice. United States v. Blueford, 312 F.3d 962, 976 (9th.Cir.2002), citing United States v. Kojayan, 8 F.3d 1315, 1323 (9th.Cir.1993) (When assessing prejudice, "closing argument matters; statements from the prosecutor matter a great deal.") During rebuttal closing, the prosecutor advocated Damien's conviction "[because] we know that he had a gun and ***we know that he talked about doing some dirt that night."*** (**ER-V**-RT10/28/09-p.865) These were "the last words from an attorney that were heard by the jury before deliberations." United States v. Carter, 236 F.3d 777, 788 (6th.Cir.2001). In response, the jury returned an unmistakably retributive verdict and convicted Damien of every possible substantive and

924(c) offense. (CR-113;**ER-I**-33-34) See de Cruz, 82 F.3d 856 at 862 (partial acquittal "indicative of the jury's ability to weigh the evidence without prejudice.").

The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. Kojayan, supra at 1323. Unfair prosecutorial tactics confirmed Matthew's warning that "prosecutors want[ed] to put [Damien] away." (EX-101;**ER-I**-30-32) Individual and cumulative prosecutorial misconduct compromised the trial's integrity, affected the verdict, and requires reversal.

E. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED DAMIEN OF A SUBSTANTIAL DEFENSE AND AFFECTED THIS TRIAL'S OUTCOME.

Where error results from counsel's repeated failures to object, the record is sufficient for review. United States v. Molina, 934 F.2d 1440, 1446 (9th.Cir.1991) (reviewing IAC claim on direct appeal for prosecutorial vouching). Extensive government vouching, an inflammatory, error-ridden closing argument which misstated crucial evidence, and defective jury instructions all remained unchallenged at trial. (Arguments B – D, supra)

Defense counsel's failure to raise the available affirmative defenses of voluntary intoxication or to suggest Matthew's defense of another, deprived Damien of a substantial defense, violating his Sixth Amendment rights.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Pirtle v. Morgan, 313 F.3d 1160, 1162 (9th.Cir.2002) (failure to request diminished capacity instruction was constitutionally deficient and undermined judicial confidence in verdict). The evidence supported both instructions. (**ER-II-**RT10/21/09-pp.330-331); (**ER-III-**RT10/22/09-pp.426;428)

Defense counsel acquiesced in admitting inculpatory testimonial, documentary evidence through second party affiants, though federal law had clearly established that defendants' Confrontation Rights extended to makers of testimonial certificates. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (June, 2009). Between that ruling and Damien's trial, judicial decisions prohibiting testimony of *non-test performing analysts* had issued nationally. Nonetheless, counsel failed to preserve the issue and the government deployed the unconfronted ballistics report and tribal enrollment certificate to fill critical voids in its case. (**ER-V**-RT10/28/09-pp.841;846;850;865;877-878) Reversal is warranted.

F. SINCE INSUFFICIENT EVIDENCE SUPPORTED THE CONVICTIONS, DEFENDANTS MOTION FOR DIRECTED VERDICT WAS WRONGLY DENIED.

Defendants' motion for directed verdict was wrongly denied. (**ER-IV** RT10/27/09-pp.730;791) As discussed in Argument B, supra, (Voluntary Intoxication) the element of specific intent remained unproven, although ubiquitously required.

As discussed in Argument A supra, the government relied on an unconfronted ballistics report to fill important gaps in its case. (**ER-V-**RT10/28/09-pp.841;846;850;865;877-878) Unconstitutionally unconfronted testimonial evidence purportedly established Damien's "Indian" status, an essential element of several charges. (ER-**III** 452-454)

Insufficient evidence proved Assault with a Dangerous Weapon against Stephanie; XXX, and Peters. No one saw Damien strike Stephanie with a gun; Damien struck her only with his hand. (**ER-IV**-RT10/27/09-p.750) Stephanie never saw Damien with a gun. (**ER-II-**RT10/21/09-pp.297;306) Stephanie "knew [Damien] didn't have a gun", but "felt something hard" in his pocket. (RT10/21/09-pp.293-296). Stephanie sustained "head bumps." (RT10/21/09-pp.302;305) Kassee observed no injury to Stephanie. (**ER-II-**RT10/21/09-p.257) Aside from scraped elbows and knees, no physical injuries to Stephanie or XXX were testified to being

medically treated. (**ER-II**-RT10/21/09-pp.336;398;402); (**ER-IV**-RT10/27/09-p.784) The jury questioned whether Damien "had to use the gun when he hit Stephanie." The judge denied their request to have Stephanie's testimony re-read. (RT10/28/09-p.884) United States v. Rocha, 598 F.3d 1144 (9th.Cir.2010) (reversing where assault with bare hands was legally insufficient for 18 U.S.C. §113(a)(3) conviction).

No testimony established that Damien *actually fired while pointing* a gun at Stephanie or XXX.(**ER-II**-RT10/21/09-pp.249;250-251;271;274;373-374;388;391) Other gunfire occurred simultaneously. (**ER-II**-RT10/21/09-pp.330-333); (**ER-III**-RT10/22/09-pp.426;428) Shots had been "fired in the air." (**ER-II**-RT10/21/09-pp.274;298;299;314;315) Only afterward, XXX actually saw Damien shoot in an unspecified direction. (**ER-II**-RT10/21/09-pp.380-381;390;393). XXX testified that Jeremy, (not Matthew) fired the shotgun in an unspecified direction after XXX entered the house. (**ER-II**-RT10/21/09-p.374)

Peters identified no gunman, couldn't identify Damien in court, and didn't know which weapon caused which wound. (**ER-III**-RT10/22/09-pp.611-612;615);(**ER-IV**-RT10/27/09-p 675) Although Damien supposedly wounded Peters' in the gun "tussle", Peters *denied* being shot then; however

Prosecutor 2 urged this would suffice for conviction. (**ER-V**-RT10/28/09-p.876)

Where the underlying substantive offenses weren't sufficiently proven, the related 924(c) charges must also be reversed.

G. CUMULATIVE EFFECT OF TRIAL ERROR AND MISCONDUCT REQUIRES REVERSAL.

When considering numerous trial errors, "analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant" may more accurately access prejudice. United States v. Frederick, 78 F.3d 1370, 1381 (9th.Cir.1996); United States v. Wallace, 848 F.2d 1464, 1475 (9th.Cir.1988) (Cumulative prejudicial effect of individual error warranted reversal).

Intent evidence against Damien was not strong (Argument E, supra), and relied on testimony that was vouched or substantially interfered with (Argument C, supra). After failing to elicit evidence of ill intent or plan,[16] prosecutors repeatedly misstated particular evidence to bolster inflammatory conspiracy and ambush theories. (**ER-V**-RT10/28/09-pp.837-839;840-841;847-848;865)[17] Each government witness admitted lying during the

[16] (**ER-I**-RT10/21/09-pp.207-208;209-210;212;215;218;329);(**ER-III**-RT10/22/09-pp.507-508;510;517;543;580).
[17] (**ER-IV**-RT10/29/09-pp.847-848)

investigation and possessed significant ulterior motives to testify as they did. [18] All parties were intoxicated or had been drinking.

The government overcharged Damien and used any means necessary to convict him. The jury returned a retributive "blanket verdict" after an incendiary, error-ridden closing argument which remained unobjected to and unremediated. Cumulative plain legal error, government misconduct, and ineffective assistance of counsel surely deprived Damien of a fair trial, and requires reversal.

H. IMPOSITION OF AN EXCESSIVE 1083 MONTH SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNSOUND; EVERYONE MISAPPREHENDED THAT THE JUDGE LACKED DISCRETION TO CONSIDER 18 U.S.C. §3553(a)'s SENTENCING FACTORS TO ALTER IMPOSITION OF CONSECUTIVE MANDATORY SENTENCES. [19]

Damien's sentencing was procedurally and substantively unreasonable. Rita v. United States, 127 S. Ct. 2456, 2459 (2007). Here, everyone believed the judge had "no discretion" when determining Damien's sentence. Thus, she omitted any consideration of 18 U.S.C. §3553(a)'s sentencing factors and imposed Guideline recommended mandatory, consecutive sentences, believing she had no other choice. (RT-3/22/10-p.7);(CR-161;**ER-I**-64)

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[18] (**ER-I**-RT10/20/09-pp.169-170;175);(**ER-II**-RT10/21/09-pp.289-290;304-305;316;320;354;382;384);(**ER-III**-RT10/22/09-pp;418;438;445;549)

[19] Defendant preserved this issue for review and appellant incorporates those arguments herein.(RT-3/33/10-p.3):(CR-161;**ER-I**-57-67)

In Pepper v. United States, 131 S. Ct. 1229, 1234, 179 L. Ed. 2d 196 (2011), the Supreme Court recently invalidated statutory provisions requiring District Courts to effectively to treat Guidelines provisions as mandatory. "Sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable." United States v. Mitchell, 624 F.3d 1023, 1030 (9th.Cir.2010). District Courts may vary from Guidelines based on policy disagreements. United States v. Henderson, 09-50544, 2011 WL 1613411 (9th.Cir.2011). Damien, only 24, had no prior felony or federal convictions, no death resulted, and this wasn't a capital offense. Proper consideration of 18 U.S.C. §3553(a)'s factors would have demonstrated this 1083 month sentence to be unreasonable, excessive, and grossly disproportionate. Resentencing is required.

VII. CONCLUSION

Accordingly, appellant respectfully requests that the convictions and sentences be vacated and remanded for corrective action.

Respectfully submitted this 31st day of August, 2011.

/s Michele R. Moretti
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Dated: August 31, 2011

CERTIFICATION OF RELATED CASES

Appellant is unaware of any case before this court related to this appeal.

/s Michele R. Moretti
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Dated: August 31, 2011

CERTIFICATION OF COMPLIANCE

In accordance with F.R.A.P. Circuit Rule 32, the foregoing document has been produced using double spaced, proportionately spaced, fourteen (14) point type face with a word count of 13,987, comprised of an average of fewer than two-hundred eighty (280) words per page.

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Dated: August 31, 2011

CERTIFICATION OF SERVICE

I, Michele R. Moretti, Esq., certify that on this day I have mailed two (2) copies of Appellant's Brief and accompanying Appendix to, A.U.S.A., Joan Ruffenach, United States Department of Justice, 2 Renaissance Square, 40 N. Central Ave., Suite 1200, Phoenix, Arizona, 85004-4408, postage prepaid.

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