No. 22-14126-AA

In the
United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SYLVANIS BRICE ET AL.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 2:19-CR-4-TPB-NPM-2

BRIEF OF THE UNITED STATES

ROGER B. HANDBERG
United States Attorney

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division

EMILY C. L. CHANG
Assistant United States Attorney
Appellate Division
USA No. 166
400 W. Washington St., Ste. 3100
Orlando, FL 32801
(407) 648-7500

May 2, 2024

United States v. Sylvanis Brice et al.
No. 22-14126-AA

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons identified in the Certificates of Interested Persons and Corporate Disclosure Statements in the appellants' principal briefs, the following persons have an interest in the outcome of this case:

1. Billie, Ronnie, Jr., victim;
2. Billie, Reuben, Jr., victim;
3. Chang, Emily C. L., Assistant United States Attorney;
4. Handberg, Roger B., United States Attorney;
5. Lopez, Maria Chapa, former United States Attorney;
6. Minor victims whose identities are protected;
7. Siekkinen, Sean, Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Statement Regarding Oral Argument

The United States does not request oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The court entered judgments against Sylvanis Brice and Johan Holder on December 12, 2022, Docs. 377, 379, and both timely filed a notice of appeal that day, Docs. 381–82. The court entered its amended judgment against Uriah Waggerby on December 13, 2022, Doc. 385, and he timely filed a notice of appeal that day, Doc. 389. *See* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

Statement of the Issues

I. Did the district court have subject-matter jurisdiction over the United States' prosecution of Waggerby for conspiracy to commit Hobbs Act robbery even though he and his victim are Indians and part of his offense occurred in Indian country? [1] (Waggerby's Issue I)

II. Did Brice waive his right to assert a violation of the Speedy Trial Act by failing to move for dismissal under 18 U.S.C. § 3162? (Brice's Issue I)

III. The district court failed to make an on-the-record finding under Rule 609(a)(1) that the probative value of admitting Brice's prior convictions outweighed their prejudicial effect. Was the error harmless given the overwhelming evidence of his guilt? (Brice's Issue II)

IV. Brice told a confidential informant that he and Holder had committed attempted robbery. Did the district court correctly deny Holder's motion to exclude Brice's statements because they were

[1] As the relevant federal laws use the term "Indian" rather than "Native American," *see* 18 U.S.C. §§ 1152–53, we use "Indian" here.

nontestimonial and did not implicate Holder's confrontation rights? (Holder's Issue)

Statement of the Case

Sylvanis Brice, Johan Holder, and Uriah Waggerby conspired to rob Reuben Billie, Jr., a marijuana dealer, at his home on an Indian reservation. The robbery went awry, resulting in the shooting death of a bystander, Ronny Billie, Jr. All three were convicted of Hobbs Act conspiracy, and Brice and Holder were convicted of attempted Hobbs Act robbery. Their issues on appeal involve the Speedy Trial Act, the district court's subject-matter jurisdiction, and evidentiary rulings.

Course of Proceedings

In January 2019, a federal grand jury charged Uriah Waggerby and Sylvanis Brice with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count One); Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a)–(b) and 2 (Count Two); and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(D) (Count Three). Doc. 3. Both defendants were arraigned the next month. Docs. 10, 18, 40. Later that year, a superseding indictment was filed, charging Waggerby and Brice with the same three offenses (but adding *attempted* Hobbs Act robbery to Count Two). Doc. 76.

A. Trial Continuances

From 2019 until October 2021, the court continued the case for various reasons, including pretrial motions, the COVID-19 pandemic, Brice's competency proceedings, and counsels' need to review extensive discovery.[2] Docs. 44, 50, 52, 66, 68, 71, 106, 127, 130, 133, 135, 138, 151–52, 154, 164, 166, 170, 175–78, 195, 211, 213, 224, 404, 409–12, 434, 447, 451–52, 454, 458–60, 466. On October 20, 2021, a second superseding indictment was filed, adding Johan Holder and Kaleb James as defendants on all three counts. Doc. 232. James was arraigned on November 3, 2021. Doc. 255. Holder was in state custody when the second superseding indictment was filed, and he was not arraigned on the instant charges until April 4, 2022, after he had stood trial in state court for murder and robbery. Doc. 413 at 4; Doc. 416 at 14; Doc. 417 at 12; Doc. 290.[3]

In the meantime, from October 21, 2021, through February 2022, the court continued the case several more times, because of COVID-19; the need for James's counsel to review discovery and avoid state- and federal-court scheduling conflicts; a prosecutor's parental-leave schedule; and Waggerby's

[2]On April 30, 2021, the court found Brice competent. Doc. 208.

[3]We cite all record documents based on the page number that appears in the header generated by the district court's electronic filing system. We cite the appellants' briefs using their own page numbers.

counsel's emergent health issues. Docs. 240–41, 269, 413, 416–17, 277. Each time, the court found that the ends of justice served by granting the continuances outweighed the best interest of the public and the defendants in a speedy trial, and (cumulatively) determined that time until the end of the June 2022 trial term would be "excludable time" pursuant to 18 U.S.C. § 3161(h). Docs. 413 at 9; Doc. 415 at 7–8; Docs. 240, 269, 277.

In April 2022, the court made that ends-of-justice finding again in granting a final continuance and excluding time through the end of the July 2022 trial term because "we have added a new defendant, and it's a serious case, with serious charges, the prosecutor needs time and the defense needs time to prepare, and I don't want to split the case up in the interests of judicial economy." Doc. 419 at 7; Doc. 302.

Beginning in October 2021, Brice demanded a speedy trial and said he wanted a trial "[a]s soon as possible." *See, e.g.*, Doc. 413 at 7; Doc. 415 at 6, Doc. 417 at 13. But he did not move for a severance, nor did he move to dismiss the indictment.

B. Waggerby's Motion to Dismiss

In January 2020, Waggerby moved to dismiss the superseding indictment. Doc. 151. He argued that the district court lacked subject-matter jurisdiction over his prosecution because (a) he and his victim, Reuben, are

Indians; (b) Waggerby's offenses occurred in Indian country; and (c) none of the charged offenses were listed in the Major Crimes Act (MCA), 18 U.S.C. § 1153. Doc. 151 at 1–3, 14. The United States opposed, explaining that federal crimes of nationwide applicability (including the charged violations) may be prosecuted federally, even if they involved Indians or took place in Indian country. Doc. 157 at 2–5.

The district court denied Waggerby's motion, pointing out that "the majority of appellate courts have held that federal district courts have subject-matter jurisdiction over these types of offenses." Doc. 167 at 3–4. The district court noted that the Second and Seventh Circuits are outliers that hold that even where general federal criminal statutes are involved, federal jurisdiction must be based on a peculiar federal interest. *Id*. But the district court observed that these charges met that higher standard because the Hobbs Act charges required proof of an effect on interstate commerce and the drug-conspiracy charge "also appear[ed] to implicate a federal interest." *Id*. at 4 n.1.

C. Convictions and Sentences

After an eight-day trial, the jury issued a mixed verdict:

Appellant	Count One	Count Two	Count Three
Waggerby	Guilty	Not Guilty	Not Guilty
Brice	Guilty	Guilty	Not Guilty
Holder	Guilty	Guilty	Not Guilty
James	Not Guilty	Not Guilty	Not Guilty

Docs. 339, 341–43, 347–50, 352.

The appellants' guidelines ranges and sentences were as follows:

Appellant	Offense level/ Criminal History Category	Guidelines Term	Sentence
Waggerby	43/III	240 months	216 months
Brice	43/VI	480 months	480 months
Holder	43/VI	480 months	480 months

Doc. 366 ¶ 74; Doc. 368 ¶ 90; Doc. 370 ¶ 102; Doc. 377 at 2; Doc. 379 at 2; Doc. 385 at 2. These appeals followed. Docs. 381–82, 389.

Statement of the Facts

A. Trial Facts

Waggerby and Holder were lifelong friends. Doc. 424 at 134. Brice knew them, too, and called Kaleb James his cousin. Doc. 424 at 138, 140–41.

(1) The botched robbery

Reuben Billie, Jr., ("Reuben") was a small-time marijuana dealer.[4] Doc. 424 at 202–03. He kept marijuana, marijuana wax (extract of the cannabis plant), drug paraphernalia, and large sums of cash at his home. Doc. 423 at

[4]Reuben's nickname is Sonny, Doc. 424 at 240; Brice's nickname is Fish, Doc. 426 at 59; Holder's nicknames include Billy Hun, Hundun, and Hun, *id.* at 58, Doc. 425 at 102–03; and James's nickname is Trill, Doc. 426 at 59. Although witnesses at times referred to them by their nicknames at trial, we use their actual names throughout.

142–43, 188–90, 194–95, 198; Doc. 424 at 188. Reuben is an Indian and he lived on an Indian reservation in Clewiston, Florida. Doc. 423 at 146; Doc. 424 at 205, 240. Clewiston also encompassed a town outside the reservation, including a neighborhood called Harlem. *Id.* at 49, 104.

At around 11:36 p.m. on November 1, 2016, Reuben and several friends, including Ronny Billie, Jr. ("Ronny"), were socializing on the porch of Reuben's house.[5] Doc. 423 at 13–14, 210–11; Doc. 424 at 240–42. Reuben's wife, Sonia, was inside the house, watching television with her baby. Doc. 423 at 14.

When the actual robbery began, Reuben was in his driveway. Doc. 424 at 241. Suddenly, three black, male robbers appeared; each was wearing all-black clothing and a mask.[6] Doc. 422 at 231, 257; Doc. 423 at 22. One robber hit one of Reuben's friends in the face with a gun. Doc. 424 at 241. A robber said, "Give me all the fucking money," and Reuben struggled with the robber as he (Reuben) ran toward his home to get his gun. *Id*. at 241–42. When Reuben reached his home, he tried to close the door and lock it behind him, but a robber had a gun pointed at his back. Doc. 423 at 15; Doc. 424 at 242. The gun was a mid-sized rifle with an AR platform. Doc. 423 at 213. Sonia

[5]Ronny and Waggerby are cousins. Gov't Ex. 29T at 13.

[6]Holder and Brice are black. Doc. 368 at 3; Doc. 370 at 3.

wrestled with the robber and held the gun up in the air as Reuben tried to push the robber out. *Id*. at 15, 211; Doc. 424 at 243.

Just then, a gunshot went off—but not from the gun of the robber with whom Sonia was wrestling. Doc. 423 at 16. That robber immediately fled. *Id*.; Doc. 424 at 243. Sonia called the police. *Id*. Around 11:42 p.m., Seminole Police officers arrived, but by then, the robbers had escaped. Doc. 422 at 221–22, 233. It was very dark out. *Id*. at 237. As an officer spoke with witnesses, he suddenly noticed that a man (later identified as Ronny) was lying unconscious in the front yard. *Id*. at 222–23, 236. Although the officer attempted to revive Ronny, paramedics declared him dead about ten minutes later. *Id*. at 223, 233; Doc. 423 at 37. A medical examiner later determined that Ronny had died from a gunshot wound and also that a blunt impact with a hard object had caused an injury on Ronny's forehead. *Id*. at 133–34.

Investigators confirmed that the robbers didn't take marijuana or cash from Reuben's house, so they didn't complete the robbery. Doc. 424 at 208.

(2) Waggerby's statements to the police

The police interviewed Waggerby several times between November 3 and December 8, 2016. Doc. 423 at 219, 237; Doc. 424 at 77. Initially, he claimed that he was not involved with Ronny's murder. Doc. 423 at 219–20. But eventually he admitted that he had conspired with others to rob Reuben,

though he was adamant that he hadn't expected anyone to get killed. Doc. 424 at 19, 90.

Waggerby said he didn't really know Reuben, but he had heard that Reuben had marijuana wax and Waggerby wanted it. Doc. 424 at 23–24. Waggerby said that a few days or weeks before the robbery, he had met with "Little Boo" and Leland Miller in the town of Clewiston. *Id*. at 24–27, 33, 86–87. Waggerby told them that Reuben had big "slabs" of marijuana that were worth a lot of money. *Id*. at 96. One of them offered to handle the robbery and split the proceeds with Waggerby, and Waggerby identified Reuben's house so they would know where to go. *Id*. at 24–25, 30–31, 37–38. Waggerby instructed them to go late in the day, when no one was moving around. *Id*. at 90–91, 96–97. Waggerby also told them to meet him at the skate park afterward so Waggerby could collect his cut. *Id*. at 86, 104. He said he would call them on November 1 so they could execute the plan. *Id*. at 93.

Waggerby said that on the evening of November 1, he met up with Little Boo, Miller, and "ABM Ball"—all three of whom were in ABM Ball's car—in the Harlem section of Clewiston. Doc. 424 at 95–98. Waggerby said that Little

Boo and ABM Ball were both armed with handguns and that they were dressed completely in black.[7] *Id.* at 99.

Waggerby instructed them to follow him as he rode in a separate car with his friend Derry West. Doc. 424 at 88, 100. Waggerby recalled that ABM Ball's white car sped toward the reservation, and when they all arrived at the reservation, ABM Ball turned toward Reuben's home and Waggerby went home. *Id*. at 102–04. Later, West dropped Waggerby off at an apartment, then Waggerby walked to the skate park. *Id*. at 109. No one met him there or even called him, and Waggerby said he felt as though ABM Ball and Little Boo had cheated him. *Id*. at 106.

While Waggerby was at the skate park, he saw the police drive by. Doc. 424 at 107. Then, around midnight, his aunt and cousin (who happened to be passing through) saw him at the skate park and gave him a ride home. *Id.* at 107, 233–35, 237; Doc. 426 at 108. His sister later told him that Ronny had been killed at Reuben's house. Doc. 424 at 110.

Cell-site records generally corroborate Waggerby's statements (although the records implicate Brice and Holder, not the people Waggerby identified). They show that at times between 7:13 and 9:23 p.m. on November 1, the

[7]Upon further investigation, the police determined that there was insufficient evidence to charge any of the people whom Waggerby identified. Doc. 424 at 33, 48, 127.

phones of Brice, Waggerby, Holder, and West were all in the Harlem neighborhood in Clewiston.[8] Doc. 426 at 194; Gov't Ex. 25 at 11. From 10:22 through 10:50 p.m., Waggerby's phone was around his home (very close to Reuben's house). *Id.* at 12; Doc. 426 at 196. And by 11:46 p.m., his phone connected to a cell tower that serves the skate park where he'd gone. Doc. 426 at 200; GX 25 at 13–14.

(3) Brice's and Holder's admissions to a confidential informant

Demaster Auther has an extensive felony record and a reputation for theft and burglary. Doc. 425 at 94, 120. He knows Waggerby, Brice, Holder, and James, and identified all four in court. *Id*. at 88, 113–14. He has known Brice and Holder since they were kids and has a "pretty good" relationship with both. *Id*. at 89–90. And through his sister, he is related to Brice. *Id*.

The day after the shooting, Brice swung by Auther's house and told him what had happened at Reuben's house the night before. Doc. 425 at 91–92.

[8]Investigators identified a -5589 phone number as Brice's based on incoming communications from his then-girlfriend, the mother of his child, and his mother. Doc. 424 at 142; Doc. 426 at 146–47, 168–69, 224; Doc. 427 at 63, 94–95; Gov't Ex. 24. Facebook also verified that the number was linked to Brice's Facebook account. Doc. 425 at 7; Doc. 426 at 111–14, 117–18; Doc. 427 at 188; Gov't Ex. 23. Holder stipulated to his -5538 phone number. Doc. 426 at 177. Waggerby identified his -5702 phone number during a police interview. Doc. 423 at 224. Detective Romanello identified West's phone number. Doc. 424 at 131.

Brice told Auther that he and his coconspirators had originally gone to the reservation to rob someone, but that person wasn't there, so they went to Reuben's house. *Id*. at 92–93. Brice said a lot of people were there and when someone tried to run, Brice ran behind him and shot him. *Id*. About two days after that, Holder stopped by Auther's house to chat. *Id*. at 93, 136–37. Holder told Auther that he and others had "hit a lick," meaning that they had robbed someone. *Id*. at 93, 110. Holder also claimed responsibility for shooting Ronny. *Id*. at 93.

Auther gave this information to law enforcement, and in January 2017, the FBI gave Auther a device so he could help in the investigation by recording a conversation with Brice (which he did). Doc. 424 at 262–64; Doc. 425 at 8, 93, 95. During that conversation, Brice described the robbery in detail, telling Auther that there had been too many people at Reuben's house. Gov't Ex. 36T at 9. He said there were cars everywhere, and that when he arrived, he jumped out of the car. *Id*. at 10. He heard people talking as they stood in the driveway in front of the house. *Id*. Brice said he crept up, leading the way, and told "Hundun [Holder] and them" to follow his lead. *Id*. at 11.

Brice described his interaction with his first victim as "Boom!" and added, "You feel me[?] I'm on my man." Gov't Ex. 36T at 11. He said the others scattered and the homeowner (*i.e.*, Reuben) ran toward his house. *Id*.

Brice followed and eventually caught Reuben in the house, and Reuben's wife and his babies ran out and she begged for him not to kill Reuben. *Id*. at 11–12.

Brice recalled that his first victim came to and then approached the house while on the phone talking to the police. Gov't Ex. 36T at 12. Brice said his gun went off and that he "hit him." *Id*. He said that the man he hit (*i.e*., Ronny) died instantly: "[I]t was over before he hit the ground. Bitch body done locked up." *Id*. Brice described the gun that they had brought as an AR rifle with two clips in it. *Id*. at 5.

Brice said he saw everyone running and he ran to catch up with "[Holder] and them." Gov't Ex. 36T at 12. He and his coconspirators jumped back into their car, and he told them not to panic. *Id*. at 13. As they drove off, he angled the car "sideways" so the license-plate reader couldn't capture an image of their tag. *Id*. They then headed south toward Dade County, driving on I-75 before swinging north to South Bay, and continuing north to Sebring. *Id.* at 13–14.

Brice confirmed that they didn't get anything from the attempted robbery. Gov't Ex. 36T at 6–7. He said, "I just did all this shit for nothing" and "I'm all in now! I got a body on my belt." *Id*. at 14. (Auther explained that this meant that Brice had killed someone. Doc. 425 at 108.)

Brice explained that after he and the other robbers left Reuben's house, they went to Sebring to commit another robbery. Gov't Ex. 36T at 14, 16. He said that when they were "about to hit the crib," they had to call it off because his associate, Christopher Bell, went online and saw that someone had died as a result of the previous robbery attempt. *Id*. at 16.

Brice said that Waggerby wasn't at the robbery at Reuben's house. Gov't Ex. 36T at 2. Brice added that had he seen Waggerby, "he probably would've got it cause I knew, he knew." *Id*. Auther understood that to mean that Brice would have shot Waggerby because Waggerby knew what was going on. Doc. 425 at 99.

(4) Corroboration of Brice's account

The investigation corroborated much of Brice's account of the attempted robbery at Reuben's house and his subsequent flight from the area. First, no one saw Ronny get shot, except possibly the shooter. Doc. 425 at 61. Indeed, no one realized that Ronny had been shot until a responding officer saw him lying on the ground. Doc. 422 at 223, 236. The medical examiner confirmed that because Ronny had been shot through the spine, he would have locked up and collapsed instantly and he would have died very quickly, Doc. 423 at 133, 136, just as Brice described, Gov't Ex. 36T at 12.

Second, home-surveillance footage from Reuben's home showed a robber struggling with Reuben and Sonia in the doorway. Doc. 423 at 211. Seminole Police Detective Jarret Romanello testified that in his lay opinion, Brice's and James's build and height were both consistent with the approximate build and height of the robber who was filmed at Reuben's door. Doc. 424 at 142–43.

Third, license-plate-reader records support Brice's account of directing the getaway vehicle away from the camera, so as to avoid detection. As background, license-plate readers capture images of reflective items like license plates, although they may not capture the image of a license plate if the car isn't in the travel lane while passing the reader, or if the driver angles the vehicle away from the reader's camera. Doc. 425 at 75–77. In the latter instance, the reader won't capture any images because normal car paint doesn't activate a license-plate reader; only readable tags do. *Id*. at 65, 76. License-plate readers at the south end of the reservation did not capture any license plates of vehicles that left the reservation during the hour after the crime occurred. *Id*. at 61; Doc. 426 at 107.

Fourth, cell-site records showed Brice leaving the reservation and driving south—which is consistent with his account to Auther. Call records show that Brice and Holder exchanged eight calls between 7:13 and 9:23 p.m. on

November 1. Doc. 426 at 194–95; Gov't Ex. 25 at 11. During that period, the phones associated with Brice, Waggerby, Holder, and West were all in the Harlem area of Clewiston. *Id.*; Doc. 426 at 194. Driving from there to Reuben's house takes more than 45 minutes. *Id*. at 132. Consistent with that timing, at 10:32 p.m., Holder's phone connected to a tower that serves the road between Clewiston and the reservation. *Id*. at 196–97; Gov't Ex. 25 at 12. And from 11:04 to 11:09 p.m., Brice's phone connected to a cell tower that was just 1,500 feet away from Reuben's residence. *Id.* at 14; Doc. 426 at 199. Then, at 11:51 p.m., Brice's phone connected with a tower to the southeast, which is consistent with the phone traveling south from Reuben's area toward I-75. Doc. 422 at 239; Doc. 426 at 201; Gov't Ex. 25 at 15.

Moreover, Holder's phone connected to a cell tower on Highway 27 (which runs north from I-75 to South Bay) at 12:34 a.m. and a cell tower in South Bay at 1:11 a.m. Gov't Ex. 25 at 18. By about 3:00 a.m., Holder's phone connected to towers near Sebring. *Id.* at 19. This is consistent with the escape route that Brice had described—exiting south from the reservation toward I-75, then taking Highway 27 north to South Bay and Sebring—which takes about three hours total. Doc. 426 at 135–36; Gov't Ex. 36T at 13–14.

Fifth, testimony from Christopher Bell, an associate of Brice's and Holder's, further corroborated Brice's account. Bell has known Holder and

Brice for years. Doc. 426 at 55–59. When he testified at trial, Bell was serving a sentence for robbery and accessory after the fact to second-degree murder. *Id.* at 57.

Bell testified that late one night when he was living in Sebring, Holder called him unexpectedly. Doc. 426 at 66–68. Holder told Bell that he, Brice, and James were heading to Sebring. *Id*. at 68. When Bell woke up early the next morning, he saw that he had missed calls and texts from Holder. *Id*. at 69. He gave Holder his home address. *Id*. Phone records support this: they show that on November 2, Holder called Bell several times between 3:00 and about 7:00 a.m., and Bell called Holder at 7:03 a.m. *Id.* at 239–40. At the time, Holder's phone was connecting to a cell tower in Sebring. *Id*.

Bell testified that about five or ten minutes later, Holder, Brice, and James arrived at Bell's home in a white car that Brice was driving. Doc. 426 at 70. Evidence from Holder's phone contains a photograph of Bell's Sebring home, and a digital forensics examiner explained that Google Maps had put the image on the phone when Holder was in the area on November 2, 2016, at 7:15 a.m. *Id*. at 47, 66–67; Gov't Exs. 16C, 40A.

(5) Holder's admissions to Bell

Bell testified that while they were outside, Holder started telling Bell that he, Brice, and James had gone to the Indian reservation the night before to rob

an Indian and that Holder had shot him. Doc. 426 at 71. Bell stopped Holder and told him to go inside before saying more. *Id*. Once inside, Holder said that while he, Brice, and James were trying to rob an Indian, Brice started to panic and said, "Let's go," and Holder ended up shooting the boy before they left. *Id*. at 72. Holder said he believed he had killed the boy. *Id*. at 73. Brice and James were present when Holder told Bell these things. *Id*. at 72–73. Bell saw on Facebook an "RIP" post about someone on the reservation, and Bell figured that that was related to what Holder had just told him. *Id*. at 73–74.

Later that day, Holder asked whether Bell knew of any robberies Holder could commit while in Sebring. Doc. 426 at 74. Bell said yes. *Id*. Bell, James, Brice, and Holder all went to the car, and before they got in, Holder opened the trunk and showed Bell two AR-15s: a "long AR-15" and an AR pistol. *Id*. at 74–75. Bell and Holder each grabbed one. *Id*. Bell said he eventually called off the robbery due to police surveillance. *Id*. at 78.

They returned to Bell's house. Doc. 426 at 78. While Brice was not present, Holder told Bell that he wanted to kill Brice because he feared Brice might tell law enforcement about what had happened the night before. *Id*. at 79. Bell interpreted this as Holder asking for permission to kill Brice in Bell's area. *Id*. at 84. Bell told Holder no, and the four men hung out before Holder, Brice, and James left. *Id*. at 79.

(6) Ballistics evidence

Investigators found Ronny's body lying within arm's length of a parked ATV, and they found a spent 5.56-by-45-millimeter shell casing on the ATV's front seat. Doc. 423 at 62–63, 74–75, 105; Gov't Exs. 4-25, 4-35. It did not appear to have been outside for a long time. Doc. 423 at 116. On the ground, just feet away from Ronny's body, investigators found a 5.56-by-45 millimeter magazine with 27 live rounds of .223 ammunition in it.[9] *Id*. at 61, 75; Gov't Ex. 4-24. A single round of .223 ammunition lay on the ground near the magazine. Doc. 422 at 244; Doc. 423 at 76. A firearms expert determined that the magazine could have held both the spent casing and the live .223 round found on the ground. *Id*. at 103–04, 107–08.

All 28 of the live rounds found at the scene were designed to fire in an AR-15 style rifle. Doc. 423 at 108. Holder's phone contained this photograph:

[9]5.56 ammunition is designed for military use and rated to higher pressure than civilian .223 ammunition, so they aren't safely interchangeable, but they appear almost identical. Doc. 423 at 103.

Gov't Ex. 16H at 1; Doc. 426 at 44. It depicts a gun that can accept the magazine found on the ground and can fire both 5.56 and .223 ammunition. Doc. 423 at 113–15. The firearm would also have extracted and ejected the spent casing. *Id*. at 113. A firearms expert concluded that one of the bullet fragments found in Ronny's body was consistent with a .223 or 5.56 bullet. *Id.* at 102, 104, 114.

Holder's phone was used to take that photograph on October 29, 2016—two days before the attempted robbery at Reuben's home. Doc. 426 at 44–45. Bell identified the photograph as depicting the same type of firearm as one of the two that he saw in Holder's trunk when Holder met him in Sebring the day after the attempted robbery. *Id*. at 76. Bell also said that the photograph looked like it was taken in Holder's room, and that Holder's shoes appeared in the picture. *Id*. at 77.

Holder's phone also contained a photo of Holder holding a gun that Bell identified as an AR pistol—the same gun as one that Bell had observed in the trunk when Holder went to Sebring the day after the robbery. Doc. 426 at 76. That photo had been taken using Holder's phone two weeks earlier. *Id*. at 43–44; Gov't Ex. 16F.

B. Brice's Rule 609 Objection

On direct examination, the prosecutors elicited from Detective Romanello certain admissions that Brice had made to him during an interview on July 1, 2017. Doc. 424 at 134–35. Those admissions included Brice's confirmation of his nickname (Fish) and Facebook usernames ("Sylvanus Brice" and "Brice Brice"); the names and contact information of his girlfriend and the mother of his children; and the fact that he knew Holder, Waggerby, and James. *Id*. at 135–38, 141–42.

On cross-examination, Brice's counsel elicited other statements that Brice had made during that interview, including that (a) he had trick-or-treated with his kids on Halloween (*i.e.*, the day before the attempted robbery); (b) he and his girlfriend Gigi had gotten a ride back to his aunt's house in Clewiston, where he stayed for some time; and (c) he had had nothing do with the robbery. Doc. 424 at 194–97. Later, during cross-examination of Detective Aimee Barlow, Brice's counsel again referred to Brice's July 2017 statement to

Detective Romanello that he had stayed with his aunt at a particular address on Route 27, and asked whether any law enforcement had tried to verify that statement. Doc. 426 at 170–71. (Detective Barlow said she didn't know. *Id.* at 171.)

The prosecutors informed the court that the United States intended to introduce evidence of Brice's prior convictions (under Rules 806 and 609) because his counsel had elicited his self-serving hearsay and the United States had not had an opportunity to cross-examine him. Doc. 424 at 198; Doc. 426 at 249. Brice's counsel objected, arguing that the government couldn't admit "the whole laundry list" of his convictions, especially if they were old. *Id*. at 249–50. She emphasized that the court had to make an on-the-record finding that the probative value of admitting the evidence outweighed its prejudicial effect. *Id*. at 252. She also argued that the prior convictions would be unduly prejudicial because they would compel the jury to believe that Brice was a bad person who should be convicted because he had done something bad before. *Id*.

The court acknowledged that the evidence was "fair game under Rule 806" and that the court therefore had to conduct a balancing test under Rule 609. Doc. 426 at 252, 254. The court encouraged the parties to confer and said

that if they could not reach an agreement, the court would rule on the issue the next day. *Id*. at 256–57. Later, the court ruled on the issue thus:

> [AUSA]: Ms. Shatz and I had very brief discussion following our 806 and 609 argument, and it sounds like Ms. Shatz does not want to stipulate and risk losing the 609 objection.
>
> THE COURT: First page of everything.
>
> [AUSA]: That's [what I] was going to say. First page of everything, and what about the ones where there are misdemeanors, just white them out?
>
> THE COURT: Yes. …
>
> . . .
>
> MS. SHATZ: Why can't we just combine into it a single page that says convicted on this date –
>
> THE COURT: … When that girl cut and pasted, you said that was bad; right? This is the way it's done. It's very innocuous. All right.

Id. at 274. The United States then admitted copies of judgments that showed that Brice had previously been convicted of possession of a firearm by a felon (in 2013 and again in 2019); and aggravated assault with a deadly weapon, fleeing and eluding law enforcement, and battery on a detainee (all in 2013). Doc. 427 at 39; Gov't Exs. A–D.

C. Holder's Motion to Exclude Evidence Based on *Bruton*

Before trial, the United States moved in limine to admit Brice's recorded statements to Auther as statements against interest under Rule 804(b)(3). Doc.

303. In portions of the statements, Brice had identified Holder as another robber at Reuben's house. Gov't Ex. 36T at 11–13. Citing *Bruton v. United States*, 391 U.S. 123 (1968), Holder moved in limine to exclude those statements on grounds that their admission would violate his Confrontation Clause rights. Doc. 421 at 78–79, 82–87; Doc. 321. The United States maintained that when Brice made the statements, he had no reason to believe that they might be used in a later prosecution, so they were nontestimonial and did not implicate *Bruton*. Doc. 421 at 80–83; Doc. 322. The court denied Holder's motion. Doc. 422 at 14; Doc. 340.

Standard of Review

I. This Court reviews de novo the district court's subject-matter jurisdiction. *United States v. Benjamin*, 958 F.3d 1124, 1133 (11th Cir. 2020).

II. This Court reviews de novo a claim under the Speedy Trial Act. *United States v. Dunn*, 345 F.3d 1285, 1288 (11th Cir. 2003).

III. This Court reviews for abuse of discretion a district court's decision to admit evidence of prior convictions under Rule 609. *United States v. Pritchard*, 973 F.2d 905, 908 (11th Cir. 1992). Any errors in admitting evidence under Rule 609 are subject to harmless-error review. *See United States v. Moore*, 76 F.4th 1355, 1367, 1369–70 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 711 (2024).

IV. This Court "review[s] *de novo* the question of whether hearsay statements are 'testimonial' for purposes of the Confrontation Clause." *United States v. Lamons*, 532 F.3d 1251, 1261 n.15 (11th Cir. 2008).

Summary of the Argument

I. The district court had subject-matter jurisdiction over Waggerby's prosecution for conspiracy to commit Hobbs Act robbery even though he (an Indian) conspired to commit Hobbs Act robbery against Reuben (another Indian) in Indian country. Waggerby inaccurately contends that the district court assumed jurisdiction over his prosecution through various enclave acts, including the Indian Country Crimes Act (ICCA) and the Major Crimes Act (MCA), 18 U.S.C. §§ 1152–53. But the district court derived its subject-matter jurisdiction from the Hobbs Act, which is a federal statute of general applicability that applies to Indians and non-Indians alike, no matter where in the United States the offense occurred.

II. By failing to move for dismissal before trial, Brice waived his right to any relief under the Speedy Trial Act. *See* 18 U.S.C. § 3162(a)(2). And, even if he had not waived his speedy-trial claim, he still would not be entitled to relief. Brice was originally indicted in 2019, but the October 20, 2021, filing of the second superseding indictment—which added James and Holder as defendants—started a new speedy-trial clock.

The last codefendant was not arraigned until April 4, 2022, so the new speedy-trial clock for all four defendants would have begun running that day. But there were no "non-excludable days" between April 4 and July 11 (when trial began) because the court had considered the statutory factors in 18 U.S.C. § 3161(h)(7)(B) and specifically found that that the ends of justice served by granting various continuances during that period outweighed the best interest of the public and the defendants in a speedy trial.

III. Brice is not entitled to relief based on the admission of his prior convictions for impeachment purposes because any error was harmless. The United States properly sought to admit Brice's five prior felony convictions under Rules 806 and 609 because Brice was the declarant of hearsay alibi statements that his counsel elicited on cross-examination. But before admitting the evidence, the court was required to "make an on-the-record finding that the probative value of admitting a prior conviction outweigh[ed] its prejudicial effect." *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979). Even though the court did not do so, any error was harmless. Even after excising evidence of Brice's prior convictions that had been admitted to impeach hearsay statements about his alibi, the jury had plenty of evidence on which to convict him, as his own statements and an array of corroborating evidence directly refute the alibi.

IV. Holder contends that the district court's admission of Brice's recorded statements to a confidential informant violated *Bruton v. United States*, 391 U.S. 123 (1968), because Brice incriminated Holder in those statements, and they were tried together. But *Bruton* concerns only testimonial statements, and the challenged statements were nontestimonial. Brice made the challenged statements to his friend Demaster Auther, not knowing that Auther was acting as a confidential informant. Had Brice known that Auther was working with law enforcement, he wouldn't have spoken to Auther, so the recorded statements were nontestimonial and did not implicate Holder's confrontation rights.

Argument and Citations of Authority

I. The district court had subject-matter jurisdiction over Waggerby's prosecution for conspiracy to commit Hobbs Act robbery.

Waggerby argues that the district court lacked subject-matter jurisdiction because he (an Indian) conspired to commit Hobbs Act robbery against Reuben (another Indian) in Indian country, and that offense is not listed in the Major Crimes Act (MCA), 18 U.S.C. § 1153. *See* Waggerby's brief at 7–15. He also contends that the district court assumed jurisdiction over his prosecution "through a legal fiction that any and all *unenumerated* crimes were incorporated into the MCA by the Assimilative Crimes Act" and argues that such a theory

"render[s] the MCA meaningless and violate[s] Native American tribal sovereignty." Waggerby's brief at 10.

Waggerby completely overlooks that the district court had subject-matter jurisdiction because Hobbs Act robbery is a federal crime of general non-territorial applicability and, as such, it can be federally prosecuted wherever it occurs in the United States—even if it involves an Indian conspiring against another Indian in Indian country. Waggerby is correct that district courts have federal jurisdiction over some offenses that occur in Indian country through the interplay of the Assimilative Crimes Act (ACA), 18 U.S.C. § 13; the Indian Country Crimes Act (ICCA), *id*. § 1152; and the Major Crimes Act (MCA), *id*. § 1153. But, as we explain below, this prosecution does not rely on any of those statutes for jurisdiction.

"Criminal jurisdiction over offenses committed in 'Indian country,' … is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (internal quotation marks and citation omitted). Those laws fall into two categories: federal-enclave laws and federal laws of general, non-territorial applicability.

First, category one. "Enclave laws are laws where the situs of the offense is an element of the crime." *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994). Federal-enclave laws confer on federal courts subject-matter jurisdiction

over prosecutions of certain crimes (like arson, assault, and theft) that occur in the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7, which includes areas such as federal land, federal courthouses, and military bases. *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992).

What if a crime occurs in a federal enclave, but no federal statute proscribes that particular offense? The ACA addresses that situation by "authoriz[ing] federal courts to exercise jurisdiction over violations of state law that occur in the special maritime or territorial jurisdiction of the United States if no federal statute proscribes such violations." *United States v. Gaskell*, 134 F.3d 1039, 1041 (11th Cir. 1998). So, for example, driving under the influence of alcohol at a federal installation in Alabama can be prosecuted federally under the ACA and Alabama law because no federal statute proscribes DUIs. *See United States v. Pate*, 321 F.3d 1373, 1374 (11th Cir. 2003).

What about crimes that occur in Indian country? Those offenses "present a jurisdictional problem because … Indian nations exercise some jurisdiction over their members and their territories," but "federal interests also extend into Indian territory." *Markiewicz*, 978 F.2d at 797. To "balance the sovereignty interest of Indian tribes and the United States' interest in punishing offenses committed in Indian country," Congress enacted 18 U.S.C. § 1152 (ICCA), and later, § 1153 (MCA). *Begay*, 42 F.3d at 498.

The ICCA applies the federal-enclave laws to Indian territory, with several exceptions. 18 U.S.C. § 1152. First, the enclave laws do not extend to: (a) "offenses committed by one Indian against the person or property of another Indian"; (b) any Indian who committed his offense in Indian country and was punished by the tribe's local law; or (c) "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." *Id*. (The Supreme Court has held that crimes committed by non-Indians against non-Indians, in Indian country, are subject to state jurisdiction. *United States v. McBratney*, 104 U.S. 621, 624 (1881).)

In 1883 (before the MCA existed), the Supreme Court held in *Ex Parte Crow Dog*, 109 U.S. 556, 562 (1883), that the ICCA's "intra-Indian exception precluded a district court from exercising subject matter jurisdiction over a murder case in which the Indian defendant had been charged under a federal enclave law." *United States v. Brisk*, 171 F.3d 514, 519 (7th Cir. 1999). In response to public concern following the Supreme Court's *Crow Dog* decision, Congress enacted the MCA, which excludes enumerated crimes from the ICCA's intra-Indian exception. *Id.*; *see Markiewicz*, 978 F.2d at 798 (recounting same legislative history). Now, an Indian can be federally prosecuted for murdering another Indian in Indian country because murder is among the offenses listed in the MCA. *See* 18 U.S.C. § 1153. Conspiracy to commit

Hobbs Act robbery is not listed in the MCA. *See id.*

Therein lies the heart of Waggerby's argument: that the district court lacked jurisdiction because his offense (a) fell within an exception of the ICCA (because both he and his victim are Indians); and (b) is not listed in the MCA. *See* Waggerby's brief at 11. But in so arguing, he improperly ignores the second category of laws that apply. After all, the ICCA and the MCA are not the only sources from which federal courts derive subject-matter jurisdiction in criminal cases. "Federal jurisdiction … extends to … crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer." *United States v. Wheeler*, 435 U.S. 313, 330 n.30 (1978); *cf. Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("[A] general statute in terms applying to all persons includes Indians and their property interests.").

Five sister circuits recognize that "federal courts may enforce general federal criminal laws against *all* persons, including Indians within Indian country." *United States v. Wadena*, 152 F.3d 831, 841 (8th Cir. 1998). Unlike federal-enclave laws, where the situs of the offense is an element of the crime, *Begay*, 42 F.3d at 498, "[f]ederal statutes of general applicability … make actions criminal wherever committed," *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1975). Thus, for example, the Eighth Circuit held that the federal

airborne-hunting statute is a "crime of general applicability" because "the situs of the offense is not an element of the crime." *United States v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997). Because that federal statute is a crime of general applicability, it is "not within the purview of [the ICCA]" and it "applies with equal force when … an Indian on the reservation" violates it. *Id.*; *see United States v. McGrady*, 508 F.2d 13, 15–16 (8th Cir. 1974) (rejecting argument that federal court lacked jurisdiction over prosecution for conversion of Indian tribal organization's funds—in violation of a federal statute of general applicability—simply because Indian committed the offense against another Indian in Indian country).

Likewise, in *United States v. Top Sky*, the Ninth Circuit concluded that an Indian was not exempt from federal prosecution for violating the Bald Eagle Protection Act and reaffirmed that the MCA "deals with the application of federal enclave law to Indians and has no bearing on the application of general laws of the United States [that] mak[e] actions criminal wherever committed." *Id.*, 547 F.2d 483, 484 (9th Cir. 1976); *see also United States v. Yannott*, 42 F.3d 999, 1004 (6th Cir. 1994) (holding that "[the ICCA] and its exceptions apply only to federal laws where the situs of the crime is an element of the offense" and that the MCA "does not strip the federal courts of jurisdiction of those crimes not enumerated therein; in fact, federal courts retain jurisdiction over

violations of federal laws of general, non-territorial applicability," including the felon-in-possession prohibition in 18 U.S.C. § 922(g)); *Head v. Hunter*, 141 F.2d 449, 451 (10th Cir. 1944) (recognizing that an "offense against the laws of the United States" is "generally applicable to all persons wherever committed"); *United States v. Boots*, 80 F.3d 580, 593 (1st Cir. 1996) (affirming conviction for honest-services wire-fraud scheme, in violation of 18 U.S.C. §§ 1343 and 1346, because those federal criminal statutes are "not specific to Native Americans, but rather are of general applicability"), *overruled in part by Pasquantino v. United States*, 544 U.S. 349, 354 (2005).

The United States relied on this second category of statutes—not the enclave laws of the ACA and the ICCA—in prosecuting Waggerby.[10] *See* Doc. 76 at 4 (citing 18 U.S.C. § 1951(a), not the ICCA, *id.* § 1152)). So there was no "intrusion upon … tribal sovereignty in errant reliance" on the ACA, as Waggerby argues. *See* Waggerby's brief at 13. Because the federal statute that criminalizes conspiracy to commit Hobbs Act robbery is a statute of general applicability, it applies to "*all* persons, including Indians within Indian

[10] Because the United States did not rely on the ACA for jurisdiction, Waggerby's arguments about the ACA (in his Issues II and III) are irrelevant, and we do not address them.

country." *Wadena*, 152 F.3d at 841. The district court had subject-matter jurisdiction over Waggerby's prosecution on that basis.[11]

And even if an independent federal interest were required to sustain federal jurisdiction, as two circuits have held,[12] the Hobbs Act would satisfy that requirement because—contrary to Waggerby's characterization—conspiracy to commit Hobbs Act robbery does not fall into "a traditional area of local authority," *see* Waggerby's brief at 12. Indeed, "the infliction of

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[11] And, in any event, by Waggerby's own admission, he planned the robbery and coordinated with his coconspirators in the town of Clewiston, outside the reservation. Doc. 424 at 24–25, 86, 94–97. His offenses therefore "did not occur solely 'within the Indian country,' 18 U.S.C. § 1153, and the district court properly exercised jurisdiction over [him]." *See Markiewicz*, 978 F.2d at 802.

[12] The Second and Seventh Circuits hold that general federal statutes of nationwide applicability reach conduct that Indians commit against Indians in Indian country only when the crime is "peculiarly Federal" in nature. *See Markiewicz*, 978 F.2d at 799–800 (upholding federal-court jurisdiction over offense of maliciously damaging a building in interstate commerce by fire or explosive, in violation of 18 U.S.C. § 844(i), because Congress "explicitly amended the statute … to confer federal jurisdiction over arson crimes"); *United States v. Smith*, 562 F.2d 453, 454–55, 458 (7th Cir. 1977) (district court had subject-matter jurisdiction over assault against federal officer, in violation of 18 U.S.C. § 111, even though defendant and the officer were both Indians and assault occurred in Indian country, "because of the 'peculiarly Federal' nature of that simple assault"). *But see Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 670–71 (7th Cir. 2010) (stating that "[s]tatutes of general applicability that do not mention Indians are nevertheless usually held to apply to them" unless doing so would interfere with tribal governance or "clash with rights granted Indians by other statutes or by treaties with Indian tribes," or if there is persuasive evidence that Congress did not intend by its silence that statute would apply to Indians).

economic harm[] is at the heart of the Hobbs Act's prohibition on robbery, and this subject is well within the permissible scope of Congress's regulatory authority under the Commerce Clause." *United States v. Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001).

Although Waggerby argues that in denying his motion to dismiss, the district court erroneously ignored the Supreme Court's precedents in *United States v. Quiver* and *United States v. Antelope*, Waggerby's brief at 14, both are inapt. In *Quiver*, the Supreme Court observed that the inclusion of certain offenses within the MCA "carries with it some implication of a purpose to exclude others." *Id.*, 241 U.S. 602, 606 (1916). But *Quiver* "concerned a prosecution for adultery, [which was] deemed to be an internal and social tribal matter" that involved "merely the relations of Indians among themselves." *United States v. Blue*, 722 F.2d 383, 386 (8th Cir. 1983) (quoting *United States v. Howard*, 654 F.2d 522 (8th Cir. 1981)). "*Quiver* has not been read to preclude federal prosecutions under general criminal federal statutes not involving such matters." *Blue*, 722 F.2d at 386.

And *Antelope* concerned the prosecution under the MCA of Indians who had committed burglary, robbery, and murder against a non-Indian. *United States v. Antelope*, 430 U.S. 641, 642–43 (1977). In the footnote that Waggerby cites, the Supreme Court stated, "Except for the offenses enumerated in the

[MCA], all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts," citing the ICCA. *Id*. at 643 n.2. Read in context, that footnote is properly read as a restatement of the ICCA—and not a comment on federal crimes of general, non-territorial applicability.[13]

Moreover, Waggerby's citation to the Ninth Circuit's *Jackson* opinion is unavailing. *See* Waggerby's brief at 14. As the Ninth Circuit subsequently explained, "*Jackson* does not stand for the proposition that federal laws of otherwise nationwide applicability do not apply in Indian country." *Begay*, 42 F.3d at 500. Rather, in *Jackson*, the Ninth Circuit had reversed the defendant's conviction because the federal statute under which he had been convicted (18 U.S.C. § 1165, for violating a tribal hunting ordinance) "was intended by Congress to apply not to *everyone* within United States jurisdiction, but rather to everyone *except* Indians." *Begay*, 42 F.3d at 499. Thus, the statute under which the Indian defendant was prosecuted in *Jackson* "was not truly a federal law of nationwide, universal applicability." *Id.* at 499–500.

In sum, the district court correctly determined that it had subject-matter jurisdiction over Waggerby because the Hobbs Act is a general federal crime of

[13]The same is true for *United States v. Welch*, 822 F.2d 460, 464 (4th Cir. 1987) (regarding rape), which Waggerby cites in his brief at 14.

nationwide applicability. So it applies to Indians and non-Indians alike, no matter where in the United States the offense occurred. *See Wheeler*, 435 U.S. at 330 n.30; *Wadena*, 152 F.3d at 841.

II. Brice is not entitled to relief under the Speedy Trial Act because he waived any such claim and, in any event, it lacks merit.

The Speedy Trial Act requires that trial begin within 70 days of the defendant's initial appearance or unsealing of his indictment, whichever occurs later. 18 U.S.C. § 3161(c)(1); *United States v. Dunn*, 345 F.3d 1285, 1292 (11th Cir. 2003). The Act provides for many periods of excludable time, including delays that result from proceedings to determine a defendant's mental competency and "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(1)(A), (h)(6).

The court may also exclude time attributable to delays that result from continuances that a court grants because the "ends of justice" support that continuance. *United States v. Ammar*, 842 F.3d 1203, 1206 (11th Cir. 2016) (citing § 3161(h)(7)(A)). Factors that the court must consider in granting such a continuance include the nature or complexity of the prosecution, the time reasonably necessary for effective trial preparation, and whether failure to grant a continuance would unreasonably deny either party continuity of

counsel. 18 U.S.C. § 3161(h)(7)(B)(ii), (iv). The court is not limited to considering the statutory factors, however, because § 3161(h)(7)(B) provides that a judge must consider the statutory factors "among others." *United States v. Dunn*, 83 F.4th 1305, 1317 (11th Cir. 2023).

After considering the factors, the court must "set[ ] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of [a] continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id*. § 3161(h)(7)(A). The Supreme Court has held that "the Act requires express findings," and "'without on-the-record findings, there can be no exclusion' of time past the 70-day requirement." *Ammar*, 842 F.3d at 1206 (quoting *Zedner v. United States*, 547 U.S. 489, 506–07 (2006)). Violation of the Speedy Trial Act requires dismissal of the indictment if a defendant moves for such relief. 18 U.S.C. § 3162(a)(2).

A. By failing to move for dismissal, Brice waived his right to any relief under the Speedy Trial Act.

A defendant's failure to move for dismissal before trial "shall constitute a waiver of the right to [relief under the Act]." 18 U.S.C. § 3162(a)(2). So, "[i]f … [a] defendant fails to move for enforcement of his Speedy Trial Act rights 'prior to trial,' he is deemed to have waived his rights and the remedy of

dismissal is no longer available to him, even if the trial technically violates the Act's requirements." *United States v. Isaacson*, 752 F.3d 1291, 1300 (11th Cir. 2014) (quoting 18 U.S.C. § 3162(a)(2)).

Brice didn't file a motion to dismiss under the Speedy Trial Act, so he has waived this claim. *See United States v. McDaniel*, 631 F.3d 1204, 1209 n.2 (11th Cir. 2011) (noting that defendant "waived his right under the Act because he failed to move for dismissal under the Act in the district court"); *United States v. Register*, 182 F.3d 820, 828 (11th Cir. 1999) (holding that defendant "waived any right he may have had" under the Act because although he "on more than one occasion demanded a speedy trial …, the record reveals that he never moved the court to dismiss the indictment").

B. Even if Brice had not waived his speedy-trial claim, it would still fail.

(1) The October 20, 2021, filing of the second superseding indictment adding James and Holder established a new Speedy Trial Act clock for Brice.

"In a multiple defendant case, the speedy trial clock begins to run when the last codefendant is indicted or arraigned." *United States v. Mathis*, 96 F.3d 1577, 1579 n.1 (11th Cir. 1996). And where, as here, a new codefendant is added in a (second) superseding indictment, all of the previous codefendants' speedy-trial clocks synchronize with that of the newly added defendant. *See*

United States v. Henderson, 476 U.S. 321, 323 n.2 (1986) (noting that "[a]ll defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant," and when superseding indictment joined petitioners with newly added codefendant, petitioners' speedy-trial period was measured with respect to his 70-day period). This rule does not apply when a motion for severance has been granted, 18 U.S.C. § 3161(h)(6), but Brice never moved for a severance; in fact, at one point, his counsel expressly stated that he was not asking to be severed. Doc. 413 at 8.

So although Brice's speedy-trial clock began to run when he was arrested and arraigned on the original indictment in February 2019, Doc. 18, he became subject to a new clock in October 2021, when the grand jury returned a second superseding indictment and he and Waggerby were joined with two new defendants (Holder and James). Doc. 232.

James had his initial appearance one month later, Doc. 255. But Holder didn't make his initial appearance until April 4, 2022, after he had stood trial in state court for murder and robbery. Doc. 413 at 4; Doc. 416 at 14; Doc. 417 at 12; Doc. 290. Accordingly, Brice's new speedy-trial clock did not begin to run until April 4, 2022—when the last of his codefendants appeared to answer on the charges in the operative indictment. *See United States v. Tobin*, 840 F.2d 867, 869 (11th Cir. 1988) (holding that Tobin's speedy-trial clock did not begin

to run until codefendant's arraignment eight months after Tobin's initial appearance); *United States v. Davenport*, 935 F.2d 1223, 1229–30 (11th Cir. 1991) (noting that Davenport's speedy-trial clock didn't start running until all codefendants were either apprehended or transferred to fugitive status, which "effectively severed them from the case").

Moreover, the delay of less than six months (between return of the second superseding indictment in October 2021 and Holder's initial appearance in April 2022) was reasonable. *See Tobin*, 840 F.2d at 869–70 (eight-month delay was reasonable given the totality of circumstances, especially because Tobin did not move to sever during delay and he failed to allege any substantial prejudice from delay).

As a result, the filing of the second superseding indictment in October 2021, Doc. 232, established a new speedy-trial clock for Brice.[14] *See Henderson*, 476 U.S. at 323 n.2; *see also United States v. King*, 483 F.3d 969, 972–73 (9th Cir.

[14]Brice contends that this concept is "contradicted by the plain language of § 3161(b)" and *Ammar*, 842 F.3d 1203. *See* Brice's brief at 35. But that's not so. Section 3161(b)—which relates to a defendant's right to a speedy indictment, not trial—isn't relevant. *See* 18 U.S.C. § 3161(b). And *Ammar* isn't on point because the superseding indictment in that case didn't add any codefendants; it merely "rearranged Ammar's charges, splitting what was originally styled as one count into two separate counts." *Id.*, 842 F.3d at 1207 n.5.

2007) (relying on *Henderson* in holding that the filing of a superseding indictment that adds a new defendant also restarts the speedy-trial clock for all defendants); *United States v. Barnes*, 251 F.3d 251, 257–58 (1st Cir. 2001) (same); *United States v. Adams*, 625 F.3d 371, 377–78 (7th Cir. 2010) (same). So although Brice devotes significant ink to events that preceded the second superseding indictment, *see* Brice's brief at 27–37, they don't matter for purposes of determining his speedy-trial rights because a new operative clock was established in October 2021.

(2) The court made the requisite ends-of-justice findings on the record such that zero non-excludable days ran by the time Brice's trial began.

"Anything which 'stops the clock' for one defendant does so for the same amount of time as to all co-defendants." *United States v. Pirolli*, 742 F.2d 1382, 1384 (11th Cir. 1984). Consequently, no excludable speedy-trial days began to run upon Holder's initial appearance on April 4, 2022, because by that time, the court had already excluded time through the end of the June 2022 trial term for Brice, Waggerby, and James. Doc. 277. The court had done so during the February 2022 status conference, Doc. 417 at 13–14, after granting a continuance for various reasons, including:

- giving Waggerby's counsel time to recover from surgery;
- giving James's counsel time to review discovery;

- addressing a scheduling conflict that James's counsel had due to trial in another federal court; and
- accounting for the COVID-19 pandemic, which had "made it challenging to try a multi-defendant case while ensuring the health and safety of all persons involved, including potential jurors."

Doc. 277. And, following the April 2022 status conference, the court granted another continuance and excluded time until the end of the July 2022 trial term, citing most of those reasons plus the need for Holder's counsel to become familiar with the case. Doc. 302.

Both times, the court made on-the-record findings that the ends of justice were served by granting the continuance. Docs. 277, 302. The court also properly considered the statutory factors in 18 U.S.C. § 3161(h)(7)(B)(ii) and (iv), including whether failure to grant the continuance would unreasonably deny defendants continuity of counsel and time necessary for effective preparation. Docs. 277, 302. And the court's consideration of the pandemic was appropriate because "the district court is not limited to considering the statutory factors" and "[i]n a public health emergency affecting court operations such as the COVID-19 pandemic, a court properly considers the health and safety of the public, court personnel, the parties, and counsel." *Dunn*, 83 F.4th at 1317.

Because of the second superseding indictment and the "ends of justice" findings that the court made in granting continuances in February and April 2022, zero days on the speedy-trial clock ran by the time the trial began on July 11, 2022, *see* Doc. 339.[15] So even if Brice had not waived his claim under the Speedy Trial Act, he would still not be entitled to relief.

III. Brice is not entitled to relief based on the admission of his prior convictions for impeachment purposes because any error was harmless.

The United States properly sought to admit Brice's five prior felony convictions under Rules 806 and 609 to impeach hearsay statements concerning his alibi; Brice was the declarant of those statements, which his counsel had elicited on cross-examination. *See United States v. Bovain*, 708 F.2d 606, 613 (11th Cir. 1983) (explaining that Rules 609 and 806 permitted use of defendant's prior convictions to impeach him because he was a hearsay declarant, even though he did not testify).

[15]Even if Holder's April 4, 2022, initial appearance (which allowed the speedy-trial clock to begin running as to all defendants) were deemed to have eviscerated the court's February order excluding time through June for the three original defendants, Brice's speedy-trial claim would still fail. At most, 15 days on the speedy-trial clock ran because on April 19, the court excluded time through the end of July based on an ends-of-justice finding. *See* Doc. 419 at 7; Docs. 299, 302.

Before admitting the evidence, however, the court was required to "make an on-the-record finding that the probative value of admitting a prior conviction outweigh[ed] its prejudicial effect." *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979). That finding is "not merely an idle gesture" because it "insures that the Judge has at least taken into account the relevant considerations." *Id*. The district court did not make that on-the-record finding here. *See* Doc. 426 at 274.

"[T]he failure to make such a finding does not automatically call for reversal of [Brice's] conviction[s]," however. *See Preston*, 608 F.2d at 639. "Erroneous evidentiary rulings will not result in reversal if they are 'harmless,' meaning that the party asserting error has not shown prejudice to a substantial right." *United States v. Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998). "In the context of Rule 609, error is harmless … if the Government's case was strong enough to support a conviction even apart from the witness['s] testimony." *Id*.

The Rule 609 error here was harmless because even if the court had not admitted the evidence of Brice's convictions to impeach his alibi statements, the United States' evidence would have been more than enough to support Brice's conviction. The elements of conspiracy to commit Hobbs Act robbery are: "(1) two or more people, including the defendant, agreed to commit Hobbs Act robbery; (2) the defendant knew of the conspiratorial goal; and

(3) the defendant voluntarily participated in furthering that goal." *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019). The elements of substantive Hobbs Act robbery are robbery (*i.e.*, the unlawful taking of property from the person or presence of another, against his will, through actual or threatened force or violence, or fear of injury to his person or property) and an effect on interstate commerce. *United States v. Hano*, 922 F.3d 1272, 1294 (11th Cir. 2019). Robbery that targets drug dealers to steal drugs or drug proceeds affects interstate commerce and satisfies the Hobbs Act's commerce element. *Taylor v. United States*, 579 U.S. 301, 303 (2016).

Ample trial evidence refuted Brice's alibi (*i.e.*, that he had been trick-or-treating with his kids the night before the attempted robbery, and that he and his girlfriend had gone back to his aunt's house in Clewiston to stay the night, *see* Doc. 424 at 196–97). For one, Brice placed himself at the robbery, taking responsibility for striking Ronny, chasing Reuben into the house, and ultimately shooting Ronny. Gov't Ex. 36T at 11–12; Doc. 423 at 134. Not only that, he provided details, the specifics of which he would not have known but for his presence there. He knew there had been a lot of people and cars at the house. Doc. 423 at 14; Doc. 424 at 206; Doc. 425 at 93; Gov't Ex. 36T at 9–10. He recalled that people were standing in the driveway, which is where Reuben said he was when the attempted robbery began. Gov't Ex. 36T at 10; Doc. 424

at 241. And he described Ronny as "lock[ing] up" and dying instantly when he was shot, Gov't Ex. 36T at 12, which is consistent with the medical examiner's conclusion based on the bullet's pathway, Doc. 423 at 136. The gun Brice said he and his fellow robbers used (an AR with two clips), Gov't Ex. 36T at 5, matches (a) the ballistics evidence collected at the murder scene and (b) the rifle that Holder had when he, Brice, and James went to see Bell after fleeing the scene, Doc. 422 at 245; Doc. 423 at 62, 108; Doc. 426 at 76.

The cell-site evidence corroborates Brice's account, too. It shows that Brice, Holder, and Waggerby were all in the Harlem area of Clewiston earlier in the evening on November 1, consistent with Waggerby's statement that he had met with the robbers immediately beforehand and directed them to follow him to the reservation. Doc. 424 at 95–98, 100, 102–04; Doc. 426 at 194; Gov't Ex. 25 at 11. It then shows that Brice's phone was near Reuben's house within the hour before the attempted robbery took place. *Id*. at 14; Doc. 426 at 199. And it shows that after the robbery occurred, Brice's and Holder's phones connected to cell towers that are consistent (both timing-wise and geography-wise) with Brice's statement that they drove east on I-75 to Highway 27, and north toward South Bay, to Sebring. Doc. 422 at 239; Doc. 426 at 135–36, 201; Gov't Ex. 36T at 13–14; Gov't Ex. 25 at 15, 18–19. Moreover, the license-plate readers showed that he successfully evaded detection at the south-exit license-

plate reader, as he intended. Gov't Ex. 36T at 13; Doc. 425 at 61; Doc. 426 at 107. Bell's testimony and Holder's phone records also corroborate Brice's account that after failing to rob Reuben of anything, Brice and Holder went to Sebring to commit a robbery with Bell there. Gov't Ex. 36T at 6–7; Doc. 425 at 105; Doc. 426 at 68, 74, 78.

In sum, Brice's convictions for conspiracy to commit Hobbs Act robbery and substantive Hobbs Act robbery did not hinge on the United States' admission of his prior convictions. Even after excising evidence of his prior convictions (that had been admitted to impeach hearsay statements about his alibi), the jury had plenty of evidence on which to convict him. His own statements and an array of corroborating evidence directly refute the alibi. And, contrary to Brice's prediction that the jury would simply conclude that he was a "bad person" and convict him because of his prior convictions, Doc. 426 at 252, the jury returned a mixed verdict and acquitted Brice of Count Three, Doc. 352. Because any error was harmless, Brice is not entitled to relief. *Cf. Burston*, 159 F.3d at 1336 (concluding that court's erroneous exclusion of Rule 609 evidence was harmless error because the government's case was strong enough to support the conviction even apart from the testimony of a particular witness, and "the marginal impact of [erroneously excluded impeachment] evidence … would have been *de minimis*").

A final note: as outlined in *Preston*, rather than undertaking harmless-error analysis at this stage, this Court could also remand to the district court for an on-the-record Rule 609 determination. *See Preston*, 608 F.2d at 639. "If the [district court] determines that the probative value of admitting the prior conviction outweighed its prejudicial effect, then the conviction will stand affirmed." *Id*. If, however, the district court determines that the probative value of the prior convictions was outweighed by its prejudicial effect, this Court could take up a subsequent appeal to decide "whether there is any reasonable possibility that the admission of the conviction affected the outcome of the case." *Id*. at 639–40. But given the substantial evidence refuting Brice's alibi and the mixed verdict, a remand isn't warranted.

IV. The district court properly declined to exclude Brice's statements to Auther—even though they incriminated Holder—because they were nontestimonial and did not implicate Holder's right to confrontation.

At least twice, Brice revealed to Auther that he and Holder had committed the attempted robbery at Reuben's house and that he had shot Ronny in the process. The second time—unbeknownst to Brice—Auther was working as a confidential informant for the FBI, and he recorded the conversation. Holder argues that the court's admission of Brice's recorded

statements violated his confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968). Holder's brief at 4–6. He is wrong.

As this Court has explained, in *Bruton* the Supreme Court held that the Sixth Amendment's Confrontation Clause "prohibits the use of the confession of a nontestifying criminal defendant in a joint trial if the statement directly inculpates a codefendant, although it may be otherwise admissible against the confessing defendant." *Hano*, 922 F.3d at 1286. The Supreme Court also held in *Crawford v. Washington* that the Confrontation Clause prohibits the "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." *Id.*, 541 U.S. 36, 53–54 (2004). The Supreme Court later clarified that "the Confrontation Clause prohibits *only* the introduction of testimonial hearsay statements." *Hano*, 922 F.3d at 1287; *see Whorton v. Bockting*, 549 U.S. 406, 419–20 (2007) ("Under *Crawford*, … the Confrontation Clause has no application to [out-of-court nontestimonial statements] and therefore permits their admission even if they lack indicia of reliability."). As a result, "'[t]he threshold question in every case' raising a *Bruton* issue 'is whether the challenged statement is testimonial.'" *Hano*, 922 F.3d at 1287 (quoting *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st

Cir. 2010)). "If it is not, the Confrontation Clause does not apply." *Hano*, 922 F.3d at 1287.

So what, then, are "testimonial" statements? Building on the premise that "[t]estimony ... is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact," the Supreme Court has stated that testimonial statements include, at a minimum:

- "*ex parte* in-court testimony or its functional equivalent";
- "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and
- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51–52 (internal quotation marks and citations omitted). "[A]ll of these formulations involve statements made under circumstances which would lead the *declarant* to believe that the statement would be available for use at a later trial." *United States v. Underwood*, 446 F.3d 1340, 1347 (11th Cir. 2006) (emphasis added).

For this reason, this Court has consistently found that when the circumstances would not lead the declarant to believe that the statement might

be used in a later prosecution, the statement is nontestimonial and does not implicate a defendant's right to confrontation. *See, e.g.*, *Underwood*, 446 F.3d at 1347 (concluding that co-conspirator's statements to a confidential informant weren't testimonial because co-conspirator would never have made the statements had he realized that the informant worked for law enforcement); *United States v. Alexander*, 237 F. App'x 399, 405–06 (11th Cir. 2007) (holding that statements made to an undercover informant were nontestimonial pursuant to *Underwood*); *United States v. Makarenkov*, 401 F. App'x 442, 444–45 (11th Cir. 2010) (holding that co-conspirator's statements to confidential informant were not testimonial—and their admission therefore did not violate defendant's confrontation rights—because "the statements were not made under circumstances in which he would expect his statements to be used in court[;] he believed he was speaking to a trusted accomplice in crime").

Holder concedes that when Brice bragged to Auther about his and Holder's commission of the attempted robbery, Brice "may have believed his statements to Auther would never be used in Court." Holder's brief at 6. Brice's surreptitiously recorded statements to Auther were therefore nontestimonial because "in light of all the circumstances, viewed objectively," the declarant (*i.e.*, Brice) had no basis to believe that the "primary purpose" of his conversation with Auther was to create "an out-of-court substitute for trial

testimony." *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 369 (2011)). When no such primary purpose exists, Confrontation Clause concerns are not implicated. *Clark*, 576 U.S. at 245.

Holder's attempt to distinguish *Hano* is unavailing. *See* Brice's brief at 4–6. *Hano*, too, involved a co-conspirator's admissions to a third party who then passed on the incriminating statements to law enforcement. Hano told Borrego—whom he had known for decades—that he and Arrastia had robbed an armored truck five years before. *Hano*, 922 F.3d at 1282. Hano described key details of the robbery, including details about the crime that had not been made public. *Id*. Borrego gave the information to the FBI, and a subsequent investigation corroborated Hano's identification of himself and Arrastia as the culprits. *Id*. The district court allowed Borrego to testify about his conversation with Hano. *Id*. at 1286. On appeal, Arrastia contended that the admission of those statements violated his rights under *Bruton*. *Id*. But this Court held that Hano's statements were "plainly nontestimonial," and therefore outside the scope of the *Bruton* doctrine. *Id*. at 1286–87.

In so holding, this Court pointed out that when Hano spoke with Borrego, no future prosecution was on the horizon; Hano had no reason to believe that his statements would ever be used in court; and Borrego had had "no ground to suspect that he would ever testify against Hano." *Hano*, 922

F.3d at 1287. Holder contends that his case is different because "there was a future prosecution on the horizon" and "Auther had full reason to suspect that he would testify against Brice as well as Holder." Holder's brief at 6. Holder thus suggests that after *Hano*, statements are nontestimonial only if both the declarant *and the hearer* believe that the statement would not be used at a trial in the future. *See id*. But he misunderstands: this Court did not engraft a hearer's-intent requirement in *Hano*; it simply explained why Hano's statements were in no way testimonial.

And anyway, Holder's argument ignores *Underwood*—which is directly analogous to this case and which this Court decided before *Hano* and remains binding in this Circuit. *See United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.") (quoting *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015)). In *Underwood*, this Court considered whether admission of recorded conversations between a confidential informant and a coconspirator that criminally implicated the defendant would violate the defendant's right to confrontation. *Id*., 446 F.3d at 1345–47. There, too, the confidential informant had reason to believe that he might be asked to testify against the defendant. Yet this Court determined that the critical inquiry was

whether the *declarant* (not the confidential informant) expected that the statement might later be used in a later prosecution. *Id*. at 1347. Because it was "clear that [the coconspirator] never would have spoken to [the confidential informant] in the first place" had he known that she was working for law enforcement, this Court held that the recorded statements were nontestimonial. *Id*.

So too here.[16] The district court properly declined to exclude Brice's statements to Auther, and Holder is not entitled to relief.

[16]Even if the statements were testimonial, any error would be harmless beyond a reasonable doubt. *See United States v. Gari*, 572 F.3d 1352, 1362 (11th Cir. 2009) (if a defendant's Sixth Amendment rights were violated, this Court considers "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'") (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted). The trial evidence against Holder was overwhelming: he himself admitted to Auther and Bell his involvement in the attempted robbery; Brice put himself at the scene of the robbery and outlined his escape route, and cell-site evidence indicates that Holder was with him the whole time; and Bell's testimony and photographic evidence from Holder's phone show that Holder had an AR-15—the type of gun that was used to shoot Ronny. *See Statement of Facts*. So there is no reasonable possibility that Brice's recorded statements that implicated Holder might have contributed to his convictions. *See Hutchins v. Wainwright*, 715 F.2d 512, 517 (11th Cir. 1983).

Conclusion

The United States requests that this Court affirm the judgments of the district court.

Respectfully submitted,

ROGER B. HANDBERG
United States Attorney

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division

By: *s/ Emily C. L. Chang*
EMILY C. L. CHANG
Assistant United States Attorney
Appellate Division
USA No. 166
400 W. Washington St., Ste. 3100
Orlando, FL 32801
(407) 648-7500
emily.chang@usdoj.gov

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This brief, which contains 12,960 countable words under 11th Cir. R. 32-4, complies with Fed. R. App. P. 32(a)(7)(B).

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I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on May 2, 2024, to:

KEITH UPSON, ESQ.
Counsel for Sylvanis Brice

ROY W. FOXALL, ESQ.
Counsel for Johan Holder

EDWARD G. SALANTRIE, ESQ.
Counsel for Uriah Waggerby

s/ Emily C. L. Chang
EMILY C. L. CHANG
Assistant United States Attorney

gkpr no / 04-24-24