C.A. No. 05-10818

D. Ct. No. CR 04-313-PHX-FJM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DERRICK MCCREARY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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Date Mailed: June 26, 2007

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A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231, based on a superseding indictment charging Derrick McCreary with offenses against the United States. (CR118, 189; ER25-28.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, based on the sentencing of McCreary on December 5, 2005, and entry of the final judgment by the district court on December 14, 2005. (CR267, 272; ER153-56.)

C. Timeliness of Appeal

Prior to entry of the judgment on December 14, 2005, McCreary filed a notice of appeal on December 7, 2005. (CR266, 274; ER151-52.) The notice was timely pursuant to Fed. R. App. P. 4(b).

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[1]"CR" refers to the Clerk's Record and is followed by pertinent document numbers. The eight-volume trial transcript is designated "TR," and is followed by relevant page numbers. Hearing transcripts are designated "RT," followed by the hearing date and page numbers. Grand Jury transcripts are designated "GJ," followed by dates and page numbers. "ER" and "SER" refer to the Excerpts and Supplemental Excerpts of Record, and are followed by relevant page numbers.

IV. ISSUES PRESENTED

A. Whether Acquisition Of The Content Of Text Messages From MCI/Skytel Via Subpoena Pursuant To 18 U.S.C. § 2703 Violated The Fourth Amendment.

B. Whether The Prosecutor Engaged In Misconduct Before The Grand Jury.

C. Whether The Prosecutors Improperly Vouched For The Credibility Of Witnesses.

D. Whether The District Court Erred In Denying McCreary's Motion To Compel Immunity For Dominic Austin.

E. Whether The Court Erred In Refusing Defendant's "Mere Presence" Instruction.

F. Whether The Mandatory Minimum And Consecutive Sentencing Scheme Of 18 U.S.C. § 924(c)(1)(A) Is Constitutional.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

A federal grand jury in Phoenix, Arizona, returned a nine-count indictment against Derrick McCreary, Jonathon Hunter, Dominic Austin and Sahdiq McNair on March 30, 2004. Counts 1, 4 and 7 charged McCreary, Hunter and Austin with Conspiracy to commit armed bank robbery and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 371. Counts 2, 5 and 8 charged McCreary, Hunter and Austin with Armed Bank Robbery, in violation of 18 U.S.C. §§ 2113(a)(d) and 2. Counts 3, 6 and 9 charged the same individuals with Use of a Firearm in Commission of a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. Sahdiq McNair was charged only in Counts 1, 2 and 3. (CR1; ER1-5.)

On January 3, 2005, defendant McCreary moved to suppress evidence of text messages, alleging violations of the Fourth Amendment and the Stored Communications Act. (CR97.) The government responded in opposition; defendant replied. (CR146, 152.)

On February 16, 2005 a superseding indictment was returned. It consolidated conspiracy allegations into a single count, and re-alleged the robbery and gun charges. (CR118; ER25-28.) On May 9, 2005, the government moved to dismiss

Counts 6 and 7 of the superseding indictment as to McCreary and Hunter, and to dismiss all charges against Dominic Austin. (CR169.) The court granted both motions. (CR189; ER95.) On May 12, 2005, Sahdiq McNair pled guilty to Count 1 of the indictment, pursuant to a cooperation plea agreement. (CR172.) On May 13, 2005, the court heard argument on outstanding pre-trial motions and ultimately denied the motion to suppress text message evidence. (CR176, 178.) On June 1, 2005, McCreary moved to dismiss the superseding indictment or, in the alternative, to compel immunity for Dominic Austin. (CR188; ER75-94.) The government responded. (CR196; ER138-44.) On June 7, 2005, the court denied the motion, and trial commenced. (CR197.)

After the government rested, McCreary and Hunter each presented a defense. (CR203.) At the close of all evidence, the court denied McCreary's request for a "mere presence" instruction. (TR1296-99; ER586-89.) On June 22, 2005, the jury returned verdicts of guilty on all counts as to each defendant. (CR208.)

McCreary objected to the presentence report, challenging the constitutionality of 18 U.S.C. § 924(c)(1)(A). (CR256; ER145-50.) On December 5, 2005, the court overruled the challenges and sentenced McCreary to 60 months on Count 1 (Conspiracy) and 78 months each on Counts 2 and 4 (Bank Robbery), the sentences to run concurrently with one another. McCreary was sentenced to 84 months on

Count 3 and 300 months on Count 5 (the 924(c) counts), and ordered to serve those sentences consecutively to each other and to the sentences imposed on Counts 1, 2 and 4. He was placed on supervised release for three years on Count 1, and five years on Counts 2-5, all terms to run concurrently, and ordered to pay a special assessment of $ 500.00 and restitution of $253,798.00. Judgment was entered on December 14, 2005. (CR267, 272; ER153-56.) A timely notice of appeal was filed on December 16, 2005. (CR274; ER151-52.)

B. Statement of Facts.

1. The Robberies.

On January 22, 2002, the Tempe Schools Credit Union in Tempe, Arizona, was robbed by three Black men wearing latex gloves and ski masks or hooded sweatshirts that obscured their faces. The men entered together and ordered tellers and customers to the floor at gunpoint. They forced the lead teller to open the vault, and stole $182,293.00. (TR351, 354-64, 368, 377-81, 383, 386-89, 396-99; SER108-34.)

Tellers alerted the alarm company. (TR360, 382; ER430, 435.) Surveillance footage and a shoe print were later recovered, as was the robbers' getaway vehicle, a stolen Toyota Camry. It was found abandoned, engine running and rear door open, a short distance away. (TR360-64, 396-401, 451-52, 456, 460-67, 799, 804-07; SER115-19, 131-36, 161-71, 317, 319-22.)

A month later, on February 28, 2002, the SAFCU Credit Union in Tempe, Arizona was robbed. Three Black men in ski masks or hooded sweatshirts entered the credit union, demanded keys for the vault at gunpoint from the manager, and ordered tellers and customers to the floor. (TR178-79, 199, 422-32, 436, 438-43; SER12-14, 139-49, 153, 155-60.) They leapt the teller counter, and stole over $100,000.00. A shoe print was also recovered from a teller counter at this robbery.[2] (TR430-33, 804-05; SER147-50, 319-20.)

The manager was on the phone when the robbers entered. Seeing that they wore masks, she advised the person with whom she was speaking to call the police. (TR423-27; SER140-44.) Police recovered surveillance footage and the getaway vehicle, a stolen, dark blue Toyota Camry. It was found abandoned, engine running, in a parking lot two blocks away. (TR203-06, 210-18, 439-43; SER15-27, 156-60.)

Unbeknownst to the robbers, bait bills and a tracking device were hidden among the stolen cash. The tracking device began emitting a signal as soon as it was removed from the teller drawer. (TR433-38; SER150-55.) Police followed the signal and recovered the device on the ground on the other side of a perimeter wall of the Tempe Groves Apartment complex, located at 909 W. Grove Parkway in Tempe.

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[2]An expert testified at trial that more than one pair of shoes left prints on the counter. (TR799-800, 812; SER317-18, 323.)

(TR219-25, 230-31, 845, 850-58; SER28-36, 328-37.) Earlier that morning, the Tempe Groves manager had called police to report that a maintenance worker, who was changing a light bulb in the parking lot, believed some Black males in a gray Chevy Astro van, California license plate 4NDT737, may have stolen a blue Toyota Camry from the lot. After the tracking device was found, a "lookout" was placed for the van. (TR239-49, 256-60, 275-76, 284-85; SER37-47, 51-55, 61-62, 70-71.)

Shortly after noon, law enforcement spotted the van and conducted a felony stop near Blythe, California. Five Black males were inside: Sahdiq McNair, Anthony Young, Deshawn Washington, Anthony Hughes, and Antoine Downs.[3] Sahdiq McNair was driving. (TR275-80, 284-86, 301; SER61-66, 70-71a, 86.) The van was secured and transported to the Sheriff's Department. A subsequent search revealed items connected to the credit union robbery, including gloves, pillow cases, a sweat shirt, money wrappers, and cash totaling $27,655, including three (3) bait bills. (TR284, 287-99, 301, 306-14, 860-63; SER70, 72-84, 86-95, 339-42.)

The men were arrested and transported to jail, where their personal property was inventoried. Officers found a scrap of paper with a phone number and the name "Kobra" in Mark Hughes' wallet. The phone number was registered to Derrick

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[3]Downs initially identified himself as "Paul Weaver," but later admitted to his true identity. (TR279, 581-82; SER65, 267-68.)

McCreary. (TR279-83, 845, 859-60, 863-67; SER65-69, 328, 338-39, 342-46.)

Interviews were completed late that evening. Sometime after midnight, surveillance was posted at apartment number 3035 at Tempe Groves, an apartment leased by Derrick McCreary and Dominic Austin. Their year-long lease expired on February 28, 2002. (TR262-63, 273, 314-16, 857-60; SER56-57, 60, 95-97, 336-39.)

On March 1, 2002, the maintenance worker that reported the suspected stolen vehicle noticed that previously empty dumpsters were now full of trash and furniture. He thought the items were from apartment 3035, because the lease on that apartment was up. He entered the apartment to confirm it was vacant. He noted the tenants were gone, but they had left some abandoned property behind. (TR250, 270-71; SER48, 58-59.)

Leaving the apartment, he noticed an unmarked police car in the parking lot. He approached and told the officer the tenants of 3035 had moved out overnight, discarding many of their belongings in the dumpster closest to the apartment. He believed the items came from apartment 3035 because it was the only apartment whose lease had expired. (TR250-52, 317-18; SER48-50.)

He and the officer sorted through boxes in the dumpster and discovered a hand-drawn map. The map depicted an area surrounding the Tempe Schools Credit Union. It contained Derrick McCreary's phone number, in his handwriting. The same box

also contained a bank statement in McCreary's name, and an electric bill for apartment 3035 in Dominic Austin's name. (TR318-22, 843; SER99-103, 327.)

Officers searched apartment 3035 that day, pursuant to a warrant. They seized rubber gloves, sweat pants, six Motorola two-way, text-message pagers, chargers for the pagers, and the packaging in which the pagers were shipped to Dominic Austin. (TR322-23, 327-31, 532-33; SER103-107b, 226-27.)

2. Antoine Downs

Antoine Downs was among the five individuals initially arrested and charged with the February 28, 2002 robbery of the SAFCU Credit Union. Downs pled guilty to armed bank robbery pursuant to a cooperation plea agreement, and was sentenced to 39 months. He was on supervised release when he testified at trial. (TR537-39, 584-86, 592-93, 618-19, 784-85, 790-92; SER228-30, 269-71, 276-77, 295-96, 307-08, 310-12.)

Downs testified that on January 21, 2002 he traveled from Los Angeles, California to Arizona with defendant Jonathan "Wack" Hunter, Sahdiq McNair, "Galvan," and "Take-Off" to rob a bank. He was recruited by Hunter, whom he had known for two years. Hunter approached him, telling him he "had a play," meaning a robbery, and if Downs participated in the robbery, Hunter would forgive a $3,500 debt Downs owed him for wrecking Hunter's car. (TR478-82, 541, 757, 785;

SER172-76, 232, 304, 308.)

The robbers traveled to Arizona in McNair's car and a second vehicle rented from a neighbor. Downs saw Hunter communicate with someone via two-way pager while they were still in Los Angeles, and also during the trip, while at a gas station in Blythe. Hunter told Downs he was communicating with "Kobe," to let Kobe know they were on their way. When they arrived in Arizona they went to Kobe's apartment at the Tempe Groves, where Downs met Kobe. Downs identified Derrick McCreary as "Kobe," and McCreary stipulated he is known as "Kobe." (TR482-87, 541, 794, 895-96; SER176-81, 232, 313, 353-54.)

Shortly after arriving at McCreary's apartment on January 22nd, Hunter left with McCreary to survey the bank they were going to rob. Both men returned and advised the crew they had already stolen a car. McCreary left again, this time with Galvan, to pick up a weapon from a relative's apartment. McCreary returned with a .45 semi-automatic handgun. Upon McCreary's return, he directed the group to his bedroom closet, telling them to select clothing for the robbery. The closet contained hooded sweatshirts, sweat pants, gloves, shoes, and beanie-type caps. Downs and Take-Off selected black, hooded sweatshirts, sweat pants, brown gloves and shoes from the closet, and cut eye holes in the beanies. Galvan wore a white, hooded sweatshirt. (TR487-93, 513-14; SER181-87, 207-08.)

McCreary and Hunter instructed the others on how to commit the robbery. McCreary described the location of the vault and surveillance cameras, sketching them out on a map. He directed them to pull the beanies over their faces upon entering the bank, and gave each of them a role to play: McNair was the get-away driver, Galvan was to "hold down the floor," Take-Off, to whom he gave the gun, was to access the vault through the manager, and Downs was to assist Take-Off. He instructed them to remain in the bank no more than four minutes, and not to take anything from the teller drawers, which contain dye-packs and trackers. (TR493-96, 504; SER187-90, 198.)

McCreary and Hunter led the way to a residential area, followed by McNair in his car, and Downs, Galvan and Take-Off in the stolen car. McNair waited there with the getaway car. The others were instructed to reunite with him after the robbery, to abandon the stolen vehicle, and to return to the apartment. McCreary and Hunter then led the others to the Tempe Schools Credit Union, and drove off. The others robbed the institution at gunpoint, putting the money into a pillowcase. (TR496-504, 796-97; SER190-98, 314-15.)

After the robbery, Galvan drove back to the residential area. They abandoned the stolen car and drove away in the getaway vehicle. They drove around the block to join McCreary and Hunter, and returned to McCreary's apartment. They changed

clothes as McCreary and Hunter counted money on the bed. Hunter put money into a duffle bag; McCreary put money into shoe boxes. Then they both went to the living room and distributed money to Downs, Galvan, Take-Off and McNair. Downs received $3,500. (TR505-11; SER199-205.)

Galvan and McNair drove back to Los Angeles in McNair's car, and Downs and Take-Off in the rented car. Hunter got into a car with McCreary and drove off. (TR512; SER206.)

Downs returned to Arizona on February 27, 2002, to commit the second robbery. Hunter told him he "had another play" that was "just as simple as the first one." (TR514; SER208.) Hunter wanted to use the same crew, but Downs had not seen Galvan and Take-Off. Hunter ultimately recruited Downs, Deshawn Washington, Anthony Young, Sahdiq McNair, and Mark Hughes to commit the second robbery. (TR514-18; SER208-12.)

At Hunter's request, Mark Hughes had a friend rent a gray Astro van for the trip to Arizona. The robbers met in front of Hunter's apartment on the evening of February 27th. Sahdiq McNair drove. During the trip, Downs again saw Hunter use the text-message pager. Hunter told Downs he was communicating with McCreary to let McCreary know they were on their way, because McCreary had warned that if Hunter's group could not make it on time, he would get "other boys" to commit the

robbery. (TR519-22, 798; SER213-16, 316.)

McNair did not drive directly to McCreary's apartment, because Hunter learned via text message that McCreary was not there; he was at a woman's apartment. Hunter directed McNair to a Burger King, where they waited for McCreary. McCreary arrived in his blue Mustang. Hunter got into the Mustang with McCreary, and they led the others to an apartment belonging to McCreary's girlfriend. The others waited at the apartment while Hunter and McCreary left to "scope out the bank." When they returned, Hunter and McCreary drove to McCreary's apartment in McCreary's girlfriend's white Mirage. The others followed in the Astro van. (TR522-28, 798, 816-17, 820; SER216-22, 316, 324-26.)

At McCreary's apartment Hunter and McCreary reviewed plans for the robbery with the crew. Because Mark Hughes had rented the van, he was to remain at the apartment. Downs, Washington and Young were to enter the bank, and McNair was to drive the getaway car. McCreary showed them sketches of the bank, told them what door to enter, and where the vault was located. He distributed latex gloves to Downs and the others, and again supplied hooded sweatshirts, shoes, sweat pants and ski masks from his closet. He obtained an unloaded gun from a baby's playpen in the living room, which he gave to Young, telling him Downs should use it, since he had experience from the first robbery. (TR528-32, 543-48; SER222-26, 234-39.)

The group drove to the robbery in three vehicles: Hunter and McCreary in the Mirage, McNair in the Astro van, and Downs, Washington and Young in the stolen Camry. Washington had trouble starting the Camry. He used scissors, because he did not have keys. Downs testified a maintenance man fixing a pole lamp in the parking lot watched them as they started the car and drove off. (TR548-52; SER239-43.)

Again, Hunter and McCreary led the way to the switch-out spot where McNair was to wait with the getaway van. From there, they led the others to the credit union, then returned to wait with McNair. Realizing they had forgotten bags for the money, the others returned to the getaway location. McCreary retrieved pillow cases from the trunk of the Mirage and gave them to Downs. (TR552-55; SER243-46.)

Downs carried the gun McCreary had given them when he and the others entered the SAFCU Credit Union. He and Young forced the manager, at gunpoint, to open the vault, and they filled both pillowcases with money. They left the bank, drove to where McNair was waiting, and got into the Astro van, abandoning the stolen Camry. After a short time they located McCreary and Hunter, and followed them back to the parking lot of McCreary's apartment, where McNair handed over the money to Hunter. (TR555-68; SER246-59.)

Downs followed Hunter and McCreary into the apartment while the others remained in the van. As Downs gathered his things, Hunter yelled that the money

was "bad." Downs saw McCreary run from the room, a tracking device in his hand. McCreary left the apartment, returned, and ordered everyone to leave, advising Hunter he had thrown the tracking device over a wall. (TR567-70; SER258-61.)

Downs and Hughes left immediately. Hunter handed them pillow cases with money inside, telling them to "give it to his homies." (TR570-72; SER261-63.) Hunter and McCreary drove off in the Mirage. The others left for Los Angeles in the van. They were stopped and arrested outside of Blythe. (TR573-75; SER264-66.)

3. Sahdiq McNair

Sahdiq McNair pled guilty to armed robbery of the SAFCU Credit Union. He was sentenced to 63 months imprisonment. While serving his sentence, he was charged in connection with the Tempe Schools Credit Union robbery. He pled guilty to conspiracy and agreed to cooperate. He testified he was recruited for both credit union robberies by Jonathan "Wack" Hunter, whom he had known since sixth grade. He drove his car, with Hunter as passenger, from Los Angeles to Arizona for the first robbery. Using directions obtained via two-way pager during the trip, Hunter directed McNair to an apartment in Arizona. (TR896-09, 1072-76; SER354-67, 415-19.)

At the apartment, Hunter introduced McNair to McCreary, whom he referred to as "Kobe." McCreary supplied clothing and a gun for the robbery, and Hunter

instructed the crew on their roles: Downs, Galvan and Take-Off were to enter the bank, and McNair was the getaway driver. Later, Hunter and McCreary showed McNair where to wait with the getaway car, and led the others to the credit union. After the robbery they split the money. Downs and Take-Off returned to Los Angeles in the rental car, McNair and Galvan returned in McNair's vehicle, and Hunter remained at McCreary's apartment. (TR910-26; SER368-84.)

Weeks later, Hunter told McNair he had "another play" in Arizona, and wanted to find the same crew. He could not, so Hunter recruited others, including Deshawn Washington, Anthony Young, and Mark Hughes. Hughes secured an Astro van and McNair drove it to Arizona. McNair watched Hunter use a text pager during the trip. Hunter punched buttons on the pager, it lit up, and Hunter read it. Hunter gave McNair directions once they got to Phoenix, but they got lost, so Hunter called McCreary to come and meet them. (TR927-37; SER385-95.)

After a brief stay at McCreary's girlfriend's apartment, they followed McCreary to his apartment. McCreary left with Downs, Washington and Hunter to steal a car. When they returned, McCreary handed out clothes and gloves and gave Downs a gun similar to the one used in the first robbery. Hunter gave assignments to the crew: McNair was to wait in an industrial area with the getaway car; Downs, Washington and Young were to take the stolen car and rob the bank; Hughes was to

remain in the apartment. (TR938-42, 1061; SER396-400, 414.)

At the industrial area McNair parked as Hunter instructed, so he could pull right out of the parking lot. Hunter and McCreary then led Downs and the others to the credit union. Within five minutes, Downs and the others returned, abandoned the stolen car, and drove off in the van. McNair got lost returning to McCreary's apartment, but he encountered Hunter and McCreary on the road and followed them back to the complex. Hunter instructed Downs to come into the apartment, and the others to wait in the van. Five minutes later, Hughes and Downs ran from the apartment, yelling to McNair to "drive," because there were tracers in the money. As McNair drove off, he saw Hunter and McCreary driving off in the Mirage, and the police arriving. (TR943-46; SER401-04.) The crew was arrested on their return to Los Angeles. (TR948-49; SER406-07.)

4. The Text Messages.

McCreary sent messages from PIN 6370[4] as Derrick or "Kobra." Hunter sent messages from PIN 3801 as "Jonathan," "Wack," "Wicked One," or "W1." (TR1080-87, 1101-02, 1124-27, 1150-51; SER421-30, 438-41, 464-65.) In early January, 2002, McCreary and Hunter exchanged text messages regarding the Tempe Schools

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[4]A PIN number is a toll-free number used to access a pager. (RT5/13/05 35-36; ER324-25.) At trial, the parties referred to the last four digits of the PIN number when referencing a particular pager.

robbery. On January 17th, Hunter asked McCreary if he had a gun ("strap"). McCreary replied he did not, but he could get one. (TR1101-02, 1105, 1135-39, 1197-99, 1208-09, 1221-27; SER429-30, 433, 449-53, 470-74, 478-84.) Hunter told McCreary he was getting things ready, and McCreary requested Hunter contact him when he was on his way. Five hours later, McCreary inquired whether Hunter had aborted "mission zona,"[5] or if he was still getting ready. Hunter initially advised he was waiting on "the wheel," but would "be on the road tonight;" however, the next day he advised he needed until Monday (the 21st) to get the crew together. (TR1101-05; SER429-33.)

On January 21st, McCreary requested Hunter let him know when he was "on the road." Hunter responded at 9:12 p.m., "I'm on the road, give me 6 hours, W1." (TR1106; SER434.) An hour later, McCreary instructed Hunter on where to stop for gas, and supplied directions to the Tempe Groves Apartments. (TR1106-07; SER434-35.)

Prior to the SAFCU robbery, Hunter and McCreary exchanged additional messages. On February 3rd, Hunter texted McCreary "the squad [was] ready to play." (TR1128-29; SER442-43.) The next day, Hunter asked how far the site of the proposed robbery was from his apartment. McCreary responded it was two to three

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[5]Quotations are verbatim from the text messages, and contain no corrections.

times the distance of the last one. On February 9th, Hunter texted McCreary they would arrive the next day. McCreary requested Hunter advise him when he was on the road, and asked if Hunter had a way home "this time?" Hunter requested assistance with his return trip, and McCreary responded he and his "roommate Dominic" had taken care of it. (TR1129-30; SER443-44.)

After a series of delays during which Hunter tried to locate a vehicle and a member of the crew, McCreary texted Hunter the next robbery would be of "another small one[;]" that Thursdays were best, to assure the credit union had money. (TR1130-34; SER444-48.) Hunter responded the "crew" wanted to wait until after Valentine's Day. On February 19th, Hunter advised they would be on the road that night. McCreary responded they only needed three people for the job, and Hunter replied, "It's 4 total. We in good shape." (TR1134-38, 1196, 1227-29; SER448-52, 469, 484-86.)

On February 21st, McCreary expressed frustration Hunter had not recruited another crew, telling Hunter he was checking out a crew on his own. Hunter assured McCreary he had a crew, and they would be there that night. (TR1140; SER454.) Just after midnight on February 24th, Hunter texted he was "getting shit in order on my behalf," and McCreary responded, "I'm posted. Handle your end, mine is taken care of." Later that afternoon, McCreary wrote, "Wack, you don't hear me though.

I know what you are all about, but I also know what you like on your spare time. Kob won't steer a loyal homie wrong. Zona is crackin o any level, especially for a nigga like you." (TR1141-42; SER455-56.)

Over the next few days, McCreary asked Hunter what was going on with the crew, and advised things were "warming up" in Arizona. On Tuesday, February 26th, Hunter texted he was "getting things in motion," and he "w[ould] be ready, tonight or wed." (TR1142; SER456.) On Wednesday, February 27th, McCreary asked if Hunter was "on deck and ready to roll???" Hunter responded he would let him know. Just after midnight he wrote they were "on the road," and would be there in five or six hours. (TR1142-43; SER456-57.) McCreary said to let him know when they were "extremely close," which Hunter did. McCreary then texted directions to his girlfriend's apartment. At 6:46 a.m. on February 28th, Hunter texted McCreary from Burger King to come get them, because they were lost. (TR1143-44, 1211-13, 1229-31; SER457-58, 475-77, 486-88.)

The SAFCU Credit Union was robbed at 9:35 a.m. that morning. At 9:47 a.m., McCreary texted to PIN 1983, registered to Dominic Austin, "Gone sour." At 5:00 p.m., Hunter texted McCreary he was in Palm Springs, and commented he was glad he spotted the danger. McCreary agreed, responding he was moving to the "new place" right then. Later that evening, Hunter wrote he had not yet heard from "the

squad," and McCreary questioned whether he thought "that shit was marked???" (TR1144-47; SER458-61.)

Shortly after midnight, Hunter advised McCreary to "make sure you clear 2way," and the two discussed feeling paranoid, because "they cars still parked. Not like non of them." Later that morning, Hunter reported the crew got "cracked" in Pomona, and "somebody is telling." (TR1147; SER461.) McCreary replied his apartment was being watched, and the police were trying to set him up at his relative's house. He told Hunter to stop paging, because he did not know if the pagers were being tracked. (TR1147-48; SER461-62.)

On March 5th, Hunter asked McCreary if they took anything from his "crib." McCreary responded, "Dominic's shit and his pager." That afternoon, McCreary advised they needed to "find a new way of communicating." (TR1148-50; SER462-64.) On March 20th, Hunter advised, "them cats crying loud I heard." (TR1151; SER465.) Sometime later, Hunter sold pager 3801.[6] (TR1152-53; SER466-67.)

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[6]Pager 3801 was never found; the PIN number was discovered through records produced in response to the grand jury subpoenas. (TR1172; SER468.)

VI. SUMMARY OF ARGUMENTS

A. The SCA, which authorizes the government to obtain the content of text messages via subpoena, does not violate the Fourth Amendment because the use of a properly limited subpoena does not constitute an unreasonable search and seizure. The subpoenas were properly limited. They were within the scope of a legitimate grand jury investigation, relevant to the investigation, and specific in directive. Failure to give notice of the subpoenas was a procedural, non-constitutional violation of the SCA; accordingly, suppression was not an available remedy.

B. McCreary fails to establish that witness Downs committed perjury before the grand jury, much less that the challenged testimony was material to the indictment. Even if they could, however, there was sufficient other evidence to support the indictment.

C. Admission of the cooperation plea agreements was not vouching where the witnesses' credibility was attacked based on those agreements in opening statements and on cross-examination. The prosecutor's closing argument was based on fair inferences from the record, and did not constitute vouching. The rebuttal argument inviting jurors to "look at" the agreements never mentioned the polygraph provisions; if any vouching occurred, it was mild. It did not affect the fairness of the trial, in light of the court's instructions and independent corroborating evidence connecting

McCreary to the offenses.

D. The government's explanation that Dominck Austin remained under investigation, despite dismissal of the indictment against him, successfully rebutted McCreary's allegation that the government engaged in misconduct by denying immunity to Austin. Distortion of the fact-finding process requires a showing that the testimony of the witness to whom immunity was denied would directly contradict the testimony of government witnesses. McCreary failed to make the requisite showing.

E. The district court properly refused McCreary's "mere presence" instruction because the government's case was based on more than just his presence. Nevertheless, McCreary's mere presence theory of defense was adequately covered in other instructions given by the court.

F. The mandatory minimum and consecutive sentencing scheme of 18 U.S.C. § 924(c) is constitutional.

VII. ARGUMENT

A. Acquisition Via Subpoena Of The Content Of Text Messages From MCI/Skytel, Pursuant To 18 U.S.C. § 2703, Did Not Violate The Fourth Amendment.

1. Standard of Review

Denial of a motion to suppress is reviewed *de novo, United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007), as are questions regarding the constitutionality of a statute. *United States v. Zakharov*, 468 F.3d 1171, 1176 (9th Cir. 2006).

2. Background

Investigation revealed that individuals responsible for planning the Tempe Schools and SAFCU robberies communicated via text messages, using two-way pagers. (RT5/13/05 23, 26; ER317, 320.) On November 21, 2002, a grand jury subpoena was issued seeking "toll records to include text," from January 1, 2001 through March 1, 2002, for each of the six pagers seized during the search of Derrick McCreary's apartment. (Ex.7; ER157; RT5/13/05 23-24; ER317-18; TR867-868; SER346-47.)

MCI/SkyTel was the service provider for the pagers. Messages are sent to MCI/SkyTel two-way pagers by: (1) entering the PIN number on another two-way pager, then typing in the message; (2) calling a toll-free number corresponding to the PIN number and leaving a voice message that is converted to a text message by a call-

center operator; (3) going to the SkyTel.com website, entering the PIN number, and typing in the message; or (4) using an e-mail facility to send the message to the PIN number by adding "at SkyTel.com" as an e-mail address. Once sent, messages are relayed by satellite to the recipient pager. (RT5/13/05 35-36; ER324-25.)

At the time of trial, MCI/SkyTel maintained "billing data" records for all PIN numbers, consisting of the date and time messages were sent, total number of characters in the message, and the first 80 characters of text. Billing records were maintained to resolve billing disputes. The data was maintained on-line for 90 days, then placed in backup storage. Billing data has been continually maintained since 1999. (RT5/13/05 37-39, 41; ER326-28, 330.)

MCI/Skytel also maintained "raw data" relating to PIN numbers. Raw data included all billing data, plus text messages in their entirety, their origin (PIN number or e-mail address), and their destination. In effect, raw data was a mirror-image of MCI/Skytel's actual customer operations system. It was available on-line for 90 hours, then taken off-line and placed in storage or backup mode for business purposes. MCI/SkyTel has maintained raw data continually since September 2001. (RT5/13/05 37-41, 47-48; SER4-10.)

Billing records produced in compliance with the first grand jury subpoena revealed only one of the six pagers was active during the requested time frame.

Consistent with MCI/Skytel's record system, the billing records for the active pager, PIN number 6370, contained only the first 80 characters of each text message. A second grand jury subpoena was issued on June 19, 2003, seeking:

> complete text messages available and all available billing information on MCI WorldCom Wireless two way pager PIN # 8779826370, SER # 22ABBG2SVW, under the user name of Dominic Austin for the period between 02/15/2002 to 03/03/2002.

(Ex.8; ER159-61; RT5/13/05 25-26, 37; SER2-7; TR868-69; SER347-48.)

The second subpoena resulted in production of a CD-disk containing an Excel spreadsheet listing the complete text of all messages sent to and from the pager with PIN number 6370 during the requested time frame. A review of those records identified two additional relevant PIN numbers: (877) 430-3801 and (877) 853-1983. As a result, a trial subpoena was issued on August 19, 2004, requesting complete text messages, billing, and client information for each of the three identified PIN numbers (6370, 3801, and 1983), from January 1, 2002 through March 31, 2003, because it was believed the pagers were no longer in use after that date. (RT5/13/05 25-28; ER319-22; TR869-71; SER348-50.) Records returned in response to this subpoena revealed the registered subscriber on PIN numbers 6370 and 1983 was Dominic Austin; the subscriber on 3801 was Joseph Jackson. The Joseph Jackson account was closed on June 21, 2002, for non-payment. (RT5/13/05 44; ER332; TR1080-81,

1085; SER421-22, 426.)

3. Analysis

a. Acquisition via subpoena, of the content of text messages held in electronic storage for over 180 days, without a warrant or finding of probable cause, did not constitute an unreasonable search and seizure in violation of the Fourth Amendment.

Congress enacted the Stored Communications Act ("SCA" or "the Act"), 18 U.S.C. §§ 2701-12, to balance the government's need to conduct investigations in cases involving electronic information stored by third-party providers of communication services against individuals' privacy and proprietary interests in the communications.[7] *See Theofel v. Farey-Jones*, 359 F.3d 1066, 1072-73 (9th Cir. 2004) (SCA protects users whose electronic communications are in electronic storage with electronic communications facility, and reflects Congress' judgment that users have a legitimate interest in confidentiality of those communications). Under § 2703 of the SCA, the government may compel disclosure of the contents of communications held in electronic storage for more than 180 days by means of a grand jury or a trial subpoena. *See* 18 U.S.C. § 2703(a) ("A governmental entity may require the disclosure . . . of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred

[7]Pursuant to Circuit Rule 28-2.7, portions of the Act relevant to this appeal are reproduced in full in the Addendum to this brief.

eighty days by the means available under subsection (b) of this subsection."); 18 U.S.C. § 2703(b) (allowing government to require service provider "to disclose contents of any wire or electronic communication . . . with prior notice from the government entity to the subscriber or customer if the government entity uses . . . a Federal or State grand jury or trial subpoena . . .).

McCreary complains that to the extent the SCA authorizes the government to obtain the content of text messages via subpoena, without a warrant or finding of probable cause, the Act violates the Fourth Amendment. His argument fails, because it confuses the law governing search warrants with that governing subpoenas. "Subpoenas are not search warrants. They involve different levels of intrusion on a person's privacy." *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991).

> [T]he use of a properly limited subpoena does not constitute an unreasonable search and seizure under the Fourth Amendment. A proper subpoena is sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. Although a subpoena results in compulsory production of private property, it does not involve the type or degree of intrusion found in an ordinary search and seizure; therefore, it does not require probable cause supported by oath or affirmation, as would be required for a search warrant. The standard for a subpoena is reasonableness.

United States v. Palmer, 536 F.2d 1278, 1282 (9th Cir. 1976) (internal citations omitted).

Here, the subpoenas were within the scope of a legitimate grand jury investigation, relevant to that investigation, and specific in directive. The bank robberies being investigated occurred on January 22, 2002, February 27, 2002, and May 12, 2003. The subpoenas were limited to time frames relevant to these robberies: the first sought information from February 15, 2002 to March 3, 2002, the second and third each sought information from January 1, 2002 to March 31, 2003. They sought information from a specific set of accounts, selected based on credible information that the target accounts had been used by the robbers to communicate among themselves. They were specific in directive in that they sought the content of all messages.

Although McCreary complains the subpoenas were overly broad because they failed to distinguish between criminal and non-criminal content, requiring MCI/Skytel to make that distinction would have resulted in subpoenas that were unduly burdensome. To comply with the subpoenas as written, MCI/Skytel had simply to make a CD-disk containing Excel spread sheets for each PIN number. The spreadsheets produced in response to the third subpoena totaled 1075 pages, 449 of which related to messages sent or received by PIN 6370. (CR80; TR1079; SER420.) The determination of relevance regarding those messages was best left, in the first instance, to law enforcement familiar with the investigation, and ultimately to the

district court.

In any event, many messages that did not refer directly to criminal activity were nonetheless relevant. They referred by name to the sender, the recipient, or a person who was the subject of the message. These messages were relevant to determining the identity of the individual(s) using the pagers, relationships, time frames, and frequency or paucity of contact between parties. Thus, McCreary's argument to the contrary notwithstanding, the subpoenas issued in this case were properly limited and reasonable.

McCreary also complains that the government's admitted failure to give the statutorily required notice of the subpoenas entitled him to suppression of the evidence. (Op. Br. at 2829.) This argument fails for two reasons. First, by its plain language, 18 U.S.C. § 2703(b) requires prior notice to the *subscriber or customer* of the service when the government uses a subpoena to obtain the material. McCreary was not a registered subscriber or customer of any of the three subpoenaed MCI/Skytel accounts. Dominic Austin and Joseph Jackson, as subscriber/customers were entitled to notice, but not McCreary.

Second, the SCA expressly rules out suppression as an authorized remedy for a non-constitutional violation of the SCA. *See United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) ("Stored Communications Act expressly rules out exclusion [of

evidence] as a remedy; § 2708, entitled 'Exclusivity of Remedies,' states specifically that § 2707's civil cause of action and § 2701(b)'s criminal penalties 'are the only judicial remedies and sanctions for violations of' the Stored Communications Act."); *see also United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (even if Internet service provider divulged defendant's subscriber information pursuant to court order based on inadequate government application, suppression is not a remedy contemplated under Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510-2711); *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999) ("Congress did not provide for suppression where party obtains stored data or transactional records in violation of the [ECPA].").

Where the subpoenas were otherwise valid, because they were reasonable in scope and directive, the failure to give notice under the statute was a procedural, non-constitutional violation of the SCA. Accordingly, suppression is not an available remedy. *See United States v. Hector*, 474 F.3d 1150 (9th Cir. 2007) (failure to serve copy of warrant did not require suppression of evidence where warrant itself was valid; causal connection between failure to present warrant and seizure of evidence was highly attenuated, and social costs of excluding evidence obtained pursuant to valid warrant were considerable).

To the extent McCreary has standing to challenge the subpoenas, which is

unlikely, *see United States v. Miller*, 425 U.S. 435, 444 (1976) (third party lacks standing to challenge subpoena even if criminal prosecution is planned against the third party), his argument that failure to give notice is a constitutional violation is unsupported by the law. The Fourth Amendment does not require notice of a third-party subpoena be given to the target of an investigation. *See SEC v. O'Brien*, 467 U.S. 735, 743 (1984) ("[W]hen a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.") The district court properly denied McCreary's motion to suppress the text messages.

b. McCreary had no legitimate expectation of privacy in text messages held in electronic storage by MCI/Skytel.

To challenge the legality of a search or seizure, a defendant must demonstrate a legitimate expectation of privacy in the items seized or the area searched. *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999). To demonstrate this, defendant "must manifest a subjective expectation of privacy in the area searched, and [his] expectation must be one that society would recognize as objectively reasonable." *Id.*

If this Court finds, as argued above, that the subpoenas were properly limited, then it need not and should not address this argument, because the Fourth

Amendment is not implicated – acquisition of the text messages via subpoena did not constitute an unreasonable search or seizure. *See Palmer*, 536 F.2d at 1182 (refusing to consider reasonable expectation of privacy argument in third-party subpoena case because properly limited subpoena does not constitute an unreasonable search and seizure under the Fourth Amendment). If the Court considers the argument, however, it should find that McCreary had no reasonable expectation of privacy in the content of text messages stored by MCI/Skytel, because "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978).

Here, the subpoenaed records related to accounts of Dominic Austin and Joseph Jackson. They were maintained in electronic storage by MCI/Skytel. McCreary was neither a customer nor subscriber of any of the accounts. He had no reasonable expectation of privacy in records of the accounts of others, maintained by a third party. *See United States v. Horowitz*, 806 F.2d 1222 (4th Cir. 1986) (defendant had no privacy interest entitled to Fourth Amendment protection in tapes storing information relating to his employer that defendant e-mailed to employer's competitor; tapes may have constituted "electronic filing cabinet," but filing cabinet belonged to and was maintained by competitor, and tapes were maintained for benefit

of competitor); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (expectation of letter-writer or e-mail sender, protected by Fourth Amendment, ordinarily terminates upon delivery of the letter or e-mail); *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990) (no reasonable expectation of privacy in a message (phone number) sent to another through a pager system).

Even if McCreary were an account holder, however, he lacked an expectation of privacy in the text messages because they were stored as business records. *Cf. Warshak v. United States*, No. 06-4092, 2007 WL 170094 at *13-15 (6th Cir. June 18, 2007) (where government can show ISP "has complete access to the e-mails in question and that it actually relies on and utilizes this access in the normal course of business," user's expectation of privacy has been waived; SCA is functional equivalent of third-party subpoena, and compelled disclosure may occur); *see Miller*, 425 U.S. at 443 (Fourth Amendment does not protect bank account information account holders divulge to their banks; by placing information under control of third-party bank, account holder assumes risk information will be conveyed to the government, even if information was revealed on assumption it would be used only for limited purpose, and confidence placed in third party would not be betrayed); *and see Couch v. United States*, 409 U.S. 322, 335 (1973) (holding that government may subpoena accountant for client information given to accountant by client, because

client retains no reasonable expectation of privacy in information given to accountant).

McCreary attempts to distinguish these cases, arguing the content of the messages was intimate and never intended for nor, in his opinion, necessary to, a business purpose. His attempt fails, because the subject matter of the messages is irrelevant to the analysis. *See Price v. Turner*, 260 F.3d 1144, 1148-49 (9th Cir. 2001) (that cordless phone user's conversations may have addressed intimate subjects was irrelevant to whether interceptions of communications violated Fourth Amendment right to privacy, inasmuch as standard was one of objective reasonableness, not subjective expectation).

The business entity, not a user of the service, determines what information must be maintained by the business to provide service to its customers. Here, a representative of MCI/Skytel testified the company uses raw data for all text-message accounts, including content, for multiple business purposes: as a potential backup for the billing system, in the event of a crash; to provide a record for corporate or other customers who want to go back and view full-text activity on a particular pager; and as a mirror-image, off-line network operating center, to test upgrades of system software without danger of interfering with actual customer operations. (RT5/13/05 40-41; ER329-30; RT5/13/05 47-48; SER9-10.) If the Court reaches this issue, it

should find McCreary has failed to demonstrate he had a reasonable expectation of privacy in the raw data maintained by MCI/Skytel.

B. The Prosecutor Did Not Engage In Misconduct Before The Grand Jury.

1. Standard of Review

When challenged below, this Court reviews *de novo* whether a prosecutor's conduct before the grand jury warrants dismissal of the indictment. *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989). Where, as here, defendant failed to raise the issue below, review is for plain error. To establish plain error, McCreary must prove (1) there was error; (2) it was plain; (3) the error affected substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997).

2. Analysis

McCreary contends the indictment in this case was based on testimony that, at least by the time of trial, the government knew was perjured. He seeks dismissal of the indictment based on this alleged misconduct. His allegations of material perjury are based on the following:

Antoine Downs testified before the grand jury. (GJ2/5/03 2-47; SER648-94.) He admitted he, along with Take-Off, Galvin, McCreary and Hunter, were involved in robbing the Tempe Schools Credit Union. (GJ2/5/03 7-11; SER654-58.) He testified McCreary provided sweats, tennis shoes and a hooded sweatshirt prior to the

robbery; instructed the crew on how to rob the credit union; and gave Take-Off a .45 automatic to use. (GJ2/5/03 10-12; SER657-59.) Downs described what occurred inside the credit union:

> Q. Okay. Tell me what each one of you did. What did Gavin (sic) do?
>
> A. Gavin (sic) was standing by the door area, and I was roaming the lobby area, and Arturo [Take-Off] went behind the counter, and then it (sic) came back around, came back out, then we left.
>
> Q. Okay. Well, in between the time you went in the bank and the time you left, was any money taken?
>
> A. Yes.
>
> Q. Okay. How did Arturo get behind the counter?
>
> A. He jumped.
>
> Q. When you say "he jumped," did he clear the counter, or did he put his foot on the counter or what?
>
> A. He put his foot on the counter.
>
> Q. Okay. And then you left. And where did you go? . . .

(GJ2/5/03 13-14; SER660-61.)

Downs next described the SAFCU robbery, testifying that he wore the tennis shoes Take-Off had worn in the first robbery; he jumped the counter and waved around a gun. (GJ2/5/03 24-25, 28, 41-42; SER671-72, 675, 688-89.) Downs admitted to the grand jury that he lied when he told police the gun was a pellet gun,

and said he later told the truth, admitting it was a .45. (GJ2/5/03 38-39; SER685-86.)

At trial, Downs testified he wore the same tennis shoes for both credit union robberies. (TR545-46, 587; SER236-37, 272.) He said that although he initially denied it, he was the one with the gun in both robberies. (TR794; SER313.) He was armed with a .45 semi-automatic for the first, because McCreary had given the gun to Take-Off to use, but Downs grabbed it when Take-Off "hesitated." (TR493-95, 501, 503; SER187-89, 195, 197.) He testified McCreary gave an unloaded gun to Young for the second robbery, saying Downs should use it, because he had experience from the first robbery. (TR531-32, 543-48; SER225-26, 234-39.)

Courts attach a presumption of regularity to grand jury proceedings. *United States v. Mechanik*, 475 U.S. 66, 75 (1986). A defendant may overcome this presumption of regularity and obtain dismissal of an indictment "on a proper showing of grand jury abuse." *United States v. Claiborne*, 765 F.2d 784, 791 (9th Cir. 1985). To obtain dismissal of an indictment based on inconsistent testimony of a witness, a defendant must show that the witness committed "knowing perjury relating to a material matter..." *United States v. Flake*, 746 F.2d 535, 538 (9th Cir. 1984) (*quoting United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977). Material perjury is that which creates a reasonable doubt with respect to a defendant's guilt that did not otherwise exist. *United States v. Bracy*, 566 F.2d 649, 656 (9th Cir. 1977).

The record bears out that Downs was never asked in the grand jury if he jumped the counter in the Tempe Schools robbery, only who was wearing the tennis shoes. When asked at trial, he admitted he jumped the counters in both robberies. He never admitted giving knowingly false testimony. Rather, despite exhaustive cross-examination regarding who wore the Adidas tennis shoes, which robber(s) jumped the teller counter, and whether the gun was a .45 semi-automatic or a pellet gun, he explained he made mistakes that were not corrected. (TR593-97, 600-10, 615, 727, 774-75, 789; SER277-94, 303a, 305-06, 309.) Downs' testimony may have been inconsistent, but McCreary fails to demonstrate it was knowingly or intentionally false. "If knowing falsehood is not shown, dismissal of an indictment is improper." *Flake*, 746 F.2d at 539.

However, even if he could establish an intentional falsehood, McCreary fails to establish the materiality of testimony to the issue of his guilt or innocence. The identity of the person wearing the Adidas and the nature of the gun were simply not relevant to the grand jury's determination of probable cause. McCreary was charged with planning robberies, not executing them. Downs never wavered in his testimony that: he and two others entered both credit unions; one participant was armed with a gun; and he participated in taking money from both institutions. Downs' testimony was also consistent that McCreary planned both robberies: he scoped out locations;

advised the inside men on camera locations and floor layouts; and provided clothing for disguises, a gun, and a stolen getaway car. While conflicting testimony regarding who wore the tennis shoes may have cast doubt on Downs' credibility, "it was not sufficiently material to justify holding that it substantially influenced the grand jury's decision to indict." *United States v. Spillone*, 879 F.2d 514, 524 (9th Cir. 1989).

Finally, the indictment did not rest solely on Downs' testimony. The grand jury also had before it the testimony of FBI Agent Nemec. (GJ2/16/05 2-30; SER695-724.) In addition, Agent Nemec read to the grand jury his testimony from a prior grand jury, regarding the SAFCU robbery (GJ3/13/02 2-14; SER604-17), and the testimony of FBI Agent Gallante regarding both the Tempe Schools and the SAFCU robberies. (GJ2/5/03 2-30; SER618-47.) Defendant makes no claim of perjury or misconduct regarding that testimony. "[I]f sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due to the presence of perjured testimony before the grand jury, on the assumption that the grand jury would have returned an indictment without the perjurious evidence." *Claiborne*, 765 F.2d at 792 (*citing Coppedge v. United States*, 311 F.2d 128, 131-32 (D.C. Cir. 1962).

McCreary's final complaint, that the indictment should be dismissed because the government vouched for Downs when it asked about his plea agreement and a

polygraph, is not a grand jury irregularity warranting dismissal of an indictment. "An indictment cannot be attacked on the ground that the evidence before the grand jury was incompetent or inadequate." *United States v. Vallez*, 653 F2d. 403, 406 (9th Cir. 1981) (rejecting as without merit argument court should have dismissed indictment for grand jury irregularity where prosecutor allegedly vouched for witness' credibility). McCreary has failed to establish any error before the grand jury, much less plain error.

C. The Prosecutors Did Not Improperly Vouch For The Credibility Of Witnesses.

1. Standard of Review

When defendant objects at trial, claims of prosecutorial misconduct are reviewed for harmless error. *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006). When defendant fails to object, review is for plain error, and this Court reverses "only if, viewing the error in the context of the entire record, the impropriety seriously affect[s] the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction would amount to a miscarriage of justice." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (internal citation omitted).

2. Analysis

Vouching occurs when a prosecutor places the prestige of the government behind a witness through personal assurances of the witness' veracity, or by suggesting that information not presented to the jury supports the witness' testimony. *Id.* In reviewing a claim of vouching, this Court considers

> a number of factors, including the form of the vouching, how much the vouching implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal opinion asserted; the timing of the vouching; the extent to which the witness's credibility was attacked; the specificity and timing of a

curative instruction; the importance of the witness's testimony and the vouching to the case overall.

Necoechea, 986 F.2d at 1278. When reviewing for plain error, it then balances the seriousness of the vouching against the strength of the curative instruction and the closeness of the case. *Id.*

McCreary claims vouching occurred during direct examination of Downs and McNair when each was asked, without objection, what his plea agreement required him to do. Downs responded, "[t]o testify completely and truthfully." (TR585-86; ER540-41.) McNair responded, "[t]o tell the truth." (TR899; ER559.) This was not vouching because "reference to the 'truthful testimony' provisions of a witness's agreement with the government does not constitute vouching if it is made in response to an attack on the witness's credibility because of his plea bargain." *United States v. Monroe*, 943 F.2d 1007, 1013 (9th Cir. 1991); *United States v. Ortiz*, 362 F.3d 1274 (9th Cir. 2004) (no plain error where prosecutor elicited on direct a witness' obligation to tell the truth under plea agreement). Here, as McCreary concedes (Op. Br. at 38), the questions were properly asked after defense counsel placed their credibility in issue in opening statement, by referring to both witnesses as "known felons" and "known liars" who "have to participate in conviction of other people under their 5K1 cooperation agreement." (TR169, 171; ER351, 353.)

Next, McCreary alleges the court erred in overruling his vouching objection when, after McNair's plea agreement was admitted without objection on redirect, the prosecutor asked him, "did you come here today and testify truthfully?" (TR1076; ER582.) Although this question may have been improper, the court did not abuse its discretion in overruling the objection. The question was an invited, direct response to co-defendant Hunter's allegation on cross-examination that McNair "tweaked" his testimony to involve Hunter, and his suggestion that the jury should not believe the testimony McNair was giving "now." (TR1053-55; SER411-13.) It was necessary to rehabilitate McNair's credibility, and to "right the scale," in light of the cross-examination. *United States v. Young*, 470 U.S. 1, 13 (1985).

McCreary also challenges, for the first time on appeal, admission of the full text of Downs' and McNair's cooperation agreements on redirect examination. (Ex.40, 71; ER185, 200; TR784, 1076; ER551, 582.) The agreements were admitted after McCreary extensively impeached both witnesses on cross-examination with the terms of their agreements and their motives for testifying. (TR589-93, 613, 618-22; SER273-277, 293, 295-99 (Downs); TR976-78; SER408-10 (McNair).) Admission of the agreements was not error because, "[t]here can be no doubt but that the agreement[s] w[ere] relevant to material facts at issue and that the court acted correctly in permitting [them] to be introduced." *United States v. Rohrer*, 708 F.2d

429, 432-33 (9th Cir. 1983) (admission of full text of cooperation agreement not vouching where part of agreement was discussed on cross-examination and witness was extensively impeached on motive to testify).

Next, McCreary contends the government vouched in closing argument by expressing personal belief in the veracity of Downs and McNair. In context, the prosecutor argued:

> The people who testified pled guilty. And Antoine Downs is a convicted felon, because he's been convicted of the felony for the Safeway Federal Credit Union Robbery.
>
> The same is true of Sahdiq McNair. He pled guilty for committing armed bank robbery for the Safeway Federal Credit Union robbery. He also pled guilty to conspiracy to commit bank robberies as charged in this case.
>
> But when you're looking at their testimony, you heard them. You heard the details that they remember. You heard what they said happened. And then you heard the evidence as well.
>
> And looking at all of that, it's for you to decide whether or not they're telling you the truth. Now, they didn't tell exactly the same story. Antoine Downs and Sahdiq McNair didn't have all of the same memories of what happened.
>
> Does that mean they're liars?
>
> I submit to you that's not the case. This happened over three years ago. If they had remembered everything exactly the same, that would be more concerning than the fact that they don't remember exactly the same.
>
> People perceive things differently. They remember things differently

over a period of time. I'm sure the defense will point out some of the inconsistencies between their testimony. But, again, if they did remember it the same, then I think that we would have more cause to believe they were colluding. I submit to you that they told you the truth as they remember it as they sat there in court today.

What they do remember is the big things that happened. They remember who asked them to participate in this conspiracy. That was Jonathan Hunter. They remember whose apartment they went to. That was Derrick McCreary. They remember who told them what to do, who gave them a gun, who helped them steal a car. They remember all of those things, because Jonathan Hunter recruited a crew, to include Antoine Downs and Sahdiq McNair, to rob banks scouted by Derrick McCreary.

Jonathan Hunter and Derrick McCreary provided the manner, the means, and the method for the robberies to occur.

McNair told you when he was testifying that Hunter approached him for the second robbery about two weeks after the first robbery had occurred. And he asked him to help him get the same crew together, to include Galvan and Take-Off.

He went around looking for them. And I remember that he eventually found Galvan, and Galvan didn't want to participate. Galvan said I'm taking all the risk; Jonathan Hunter's getting all the reward; he's getting most of the money.

So he decided he didn't want to participate in the second robbery.

Jonathan – or Antoine Downs and Sahdiq McNair remember who got most of the money from these robberies, and it was Derrick McCreary and Jonathan Hunter.

McNair also, in his cross-examination, he didn't remember how many seats were in the van. Remember there was some discussion about that.

Again, does that make him a liar? Does that mean he wasn't telling you

the truth on the stand, or did he simply forget that?

He could have corrected that. He could have tried to look at the photos ahead of time or asked to see the van photos so that he could give you the best story.

But that's not what he was doing. He was telling you the truth as he remembers it. . .

. . . Using your common sense in this case, hearing the testimony from Downs and McNair, and all of the other evidence the government presented, I submit to you that the government has proven beyond a reasonable doubt that defendants Hunter and McCreary conspired to commit armed bank robbery and did in fact commit armed bank robbery and using a gun in commission of a crime of violence.

Now, there's also some discussion that McNair and Downs didn't tell the police the full story from the very beginning. And you heard a little bit about that.

Antoine Downs kind of downplayed initially his role in the robbery. He didn't want to admit to having the gun at first or that he was wearing the Adidas tennis shoes who left the teller counter (sic), because at the beginning he was trying to minimize his conduct and hoping probably that he wouldn't get in as much trouble.

But he came in here and did fess up and did tell the whole truth. And Sahdiq McNair told you that – or you heard a lot about how at the beginning he never mentioned Jonathan Hunter. He got arrested with four other guys, and he put most of the blame on Antoine Downs.

Why did he do that? . . .

Let's look at some of the things, some of the other evidence that supports the testimony of McNair and Downs. . .

(TR1328-32; SER499-503.)

In context, the prosecutor did not personally assure the witnesses' veracity. She argued fair inferences from the record, based on the evidence. No vouching occurred. *Necoechea*, 986 F.2d at 1279 (prosecutor's statements during closing, submitting to jury that witness was telling the truth because if she was lying she would have done a better job, was not vouching; argument was simply an inference from evidence in the record, not a reference to extra-record facts or personal guarantee of witness' credibility).

Finally, citing *United States v. Brown*, 720 F.2d 1059, 1071-75 (9th Cir. 1984), McCreary argues the prosecutor vouched in rebuttal argument when he invited the jury to "look at" the plea agreements, because in doing so he conveyed to them that the witnesses had taken polygraphs and passed, or that "they were truthful because at any moment a polygraph could detect their lying ways." (Op. Br. at 43.) In assessing whether vouching occurred in rebuttal argument, this Court considers the prosecutor's comments in the context of defense arguments. *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir. 1988).

Here, the defense made lengthy and repeated attacks on the witnesses' credibility based on their plea agreements, arguing the jury should not believe "informants" who were "paid with their freedom," and who "created" a story to fit the evidence. *See* (TR1348-70; SER519-41 (McCreary); TR1373-1404; SER544-75

(Hunter).) The prosecutor responded:

> Now, your common sense and experience tells you that people don't agree or don't conspire to commit crimes in public. They do not announce their intentions to the world. So how is it that the government has to prove a conspiracy?
>
> Well, the most common scenario is that the government uses a co-conspirator to inform law enforcement about the terms of the agreement, who was involved with it, what the roles play. Now, generally co-conspirators testify for the government, and in almost every case they're branded as liars or they're branded as felons. They're branded as people who want to lie for the government. Those are the words you hear, lie for the government, so they can have their punishment lessened.
>
> You heard that right out of the box in this case, . . .
>
> Now, let's talk about Mr. McNair and Mr. Downs. They're both convicted felons – you've heard that – arising out of the charges in this case.
>
> They both initially lied about a number of things to law enforcement.
>
> Is that unusual? No.
>
> Most people don't want to admit when they break the law, and it's a defense mechanism that we learn when we're kids. . .
>
> . . . We've all had that as a defense mechanism. People lie. They deny guilt when they're accused as a rule. . .
>
> And in all conspiracies, regardless of where it is, how big it is, how small it is, that's – you get a little pyramid, the guys at the top and the guys down the chain. And everybody below the guys at the top are expendable.
>
> Now, it's important that you understand this, because you're the sole

judges of the credibility of these witnesses. We're not. You're the sole judges of the evidence. We're not.

We're sort of like mechanics. We just present it to you. You're the ones who make the decision.

But I submit to you when you examine Mr. Downs and Mr. McNair's testimony and you look at all of the evidence, you'll come to the conclusion that they had testified truthfully and all – on all of the material facts to the best of their recollection.

Now, you've heard the words that they have to testify to make the government happy, there's a conspiracy here. First of all, there's two plea agreements or three plea agreements in evidence. Look at them. They set out the terms of what the agreements are. They show what the benefit is. And they show what the down side is if the witnesses don't tell the truth. That's the bottom line of plea agreements. They have to tell the truth. Look at them.

In this case there hasn't been one time that Mr. Downs or Mr. McNair has been cross-examined to show a prior statement which wasn't true that didn't come off of a police report or an FBI report. The government documents.

You remember Mr. Carpenter questioning Mr. Downs did you correct these mistakes? Did Mr. Nemec correct these mistakes? Did Mr. Hyder correct these mistakes?

No.

What's he talking about correcting the mistakes? Purging the documents to change them so they don't reflect what really happened?

If we were in a conspiracy, there would be nothing to look at these defendants and say you testified to this or you told them this, and it was false, because that would all be cleared up. They've got everything. It shows what these guys testified to or talked about originally. It shows

that they lied. There's been no cover-up or correcting the mistakes, purging these mistakes. Without that, they wouldn't have anything to talk about . . .

Now, in determining the credibility of Downs and McNair, bear with me for a minute. I invite you to look at these events in the perspective, in the perspective, of the history of mankind as we know it today. . .

But there's evidence that you have that shows that McNair and Downs were truthful about things of which they had no personal knowledge other than what they were told regarding the pager communications between Hunter and McCreary. . .

. . . And yet the testimony of these two people who are supposed to be liars is verified, verified by messages that were recorded at the time they were made before the government even knew who was involved, before anybody was arrested, before any crime had been committed.

I submit to you, ladies and gentlemen, Mr. Downs and Mr. McNair testified on all the material facts truthfully. They've admitted when they were not truthful. All of their observations as they related to you have been corroborated by independent evidence. . .

Mr. Downs is street-wise probably more than Mr. McNair. He came in early because he recognized he was in trouble. Mr. McNair didn't realize it until he had been sentenced.

Is that a motive to testify?

Of course it is. Is it a motive to testify falsely? No, not when you look at the plea agreements and not when you take their testimony and compare it with all the other evidence. . .

(TR1409-13, 1423-24, 1427-28; SER580-84, 594-95, 598-99.)

In *Brown*, this Court reversed a conviction for improper vouching where the

prosecution made extensive use at trial, and in closing argument, of a provision in key witnesses' plea agreements that required them to submit to polygraph examinations. *Brown*, 720 F.2d at 1070-75. The facts here are distinguishable from those in *Brown* in several critical ways. Here, unlike in *Brown*: (1) the government never brought the existence of the polygraph provision to the jury's attention during examination of any witness; (2) McCreary never objected to the admission of the full text of the agreements; (3) he never requested that the now-challenged language be redacted; and (4) in closing argument and rebuttal, the prosecutor never referred directly to the polygraph provision, never suggested a polygraph was being used to monitor the witnesses, and reminded the jurors that they were the sole judges of witness credibility and the evidence. *See Id.* at 1070-72.

If, however, this Court finds the rebuttal argument constituted vouching, that finding would not warrant reversal of McCreary's convictions, because the vouching does not amount to plain error. The credibility of Downs and McNair was forcefully challenged at trial. The invitation to the jury to "look at" the plea agreements was much milder than the vouching in *Brown*, and was tempered by the prosecutor's argument that jurors should determine the witnesses' credibility by comparing their testimony against the independent, corroborating evidence presented. In addition, the jury was instructed to weigh the testimony of Downs and McNair more carefully and

with greater caution than that of any other witness, because they were convicted felons, and because they were accomplices who pled guilty and received favorable treatment from the government. (TR1434-35; SER602-03.)

While Downs and McNair were important witnesses against McCreary, there was significant independent evidence tying him to the conspiracy and robberies. The maintenance man observed the suspicious activity at McCreary's apartment complex before and after the SAFCU robbery; the tracking device was found at the complex after that robbery; the pagers were found in McCreary's apartment; and text messages overwhelmingly demonstrate McCreary's role in planning and orchestrating both robberies. Balancing the mild nature of the vouching against the impeachment of the witnesses, the cautionary instructions regarding the credibility of the witnesses, and the strength of this independent, corroborating evidence, no plain error occurred.

D. The District Court Did Not Err In Denying McCreary's Motion To Compel Immunity For Dominic Austin.

1. Standard of Review

Denial of a defendant's motion to compel the government to grant immunity to a defense witness is reviewed *de novo*; related factual findings are reviewed for clear error. *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004).

2. Analysis

McCreary proffered that if granted immunity, Dominc Austin would testify that: (1) Austin and McCreary were cousins and roommates; (2) there were no weapons of any type in the Tempe Groves apartment, and McCreary had no weapons; (3) Austin lived at the Tempe Groves apartment with McCreary for the last two years; (4) Austin had no knowledge of McCreary being involved in any bank robberies, and Austin was not involved in any robberies; (5) upon returning to his apartment on February 28, 2002 at 10:00 a.m., between job shifts, Austin saw "Foot," a Black male, sitting at the kitchen table;[8] (6) Austin knew "Foot" and McCreary were friends; (7) minutes later, McCreary and two other Black males, whom Austin did not know, walked into the apartment, and the three men entered McCreary's bedroom; (8) Austin did not see McCreary or the men carry anything into the apartment, and

---

[8]"Foot" is the nickname of Mark Hughes. (TR542; SER233.)

saw nothing in their hands. (CR188; ER76-77.) The district court denied McCreary's motion to compel the government to grant immunity to Austin, ruling that, "this is not one of those rare cases in which such an extraordinary remedy would be appropriate. There's no showing here of improper motive, nor is there any showing of prejudice to the defendant as a result of the dismissal of the indictment against the former defendant Austin." (TR25; ER345.)

McCreary alleges prosecutorial misconduct in that the government entered into cooperation plea agreements with Downs and McNair, but declined to grant immunity to Austin after charges against him were dismissed, without prejudice, a month before trial. McCreary seeks alternatively remand for an evidentiary hearing, or dismissal of the charges against him.

Although "[a] criminal defendant is not entitled to compel the government to grant immunity to a witness[,]" *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996), an exception to this general rule exists where defendant can establish that "[a] defense witness's testimony would have been relevant, and the prosecutor's denial of immunity intentionally distorted the fact-finding process." *United States v. Croft*, 124 F.3d 1109, 1116 (9th Cir. 1997). "If a defendant makes an 'unrebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony,'" this Court will remand to the district court

for an evidentiary hearing to determine whether the government intentionally distorted the fact-finding process. *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991).

No remand is required here, because the government successfully rebutted McCreary's allegation that the prosecutor engaged in misconduct and distorted the fact-finding process by denying immunity to Austin. The prosecutor explained, to the satisfaction of the district court, that although it believed Austin was involved in the conspiracy, evidence against him was weaker than it was against the others. Therefore, it dismissed the indictment against Austin for tactical reasons; if the government was successful in prosecuting McCreary and Hunter, it would seek their cooperation in a future prosecution of Austin. (CR188, Ex.D; ER88-89; CR196; ER142-42; TR22; SER11.) Under these circumstances, declining to grant immunity to Austin was not misconduct because "[t]he prosecution does not abuse its discretion when it refuses to grant use immunity to a defense witness who has been indicted or is the subject of a criminal investigation." *Williams v. Woodford*, 384 F.3d 567, 602 (9th Cir. 2004).

Moreover, intentional distortion of the fact-finding process requires a showing that the government "grant[ed] immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness *whose testimony would directly*

contradict that of the government witness[.]" *Westerdahl*, 945 F.2d at 1087 (emphasis added). Austin's proffered testimony, to the extent it was relevant, did not directly contradict the testimony of Downs and/or McNair.

His proffered testimony about his familial relationship with McCreary; their living arrangement; McCreary's friendship with "Foot;" that "Foot" was in the apartment; and that McCreary returned to the apartment with two other Black males and the three entered his bedroom, was not exculpatory. It was consistent with and corroborated other evidence admitted at trial. *See* (TR518-19, 529-30, 567-69, 942; SER212-13, 223-24, 258-260, 400.) His testimony regarding February 28, 2002, covered a 15-minute period at 10:00 a.m. On the other hand, Downs and McNair testified to their recruitment for, and the planning of, two robberies over a two-month period, and to their personal participation in each robbery.

This is not a case where two eyewitnesses had conflicting stories to tell, and the government sought and obtained immunity for its witness while refusing to request immunity for defendant's witness. To the contrary, Austin denied being involved in any conspiracy. At best, he could testify that, to his knowledge, McCreary did not have a gun and was not involved in robbing banks, and he did not observe that anyone carried anything into McCreary's bedroom on February 28th. Austin did not purport to witness everything that took place in the conspiracy, nor did

his testimony purport to cover all of the charged activities. This Court has, under similar circumstances, held that denying such a witness immunity did not distort the fact-finding process. *See Alvarez*, 358 F.3d at 1216 (no error in refusing to compel immunity for defense witness where witness was not present during any of shipments of cocaine to various "stash" houses; witness' testimony that defendant's home was not among "stash" houses she visited did not directly contradict testimony of immunized government witnesses that defendant's home was in fact used to store cocaine); *see also Croft*, 124 F.3d at 1116-17 (neither of non-immunized witnesses could provide testimony that would be wholly exculpatory because neither witnessed everything that took place in the conspiracy; conspiracy involved many meetings at different times and proffered testimony did not purport to cover all charged activity). There was no error in denying immunity to Austin.

E. The Court Did Not Err In Refusing Defendant's "Mere Presence" Instruction.

1. Standard of Review

Whether a proposed jury instruction is supported by the law is reviewed *de novo*, as is the question whether other instructions adequately cover the defense theory of the case. *United States v. Medrano* , 5 F.3d 1214, 1218 (9 th Cir. 1993). Whether a factual foundation exists for proposed instruction is reviewed for abuse of discretion. *Id.*

2. Analysis

McCreary argues the district court erred by failing to give his proffered instruction on mere presence. However, where "the government's case is based on more than just a defendant's presence, and the jury is properly instructed on all elements of the crime, then a 'mere presence' instruction is unnecessary." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992). The district court reasoned that a mere presence instruction was unwarranted here because, "[t]his strikes me as not a case in which the government is resting primarily on the defendant's presence and nothing more." (TR1297; ER587.) The court's finding is supported by the record, which shows that McCreary was an active participant in both credit union robberies. Downs and McNair testified McCreary participated in

planning the robberies, and provided instructions, clothing, and guns to the men who physically committed the crimes. (*See* Statement of Facts, 10 to 18.) Text message evidence independently connects McCreary, who stipulated he is known as "Kobe," to the robberies, and demonstrates his participation in the offenses. (TR486-87, 541, 895-96; SER180-81, 232, 353-54.) Accordingly, a mere presence instruction was unwarranted.

Nevertheless, McCreary's theory of mere presence was, in fact, adequately covered by other instructions given. A defendant is not entitled to any particular form of instruction, so long as the instructions fairly and adequately cover the defense. *United States v. Solomon,* 825 F.2d 1292 (9th Cir.1987). Here, the court instructed that to be found an aider and abettor, it was not enough that defendant associated with another or was present at the scene of the crime, or even did things that were helpful to another; the evidence must show beyond a reasonable doubt that defendant acted with the knowledge and intention of helping that person commit the particular offense. (TR1443-44; ER615-16.) The court also instructed that knowledge of a conspiracy, even when coupled with the defendant's association with the conspirators and conduct which happens to advance the purposes of the conspiracy, is not enough to support a charge of conspiracy if there is no agreement. (TR1437-38; ER609-10.) These instructions sufficiently warned the jury not to convict McCreary for his "mere

presence" with the other conspirators. *United States v. Taren-Palma*, 997 F.2d 525, 535 (9th Cir. 1993), *overruled on other grounds by United States v. Shabani*, 513 U.S. 10, 11 (1994); *United States v. Burgess*, 791 F.2d 676, 680 (9th Cir. 1986).

F. The Mandatory Minimum And Consecutive Sentencing Scheme of 18 U.S.C. § 924(c) Is Constitutional.

1. Standard of Review

The constitutionality of a statute is reviewed *de novo*. *United States v. Jensen*, 425 F.3d 698, 706 (9th Cir. 2005).

2. Analysis

McCreary was sentenced to 462 months imprisonment, which included consecutive, mandatory minimum sentences under 18 U.S.C. § 924(c)(1)(A) of 84 months and 300 months, respectively, on Counts 3 and 5. He argues that the sentencing penalties provided under § 924(c)(1)(A) violate the separation of powers and non-delegation doctrines; violate his due process rights; and subject him to cruel and unusual punishment in violation of the Eighth Amendment. His constitutional challenges are without merit.

McCreary's separation of powers and cruel and unusual punishment arguments are foreclosed by prior holdings of this Court. *See United States v. Chaidez*, 916 F.2d 563, 565 (9th Cir. 1990) (mandatory minimum penalty provision of § 924(c)(1) does not violate doctrine of separation of powers); *United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998) (imposition of sentence of 597 months for three counts each of robbery and use of a firearm in crime of violence not grossly disproportionate to crime and

thus not cruel and unusual punishment under Eighth Amendment; bulk of sentence was result of mandated sentence under § 924(c)(1) for every conviction of use of firearm after initial violation). This panel cannot overrule the prior decision of another panel, absent intervening authority. *United States v. Flores-Montano*, 424 F.3d 1044, 1050 n.7 (9th Cir. 2005).

McCreary next argues that § 924(c)(1)(A) violates the non-delegation doctrine inasmuch as it delegates to the executive branch the legislative power and discretion to sentence defendants. In *United States v. Cespedes*, the Eleventh Circuit held that "rather than delegating legislative power, [21 U.S.C.] § 851 affords prosecutors a power no greater than that traditionally exercised by the executive branch in the charging decision[,] and concluded that "even if the sentence enhancement provisions of § 851 were characterized as a delegation of legislative power, [it] would find that Congress had provided altogether intelligible principles to render the delegation constitutional." *Cespedes*, 151 F.3d 1329, 1333 (11th Cir. 1998). The court so held because "[s]ections 841 and 851 identif[ied] with specificity the type of defendant and the nature of crimes that are to be considered for sentencing enhancement purposes[.]" *Id.*

McCreary acknowledges this Court found the reasoning of *Cespedes* persuasive and cited it with approval in rejecting an identical challenge to § 851 in

United States v. Jensen, 425 F.3d at 707. He nevertheless argues that here, unlike in *Jensen*, Congress failed to provide "intelligible principles" by which to exercise the delegated authority. He is mistaken. The sentencing scheme of § 924(c) applies to "any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]" *See* 18 U.S.C. § 924(c)(1)(A). Accordingly, like §§ 841 and 851, it "identif[ies] with specificity the type of defendant and the nature of crimes that are to be considered for sentencing enhancement purposes[.]" *Cespedes*, 151 F.3d 1329, 1333 n. 1 (11th Cir. 1998). This Court should apply the reasoning of *Cespedes* that it found persuasive in *Jensen*, and hold that § 924(c)(1)(A) does not violate the non-delegation doctrine.

Finally, McCreary argues the statutorily-mandated minimum sentences provided in § 924(c)(1)(A) violate due process by depriving the sentencing court of its ability to consider individualized mitigating circumstances to the extent such circumstances may warrant a sentence below the minimum. This Court rejected an identical claim in *United States v. Kidder*, 869 F.2d 1328, 1334-35 (9th Cir. 1989)

(rejecting argument that minimum sentencing provisions of 21 U.S.C. § 841(b)(1)(B) is "unconstitutional because it unduly restricts the sentencing judge's ability to impose an individualized sentence"). It should do so here.

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

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IX. STATEMENT OF RELATED CASES

The related case of *United States v. Jonathon Hunter*, C.A. No. 05-10827, has already been fully briefed and is currently pending before the Court.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 05-10818

I certify that: (check appropriate option(s))

✔ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,996 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

___ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words, or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

June 26, 2007
Date

Joan G Ruffennach
Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2007, I caused the Brief of Appellee and Supplemental Excerpts of Record to be served by causing two copies of the brief and one copy of the supplemental excerpts to be mailed, postage prepaid, to **Nancy Hinchcliffe, Esq., 11 West Jefferson, Suite 2, Phoenix, Arizona 85003,** counsel for defendant-appellant McCreary.

JOAN G. RUFFENNACH
Assistant U.S. Attorney

ADDENDUM

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032);

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub.L. 108–21, Title V, § 508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

[(C) Repealed. Pub.L. 107–296, Title II, § 225(d)(1)(C), Nov. 25, 2002, 116 Stat. 2157]

(8) to a Federal, State, or local governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) Exceptions for disclosure of customer records.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or

(6) to any person other than a governmental entity.

(Added Pub.L. 99–508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1860, and amended Pub.L. 100–690, Title VII, § 7037, Nov. 18, 1988, 102 Stat. 4399; Pub.L. 105–314, Title VI, § 604(b), Oct. 30, 1998, 112 Stat. 2984; Pub.L. 107–56, Title II, § 212(a)(1), Oct. 26, 2001, 115 Stat. 284; Pub.L. 107–296, Title II, § 225(d)(1), Nov. 25, 2002, 116 Stat. 2157; Pub.L. 108–21, Title V, § 508(b), Apr. 30, 2003, Stat. 684.)

Termination of Amendments

For termination of amendments by Pub.L. 107–56, see Sunset Provisions note set out below.

HISTORICAL AND STATUTORY NOTES

References in Text

Section 227 of the Victims of Child Abuse Act of 1990, referred to in subsecs. (b)(6) and (c)(5), is Pub.L. 101–647, Title II, § 227, as added Pub.L. 105–314, Title VI, § 604(a), Oct. 30, 1998, 112 Stat. 2983, which is classified to 42 U.S.C.A. § 13032.

The Crime Control Act of 1990, referred to in subsec. (b)(6)(B) of the text, is Pub.L. 101–647, Nov. 29, 1990, 104 Stat. 4789, for complete classification of which, see Tables.

Title II of that Act is entitled the Victims of Child Abuse Act of 1990. Thus, section 227 of the Crime Control Act of 1990, which enacted 42 U.S.C.A. § 13032, is also section 227 of the Victims of Child Abuse Act of 1990, Pub.L. 101-647, Title II, § 227, as added Pub.L. 105-314, Title VI, § 604(a), Oct. 30, 1998, 112 Stat. 2983.

Effective and Applicability Provisions

2002 Acts. Amendment to this section by Pub.L. 107-296 effective 60 days after Nov. 25, 2002, see Pub.L. 107-296, § 4, set out as a note under 6 U.S.C.A. § 101.

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99-508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99-508, set out as a note under section 2701 of this title.

Sunset Provisions

Amendments by Pub.L. 107-56, Title II, Oct. 26, 2001, 115 Stat. 278, with certain exclusions, to cease to have effect on Feb. 3, 2006, except with respect to any particular foreign intelligence investigation that began before that date, or with respect to any particular offense or potential offense that began or occurred before that date, such provisions to continue in effect, see Pub.L. 107-56, Title II, § 224, Oct. 26, 2001, 115 Stat. 295, as amended, set out as a note under 18 U.S.C.A. § 2510.

§ 2703. Required disclosure of customer communications or records

(a) Contents of wire or electronic communications in electronic storage.—A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of wire or electronic communications in a remote computing service.—(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing service.—(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for court order.—A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No cause of action against a provider disclosing information under this chapter.—No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) Requirement to preserve evidence.—

(1) In general.—A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention.—Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of officer not required.—Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(Added Pub.L. 99–508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1861, and amended Pub.L. 100–690, Title VII, §§ 7038, 7039, Nov. 18, 1988, 102 Stat. 4399; Pub.L. 103–322, Title XXXIII, § 330003(b), Sept. 13, 1994, 108 Stat. 2140; Pub.L. 103–414, Title II, § 207(a), Oct. 25, 1994, 108 Stat. 4292; Pub.L. 104–132, Title VIII, § 804, Apr. 24, 1996, 110 Stat. 1305; Pub.L. 104–293, Title VI, § 601(b), Oct. 11, 1996, 110 Stat. 3469; Pub.L. 104–294, Title VI, § 605(f), Oct. 11, 1996, 110 Stat. 3510; Pub.L. 105–184, § 8, June 23, 1998, 112 Stat. 522; Pub.L. 107–56, Title II, §§ 209(2), 210, 212(b)(1), 220(a)(1), (b), Oct. 26, 2001, 115 Stat. 283, 285, 291, 292; Pub.L. 107–273, Div. B, Title IV, § 4005(a)(2), Div. C, Title I, § 11010, Nov. 2, 2002, 116 Stat. 1812, 1822; Pub.L. 107–296, Title II, § 225(h)(1), Nov. 25, 2002, 116 Stat. 2158; Pub.L. 109–162, Title XI, § 1171(a)(1), Jan. 5, 2006, 119 Stat. 3123.)

TERMINATION OF AMENDMENTS

For termination of amendments by Pub.L. 107–56, see Sunset Provisions note set out below.

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

2002 Acts. Amendment to this section by Pub.L. 107–296 effective 60 days after Nov. 25, 2002, see Pub.L. 107–296, § 4, set out as a note under 6 U.S.C.A. § 101.

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99–508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99–508, set out as a note under section 2701 of this title.

Sunset Provisions

Amendments by Pub.L. 107–56, Title II, Oct. 26, 2001, 115 Stat. 278, with certain exclusions, to cease to have effect on Feb. 3, 2006, except with respect to any particular foreign intelligence investigation that began before that date, or with respect to any particular offense or potential offense that began or occurred before that, such provisions to continue in effect, see Pub.L. 107–56, Title II, § 224, Oct. 26, 2001, 115 Stat. 295, as amended, set out as a note under 18 U.S.C.A. § 2510.

§ 2704. Backup preservation

(a) Backup preservation.—(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communi-

cations. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.

(2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705(a).

(3) The service provider shall not destroy such backup copy until the later of—

(A) the delivery of the information; or

(B) the resolution of any proceedings (including appeals of any proceeding) concerning the government's subpoena or court order.

(4) The service provider shall release such backup copy to the requesting governmental entity no sooner than fourteen days after the governmental entity's notice to the subscriber or customer if such service provider—

(A) has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and

(B) has not initiated proceedings to challenge the request of the governmental entity.

(5) A governmental entity may seek to require the creation of a backup copy under subsection (a)(1) of this section if in its sole discretion such entity determines that there is reason to believe that notification under section 2703 of this title of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber or customer or service provider.

(b) **Customer challenges.**—(1) Within fourteen days after notice by the governmental entity to the subscriber or customer under subsection (a)(2) of this section, such subscriber or customer may file a motion to quash such subpoena or vacate such court order, with copies served upon the governmental entity and with written notice of such challenge to the service provider. A motion to vacate a court order shall be filed in the court which issued such order. A motion to quash a subpoena shall be filed in the appropriate United States district court or State court. Such motion or application shall contain an affidavit or sworn statement—

(A) stating that the applicant is a customer or subscriber to the service from which the contents of electronic communications maintained for him have been sought; and

(B) stating the applicant's reasons for believing that the records sought are not relevant to a legitimate law enforcement inquiry or that there has not been substantial compliance with the provisions of this chapter in some other respect.

(2) Service shall be made under this section upon a governmental entity by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, the term "delivery" has the meaning given that term in the Federal Rules of Civil Procedure.

(3) If the court finds that the customer has complied with paragraphs (1) and (2) of this subsection, the court shall order the governmental entity to file a sworn response, which may be filed in camera if the governmental entity includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided as soon as practicable after the filing of the governmental entity's response.

(4) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the governmental entity are maintained, or that there is a reason to believe that the law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order such process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is not a reason to believe that the communications sought are relevant to a legitimate law enforcement inquiry, or that there has not been substantial compliance with the provisions of this chapter, it shall order the process quashed.

(5) A court order denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer.

(Added Pub.L. 99–508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1863.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99–508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99–508, set out as a note under section 2701 of this title.

§ 2705. Delayed notice

(a) **Delay of notification.**—(1) A governmental entity acting under section 2703(b) of this title may—

(A) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 2703(b) of this title for a period not to exceed ninety days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2) of this subsection; or

(B) where an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena is obtained, delay the notification required under section 2703(b) of this title for a period not to exceed ninety days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2) of this subsection.

(2) An adverse result for the purposes of paragraph (1) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) The governmental entity shall maintain a true copy of certification under paragraph (1)(B).

(4) Extensions of the delay of notification provided in section 2703 of up to ninety days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subsection (b) of this section.

(5) Upon expiration of the period of delay of notification under paragraph (1) or (4) of this subsection, the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

(A) states with reasonable specificity the nature of the law enforcement inquiry; and

(B) informs such customer or subscriber—

(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of such customer or subscriber was delayed;

(iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and

(iv) which provision of this chapter allowed such delay.

(6) As used in this subsection, the term "supervisory official" means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an investigating agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney or an equivalent of a prosecuting attorney's headquarters or regional office.

(b) **Preclusion of notice to subject of governmental access.**—A governmental entity acting under section 2703, when it is not required to notify the subscriber or customer under section 2703(b)(1), or to the extent that it may delay such notice pursuant to subsection (a) of this section, may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of potential witnesses; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(Added Pub.L. 99–508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1864.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99–508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99–508, set out as a note under section 2701 of this title.

§ 2706. Cost reimbursement

(a) **Payment.**—Except as otherwise provided in subsection (c), a governmental entity obtaining the contents of communications, records, or other information under section 2702, 2703, or 2704 of this title shall pay to the person or entity assembling or providing such information a fee for reimbursement for such costs as are reasonably necessary and which have

been directly incurred in searching for, assembling, reproducing, or otherwise providing such information. Such reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information may be stored.

(b) Amount.—The amount of the fee provided by subsection (a) shall be as mutually agreed by the governmental entity and the person or entity providing the information, or, in the absence of agreement, shall be as determined by the court which issued the order for production of such information (or the court before which a criminal prosecution relating to such information would be brought, if no court order was issued for production of the information).

(c) Exception.— The requirement of subsection (a) of this section does not apply with respect to records or other information maintained by a communications common carrier that relate to telephone toll records and telephone listings obtained under section 2703 of this title. The court may, however, order a payment as described in subsection (a) if the court determines the information required is unusually voluminous in nature or otherwise caused an undue burden on the provider.

(Added Pub.L. 99-508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1866, and amended Pub.L. 100-690, Title VII, § 7061, Nov. 18, 1988, 102 Stat. 4404.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99-508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99-508, set out as a note under section 2701 of this title.

§ 2707. Civil action

(a) Cause of action.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Damages.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

(d) Administrative discipline.—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(e) Defense.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under section 2703(f) of this title);

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law.

(f) Limitation.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(g) Improper disclosure.—Any willful disclosure of a 'record', as that term is defined in section 552a(a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title, or from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to

information previously lawfully disclosed (prior to the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter.

(Added Pub.L. 99-508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1866, and amended Pub.L. 104-293, Title VI, § 601(e), Oct. 11, 1996, 110 Stat. 3469; Pub.L. 107-56, Title II, § 223(b), Title VIII, § 815, Oct. 26, 2001, 115 Stat. 293, 384; Pub.L. 107-273, Div. B, Title IV, § 4005(f)(2), Nov. 2, 2002, 116 Stat. 1813.)

TERMINATION OF AMENDMENTS

For termination of amendments by Pub.L. 107-56, see Sunset Provisions note set out below.

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

2002 Acts. Amendment by section 4005(f)(2) of Pub.L. 107-273, as therein provided, effective Oct. 26, 2001, which is the date of enactment of Pub.L. 107-56, to which such amendment relates.

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99-508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99-508, set out as a note under section 2701 of this title.

Sunset Provisions

Amendments by Pub.L. 107-56, Title II, Oct. 26, 2001, 115 Stat. 278, with certain exclusions, to cease to have effect on Feb. 3, 2006, except with respect to any particular foreign intelligence investigation that began before that date, or with respect to any particular offense or potential offense that began or occurred before that, such provisions to continue in effect, see Pub.L. 107-56, Title II, § 224, Oct. 26, 2001, 115 Stat. 295, as amended, set out as a note under 18 U.S.C.A. § 2510.

§ 2708. Exclusivity of remedies

The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

(Added Pub.L. 99-508, Title II, § 201[a], Oct. 21, 1986, 100 Stat. 1867.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1986 Acts. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 202 of Pub.L. 99-508 with respect to conduct pursuant to court order or extension, see section 202 of Pub.L. 99-508, set out as a note under section 2701 of this title.

§ 2709. Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.—A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.—The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may—

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Prohibition of certain disclosure.—No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) Dissemination by bureau.—The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) Requirement that certain congressional bodies be informed.—On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the