FILED
United States Court of Appeals
Tenth Circuit

July 5, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARTURO ARNULFO GARCIA, a/k/a Shotgun,

Defendant - Appellant.

No. 19-2148
(D.C. No. 2:15-CR-04268-JB-10)
(D. N.M.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BILLY GARCIA, a/k/a "WILD BILL"

Defendant - Appellant.

No. 19-2152
(D.C. No. 2:15-CR-04268-JB-5)
(D. N.M.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD TROUP, a/k/a Huero Troup,

Defendant - Appellant.

No. 19-2188
(D.C. No. 2:15-CR-04268-JB-3)
(D. N.M.)

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANDREW GALLEGOS, Defendant - Appellant.	No. 20-2056 (D.C. No. 2:15-CR-04268-JB-27) (D. N.M.)
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOE LAWRENCE GALLEGOS, Defendant - Appellant.	No. 20-2058 (D.C. No. 2:15-CR-04268-JB-2) (D. N.M.)

ORDER

Before **TYMKOVICH, McHUGH, CARSON**, Circuit Judges.

These matters are before the court on the United States' *Petition for Panel Rehearing* filed in appeal Nos. 19-2152 (Billy Garcia), 19-2188 (Troup), and 20-2058 (Joe Gallegos), on Arturo Garcia's *Petition for Rehearing en Banc* filed in appeal No. 19-2148, and on Billy Garcia's *Petition for Panel Rehearing* filed in appeal No. 19-2152. We also have responses to the United States' *Petition for Panel Rehearing* from Billy

Garcia, Edward Troup, and Joe Gallegos. In addition, Edward Troup has joined the rehearing petitions filed by Billy Garcia and Arturo Garcia.

Pursuant to Fed. R. App. P. 40, the United States' *Petition for Panel Rehearing* is granted in part to the extent of the modifications in the attached revised opinion. The court's April 17, 2023, opinion is withdrawn and replaced by the attached revised opinion, which shall be filed as of today's date. Because the panel's decision to partially grant rehearing resulted in only non-substantive changes to the opinion, which do not affect the outcome of these appeals, the parties may not file second or successive rehearing petitions.

Billy Garcia's *Petition for Panel Rehearing* in No. 19-2152 is denied pursuant to Fed. R. App. P. 40.

To the extent Arturo Garcia seeks rehearing by the panel in No. 19-2148, that petition is denied pursuant to Fed. R. App. P. 40. Arturo Garcia's *Petition for Rehearing en Banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

This order shall stand as a supplement to the mandate that issued on April 19, 2023 in appeal No. 20-2056.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff – Appellee, v. ARTURO ARNULFO GARCIA, a/k/a Shotgun, Defendant – Appellant.	No. 19-2148 (D.C. No. 2:15-CR-04268-JB-10) (D.N.M.)
UNITED STATES OF AMERICA, Plaintiff – Appellee, v. BILLY GARCIA, a/k/a Wild Bill, Defendant – Appellant.	No. 19-2152 (D.C. No. 2:15-CR-04268-JB-5) (D.N.M.)
UNITED STATES OF AMERICA, Plaintiff – Appellee, v. EDWARD TROUP, a/k/a Huero Troup, Defendant – Appellant.	No. 19-2188 (D.C. No. 2:15-CR-04268-JB-3) (D.N.M.)

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. ANDREW GALLEGOS, Defendant – Appellant.	No. 20-2056 (D.C. No. 2:15-CR-04268-JB-27) (D.N.M.)
UNITED STATES OF AMERICA, Plaintiff – Appellee, v. JOE LAWRENCE GALLEGOS, Defendant – Appellant.	No. 20-2058 (D.C. No. 2:15-CR-04268-JB-2) (D.N.M.)

Appeals from the United States District Court
for the District of New Mexico
D.C. No. 2:15-CR-04268

Scott M. Davidson, The Law Office of Scott M. Davidson, Ph.D., Albuquerque, New Mexico, for Defendant – Appellant Arturo Arnulfo Garcia.

Kathleen A. Lord, Lord Law Firm, LLC, Denver, Colorado, for Defendant – Appellant Billy Garcia.

John T. Carlson, Ridley McGreevy & Winocur, Denver, Colorado, for Defendant – Appellant Edward Troup.

John M. Bowlin, Bowlin & Schall LLC, Greenwood Village, Colorado, for Defendant – Appellant Andrew Gallegos.

Gregory M. Acton, Acton Law Office PC, Albuquerque, New Mexico, for Defendant – Appellant Joe Lawrence Gallegos.

C. Paige Messec, Appellate Chief, Office of the United States Attorney, Albuquerque, New Mexico, and Richard C. Williams, Assistant United States Attorney, Office of the United States Attorney, Las Cruces, New Mexico (Alexander M.M. Uballez, United States Attorney, Albuquerque, New Mexico, with them on the briefs), for Plaintiff – Appellee.

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

PER CURIAM.

This appeal arises from the convictions of five individuals for murder under the Violent Crimes in Aid of Racketeering ("VICAR") Act, 18 U.S.C. § 1959(a). Arturo Arnulfo Garcia, Billy Garcia, Edward Troup, Andrew Gallegos, and Joe Lawrence Gallegos were members of the Syndicato de Nuevo México ("SNM"), a violent gang operating in and from New Mexico state prisons. After a joint trial, a jury convicted Billy Garcia, Mr. Troup, and Joe Gallegos for the 2001 SNM-ordered in-prison murders; Arturo Garcia and Mr. Troup for a 2007 SNM-ordered in-prison murder; and Andrew Gallegos and Joe Gallegos for a 2012 out-of-prison murder and conspiracy to murder. All five defendants separately appealed. Because their appeals arise from the same trial and raise many of the same or overlapping issues, we address them together. We affirm the convictions on Counts 1 through 3 and vacate the convictions on Counts 4 and 5.

I. BACKGROUND

To begin, we provide a general overview of the facts the Government established at trial concerning the operations of SNM and the murders underlying the convictions in

this case, saving more detailed factual background for the relevant sections of our analysis. We then summarize the procedural history leading to this appeal.

A. Factual History

1. Syndicato de Nuevo México ("SNM")

SNM was formed in the New Mexico prison system in the early 1980s and grew to have hundreds of members in various penal facilities throughout the state. SNM was heavily involved in drug trafficking and other illegal activities both within the New Mexico prisons and outside of prison. SNM had a well-established hierarchy in which lower-ranking members were required to obey orders from leaders or face potentially violent punishment, including death. SNM carried out "hits"—violence ranging from beatings to murders—against members of rival gangs, SNM members in bad standing, and others who offended the gang or its members. As detailed below, in 2015, the FBI commenced a sweeping federal investigation that culminated in the convictions in 2018 of the five defendants in this appeal.

2. Murders of Ronaldo Garza and Frank Castillo

In March 2001, Billy Garcia was the highest ranking SNM member in the Southern New Mexico Correctional Facility ("Southern"). He ordered the near-simultaneous murders of SNM member Frank Castillo, who he believed was a law-enforcement cooperator, and Ronaldo Garza, who had been a member of a rival gang. Billy Garcia dictated the timing and manner of the murders and ordered an SNM member to hand-pick teams to carry them out. Joe Gallegos and two other inmates were tasked with murdering Mr. Castillo in the early morning hours, while Mr. Troup acted as

lookout. Prison authorities discovered the bodies of Mr. Castillo and Mr. Garza in their beds; both had been strangled to death.

3. Murder of Freddie Sanchez

In June 2007, Arturo Garcia was an SNM leader who ordered a hit on SNM member Freddie Sanchez because Mr. Sanchez had given statements to law enforcement. The order was transmitted through the SNM ranks until it reached Mr. Troup and another inmate; the two strangled Mr. Sanchez to death in his bed.

4. Murder of Adrian Burns

In 2012, Adrian Burns was a small-scale heroin dealer in and around Los Lunas, New Mexico. His regular customers included brothers Andrew Gallegos and Joe Gallegos. Testimony about the days before the murder suggested Joe Gallegos owed Mr. Burns money. On the evening of the murder, Mr. Burns received a phone call, told his girlfriend he was meeting the Gallegos brothers for a drug deal, and left in his girlfriend's car. He was not seen alive again.

Store surveillance video showed Andrew Gallegos buying a gallon of gasoline that evening, just a few hours before an onlooker and eventual trial witness noticed flames in a remote, wooded area. When firefighters arrived to investigate, they encountered a gruesome scene: Mr. Burns had been beaten, handcuffed, and shot in the head before his lifeless body was doused in gasoline and set on fire, along with the car he had been driving.

New Mexico State Police found the Gallegos brothers a week later at an Albuquerque motel, but the State of New Mexico did not prosecute them. Years later, Joe

Gallegos told his girlfriend about the murder, and Andrew Gallegos confessed to an SNM member with whom he was then incarcerated.

B. Procedural History

1. The FBI Investigation and Indictment

Impelled by information suggesting SNM was plotting to assassinate New Mexico Department of Corrections officials in 2015, the FBI conducted an extensive investigation that culminated in a Second Superseding Indictment charging twenty-two defendants for those and many other crimes. The Second Superseding Indictment of March 2017—the operative indictment in this case—contained a total of sixteen counts.

The Second Superseding Indictment alleged SNM was a racketeering enterprise and charged various murders, attempted murders, and conspiracies to murder under VICAR, all allegedly committed for purposes related to SNM. As relevant here, Count 1 alleged that Billy Garcia, Mr. Troup, Joe Gallegos, and two others murdered Mr. Castillo in 2001. Count 2 alleged that, on the same day, Billy Garcia and four others murdered Mr. Garza. Count 3 alleged that, in June 2007, Arturo Garcia, Mr. Troup, and three others murdered Mr. Sanchez. Counts 4 and 5 alleged Andrew Gallegos and Joe Gallegos conspired to murder and murdered Mr. Burns. Count 13 charged Joe Gallegos with assault of Jose Gomez with a dangerous weapon. And Counts 14 and 15 alleged Joe Gallegos and several others conspired to murder and attempted to murder Mr. Gomez. Counts 1 through 5 and 13 through 15 were charged pursuant to VICAR. Finally, Count 16 charged Joe Gallegos and others with the non-VICAR crime of witness tampering, in

violation of 18 U.S.C. §§ 1512(a)(2)(A) and 2, based on an attempt to prevent Mr. Gomez from testifying against Joe Gallegos.[1]

2. Pretrial Proceedings

a. Motions to dismiss

After the grand jury returned the Second Superseding Indictment, Billy Garcia filed a motion to dismiss the indictment against him as to Counts 1 and 2 "based on violations of his rights to due process and fundamental fairness, including:" "(1) destruction of exculpatory evidence"; "(2) non-disclosure of the identities of confidential informants"; and "(3) unjustified pre-indictment delay of approximately 15 years, which, . . . substantially prejudiced his defense." Troup ROA Vol. I at 1002–03.[2] In the alternative, Billy Garcia filed a motion for alternative remedies or sanctions, asking the district court "to relax the rules of evidence and allow the defense to present the lost or destroyed evidence without strict adherence to hearsay rules." Motion for Alternative Remedies or Sanctions in Relation to Motion to Dismiss (Doc. No. 1283) at 1, *United States v. DeLeon*, No. 2:15-cr-04268-JB (D.N.M. Apr. 4, 2018), ECF No. 2072.

[1] The remaining counts charged defendants not party to this appeal and were not included in the trial of the defendants in this appeal. Counts 6 through 10 alleged various defendants conspired to assault, conspired to murder, and/or murdered four victims. Counts 11 and 12 charged a single defendant with being a felon in possession of a firearm and using such firearm during and in relation to a crime of violence.

[2] We observe some of the compiled records and supplemental records on appeal use Roman numerals to distinguish volumes and other records use ordinal numbers to distinguish volumes. When citing to a record or supplemental record on appeal, we follow the compilation format.

Mr. Troup filed a substantially similar motion to dismiss based on prejudice caused by the Government's pre-indictment delay. Andrew Gallegos and Joe Gallegos likewise moved to dismiss based on prejudice caused by the Government's pre-indictment delay.

The district court determined there had been no tactical delay in bringing the indictment because the FBI had not investigated the possibility of VICAR charges until 2015.

b. Motions to sever

Over the course of pretrial proceedings, all five appellants moved to sever the trial. Andrew Gallegos and Joe Gallegos moved to sever Counts 4 and 5, the VICAR charges stemming from the murder of Mr. Burns, from the other counts. They argued joinder of Counts 4 and 5 was improper under Federal Rule of Criminal Procedure 8(b) and that failure to sever Counts 4 and 5 would unfairly prejudice them and interfere with their right to a fair trial. Billy Garcia, joined by Mr. Troup, also filed a motion to bifurcate Counts 4 and 5 from Counts 1 through 3 and 13 through 16 to "remedy the substantial prejudice to [him] while achieving judicial economy." Troup ROA Vol. II at 1406. The Gallegos brothers objected to bifurcation, maintaining that Counts 4 and 5 should be severed from the other charges.

Billy Garcia and Mr. Troup filed a motion to sever Counts 1 and 2, the VICAR charges relating to the murders of Mr. Castillo and Mr. Garza. They argued failure to sever Counts 1 and 2 would allow the Government to admit temporally distant evidence of SNM's "enterprise" that otherwise would be inadmissible as to the murders of Mr. Garza and Mr. Castillo. *Id.* at 822. And Arturo Garcia, joined by Mr. Troup, similarly

requested that the court sever Count 3, related to the murder of Mr. Sanchez, from Counts 6 and 7, related to the 2014 murder of Jose Gomez by nine defendants not party to this appeal. Arturo Garcia and Mr. Troup argued a joint trial of Count 3 with Counts 6 and 7 would severely prejudice them by admitting evidence related to alleged crimes occurring seven years after the murder of Mr. Sanchez. The Government opposed severing any of the counts or defendants, advocating for a single trial on all sixteen counts and as to all defendants.

Following three hearings on the matter, the district court granted the motions to sever in part, ordering two trial groupings: Trial One, comprised of Counts 6 through 12, and Trial Two, comprising Counts 1 through 5 and 13 through 16.[3] The court declined to further sever or to bifurcate the groupings. The court explained its reasoning was "rooted in part in the alleviation of the logistical complexities by severance into two distinct trial groupings[,]" but that "the Defendants [had] not demonstrated a prejudice sufficient enough to warrant further severance . . . at this time." Troup ROA Vol. I at 931.

Following plea agreements, Trial One comprised seven co-defendants: Arturo Garcia (Count 3), Billy Garcia (Counts 1 and 2), Mr. Troup (Counts 1 and 3), Andrew Gallegos (Counts 4 and 5), Joe Gallegos (Counts 1, 4, 5, and 13 through 16), Allen Patterson (Count 2), and Christopher Chavez (Count 2).

[3] A third trial proceeded against Angel DeLeon as to Count 1 in September 2021, following his arrest in March 2019.

c. Objection to Jury Instruction No. 31

Prior to trial, Arturo Garcia, Billy Garcia, Mr. Troup, and Joe Gallegos objected to Jury Instruction No. 31's reference to second-degree murder. The district court overruled the objection, concluding a violation of New Mexico's second-degree murder statute could satisfy VICAR even where the state statute of limitations had run because "New Mexico's statute of limitations does not apply to a federal VICAR prosecution." *Id.* at 2105.

3. Trial

The 2018 trial of the seven Trial Two defendants spanned approximately six weeks.

a. Witness testimony

Over the nearly two months of trial, the jury heard testimony from dozens of witnesses, including FBI agents, New Mexico law enforcement agents, SNM members, inmates housed with defendants or victims, and the victims' and defendants' friends and relatives. Federal agents testified extensively about their investigation, SNM, and SNM's plot to assassinate New Mexico Department of Corrections officials. SNM members who had been indicted and pleaded guilty testified about their involvement in the murders, while other witnesses testified about the events surrounding the murders or conversations they had with the defendants about their involvement.

Multiple SNM members testified in vivid detail about violent assaults, torture, or murders they had participated in for SNM while incarcerated in New Mexico prisons. One SNM member also testified about the culture and rules of SNM, including the

consequence of disobeying orders: "If you're given orders, you have to follow through with them or you will be killed yourself." Andrew Gallegos Supp. ROA Vol. 2 at 8318. A different SNM member explained the rewards for following through on orders: "Whenever SNMers conduct violent assaults on anyone, when you show up to a facility, you automatically get a care package. . . . That's love. That's showing that, hey, you did something good, and you're going to be rewarded." *Id.* at 1455. SNM members also testified about retaliation for disrespect against SNM members—disrespect "will go against you in the SNM. If you allow someone to disrespect you, it's not just you at that time; you're representing the whole *onda*. Anything you do reflects good or bad on the SNM." *Id.* at 1454; *see also id.* at 3008 ("If it's somebody . . . within the organization, [] they'll either tell you to take it into the cell and . . . fight it out with each other. Or if it's . . . not in the structure of the SNM, [] then if somebody disrespects you, you're either going to stick him or beat him up or – you know, a lot of times, . . . if somebody disrespects, they're going to leave in a gurney."). Additionally, an SNM member elucidated that SNM's rules applied on the streets as well as in prison. For example, SNM members testified about violently assaulting rival gang members and murdering off-duty police officers while out of prison.

b. Notable trial objections and motions

Of particular relevance to this appeal was the testimony of Michael Jaramillo, who was part of the hit team that murdered Mr. Castillo. Mr. Jaramillo was an inmate with Mr. Troup at Southern in 2001, and he had been at the periphery of the Garza and Castillo investigations. However, the Government represented Mr. Jaramillo consistently

maintained throughout the years that he had no pertinent information about the murders. As a result, Mr. Jaramillo was not on the Government's witness list, but the Government indicated at voir dire it might call him. A week into the trial, the Government gave notice it would call Mr. Jaramillo to testify. A few days later, the Government gave Mr. Jaramillo immunity and interviewed him about the murder, providing the interview notes to the defense. Billy Garcia, Mr. Troup, and Joe Gallegos all objected to the admission of Mr. Jaramillo's testimony.

The district court initially excluded the testimony, explaining that the Government's failure to include Mr. Jaramillo on its witness list violated 18 U.S.C. § 3432 and the parties' agreement regarding witness lists and pretrial disclosures, causing prejudice to the defendants. While noting its reluctance to wholly exclude Mr. Jaramillo's testimony, due to its likely value, the court determined that "for present purposes, . . . we need to plan [] without Mr. Jaramillo being a witness in this case." *Id.* at 2413. The district court later changed course, permitting Mr. Jaramillo's testimony, but delaying it to allow the defense time to prepare. The court explained that the Government's violation of the statute did not warrant exclusion because neither side knew the substance of Mr. Jaramillo's testimony before trial and there was minimal, if any, prejudice to the defendants given the court's decision to delay his trial testimony. Ultimately, nearly a month after the Government disclosed its intent to call him as a witness, Mr. Jaramillo testified that he, with the assistance of Joe Gallegos and another SNM member, murdered Mr. Castillo.

At the close of the Government's case, the defendants made oral motions for directed verdicts under Federal Rule of Criminal Procedure 29. Andrew Gallegos argued insufficiency of the evidence that he committed the murder of Mr. Burns, conspired to commit the murder, or did so for an SNM-related purpose. Joe Gallegos argued insufficiency of the evidence that he committed the Burns murder to gain or increase his position in SNM.[4] Arturo Garcia argued the Government presented insufficient evidence that he committed the murder charged in Count 3 under VICAR and that "Congress has exceeded its authority" such that the "application of VICAR to [Arturo Garcia] violates the [C]ommerce [C]lause." *Id.* at 8944. Billy Garcia adopted the arguments advanced by Arturo Garcia and similarly argued the evidence was insufficient to sustain his convictions under VICAR. Mr. Troup also adopted "all previous arguments made by counsel" and independently argued the Government presented insufficient evidence that he committed the murders charged in Counts 1 or 3 under VICAR. *Id.* at 8969. Counsel renewed their motions at the close of evidence, and the court took all the motions under advisement.

[4] The insufficiency of the evidence arguments raised by Andrew Gallegos and Joe Gallegos vary, as Andrew Gallegos argued the Government did not prove he committed the murder "on behalf of the enterprise" while Joe Gallegos argued the Government did not prove he committed the murder for the purpose of "gaining or increasing position" in SNM. *Compare* Andrew Gallegos Supp. ROA Vol. 2 at 8987, *with id.* at 8917. To the extent Andrew Gallegos has changed or refined his insufficiency of the evidence argument on appeal to focus on whether the Government proved he murdered Mr. Burns to maintain to increase his position in SNM, *see* 18 U.S.C. § 1959(a), the Government has not argued waiver and concedes Andrew Gallegos's insufficiency of the evidence argument on appeal is subject to de novo review. Appellee's Br. at 196; *see also id.* at 197–207.

c. Verdict

The jury returned a verdict of guilty as to (1) Arturo Garcia on Count 3; (2) Billy Garcia on Counts 1 and 2; (3) Mr. Troup on Counts 1 and 3; (4) Andrew Gallegos on Counts 4 and 5; and (5) Joe Gallegos on Counts 1, 4, and 5. The jury acquitted Joe Gallegos on Counts 13 through 16 and acquitted Mr. Patterson and Mr. Chavez.

4. Post-Trial Motions

After trial, Arturo Garcia renewed his motion for judgment of acquittal and pursued dismissal under Federal Rule of Criminal Procedure 12(b)(2). Arturo Garcia raised facial and as applied challenges to the constitutionality of VICAR and claimed Congress had exceeded its Commerce Clause power. Arturo Garcia also argued the district court lacked subject matter jurisdiction because VICAR was unconstitutional. Billy Garcia, Mr. Troup, and Andrew Gallegos joined Arturo Garcia's motion. Ultimately, the district court issued a written order denying the motion.

Mr. Troup and Joe Gallegos filed separate motions for a judgment of acquittal or a new trial based on the admission of the testimony of Mr. Jaramillo, arguing it violated their due process rights. The district court denied the motions. Although it determined the omission of Mr. Jaramillo from the Government's witness list violated 18 U.S.C. § 3432, the court concluded the admission of Mr. Jaramillo's testimony was proper and did not unfairly prejudice the defendants.

Andrew Gallegos and Joe Gallegos also renewed their prior motions for judgment of acquittal. Joe Gallegos joined Andrew Gallegos in a post-trial motion for a judgment of acquittal due to insufficiency of the evidence that Mr. Burns was murdered for the

purpose of maintaining or improving their position in SNM. In a separate motion, Andrew Gallegos argued for a new trial, alleging he was prejudiced by the joint trial, including the volume of prejudicial testimony that he contended could not have been admitted against him in a separate trial and the antagonistic defenses of the co-defendants. After a hearing, the district court denied Andrew Gallegos's and Joe Gallegos's motions. The court determined the evidence was sufficient to find a VICAR motive on Counts 4 and 5, rejecting the argument that combining Counts 1 through 5 and 13 through 16 in one trial impermissibly prejudiced Andrew Gallegos.

5. Appeal

All five defendants convicted at Trial Two appealed. Collectively, they raise the following issues: First, Arturo Garcia argues VICAR is unconstitutional and exceeds Congress's Commerce Clause power, facially and as applied. And Arturo Garcia argues the district court lacked jurisdiction because VICAR was facially unconstitutional. Both Billy Garcia and Mr. Troup join Arturo Garcia's facial and as-applied challenges, arguing the evidence is insufficient to demonstrate interstate effects satisfying VICAR's jurisdictional element. Second, Billy Garcia, joined by Mr. Troup, argues the Government's pre-indictment delay in bringing Counts 1 and 2 violated the Due Process Clause such that dismissal or an alternate remedy was required. Third, all appellants except for Joe Gallegos argue the district court abused its discretion by declining to further sever or to bifurcate the trial. Fourth, Andrew Gallegos and Joe Gallegos argue the district court erred in denying a judgment of acquittal for insufficient evidence on Counts 4 and 5. Joe Gallegos additionally argues the evidence was insufficient to support

a conviction on Count 1. Fifth, Mr. Troup argues Jury Instruction No. 31 erroneously included elements for second-degree murder under New Mexico law and that VICAR should be held to incorporate state statutes of limitation as to predicate crimes. Sixth, Mr. Troup, joined by Billy Garcia and Joe Gallegos, argues the district court abused its discretion by admitting Mr. Jaramillo's testimony. Seventh, Andrew Gallegos argues the district court abused its discretion by admitting testimony concerning the SNM activities of another of his brothers, Frankie Gallegos. And eighth, Mr. Troup argues that even if individual errors were harmless, the cumulative effect of the district court's errors prejudiced him such that he should be entitled to a new trial. We consider each issue in turn.

II. DISCUSSION

A. Commerce Clause -- Arturo Garcia, Billy Garcia, Mr. Troup

1. Additional Background

After trial, Arturo Garcia moved to dismiss Count 3 of the Second Superseding Indictment, which charged him under VICAR for the murder of Freddie Sanchez, for three reasons: (1) VICAR exceeds Congress's Commerce Clause authority to criminalize purely intrastate conduct; (2) the Sanchez murder did not have anything to do with SNM's economic activities that somehow might implicate interstate commerce; and (3) the court lacked subject matter jurisdiction over the case because the Government charged him for noneconomic, purely intrastate conduct. Billy Garcia likewise asserted

that Arturo Garcia's arguments were applicable to Counts 1 and 2.[5] The district court denied these motions.

2. Application

Defendants Arturo Garcia, Billy Garcia, and Mr. Troup argue that VICAR (1) is facially unconstitutional because it exceeds Congress's power under the Commerce Clause, and (2) is unconstitutional as applied here.

a. Facial challenge

The defendants first contend VICAR is an unconstitutional exercise of Congress's Commerce Clause power because it punishes purely local, noneconomic conduct.[6] We review this question de novo. *United States v. Haney*, 264 F.3d 1161, 1163–64 (10th Cir. 2001).

Article I, § 8 of the Constitution authorizes Congress to make laws as necessary to regulate commerce among the States so long as it has a "'rational basis' . . . for . . . concluding" that the prohibited activities, "taken in the aggregate, substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Section 1959 of the United States Code punishes violent crimes, including murder, committed "for the purpose of . . . *maintaining or increasing position* in an enterprise engaged in racketeering activity." (emphasis added). An "enterprise" includes "any

[5] Mr. Troup joined these arguments while before the district court.

[6] The defendants also argue this is an improper exercise of the Necessary and Proper Clause. We reject these arguments for the same reasons we reject their Commerce Clause challenges.

partnership, corporation, association, or other legal entity . . . *which is engaged in, or the activities of which affect, interstate or foreign commerce*." 18 U.S.C. § 1959(b)(2) (emphasis added).[7] To establish murder in aid of racketeering activity under § 1959, the government must show that:

1. there was an enterprise engaged in racketeering activity;
2. the enterprise's activities affected interstate commerce;
3. the defendant committed murder; and
4. the defendant, in committing murder, acted in response to payment or a promise of payment by the enterprise or "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise."

See § 1959(a)(1).

Section 1959 thus requires the government to prove an affecting interstate commerce element. But "[t]he statute does not require the violent acts themselves to have any connection to interstate commerce other than that they were committed for the purpose of establishing or maintaining a position within the enterprise." *United States v. Crenshaw*, 359 F.3d 977, 984 (8th Cir. 2004). In sum, if the enterprise "substantially affects" interstate commerce, VICAR may reach the underlying criminal conduct as a constitutional matter. We thus reject the defendants' contention that conduct below the enterprise level cannot be constitutionally regulated.

First, VICAR's jurisdictional element limits its use only to enterprises actually engaged in or whose activities affect interstate commerce. *See United States v. Morrison*,

[7] The provision more fully states: "As used in this section—'enterprise' includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2).

529 U.S. 589, 613 (2000) (noting a jurisdictional element "lend[s] support to the argument that [the challenged statute] is sufficiently tied to interstate commerce"). VICAR targets racketeering enterprises that by definition affect interstate commerce. This distinguishes VICAR from the cases relied on by Arturo Garcia—*Morrison* and *Lopez*—where the Supreme Court struck down the Violence Against Women Act and Gun Free School Zones Act, both of which targeted noneconomic activities but lacked jurisdictional elements. *Id.* at 601–02; *United States v. Lopez*, 514 U.S. 549, 551 (1995). Thus, a criminal enterprise that moves drugs and firearms across state boundaries can fit the bill for jurisdictional purposes.

Second, in enacting VICAR, Congress determined that murders, assaults, and other underlying conduct proscribed by § 1959 constituted an "integral aspect of membership in an enterprise engaged in racketeering activity." S. Rep. No. 98–225, at 304 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3483. Congress could rationally conclude that enterprise members engage in violence to maintain or increase their positions within the enterprise and, in turn, this "enhance[s] the power and reach of the racketeering enterprise itself." *United States v. Umana*, 750 F.3d 320, 337 (4th Cir. 2014); *see also Raich*, 545 U.S. at 22.

VICAR thus meets the requirements the Supreme Court has established in its Commerce Clause jurisprudence as long as the government proves the interstate element necessary for liability.

This conclusion is consistent with our precedent examining VICAR convictions. *See United States v. Garcia*, 793 F.3d 1194, 1210–11 (10th Cir. 2015) (concluding that

there was sufficient evidence to show a substantial effect on interstate commerce for VICAR where the enterprise had a commercial component, drug trafficking). Other circuits reached the same conclusion. *See Umana*, 750 F.3d at 336 (on plain error review the court explained that "Congress could rationally have concluded that intrastate acts of violence, such as murder, committed for the purpose of maintaining or increasing one's status in an interstate racketeering enterprise, would substantially affect the interstate activities of that enterprise"); *Crenshaw*, 359 F.3d at 986 ("Conclude[d] that the activity regulated by § 1959 substantially affects interstate commerce. The connection between *intra* state acts of violence committed by RICO enterprises and the enterprises' *inter* state commerce activity seems difficult to deny. It is well-established, for example, that drug trafficking and other forms of organized crime have a sufficient effect on interstate commerce to allow for regulation by Congress."); *United States v. Riddle*, 249 F.3d 529, 536–38 (6th Cir. 2001) ("We agree with the government that the jurisdictional provision in the enterprise definition distinguishes the statute from *Lopez*."); *United States v. Mapp*, 170 F.3d 328, 336 (2d Cir. 1999) ("Moreover, because our interpretation of the statute preserves the requirement that any predicate murder, whether intentional or not, bear a strong relationship to racketeering activity that affects interstate commerce, it does not risk improperly making purely local crimes a matter of federal concern."); *United States v. Torres* (*Ramon*), 129 F.3d 710, 717 (1st Cir. 1997) ("Section 1959 satisfies the substantial effect requirement. Section 1959 incorporates a jurisdictional element requiring a nexus between the offense in question and interstate commerce.").

Despite the weight of authority and presence of a jurisdictional element, the defendants nevertheless argue that VICAR is an unconstitutional exercise of Congress's Commerce Clause power because (1) it undermines our dual structure of government, and (2) it fails to analyze the criminal conduct at the appropriate level—the individual level.[8] We disagree.

First, because, as we explained above, VICAR is a proper exercise of Congress's constitutional authority, it does not violate basic federalism principles. The Supreme Court's Commerce Clause cases define a broad scope for conduct that substantially affects interstate commerce, including homegrown marijuana and homegrown wheat. *Raich*, 545 U.S. at 22; *Wickard v. Filburn*, 317 U.S. 111, 132–33 (1942).

Second, the level-of-analysis argument incorrectly focuses on one aspect of VICAR: the underlying predicate offense. It ignores the enterprise component and

[8] Arturo Garcia rehashes his Commerce Clause arguments but frames them as challenges under Federal Rule of Criminal Procedure 29, which governs motions for a judgment of acquittal, and Federal Rule of Criminal Procedure 12(b)(2), which challenges the court's jurisdiction. For two reasons this argument fails. First, under our precedent, even if we had concluded VICAR was unconstitutional, the unconstitutionality of a criminal statute does not deprive the district court of subject matter jurisdiction over the case for purposes of Rule 12(b)(2). *See United States v. De Vaughn*, 694 F.3d 1141, 1153 (10th Cir. 2012) ("A claim that a criminal statute is unconstitutional does not implicate a court's subject matter jurisdiction."); *see also United States v. Herrera*, 51 F.4th 1226, 1283 (10th Cir. 2022) ("[T]he constitutional challenge to a criminal statute [i]s not jurisdictional because [(1)] jurisdiction involves a court's power to adjudicate a case and [(2)] deciding the constitutionality of a statute is squarely within the power of the federal courts." (internal quotation marks omitted)). Second, as we have discussed, VICAR is a proper exercise of Congress's Commerce Clause authority. Neither the district court's nor our jurisdiction is lacking. This is not a case where a state crime was prosecuted in federal court. The defendants, instead, were charged in federal court by a valid federal law.

jurisdictional element. It is not, as Arturo Garcia argues, merely a New Mexico first-degree murder charge with an added layer of specific intent. VICAR does not convert every murder into a federal crime; rather, it criminalizes a murder committed to increase or maintain an individual's position in an enterprise that engages in interstate racketeering activity. 18 U.S.C. § 1959. Thus, the district court correctly rejected the defendants' facial challenge to VICAR.

b. As applied challenge

The defendants argue the murders alleged in Counts 1 through 3 are too attenuated from interstate commerce. They frame the criminal conduct as relating solely to enforcement of gang rules, not to any other racketeering activity (*i.e.*, drug trafficking). Because it is related only to enforcing gang rule, they assert such conduct is noneconomic in nature.[9] We treat this argument as a sufficiency-of-the-evidence challenge. *See Crenshaw*, 359 F.3d at 984 ("We [] note that the 'as applied' constitutional challenge raised by [the defendants] is really not a constitutional objection at all, but is a challenge to the sufficiency of the evidence supporting the jury verdict."). We review the issue of whether there is sufficient evidence to sustain a jury verdict de novo. *United States v. Brooks*, 438 F.3d 1231, 1236 (10th Cir. 2006). We examine "the evidence in the light

[9] The defendants also appear to challenge the sufficiency of the evidence for the maintain-or-increase-position element. But we agree with the Government that this argument is forfeited because the defendants did not raise it to the district court, and they fail to provide us with a citation in the record where the district court would have been on notice of this argument. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Miller*, 987 F.2d 1462, 1464 (10th Cir. 1993).

We begin by clarifying the applicable rule. In *Garcia*, we suggested that VICAR requires only a minimal or de minimis effect on interstate commerce where the enterprise engaged in economic activities, including drug trafficking. 793 F.3d at 1209–11. Like other circuits, we agree that § 1959's requirements are met if the government establishes "a connection between the § 1959 act of violence and a RICO enterprise which has a de minimis interstate commerce connection." *Riddle*, 249 F.3d at 538; *see also*; *Brooks*, 438 F.3d at 1236; *Crenshaw*, 359 F.3d at 984; *Miller*, 987 F.2d at 1464.

Under this standard, the evidence admitted at the defendants' trial established a more than de minimis interstate commerce connection between the murders and the SNM enterprise. As the district court noted, Arturo Garcia conceded that drug activity and drug trafficking have an interstate commerce component. And the Government introduced evidence showing the gang's drug trafficking activity affected interstate commerce:

- Testimony that an SNM member received drugs in Tennessee from New Mexico. Arturo Garcia, ROA Vol. 6 at 3856.
- Testimony from an SNM member that SNM engaged in drug trafficking. *Id.* at 7205–06.
- Testimony regarding investigating SNM for drug trafficking. *Id.* at 7634.
- Testimony about sending drugs into prison to Arturo Garcia. *Id.* at 8325, 8350.

In addition, the Government produced sufficient evidence that SNM's rules regarding the defendants' membership in SNM often included violence:

- Testimony that to gain entrance ("earn your bones") into SNM members had to engage in violence—assaults, stabbing, etc. *Id.* at 417, 4050, 4057, 6878.

- Testimony that Arturo Garcia was the SNM "commander in chief" and a member of the tabla (leadership). *Id.* at 8145, 8310.
- Testimony regarding a hit on an individual related to an order from Arturo Garcia. *Id.* at 8147.
- Testimony that SNM knew Sanchez and Castillo were cooperating with law enforcement. *Id.* at 841.
- Testimony that SNM had rules requiring that members murder snitches. *Id.* at 840.

Thus, the record contains sufficient evidence of SNM interstate commerce activities and sufficient evidence connecting SNM with the defendants' violent acts in furtherance of the objectives of the enterprise.

Accordingly, the district court correctly rejected the defendants' sufficiency of the evidence challenge to VICAR.

B. Pre-indictment Delay Counts 1 & 2 —Billy Garcia, Mr. Troup

Billy Garcia argues the district court clearly erred in denying his motion to dismiss for unconstitutional pre-indictment delay. Mr. Troup joins this argument, claiming the delay "caused him to suffer substantially the same prejudice that B[illy] Garcia suffered" because "both men [were] part of a collective-defense agreement and both men [were] convicted on Count 1." Notice that Edward Troup Adopts Portions of Codefendants' Opening Briefs at 3 (Oct. 20, 2021).

Billy Garcia also contends the district court erred by denying his request for an alternate remedy to mitigate the prejudice allegedly caused by the delay. Specifically, Billy Garcia requested that the Federal Rules of Evidence be suspended so he could introduce evidence that would otherwise be excluded.

Before turning to the merits of these arguments, we first set forth the applicable standard of review. We then describe the test in this circuit for establishing a due process

violation based on pre-indictment delay. Next, we discuss the district court's ruling. Turning to the application of the law to the facts of this case, we conclude that neither Billy Garcia nor Mr. Troup can prevail on a claim of unconstitutional pre-indictment delay. Finally, we consider Billy Garcia's contention that the district court erred in denying him an alternate remedy in the form of relaxed rules of evidence. We reject that argument as well and affirm the district court's denial of relief on the grounds of pre-indictment delay.

1. Standard of Review

Billy Garcia argues this court applies clear error review to the denial of a motion to dismiss based on pre-indictment delay. The Government agrees that clear error review is appropriate, but also notes a line of Tenth Circuit cases applying an abuse of discretion standard—a standard under which the Government contends it can also prevail. While the parties agree regarding the applicability of clear error review, and their reliance on this standard is understandable given inconsistency in our case law, on a matter of law we are not bound by the arguments of the parties. *See Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995) ("[I]t is well-settled that a court is not bound by stipulations of the parties as to questions of law." (quoting *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986))).

The earliest Tenth Circuit case we have identified that touches upon the standard of review for a district court's ruling on a motion to dismiss for pre-indictment delay is *United States v. Comosona (Rufus)*, 614 F.2d 695 (10th Cir. 1980). There, in a footnote, we stated that where a district court conducts an evidentiary hearing and makes findings

of facts, those finding "will not be disturbed unless clearly erroneous." *Id.* at 697 n.4. We, however, did not state an overarching standard for reviewing a ruling on a motion to dismiss for pre-indictment delay. *See id.* at 696–97. Eight years later, in *United States v. Comosona (Bernard)*, we again broached the standard of review, stating: "The trial court denied Comosona's motion to dismiss the indictment because of preindictment and prearraignment delay. This is reviewed under the abuse of discretion standard." 848 F.2d 1110, 1113 (10th Cir. 1988) (citing *United States v. Derr*, 726 F.2d 617, 619 (10th Cir. 1984)).

Although *Comosona (Bernard)* directly announced the overarching standard of review for a district court's ruling on a motion to dismiss for pre-indictment delay, our subsequent case law has varied between applying an abuse of discretion standard and a clear error standard. *Compare United States v. Madden*, 682 F.3d 920, 929 (10th Cir. 2012) (reviewing "a motion to dismiss based on preindictment delay for abuse of discretion"), *and United States v. Colonna*, 360 F.3d 1169, 1176 (10th Cir. 2004) (reviewing "preindictment delay for abuse of discretion"), *overruled on other grounds by Henderson v. United States*, 575 U.S. 622 (2015), *with United States v. Wood*, 207 F.3d 1222, 1234 (10th Cir. 2000) (applying clear error standard without mention of factual findings by the district court after an evidentiary hearing), *and United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998) (same). For two reasons, we conclude an overarching abuse of discretion standard applies to a district court's ruling on a motion to dismiss based on pre-indictment delay but that we review any underlying factual findings by the district court, made after an evidentiary hearing, for clear error.

First, this standard harmonizes the standards from the two *Comosona* cases. *Comosona (Rufus)* announced a limited standard of review for factual findings while *Comosona (Bernard)* announced a general standard of review for the district court's ruling as a whole. And it is commonplace for us to review the general ruling of a district court for an abuse of discretion while displacing a district court's underlying factual findings only upon a showing of clear error. *See United States v. Coleman*, 9 F.3d 1480, 1486 n.4 (10th Cir. 1993) ("We review the district court's factual findings underlying the restitution order for clear error, and the amount of the restitution order for abuse of discretion."); *First Nat'l Bank of Turley v. Fidelity & Deposit Ins. Co. of Md.*, 196 F.3d 1186, 1189 (10th Cir. 1999) ("We review the district court's refusal to grant costs under Rule 68 for abuse of discretion, and review its underlying factual findings for clear error."); *see also United States v. Howard*, 887 F.3d 1072, 1077 (10th Cir. 2018); *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). In this sense, abuse of discretion review typically includes reviewing factual findings for clear error. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017 (10th Cir. 2017) ("The abuse of discretion standard requires reviewing the district court's legal conclusions de novo and its factual findings for clear error."). Thus, we do not view there to be a conflict between the two *Comosona* cases, only a conflict between our subsequent cases that cited the *Comosona* cases for varying standards without recognizing the distinction between them.

Second, applying an overarching abuse of discretion standard is consistent with the standard of review used by other circuits when reviewing a district court's ruling on a motion to dismiss based on pre-indictment delay. *See United States v. Ross*, 123 F.3d

1181, 1184 (9th Cir. 1997) ("The trial court's decision on a defendant's motion to dismiss charges for preindictment delay is reviewed for abuse of discretion."); *United States v. Fuzer*, 18 F.3d 517, 519 (7th Cir. 1994) ("'We review for abuse of discretion the court's denial of motions to dismiss' an indictment for pre-indictment delay." (quoting *United States v. Sherlock*, 962 F.2d 1349, 1354 (9th Cir. 1989))); *United States v. Scott*, 579 F.2d 1013, 1014 (6th Cir. 1978) ("[T]he district court's finding that the preindictment delay resulted in prejudice to the defendant-appellee's case is not clearly erroneous, and [] the district court did not abuse its discretion in granting defendant-appellee's motion to dismiss counts 1 and 2 of the indictment."); *see also United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997) (applying abuse of discretion review to denial of motion for discovery as remedy after district court found defendant suffered prejudice from pre-indictment delay); *United States v. Carlson*, 697 F.2d 231, 236 (8th Cir. 1983) (reviewing denial of motion to dismiss for want of prosecution for abuse of discretion). It is also consistent with the standard of review we have applied to rulings on other motions seeking dismissal based on delays in a criminal proceeding. *See United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010) ("We review the denial of a motion to dismiss for violation of the Speedy Trial Act for an abuse of discretion . . . . and its underlying factual findings are reviewed for clear error."); *United States v. Barney*, 550 F.2d 1251, 1254 (10th Cir. 1977) (applying abuse of discretion standard to district court's dismissal of criminal proceeding under Federal Rule of Criminal Procedure 48(b) for "unnecessary delay").

As discussed later, in ruling on Billy Garcia's motion, the district court held an evidentiary hearing but made no record of any factual findings. Accordingly, we apply an abuse of discretion standard to the district court's denial of Billy Garcia's motion to dismiss based on pre-indictment delay.

2. Legal Standard

The Supreme Court has acknowledged that statutes of limitations "provide 'the primary guarantee against bringing overly stale criminal charges.'" *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)). But these statutes do not "'fully define (defendants') rights with respect to the events occurring prior to indictment,' [because] the Due Process Clause [also] has a limited role to play in protecting against oppressive delay." *Id.* (quoting *Marion*, 404 U.S. at 324).

In *Lovasco*, the Supreme Court held that pre-indictment delay "solely 'to gain tactical advantage over the accused,'" deviates "from elementary standards of 'fair play and decency,'" required by the Due Process Clause of the Fifth Amendment. *Id.* at 795 (first quoting *Marion*, 404 U.S. at 324, then quoting *Smith v. United States*, 360 U.S. 1, 10 (1959)). The Court also acknowledged the government's concession that "[a] due process violation might . . . be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Id.* at 795 n.17. Rather than "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions," the Supreme Court

tasked "lower courts, in the first instance, [with] applying the settled principles of due process . . . to the particular circumstances of individual cases." *Id.* at 796–97.

This circuit has understood the Supreme Court to have "establish[ed] a two-pronged due process test against which to measure pre-indictment delay" requiring (1) "a showing of actual prejudice resulting from the preindictment delay" and (2) "that the delay was purposefully designed to gain tactical advantage or to harass the defendants." *United States v. Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978) (citation omitted); *see also Colonna*, 360 F.3d at 1177. We also announced a test to apply when "determining whether dismissal is appropriate for pre-indictment delay": (1) "there must be demonstration of actual prejudice to the defendant resulting from the delay. Generally, such prejudice will take the form of either a loss of witnesses and/or physical evidence or the impairment of their effective use at trial"; (2) "the length of delay must be considered"; and (3) "the Government's reasons for the delay must be carefully considered." *Comosona* (*Rufus*), 614 F.2d at 696. This analysis incorporates a burden shifting framework:

> Upon a prima facie showing of fact by a defendant that the delay in charging him has actually prejudiced his ability to defend, and that this delay was intentionally or purposely designed and pursued by the Government to gain some tactical advantage over or to harass him, the burden of going forward with the evidence shifts to the Government. Once the Government presents evidence showing that the delay was not improperly motivated or unjustified, the defendant then bears the ultimate burden of establishing the Government's due process violation by a preponderance of evidence.

Id. at 696–97.

Billy Garcia, joined by Mr. Troup, argues our standard should be expanded to include the "reckless disregard" language approved in *Lovasco* and supported by more recent Supreme Court precedent. Billy Garcia's Br. at 22. He cites to *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, where the Supreme Court explained that due process claims based on pre-indictment delay "can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant *or in reckless disregard* of its probable prejudicial impact upon the defendant's ability to defend against the charges." 461 U.S. 555, 563 (1983) (emphasis added). Although Billy Garcia correctly quotes the Court, effectively calling our test into question, he fails to make a specific argument that the Government here acted with "reckless disregard."[10] *See* Billy Garcia's Br. at 39. Accordingly, we leave for another day the question of whether this circuit's test should be expanded.

Turning to Billy Garcia's and Mr. Troup's supported argument, we now consider whether the Government deliberately obtained a tactical advantage that actually prejudiced their substantial rights. To place our discussion in context, we begin with an

[10] Billy Garcia makes one passing statement that "it could not have been lost on the [G]overnment that the lengthy delay in indicting [him] would give rise to an appreciable risk that his ability to mount an effective defense would be impaired." Billy Garcia's Br. at 39. This is insufficient to raise a claim that the Government acted in reckless disregard of the probable prejudicial impacts on the defense. *See Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004) ("Scattered statements in the appellant's brief are not enough to preserve an issue for appeal.").

overview of the district court's decision denying the motion to dismiss based on pre-indictment delay.

3. District Court Ruling

The district court held an evidentiary hearing on the motions to dismiss for pre-indictment delay. Despite taking testimony from several witnesses, the district court did not make any findings of fact after the hearing. Billy Garcia and Mr. Troup highlight the absence of findings of fact and suggest that it may be necessary to "remand to the district court for a hearing and ruling on the dismissal motions." Billy Garcia's Br. at 17. We decline the invitation to remand because we are confident the basis of the district court's decision is apparent from the existing record.

Federal Rule of Criminal Procedure 12(d) requires the district court to "state its essential findings" when a motion involves factual issues. A finding is essential if it is required for meaningful review. *United States v. Prieto-Villa*, 910 F.2d 601, 610 (9th Cir. 1990). However, "[d]etailed findings are unnecessary when the district court's explanation shows its reasoning." *United States v. Torres* (*Ronald*), 987 F.3d 893, 898 (10th Cir. 2021). In the context of motions to dismiss for pre-indictment delay, this court has noted that although adequate factual findings "should normally be made only on the basis of testimony and other evidence at an evidentiary hearing, it is, nevertheless, not necessary for district courts to provide detailed findings of fact and conclusions of law if the essential bases of their decisions are apparent." *Comosona* (*Rufus*), 614 F.2d at 697; *see also United States v. Toro-Pelaez*, 107 F.3d 819, 824 (10th Cir. 1997) ("While

helpful to appellate review, Rule 12(e) does not require detailed findings of facts as long as the essential basis of the court's decision is apparent.").

Before the hearing on the motion to dismiss, the district court shared its initial impressions:

> I do think the defendants have an uphill battle in trying to get me to dismiss the counts here for preindictment delay. The standards are very high . . . .
>
> My impression[] . . . was that the United States didn't want to have anything to do with the SNM Gang. . . .
>
> [The Government] thought it was a State of New Mexico problem, until [SNM Members] ordered the hit on [corrections officials].
>
> And at that point, there was a recognition by the United States that the State of New Mexico could not control the situation. . . . And they stepped in and they brought this racketeering case.
>
> And the decisions that they made in bringing the racketeering case, we can call them tactical, we can call them strategic, but it is the way you put together a racketeering case. They didn't have any interest in bringing murder cases. They wanted to -- but once they bit, once they decided that they needed to come in and help with the state, then they began to put together a racketeering case. . . .
>
> But I think it's unfair to go back into pre-2015 -- I don't know where exactly the cutoff is -- and treat the Corrections Department and the Department of Justice as one and the same. And so, to me, to tell the Government that they have engaged in preindictment delay is not something that I'm inclined to do. And the State just didn't prosecute it. So there is not a delay on their part, they just didn't prosecute it. And we can all look at the names of the people that made those decisions not to prosecute at that time.
>
> So that's what I'm inclined to do. I understand that the defendants want to make a record, and that they are entitled to that. But I do think it's an uphill battle to try to convince me to dismiss these counts, and not allow them to proceed to trial. So we'll be making a record, but I think that the Government may -- the defendants may want to take into account what I have said.

Billy Garcia ROA Vol. 5 at 2866–70. The district court then proceeded with the evidentiary hearing.

In April 2018, the court ruled on the motions to dismiss, the supplement to the motion to dismiss, and the motion for relaxation of the Rules of Evidence, stating: "All three of those motions are denied. I thought I had made that clear pretrial, but if I haven't[,] they are all denied." Billy Garcia Supp. ROA Vol. 1 at 4452. The district court continued, indicating that it "d[id] intend to write an opinion on that. . . . If the gentlemen are convicted, I think that that will be an appealable issue. So I want to spend some time with it. But for purposes of your planning, you should plan on those three motions being denied." *Id.* The district court, however, did not provide a written discussion of the pre-indictment delay issue or make findings of fact based on the evidentiary hearing.

That omission does not prevent our appellate review of this issue. As set forth above, the district court provided a detailed description of the basis for its decision. From that record, it is apparent the district court determined there had been no tactical motive for the delay in bringing the indictment because the FBI did not investigate the possibility of VICAR charges until 2015, when it learned of the assassination plot against corrections officials. Prior to that time, the FBI viewed the State of New Mexico as responsible for prosecuting the prison murders. It was only years later, after the FBI learned of SNM's plot to execute New Mexico corrections officials, that the Government deemed it necessary to pursue federal charges targeting SNM under VICAR. This explanation for the district court's denial of the motions is sufficiently clear to permit meaningful review, and we turn to that task now.

4. Application

As discussed, this circuit has applied a two-prong test to assess whether pre-indictment delay rises to a violation of due process. *Revada*, 574 F.2d at 1048. The movant must show (1) "actual prejudice resulting from the pre-indictment delay" and (2) "that the delay was purposefully designed to gain tactical advantage or to harass the defendants." *Id.* We now consider whether the district court abused its discretion when concluding Billy Garcia and Mr. Troup failed to meet this test, addressing each prong in turn.

a. Actual prejudice

"To constitute a showing of actual prejudice, the defendant must show that he has suffered definite and not speculative prejudice." *Colonna*, 360 F.3d at 1177 (internal quotation marks omitted). "Vague and conclusory allegations of prejudice resulting from the passage of time are insufficient to constitute a showing of actual prejudice for the purposes of preindictment delay." *Id.* (quotation marks and ellipses omitted). And we "require more than ordinary negligence on the part of government representatives." *United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979).

Billy Garcia, joined by Mr. Troup, presents five reasons that support the actual prejudice prong of pre-indictment delay: (1) the court should presume actual prejudice, (2) the death of two witnesses, (3) the loss of informant identities, (4) the passage of excessive time, and (5) the loss or destruction of physical evidence. We now consider each of these arguments in turn, ultimately concluding that Billy Garcia has failed to demonstrate actual prejudice here.

i. Presumed prejudice

First, Billy Garcia, joined by Mr. Troup, contends the fifteen-year delay in bringing the indictment "is presumptively prejudicial by any reasonable measure." Billy Garcia's Br. at 34 (citing *Doggett v. United States*, 505 U.S. 647, 652 & n.1 (1992); *Barker v. Wingo*, 407 U.S. 514, 530–31 (1972)). In support, he relies on decisions presuming prejudice in instances of excessive post-indictment delay, arguing this "analysis applies with equal or greater force to pre-accusation delay" because "[b]efore a person has been accused, he is far less likely to focus upon the events . . . [or] locate important witnesses." *Id.* at 34–35. The Government disagrees, claiming that unlike delay post-indictment, there is no presumptive prejudice from pre-indictment delay; instead, the defendant has the burden to demonstrate actual prejudice. We agree with the Government.

Post-indictment delay is assessed under the Sixth Amendment[11] and the Speedy Trial Act.[12] *See United States v. Medina,* 918 F.3d 774, 779 (10th Cir. 2019). When

[11] The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

[12] The Speedy Trial Act provides, in relevant part, that

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. . . .

18 U.S.C. § 3161(c)(1).

asserting a speedy trial violation, the defendant bears the burden of demonstrating that the length of delay between arrest or indictment and trial has "crossed the threshold dividing ordinary delay from 'presumptively prejudicial' delay." *Doggett,* 505 U.S. at 651–52 (quoting *Barker*, 407 U.S. at 530). This court has recognized, that "[d]elays approaching one year generally satisfy the requirement of presumptive prejudice" in the context of post-indictment delay. *United States v. Batie,* 433 F.3d 1287, 1290 (10th Cir. 2006). We have identified three interests protected by the speedy trial right: "(i) the prevention of oppressive pretrial incarceration; (ii) the minimization of anxiety and concern of the accused; and (iii) minimization of the possibility that the defense will be impaired." *United States v. Seltzer,* 595 F.3d 1170, 1179 (10th Cir. 2010).

In contrast, pre-indictment delay is governed by the Due Process Clause of the Fifth Amendment,[13] as well as the statutes of limitations imposed by Congress. *See Lovasco,* 431 U.S. at 788–89. The interests protected by restrictions on pre-indictment delay are different than the interests identified with respect to post-indictment delay. Because the defendant has not yet been charged with an offense, he is subject to neither pretrial incarceration nor anxiety and concern related to being indicted for a crime. Further, pre-indictment delay is unconstitutional under the Due Process Clause only if it violates those "'fundamental conceptions of justice which lie at the base of our civil and political institutions,'" and "which define 'the community's sense of fair play and

[13] The Fifth Amendment states, in relevant part: "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

decency.'" *Id.* at 790 (first quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), then quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)). Prosecutors do not stray from these interests when they "defer seeking indictments until they have probable cause to believe an accused is guilty." *Id.* at 791. Indeed, such delay may be warranted where "a criminal transaction involves more than one person or more than one illegal act." *Id.* at 793. Importantly, unlike post-indictment delay, the outer limits of pre-indictment delay have been set by Congress in statutes of limitations for individual crimes. These statutory limitations are designed to protect the defendant from the impact of delay on his defense. *See Marion,* 404 U.S. at 322 (observing that the statutes of limitations "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice" (quoting *Pub. Schls. v. Walker*, 9 Wall. 282, 288 (1869))). Where the Government has acted within those legislative boundaries, it is the defendant's burden to demonstrate he has nonetheless suffered actual prejudice such that fundamental concepts of justice have been violated. *See Comosona* (*Rufus*), 614 F.2d at 696–97 (explaining defendants must demonstrate "a prima facie showing of fact . . . that the delay in charging him has actually prejudiced his ability to defend"). Here, there is no dispute the Government timely prosecuted the VICAR charges.[14]

[14] VICAR murder is an offense punishable by death and therefore not subject to a statute of limitations. *See* 18 U.S.C. § 3281 (stating that no statute of limitations exists for "any offense punishable by death"); *United States v. Payne,* 591 F.3d 46, 58–59 (2d Cir. 2010) (holding VICAR murder is an offense punishable by death for purposes of 18 U.S.C. § 3281 whether or not the government seeks the death penalty).

For these reasons, we conclude the district court did not abuse its discretion in rejecting Billy Garcia's and Mr. Troup's argument that prejudice may be presumed solely from the length of the pre-indictment delay.

ii. Deceased witnesses

Second, Billy Garcia argues the pre-indictment delay actually prejudiced the defense because two witnesses with potentially exculpatory information died during the interim. Billy Garcia notes that in a 2001 interview, Leroy Lucero identified SNM members Ray Molina, Jake Armijo, and Angel Munoz as being involved in the Garza and Castillo murders. Billy Garcia further contends that Leroy Lucero, Toby Romero, and an unidentified inmate witness "all identified [Angel Munoz] as having orchestrated the Garza and Castillo murders." Billy Garcia's Br. at 36. Because both Angel Munoz and Toby Romero had died by the time of the indictment, and thus could not be interviewed or presented as defense witnesses to state under oath that Billy Garcia did not order the murders, Billy Garcia argues this shows actual prejudice.

The Government disagrees and contends there is no reason to conclude Mr. Munoz would have incriminated himself at trial by admitting he gave the order to murder Mr. Garza and Mr. Castillo. The Government further notes that even if Toby Romero identified Mr. Munoz as orchestrating the Garza and Castillo murders, or Mr. Munoz had admitted involvement, nothing about their hypothetical testimony would exonerate Billy Garcia. The evidence showed that Mr. Armijo was transferred from Southern weeks before the murders, and Mr. Munoz told Mr. Lucero that Billy Garcia was going to "clean house." Appellee's Br. at 52 (quoting Andrew Gallegos Supp. ROA

Vol. 2 at 3943). Thus, the Government argues, both Mr. Munoz and Billy Garcia could have sanctioned the murders. We agree with the Government that Billy Garcia has failed to show actual prejudice.

In *United States v. Koch*, we evaluated the defendant's assertion of prejudice based on the death of "some significant witnesses" during the nine years of pre-indictment delay. 444 F. App'x 293, 298 (10th Cir. 2011) (unpublished).[15] We concluded this did not demonstrate actual prejudice where the defendant "offered no non-speculative reason to conclude that these witnesses would have been anymore [sic] helpful to him than those that survived and provided testimony distinctly adverse to him." *Id.* Because the defendant failed to explain how "the evidence lost to him as a result of the government's delay—would have assisted his defense," we rejected his claim of pre-indictment delay. *Id.* (internal quotation marks omitted).

The death of the two potential witnesses here similarly does not demonstrate actual prejudice. As an initial matter, Mr. Lucero did testify at trial about his prior statements to the FBI that Mr. Munoz ordered Mr. Armijo to kill Mr. Castillo and Mr. Garza. When asked about these statements at trial, Mr. Lucero first testified he had no memory of making them, and upon further reflection indicated he was "mixed up" when he made the statements. Troup Supp. ROA Vol. 2 at 6592. Mr. Armijo also testified at trial. He denied ordering the murders of Mr. Castillo or Mr. Garza, and claimed he was

[15] Although unpublished decisions from this court are not precedential, we may rely on them to the extent their reasoning is persuasive. *United States v. Austin,* 426 F.3d 1266, 1274 (10th Cir. 2005).

transferred out of Southern before the orders were conveyed. Indeed, Mr. Armijo stated he was not "aware of any orders to kill either Mr. Garza or Mr. Castillo." *Id.* at 3947. The pre-indictment delay did not prejudice Billy Garcia's ability to cross-examine Mr. Armijo or to impeach Mr. Lucero based on his prior inconsistent statements. And although Mr. Lucero and Mr. Armijo testified at trial, neither was particularly helpful to the defense.

Billy Garcia does not explain why the deceased witnesses would "have been any[ ]more helpful to [them] than those [who] survived and provided testimony distinctly adverse to [them]." *Koch*, 444 F. App'x at 298. Like the witnesses who did testify, it is probable Mr. Lucero and Mr. Romero would be unwilling to implicate themselves in the murders of Mr. Castillo and Mr. Garza. Billy Garcia's argument to the contrary is speculative and not supported by citation to any similar prior statements by Mr. Munoz. As to Toby Romero, Billy Garcia makes no attempt to demonstrate what Mr. Romero's testimony would be and why its loss actually prejudiced the defense. Although Billy Garcia asserts that Toby Romero "identified [Mr. Munoz] as having orchestrated the Garza and Castillo murders," he does not provide a record citation to this statement, and he fails to explain how Mr. Munoz's involvement would prove Billy Garcia was not also involved. Billy Garcia's Br. at 36. Accordingly, Billy Garcia has failed to demonstrate actual prejudice from the loss of witnesses during the pre-indictment delay.

iii. Informant identities

Third, Billy Garcia, joined by Mr. Troup, argues the identities of the seven informants "possessing exculpatory information ha[s] been lost forever." Billy Garcia's

Br. at 36. Without the informants' identities, Billy Garcia argues he was unable to interview "critical witnesses" who "could also have led to other sources of exculpatory information" in preparation of his defense. *Id*. The Government contends this does not demonstrate actual prejudice because Billy Garcia did not "identify which informants remained unidentified" or "describe what testimony or information [the witnesses] would have provided." Appellee's Br. at 55. Again, we agree with the Government.

Billy Garcia makes no effort to identify any specific exculpatory statements from the unidentified informants. Instead, he speculates that had he known the identity of these informants, he could have interviewed them and discovered information helpful to the defense. Such aspirational allegations are insufficient to demonstrate actual prejudice.

In *United States v. Jenkins*, we affirmed the district court's denial of the defendant's motion to dismiss the charges due to pre-indictment delay. 701 F.2d 850, 854–55 (10th Cir. 1983), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). As evidence of actual prejudice, the defendant claimed he recognized voices on audio tapes offered by the Government but, due to the passage of time, was unable to locate some of these witnesses and that others he did locate had faded memories. *Id.* at 855. We rejected that argument, stating, "Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice." *Id*. Instead, the defendant "must be able to show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided his defense." *Id.*

Billy Garcia has not met that standard here. He points to no specific statements from the unidentified witnesses that would have aided his defense and offers mere conjecture as to what additional testimony he might have obtained from these unidentified informants. He therefore has failed to demonstrate the loss of these informants' identities actually prejudiced his defense.

iv. Passage of time

Fourth, Billy Garcia, joined by Mr. Troup, argues the fifteen-year delay in bringing the indictment negatively affected the witnesses' memories. As the Government notes, however, Billy Garcia again provides a mere "vague and conclusory allegation[] of prejudice." Appellee's Br. at 55 (quoting *Jenkins*, 701 F.2d at 855).

Although "the length of delay" is one factor that "must be considered" when "determining whether dismissal is appropriate for pre-indictment delay," it is not enough standing alone. *Comosona* (*Rufus*), 614 F.2d at 696. The defendant must "demonstrat[e] actual prejudice . . . resulting from the delay." *Id.* Because general lack of recall is not enough to demonstrate actual prejudice based on the pre-indictment delay, *see Jenkins*, 701 F.2d at 855, the district court did not abuse its discretion when it denied the motion to dismiss based on the passage of time.

v. Loss or destruction of physical evidence

Finally, Billy Garcia, joined by Mr. Troup, argues the pre-indictment delay has "resulted in the loss of physical evidence, phone calls, video recordings, mail searches, corrections records, investigators' reports, and other material." Billy Garcia's Br. at 37. As the Government notes, however, the hearing on the motion to dismiss "established

that some of the 'lost' evidence, such as surveillance video from the prison, had never existed in the first place." Appellee's Br. at 45; *see also* Billy Garcia ROA Vol. 5 at 3858, 3863; Andrew Gallegos Supp. ROA. Vol. 2 at 904–05, 927–28 (noting the prison did not have cameras at the time). In addition, some of the 'lost' evidence was eventually found, including the state police crime scene videos that were admitted at trial. And Billy Garcia does not indicate what prejudice he suffered from the loss of any particular remaining evidence.

It is true that actual prejudice in a pre-indictment delay case generally "take[s] the form of either a loss of witnesses and/or physical evidence or the impairment of their effective use at trial." *Comosona* (*Rufus*), 614 F.2d at 696. But the loss of evidence, without more, is insufficient to support a claim of unconstitutional pre-indictment delay. The defendant must show actual prejudice. *See Wood,* 207 F.3d at 1235 (affirming denial of motion to dismiss for pre-indictment delay despite testimony that victim's body was putrefied resulting in the inability of the autopsy to reveal potentially helpful evidence).

The lost evidence argument here fails for much the same reason as the other alleged grounds of prejudice. Billy Garcia fails to make the necessary connection between the allegedly lost evidence and a negative impact on the defense. Instead, he provides a general statement that physical evidence was lost without making any specific argument as to how that lost evidence actually prejudiced the defense. This is insufficient to show actual prejudice.

In summary, Billy Garcia, joined by Mr. Troup, provides an initially impressive list of information, witnesses, and evidence lost during the pre-indictment delay, but he

fails to show how any of it actually prejudiced the defense. Accordingly, the district court did not abuse its discretion when it denied the motion to dismiss based on pre-indictment delay.

b. Tactical advantage

Even if Billy Garcia, joined by Mr. Troup, had established actual prejudice, the district court did not abuse its discretion in denying the motion to dismiss, because he failed to show the Government delayed in order to gain a tactical advantage. *See Revada*, 574 F.2d at 1048. Billy Garcia, joined by Mr. Troup, argues the "[G]overnment elect[ed] to use the charges as a tactic to bring down a criminal organization." Billy Garcia's Br. at 10. Because the evidence to support the charges was obtained long before the Government filed the indictment, Billy Garcia claims the indictment was based on the Government's decision, after the "explosive allegations of a conspiracy to murder corrections officials[,]" to obtain "the tactical objective of destroying the SNM." *Id*. at 38; *see also id.* (noting "[t]he DNA testing was completed in 2001," and the statements forming the basis of the indictment were made in 2001, 2007, and 2008). Billy Garcia argues there were no changes in the fifteen years between the murders and the indictment, other than the Government's sense "in 2015 that it might be able to successfully indict [Billy Garcia] because it would now be able to lump him in with the new, sensational SNM allegations that arose between 2014–15, and that a jury would

now be far more likely to convict."[16] *Id.* at 39. Even accepting these allegations as true, Billy Garcia has failed to identify a tactical motive rendering the pre-indictment delay here unconstitutional.

In *Lovasco,* the Supreme Court granted certiorari to review the affirmance of the dismissal of an indictment based on an eighteen-month pre-indictment delay. 431 U.S. at 784. The Supreme Court reversed and stated, "[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Id.* at 790. Instead, courts "are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define the 'community's sense of fair play and decency.'" *Id.* (first quoting *Mooney*, 294 U.S. at 112, then quoting *Rochin*, 342 U.S. at 173). The Court explained,

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

Id. at 790–91 (footnote omitted). Where prosecutors are under no duty to "file charges as soon as probable cause exists," this court looks to whether the government has gained a

[16] Billy Garcia, however, conceded that "state and federal authorities believed the evidence wasn't sufficient to charge [him] for fifteen years." Billy Garcia ROA Vol. I at 851.

tactical advantage by the delay that violates the "community's sense of fair play and decency." *Id* at 790–91.

Billy Garcia has failed to demonstrate the Government delayed proceeding to gain such a tactical advantage. *See Marion*, 404 U.S. at 324 (noting a due process violation based on pre-indictment delay requires a showing "that the delay was an intentional device to gain tactical advantage over the accused"). It is true that by the time of the indictment in 2015, the Government had decided to combine the murder charges with other VICAR offenses against other defendants. And it may be true that the chances of conviction were enhanced by combining these VICAR claims in a single prosecution. But, as the district court noted, the Government initially considered filing criminal charges with respect to murders committed in New Mexico prisons to be the State of New Mexico's responsibility. It was only after the Government learned of SNM's plot to murder corrections officials that the Government decided to renew its investigation into SNM. Billy Garcia has failed to provide support for the theory that the timing of the Government's prosecution was motivated by a desire to gain a tactical advantage as opposed to its belated discovery of additional evidence justifying prosecution and its realization that SNM posed a significant threat and needed to be dismantled. Similarly, the Government's decision to bring a VICAR action, even if that decision increased the chances of conviction, does not constitute an unconstitutional tactical advantage. *See Lovasco*, 431 U.S. at 791 (holding that waiting to bring charges until the Government is "satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt" is not a tactical advantage that supports a finding of a due process violation). Once the

Government decided to prosecute, it could pursue any federal charges for which probable cause was present. *Id.* at 790–91.

Because the tactical advantage Billy Garcia and Mr. Troup identify is permissible, they have failed to establish the second prong of our pre-indictment delay test. We therefore affirm the district court's denial of Billy Garcia's and Mr. Troup's motion to dismiss for violation of their due process rights based on pre-indictment delay.

5. Alternative Remedy

Billy Garcia argues, in the alternative to dismissing the indictment, that the district court should have "allow[ed] him to admit some of the lost evidence without strict adherence to the rules against hearsay." Billy Garcia's Br. at 40. Specifically, Billy Garcia attempted to "introduce statements of the deceased witness Toby Romero to contradict the inculpatory testimony of Leroy Lucero." *Id.* He argues, due to the Government's delay in prosecuting the murders, "it seems only fair to allow a defendant some latitude in presenting evidence when . . . the witness is no longer available." *Id.* Billy Garcia and Mr. Troup also note that they were no longer able to impeach certain witnesses based on their criminal history because over ten years had passed since their convictions. *See* Fed. R. Evid. 609(b) (limiting the circumstances under which evidence of prior convictions older than ten years can be admitted for impeachment purposes).

The Government argues this alternative remedy is not preserved and is therefore subject to plain error review because Billy Garcia did not ask for any specific evidence to be admitted under a relaxed evidentiary standard. Even if he had argued plain error, the Government contends Billy Garcia cannot demonstrate any error was plain because he

"cites no law providing that a district court must relax the rules of evidence to compensate for any alleged prejudice caused by preindictment delay." Appellee's Br. at 64. Finally, the Government contends Billy Garcia's and Mr. Troup's arguments based on Rule 609 were not presented to the district court.

Billy Garcia has not referred us to any place in the record where he requested a relaxed application of the Federal Rules of Evidence as to any particular evidence offered at trial.[17] We agree with the Government that this issue has not been preserved. And even if Billy Garcia had argued plain error, he does not point us to, and we have not found, any law that requires relaxed application of the evidentiary rules in these circumstances. Thus, any presumed error is not plain. *Cf. United States v. Harbin*, 56 F.4th 843, 845 (10th Cir. 2022) ("To show that an error is plain, [appellant] must demonstrate either that this court or the Supreme Court has resolved these matters in his favor, or that the language of the relevant statutes . . . is clearly and obviously limited to the interpretation he advances." (internal quotation marks and brackets omitted)).

[17] Billy Garcia argues that he attempted to introduce statements of deceased witness Toby Romero, but the district court excluded them as hearsay. Importantly, however, Billy Garcia fails to offer a citation to the record where he sought relaxation of the hearsay rule as to this specific evidence. Nor does he identify the substance of Toby Romero's prior statements and how the exclusion prejudiced his defense. *See* Billy Garcia's Br. at 40; *cf.* 10th Cir. R. 28.2(c)(2) (requiring briefs to "cite the precise reference in the record where the issue was raised and ruled on"); *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.,* 82 F.3d 1533, 1540 n.3 (10th Cir. 1996) (refusing to consider argument where appellant failed to provide a record citation showing it raised the issue in the district court).

Further, Billy Garcia cannot demonstrate prejudice from the exclusion under Rule 609 of evidence that Michael Jaramillo committed a prior murder because Mr. Jaramillo admitted at trial that he murdered Mr. Castillo. Where the jury knew that Mr. Jaramillo was a murderer, his credibility was sufficiently impeached such that Billy Garcia was not prejudiced by exclusion of the prior murder. *See United States v. Howell,* 285 F.3d 1263, 1270 (10th Cir. 2002) ("[I]n the context of Rule 609, error is harmless if the witness' credibility was sufficiently impeached by other evidence. . . ." (quotation marks omitted)).

For these reasons, the district court did not abuse its discretion in denying Billy Garcia's and Mr. Troup's motion to relax the rules of evidence.

6. Conclusion

Because Billy Garcia and Mr. Troup failed to demonstrate any actual prejudice as a result of the pre-indictment delay or any motive by the Government to gain tactical advantage, the district court did not abuse its discretion by denying the motion to dismiss and the alternative motion for relaxation of the rules of evidence.

C. Severance and Bifurcation—Arturo Garcia, Billy Garcia, Mr. Troup

On appeal, Arturo Garcia, Billy Garcia, and Mr. Troup advance arguments that the district court should have further severed the trials.[18] Alternatively, these three defendants

[18] Additionally, Andrew Gallegos argues the district court should have severed trial on Counts 4 and 5. Because we grant Andrew Gallegos relief on his insufficiency of the evidence argument, we need not address his severance argument. Furthermore, although Joe Gallegos joined arguments for severance in the district court, he did not advance or join arguments for severance on appeal.

contend the district court should have bifurcated the trial on Counts 1 through 3 from the trial on Counts 4 and 5. We provide some additional procedural history regarding the motions to sever and bifurcate before stating the standard of review and analyzing the argumentation.

1. Additional Procedural History

A superseding indictment charged thirty defendants across fifteen counts. Accounting for guilty pleas and the addition of one defendant, a Second Superseding Indictment narrowed the field of defendants to twenty-two. An additional ten defendants charged in the Second Superseding Indictment pleaded guilty. Thus, twelve defendants remained, charged across sixteen counts.

Ultimately, the district court conducted three trials for the twelve remaining defendants: (1) Trial #1, on Counts 6 through 12, not at issue in these appeals; (2) Trial #2, on Counts 1 through 5 and 13 through 16, at which a jury tried each of the defendants in these appeals; and (3) Trial #3, on Count 1 as to Angel DeLeon, who was arrested and arraigned after Trial #2. A series of motions to sever preceded these trials.

First, the defendants in Counts 6 and 7 moved for severance of their trial under both Federal Rules of Criminal Procedure 8 and 14. Arturo Garcia, Billy Garcia, Mr. Troup, and Joe Gallegos filed responses in support of the Counts 6 and 7 defendants' motion to sever.

Second, Andrew Gallegos and Joe Gallegos moved to sever Counts 4 and 5, arising from the Burns murder, from the other counts. They argued joinder of these counts in the indictment was improper under Federal Rule of Criminal Procedure 8(b)

because "there [wa]s no evidence that the crimes alleged in Counts 4 and 5 were part of a series of acts or transactions." Troup ROA Vol. I at 475. In the alternative, the Gallegos brothers argued Counts 4 and 5 should be severed under Federal Rule of Criminal Procedure 14 because they would be substantially prejudiced by the introduction of evidence of the other murders, assaults, and conspiracies; antagonistic defenses; and the appearance of association. Finally, they argued severance was required "to protect [their] respective rights to a fair trial under the Fifth Amendment." *Id.* at 486.

Third, Billy Garcia and Mr. Troup filed a motion to sever Counts 1 and 2 stemming from the murders of Mr. Castillo and Mr. Garza. These two defendants made five arguments in support of this motion. They argued the conduct alleged in Counts 1 and 2, occurring in March of 2001, was "remote in time from the remaining counts." Troup ROA Vol. II at 815. Relatedly, the defendants argued that "when the vast majority of the crimes alleged in the superseding indictment occurred, almost all of the 2001 defendants were living in the community at large and were not a part of the prison system." *Id.* These two defendants also argued Counts 1 and 2 "are alleged to have been carried out by a different faction of the SNM than those alleged to have been committed in other counts." *Id.* And they argued evidence introduced to support the other counts "will unfairly prejudice the defendants indicted in Counts 1 and 2." *Id.* at 816. To support this argument, they contended the jury would suffer from confusion based on the large number of limiting instructions and might "treat all defendants as a group responsible for all crimes alleged, rather than [] assess culpability of individual defendants for individual

crimes." *Id.* at 836. Finally, these defendants asserted severance of Counts 1 and 2 would serve "the interest of judicial economy and efficiency." *Id.* at 816.

Fourth, Javier Alonso, one of the Count 3 defendants who ultimately pleaded guilty, moved to sever trial on Count 3 from trial on all other counts and to sever his Count 3 trial from Mr. Troup's trial. None of the five defendants in this appeal have identified any place in the record where any of them joined Mr. Alonso's motion.

Fifth, Santos Gonzalez, another defendant who ultimately pleaded guilty, moved to sever his trial on Counts 14 and 15 from all other trials. As with Mr. Alonso's severance motion, none of the five defendants party to this appeal have identified any entry in the record where they joined Mr. Gonzalez's motion. And Mr. Gonzalez's motion represents that the five defendants did not object to the motion.

Sixth, Shauna Gutierrez, yet another defendant who ultimately pleaded guilty, moved to sever trial on Counts 14 and 15. As with the motions to sever filed by Mr. Alonso and Mr. Gonzalez, none of the five defendants party to this appeal have identified any entry in the record where they joined Ms. Gutierrez's motion.

The Government opposed all the motions for severance, advocating for one trial for all counts and all defendants. The district court held two hearings on the motions for severance. At the second hearing, the district court severed the case into two "trial groupings"—(1) Counts 6 through 12 (Trial #1) and (2) Counts 1 through 5 and Counts 13 through 16 (Trial #2). Troup ROA Vol. I at 879. Thereafter, the district court issued a written order addressing the motions to sever in more detail, granting them in part and denying them in part. As to the denial of further severance of Counts 1 and 2 from Counts

4 and 5, the district court first concluded Andrew Gallegos and Joe Gallegos were correctly joined under Rule 8(b) because their charged offenses were "alleged to be violent crimes in aid of racketeering activity . . . connected with or constitut[ing] parts of a common scheme or plan" with the offenses charged in other counts. *Id.* at 935. The district court then concluded "the risk of spillover prejudice" against Andrew Gallegos and Joe Gallegos did not warrant severance of any individual counts. *Id.* at 962–63. The district court reached a similar conclusion as to Arturo Garcia, Billy Garcia, and Mr. Troup.[19] Accordingly, seven defendants—Arturo Garcia, Billy Garcia, Mr. Troup, Andrew Gallegos, Joe Gallegos, Christopher Chavez, and Allen Patterson—proceeded to trial in Trial #2.

Prior to trial, Billy Garcia filed a motion for bifurcation, pursuant to Federal Rule of Criminal Procedure 14, arguing that because the district court was empaneling a single jury to try the charges against the seven defendants, trial on Counts 1 through 3 and 14 through 16 should occur prior to trial on Counts 4 and 5. Billy Garcia argued bifurcation would "remedy the substantial prejudice" stemming from the images of Mr. Burns's incinerated body, "while achieving judicial economy in th[e] case." Troup ROA Vol. II at 1406. Arturo Garcia and Mr. Troup joined the motion; meanwhile, Andrew Gallegos and Joe Gallegos objected to the motion. The district court denied the motion for bifurcation.

[19] After the district court issued its order, Andrew Gallegos filed a second motion to sever Counts 4 and 5. We do not discuss this motion because, as noted earlier, we grant Andrew Gallegos relief on his insufficiency of the evidence argument.

On appeal, Arturo Garcia argues the district court should have severed trial on Count 3 from trial on Counts 4 and 5. Billy Garcia and Mr. Troup join this argument. Billy Garcia, joined by Mr. Troup, also argues the district court should have severed trial on Counts 1 and 2 from all other counts because, by not severing the trial, the jury heard evidence regarding SNM's activities at a temporally distant time—2007 and after—from the murders underlying Counts 1 and 2, which occurred in 2001. Finally, Mr. Troup, joined by Arturo Garcia and Billy Garcia, renews the bifurcation argument, contending the district court should have permitted evidence only on Counts 1 through 3 and 14 through 16, and obtained a verdict on those counts, before letting the jury hear evidence on Counts 4 and 5. In advancing this argument, Mr. Troup contends the photos of Mr. Burns's body were likely to play on the emotions of the jury and prejudice the jury as to Counts 1 through 3.

The Government defends the district court's decisions on severance and bifurcation. The Government argues that the district court gave numerous limiting instructions to reduce the risk of prejudice and that further severance of the case would have hindered the goals of judicial and prosecutorial efficiency. The Government makes similar arguments regarding bifurcation, and also contends the photos of Mr. Burns were not unfairly prejudicial or more inflammatory than first-hand testimony describing the murders of Mr. Garza, Mr. Castillo, and Mr. Sanchez.[20]

[20] The Government also argues the defendants failed to preserve the severance arguments they raise on appeal by (1) changing the nature of their arguments and (2) never moving for severance of Count 3 from the other counts. We are skeptical that

2. Standard of Review

We review the district court's denial of a motion to sever under Federal Rule of Criminal Procedure 14 for an abuse of discretion. *United States v. Clark*, 717 F.3d 790, 818 (10th Cir. 2013). In conducting this review, we must remember "[t]he district court is the primary referee on severance claims" and "an appellate court[] ha[s] only a distant view of the ring." *Id.* In this respect, Federal Rule of Criminal Procedure 14 "leaves the determination of risk of prejudice and any remedy for such prejudice to the sound discretion of the district court, and a defendant seeking to vacate a conviction based upon the denial of a motion to sever faces a steep challenge." *Id.* (internal quotation marks and citation omitted).

We, likewise, review a district court's denial of a motion to bifurcate trials for an abuse of discretion. *United States v. Duran*, 96 F.3d 1495, 1502 (D.C. Cir. 1996); *see also Palace Exploration Co. v. Petroleum Dev. Co.*, 336 F.3d 1110, 1119 (10th Cir. 2003).

"A district court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Landers*, 564 F.3d 1217, 1224 (10th Cir. 2009) (internal quotation marks omitted). Additionally, "[a]n error

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Arturo Garcia, Billy Garcia, and Mr. Troup preserved all the severance arguments they raise on appeal, particularly the argument for severance of Count 3 from Counts 4 and 5. However, we do not resolve the severance issues on preservation grounds because the arguments fail on the merits.

of law is per se an abuse of discretion." *United States v. Lopez-Avila*, 665 F.3d 1216, 1219 (10th Cir. 2011).

3. Severance

As noted, the defendants raise two arguments regarding the district court's declination to further sever the trials. First, Arturo Garcia, Billy Garcia, and Mr. Troup contend trial on Counts 1 through 3 (the Castillo, Garza, and Sanchez murders) should have been severed from trial on Counts 4 and 5 (the Burns murder). Second, Billy Garcia and Mr. Troup argue trial on Counts 1 and 2 (the Castillo and Garza murders) should have been severed from trial on the remaining counts because Counts 1 and 2 involved offenses committed in 2001, while the other counts involved offenses committed in 2007 and thereafter. We discuss each issue in turn.

a. Broad severance argument on Counts 1 through 3

Under Federal Rule of Criminal Procedure 8, two or more defendants may be joined for purposes of an indictment "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). Here, the Government alleged Arturo Garcia, Billy Garcia, and Mr. Troup were all members of SNM. Additionally, the Government alleged that the conduct underlying each count was committed in furtherance of the goals of SNM or an individual's continued association with SNM. As a result, joinder was proper under Rule 8.

Where defendants have been properly joined in an indictment, they may seek severance of trial under Federal Rule of Criminal Procedure 14. That Rule states that "[i]f

the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). One of the main prejudice concerns—not present here—is that the government will admit the statements of one co-defendant at joint trial, thereby inculpating co-defendants.[21] *See* Fed. R. Crim P. 14(b) ("Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.").

"Joint trials play a vital role in the criminal justice system and serve important interests: they reduce the risk of inconsistent verdicts and the unfairness inherent in serial trials, lighten the burden on victims and witnesses, increase efficiency, and conserve scarce judicial resources." *United States v. Lopez*, 649 F.3d 1222, 1233 (11th Cir. 2011). As a result, "[w]e usually prefer district courts to conduct joint trials of defendants who are charged together." *United States v. Herrera*, 51 F.4th 1226, 1264 (10th Cir. 2022). "An exception exists when a party shows actual prejudice outweighing the expense and inconvenience of separate trials." *Id.* However, a defendant must show more than "that separate trials may have afforded a better chance of acquittal"; rather, the defendant "must show the right to a fair trial is threatened or actually impaired." *Id.* (quotation

[21] Arturo Garcia, Billy Garcia, and Mr. Troup do not contend that prejudicial co-defendant statements supported severance under Federal Rule of Criminal Procedure 14.

marks omitted). Notably, a defendant does not satisfy this threshold "merely by pointing to a negative spill-over effect from damaging evidence presented against codefendants." *United States v. Caldwell*, 560 F.3d 1214, 1221 (10th Cir. 2009) (internal quotation marks omitted).

A court must analyze "the jury's ability to separately consider the evidence as to each defendant." *Herrera*, 51 F.4th at 1266. An instruction by a district court to the jury that it must consider the guilt of each defendant separately helps ensure this ability. *Caldwell*, 560 F.3d at 1221. A jury's acquittal of some codefendants in a joint trial supports the presumption that the jury followed limiting instructions and gives an appellate court "extra confidence that there was no abuse of discretion in the denial of severance." *Id.*

Arturo Garcia, Billy Garcia, and Mr. Troup have not demonstrated prejudice from joinder. It is true that the photographs of Mr. Burns's body were graphic and likely to trigger the emotions of the jurors. However, for three reasons, this is insufficient to have required severance. First, as evident by the analysis of Arturo Garcia's constitutional challenges, the Government needed to prove that SNM was an "enterprise" engaged in a series of illicit conduct that affected interstate commerce. Thus, proof of some of SNM's conduct outside of prison was particularly relevant, as those actions went most directly to SNM's interstate activities. And this evidence was admissible against all defendants because requiring proof of SNM's status as an "enterprise" was common to all charges. Thus, although we conclude later in this opinion that the Government ultimately did not support its VICAR case against Andrew Gallegos and Joe Gallegos stemming from the

murder of Mr. Burns, it is not apparent such evidence would not have been admissible against the other defendants even in a separate trial.

Second, to the extent evidence of the charges stemming from the murder of Mr. Burns was predominantly or exclusively against the Gallegos brothers, the district court properly instructed the jury on how it could use the evidence. Specifically, Jury Instruction No. 5 stated:

> During the course of this trial, and on multiple occasions throughout the trial, you have heard evidence that was admitted for a limited purpose *and as to a particular defendant, only*.
>
> Each time this type of evidence was admitted, I instructed you of the specific limitations placed on your use of that evidence. By providing these instructions, I was not suggesting that you must or should find the particular evidence credible or probative of any issue in this case. *You may use the limited evidence only for the limited purpose, and only as to the particular defendant, for which it was admitted*.
>
> You are not to consider any limited evidence for any other purpose than the particular purpose for which it was admitted. *And you may not use it in any way during your deliberations concerning any defendant against whom the evidence was not admitted*.

Arturo Garcia ROA Vol. 2 at 687 (emphasis added). Through Jury Instruction 40, the district court conveyed a similar message:

> A separate crime is charged against Mr. Joe Gallegos, Mr. Troup, Mr. Billy Garcia, Mr. Patterson, Mr. Chavez, Mr. Arturo Garcia, and Mr. Andrew Gallegos in each count of the indictment. You must *separately consider the evidence* against Mr. Joe Gallegos, Mr. Troup, Mr. Billy Garcia, Mr. Patterson, Mr. Chavez, Mr. Arturo Garcia, and Mr. Andrew Gallegos on each count and *return a separate verdict for* Mr. Joe Gallegos, Mr. Troup, Mr. Billy Garcia, Mr. Patterson, Mr. Chavez, Mr. Arturo Garcia, and Mr. Andrew Gallegos.
>
> *Your verdict as to any one defendant or count, whether it is guilty or not guilty, should not influence your verdict as to any other defendants or counts.*

Id. at 739 (emphasis added). "We presume the jury follows its instructions in the absence of an overwhelming probability to the contrary." *United States v. Currie*, 911 F.3d 1047, 1061 (10th Cir. 2018) (quotation marks omitted). And here, as discussed next, not only is there an absence of evidence suggesting the jury did not follow Jury Instruction Nos. 5 and 40, but there is also strong evidence that the jury faithfully applied those two instructions.

Third, the record demonstrates the jury dutifully evaluated the evidence as to each defendant and as to each count. Rather than returning a straight guilty verdict on each count, the jury delivered a mixed verdict. Specifically, the jury acquitted Mr. Chavez and Mr. Patterson. More tellingly, though, while the jury convicted Joe Gallegos on the charges stemming from the murders of Mr. Castillo and Mr. Burns, it acquitted him of four other charges. Thus, if the pictures of Mr. Burns's body did not so influence the jury as to convict Joe Gallegos on all counts, it is implausible that the pictures unduly influenced the jury to convict Arturo Garcia, Billy Garcia, and Mr. Troup on Counts 1 through 3. The mixed verdict gives us "extra confidence" that the verdicts as to Arturo Garcia, Billy Garcia, and Mr. Troup were not tainted by undue prejudice and, instead, reflected the jury's careful consideration of the evidence on each count.[22] *Cf. Caldwell*, 560 F.3d at 1221 ("Not only do we presume that juries follow . . . instructions [to consider each count and each defendant individually], but the jury's acquittal of [one]

[22] Indeed, the jury in Trial #3 convicted Mr. DeLeon, providing additional evidence that individual trials would not have altered the verdicts.

codefendant . . . on one count gives us extra confidence that there was no abuse of discretion in the denial of severance."). Accordingly, we conclude the district court did not abuse its discretion by declining to sever trial on Counts 1 through 3 from trial on Counts 4 and 5.

b. Time-specific severance argument on Counts 1 and 2

Billy Garcia and Mr. Troup argue the district court abused its discretion by not further severing trial where Counts 1 and 2 (the Castillo and Garza murders) involved underlying conduct occurring in 2001, some six years prior to the conduct involved in the next earliest charge. Billy Garcia's and Mr. Troup's argument fails because it does not account for the intricacies of the Violent Crimes in Aid of Racketeering statute.

VICAR, like RICO, "regulates enterprises, not people." *Waucaush v. United States*, 380 F.3d 251, 255 (6th Cir. 2004). The statute defines "enterprise" to "include[] any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2). In turn, "[a]n association-in-fact requires: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) *longevity* sufficient to permit those associated with the enterprise to pursue the enterprise's purpose." *United States v. Kamahele*, 748 F.3d 984, 1003 (10th Cir. 2014) (emphasis added). Thus, to prove its case, the Government needed to demonstrate the "longevity" of SNM. When considering whether the government demonstrated the "longevity" of an enterprise in other cases, we have looked to evidence of the enterprise's existence and activities "spann[ing] multiple

'generations'" *Id.* at 1005; *see also United States v. Harris*, 695 F.3d 1125, 1136 (10th Cir. 2012) ("As to 'longevity,' the record showed that the pattern of activity that the government alleged continued over a period of years."). As a result, even if the district court had severed trial on Counts 1 and 2, the Government could have still presented evidence regarding SNM's activities many years after 2001.[23] For this reason, as well as the earlier-discussed inability of Billy Garcia and Mr. Troup to demonstrate prejudice as a result of the joint trial, we reject this severance argument.

4. Bifurcation

Similar to an appeal challenging the denial of a motion to sever, a defendant challenging the denial of a motion to bifurcate must demonstrate prejudice, which requires the defendant to "show more than just a better chance of acquittal at separate trials." *United States v. Neal*, 692 F.2d 1296, 1305 (10th Cir. 1982); *see also id.* at 1305 n.8. Accordingly, for the same reasons we reject the argument regarding severance advanced by Arturo Garcia, Billy Garcia, and Mr. Troup, we reject their argument that the district court abused its discretion in not bifurcating the trial. Simply put, the limiting instructions provided by the district court and the verdict rendered by the jury combine to defeat the attempt to show prejudice.

[23] The admission of evidence to prove longevity in VICAR cases is not without a limiting principal. Even where evidence of the enterprise's activity that is temporally distant from the predicate crime is relevant, it may be excluded if its probative value is substantially outweighed by unfair prejudice. *See* Fed. R. Evid. 401, 403. Billy Garcia and Mr. Troup did not challenge any of the enterprise evidence at trial under Rule 403.

D. Sufficiency of the Evidence—Andrew Gallegos, Joe Gallegos

The jury convicted Andrew Gallegos and Joe Gallegos of VICAR conspiracy to murder and VICAR murder for the 2012 death of Adrian Burns, a drug dealer who supplied the brothers' daily, personal heroin needs. The Gallegos brothers contend the Government failed to introduce sufficient evidence from which a rational jury could find beyond a reasonable doubt that the alleged acts were committed for the purpose of establishing, maintaining, or increasing a position in SNM, as required to sustain a VICAR conviction. After thoroughly reviewing the trial transcript, we agree the Government failed to introduce sufficient evidence connecting the alleged conspiracy and murder with either defendant's status in SNM. Accordingly, we vacate the convictions on Counts 4 and 5 and remand with instructions to enter judgments of acquittal on those counts.

Joe Gallegos also argues insufficiency of the evidence of a VICAR purpose on Count 1, the 2001 murder of Frank Castillo. He suggests the evidence showed only that if he participated in the murder, he did so out of self-preservation rather than for maintaining or increasing status in SNM. We disagree and affirm his conviction on Count 1.

We first present the trial testimony relevant to the alleged VICAR purpose in the light most favorable to the Government. We then explain the standard for sufficiency of the evidence generally, and for a VICAR purpose specifically, before analyzing whether the evidence against the Gallegos brothers was sufficient on these counts.

1. Additional Background

a. Adrian Burns murder

Testimony at trial showed that Mr. Burns sold heroin to Andrew Gallegos and Joe Gallegos on a daily basis—sometimes multiple times a day and usually in $20 quantities. Mr. Burns would occasionally front money for drugs to the Gallegos brothers. Willie Romero, an SNM member who had been out of prison since 2008, occasionally supplied Mr. Burns with drugs and vice versa. Two days before the murder in 2012, Mr. Burns and his girlfriend, Amber Sutton, met with another Burns's customer, Daniel Orndorff, for a drug sale. Mr. Burns told Mr. Orndorff to deliver a message to Joe Gallegos: "Tell him if he doesn't have my money to stop being a bitch and give me a call." Andrew Gallegos Supp. ROA Vol. 2 at 4510.

On the evening of the murder, Mr. Burns received a call and told Ms. Sutton he was going to meet the Gallegos brothers at their home. Ms. Sutton was surprised because Mr. Burns never did deals at people's houses. Mr. Burns left the house in Ms. Sutton's vehicle with his drugs around 6:45 p.m. Around 9:00 p.m., a person working near Belen, New Mexico, saw flames in the distance, drove to a wooded area, and discovered a car with an open trunk engulfed in flames. The car was Ms. Sutton's, and authorities found the body of Mr. Burns about ten feet from the rear of the vehicle. He had been handcuffed and shot near his left ear and had also sustained blunt force injuries. A plastic grocery bag partially covered his head. The body had been extensively burned, and testing indicated the body had been burned after death.

When Mr. Burns did not return at the expected time, Ms. Sutton became concerned and went looking for him in a borrowed car. As she approached the Gallegos

brothers' trailer, she saw Mr. Orndorff, who said, "Don't go up there, don't go up there" and told her to leave. *Id.* at 4487. Mr. Orndorff also told her that he "couldn't snitch out a homie." *Id*. at 4548. Ms. Sutton's brother, and his friend Leroy Vallejos, also went looking for Mr. Burns. They encountered the Gallegos brothers at a store. Mr. Vallejos entered the store and, when he returned, he looked uneasy and said they needed to go home. Mr. Vallejos had heroin in his hand that Ms. Sutton's brother believed came from Mr. Burns, due to its distinctive packaging.

That night, Joe Gallegos woke up Jason Van Veghel, who had been staying at the Gallegos home, and asked him to help clean the living room and tear up the carpet, which Mr. Van Veghel did. The day after the murder, Mr. Van Veghel saw Mr. Orndorff at a gathering with the Gallegos brothers and heard Mr. Orndorff say he had spoken to Ms. Sutton and the police would be coming to raid the Gallegos brothers' home. In response, Joe Gallegos gathered some rifles, told Mr. Van Veghel to stash them, and then Joe Gallegos fled to Albuquerque with his brother, Andrew Gallegos. Also within days of the murder, Willie Romero heard something that prompted him to seek out Joe Gallegos. Willie Romero testified that he asked if Joe Gallegos "was looking to kill me, and that I had heard that he was looking to kill me, and he had killed my friend [Mr. Burns]. And he said, 'I don't have no problems with you, bro. And anything else, you need to just mind your own business.'" *Id.* at 5483. Approximately a week after the murder, Andrew Gallegos's ex-girlfriend went with Joe Gallegos's daughter to an Albuquerque motel to

meet the brothers. She learned Andrew Gallegos had over four hundred dollars—which seemed a suspiciously large amount of cash for him.[24]

Years later, in 2014 or 2015, Joe Gallegos disclosed his involvement in the Burns murder to his then-girlfriend. In response to the girlfriend's comment that she found a room in his house "creep[y]," Joe Gallegos said, "Don't worry. No one has actually died in here. Someone may have got shot in here, but they didn't die." *Id.* at 4836. He then explained they shot Mr. Burns in the head, but the bullet got stopped by a bone in his ear. Joe Gallegos stated that after they shot Mr. Burns, they put a bag over his head and "ended up burning him and his car." *Id*. at 4844. When the girlfriend asked why he did it, Joe Gallegos told her, "Because motherfuckers with big mouths, that's what happened." *Id*. at 4838. Joe Gallegos also said that he and Mr. Van Veghel had removed the carpet. Joe Gallegos later got nervous about Mr. Van Veghel and wondered if he needed "to tie off loose ends." *Id.* at 4842. Joe Gallegos's then-girlfriend confirmed the carpet looked like it had been torn up when she lived there. She said Joe Gallegos would make a pun on Mr. Burns's name—when someone would say "Adrian Burns," he would say, "Yeah, he sure does." *Id.* at 4847.

SNM member Billy Cordova testified that he had a discussion with Andrew Gallegos in 2015, while they were imprisoned together,[25] about murder charges pending

[24] The State of New Mexico arrested and charged the Gallegos brothers, but later dropped the charges.

[25] Andrew Gallegos was apparently imprisoned on charges unrelated to this case, as he was not arrested on these charges until April 2016.

against Mr. Cordova. Andrew Gallegos advised him not to plead, saying, "Look at us. We got charged for Adrian Burns and were released a few months later. . . . Even though we did it, we got off." *Id.* at 7445. Andrew Gallegos told Mr. Cordova that he and Joe Gallegos "shot him, bound him, and burned him up[.]" *Id.* at 7446. He also said that "they walked because all of them stayed solid," meaning "[n]obody told on each other." *Id.* at 7447.

After being indicted on the charges in this case, Joe Gallegos was arrested in December 2015 and Andrew Gallegos in April 2016.

b. Frank Castillo murder

Leonard Lujan testified that Billy Garcia had recently risen to be the leader of SNM at the "Southern" facility at the time of Mr. Castillo's murder in 2001, and Billy Garcia wanted to "clean[ ] house"—*i.e.*, to hit people within SNM. *Id.* at 3062–63. Billy Garcia told Mr. Lujan that Mr. Castillo was a "rat"—an informant—and ordered Mr. Lujan to choose a team to kill Mr. Castillo by strangulation in the early morning. *Id.* at 3063. Mr. Lujan testified that obedience was expected in SNM and, if he had not followed through with Billy Garcia's order to assemble the hit team, he would have been killed himself. Billy Garcia also ordered the hit to occur on a Monday morning.

Mr. Lujan approached Joe Gallegos, Michael Jaramillo, and Angel DeLeon, and told them Billy Garcia had ordered the hit. Mr. Lujan testified he chose Joe Gallegos and others who had not yet "earned their bones" in SNM. *Id.* at 3079; *see also id.* at 3334–35. He also testified Joe Gallegos had a "green light" (authorization to kill) on him, which could be removed by doing a "hit" for the gang. *Id.* at 3331, 3335, 3382–83. As they

discussed how to murder Mr. Castillo, Joe Gallegos said he wanted to give Mr. Castillo a "hotshot"—heroin laced with poison—but Billy Garcia insisted on strangulation. *Id.* at 3066, 3078. Mr. Lujan had another team in place, with shanks at the ready, to kill Joe Gallegos and the others if they failed to do the job, and Mr. Lujan confirmed that the hit team, including Joe Gallegos, "were doing it so they didn't get killed." *Id.* at 3332.

Mr. Jaramillo recalled Mr. Lujan telling him he had met with Billy Garcia and that Mr. Jaramillo had been chosen to do some "work." *Id.* at 8325, 8326. Mr. Lujan instructed Mr. Jaramillo to talk to "Joe," who would give him "the details of the hit." *Id.* at 8325. Joe Gallegos then told Mr. Jaramillo and Mr. DeLeon they would be killing Mr. Castillo. Joe Gallegos's plan was to wait for some heroin to come into the facility, after which the three of them would enter Mr. Castillo's room in the early morning, give him a shot of heroin, and then strangle him. Joe Gallegos assigned roles in the murder: he and Mr. DeLeon would hold Mr. Castillo while Mr. Jaramillo strangled him. Joe Gallegos told them not to worry if they got caught because his family would provide an attorney, and he instructed them not to submit to DNA tests. The next morning, the three entered Mr. Castillo's cell and Mr. Castillo injected a dose of heroin. Then "Joe and Angel grabbed him, rolled him over onto his bed, and [Mr. Jaramillo] began to choke him out." *Id.* at 8333. Joe Gallegos helped to hold down Mr. Castillo. The murder occurred simultaneously with the SNM-ordered murder of Mr. Garza, also arranged by Mr. Lujan. Joe Gallegos later asked Mr. Jaramillo if he had given a DNA sample or made statements to the police.

Lawrence Torres, who was incarcerated in Southern at the time of the Castillo murder, testified that Mr. DeLeon told him Joe Gallegos was the one who had strangled Mr. Castillo. He recalled that, after the murder, Joe Gallegos showed him marks or a cut on his hand as though trying to impress him, and Joe Gallegos was smiling smugly. Leroy Lucero testified that Joe Gallegos asked him if he thought another prisoner who had observed the murder of Mr. Castillo would "snitch." *Id.* at 6767–68, 6857. Another SNM member, Benjamin Clark, testified that he had a conversation with Joe Gallegos in 2004, during which they discussed an SNM leader placing a "green light" on Joe Gallegos in 2004. According to Mr. Clark, Joe Gallegos expressed his frustration over being the target of a hit, stating, "After everything I've done for the SNM, after killing [Mr. Castillo] . . . this guy wants to do this to me." *Id.* at 6125.

c. SNM membership and culture

Joe Gallegos admits he was an SNM member, and there was extensive testimony at trial about his involvement in the gang, including that he had been involved in the SNM-ordered murder of Mr. Castillo in 2001, that SNM had a "green light" on him in 2004, that he put a "green light" on someone else in 2015, and that SNM-related materials were found in his home in 2016.[26] Witnesses also testified that Andrew Gallegos was a member of SNM or gave evidence from which membership could be

[26] Although there was evidence Joe Gallegos was actively involved in SNM until 2004, and evidence he was actively involved after 2015 when he was again in prison, there is no evidence that Joe Gallegos was actively involved with SNM while out of prison in 2012, the time of the Burns murder.

inferred, such as his use of words characteristic of SNM members and doing favors for SNM members.

SNM members and former members testified about SNM's culture of demanding respect, violently retaliating for disrespect, looking down on those who failed to retaliate for disrespect, and using violence to maintain or enhance status in the gang. At least one SNM member testified that SNM's rules applied on the streets as well as in prison, and that he had assaulted rival gang members on the streets. Various witnesses testified that failure to follow an order from an SNM leader could result in death. Inmates who felt in danger could enter protective custody or the "dropout program," a New Mexico Department of Corrections program for prisoners renouncing gang membership. *Id.* at 704, 713. However, these options carried their own risks; an SNM member who voluntarily went into protective custody or entered the dropout program could be eligible for a "green light" from SNM.

d. Motions and district court decision

At trial, Andrew Gallegos and Joe Gallegos made unsuccessful oral motions for directed verdicts under Federal Rule of Criminal Procedure 29. Post-trial, both Gallegos brothers moved for a judgment of acquittal or, in the alternative, a new trial.[27] After a hearing, the district court denied the motions. The court determined the evidence was

[27] The Gallegos brothers further argued the improper introduction of hearsay evidence and the violation of their Confrontation Clause rights. Specifically, they challenged the admission of Ms. Sutton's testimony relating a statement allegedly made by Mr. Burns to Mr. Orndorff about Joe Gallegos. They do not revive this argument on appeal.

sufficient to convict them of VICAR crimes on Counts 4 and 5, pointing to evidence that Mr. Burns disrespected Joe Gallegos, SNM members injure or kill people who disrespect SNM members, and both Andrew Gallegos and Joe Gallegos admitted to others that they had killed Mr. Burns.[28]

2. Legal Standard

a. Sufficiency of the evidence

"[T]he Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,'" and also "'gives a criminal defendant the right to demand that [the] jury find him guilty of all the elements of the crime with which he is charged.'" *United States v. Booker*, 543 U.S. 220, 230 (2005) (first quoting *In re Winship*, 397 U.S. 358, 364 (1970), then quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)). To safeguard this right, Federal Rule of Criminal Procedure 29 allows the trial court to enter a judgment of acquittal after a guilty verdict if the evidence at trial was insufficient to sustain a conviction. Fed. R. Crim. P. 29(a), (c)(2). Judgments of acquittal for insufficient evidence reflect "the traditional understanding in our system that the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979). A judgment of acquittal removes a charge from jury consideration, either before or after a guilty verdict, where no

[28] The district court orally ruled at trial that there was sufficient evidence of a VICAR purpose on Count 1 for the matter to go to the jury. Joe Gallegos did not renew his insufficiency motion as to Count 1 post-trial, so it was not included in the district court's order disposing of post-trial motions.

rational trier of fact could find guilt beyond a reasonable doubt based on the evidence before the jury. *Id.* at 317–19.

We review the denial of a judgment of acquittal for insufficient evidence de novo. *United States v. McKissick*, 204 F.3d 1282, 1290 (10th Cir. 2000). To assess the sufficiency of evidence, we neither weigh the evidence nor judge witness credibility, *see Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Radcliff*, 331 F.3d 1153, 1157–58 (10th Cir. 2003), nor do we question the jury's resolution of evidence if it is reasonable, *Messer v. Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, we "ask only whether taking the evidence–both direct and circumstantial, together with the reasonable inferences to be drawn therefrom–in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *McKissick*, 204 F.3d at 1289 (quotation marks omitted). A judgment of acquittal is appropriate only if a finding of an element of a crime beyond a reasonable doubt could not have been based on evidence and inferences reasonably drawn from evidence or where the guilty verdict rested only on a series of inferences. *See United States v. Rakes*, 510 F.3d 1280, 1284 (10th Cir. 2007) ("While our standard of review is deferential to be sure, we will not uphold a conviction obtained by piling inference upon inference, and the evidence supporting a conviction must do more than raise a mere suspicion of guilt."); *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005) ("[T]he chance of error or speculation increases in proportion to the width of the gap between underlying fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based upon the preceding one." (quotation marks omitted)). Put another way, a judgment of

acquittal is appropriate if the evidence was so far removed from the facts necessary to prove the elements of the crime that a rational jury could not find guilt beyond a reasonable doubt.

b. VICAR purpose

As relevant in this case, a VICAR conviction requires that a violent act be committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). To convict the Gallegos brothers of Counts 4 and 5, therefore, the Government had to prove beyond a reasonable doubt that they murdered Mr. Burns *and* did so for the purpose of gaining entrance to or maintaining or increasing position in SNM.

In *United States v. Smith* (*Tyrese*), we analyzed the sufficiency of the evidence that a prison-gang-related murder was committed for VICAR purposes. 413 F.3d 1253, 1277–78 (10th Cir. 2005), *abrogated on other grounds by United States v. Hutchinson*, 573 F.3d 1011 (10th Cir. 2009). Mr. Smith had recruited gang members to murder a rival gang member who had attacked a member of Mr. Smith's gang. Rejecting the argument that the purpose for the murder was to avenge the death of a fellow gang member, rather than for gang status, we explained that a VICAR purpose may be based on an inference that "the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Id.* at 1278 (quoting *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001); *cf. United States v. Banks*, 514 F.3d 959, 972 (9th Cir. 2008) (holding evidence of VICAR purpose sufficient where testimony showed gang expected retaliation

for this type of insult, defendant had enlisted fellow gang members to assault victim, and defendant was "concerned with his standing within the [gang] and was willing to act violently to preserve it").

Similarly, in *Kamahele*, we held that sufficient evidence supported finding a VICAR purpose for a shooting where a gang member enlisted other gang members to retaliate for a personal affront. 748 F.3d at 1009.[29] We noted the attackers were all gang members and their actions suggested they wanted others to know the gang was responsible: they wore gang insignia during the shooting and committed it in broad daylight. *Id.* Furthermore, the jury could have inferred that the defendant's reputation in the gang would have been diminished had the defendant not retaliated against the personal affront. *Id.* On this evidence and appropriate inferences, the jury could reasonably infer intent to enhance status in the gang. *Id.*

The Second Circuit case of *United States v. Thai* provides an example of evidence insufficient to show a VICAR purpose. 29 F.3d 785 (2d Cir. 1994). Mr. Thai, a gang leader, allegedly told another gang member he had been offered $10,000 to set off a bomb at a restaurant. *Id.* at 799. Mr. Thai gave the other gang member a bomb, instructed him how to detonate it, and told him to find a newcomer to the gang to commit the act. *Id.* The other gang member persuaded a new gang member to do the bombing and a

[29] Although subsequent post-conviction motions generated a complex procedural history, that subsequent history does not affect our holding in *United States v. Kamahele*, 748 F.3d 984 (10th Cir. 2014), that the evidence was sufficient to show a VICAR purpose.

different gang member offered to act as a lookout. *Id.* Police eventually foiled the plot, but Mr. Thai was indicted for VICAR conspiracy to commit assault with a deadly weapon. *Id.* at 799, 817.

The Second Circuit held the evidence of a VICAR purpose insufficient because there was no evidence from which the jury could conclude that Mr. Thai's motive was anything "other than purely mercenary." *Id.* at 818. Mr. Thai said he wanted to bomb the restaurant "because somebody offer[ed] him [a] big amount of money to do it." *Id.* The court continued:

> There was no evidence, for example, that the bombing was to be a response to any threat to the [gang] or to [Mr.] Thai's position as [the gang]'s leader, nor any evidence that he thought that as a leader he would be expected to bomb the restaurant. And though [Mr.] Thai paid the expenses of gang members, any suggestion that he undertook to bomb the [restaurant] to obtain money in order to carry out that responsibility would be entirely speculative, since the government concedes that there was no evidence as to [Mr.] Thai's intended use of the money.

Id. The court rejected the government's argument that the jury could find a VICAR purpose because the crime was "part of [the gang's] criminal affairs" and consistent with its purpose "to earn money by committing crimes of violence against Asians." *Id.* (internal quotation marks, citation, brackets, and emphasis omitted). The court reasoned, "[T]he government's argument reveals too much: if it were valid, any Hobbs Act robbery or robbery conspiracy ordered by the leader of a RICO enterprise would automatically constitute a violation of § 1959." *Id.* (emphasis omitted). The Second Circuit concluded, "While a defendant's § 1959 conviction is to be affirmed if a motivation to maintain or increase his position may be reasonably inferred from the evidence, such a conviction

may not be affirmed where, as here, that inference is based on no more than guesswork." *Id.* at 818–19.

3. Application

Turning to the Gallegos brothers' challenges to their convictions, we hold there was insufficient evidence of a VICAR purpose for the murder of Mr. Burns to sustain those convictions beyond a reasonable doubt. However, sufficient evidence showed a VICAR purpose for the murder of Mr. Castillo.

a. Counts 4 and 5

The Government presented no evidence, direct or circumstantial, that the Gallegos brothers murdered Mr. Burns for status in SNM. In place of evidence, the Government rests its case on a web of inferences too far removed from facts. This is insufficient to find guilt beyond a reasonable doubt.

We begin with the evidence most favorable to the Government. *McKissick*, 204 F.3d at 1289. In the Government's own words, the evidence allegedly allowing the jury to infer a VICAR purpose for the Burns murder was as follows:

> Joe and Andrew Gallegos were both SNM members, and one of SNM's most fundamental tenets is that disrespect must not be tolerated. Not only is a member expected to violently retaliate against any act of disrespect (lest he look weak and make the gang look weak), but other members are expected to assist the disrespected member with committing the acts of violence necessary to defend his and the gang's honor. Against this backdrop is the evidence that two days before his death, Adrian Burns called Joe Gallegos "a bitch." Filling in the picture is the fact that Joe Gallegos told his ex-girlfriend that he shot Burns "[b]ecause motherfuckers with big mouths, that's what happened[.]"

Appellee's Br. at 36 (citations omitted). Even if the jury accepted all these facts, none of them—individually or cumulatively—shows that the Gallegos brothers' purpose in murdering Mr. Burns was to maintain or enhance their status in SNM.

The only evidence reasonably suggesting even the possibility of an SNM link is that the Gallegos brothers and some of their associates were, or had been, SNM members. This is clearly insufficient to show an SNM purpose. *See United States v. Banks*, 506 F.3d 756, 764–65 (10th Cir. 2007) ("The VICAR statute itself contains no indication that Congress intended it to make gang membership a status offense such that mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation. Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well."); *see also Thai*, 29 F.3d at 818.

The Government failed to point to any other connection between the murder of Mr. Burns and SNM. Unlike in *Smith* (*Tyrese*), where the defendant's victim was a rival gang member who had killed a member of the defendant's gang, Mr. Burns was not affiliated with SNM or any rival gang, and nothing about his allegedly disrespectful comment pointed to SNM. There was no evidence either Gallegos brother was actively involved in SNM for the years spent largely out of prison prior to or following the 2012 Burns murder. Neither brother was in bad standing with SNM in 2012, or otherwise had an apparent need to enhance SNM status. There is no evidence that an SNM leader authorized or encouraged the murder. Neither Gallegos brother attempted to take contemporaneous credit for the murder. On the contrary, when asked about it, Joe

Gallegos told Willie Romero to mind his own business. What's more, even after allegedly admitting the murder, neither Gallegos brother ever indicated it had any SNM connection.

Unlike in *Kamahele*, nothing about the manner of this murder suggested a gang connection. No SNM insignia or other gang identifiers marked the crime scene. The crime was not characteristic of an SNM "hit"—it was not, for example, committed against a rival gang member or SNM snitch, nor was it an early-morning in-prison strangulation or a knifing in the prison yard in view of the "homies." The Government suggests that the brazenness of burning the body could be interpreted as a signal of an SNM connection, but this is not a reasonable inference. Taking a victim's car and body to a remote wooded area, dousing them in gasoline, and burning them is consistent with an attempt to destroy evidence, not a bid for publicity. More importantly, even if the burning of the car and body could be seen as an attempt to draw attention, nothing about the scene would signify SNM involvement or even point to the Gallegos brothers. The Government also points to testimony by or about Mr. Orndorff, Mr. Van Veghel, and Willie Romero to show that Joe Gallegos's involvement in the murder "was not a well-kept secret." Appellee's Br. at 202. Evidence others knew of or suspected the Gallegos brothers' involvement in the murder is a far cry from evidence that Andrew Gallegos or Joe Gallegos wanted SNM to know about it, carried it out for SNM, or hoped to maintain or increase their SNM status because of it.

The Government tries to fill the hole in the evidence with Mr. Burns's allegedly disrespectful message and Joe Gallegos's comment about "big mouths." There was no

testimony showing the Gallegos brothers ever received Mr. Burns's message, let alone found it disrespectful. But even if they did receive the message, found it disrespectful, and were motivated to retaliate, there is no evidence such retaliation was an effort to maintain or increase status in SNM. The Government admitted at oral argument that retaliation for a purely personal slight would not suffice to show an SNM motive, Andrew Gallegos Oral Argument at 17:48–18:50, and there is no basis in the evidence for viewing Mr. Burns's allegedly offensive comment as connected to anything except a private drug debt.

The Government attempts to shore up its inferences with general testimony about SNM's culture of violence and retaliation for disrespect. However, without any evidence linking that culture to this crime, no reasonable factfinder could conclude beyond a reasonable doubt that SNM's culture was even relevant to the crime, let alone a purpose behind it. *See Thai*, 29 F.3d at 818 (rejecting argument that defendant's status as gang leader and general testimony about gang was enough to infer VICAR purpose for crime); *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (rejecting presumption that gang members are always motivated to some extent by gang status, because "[o]therwise, in gang cases, the purpose element would be merely a tautology"). The Government also suggested at oral argument that the fact the murder appeared premeditated supported a VICAR purpose, but there are virtually infinite possible reasons for premeditation besides a gang hit and no reason in the evidence to connect this premeditation to SNM.

The Government further contended at oral argument that the jury could infer an SNM purpose from the fact the murder occurred in the "drug trafficking community" or

in a "drug context." Andrew Gallegos Oral Argument at 30:35–38, 31:24–25. Such an inference is unsupported. The evidence showed Mr. Burns was a small-scale dealer from whom the Gallegos brothers purchased small quantities of heroin for their personal consumption. Without evidence Mr. Burns had any connection to, or posed any threat to, SNM's drug trafficking activities, it is gross speculation to impute intent to enhance gang status to the murder of Mr. Burns.

Finally, the Government suggests the Gallegos brothers must have had an SNM motivation because there is no other explanation as to why they would kill their own drug dealer. Among its other weaknesses, this argument is contrary to the evidence that shows a conflict between Joe Gallegos and Mr. Burns about drug money around the time of the murder, and also shows that drugs were readily available from other sources in the area such that the Gallegos brothers could adequately fuel their heroin addictions without Mr. Burns.

To be clear, the Government offered sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that Andrew Gallegos and Joe Gallegos murdered Mr. Burns. But that finding is not sufficient to support the VICAR charges in Counts 4 and 5 of the operative indictment. To elevate this murder to a federal crime under VICAR, the Government had to establish all elements beyond a reasonable doubt. Because no reasonable factfinder could find beyond a reasonable doubt a VICAR purpose for the murder of Mr. Burns based on the evidence the Government offered, we vacate

the convictions of Andrew Gallegos and Joe Gallegos on Counts 4 and 5 and remand with instructions to enter judgments of acquittal on those counts.[30]

b. Count 1

Joe Gallegos argues there was insufficient evidence to conclude that his purpose in killing Mr. Castillo was to establish, maintain, or increase his position in SNM because he would have been killed had he not participated in the murder.[31] He contends, therefore, that the only motive the jury could reasonably infer was a motive to stay alive. We disagree.

To have a VICAR purpose, status in the enterprise need not be the sole, or even the primary, motive for the violent act. *Smith* (*Tyrese*), 413 F.3d at 1277; *Banks*, 506 F.3d at 763–64; *see also United States v. Gills*, 702 F. App'x 367, 376 (6th Cir. 2017) (unpublished); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992). Most crimes committed for gang status presumably have another underlying motive, such as survival, protection, camaraderie, or another benefit the perpetrator expects to receive by virtue of improved gang status. The fact that Joe Gallegos's life was in danger due to poor standing in SNM is not only consistent with a VICAR purpose but supports finding

[30] Because the insufficiency of the evidence on Counts 4 and 5 entitles Andrew Gallegos to a judgment of acquittal on the only charges of which he was convicted, we need not address his other arguments on appeal.

[31] Joe Gallegos did not argue a duress defense, nor does he couch his sufficiency-of-the-evidence argument in those terms, but his basic argument is that duress negates the purpose element of a VICAR crime. It does not. *See Dixon v. United States*, 548 U.S. 1, 7 (2006) (rejecting appellant's argument that duress could negate the necessary *mens rea* for crime); *State v. Rios*, 980 P.2d 1068, 1071 (N.M. 1999) (expressing concern about viewing duress as negating mens rea rather than as an excuse negating culpability).

a VICAR purpose, because it shows his motive for improving his status in SNM. *See United States v. Santistevan*, 39 F.3d 250, 255 n.7 (10th Cir. 1994) ("Motive, unlike *mens rea*, is not an essential element of a criminal offense. It is an explanation that may tend to make a party's theory of the case seem more plausible or understandable."). Thus, there can be many underlying motives for committing a crime, all with the purpose of increasing status in a gang.

Joe Gallegos argues these circumstances are similar to *Thai* in that, where Mr. Thai's motive in bombing the restaurant was "purely mercenary," Joe Gallegos's motive was "purely self-preservation." Joe Gallegos's Br. at 26–27. But this case is easily distinguishable from *Thai*. Mr. Thai would have conspired to bomb the restaurant for the $10,000 reward whether he was part of a gang or not, and there was no evidence his participation in the bombing conspiracy would affect his status in the gang. In contrast, Joe Gallegos was following an order from SNM higher-ups, which even a member in good standing would have been expected to obey. He also had a "green light" on him that could potentially be removed if he did the hit and/or could earn his "bones" by murdering for SNM. Joe Gallegos followed SNM leader Billy Garcia's instructions about the timing and method of the murder, including strangling Mr. Castillo, even though he personally would have chosen a different method. This was ample evidence from which the jury could find beyond a reasonable doubt that Joe Gallegos's purpose in committing the murder was to establish, maintain, or enhance his position in SNM.

Because there was sufficient evidence from which a rational juror could conclude beyond a reasonable doubt that Joe Gallegos murdered Mr. Castillo for a VICAR purpose, we affirm his conviction on Count 1.

E. Challenges to Jury Instruction No. 31 – Mr. Troup

At trial for Counts 1 and 3—the 2001 murder of Frank Castillo and 2007 murder of Freddie Sanchez—the district court instructed the jury that the elements of New Mexico second-degree murder could satisfy the VICAR murder element.[32] The district court read Jury Instruction No. 31, along with the other instructions, after the defense rested on May 17, 2018. After instructing the jury, the district court recessed until May 21 to give counsel adequate time to prepare for closing arguments. During the recess, on May 20, Mr. Troup and others objected to Jury Instruction No. 31 based on a statute of limitations issue. The district court overruled the objection on May 22, and its final charge (dated May 23) instructed the jury that either New Mexico first- or second-degree murder could support VICAR's murder element.

Post-trial, Mr. Troup articulated two new arguments against Jury Instruction No. 31: that the instruction should have included a "general recognized murder instruction" instead of New Mexico's first- and second-degree murder instructions, and

[32] Jury Instruction No. 31 covered the VICAR murder element for Counts 1, 2, 3, and 5, providing that the jury could find the element met if the Government proved the elements of New Mexico first- or second-degree murder beyond a reasonable doubt as to each defendant on each count.

that New Mexico's second-degree murder statute improperly mentioned "probability."[33] *See* Troup ROA Vol. I at 3370. In its post-trial order, the district court reaffirmed its earlier determination that the New Mexico statute of limitations did not apply to VICAR and disagreed with Mr. Troup's other arguments, finding no error in Jury Instruction No. 31 for failure to include a generic murder instruction or for use of "probability."

On appeal, Mr. Troup makes similar challenges to Jury Instruction No. 31. First, he says that New Mexico second-degree murder could not support the VICAR offense because the state statute of limitations had expired. Second, he says that the district court should have provided the jury with a generic murder instruction instead of New Mexico's overly broad second-degree murder instruction.

1. Legal Standard

"The appropriate standard of review for challenges to jury instructions is whether the jury, considering the instructions as a whole, was misled." *United States v. Smith* (*Brenda*), 13 F.3d 1421, 1424 (10th Cir. 1994). Only where we have "substantial doubt that the jury was fairly guided will the judgment be disturbed." *Id.* (internal quotation marks omitted). If an objection to an individual jury instruction was made "before the jury retires to deliberate," we review the propriety of the instruction de novo. Fed. R. Crim. P. 30(d); *see also United States v. Sasser*, 974 F.2d 1544, 1551 (10th Cir. 1992). If, however, a party fails to timely object to the instruction, we review for plain error. *United*

[33] In the district court's view, it ruled on Mr. Troup's "generic murder" argument, along with the statute of limitations argument, in its May 22 order. We address the effect of that view *infra* § II(E)(3).

States v. Uresti–Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992). In this context, plain error is error that affects a defendant's right to a fair and impartial trial. *Id*.

2. New Mexico Statute of Limitations

Mr. Troup argues that second-degree murder under New Mexico law could not support an 18 U.S.C. § 1959 conviction because the statute of limitations expired before the indictment. Because Mr. Troup raised this objection before the jury retired to deliberate, we review de novo.

Section 1959 provides in part:

> Whoever . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . for murder, by death or life imprisonment[.]

18 U.S.C. § 1959(a)(1). And this federal crime has its own statute of limitations: "[a]n indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C. § 3281. According to Mr. Troup, however, the statute's requirement that the predicate offense be "in violation of the laws of any State" necessarily imports state statutes of limitations. Troup's Br. at 19–21 (quoting 18 U.S.C. § 1959(a)(1)). In other words, if Mr. Troup's actions fell outside the state statute of limitations, he could not be prosecuted, so his actions could not be "in violation of the laws" of the state. *Id.* The Government disagrees with the premise that Congress imported state statutes of limitations into § 1959, suggesting that the statutory language and legal landscape preclude such a result. We agree with the Government.

Turning first to the statutory language, "murders . . . *in violation of the laws of any State*" does not require that a person could be charged or convicted of murder under state law. 18 U.S.C. § 1959(a)(1) (emphasis added). Yet, that is Mr. Troup's implicit argument: to be charged under VICAR, he must be chargeable under state law. Accepting that argument requires reading additional language into the statute, which we decline to do.

Nor do we read the text divorced from its statutory scheme. Rather, we understand that several enumerated crimes in Chapter 95 of Title 18—including VICAR—reference offenses committed in violation of the laws of a State. *See*, *e.g.*, 18 U.S.C. § 1952(b) (defining "unlawful activity" as certain offenses "in violation of the laws of the State"); 18 U.S.C. § 1955(b)(1)(i) (defining "illegal gambling business" as one which "is a violation of the law of a State"); 18 U.S.C. § 1958(a) (proscribing murder-for-hire and describing "intent that a murder be committed in violation of the laws of any State").

Starting with 18 U.S.C. § 1952 (the Travel Act), we—along with other courts—have concluded "that a violation of state law is not an element of the Travel Act, but rather serves a definitional purpose in characterizing the proscribed conduct." *United States v. Davis*, 965 F.2d 804, 809 (10th Cir. 1992) (internal quotation marks omitted); *accord United States v. Loucas*, 629 F.2d 989, 991 (4th Cir. 1980); *United States v. Conway*, 507 F.2d 1047, 1051 (5th Cir. 1975); *United States v. Polizzi*, 500 F.2d 856, 869 (9th Cir. 1974); *United States v. Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969). That is, the government need not be able to convict a defendant of a state law violation. Instead, state law simply defines the prohibited conduct.

Courts apply the same analysis to 18 U.S.C. § 1955. The Fifth Circuit explained, "[j]ust as in 18 U.S.C. § 1952, . . . the reference to state law in the federal statute is for the purpose of defining the conduct prohibited and for the purpose of supplementing, rather than pre-empting, state gambling laws." *United States v. Revel*, 493 F.2d 1, 2–3 (5th Cir. 1974) (footnote omitted). And, highly relevant here, it then analyzed whether state statutes of limitations apply to § 1955:

> Certainly Congress could have incorporated state statutes of limitations into the federal statute, but we cannot perceive any indication that it has done so, either in the pre-existing federal racketeering statutes, Chapter 95 of Title 18, United States Code, or in the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 922, which added § 1955 to Title 18. To the contrary, Congress, in passing the 1970 act, emphasized the federal interest in dealing with organized crime because of the influence of organized criminal activities on the economy, security and general welfare of the entire country. Congress excluded local, transitory gambling activities from the scope of the law, leaving their regulation to state and local authorities, but it asserted federal jurisdiction over racketeering and large-scale gambling activities. In view of this bifurcated system of enforcement, it seems reasonable to use federal standards in enforcing the federal law. This is proper for § 1955, just as it is for § 1952.

Id. at 3; *accord United States v. Sacco*, 491 F.2d 995, 1003 (9th Cir. 1974) ("While Congress did adopt a particular substantive statute (anti-gambling) of the state, Congress did not incorporate into § 1955 the procedural rules of the state where the illegal activity occurred.").

The same is true for VICAR. Congress passed 18 U.S.C. §§ 1958 and 1959 in 1984, with language that mirrors that of the Travel Act with respect to "violation of the laws" of a State. *Compare* 18 U.S.C. § 1952(b) ("in violation of the laws of the State in which they are committed"), *with id.* § 1958(a) ("in violation of the laws of any State")

and id. § 1959(a) ("in violation of the laws of any State"). "We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010)). Thus, in mirroring the Travel Act's language, Congress intended "violation of the laws" to keep the definitional meaning courts had (and have) uniformly ascribed. And the inverse is also true. Congress did not intend VICAR's "violation of the laws" language to incorporate various states' procedural, evidentiary, and limitations rules, because that is not how courts have interpreted this language.[34]

Mr. Troup raises several other arguments opposing the conclusion that Congress did not incorporate state statutes of limitations into VICAR. He argues, for example, that the reference to state "laws" (plural) instead of "law" (singular) matters. By his estimation, "laws" includes *all* laws—such as statutes of limitations—or, at worst, "laws" makes the statute ambiguous, and the district court should have resolved the ambiguity with the rule of lenity. But, as outlined above, the Travel Act contains identical reference to state "laws," and no court has ever understood that language to do more than define

[34] This interpretation also tracks interpretations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, which was enacted as part of the Organized Crime Control Act of 1970. *See*, *e.g.*, *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986) ("We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge."); *United States v. Crenshaw*, 359 F.3d 977, 988 n.4 (8th Cir. 2004) (observing that other circuits have held procedural rules inapplicable to federal RICO trials).

prohibited conduct. And we will not use the rule of lenity to create or resolve a fictional ambiguity. *Cf. Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980))).

Mr. Troup also argues that the Supreme Court of New Mexico has called statutes of limitations "substantive rights." *See* Troup's Br. at 24 (citing *State v. Kerby*, 156 P.3d 704, 708–09 (N.M. 2007)); *see also Kerby*, 156 P.3d at 706 ("We hold that the statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent, and voluntary."). He reasons if statutes of limitation are "substantive," then they are incorporated into "the laws of any State." 18 U.S.C. § 1959(a)(1); *see* Troup's Br. at 23–24. Mr. Troup's reasoning relies on a dichotomy between "substantive" and "procedural" laws. But the language of the statute itself does not draw this distinction. So, once again, for us to accept Mr. Troup's argument, we would have to read language into the statute that does not exist.

Plus, we cannot definitively say that statutes of limitations in New Mexico are "substantive," as Mr. Troup argues. *See Sierra Life Ins. Co. v. First Nat. Life Ins. Co.*, 512 P.2d 1245, 1249 (N.M. 1973) (affirming "that under New Mexico law statutes of limitations are procedural and that the law of the forum governs matters of procedure"). And we have said that "[s]tatutes of limitations are neither substantive nor procedural per

se but have 'mixed substantive and procedural aspects.'" *Lujan v. Regents of Univ. of Cal.*, 69 F.3d 1511, 1516 (10th Cir. 1995) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) (Brennan, J., concurring)). Thus, even assuming Congress intended to include all "substantive" state laws in VICAR, the fact that New Mexico has called statutes of limitations "substantive right[s]" in the criminal defense context would not mandate Mr. Troup's desired result.

In sum, VICAR's plain language and prior readings of that language confirm that Congress did not intend to incorporate state statutes of limitations into VICAR. We thus reject Mr. Troup's contention that the district court erred by instructing the jury that New Mexico second-degree murder could serve as predicate for a VICAR offense because the New Mexico statute of limitations had expired.[35]

3. Definition of Generic Murder

Mr. Troup next argues that Jury Instruction No. 31 improperly expanded the definition of murder. The Government says Mr. Troup waived this issue. Mr. Troup concedes that he and other defendants were not sufficiently specific before the district court charged the jury. Yet, according to Mr. Troup, the district court addressed the generic-murder issue in its order denying motions for a new trial, which allows us to consider his argument as if he had properly raised it.

[35] Because we conclude submitting the second-degree murder theory to the jury was not error, we do not reach the Government's harmless error theory. As a result, we decline to address whether *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), abrogated *United States v. Holly*, 488 F.3d 1298 (10th Cir. 2007).

In part, Mr. Troup is correct. The district court addressed (and disagreed with) Mr. Troup's argument that Jury Instruction No. 31 should have included a "general recognized murder instruction" instead of instructions on murder under New Mexico law in its post-trial order. It also addressed (and disagreed with) Mr. Troup's argument that instructing the jury on "probability" under New Mexico law was improper. To that end, the district court determined in its post-trial order that, "although VICAR does not expressly require that the Court use a generic murder definition, New Mexico second-degree murder corresponds with murder's generic definition."

Before us, Mr. Troup amalgamates his previous arguments. At bottom, he appears to argue that the district court relied on "a broader state-law definition" of murder over "a generic definition."[36] This argument most accurately matches his "probability" argument to the district court. Yet Mr. Troup did not make that argument before the jury retired to deliberate. And now he tries to shoehorn the latest iteration of his argument into the "generic murder" argument that the district court said Mr. Troup raised at trial. He

[36] Mr. Troup does not challenge the ability of the district court to use state law definitions where they track the generic definitions of offenses. For example, in his briefing, Mr. Troup concedes that "there would be no complaint" if New Mexico first-degree murder "were the only definition of murder given to the jurors." Troup's Br. at 32. But, even if Mr. Troup is suggesting the law required the district court to instruct the jury with the generic definition of murder, without reference to New Mexico murder, his argument fails. *See*, *e.g.*, *United States v. Adkins*, 883 F.3d 1207, 1211 (9th Cir. 2018) ("[C]ourts, in certain circumstances, should instruct on the state definition or otherwise risk prejudice to the defendant."); *United States v. Carrillo*, 229 F.3d 177, 184–85 (2d Cir. 2000) (suggesting that the "best practice" is to instruct juries on the elements of the state offenses that are charged as predicate acts because, even if theoretically permissible, instruction on a "generic" offense risks prejudice to the defendant and possible reversal on appeal).

believes that the district court's statement on preservation "spares [him] and his codefendants the rigors of plain-error review." Troup's Br. at 38. But Mr. Troup's position on preservation is not a precise recitation of the law. True, we *may* consider arguments raised post-trial where the district court fully analyzed and responded to a given argument. *See Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1243 (10th Cir. 2000) (exercising discretion to consider argument that party conceded it first raised in post-trial motion). But Mr. Troup wrongly suggests that we *must* consider his argument de novo.

Mr. Troup's argument fails under our rigorous plain-error review. But even if we reviewed this issue de novo, Mr. Troup could not prevail because his opening brief contains no arguments or authorities in support of his position. *See* Fed. R. App. P. 28(a)(8)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]"); *United States v. Graham*, 305 F.3d 1094, 1107 (10th Cir. 2002) (declining to consider contentions where appellant "failed to provide any actual argument or legal authority in support"). More specifically, Mr. Troup never meaningfully grapples with the district court's determination that New Mexico second-degree murder corresponds with murder's generic definition. True, he says that New Mexico second-degree murder constitutes an improper step-down in culpability from generic murder. But he fails to support his assertion with any case law or developed argument. That is, Mr. Troup never articulates *why* the district court erred in instructing the jury on New Mexico second-degree murder or *how* New Mexico second-degree murder broadens

generic murder. For us to go down this path with Mr. Troup, we would need to construct arguments on his behalf. We decline to do so. *See Graham*, 305 F.3d at 1107 ("[W]e will not craft [appellant's] arguments for him.").

Simply put, Mr. Troup provides no basis on which we could determine that the district court erred by failing to instruct the jury with a generic murder instruction

F. Jaramillo Testimony—Billy Garcia, Joe Gallegos, Mr. Troup

1. Additional Background

The defendants argue that the district court erred by allowing surprise testimony of a witness not properly identified before trial. They contend that the Government was well-aware of the potentially favorable testimony of Michael Jaramillo but never subpoenaed him to testify before the grand jury or offered him immunity to compel his grand-jury testimony.

Mr. Jaramillo was involved in the murder of Frank Castillo in 2001. The Government first learned of his involvement in the murder in 2007, when Leonard Lujan implicated Mr. Jaramillo in an interview with the Albuquerque Police Department. But when government agents interviewed him about his involvement, Mr. Jaramillo consistently maintained that he knew nothing about the murder. Despite these repeated disavowals, the Government served him with a subpoena to testify at trial in this case. Having done that, however, the Government failed to include him on the witness list it initially provided to defense counsel before trial. Despite this omission, several days into trial, the Government advised the defendants that it would be calling Mr. Jaramillo. According to the Government, Mr. Jaramillo had a sudden change of heart and agreed to

provide testimony regarding his involvement in the Castillo murder. Of course, this change of heart came with immunity from future prosecution for his role in that crime. *See Kastigar v. United States*, 406 U.S. 441 (1972) (holding that compelled testimony is admissible where there is a grant of immunity).

The defendants objected to the admission of Mr. Jaramillo's testimony based on surprise and prejudice. The district court raised a statutory requirement, 18 U.S.C. § 3432, which requires the government to provide a complete witness list to defendants charged with a capital offense three days prior to the commencement of trial.[37] The district court agreed the omission violated § 3432 but determined that excluding Mr. Jaramillo's testimony was not the proper remedy. It concluded that the Government (and the defendants) would not have known of the substance of Mr. Jaramillo's testimony prior to the trial because he had consistently refused to cooperate in pretrial interviews. Thus, they were not prejudiced by the Government's failure to disclose his identity as required by § 3432. Instead of excluding Mr. Jaramillo's testimony, the court remedied

[37] Section 3432 provides that

> [a] person charged with treason or other capital offense shall at least three entire days before commencement of trial, excluding intermediate weekends and holidays, be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

the omission by delaying his appearance until roughly a month later in the trial so that defense counsel would have more time to prepare cross-examination.

As it turns out, Mr. Jaramillo had a lot to say about his involvement in the Castillo murder. He testified that Billy Garcia had ordered Mr. Castillo's murder, Joe Gallegos provided him with additional details, and he, with Joe Gallegos, and Mr. DeLeon, went into the cell and murdered Mr. Castillo. Joe Gallegos and Mr. DeLeon grabbed Mr. Castillo and Mr. Jaramillo strangled him to death.

2. Application

Billy Garcia, Mr. Troup, and Joe Gallegos challenge the district court's admission of Mr. Jaramillo's testimony during trial because, in their view, the Government violated § 3432 when it did not list Mr. Jaramillo on its pretrial witness list. This requires us to decide (1) the meaning of § 3432, and (2) whether the district court abused its discretion in admitting Mr. Jaramillo's testimony.

a. Interpretation of § 3432

By its plain language, § 3432 applies when a defendant is charged with a capital offense. Here, the defendants were charged with violating § 1959(a)(1), which provides death as a punishment when the underlying offense is murder. The Government contends the statute does not apply because prior to trial it filed a notice of its intent not to seek the death penalty.

The Government relies on *Maestas v. United States*, 523 F.2d 316, 319 (10th Cir. 1975), a case interpreting then-Rule 24(b)[38], in which we held that where the government chose not to seek the death penalty at trial, a defendant was not entitled to the Rule 24's 20-additional-peremptory-challenges provision. It contends the similar language in § 3432— "charged with a capital offense" —mandates the same outcome here.

We need not resolve the conflict between Rule 24 and § 3432 because the district court did not abuse its discretion in admitting Mr. Jaramillo's testimony. But we do note that the statute plainly looks to when the prosecution is *initiated*, not at some arbitrary time when the government determines what punishment it intends to seek if it attains a conviction. And nothing in the text suggests the statute does not apply when the government has notified a defendant that it will not seek capital punishment when it otherwise could. The statute unambiguously states "a person charged with . . . [a] capital offense shall at least three entire days before commencement of trial, . . . be furnished with a copy . . . of the witnesses to be produced on the trial." § 3432.

[38] Then-Rule 24(b) provides that "[i]f the *offense charged is punishable by death*, each side is entitled to 20 peremptory challenges." (emphasis added).

b. The district court's remedy

But even assuming the Government violated § 3432, we consider whether the district court abused its discretion in nevertheless admitting Mr. Jaramillo's testimony.[39] *United States v. Murry*, 31 F.4th 1274, 1290 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 245 (2022). We will not "disturb [a] district court's decision to admit evidence" without a "definite and firm conviction" that the lower court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1290.

In admitting Mr. Jaramillo's testimony, the district court explained that the defendants would not have known the substance of his testimony even if he had been properly listed as a witness. It determined that the appropriate remedy was to delay Mr. Jaramillo's testimony, which limited any prejudice. In making this assessment, the district court analyzed the prejudice to the defendants, including the defendants' inability to address the testimony in opening statements, and it tailored an appropriate remedy in light of its role to facilitate the jury's factfinding by admitting relevant evidence. *Id.* at 1291 ("Our cases favor admission of relevant evidence not otherwise prohibited.").

[39] While the Government asserts that Billy Garcia attempted to raise unpreserved evidentiary issues, Billy Garcia clarifies that he is providing examples of the prejudicial testimony from Mr. Jaramillo, including (a) testimony that Mr. Jaramillo believed Mr. Lujan when Mr. Lujan told him that Billy Garcia had ordered Mr. Castillo's murder because lying about that sort of thing would open up a person to violence; (b) testimony that it was "definitely possible" that Billy Garcia had done so based on his reputation; and (c) testimony that in Mr. Jaramillo's opinion Billy Garcia had "participated in" the murder by ordering it. Billy Garcia's Br. at 49–60.

The defendants point to two sources of legal authority they argue mandated pretrial disclosure of Mr. Jaramillo's testimony: (1) the Jencks Act, and (2) the *James* hearing.[40] The Jencks Act governs the production of witness statements from the government to defendants. 18 U.S.C. § 3500. Here, the district court required accelerated government disclosure of witness statements. A *James* hearing is a proceeding to determine the admissibility of a statement made by a co-conspirator. *See generally United States v. James*, 590 F.2d 575 (5th Cir. 1979) (en banc). Both the Jencks Act and a *James* hearing assume *knowledge* of the substance of testimony prior to the trial. The government, and in fact the defendants, did not learn of the substance of Mr. Jaramillo's testimony until after the trial started, so any requirement to produce the substance had not been triggered yet.

Because none of the parties knew the substance of Mr. Jaramillo's testimony prior to trial, and the district court alleviated any prejudice arising from the omission, we conclude the district court did not abuse its discretion in admitting it.

G. Frankie Gallegos Testimony – Andrew Gallegos

Andrew Gallegos objected at trial to the admission of evidence about Frankie Gallegos. Specifically, Andrew Gallegos objected to the admission of evidence that

[40] Mr. Troup also argues that the ligature used to strangle Mr. Castillo had Mr. Jaramillo's DNA on it. This, he says, was in the possession of the FBI and should have alerted the Government of Mr. Jaramillo's involvement before trial. This argument appears to go to the Government's various pretrial obligations and not § 3432. Regardless, the district court did not abuse its discretion in admitting Mr. Jaramillo's testimony.

Frankie was his brother and was, at the time of trial, a leader of SNM. On appeal, Andrew Gallegos argues that the district court abused its discretion in admitting this evidence because it was irrelevant under Federal Rule of Evidence 401, or if relevant, outweighed by its unduly prejudicial effect under Rule 403.

Because we vacate Andrew Gallegos's conviction based on insufficient evidence as described *supra*, we decline to address arguments about the admission of evidence about Frankie Gallegos. *See supra* Slip op. at 82 n.30.

H. Cumulative Error – Mr. Troup

Finally, Mr. Troup argues the cumulative-error doctrine entitles him to a new trial. "Cumulative error is present when the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003) (internal quotation marks omitted). In assessing the possibility of cumulative error, we can "consider [only] actual errors in determining whether the defendant's right to a fair trial was violated." *Id.*; *see United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (en banc) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

In his briefing, Mr. Troup argued that the district court erred by denying the motion to bifurcate, by allowing Mr. Jaramillo to testify, and by instructing the jury on second-degree murder. Mr. Troup also filed a Federal Rule of Appellate Procedure 28(i) notice that he adopted Arturo Garcia's commerce-clause argument, Billy Garcia's due-process argument, and both Arturo and Billy Garcia's severance arguments. As

discussed, we disagree that the district court erred in resolving these issues. Thus, Mr. Troup's cumulative error argument fails. *See Rivera*, 900 F.2d at 1477 ("Because there was no error in the trial, there is no occasion for us to employ a cumulative-error analysis in order to determine whether defendant's substantial rights were affected.").

III. CONCLUSION

For the reasons stated above, we AFFIRM Billy Garcia's, Mr. Troup's, and Joe Gallegos's convictions for the VICAR murder of Mr. Castillo alleged in Count 1. We also AFFIRM Billy Garcia's conviction under Count 2 for the VICAR murder of Mr. Garza. And we AFFIRM Arturo Garcia's and Mr. Troup's convictions as alleged in Count 3 for the VICAR murder of Mr. Sanchez. However, because the Government failed to provide evidence from which the jury could find beyond a reasonable doubt that Andrew Gallegos and Joe Gallegos conspired to murder and murdered Mr. Burns for a VICAR purpose, we REMAND to the district court with instructions to VACATE their convictions and sentences on Counts 4 and 5.