No. 05-10478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

KIL SOO LEE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction pursuant to 18 U.S.C. 3231. It sentenced defendant on June 22, 2005, and entered an amended final judgment on July 1, 2005. Defendant filed a timely notice of appeal on June 22, 2005. See Fed. R. App. P. 4(b)(2). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying defendant's motion to dismiss the indictment for lack of jurisdiction and/or improper venue.

2. Whether the district court abused its discretion in denying defendant's

motion for a mistrial based on comments made during the government's rebuttal argument.

3. Whether the district court was required to refer to American Samoan law when it instructed the jury.

4. Whether the district court was authorized to impose consecutive sentences pursuant to 18 U.S.C. 3584.

STATEMENT OF CASE

1. Prior Proceedings

On March 23, 2001, federal authorities obtained a warrant from the United States District Court for the District of Hawaii for the arrest of defendant, Kil Soo Lee. R. 1.[1] The Complaint and Affidavit filed in support of the warrant alleged that defendant violated 18 U.S.C. 1584 (involuntary servitude) and 18 U.S.C. 1589 (forced labor) with regard to a garment sweatshop factory he owned and operated in American Samoa, an unincorporated territory of the United States. Federal authorities arrested defendant on March 23, 2001, in American Samoa and, on March 30, took him directly to the District of Hawaii.

On April 5, 2001, a federal grand jury sitting in the District of Hawaii returned a two-count indictment charging defendant with the offenses cited in the

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[1] "R." refers to the record number listed on the district court docket sheet. "E.R." refers to Excerpts of Record defendant filed with this Court under separate cover with his brief. "Br." refers to defendant's opening brief filed with this Court. "G.E.R." refers to the Government's Excerpts of Record filed with this Court under separate cover with this brief.

Complaint. R. 11. On July 16, 2001, defendant filed a Motion to Dismiss. G.E.R. 1-39. Defendant argued that "jurisdiction and venue * * * lies [*sic*] in the courts of American Samoa[,]" not the United States District Court for the District of Hawaii, because he was charged with committing crimes in American Samoa. G.E.R. 7-8. On August 20, 2001, the United States filed an Opposition to Defendant's Motion to Dismiss, arguing, *inter alia*, that the district court had jurisdiction pursuant to 18 U.S.C. 3231 and that venue was proper in the District of Hawaii pursuant to 18 U.S.C. 3238. G.E.R. 40-73. On August 30, 2001, the district court issued a written decision denying defendant's motion. E.R. 4-21.

On that same day, a federal grand jury sitting in the District of Hawaii returned a 22-count superseding indictment that charged defendant in all of the counts, and co-defendants, Virginia Soliai and Robert Atimalala, in 11 and 8 of the counts, respectively. R. 50.[2] Count 1 charged that from August 1998 until January 2001, defendant, his two codefendants, and others conspired to deny approximately 250 Vietnamese and Chinese garment workers the right to be free from involuntary servitude in violation of 18 U.S.C. 241. E.R. 22-34. Counts 2 through 18 each charged defendant with holding a different worker to a condition of involuntary servitude in violation of 18 U.S.C. 1584 and 1594. E.R. 34-36.[3] Count 19 charged

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[2] Because a jury ultimately found co-defendants Soliai and Atimalala not guilty of all counts, this brief sets forth only the facts and issues that pertain to defendant.

[3] Counts 2 through 8 each alleged involuntary servitude during "March and

(continued...)

defendant with extortion in violation of 18 U.S.C. 1951. E.R. 37. Count 20 charged defendant with money laundering in violation of 18 U.S.C. 1956(a)(1)(A)(i). Count 21 charged defendant with making a false statement to a financial institution in violation of 18 U.S.C. 1014. E.R. 38-39. Count 22 charged defendant with bribery of a bank official in violation of 18 U.S.C. 215(a)(1). E.R. 39-40.

On September 10, 2001, defendant renewed his Motion to Dismiss as to the superseding indictment. R. 68. Ten days later, the district court denied defendant's motion. R. 77.

Defendant appealed. R. 79 (Appeal No. 01-10615). On December 7, 2001, the United States filed a Motion to Dismiss defendant's appeal, arguing that the district court's order denying defendant's Motion to Dismiss was not an appealable order. On January 18, 2002, this Court dismissed defendant's appeal for lack of jurisdiction. G.E.R. 74-75.

On February 19, 2002, defendant renewed his Motion to Dismiss as to a second superseding indictment, E.R. 22-40, charging the same defendants with the same 22 counts as in the first superseding indictment. E.R. 21-40. On February 22, 2002, the district court denied defendant's motion "[f]or the reasons stated [in

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[3](...continued)
April 1999" in violation of 18 U.S.C. 1584. E.R. 35. Counts 9 through 18 each alleged involuntary servitude on November 28, 2000, except for Count 11, which alleged involuntary servitude from "November 28 through December, 2000" in violation of 18 U.S.C. 1584 and 1594. E.R. 36.

its] * * * August 30, 2001" decision. E.R. 41.

On October 22, 2002, a jury trial commenced. Thirty-six witnesses testified on behalf of the government, including 21 individuals who worked at defendant's factory. Following presentation of all the evidence, the district court granted the government's oral motion to dismiss Counts 13, 16, and 18 (involuntary servitude) and Count 21 (false statement to a bank official). G.E.R. 780. On February 21, 2003, the jury returned its verdict. R. 523. It found defendant guilty of 14 of 18 counts: Count 1 (conspiracy to violate civil rights); Counts 2, 3, 4, 5, 6, 7, 9, 12, 13, 15, and 17 (involuntary servitude); Count 19 (extortion); and Count 20 (money laundering).

On June 22, 2005, the district court sentenced defendant. The court noted that the United States Sentencing Guidelines, which were merely advisory, provided a guideline range of 360 months to life. G.E.R. 850-855. Relying on the factors set forth in 18 U.S.C. 3553(a), the court sentenced defendant to a term of imprisonment totaling 480 months, or 120 months on each of Counts 1 through 7, to run concurrently; 240 months on each of Counts 9, 12, 14, 15, and 17, to run concurrently to each other and consecutively to the terms on the other counts; and 60 months on each of Counts 19 and 20, to run consecutively to each other and to the terms on the other counts. G.E.R. 854-855. The court also ordered defendant to pay $1,826,087.94 in restitution and a fine of $1,400, or $100 per count of conviction. G.E.R. 856.

2. Facts

Defendant Kil Soo Lee was the owner, operator, president, and director of Daewoosa Ltd., a garment factory located in American Samoa. G.E.R. 91-92, 289-290, 417, 440-441, 509, 511. Defendant and his agents, including two labor exporting companies, recruited individuals from Vietnam, China, and Samoa to work at his factory. G.E.R. 370, 468, 475-477, 569, 603.

To secure a job at Daewoosa, foreign workers had to pay from $3,600 to nearly $8,000, which depending on their situation, was eight years to several decades of salary at an equivalent job in their native country. G.E.R. 205, 421-422, 534-535, 632-633, 641. Foreign hirees were also required to sign a contract that obligated them to work at defendant's factory for a minimum of three years, or pay an additional $5,000 if they did not complete their term of employment. G.E.R. 81-84, 203, 205-206, 229-230, 233, 279, 345, 356, 405, 429-430, 465. Consequently, defendant's foreign workers and their extended families made enormous personal and financial sacrifices to work at Daewoosa, including selling their possessions, putting their homes up as collateral, and borrowing money from banks and loan sharks. G.E.R. 86, 155, 192, 205, 248-249, 267, 280, 336-337, 360, 420, 469, 479, 536, 580, 603-604, 633.

Once the foreign workers arrived in American Samoa, defendant controlled the conditions under which they lived, including when and whether they worked, were provided food, were paid, could leave the compound, and could speak with persons unaffiliated with the company. G.E.R. 97, 101-102, 105-106, 117-118,

120-122, 133, 135, 138, 146, 193, 198-199, 217-219, 221-222, 255, 257-258, 316, 331-332, 347-349, 375, 379, 399-400, 437, 548, 586-588, 596, 612-614, 678, 776-779. For days at a time, defendant confined his workers and forbade them from leaving the compound, which was walled, fenced-in, padlocked, gated, and secured by guards. G.E.R. 118, 120, 122, 158-161, 164, 187, 302-307, 309, 314, 330-331, 437-439, 487-488, 503-504, 512, 548, 576, 617-618, 670, 680, 688. Sometimes, defendant allowed five workers at a time to leave the compound, but only for ten minutes and in a line formation with escorts at the front and rear. G.E.R. 403, 549, 596. The compound had a "lockdown" each night and a security guard slapped workers in the face if they returned after the 8 or 9 p.m. curfew. G.E.R. 300, 402, 612, 647, 653. When workers complained about the conditions at Daewoosa, defendant threatened them, denied them food, and had them beaten, detained, jailed, and/or deported. G.E.R. 78, 116, 257-258, 309, 399). According to an interpreter who worked at the factory, defendant was able to call the police and incarcerate his workers "at will." G.E.R. 401. A security guard testified that he resigned from his job because the Vietnamese workers were treated so poorly. G.E.R. 310.

Defendant required foreign workers to pay him a $500 deposit and $1,000 in cash for an immigration card that cost only $15.00. G.E.R. 107-108, 176, 210-212, 225, 250-252, 263, 277, 280, 337, 340-341, 346, 376-378, 404, 481, 519, 537-538. The workers had to turn over their passports over to defendant so they could not leave the island, or look for other jobs. G.E.R. 89-90, 209, 340, 361, 370-372,

432-433, 470, 481-482, 539, 591, 598-600, 605-606, 627, 633-634, 642-643, 675-677, 770-772.

The compound at Daewoosa included a factory, barracks, and a mess hall. G.E.R. 122, 158-161, 212, 314, 330-331. Dormitories housed as many as 32 workers in one room, which was infested with rats and roaches. G.E.R. 97, 464, 614.

The first group of workers arrived at Daewoosa from China during the fall of 1998. G.E.R. 418, 474, 484, 490, 728-729. These workers did "a little of everything," including building dormitories and a guard shack, welding bedframes, constructing security gates, and installing a barbed wire fence around the compound. G.E.R. 435-436, 485-487, 489-491. Defendant refused to pay these workers for many months and then only a fraction of what they were owed. G.E.R. 418-419, 427-428, 445-446, 493, 511-512.

On February 9, 1999, defendant's garment factory became operational with the arrival of 28 experienced Vietnamese seamstresses, who had to pass a sewing proficiency test to be hired. G.E.R. 204, 207-208, 253-254, 338-339, 355, 369. On February 28, 1999, and in the middle of March, two groups of approximately 15 Chinese and 30 Vietnamese workers arrived at Daewoosa. G.E.R. 483. In mid-March, defendant told the workers that he would not honor their contracts and they would be deported if they did not sign a new contract his attorney drafted. G.E.R. 194, 281-282, 344, 363-364, 407-408. Also in March, defendant had the police handcuff, arrest, and arrange for deportation of eight Chinese workers, who had

recently arrived and done nothing wrong. G.E.R. 116, 214-215, 442-443, 492, 596.

On Saturday, March 27, 1999, several Vietnamese seamstresses cried during lunch because they had worked for more than six weeks and not been paid. G.E.R. 98-99, 101, 255-256, 246-247, 362, 570-574. Angered by his workers' reaction, defendant flipped over a table and announced that meals would be discontinued for all Vietnamese workers and they would be deported. G.E.R. 99-100, 218, 257-258, 382-385, 597.

The following day, several workers and a translator, who were desperate and hungry, snuck out of the compound to beg for food. G.E.R. 103, 238-239, 285, 349, 386-387. Defendant obtained a list of those who left and threatened to send them back to Vietnam. G.E.R. 104, 389-390, 391-393. That evening, he called a meeting of the 50 Vietnamese seamstresses, who had not been fed at the compound for more than 24 hours, and announced that anyone who did not report to work the following day would be deported. G.E.R. 105-106, 224, 240, 394.

The next morning, several seamstresses, who were too exhausted and weak to work, requested the day off. G.E.R. 225, 241-242, 261-262, 272-273, 352, 414. Defendant refused and ordered all the Vietnamese workers to surrender their identification cards. G.E.R. 107-108, 179-180, 225, 243, 263, 340, 346, 353, 395, 519, 537-538. That afternoon, after providing the workers with lunch, defendant summoned the police and assisted them in handcuffing and arresting three Vietnamese seamstresses so they could be deported. G.E.R. 79, 109-112, 180-184,

216, 226, 264, 275, 292, 296, 299, 308, 354, 547. Several of the workers were so frightened they fainted and were taken to the hospital. G.E.R. 113-115, 264, 276, 291, 293, 396. After the arrests, defendant barred all the remaining workers from leaving the compound for several days. G.E.R. 117-118, 307, 309, 331-332, 399, 439, 548, 576, 596.

When the workers snuck out of the compound the day before to search for food, they attempted to contact a charitable organization, spoke to civilians, and faxed letters to the Vietnamese Embassy in Washington, D.C. and the labor exporting company, which had sent them to American Samoa, about the conditions at Daewoosa. G.E.R. 104, 123-125, 179, 221-223, 250-260, 270-271, 284, 349-351. As a result, during the late afternoon on Monday, March 29, 1999, two men from the Seafarers Center, a missionary organization that assists fisherman and private boat owners, went to the compound. G.E.R. 126, 294, 312, 321-324, 397, 412-413. At the front gate, which was padlocked and guarded by security officers, the men observed approximately 30 Vietnamese women behind a barbed-wire fence crying out for help. G.E.R. 119-122, 126-127, 295, 297-298, 313-315, 319, 324-326, 397. Defendant called the police, who arrived and directed the men to leave. G.E.R. 397. Before the men departed, a worker slipped them a note pleading for help. G.E.R. 317-318.

Later that evening, several civilians with whom the workers had spoken came to the compound. The civilians, like the two missionary men, and a police officer, observed several Vietnamese women standing behind the front gate,

guarded by security officers, and crying for help. G.E.R. 329-331.

In May 1999, the United States Department of Labor (DOL) and the National Labor Relations Board (NLRB), through their offices in Hawaii, opened investigations regarding the conditions at Daewoosa. G.E.R. 516, 522-526. DOL filed charges against defendant and his corporation for violating various provisions of the Fair Labor Standards Act and National Labor Relations Act. G.E.R. 509-514, 527-528. Defendant was told, *inter alia*, that the provisions in his labor contracts, which prohibited workers from striking or complaining about work conditions, violated the National Labor Relations Act and that it was illegal to retaliate against and threaten workers with deportation for engaging in a protected work activity. G.E.R. 130, 509-513, 527-530.

Pursuant to the investigations, defendant was required to provide back pay to numerous workers. G.E.R. 150, 471-472, 520-521, 531, 552. On September 27, 1999, and again in October 1999, the Attorney General of American Samoa went to the compound and distributed checks issued by the United States government for salary defendant owed his workers, which ranged in amounts from $1,800 to $2,300. G.E.R. 131-132, 188, 196, 456, 458, 471, 512-518, 550, 554-555, 575, 581.

The very afternoon the workers received their government checks, defendant and his managers told them they would be deported if they did not endorse the checks over to the company. G.E.R. 133-138, 143-144, 147, 189, 198, 552-558, 582-586. Four workers, who “feared for their life” and believed they would be

sent to jail and deported if they did not comply with defendant's demand, turned their checks over to defendant, who deposited them in his bank account. G.E.R. 143-146, 148, 196-198, 560-561, 568, 692-697. Those workers also acquiesced when defendant ordered them to write a letter to DOL exculpating him. G.E.R. 143-146, 148-149, 563-564, 565-568. Nine workers, who refused to sign over their checks, were required to pay room and board and were not allowed to work, and in December 1999, were deported. G.E.R. 139-142, 561-562, 587-590, 592.

Meanwhile, several of the workers, who were able to obtain legal assistance, filed lawsuits regarding the conditions at Daewoosa. G.E.R. 448, 455, 494. Defendant did not allow those involved in the lawsuits to work, charged them room and board, and threatened to have them arrested and deported. G.E.R. 449, 494-495, 608. In October, 1999, several Chinese workers, frightened by defendant's threats, signed a letter stating they no longer wanted to pursue their lawsuits. G.E.R. 453-454, 457, 496-498, 505. Other workers were deported as a result of their participation in litigation against defendant and his company. G.E.R. 442-443. In August 2000, defendant showed the workers a list of 38 persons who were going to be deported. G.E.R. 773-776. All the names on the list were workers who were involved in litigation regarding the conditions at Daewoosa. G.E.R. 774-775.

In September 2000, there were nearly 300 workers at Daewoosa, including more than 200 Vietnamese seamstresses and at least 50 Samoan packers. G.E.R. 732-733. In late September, defendant secured a large contract to produce 70,000

garments for J.C. Penney by November 30, 2000. G.E.R. 163, 736-737.

During the fall of 2000, defendant became concerned about meeting the contract deadline and had several conversations with Elekana Nuu'Uli Ioane (Nuu'Uli), a Samoan factory manager. G.E.R. 619–620, 635, 656-658, 702-704, 733-734, 737-743, 746-748, 754. Nuu'Uli had pled guilty to conspiracy to hold workers in involuntary servitude and testified for the government. In October and early November, defendant repeatedly told Nuu'Uli, "if the Vietnamese [seamstresses] are very slow or disobey[,] just beat them up and let them go home." G.E.R. 743-744. During those months, one of defendant's assistants in charge of factory production hit two Vietnamese seamstresses with a wooden stick. G.E.R. 648-652.

On Monday, November 27, 1999, defendant and Nuu'Uli met with the Samoan factory workers to discuss the contract deadline. G.E.R. 702, 704-706, 707. According to a Samoan packer who was at the meeting, defendant said, "if there's a Vietnamese that does not listen, beat'em up." G.E.R. 706, 714-716.

The next morning, defendant spoke with Nuu'Uli several times and expressed concern that the garments would not be finished by the contract deadline on Friday. G.E.R. 738, 743, 745-746. Nuu'Uli complained to defendant in the presence of others that the Vietnamese seamstresses were not following his instructions. G.E.R. 620-621, 637, 655-659, 747. Defendant got angry, hit the table and said, "Nuu'Uli, if they disobey and if [they] don't want to work[,] beat them up and send them home." G.E.R. 628, 638-639, 656-659, 747.

Nuu'Uli approached Truong Thi Le Quyen (Quyen), a Vietnamese seamstress, who was assigned to one of the six sewing lines. G.E.R. 636, 660-661, 748. Nuu'Uli told her to get to work. G.E.R. 619, 681, 748. Just after the remark, defendant appeared and said, "Nuu'Uli just beat them up. If they die, I will be responsible." G.E.R. 748; 682-684, 687.

Thereafter, Nuu'Uli grabbed Quyen's shirt collar, choking her so she could not breathe. G.E.R. 622, 661, 684, 749-751. As Vietnamese workers came to her rescue, approximately 20 Samoan workers, who were more than twice the size of the Vietnamese seamstresses, rushed over and started hitting the seamstresses with plastic plumbing pipes, which were more than a yard long and had broken and jagged ends. G.E.R. 151-154, 623-625, 661-666, 671-672, 684-685, 710-711, 726, 752, 753, 757. For several minutes, the Samoans hit the Vietnamese with pipes, and as Quyen was held by several Samoan workers, others beat her and gauged out her eye with a pipe. G.E.R. 153-154, 667, 713, 717-719. According to one worker, it was like "watching a film where the people are being brutally beaten to the point of like a massacre." G.E.R. 668; see G.E.R. 669 ("there was a lot of blood on the line and on the floor of the factory and on the fabrics"); G.E.R. 678 ("blood was pouring out of [Miss] Quyen's head); G.E.R. 708-709 ("Samoans came * * * with pipes and hit the Vietnamese"); G.E.R. 752 ("Samoans [were] beating Vietnamese all over the place"). Quyen's entire body was bruised and she lost an eye, which was later replaced with a prosthesis. G.E.R. 760, 765. In addition, several Vietnamese workers were injured. G.E.R. 712, 759-760, 764. On

January 12, 2001, a Samoan court ordered that Daewoosa be taken over by a receiver.

3. The District Court's Decision Denying Defendant's Motion To Dismiss

On February 21, 2002, the district court denied defendant's Motion to Dismiss the second superseding indictment for the reasons set forth in its August 30, 2001 decision. E.R. 22-40. In its earlier decision, the court ruled that defendant's "motion raise[d] issues only of venue, not of jurisdiction" since defendant was not "arguing that no federal court could try him[,]" but "only that the District of Hawaii is the wrong place for this case." E.R. 5-6. Applying 18 U.S.C. 3238, the district court ruled that the District of Hawaii was the proper venue for defendant's trial because defendant's offense was not committed in "any district[,]" and "[i]t is undisputed" that defendant was "first brought" to the District of Hawaii after he was arrested in American Samoa.

The district court rejected defendant's claim that he should be tried in American Samoa. The court reasoned that "American Samoa's courts * * * lack the power to prosecute violations of Title 18" because 18 U.S.C. 3231 vests "the United States district courts [with] exclusive jurisdiction to prosecute federal crimes." E.R. 9-10. The court further explained that "America Samoa is nowhere defined as a judicial district[,]" E.R. 9, its courts are not "district courts of the United States," E.R. 10 (quoting 18 U.S.C. 3231), and "[n]othing in the laws passed by Congress relating to American Samoa comes close to stating that [its territorial] courts have the authority possessed by the district courts of the United

States[],” E.R. 19.

The district court also ruled that 48 U.S.C. 1661(c) does not “implicit[ly] limit[] * * * or repeal * * * § 3231.” E.R. 15. The court explained that Section 1661 merely “g[i]ve[s] the President the right to designate those who would have ‘all’ judicial powers in American Samoa” and to “establish courts in American Samoa with jurisdiction over matters not otherwise in the exclusive jurisdiction of other courts.” E.R. 14-15. To conclude otherwise, the court reasoned, would not only be inconsistent with the express terms of Section 3231, but would provide American Samoan courts with “unlimited jurisdiction” and “broader powers than federal district or circuit courts.” E.R. 15. Finally, the district court reasoned that since American Samoan courts do not provide defendants with “the full panoply of rights and protections available to defendants in the United States district courts,” Congress could not have intended defendants charged with federal offenses to be prosecuted in an American Samoan court. E.R. 10-13.

SUMMARY OF ARGUMENT

Defendant contends (Br. 19-42) that the district court erred in denying his Motion to Dismiss the indictment for lack of jurisdiction and/or venue and that his trial should have been in American Samoa. The court correctly ruled that it had jurisdiction pursuant to 18 U.S.C. 3231, and that under 18 U.S.C. 3238, the District of Hawaii was the proper venue.

The district court did not abuse its discretion in denying defendant’s motion for a mistrial based on comments made during the government’s rebuttal argument.

All but one of the remarks to which defendant now objects were permissible under the "invited reply" doctrine. In any event, defendant was not prejudiced since: the evidence was overwhelming; government counsel's comments were inconsequential in the context of the nearly four month trial; the district court gave special cautionary instructions that repeatedly admonished the jury to disregard all but one of the arguments to which defendant now objects; and the jury was able to impartially weigh the evidence since it acquitted defendant of four counts and his two co-defendants of all counts.

The district court was not required to refer to American Samoan law in its jury instructions. The indictment charged defendant with denying his workers rights guaranteed by the Thirteenth Amendment to the Constitution, not American Samoan law. Moreover, defendant conceded below that American Samoan law did not provide a defense to the charges.

Finally, the district court was authorized to impose consecutive sentences pursuant to 18 U.S.C. 3584. In *United States* v. *Fifield*, 432 F.3d 1056, 1066 (9th 2005), cert. denied, No. 05-10205, 2006 WL 901022 (May 1, 2006), this Court, interpreting *United States* v. *Booker*, 543 U.S. 220 (2005), held that no special facts need "be pled and proven to a jury" in order for a district court to impose consecutive sentences pursuant to 18 U.S.C. 3584.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

A. The United States District Court For The District Of Hawaii Had Jurisdiction Pursuant To 18 U.S.C. 3231

Defendant does not dispute that the "federal criminal code is in full force in American Samoa." Br. 27. See 18 U.S.C. 5 ("The term 'United States', as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."). Nor does he contest that the court below had jurisdiction over his case. See Br. 28 n.18 (conceding that "all of the United States District Courts * * * obviously have jurisdiction over offenses defined in the federal criminal code").[4]

18 U.S.C. 3231, which defendant never mentions in his brief, provides federal district courts exclusively with jurisdiction over federal criminal offenses. It states, "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. 3231. Because the United States District Court for the District of Hawaii is a "district court[] of the United States[,]" see 28 U.S.C. 132(a) and 451, it had jurisdiction. The court correctly concluded that defendant's motion "raises issues only of venue." E.R. 5.

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[4] Defendant wrongly asserts (Br. 1) that the district court's jurisdiction "was based upon 28 U.S.C. § 1343(4)."

B. No Court In American Samoa Has Jurisdiction To Prosecute The Offenses Charged In The Indictment

1. Congress Has Not Vested Any Court In American Samoa With Jurisdiction To Prosecute The Crimes Charged In The Indictment

Congress has the sole power to vest federal courts with jurisdiction. See U.S. Const. Art. III, §1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). See also *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989); *Federal Power Comm.* v. *Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939); *Cary* v. *Curtis*, 44 U.S. (How.) 236, 245 (1845); *McColgan* v. *Bruce*, 129 F.2d 421, 423 (9th Cir.), cert. denied, 317 U.S. 678 (1942). Because "[i]t is axiomatic * * * that [a] clear statutory mandate must exist to f[in]d jurisdiction[,]" *Carroll* v. *United States*, 354 U.S. 394, 399 (1957), this Court has repeatedly recognized that it must "strictly construe jurisdictional statutes" and resolve doubts against the assumption of jurisdiction. *Operators Indep. Drivers Ass'n of Am., Inc.* v. *Skinner*, 931 F.2d 582, 590 (9th Cir. 1991); *General Atomic Co.* v. *United Nuclear Corp.*, 655 F.2d 968, 968-969 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982). See, *e.g.*, *Whitman* v. *Department of Transp*., 382 F.3d 938, 943-944 (9th Cir. 2004) (refusing to construe statute as implicitly authorizing jurisdiction), cert. denied, 125 S. Ct. 2962 (2005).

The district court correctly concluded, E.R. 7-19, that no court in American Samoa has jurisdiction to prosecute the offenses charged in the indictment. 18

U.S.C. 3231 vests "district courts of the United States" exclusively with jurisdiction to prosecute federal crimes. Congress has not expressly vested any court in American Samoa with jurisdiction to prosecute the crimes charged in the indictment. The words "'district court of the United States' commonly describe * * * courts created under Article III of the Constitution," *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 241 (1952), and "ordinarily exclude * * * territorial courts" constituted pursuant to Article IV of the Constitution. *Nguyen* v. *United States*, 539 U.S. 69, 75-76 (2003). See *Mookini* v. *United States*, 303 U.S. 201, 204-205 (1938) (territorial courts are not courts of the United States); *International Longshoremen's and Warehousemen's Union* v. *Wirtz*, 170 F.2d 183, 185 (9th Cir. 1948) (statute that provides "court of the United States" with certain powers does not include court for the [then] territory of Hawaii), cert. denied, 336 U.S. 919 (1949); *Miranda* v. *United States*, 255 F.2d 9, 13-15 (1st Cir. 1958) (United States District Court for the District of Puerto Rico is a "district court of the United States" within the meaning of 18 U.S.C. 3231 because Congress has designated Puerto Rico a judicial district and empowered the District Court of Puerto Rico with jurisdiction over offenses against the law of the United States.). See also 28 U.S.C. 81-131 (specifying the district courts). Congress has not created a United States District Court in American Samoa. Nor has Congress provided, unlike with Guam or the Virgin Islands, that any American Samoan court has the equivalent jurisdiction of a federal district court. Cf. *United States* v. *Burroughs*, 289 U.S. 159, 163 (1933)

("Where a statute uses * * * language" that specifies that a court "'shall possess the same powers and exercise the same jurisdiction as the district courts of the United States'[,] * * * such a court is authorized to try statutory actions declared to be cognizable by district courts."); *United States* v. *Santos*, 623 F.2d 75, 76 (9th Cir. 1980) (District Court of Guam had jurisdiction over criminal complaint charging federal offense because Congress created that court and expressly vested it with "the jurisdiction of a district court of the United States.") (quoting 48 U.S.C. 1424(a)); *Walker* v. *Government of the Virgin Islands*, 230 F.3d 82, 86 (3d Cir. 2000) (District Court of the Virgin Islands has jurisdiction to entertain habeas petition because Congress "affirmatively bestow[ed] on the [former] the entire jurisdiction of a District Court of the United States.").

2. 48 U.S.C. 1661(c) Does Not Vest Any Court In American Samoa With Jurisdiction Over Federal Crimes

48 U.S.C. 1661(c), which was originally enacted in 1929, provides:

> Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in person or persons and shall be exercised in such a manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

First, it is undisputed "[t]here is no federal legislation creating a court system for American Samoa." Br. 28 (quoting *Vessel Fijian Swift* v. *Trial Div., High Ct. of Am. Samoa*, 4 Am. Samoa 983, 986-989 (1975)). By its terms, 48 U.S.C. 1661(c) provides the President with the power to select the persons who will exercise "all civil, judicial, and military powers" in American Samoa and to

ensure that they carry out their responsibilities as he or she directs. It does not vest any territorial entity with any specific powers, refer to any court, or specify any powers the judiciary may exercise.

Defendant nonetheless maintains (Br. 27-31, 38-40) that a "chain of delegated authority" which includes the President's delegating administration over American Samoa to the Secretary of the Interior, see Exec. Order No. 10264 (1951), reprinted in 48 U.S.C. 1662, and the Secretary's ratifying American Samoa's Revised Constitution and Code, "clearly vest[s] * * * the High Court of American Samoa" with jurisdiction to hear federal criminal cases. The argument is wrong for multiple reasons. Br. 35, 27-28.

First, by providing the President with supervisory authority over the territory "*[u]ntil Congress shall provide* for the government of such islands[,]" the statute is not a congressional establishment of any governmental entity, including a federal court. 48 U.S.C. 1661(c) (emphasis added).

When Congress has sought to vest a territorial court with jurisdiction to prosecute federal offenses, it has done so explicitly and directly. See, *e.g.*, 18 U.S.C. 23, 3241; 28 U.S.C. 2241; 48 U.S.C. 1424(a)(1), 1611(a) 1821(a), and 1822. In the very few circumstances where Congress has intended a court in American Samoa to have jurisdiction over a particular criminal matter, it has expressly and directly granted such authority. See, *e.g.*, 7 U.S.C. 87f(h) and 136(i); 48 U.S.C. 1704. Such specific grants of jurisdiction demonstrate that

Congress did not believe American Samoan courts had general jurisdiction over federal crimes.

Moreover, the statutes defendant cites (Br. 36-37), which expressly provide the United States District Court for the District of Hawaii with jurisdiction to hear certain types of civil and criminal cases occurring in American Samoa or its waters, all but confirm that Congress did not intend American Samoan courts to have jurisdiction over federal criminal cases, generally. Contrary to defendant's claim (Br. 37-38, 40-41), those statutes do not "divest[] the High Court of American Samoa of jurisdiction," but rather, demonstrate that there is nothing particularly extraordinary about the District Court for the District of Hawaii hearing a case involving conduct committed in American Samoa, or some other territory that is a substantial distance from it.

Further, defendant's reliance on the American Samoan Constitution and Code to negate the express terms of 18 U.S.C. 3231 is misplaced. A territory does not have authority to enact a law that is inconsistent with a federal statute. See *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1455-1458 (9th Cir. 1990) (legislature of Northern Mariana Islands exceeded its authority when it enacted a law that established a local appellate court and purported to divest all federal courts of jurisdiction over appeals which involved cases originating in local trial courts), cert. denied, 506 U.S. 1027 (1992); *Bordenelli* v. *United States*, 233 F.2d 120, 124 (9th Cir. 1956) ("Insofar as the legislation [of a territory goes] beyond the limits of the governing statute of Congress, it [i]s void."). In fact, the Samoan

Constitution provides the same. Rev. Const. American Samoa, Art. II, § 1 ("No [Samoan] legislation may be inconsistent with * * * the laws of the United States.").

Nor does the American Samoan Code purport to confer federal jurisdiction. That the American Samoan Code provides the High Court with jurisdiction over "criminal cases in which a felony is charged" does not suggest that it has jurisdiction to prosecute federal offenses exclusively within the jurisdiction of federal courts. Am. Samoa Code § 3.0202(a)(2) (1992). In fact, since the American Samoan Code specifies that offenses are "defined by * * * statute[s] of th[e] Territory[,]" any territorial enactment vesting a local court with the jurisdiction over a criminal case merely provides the tribunal with authority relating to violations of American Samoan law. Am. Samoa Code Section 46.3102. Accordingly, Congress has not explicitly or implicitly vested any court in American Samoa with jurisdiction to prosecute federal crimes when it enacted 48 U.S.C. 1661(c).[5]

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[5] Contrary to defendant's claim (Br. 38-41), *Meaamaile* v. *American Samoa*, 550 F. Supp. 1227 (D. Haw. 1982), does not dictate the result in this case. The decision is obviously not binding on this court, and in any event, is distinguishable on the facts.

In *Meaamaile*, a district court in Hawaii granted defendant's motion to dismiss for lack of venue a civil action arising out of activities in the waters of American Samoa. The court held that the High Court of American Samoa had jurisdiction to adjudicate plaintiff's admiralty claim, which could have been brought in local or federal court. As the district court noted, E.R. 13, because *Meaamaile* involved a civil claim, the decision does not address the dispositive

(continued...)

Finally, defendant's argument should be rejected since it presumes the improbable result that Congress would have provided a local Samoan court with broader jurisdiction than any state or local court within the United States. As the district court notes, E.R. 10, to suggest that the High Court of American Samoa is the equivalent of a federal court seems particularly far-fetched since it is beyond dispute that in American Samoa, a defendant is "denied the full panoply of rights and protections available to defendants in the United States[;]" there is no grand jury system or automatic right of appeal to an Article III court upon conviction, and lawyers are not even required to have attended an American law school. See E.R. 10-11. Accordingly, the district court did not err in concluding that no court in American Samoa has jurisdiction to try the offenses charged in the indictment.

C. The District Court Correctly Concluded That Pursuant To 18 U.S.C. 3238, The District Of Hawaii Was The Proper Venue For Defendant's Trial

Unlike jurisdiction, which concerns a court's power to adjudicate, venue relates to the place where a court should exercise its jurisdiction. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168 (1939). Article III, Section 2 of the Constitution provides, "when [a crime is] not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." As a result, it has long been recognized that when a defendant commits

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[5](...continued)
issue here: whether in the absence of an explicit congressional directive -- which 48 U.S.C. 1661(c) is not -- Section 3231 bars any American Samoan court from exercising jurisdiction over federal criminal offenses.

a crime in a territory of the United States, the Sixth Amendment's guarantee with "respect[ ] [to] venue" does not apply, and Congress may designate "any place" as the site for the trial. *United States* v. *Dawson*, 56 U.S. 467, 488 (1853); *Cook* v. *United States*, 138 U.S. 157, 182 (1891). See *Jones* v. *United States*, 137 U.S. 202, 211-212 (1890). Consequently, defendant's only right as to venue in the instant case was to have his trial where Congress directed.

Since nearly the inception of the Nation, Congress has directed that a defendant who commits a federal offense outside the jurisdiction of a State shall be tried in the district where he or she is first arrested or brought. See Act of April 30, 1790, 1 Stat. 114 ("The trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."). The current version of that statute, which is codified at 18 U.S.C. 3238 and entitled "Offenses not committed in any district[,]" provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The venue statute, which has remained remarkably consistent over the past 200 years, has been routinely and repeatedly applied to establish the proper

location for a trial when a defendant commits a federal offense in a territory of the United States, see, *e.g.*, *Jones*, 137 U.S. at 203, 216; *Dawson*, 56 U.S. at 484; *Harlow* v. *United States*, 301 F.2d 361, 369-370 (5th Cir.), cert. denied, 371 U.S. 814 (1962); *United States* v. *Provoo*, 215 F.2d 531, 538 (2d Cir. 1954); *Chandler* v. *United States*, 171 F.2d 921, 931-933 (lst Cir. 1948), cert. denied, 336 U.S. 918 (1949); *United States* v. *Newth*, 149 F. 302 (D.C. Wash. 1906); *United States* v. *Carr*, 25 F.Cas. 303 (D. Oregon 1875), or on land outside the United States where there is no court expressly vested with jurisdiction over offenses against the United States. See, *e.g.*, *United States* v. *Liang*, 224 F.3d 1057 (9th Cir. 2000); *United States* v. *Wharton*, 320 F.3d 526 (5th Cir.), cert. denied, 539 U.S. 916 (2003); *United States* v. *Bascope-Zurita*, 68 F.3d 1057 (8th Cir. 1995), cert. denied, 516 U.S. 1062 (1996); *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973); *United States* v. *Kampiles*, 609 F.2d 1233, 1238 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980). For example, in *Jones*, 137 U.S. at 224, 211, the Supreme Court applied an earlier version of Section 3238[6] and held that a defendant charged with committing murder on the Caribbean island of Navassa, a territory of the United States, should be tried in the "circuit court of the United States for the district of Maryland" because the offense occurred "out of the jurisdiction of any state or district" and Maryland was the judicial district to which

[6] Rev. St. § 730 directed that "the trial of all offenses committed upon the high seas, or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, into which is first brought." See *Jones*, 137 U.S. at 211 (quoting Rev. St. § 730).

defendant was "first brought." See *Bascope-Zurita*, 68 F.2d at 1063 (crime committed in Bolivia properly prosecuted in Western District of Missouri since offense "commenced outside of the borders of the United States (and by extension outside of any particular district"); *Harlow*, 301 F.3d at 369 (crime committed in territory occupied by the United States in Germany properly tried in the United States District Court for the Western District of Texas because offense was not committed in "a 'district' within the meaning of Section 3238"); *Chandler*, 171 F.2d at 932 (offense committed in occupied Germany properly prosecuted in the United States District Court in the District of Massachusetts because offense was "'out of the jurisdiction of any particular State or district' [and] * * * include[s] places on land within the jurisdiction either of the United States or of foreign powers"); *Carr*, 25 F.Cas. at 303 (crime committed in the territory of Alaska should be tried in the district court of Oregon because offense occurred "[]out [of] the jurisdiction of any particular state or district"). See also *Wynne* v. *United States*, 217 U.S. 234, 240-241 (1910) (territory of Hawaii "out of the jurisdiction of any particular state"); *United States* v. *Pace*, 314 F.3d 344, 351 (9th Cir. 2002) ("Section 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States.").

Applying precedent, it is obvious that the district court properly relied on 18 U.S.C. 3238 to conclude that the District of Hawaii was the proper venue for defendant's trial. Since the second superseding indictment charged defendant with crimes that occurred in American Samoa, or "[o]ffenses not committed in any

district," and he does not dispute that the District of Hawaii was the district to which he was "first brought" after he was arrested in American Samoa, the district court correctly concluded that the District of Hawaii was the proper venue for his trial. 18 U.S.C. 3238.

Contrary to defendant's claim (Br. 31-34, 42-43), neither *Ex Parte Bollman*, 8 U.S. 75, 135-136 (1807), or *United States* v. *Chapman*, 14 F.2d 312 (W.D. Wash. 1926), suggests that the district court wrongly relied on Section 3238 to determine the proper venue for his trial. In *Bollman*, 8 U.S. at 122, the Supreme Court held that a predecessor to Section 3238 should not dictate the location of a trial for an offense committed in the territory of Orleans because Congress, by statute, had established "a district court of the United States * * * having all the original powers and jurisdiction of a circuit court of the United States[,] * * * [including] punishment of certain crimes against the United States" in that territory. In *Chapman*, the court did not even address the applicability of Section 3238. Rather, a district court in the Western District of Washington merely granted an application for removal to allow a defendant charged with embezzlement from the United States Court for China to be tried in that court because Congress, by special act, had "created the 'United States Court for China'" and vested it "with [the] authority possessed by the * * * District Courts of the United States." *Chapman*, 14 F.2d at 313.

Bollman and *Chapman* simply demonstrate the rule that when an offense is committed in a locality, unlike American Samoa, where Congress has created a

court of the United States expressly vested with the powers of a federal district court, a defendant should be tried in that court, rather than the federal court within the district designated by 18 U.S.C. 3238. See *Ex parte Monti*, 79 F. Supp. 651, 653 (E.D.N.Y. 1948) (Neither *Bollman* or *Chapman* bars defendant charged with committing treason in Italy and Germany from being tried in the Eastern District of New York pursuant to 18 U.S.C. 3238 since those two cases both "involved situations under which there was a local tribunal, connected with the judicial system of the United States, which had power to deal with the offenses."). See also *Santos*, 623 F.2d at 77 ("hold[ing] that since the Guam District Court possesses jurisdiction over offenses committed in Guam, [federal crimes are] not 'committed . . . out of the jurisdiction of any particular . . . district' within the meaning of [18 U.S.C.] 3238" (quoting 18 U.S.C. 3238)).

Finally, defendant's argument (Br. 35-41) that crimes committed in American Samoa should not be tried in the District of Hawaii must be rejected because it would allow crimes that occur in territories where Congress has not established a "district court of the United States" to go unpunished since venue would not be proper in any federal district. See *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (rejecting construction of statute that yields "absurd and unjust result[s]") (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). Accordingly, the district court did not err when it applied Section 3238,

concluded that the District of Hawaii was the proper venue for defendant's trial, and denied defendant's Motion to Dismiss.[7]

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL BASED ON COMMENTS MADE DURING THE GOVERNMENT'S REBUTTAL ARGUMENT

Defendant contends (Br. 43-50) that the district court erred in refusing to grant a mistrial based on four comments made during government's rebuttal argument.[8] Because government counsel's remarks were proper and could not have prejudiced defendant, he is not entitled to relief.[9]

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[7] This Court should not reverse defendant's convictions even if it concludes that the district should not have applied 18 U.S.C. 3238 to determine that the District of Hawaii was the proper venue for defendant's trial. Rather, because the government alternatively claimed below that venue was proper in the District of Hawaii pursuant to 18 U.S.C. 3237, this Court should remand the case to allow the district court to resolve that claim. G.E.R. 50.

[8] As for all but one of the comments to which defendant objects, he does not provide a page number, quote the remarks, or include a transcript of the argument that he alleges is error. As a result, the government has set forth in a footnote the remarks to which it believes defendant now objects when addressing each one of his claims. In addition, because the record reflects that defendant could not have been prejudiced under any standard of review, this Court need not resolve whether certain rebuttal comments, which were not objected to during argument, but challenged the following morning at the prompting of the court, G.E.R. 845-846, should be evaluated under the plain or harmless error standard.

[9] In the court below, government counsel acknowledged, G.E.R. 844, 846, that he should not have argued that the "religious calling" of two witnesses, who were affiliated with a missionary, made it more likely that they would adhere to their oaths to tell the truth. Br. 47. Because defendant, for the reasons discussed on page 17, was not prejudiced, he was not entitled to a mistrial.

Prosecutors, during closing arguments, "have considerable leeway to strike hard blows based on * * * all reasonable inferences from the evidence" *United States* v. *Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002) (quoting *United States* v. *Henderson*, 241 F.3d 638, 652 (9th Cir. 2000), cert. denied, 532 U.S. 986 (2001)), cert. denied, 537 U.S. 1223 (2003), and alleged errors "must be reviewed in the context of the entire record." *United States* v. *Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991). The latitude afforded prosecutors is unquestionably extended during rebuttal argument since "[u]nder the 'invited reply' rule, a prosecutor may respond substantially to a defense counsel's attack in order to 'right the scale'" and neutralize improper defense comments. *United States* v. *Parker*, 991 F.2d 1493, 1498 n.1 (9th Cir.) (quoting *United States* v. *Young*, 470 U.S. 1, 12-13 (1985)), cert. denied, 510 U.S. 839 (1993). Because "[d]efense counsel, like his adversary," has a "reciprocal" "duty to abstain from [personal] attacks" on opposing counsel, *Young*, 470 U.S. at 9-10, "when defense counsel * * * attack[s] the prosecutor's credibility or the credibility of the government agents, [government counsel] is entitled to reply with rebutting language suitable to the occasion." *United States* v. *Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000) (internal quotation marks omitted), cert. denied, 532 U.S. 943 (2001). Accordingly, rebuttal comments that properly respond to a defendant's allegations of governmental impropriety are not error. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359 n. 15 (1958) (prosecutor's comment that government's witness testified truthfully was "clearly invited" by defense counsel's assertion that case was brought in bad faith and the

government's key witnesses were perjurers); *United States* v. *Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) (prosecutor's closing argument was "invited reply" to defense counsel's characterization that government's case was a "web of deception"); *United States* v. *Lopez-Alvarez*, 970 F.2d 583, 598 (9th Cir.) (government counsel's "insistence that the witnesses were trustworthy" was "acceptable" since it "merely rebutted defense counsel's repeated allegations that the prosecution had intimidated, coached, and bribed witnesses"), cert. denied, 505 U.S. 989 (1992).

A. Government Counsel Did Not Engage In Improper Vouching During Rebuttal Argument

"As a general rule, a prosecutor may not express his . . . belief in the credibility of government witnesses," or opinion as to the defendant's guilt. *United States* v. *Jackson*, 84 F.3d 1154, 1158 (9th Cir.) (quoting *United States* v. *Nocoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)), cert. denied, 519 U.S. 986 (1996). See *Molina*, 934 F.2d at 1444-1445. "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States* v. *Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (quoting *Necoechea*, 986 F.2d at 1276). "In drawing the line between acceptable statements grounded on inferences from the evidence and unacceptable statements representing an improper suggestion of personal opinion, [this Court has] been especially sensitive to the form of [the] prosecutorial

statements." *Weatherspoon*, 410 F.3d at 1147 n.3. This Court has also repeatedly recognized that comments that merely suggest that a witness "had no motive to lie," *United States* v. *Nash*, 115 F.3d 1431, 1439 (9th Cir. 1997), or "focus the jury's attention on * * * incentives [a witness] had to tell the truth" do not amount to vouching. *United States* v. *Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999), cert. denied, 531 U.S. 999 (2000).

1. Contrary to defendant's claim (Br. 43-44), the prosecutor did not "engage[] in improper vouching for the government's entire case [when he] ask[ed] the jury why the government would have gone to the trouble of bringing this case with all its attendant difficulties, especially with the distances involved."[10]

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[10] During rebuttal argument, government counsel contended:

> [They] tell[] you that the government conspired, that we made people say things they didn't want to say, that we coached the witnesses, that we acted unethically, that we suborn[ed] perjury.
>
> * * * * *
>
> First of all, why would we do it? Why do you have an office in Washington, D.C. and two years ago you say let's go down to American Samoa and pick out a few people and prosecute them? And let's create a whole world of evidence, a whole big lie. Why would you do that? I assure you, there are plenty other things on the continent there that can take up our time. So why would we do that in the first place?
>
> Okay. So we did that. Now, why would we pick these three defendants? Of all the people in American Samoa, why pick them? Is there any reason to do that? And this

(continued...)

First, government counsel's comments do not amount to vouching because they were "invited reply" to defense counsels' relentless attacks on the integrity of the government and its attorneys. See *Molina*, 934 F.2d at 1445 n.4 Defendant and his co-defendants called only five witnesses, and their main line of defense was that the government fabricated its case against them. For example, throughout closing argument, defense counsel for co-defendant Atimalala repeatedly accused the government of suborning perjury, coaching and pressuring witnesses to testify falsely, and selectively presenting evidence to deliberately give a false impression of what occurred.[11]

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[10](...continued)

> is the one thing that gets me is why would we make the commitment to travel to Hawai'i 5,000 miles away from home –
>
> G.E.R. 836-837.

[11] See, *e.g.*, G.E.R. 806 ("[If] [one witness] doesn't know [something] and [another] does, do you think it had anything to do with * * * preparation."); G.E.R. 807-808 (Do "[you] [t]hink [that witness' testimony] had anything to do with [her] prepar[ation?]"); G.E.R. 809 (The government was "[s]elective. Selective. Selective. From day one with Trinh Thi Hao"); G.E.R. 801 ("The government put * * * on * * * Mr. Moushon [youth minister], * * * when he couldn't [even] have been there."); G.E.R. 811-812 ("The government knew what Mr. Moushon was going to say. * * * They prepared it. * * * [T]hey put him up there * * * [to] selective[ly]" testify "to dirty the defendants."); G.E.R. 813 ("I [Edwards, defense counsel] suggest to you that" the government's decision to "put up [that witness] * * * was designed to get you to infer something which isn't correct. Deliberate. Selective."); G.E.R. 814 ("So you know [Moossy, the prosecutor] prepared [Bai Hui Guo] and you know [Moossy] prepared [Le Bich Thuy].); G.E.R. 815 ("[I]t

(continued...)

Defendant's counsel and counsel for co-defendant Soliai also argued that the government's case could not be believed due to the unethical conduct of the government.[12]

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[11](...continued)
doesn't fit. It's all propaganda."); G.E.R. 817 ("[t]he fact is Nu'uuli was put up there to tell * * * lies about March 29 * * * the things he said were bald-faced lies, and you know it"); G.E.R. 818 ("You heard about [Save's, security guard's] preparation * * * [and] I'd submit that you can infer, it doesn't take that long to prepare a witness to testify [as to] the truth."); G.E.R. 819 (Save "was put up there to say the same lie three times."); G.E.R. 820 ("Save['s] [testimony is] * * * a lie."); G.E.R. 821 ("You think [Save] had any help * * * the night before when he's preparing for his testimony?"); G.E.R. 822 (Save "work[ed] with the government day in, day out day in, day out, night and day, until he testified here, and * * * didn't tell the truth here."); G.E.R. 823-824 ("[Y]ou can infer how [the testimony of Pham Thi Minh Tam and Le Bich Thuy] became closer during the lunch hour[,]" those two witnesses had "conflicting stories that somehow or other, [the government] magically * * * got corrected during the lunch hour"); G.E.R. 826 ("[T]his became a federal case [once] * * * [a] civil rights specialist in Washington" became involved and, that is how "the evidence you hear[ ] from this stand c[a]me to be."); G.E.R. 827 ("Justice is not served by false and misleading evidence. Our system demands more. * * * You watched time and again the story line adapt and change, even during lunch, or after a recess."); G.E.R. 827 (Le Bich Thuy "met with Moossy about those [documents] before she was cross-examined about them"); G.E.R. 828 ("You watch Le Bich Thuy say one thing, then Pham Thi Minh Tam another, and then another after lunch."); G.E.R. 829 (Nu'uuli "lied so smoothly, so readily, so easily, and so completely about everything that happened after the government began to lean on him with threatened charges that it almost was a relief."); G.E.R. 831 ("[You] might want to consider how the government and their witnesses work[ed] together. * * * Well, you ought to consider how their conduct meshed throughout this case on the witness stand. And, hopefully, you'll send a message that you insist on the truth to the Department Justice and the United States.").

[12] G.E.R. 797 ("The government had opportunity after opportunity after opportunity to tune [the witnesses] up and put them on the witness stand."); G.E.R. 802 (The "government bought and paid for [Nu'uuli] who's cooperating with the government, pled guilty, [and is] up [t]here on cooperation."); G.E.R. 803 ("You think [the government] asked that question by mistake? Nothing's done by

(continued...)

The district court correctly recognized that government counsel was entitled to respond to defense counsels' accusations during rebuttal argument:

> [Defense counsel] clearly accused [the government] of meeting with [witnesses], shaping their testimony, getting them to change their testimony, * * * and kind of bullied these people until they gave the answers these attorneys wanted for their own[.] * * * [T]he government doesn't just have to sit there and go, "I guess we can't say anything." The government can come back and say, "Excuse me? Where's the evidence that anyone on our side of the fence asked anybody to lie or tried to get them to perjure themselves. I mean can you guys think of any motive for us to do it." I think that's [a] fair response.

G.E.R. 847-848. See also G.E.R. 841 (explaining that the prosecutor was "entitled to respond" to defense accusations that "witnesses were coached * * * and [the government] led them to tell lies"). Since the prosecutor's remarks did no more than rebut defense counsels' unyielding attacks on the government and its counsel, they were proper under the "invited reply" doctrine. For example, this Court, in *United States* v. *McChristian*, 47 F.3d 1499, 1506 (9th Cir. 1995), found that the prosecutor's comments that "I take it very seriously in representing my client, the United States, that I will not allow perjured testimony from the stand * * * from any witness. I called witnesses and everyone - I have told you that we live and we die by the truth here" was "a fair response to the defense's closing argument." See

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[12](...continued)
mistake. Not with prepared witnesses."); G.E.R. 804 ("The government has chosen selective information, selective testimony * * * [a]nd I believe that the case the government has tried to present to you * * * highlights this very problem."); G.E.R. 805 (co-counsel "talked about * * * [the] many meetings [Bui Thi Thuy] [had] with the government in preparation for her testimony").

United States v. *Rivera*, 22 F.3d 430, 438 (2d Cir. 1994) (government's response that witness "'was not playing a game up there,' [that she] 'did whatever she could to tell the truth[,]' [and] that '[s]he had the demeanor of a person who told the truth'" was proper in light of defense counsel's accusation that witness "was scripted[,]" met with the prosecutor "a hundred to two hundred times[,]" and was "not called * * * as a grand jury witness because [the government] did not like the way her testimony would have emerged at that time and needed time to have it changed").

The prosecutor's remarks also were proper because they did not amount to vouching. Government counsel did not assure the jury that its witnesses were telling the truth. Nor did he provide the jury with any new information when he commented on details of the government's investigation. Indeed, counsel for co-defendant Atimalala, during his closing argument, maintained, G.E.R. 826, that defendant's conduct became a "federal case" only after a "civil rights specialist from Washington, [D.C.]" got involved; defendant's counsel, during his opening statement, G.E.R. 76, held up a map and pointed out that "Washington, D.C., * * * where the Civil Rights Division is," is "way over here" and "Hawaii, where we are right now," is here; and FBI Agent Charles Beckwith testified that the federal investigation of defendant's conduct at Daewoosa was initiated in February 2001, or 23 months before. G.E.R. 172.

Moreover, defendant mischaracterizes the prosecutor's remarks when he contends (Br. 44) that they were designed to demonstrate that the government's

case "was * * * meritorious." The morning after rebuttal argument, the prosecutor explained the purpose of his comments:

> The[] [defense] theory was [that] the government had put together a conspiracy and caused people to come into the courtroom and lie to them. And I was asking the questions to lead up to the questions that I asked about travel, about the length of the investigation, does it seem reasonable to you that the government would invest that amount of time in such a cockamamie idea. That's not vouching. That's simply asking the jury to see whether or not the defense theory is reasonable.

G.E.R. 847-848. Because the record establishes that the prosecutor's remarks were not intended to bolster the credibility of the government's witnesses, but merely to take issue with defendants' claim that government's case was fabricated, they did not amount to vouching. See *United States* v. *Leon-Reyes*, 177 F.3d 816, 822-823 (9th Cir. 1999) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.") (quoting *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974)). Further, since it is permissible for the government to challenge the defense theory and explain the reasons why it should be rejected during argument, the prosecutor, here, clearly was entitled to refute defendants' claim of government misconduct and suggest that the trial team had no motive to engage in the burdensome conduct that would have been required to falsify the evidence as alleged. See, *e.g.*, *Daas*, 198 U.S. at 1178-1179 (prosecutor's comments explaining witness's incentives to tell the truth "fair comment" on the evidence);

United States v. *Sarno*, 73 F.3d 1470, 1497 (9th Cir. 1995) (prosecutor's comment, "There is no reason for [witness] to make this up. You heard him, he came to the FBI with this information." "does not qualify as vouching" because it "merely noted that [witness] had no incentive to lie and that he had volunteered his information without any prompting by the Government"), cert. denied, 518 U.S. 1020 (1996); *United States* v. *Lore*, 430 F.3d 190, 212 (3d Cir. 2005) (prosecutor's "rhetorical questions implying that he would not suborn perjury * * * did not constitute improper vouching"). But see *United States* v. *Sarkisian*, 197 F.3d 966, 989-990 (9th Cir. 1999) (prosecutor's comment, "'do you really think Mr. Bender (the other prosecutor) or myself would have such a conversation with a witness?' * * * was vouching"), cert. denied, 530 U.S. 1220 (2000).

Finally, to conclude that government counsel's remarks were improper would deny the prosecution a legitimate tool of advocacy that was particularly justified given the nature and degree of defense counsels' sustained and improper attacks on the government. Accordingly, when viewed in the context of the entire case, government counsel's rebuttal remarks were clearly proper. See, *e.g.*, *United States* v. *Ponce*, 51 F.3d 820 (9th Cir. 1995) (prosecutor's rhetorical question, "Did [a principal government witness] lie to you here? No, ladies and gentlemen. He didn't." when "review[ed] * * * [i]n context," did not amount to vouching); *Parker*, 991 F.2d at 1499 (government's comments in "the context [that] reasonable jurors would have understood" them, did not constitute vouching).

2. The prosecutor's reference (Br. 50) during rebuttal argument to "his more

than 25 years experience as a trial attorney" did not amount to vouching and was not error. First, contrary to defendant's suggestion, it was counsel for co-defendant Atimalala, not the government, who brought up the prosecutor's experience. Twice during argument, counsel for co-defendant Atimalala, implied that government counsel unfairly relied on his experience to disadvantage defendants.[13] See G.E.R. 838-839 (district court finding that defense counsel's twice telling the jury that the prosecutor "[had] been around the block" suggested that "he's an old man * * * knows every trick in the book, * * * pulled every trick in the book and [you should]n't be fooled by him"). The prosecutor merely responded to co-counsel's comments defensively and self-critically, stating that he had "been a trial attorney for over 25 years, * * * developed a pretty tough hide," and criticized "by a lot better attorneys than [defendant's counsel], * * * [s]ome of [whom] are federal judges." G.E.R. 835-836. Accordingly, because government counsel's remark about his experience did not bolster his credibility, or the reliability of the

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[13] Defense counsel argued "Nu'uuli, of course, is examined by David Allred. He's *been around the block*, okay. This is not intended as an insult, but he's a *seasoned* lawyer." G.E.R. 816 (emphasis added). Defense counsel also argued:

> You watched Nu'uuli. This is important. He lied so smoothly, so readily, so easily, and so completely about everything that happened after the government began to lean on him with threatened charges that it almost was a relief. * * * But Allred has *been around the block*. Smart guy. He had him admit all these lies in direct.

G.E.R. 829-830 (emphasis added).

government's case and, as the district court correctly found, G.E.R. 839, was a "legitimate" and "fair response to comments by [defense] counsel[,]" it was proper.

B. Government Counsel Did Not Improperly Invoke The "Golden Rule" During Rebuttal Argument

Defendant contends (Br. 48) that "government counsel clearly violated the 'Golden Rule' by asking the jurors to put themselves in the places of the Vietnamese and Chinese complainants in evaluating whether or not they were truthful in their testimony."[14] Defendant misperceives the Rule and mischaracterizes the record.

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[14] The prosecutor argued:

> Well, you also heard the questions that [defendant's] counsel asked. You heard the use of double negatives. You heard his repetitious asking the same questions over and over again. You heard cross-examination that lasted for hours, that lasted for sometimes days. And I ask you, were you surprised that any of these witnesses who don't speak English said "I don't know" or "I don't remember" or "I'm not sure" with that kind of cross-examination.
>
> Ask yourself what would happen if you were being asked questions about something that had happened months ago in a different language? Does it make sense that it's not evidence that you're trying to avoid answering the question. It's not evidence that you're trying to lie about what happened. If anything, it's evidence that you're trying to do the best you can to understand the question so you can tell the truth.

G.E.R. 832-833.

The Golden Rule prohibits counsel from asking the jury to put itself in the place of a defendant or victim in order to ensure that the jury remains neutral and does not "decide the case on the basis of personal interest and bias rather than on the evidence." *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978), cert. denied, 446 U.S. 956 (1980). See *United States* v. *Teslim*, 869 F.2d 316, 327-328 (7th Cir. 1989). First, defendant should hardly complain since his counsel twice asked the jurors to place themselves in the position of the victims.[15]

In contrast, government counsel's remarks were proper. The prosecutor did not appeal to the passion, prejudice, or sympathy of the jurors. Rather, his comments amounted to nothing more than a suggestion that the jury use its common sense to determine whether witnesses, who testified through an interpreter, deliberately falsified their testimony and intentionally provided misleading information as defense counsel alleged, or actually had difficulty understanding and answering some of the questions. Accordingly, government counsel's remarks were proper.

C. Defendant Was Not Entitled To A Mistrial Because The Alleged Errors Could Not Have Prejudiced Defendant

In any event, the district court clearly did not abuse its discretion in denying

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[15] Defense counsel argued, "And I ask you, when you go back to the jury room, remember how you felt when they were on the witness stand being subject to cross-examination. Don't forget that." G.E.R. 796. Defense counsel also argued, "They stand in front of the police car so it couldn't get out. That takes a lot of guts. How many of you people have ever done anything like that?" G.E.R. 800-801.

defendant's motion for a mistrial since the prosecutor's rebuttal comments, considered individually or together, were harmless.

First, it is inconceivable that the challenged remarks could have influenced the jury. The comments were brief isolated remarks, added little to the government's case, and occurred during a trial that spanned nearly four months and closing arguments that lasted more than ten hours. See *United States* v. *Koon*, 34 F.3d 1416, 1145 (9th Cir. 1994).

Second, it is well-established that "ordinarily, cautionary instructions or prompt and effective actions by the trial court are sufficient to cure the effects of improper comments." *United States* v. *Nelson*, 137 F.3d 1094, 1106 (9th Cir.) (quoting *McChristian*, 47 F.3d at 1507-1508), cert. denied, 525 U.S. 901 (1998). The court repeatedly reminded the jury, both before and after closing arguments, that the arguments of counsel were not evidence. See E.R. 90, 106. The court also sustained defense counsel's objections to the two remarks he challenged and immediately admonished the jury to disregard them. See G.E.R. 834, 837. In fact, defense counsel conceded below that as to the prosecutor's comment about the probability that the missionary witnesses adhered to their oath to testify truthfully, nothing "more than that" -- including a cautionary instruction -- was necessary since the court had sustained his objection and directed the jury to disregard the comment. G.E.R. 842. G.E.R. 840 (Court noting that its "inclination" that sustaining defense objection and admonishing jury to disregard remark was "sufficient").

Moreover, the morning after rebuttal argument and immediately before the jury began its deliberations, the district court gave a special two-page type-written cautionary instruction that identified and summarized *each* of the remarks to which defendant now objects, with the exception of government counsel's comments about his experience. E.R. 105-106. The court admonished the jury five times in four different ways that the identified comments and/or arguments must be "disregard[ed]," "put out of your mind[,]" "not consider[ed] * * * for any purpose whatsoever during your deliberations[,]" and not be "allowe[ed] [to] influence or affect * * * any decision as to whether * * * defendant is guilty or not guilty of any count." E.R. 105-106. Because the court correctly found that none of "the comments by the government * * * rise to the level of unfairness that cannot be cured by an instruction," the record establishes that defendant was not entitled to a mistrial. G.E.R. 849.

Further, defendant could not have been prejudiced by the challenged remarks since the government's evidence, was not only sufficient, as defendant concedes (Br. 13), but truly overwhelming. The government presented 36 witnesses, including 18 foreign workers and a company manager from Daewoosa, who pled guilty to conspiracy to deny workers the right to be free from involuntary servitude in violation of 18 U.S.C. 241. Several witnesses testified as to each of the counts for which defendant was convicted so that all evidence necessary to convict was corroborated, and usually by more than one witness.

The district court also correctly denied defendant's motion for a mistrial

since, as previously noted, *supra*, all the objected to remarks, with the exception of a comment about the missionary witnesses, were invited error. *United States* v. *de Cruz*, 82 F.3d 856, 863 (9th Cir. 1996) (prosecutor's alleged vouching held harmless in part because it was invited by defense counsel). The prosecutor's brief remark about the missionary witnesses was nonetheless harmless since their testimony was not crucial to the government's case, was corroborated by a civilian and a police officer, and was undoubtedly disregarded by the jury in light of the court's special curative instructions.

Finally, it is obvious that the rebuttal argument did not prevent the jury from impartially weighing the evidence. It acquitted defendant of four counts and his two co-defendants of all counts. Accordingly, because the record affirmatively establishes that defendant was not prejudiced by the challenged remarks, the district court did not abuse its discretion in denying his motion for a mistrial.

III

THE DISTRICT COURT WAS NOT REQUIRED TO REFER TO AMERICAN SAMOAN LAW WHEN IT INSTRUCTED THE JURY

Without citation to supporting authority, defendant argues (Br. 51) that because he "was charged with misusing American Samoa[n] law by having recalcitrant workers deported or threatening to deport them[,] * * * the jury [should have been] told what American Samoan law" he violated. Defendant's claim mischaracterizes the charges and is contradicted by Supreme Court precedent.

First, defendant wrongly maintains (Br. 51) that he "was charged with misusing American Samoa[n] law." Count 1 of the indictment charged defendant with conspiracy to deny his workers "the free exercise and enjoyment of the rights and privileges *secured to them by the Constitution and laws of the United States*, that is, the right to be free from involuntary servitude, as *secured by the Thirteenth Amendment of the United States Constitution*" in violation of 18 U.S.C. 241 (E.R. 26-27 (emphasis added). Counts 2 through 18 charged defendant with holding 17 victims to a condition of involuntary servitude in violation of 18 U.S.C. 1584. E.R. 34-36. Accordingly, because the counts alleged that defendant either conspired to, or violated rights guaranteed by the Thirteenth Amendment, not American Samoan law, the latter was irrelevant to these charges.

Defendant's claim also fails because he need not have "[mis]used any law" to have been convicted of Counts 1 through 18. It is well-established that the Thirteenth Amendment's prohibition against involuntary servitude is "self-executing without any ancillary legislation." *United States* v. *Kozminski*, 487 U.S. 931, 942 (1988) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Consequently, the jury need not have been told anything about American Samoan law to have found defendant guilty of either holding his workers to a condition of involuntary servitude or conspiring to deprive them of their constitutional right to be free from involuntary servitude.

Moreover, defendant's contention reflects a misperception as to the definition of "involuntary servitude." The Supreme Court has explained, "[f]or

purposes of criminal prosecution under § 241 or § 1584, the term 'involuntary servitude' * * * means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, *or by the use or threat of coercion through law or the legal process*." *Kozminski*, 487 U.S. at 931 (emphasis added). As to the latter type of coercion, a defendant's "threatening * * * an immigrant with deportation [may] constitute * * * legal coercion that induces involuntary servitude." *Id.* at 948.

Consistent with *Kozminski*, the district court did not err in refusing to instruct the jury as to American Samoan immigration law. G.E.R. 795. See *United States* v. *Veerapol*, 312 F.3d 1128 (9th Cir. 2002) (applying *Kozminski* and upholding court's instructions as to "involuntary servitude"), cert. denied, 538 U.S. 981 (2003). As the district court repeatedly explained, G.E.R. 781-794; E.R. 48-50, 53, 55, 58-59, since the issue before the jury was not whether defendant could lawfully deport his workers, but whether his workers were compelled into involuntary servitude as a result of his threatening them with deportation, it makes no difference what American Samoa law says about the process of deportation.

Finally, to the extent that defendant suggests that the jury should have been instructed about American Samoan law because it somehow justified his conduct, he is wrong. Defendant has not cited any provision of the American Samoan Code that even implies that it is lawful to compel workers to labor by "threatening to deport them." Br. 51-52. Indeed, defense counsel conceded below that American Samoan law does not provide a defense to the charges. G.E.R. 782, 784. Even if it

did, the law would be void since territorial law, as noted at pages 22-23, *supra*, cannot conflict with federal law. Accordingly, the district court was not obligated to instruct the jury as to American Samoan law.

IV

THE DISTRICT COURT WAS AUTHORIZED TO IMPOSE CONSECUTIVE SENTENCES PURSUANT TO 18 U.S.C. 3584

Relying on *United States* v. *Booker*, 543 U.S. 220 (2005), defendant contends (Br. 52-57) that the district court was not entitled to impose consecutive sentences pursuant to 18 U.S.C. 3584 because the indictment did not allege and the jury did not find the facts to warrant such punishment. This Court squarely rejected the identical claim in *United States* v. *Fifield*, 432 F.3d 1056 (9th Cir. 2005), cert. denied, No. 05-10205, 2006 WL 901022 (May 1, 2006).

In *Booker*, 543 U.S. at 230-244, the Supreme Court held that a defendant's Sixth Amendment rights were violated when a sentence imposed under the United States Sentencing Guidelines was increased based upon a district court's finding of fact that was not a prior conviction, not found by the jury, or admitted by the defendant. Applying *Booker*, this Court held that the Sixth Amendment does not require that an enhanced sentence "be pled and proven to a jury" when the Guidelines are merely advisory. *Fifield*, 432 F.3d at 1066. It explained:

> "[W]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." Furthermore, *Booker* held that "the selection of particular sentences in response to differing sets of facts" under an advisory Guidelines regime "would not implicate the Sixth Amendment."

Ibid. (quoting *Booker*, 543 U.S. at 221, 233); *Booker*, 543 U.S. at 233 ("When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

In addition, *Booker* aside, this Court in *Fifield*, 432 F.3d at 1066-1067, ruled that imposition of consecutive sentences pursuant to Section 3584 could not violate the Sixth Amendment because a sentencing judge "need not find any particular fact to impose" such punishment. Consequently, defendant's claim that a jury must have found certain facts for the court below to have imposed consecutive sentences pursuant to Section 3584 for certain counts is wrong and contrary to this Court's precedent.

Finally, the indictment, along with the United States Code, provided defendant with clear notice that he could receive consecutive sentences. The indictment charged defendant with 22 separate offenses. The United States Code informed defendant of the maximum potential penalty for each count and that consecutive sentences, pursuant to Section 3584, could be imposed. Accordingly, defendant received adequate warning of his potential punishment and that he could receive consecutive sentences for his crimes. See *United States* v. *Mix*, 442 F.3d 1191, 1198 (9th Cir. 2006).

CONCLUSION

Wherefore, this Court should affirm defendant's convictions and sentence.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellee is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 13,305 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: May 31, 2006

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, as well as an electronic copy by electronic mail, to counsel of record:

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