# 05-3346-CR

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

GERALD T. SKINNER,

Defendant

SYLVESTRE ACOSTA, also known as
SLY ACOSTA, PAUL SKINNER,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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05-3346

UNITED STATES OF AMERICA,

Appellee

v.

GERALD T. SKINNER,

Defendant

SYLVESTRE ACOSTA, also known as
SLY ACOSTA, PAUL SKINNER,

Defendants-Appellants

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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BRIEF FOR THE UNITED STATES AS APPELLEE

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**JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of conviction, following a jury trial, entered by the United States District Court (Arcara, D.J.) for the Western District of New York. The United States charged defendants with nine counts of violating four federal statutes, 18 U.S.C. 241, 18 U.S.C. 242, 18 U.S.C. 924(c), and 18

U.S.C. 2. S. A-20-26.[1] Defendant Skinner was convicted on three counts: one misdemeanor violation of 18 U.S.C. 242, and two felony violations – one each for violating 18 U.S.C. 241 and 18 U.S.C. 924(c). Defendant Acosta was convicted on seven counts: one misdemeanor violation of 18 U.S.C. 242, two felony violations of 18 U.S.C. 242, one violation of 18 U.S.C. 241, and three violations of 18 U.S.C. 924(c). The district court sentenced defendants and entered judgment against Acosta on June 8, 2005, A. A-1711-1716, and Skinner on June 27, 2005, S. A-1711-1720. Each defendant filed a timely notice of appeal. A. A-1717-1718; S. A-1723. The district court had subject matter jurisdiction under 18 U.S.C. 3231. This Court has appellate jurisdiction under 28 U.S.C. 1291.[2]

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[1] Citations to "S. A-__" refer to pages in the Appendix for defendant-appellant Paul Skinner. Citations to "A. A-__" refer to pages in the Appendix for defendant-appellant Acosta. Citations to "R. __" refer to documents in the record as shown in the index to the district court's docket entries included in the Appendix (S. A.-1-19). Citations to "Skinner's Br. __" refer to pages in defendant-appellant Skinner's opening brief. Citations to "Acosta's Br. __" refer to pages in defendant-appellant Acosta's opening brief.

[2] Defendants erroneously state that this Court's jurisdiction arises under 18 U.S.C. 3731. Section 3731 of Title 18, United States Code, grants appellate courts jurisdiction over appeals *brought by the United States*. 18 U.S.C. 3731.

## GOVERNMENT'S RE-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether sufficient evidence supports defendants' convictions.

2. Whether the indictment properly alleges violations of 18 U.S.C. 242.

3. Whether charges against Acosta under 18 U.S.C. 924(c) for using or carrying a firearm during the commission of an eight-year conspiracy to violate rights, and using or carrying a firearm during two distinct substantive civil rights violations, exposed him to double jeopardy.

4. Whether the district court properly instructed the jury that defendants could be held liable for the reasonable and foreseeable actions of their co-conspirators.

5. Whether the district court's instruction on "use" for purposes of 18 U.S.C. 242 was plainly erroneous and prejudicial.

6. Whether 18 U.S.C. 242 is a crime of violence for purposes of 18 U.S.C. 924(c).

7. Whether 18 U.S.C. 241 is a crime of violence for purposes of 18 U.S.C. 924(c).

8. Whether the defendants received a fair trial within the meaning of the Sixth Amendment.

## STATEMENT OF THE CASE

On October 30, 2003, a federal grand jury returned a 14-count Second Superseding Indictment alleging various civil rights and firearms violations against

defendants Paul Skinner, Sylvestre Acosta, and Gerald Skinner,[3] all of whom were, at relevant times, employed as officers by the Buffalo Police Department. Counts I-III alleged that Acosta and another executed search warrants based on false information and stole property from private individuals, thereby willfully depriving those individuals of their Fourth Amendment right to be free from unreasonable searches and seizures, and of their Fourteenth Amendment right not to be deprived of property without due process of law, in violation of 18 U.S.C. 242 and 2.[4] S. A-20-23. Count IV alleged that Skinner stole property from a private individual, thereby willfully depriving him of his Fourth Amendment right to be free from unreasonable searches and seizures, and of his Fourteenth Amendment right not to be deprived of property without due process of law, in violation of 18 U.S.C. 242 and 2. S. A-23-24. Counts II, III and IV charged that defendants used a dangerous

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[3] Gerald Skinner entered a plea of guilty to Count VIII of the Second Superseding Indictment, alleging a violation of 18 U.S.C. 241 (conspiracy against rights), and was sentenced to 30 months' imprisonment. Following his plea, the government redacted the Second Superseding Indictment, dismissed several counts, and renumbered the remaining counts as to Paul Skinner and Sylvestre Acosta. All further references to the counts set forth in the indictment are to the redacted, renumbered indictment reproduced at S. A-20-26.

[4] 18 U.S.C. 2 makes it a federal offense to aid, abet, counsel, command, induce or procure an offense against the United States, 18 U.S.C. 2(a), or to willfully cause an act to be done which if directly performed by the defendant or another would be an offense, 18 U.S.C. 2(b).

weapon while committing the underlying civil rights violations. Count V alleged that Skinner, Acosta, and others conspired to deprive individuals of their Fourth and Fourteenth Amendment rights, in violation of 18 U.S.C. 241. S. A-24. Counts VI through IX alleged that the defendants violated 18 U.S.C. 924(c)[5] and 2 in relation to the civil rights violations alleged in Counts II through V. S. A-25-26.

Defendants' trial began on November 30, 2004. S. A-27. Following the close of all evidence, Skinner and Acosta moved for judgments of acquittal on the ground that there was insufficient proof to support convictions under the charged counts. S. A-1502-1509. The district court denied their motions. S. A-1515-1517.

The district court instructed the jury that defendants could be found guilty under several theories of liability, as well as of lesser-included offenses, where applicable. Specifically, the district court instructed the jury with respect to Counts I, II, III, IV, VI, VII, VIII and IX that Skinner and Acosta could be found guilty of their respective 18 U.S.C. 242 and 924(c) counts as principals, S. A-1649-1662, 1677-1682, or as aiders and abettors, S. A-1663-1666, 1682. The district court also instructed the jury that defendants could be found guilty of their respective 18

[5] 18 U.S.C. 924(c) makes it a federal offense to use or carry a firearm during and in relation to a crime of violence, or to possess a firearm in furtherance of a crime of violence. 18 U.S.C. 924(c). Count VI corresponds to Count II; Count VII corresponds to Count III; Count VIII corresponds to Count IV; Count IX corresponds to Count V.

U.S.C. 242 counts and the firearm charge in Count IX under a *Pinkerton* theory of liability. S. A-1675-1676, 1678. The district court also instructed the jury that defendants could be found guilty of the lesser included offenses in Counts II through IV of deprivation of rights under color of law without the use of a dangerous weapon. S. A-1662-1663.

The jury convicted Skinner of Counts V and IX as charged. He was convicted of the lesser included offense of deprivation of rights without the use of a dangerous weapon (a misdemeanor) in Count IV, and was acquitted of Count VIII. S. A-1711-1720. Acosta was convicted of Counts I, II, III, V, VI, VII, and IX as charged. A. A-1711-1718. Both defendants moved for judgments of acquittal. R. 172; R. 173; see Fed. R. Crim. P. 29(c). The district court denied both motions. R. 185. This appeal followed.

## STATEMENT OF FACTS

Viewed in the light most favorable to the government, *United States* v. *LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002), the evidence presented at trial established the following facts.

### *1. General Background Of Conspiracy*

Toward the end of 1989, defendants Paul Skinner and Sly Acosta, along with several other Buffalo Police Department officers, including Rene Gil,

defendant Skinner's brother Gerald Skinner, Bobby Hill and Andy Ortiz,[6] were assigned to the Maryland Street Detail (MSD) – a unit formed to combat drug traffic in the lower west side of Buffalo. S. A-699-700. Members of the MSD were instructed by their lieutenant to take "whatever means necessary" to accomplish their objective. S. A-703. According to Gil, members of the MSD would routinely "toss" suspects – that is, search them in violation of their constitutional rights – a tactic that MSD members, including defendants, discussed with one another on various social occasions. S. A-704. This tactic continued after the MSD became the Street Crime Unit and then the Street Narcotic Attack Program (SNAP) around 1993 or 1994, because doing so was easier than conducting a full investigation. S. A-703-705, 710, 715. On at least one known occasion, a member of the MSD planted drugs on a suspect. S. A-706-709. Acosta explained to Gil that sometimes planting drugs was what it took to get the job done. S. A-707-709.

In addition to "tossing" suspects and planting evidence, the MSD/SNAP

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[6] Bobby Hill and Darnyl Parker (unindicted co-conspirators here) were indicted with other officers in 2000 in relation to a separate conspiracy. Hill was convicted of 18 U.S.C. 641; Parker was convicted of 641 and other charges. See generally, *United States* v. *Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001). Ortiz (also an unindicted co-conspirator here) pleaded guilty in 2005 to an unrelated misdemeanor offense.

officers stole money from suspected drug dealers. S. A-711-712. For example, around 1993 or 1994, both defendants, together with various of their co-conspirators (*i.e.*, Gil, Ortiz, Gerald Skinner) and other members of the unit, followed up on information that a person at a motel was in possession of drugs, money and a gun. S. A-716. Defendants and others went to the motel to investigate even though they did not have a search warrant. S. A-716. Defendant Skinner knocked on the door of the motel room. S. A-717. When the occupant opened the door, the officers pushed their way into the room and subdued the suspect. S. A-716-717. After the suspect was in custody, Ortiz grabbed a pack of money from a bundle located on the nightstand and put it in his pocket. S. A-717. Gil also took some of the money collected at the scene. S. A-717-719.

Acosta took money directly from suspects. In the mid-1990s, Acosta arrived on the scene of a traffic stop of Carmelo Rosa, a home re-modeler who was on his way to purchase building supplies. S. A-293-296. Rosa had been pulled over by officer Santiago. S. A-297. When Acosta arrived on the scene, he ordered Rosa out of the vehicle, searched his pockets, and removed $1500. S. A-296-300. Acosta put the money in his own pocket, and told Rosa that if he wanted his money back, he would have to come to the police station and bring a receipt. S. A-301. Acosta never provided Rosa with a receipt for the money, S. A-304, and when

Rosa came to the station, Acosta told him he would need a lawyer to get his money back, S. A-304-305. Following an exchange of words, Acosta laughed and walked away. S. A-305. Rosa's money was never returned to him. S. A-306. Officer Santiago testified that shortly before trial, Acosta admitted he had taken $1500 from Rosa during the traffic stop, but suggested that he had given it to Santiago to report as seized. S. A-324-327. Santiago testified that he did not receive money from Acosta, S. A-325-326, and felt that Acosta was "basically trying to blame [him] for something that [he] didn't do," S. A-327.

Members of the SNAP unit, including the defendants, Gil, Gerald Skinner, and Hill, were eventually absorbed into the BPD's Narcotics Division.[7] S. A-719. There the "shortcuts" continued, including falsifying information in search warrant applications.[8] S. A-760. On at least five occasions during May and June of 1999, defendant Skinner and his partner, Hill, applied for, and received, search warrants

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[7] Detective David Rodriguez was also a member of the Narcotics Division and was an unindicted co-conspirator of defendants Skinner and Acosta in the conspiracy at issue here. Rodriguez was indicted with Parker and Hill in a separate conspiracy in 2000 for violating, among other statutes, 18 U.S.C. 241 and 641; he was acquitted of all charges.

[8] An officer could apply for a search warrant without having the informant appear before a judge if the information contained in the application was provided by an informant who had previously provided reliable information on two occasions. See generally S. A-110-111, 128-130, 132-133.

based on applications that attributed information to reliable informants, when those informants had not provided the information. S. A-129-130, 133-135, 155-156, 161-165, 168-172. Defendant Skinner attempted to cover up this practice by signing fund disbursement forms (P-173s) indicating that money was paid to informants for controlled drug purchases or as compensation for information, when in fact either different informants provided the information for those locations, see, *e.g.*, S. A-244-245, or no information was provided at all, see generally S. A-520-528.

Gerald Skinner and Gil did the same by signing P-173 forms indicating that an informant, Roland Adside, provided information relating to two locations (*i.e.*, 395 West Delavan, 120 Potomac) when, in fact, Adside had not provided information for those locations. S. A-528-530. Rather, the officers instructed Adside to sign blank P-173 forms. S. A-530. Adside also cooperated "[q]uite a bit of times" with both defendant Skinner and Acosta. S. A-519. After the FBI began investigating members of the BPD, Adside was picked up by Gerald Skinner and taken to an old train station where defendant Skinner and another officer were waiting. S. A-531-533. After searching Adside, Gerald Skinner warned him that he would "fuck [him] up" if Adside cooperated with the federal agents. S. A-533-534.

Defendants and their co-conspirators met in various places (*e.g.*, bars, the narcotics office) and discussed the practice of using false information to obtain search warrants, as well as stealing money during the execution of search warrants. S. A-759-761. These meetings began as far back as the SNAP unit and continued until at least March or April of 1998. S. A-760, 762. Although officers would not steal every time they executed a warrant, they would do it under the "right circumstances," meaning if the defendants, Gil, Gerald Skinner, Hill and Ortiz were present. S. A-761. The possibility of money being present during the execution of a search warrant increased the officers' motivation for using a "shortcut." S. A-762.

When officers executed a search warrant, there was always an officer with a shotgun out and another officer assisting the "shotgun" officer with his weapon visible and "ready to be fired." S. A-438; see also S. A-426, 872. According to several witnesses, *all* officers executing a search warrant – except those responsible for breaking down the door – had their guns drawn. S. A-872, 1022-1023, 1296-1297. Doing so, in part, made it easier to steal from the victims. S. A-872.

Near the end of 1998, after the FBI began investigating members of the BPD's Narcotics Unit, the defendants, as well as Gil, Gerald Skinner, and Hill, met

at a restaurant to discuss the ongoing investigation. S. A-763-764. All officers present agreed that "[i]f one * * * was to go to jail, that person would keep his mouth quiet and the rest of the guys would take care of this guy's family until he got out of jail." S. A-764.

*2. Johnny Reed*

On December 27, 1997, defendants, together with certain of their co-conspirators (*i.e.*, Gil, Gerald Skinner, Darnyl Parker) and others executed a search warrant at 521 Walden, the home of Johnny Reed. S. A-456, 724-726. During the course of the search, a sum of money was seized from Reed's home. S. A-457-458. According to police records, $2,226 was seized; the victim testified that thousands more were taken. S. A-457-458. Gil admitted to taking additional property that was not inventoried. S. A-726-727. After Reed was arrested, he agreed to cooperate with Gerald Skinner and provided him with a lead – the name "Bebe," which was Victor Miller's nickname. S. A-458-459, 730. When Reed failed to provide additional information, Gerald Skinner told Gil that he would "take care of it." S. A-730. A few months later, defendants and some of their co-conspirators (*i.e.*, Darnyl Parker, Gerald Skinner) stopped Reed in his vehicle. S. A-461-462. Gerald Skinner pulled Reed from his vehicle and punched him in the face while defendant Skinner stood close by. S. A-463-465. Reed was taken to an

unmarked car and placed in the backseat with Gerald Skinner and Darnyl Parker; Acosta was waiting in the front seat. S. A-466. Once there, Gerald Skinner stuck his gun in Reed's mouth and told Reed that he was messing up the investigation. S. A-467. Reed was able to exit the car after agreeing to help the officers in future drug investigations. S. A-467.

*3. 16 Center Lane (Addarich)*

On January 12, 1998, defendants, together with certain of their co-conspirators (*i.e.*, Gil, Gerald Skinner) and other members of the Narcotics Unit conducted a search of Alberto Addarich's home at 16 Center Lane. S. A-590-593, 731-733, 889-892. In preparing the warrant application, Gil falsely attributed information from one informant to another informant who was considered reliable. S. A-731-732, 758. Gil and Gerald Skinner went to Addarich's home, showed him the warrant, and proceeded to enter. S. A-733. Doing so was contrary to police procedures, which required the preparation of an operational plan,[9] as well as the presence of a supervisor and a minimum of five detectives. S. A-594. Once inside, Gerald Skinner remained in the kitchen with Addarich and his wife while Gil

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[9] An operational plan sets forth the procedures for the warrant execution and personnel assignments (*i.e.*, case officer, shotgun officer, shotgun assist, ram, pry/pick, evidence control officer, entry assist, perimeter) prior to the actual search. S. A-175, 424, 597-598.

searched. S. A-734. Gil found "a pack of money" in a box in the bedroom closet. S. A-734. He took the money (totaling $3600), exited the bedroom, and waited for other officers to arrive to conduct a more complete search. S. A-735-736. The defendants and other co-conspirators arrived and finished the search. S. A-736-737. No contraband was recovered. S. A-736. After leaving the apartment, Gil gave Gerald Skinner $1000 from the money he had stolen. S. A-737. He gave Gerald Skinner an additional $800 to give to defendant Skinner and Hill. S. A-737. Gil later met with Acosta and gave him $800. S. A-737. Addarich contacted Gil and the department's Professional Standard Division (PSD) in an attempt to recover his money; Gil repeatedly lied to Addarich and lied to the PSD to cover for the theft. S. A-737-738, 762-763, 899-904. Addarich eventually contacted the FBI. S. A-900-904.

*4. 120 Potomac (Berrios)*

On February 2, 1998, defendants, together with certain of their co-conspirators (*i.e.*, Gil, Gerald Skinner) and others conducted a search of Edgardo Berrios's home at 120 Potomac. S. A-596-599, 738-741, 933-935. In preparing the warrant application, Gil falsely attributed information from one informant to another informant who was considered reliable. S. A-739, 758-759, 836. Gil and Gerald Skinner also falsified a P-173 form indicating a $280 payment to Adside for

providing information on that location. S. A-529-530. Adside never received such payment. S. A-530, 758.

Around 10:00 or 11:00 p.m., officers kicked in Berrios's door as he sat at his kitchen table. S. A-935. As soon as officers entered his home, Gerald Skinner shot Berrios's puppy. S. A-740, 935. Another officer shot the puppy three additional times. S. A-937. Gil threw Berrios to the floor while Gerald Skinner put the shotgun to the back of his head and told him not to move. S. A-741, 838, 935-936. Gil placed him in handcuffs, searched his pockets, and removed $1000. S. A-741, 838, 935-936.

Defendants and other officers seized – and reported seizing – drugs, guns, pagers, a cell phone, and a wallet.[10] S. A-602, 742, 836-839. Gil and Acosta removed computer equipment (*i.e.*, scanner, laser printer) from Berrios's home, but did not report that equipment on a property form (P-10) as required by police procedure; indeed, they intended to steal it. S. A-742-743, 840. Defendant Skinner and other officers observed them taking the equipment from Berrios's home. S. A-840. Gil and Acosta put the equipment in the back of Gil's unmarked police vehicle, and later transferred it to Acosta's canine vehicle behind police

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[10] Drugs recovered during a search are inventoried on a laboratory request form; non-drug evidence is inventoried on a P-10 form. S. A-1036-1037.

headquarters where there was no surveillance equipment. S. A-743, 840. Once inside police headquarters, Gil divided up money he had also taken from Berrios: he gave $350 to Acosta and $250 to Gerald Skinner. S. A-741-744, 809. Unbeknownst to these officers, this transaction was recorded on a hidden surveillance camera.[11] S. A-744.

Berrios was arrested and held in custody overnight. S. A-940. When he returned to his home, he noticed a number of items missing, including his printer, scanner, cable box and cable de-scrambler. S. A-942. He was later interviewed by the FBI and shown a number of items to see if he could identify any as his. S. A-943-944. From items seized during a search of Gerald Skinner's home, Berrios recognized his cable box and cable de-scrambler. S. A-944.

*5. 395 West Delavan (Miller)*

On February 3, 1998, defendants, together with certain of their co-conspirators (*i.e.*, Gil, Gerald Skinner, Hill, Parker) and others conducted a search of Victor Miller's (a.k.a. "Bebe") home at 395 West Delavan. S. A-603-605, 748, 961, 963-965. The warrant application falsely attributed information from Johnny Reed to another informant who was considered reliable. S. A-747-748, 759, 841-

[11] After the camera was discovered, Gil falsely told his supervisor that he was paying the others back for money they had lent him. S. A-745, 1249.

842. Gil also falsified a P-173 form indicating a $500 payment to an informant, Cody Brown, for providing information on that location. S. A-759. Brown never received such payment. S. A-759.

Late in the afternoon, around 4:00 or 5:00 p.m., Miller and his family were getting ready to eat dinner when Miller heard what sounded like his door crashing in. S. A-964-965. He directed his fiancee and children to head down the back staircase. S. A-965. As Miller was attempting to jump through the back window, Detective Lawrence Sadlocha fired a warning shot into the air so that Miller would submit to police authority. S. A-604, 678, 965. Miller was taken into custody and returned to his upstairs apartment. S. A-965. Officers searched his pockets and removed about $600. S. A-970-971, 975. Officers informed Miller that they had a search warrant for the premises, and Miller told the officers where they could find drugs in the apartment. S. A-749, 966. Gil and Gerald Skinner searched under a waterbed in a bedroom; defendants were also present in that bedroom. S. A-605, 750. From under the waterbed, Gil took drugs and "bundles of money." S. A-750-751. He also observed jewelry on top of a dresser and on the headboard of the bed. S. A-752. Gil gave the drugs to Acosta, who was the evidence control officer for the search. S. A-607, 677, 752. Gil handed the money to Gerald Skinner. S. A-751. The P-10 (property form) for the search indicates a total of $1392 was seized.

S. A-753. Officers took additional money without reporting it. S. A-753. After the search, Gerald Skinner gave $1000 to Gil and told him to “take care of” Acosta. S. A-754. Gil kept $500 for himself and gave $500 to Acosta. S. A-754. Later that night, defendant Skinner approached Gil and asked for his “cut.” S. A-754. Gil told defendant Skinner to ask his brother Gerald about the money. S. A-754. Gerald Skinner later told Gil that he refused to give defendant Skinner any money because defendant Skinner had not given him any money from a seizure earlier in the week. S. A-754-755.

Miller was arrested and taken into custody. S. A-971. He returned to his apartment and noticed several items missing, including money and several pieces of jewelry. S. A-972. In particular, a ring with a jeweled lion on it was missing from his headboard. S. A-973-974. On August 28, 2001, a federal agent found a ring matching this description, along with several other rings, inside a canvas bag in Acosta’s garage. S. A-1000, 1002-1004. Miller later identified one of the rings found in Acosta’s garage as his. S. A-1487-1488.

*6. 1198 West Avenue (Toledo)*

On August 14, 2001, defendant Skinner and other officers conducted a search of John Toledo’s home at 1198 West Avenue. S. A-384-387, 1017, 1109. Skinner was the evidence control officer and was therefore responsible for taking

control of any evidence, documenting who found it where, and maintaining the chain of custody. S. A-385, 1036.

Several officers entered Toledo's home with their guns drawn and told him to get down on the floor and not to look at anybody. S. A-1109-1110. Toledo complied. S. A-1000-1111. Toledo had about 11 pounds of marijuana in a large duffel bag in the dining room and he was growing about 60-70 plants in the basement. S. A-1113. Officers removed numerous items from his home in large gym bags. S. A-1116. Also in the house were two laptop computers – one on a chair in the living room and one in a box in a bedroom. S. A-1111, 1114. Toledo heard officers arguing about who was going to get the laptop. S. A-1111. Toledo was taken into custody; upon his return home, he noticed several items missing, including his laptops, some switchblades, jewelry and money. S. A-1116, 1121. The P-10 (property form) associated with this search did not include laptop computers. S. A-436.

On August 28, 2001, the FBI searched defendant Skinner's home and seized a laptop computer, power cord, battery and an adaptor. S. A-1325-1326, 1334, 1336-1337. Also on that date, the FBI searched defendant Skinner's desk at police headquarters and seized a switchblade. S. A-1298-1299. Toledo later recognized the switchblade as his, and the laptop as being identical to the one that had been

taken from his home. S. A-1129, 1149.

Following the search, defendant Skinner told Lt. Lyon that the FBI had recovered a laptop from his home that had been seized during the raid at 1198 West Avenue. S. A-1055-1056. Defendant Skinner asked Lt. Lyon what he should do; Lyon instructed him to draft a memo explaining what happened. S. A-1056. In that memo, defendant Skinner stated that the laptop was seized as part of an ongoing investigation involving Toledo and drug trafficking between Buffalo and Canada. S. A-1057-1058, 1096-1097. Prior to his discussion with defendant Skinner, Lt. Lyon, notwithstanding his presence at the search of 1198 West Avenue, S. A-1021, 1023, his responsibility for photographing all evidence seized during that search, S. A-1024, and his position as Skinner's superior officer, was unaware that a laptop had been seized at 1198 West Avenue, S. A-1103, and was unaware of an investigation involving Canada, S. A-1058-1059. Lyon was also unaware of anyone within the department giving Skinner permission to take a computer seized from 1198 West Avenue to his home. S. A-1073.

A few days after the search of his house, defendant Skinner approached the captain of the Narcotics Squad, Mark Morgan, and told him a computer was seized from his home, and that such computer was originally seized by the Narcotics Unit during a search. S. A-1369-1370. Defendant Skinner explained that he was in

possession of the computer because he believed it contained email relating to drug trafficking in Canada, and because the computer required certain equipment for operation that the department did not have, but he did. S. A-1370. The captain was unaware that a computer had been seized during the search on West Avenue, was unaware of an investigation involving Canada, and had not given Skinner permission to take a laptop home. S. A-1372. Defendant Skinner did not inform Captain Morgan that he had made any purchases relating to the laptop, nor did he request any reimbursement of funds. S. A-1371. Circuit City records indicated that defendant Skinner purchased a laptop briefcase, power adaptor and power inverter on August 22, 2001. S. A-1315. A computer specialist performed a detailed examination of the computer seized from Skinner's home and concluded that the activity on the computer post-seizure was *not* consistent with Skinner having conducted any forensic analysis. S. A-1427.

## SUMMARY OF ARGUMENT

Defendants challenge their convictions on numerous grounds; none of their arguments warrants reversal.

1. The evidence was more than sufficient to support defendants' convictions. There was more than sufficient evidence upon which a reasonable jury could conclude that defendants joined and participated in a long-standing

conspiracy to deprive persons of their civil rights. Defendants and their co-conspirators met and discussed and engaged in a common scheme employing "shortcuts" for obtaining unlawful search warrants and enriching themselves through theft of money and property from the searches. Defendants and their co-conspirators also furthered their conspiracy's objectives by using and carrying firearms throughout the course of the conspiracy, intimidating informants, falsifying paperwork, and agreeing to cover for one another.

2. The indictment, which charges defendants with participating in the execution of search warrants known to be defective and then willfully taking money or property from the subjects of the search warrants, in violation of the Fourth and Fourteenth Amendments, properly alleges violations of 18 U.S.C. 242. This Court has previously held that a police officer's theft of personal property during the execution of a search warrant violates the Fourteenth Amendment and is the proper subject of a prosecution under 18 U.S.C. 242. Moreover, all of the alleged misconduct (*i.e.*, knowingly executing searches based on invalid warrants and unlawfully seizing personal property during the execution of unlawful searches), violates the Fourth Amendment; the indictment thus states a cognizable offense.

3. Count IX of the indictment, charging Acosta with using/carrying a

weapon during the course of the conspiracy to violate civil rights, in violation of 18 U.S.C. 924(c), does not expose him to double jeopardy even though he was charged with two additional violations of 18 U.S.C. 924(c) that correspond to the two substantive civil rights violations charged in Counts II and III. A substantive offense and the conspiracy to commit that offense are separate crimes. Moreover, the 924(c) charge in Count IX was based on a conspiracy that spanned eight years, and involved the use/carrying of weapons in several instances in addition to those supporting Counts VI and VII.

4. The district court properly instructed the jury that defendants could be held liable for Counts I-IV and IX under a *Pinkerton* theory of liability. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). It is well-settled in this Circuit that a conspirator may be held responsible for the substantive crimes committed by his co-conspirators if those crimes were reasonably foreseeable consequences of acts committed in furtherance of the conspiracy. Defendants were properly charged with conspiracy and substantive civil rights violations in the indictment; the government was not required to allege *Pinkerton* liability in the indictment.

5. The district court did not clearly err in instructing the jury on the definition of "use" for purposes of 18 U.S.C. 242. The instruction was similar to the definition of "use" for purposes of 18 U.S.C. 924(c), and, even if erroneous,

Acosta cannot establish prejudice. The evidence was more than sufficient to establish that Acosta and/or his co-conspirators "used" a weapon under *any* definition of "use," as the uncontroverted evidence established that one of Acosta's co-conspirators discharged his weapon on the occasion giving rise to Counts II, and his co-conspirators had at least two weapons drawn and at the ready on the occasions giving rise to Counts II and III.

6. The district court correctly refused to dismiss Counts VI and VII, charging violations of 18 U.S.C. 924(c) in relation to the substantive civil rights violations. Depriving persons of their civil rights through the use, attempted use, or threatened use of a dangerous weapon in violation of 18 U.S.C. 242 has, as an element of the offense, the use, attempted use, or threatened use of physical force against another, see 18 U.S.C. 924(c)(3)(A), and, by its nature, involves a substantial risk that physical force will be used against another, see 18 U.S.C. 924(c)(3)(B).

7. The district court correctly refused to dismiss Count IX of the indictment, charging a violation of 18 U.S.C. 924(c) in relation to the conspiracy. Conspiring to deny citizens their civil rights in violation of 18 U.S.C. 241 through injury, oppression, threats or intimidation is a crime of violence because it involves a substantial risk that physical force will be used against a person or the person's

property.

8. Defendants received a fair trial. The decisions of the trial court to admit or curtail certain testimony, and the court's instructions to the jury regarding the government's burden of proof were sound.

## ARGUMENT[12]

## I

## THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANTS' CONVICTIONS

This Court reviews a challenge to the sufficiency of the evidence supporting a criminal conviction *de novo*, see *United States* v. *Reyes*, 302 F.3d 48, 52-53 (2d Cir. 2002), and must affirm if the evidence, when viewed in the light most favorable to the government and drawing all inferences in the government's favor, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt. See *United States* v. *LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002). With a court reviewing the evidence in this manner, "[a] defendant challenging the sufficiency of the evidence bears a heavy burden[.]" *United States* v. *Pipola*, 83

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[12] Although each defendant submitted a separate brief to this Court, some of the defendants' arguments overlap, and Acosta joins in Skinner's arguments to the extent they are applicable to his convictions. See Acosta's Br. 61-62; see also Fed. R. App. P. 28(i). For clarity, the government has grouped the defendants' common arguments and addresses them together where appropriate.

F.3d 556, 564 (2d Cir.), cert. denied, 519 U.S. 869 (1996).

Both defendants challenge their convictions on sufficiency grounds. Skinner argues that there was insufficient evidence to support all of his convictions; Acosta argues that there was insufficient evidence to support his participation in the conspiracy, Acosta Br. 37. Viewing the evidence presented in the light most favorable to the government, the defendants' convictions are supported by ample evidence.

*A. Sufficient Evidence Supports Defendants' 18 U.S.C. 241 Convictions*

Section 241 of Title 18 provides, in pertinent part: "If two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * * [t]hey shall be fined * * * or imprisoned * * * or both." 18 U.S.C. 241. To sustain a conspiracy conviction, the government must present "some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States* v. *Morgan*, 385 F.3d 196, 206 (2d Cir. 2004) (quoting *United States* v. *Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984)). Proof of a tacit conspiratorial understanding will suffice, whether or not the conspirators have agreed to all of the details. See, *e.g.*, *United*

*States* v. *Skowronski*, 968 F.2d 242, 247 (2d Cir. 1992).

Defendants were both charged with a violation of 18 U.S.C. 241 for their actions between January 1993 and late August 2001. Specifically, the government alleged that during that time, defendants and other members of the Buffalo Police Department conspired to deprive persons of their right to be free from unreasonable searches and seizures, and their right to be free from deprivation of their property without due process of law. Skinner argues that the evidence was insufficient to support his conviction under 18 U.S.C. 241 because there was no evidence establishing his knowledge of, and specific intent to participate in, the crimes charged. Skinner Br. 27-30. Acosta indirectly challenges the sufficiency of evidence establishing his participation in a conspiracy to execute false search warrants, Acosta Br. 36-37, and joins in Skinner's sufficiency arguments to the extent they are applicable to him, Acosta Br. 61.[13] Defendants' arguments are without merit, as more than sufficient evidence was presented to establish their full participation in the conspiracy.

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[13] In contrast to Counts I-IV, Count V – the conspiracy count – does not charge defendants with securing and executing false search warrants; rather, it charges defendants with generally conspiring to deprive persons of their right to be free from deprivation of property without due process, and their right to be free from unreasonable searches and seizures. S. A-24. Acosta acknowledges that the record contains evidence of him "stealing * * * the money." Acosta Br. 37.

The evidence presented established that, beginning in the early 1990s, defendants and other members of the Maryland Street Detail entered into a scheme to steal money and property from persons they encountered in their roles as police officers. Usually (but not always) this took the form of falsifying information in search warrant affidavits, creating false paper trails to conceal their actions, executing search warrants issued pursuant to the false affidavits, and then stealing property from targets of the search warrants. Defendants and their co-conspirators met and discussed use of these unlawful tactics, S. A-704, 759-761, which were used only when the "right people" were present, S. A-715, 761. The "right people" included defendants Skinner and Acosta. S. A-761. They continued these practices for years. S. A-705.

Specifically, the evidence showed that defendant Skinner falsified information for at least five search warrants during the course of the conspiracy, S. A-129-130, 133-135, 155-156, 161-165, 168-172, and attempted to cover his actions by falsifying informant payment forms, S. A-244-245, 520-528. Skinner and Acosta, together with their co-conspirators, participated in the execution of at least three search warrants that were based upon false information (*i.e.*, 16 Center Lane, 120 Potomac, 395 West Delavan), S. A-598-599, 603, 736, 740, 748, 935. Acosta received money that was stolen during these searches, S. A-737, 741-744,

754, 809, and he stole property during two of these searches, S. A-742-743, 840, 1000, 1002-1004, 1487-1488. Skinner sought out a co-conspirator on one occasion and demanded his portion of the stolen money. S. A-754. On at least one occasion, Skinner stole property during a search. S. A-1129, 1149, 1298-1299, 1334. This conduct formed the basis for the substantive crimes charged in Counts I-IV.

Defendants' actions, however, were not limited to those charged as substantive crimes. For example, a jury could reasonably conclude that both defendants participated in a warrantless raid of a hotel room where co-conspirators stole money from the occupant, S. A-716-719, that Acosta personally stole $1500 from Carmelo Rosa during a traffic stop, S. A-296, 300, and that both defendants, together with their co-conspirators, executed a search warrant at Johnny Reed's home from which money was stolen, S. A-456-458, 724-726, and participated in the unlawful traffic stop of Johnny Reed, during which he was dragged from his car, assaulted, placed in the back of an unmarked car, and threatened with a gun until he agreed to provide them information that would lead to an additional drug suspect (*i.e.*, Victor Miller) who they then victimized, S. A-461-467.

Finally, a reasonable jury could have concluded from the evidence presented that both defendants took steps to cover up their actions and protect the conspiracy.

Skinner and others threatened Adside – the informant who worked with both defendants and who routinely signed blank disbursement forms that showed payment for buys he did not make – that he would be harmed if he cooperated with the FBI's investigation, S. A-519, 528-534; Acosta tried to blame Officer Santiago for stealing $1500 from Rosa, S. A-325-327. A group of co-conspirators met to discuss the possibility that they were being investigated by the FBI, and at the meeting they all agreed to keep quiet in the event one of them went to jail. S. A-763-764. This evidence, viewed in the light most favorable to the government, is more than sufficient to establish that defendants (1) knew of a conspiracy to deprive persons of their civil rights, and (2) knowingly joined and participated in it. *Morgan*, 385 F.3d at 206.

*B. Sufficient Evidence Supports Skinner's 18 U.S.C. 242 Conviction*

Skinner argues that the evidence presented at trial was insufficient to support a conviction under 18 U.S.C. 242 because there was no evidence that he acted willfully. Skinner Br. 37-40. Specifically, Skinner argues that even though Toledo's computer was found in his home, there is no proof that he was the one who removed it from Toledo's house.[14] Skinner Br. 37, 40. According to Skinner,

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[14] Skinner does not make a similar argument with respect to Toledo's switchblade, which was found in Skinner's desk.

this suggests he did not act willfully to deprive Toledo of his constitutional rights. Skinner Br. 37. This argument fails.

To prove a violation of 18 U.S.C. 242, the government must show that the defendant acted: 1) willfully; 2) to deprive another of a federal constitutional or statutory right; 3) under color of law. *United States* v. *Lanier*, 520 U.S. 259, 264 (1997). "Willfulness," within the meaning of 18 U.S.C. 242, is established by proof that the defendant acted "in open defiance or in reckless disregard of a constitutional [or statutory] requirement which has been made specific and definite." *Screws* v. *United States*, 325 U.S. 91, 105 (1945).

Here, the evidence overwhelmingly supports the jury's finding that Skinner willfully appropriated Toledo's property for his own use. During the search at Toledo's home, he overheard officers discussing who was to receive the laptop. S. A-1111. As the evidence control officer for the search of Toledo's home, Skinner was responsible for collecting and logging any property seized during the search. S. A-385, 1036. And, ultimately, Toledo's computer was found in Skinner's home (and his switchblade in Skinner's desk). A jury could have reasonably – and easily – found that Skinner intended to appropriate Toledo's personal property for his own use. Although Skinner attempted to show that he was in possession of the computer because it played some role in a Buffalo/Canada drug investigation, the

jury obviously credited evidence to the contrary: 1) Skinner's supervisors, who testified that they were unaware of an international drug trafficking investigation involving John Toledo and his laptop computer, S. A-1058-1059, 1372; 2) Skinner's colleagues and supervisors, who testified that a laptop, if recovered pursuant to a search warrant, would be inventoried on a P-10 form; 3) the computer specialist, who testified that Skinner had not performed a forensic analysis on the computer between the time it was taken from Toledo and recovered from Skinner, S. A-1427; and, 4) the store receipt showing that Skinner, without ever seeking reimbursement from the police department, purchased personal accessories (*i.e.*, carrying case; car adaptor) to complement his personal use of the computer, S. A-1315.

Even if Skinner was *not* the officer who removed the laptop from Toledo's home, the evidence is sufficient to support Skinner's conviction on Count IV under an aiding and abetting theory. The jury was presented with sufficient evidence from which it could reasonably conclude that Skinner joined in the venture to steal Toledo's laptop (*i.e.*, he was present at the search as the evidence control officer and discussions took place as to who was to receive the laptop); shared in it (*i.e.*, he, in fact, ended up with the laptop and switchblade), and contributed to the venture's success (*i.e.*, he was an active member of the search team). *United States*

v. *Labat*, 905 F.2d 18, 23 (2d Cir. 1990); see also *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949) (aiding and abetting theory supports liability when defendant "consciously shares in" the underlying criminal act).

*C. Sufficient Evidence Supports Defendants' 18 U.S.C. 924(c) Convictions As They Relate To The Conspiracy Offense In Count V*

Count IX alleges that defendants either acted as principals in violating 18 U.S.C. 924(c), or aided and abetted or willfully caused others to violate 924(c), in violation of 18 U.S.C. 2(a) and (b). The district court instructed the jury on these theories of liability as well as a *Pinkerton* theory of liability. The evidence need only support one theory for this Court to uphold defendants' convictions on this count. *United States* v. *Masotto*, 73 F.3d 1233, 1241 (2d Cir.), cert. denied, 519 U.S. 810 (1996). In this case, the evidence supports defendants' convictions under all three theories of liability.

*1. Defendants Used Firearms During The Conspiracy*

To prove a violation of 18 U.S.C. 924(c), the government must establish that a defendant knowingly used or carried a firearm during and in relation to a crime of violence.[15] *United States* v. *Desena*, 287 F.3d 170, 180 (2d Cir. 2002). A

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[15] This section assumes 18 U.S.C. 241 is a crime of violence for purposes of 924(c) charges. Defendants' challenges to whether 18 U.S.C. 241 may serve as a predicate crime of violence for a 924(c) charge are addressed *infra*, Part VII.

defendant uses a firearm when he actively employs it; he carries it if he had physical possession of it, or if he moved it from one place to another. *Ibid.*

Defendants were police officers who routinely executed fraudulently obtained search warrants for the purpose of taking victims' property, and guns were used to accomplish this goal. Lieutenant Lyon testified that it was standard procedure during the execution of search warrants for all members of the search warrant team to have their weapons drawn before entry and to keep them drawn after entering the premises. S. A-1022-1023. Gil also testified that the standard procedure was for officers to have their weapons drawn upon entry. S. A-872. Based on this testimony, the jury could reasonably infer that, as officers participating in these searches, they had weapons and had them drawn – thus "using" or actively employing the weapons – during the course of the conspiracy. See *United States* v. *Patino*, 962 F.2d 263, 265 (2d Cir. 1992).

*2. Defendants Carried Firearms During The Conspiracy*

Even if the evidence is insufficient to support a finding that defendants used their firearms during the course of the conspiracy, the evidence supports a finding that they knowingly possessed and transported their weapons during the conspiracy – that is, they "carried" weapons in violation of 18 U.S.C. 924(c). Again, the evidence showed that it was a regular practice for officers to have their weapons

*available and accessible* during the execution of search warrants. S. A-1022-1023. Indeed, no witness testified that officers were *without weapons* during the searches. A reasonable inference, then, is that the defendants had physical possession of their weapons and transported them during the raids – thus furthering the ends of the conspiracy. See *Desena*, 287 F.3d at 180; see *United States* v. *Persico*, 164 F.3d 796, 803 (2d Cir.), cert. denied, 527 U.S. 1039 (1999).

Although the mere presence of a firearm "entirely unrelated to the crime" is insufficient to satisfy the "in relation to" requirement, the nexus is established if the gun "facilitat[es] or ha[s] the potential of facilitating, the [crime of violence.]" *Smith* v. *United States*, 508 U.S. 223, 238 (1993). The Supreme Court considers the phrase "in relation to" to be expansive. *Id.* at 237; see also, *United States* v. *Novaton*, 271 F.3d 968, 1013 (11th Cir. 2001) (affirming 924(c) conviction of defendant police officer where "[t]here was evidence that [defendant], while armed, furthered the drug trafficking conspiracy by providing protection for and escorting co-conspirators," and noting that in light of such evidence, "it was certainly reasonable for the jury to conclude that [defendant] used his weapon, albeit a police-issued firearm, 'in relation to' the drug conspiracy and that his carrying the weapon facilitated, or had the potential for facilitating, the co-conspirators' drug trafficking"), cert. denied, 535 U.S. 1120 (2002). Here, the

defendants carried weapons during the raids, and their presence aided (or at least had the *potential* to facilitate) the execution of the illegal searches and subsequent stealing of property while other co-conspirators were actively employing their weapons to accomplish the same objective. Indeed, a co-conspirator explained that having the weapons made it easier to both conduct the searches *and* steal from their victims. S. A-872.

That defendants may not have "used" firearms themselves is irrelevant. By "carrying" their firearms during the period in which the conspiracy's plans "were constantly hatched, consummated, and discarded," defendants carried firearms "during and in relation to" the conspiracy. *Persico*, 164 F.3d at 803. That defendants possessed and transported their weapons *lawfully*, as police officers, is of no consequence. Congress intended 924(c) to apply to police officers, like defendants, who "abuse that privilege [of being licensed to carry a firearm] by committing a crime with the weapon." S. Rep. No. 225 98th Cong., 1st Sess. 3490-3492 (1983). Drawing all inferences in favor of the government, the evidence was sufficient for the jury to conclude that defendants carried weapons in furtherance of the conspiracy.

### *3. Defendants Aided And Abetted The Use And Carrying Of Firearms During The Conspiracy*

Even if the evidence was insufficient to support defendants' convictions as principals, the evidence overwhelmingly supports their convictions as aiders and abettors of 18 U.S.C. 924(c). A defendant charged with aiding and abetting a 924(c) violation must "have known of the underlying crime," "had an interest in furthering it," and have consciously "assisted others in the use or carrying of weapons in the underlying crime." *Persico*, 164 F.3d at 802; see also *United States* v. *Giraldo*, 80 F.3d 667, 676 (2d Cir.) (government may prove a defendant aided and abetted a 924(c) charge by showing the defendant knew a gun would be used or carried during a crime of violence, and performed an act that directly facilitated or encouraged the use or carrying of a firearm), cert. denied, 117 S. Ct. 1235 (1996). As already established, both defendants knew of, and had an interest in furthering, the underlying conspiracy to deprive persons of their constitutional rights. *Persico*, 164 F.3d at 802; see *supra*, Part I.A. Defendants also knew that guns would be used in carrying out the conspiracy, which consisted primarily of executing false search warrants on suspected drug dealers. *Giraldo*, 80 F.3d at 676. It was standard procedure on raids for an officer to have a shotgun at the ready, see, *e.g.*, S. A-175, 386, 426, 438-439, and for other officers to have their weapons drawn upon entry, S. A-872, 1022-1023, 1296-1297. As members of the

search team – deterring resistance from victims and providing protection for their co-conspirators – defendants certainly facilitated the use of firearms by their co-conspirators during the course of the conspiracy.

On at least two occasions, weapons were actually *fired* during acts taken in furtherance of the conspiracy. *United States* v. *Lindsay*, 985 F.2d 666, 672 (2d Cir.) (evidence sufficient to support defendant's 924(c) conviction where defendant discharged firearm during drug-trafficking offense), cert. denied, 510 U.S. 832 (1993). At 120 Potomac, a co-conspirator shot the victim's dog after entering the victim's home, S. A-740, 935, 937, and put a shotgun to the victim's head while another co-conspirator stole $1000 from his pocket, S. A-741, 838, 935-936. At 395 West Delavan, Sadlocha fired his weapon as the victim was attempting to escape. S. A-604, 678, 965; see *Lindsay*, 985 F.2d at 672 (evidence sufficient to support defendant's 924(c) conviction where defendant discharged firearm outside building where drugs were stored).

In addition to these two instances, both defendants participated in the search and subsequent traffic stop of Johnny Reed. S. A-456, 461-462. During the traffic stop, Reed was dragged from his truck, hit by a co-conspirator while Skinner stood nearby, and taken into the back of an unmarked car where Acosta was waiting. S. A-463-466. At that time, a co-conspirator stuck a gun in Reed's mouth until he

agreed to give the conspirators the information they wanted. S. A-466-467. Both defendants' actions aided and abetted their co-conspirator's active employment of a firearm. And based on the evidence presented, it was reasonable for the jury to infer that defendants' conduct relative to Reed was intended to, and in fact did, further the objective of the conspiracy by providing defendants and their co-conspirators with information to support additional raids during which they could steal from their victims.

This same evidence also supports a finding that defendants "willfully cause[d]" others to use and carry firearms. See 18 U.S.C. 2(b). As this Court previously noted:

> Section 2(b) "allows a conviction . . . even when the defendant was not present or did not personally commit all of the requisite acts establishing the offense." It is a "generic statute [that] 'removes all doubt' that *one who sets an illegal course in motion but intentionally refrains from 'the direct act constituting the completed offense' shall not escape punishment*."

*United States* v. *Holland*, 381 F.3d 80, 88 (2d Cir. 2004) (citation omitted); (emphasis added). From the information Reed provided during the unlawful traffic stop (after being threatened by defendants and their co-conspirators), Gerald Skinner submitted a fraudulent warrant application for Victor Miller's house. At the search of Miller's house, defendants and all but one of their co-conspirators

were part of the team that made entry into the house. As previously explained, the entry officers are armed and their weapons are drawn upon execution of a search warrant. And as Miller tried to flee, Sadlocha fired a shot that caused Miller to submit to police authority. From these facts, a reasonable jury could conclude that defendants and their co-conspirators willfully "set[] an illegal course in motion" that caused others to use and carry firearms during the underlying conspiracy to deprive persons of their civil rights. *Holland*, 381 F.3d at 88; see 18 U.S.C. 2(b).

*4. Pinkerton Liability*

Contrary to defendants' assertions (Skinner Br. 34-36; Acosta Br. 61), the district court did instruct the jury that defendants could be found guilty of Count IX under a *Pinkerton* theory of liability. See *Masotto*, 73 F.3d at 1240 ("It is well-settled in this Circuit that a jury may be instructed on the *Pinkerton* theory of liability in connection with a charged violation of § 924(c)."); see also *United States* v. *Pimentel*, 83 F.3d 55 (2d Cir. 1996). The court instructed the jury that defendants could be found guilty of the charge if they "knowingly used or carried a firearm in relation to" the conspiracy, S. A-1678, *or* if "the co-conspirator of the defendant used or carried a firearm during and in relation to the [conspiracy] – in furtherance of or [as] the natural and foreseeable consequence of a conspiracy to violate civil rights * * * at the time when the defendant was a member of the

conspiracy," S. A-1679. This charge followed the detailed *Pinkerton* charge given with respect to Counts I through IV. S. A-1675-1676.

While the government contends that the evidence is more than sufficient to establish defendants' liability under either a principal or aiding and abetting theory, the evidence also supports defendants' liability on Count IX under a *Pinkerton* theory. Defendants joined in the conspiracy to deprive persons of their civil rights, they knew the conspiracy involved stealing money and property from the subjects of their investigations during the execution of unlawful searches, and their co-conspirators' actual use of weapons to accomplish the conspiracy's objective was undoubtably a reasonably foreseeable action taken in furtherance of the conspiracy. S. A-872, 1022-1023, 1296-1297.

## II

## THE INDICTMENT PROPERLY ALLEGES VIOLATIONS OF 18 U.S.C. 242

Acosta argues that the indictment should be dismissed and his convictions reversed because the indictment fails to state actionable offenses. Acosta Br. 22-29. Specifically, Acosta argues that a law enforcement officer's theft of property from a victim does not constitute a violation of the Fourteenth Amendment. This Court reviews his argument for plain error. *United States* v. *Glick*, 142 F.3d 520,

523 (2d Cir. 1998).

First, the indictment properly alleges a violation of the Fourteenth Amendment. Acosta's argument was rejected by this Court in *United States* v. *McClean*, 528 F.2d 1250 (2d Cir. 1976), a case with facts strikingly similar to the case at hand. In *McClean*, police officers seized money from suspected drug traffickers in the course of executing search warrants. The officers returned some of the money to the victims, turned in some of the money to the police department as proceeds from the search, and retained the rest for themselves. *Id.* at 1253-1254. This Court had no difficulty concluding that the officers violated Fourteenth Amendment rights by stealing some of the money. It explained that "[a] plainer, less ambiguous violation of [18 U.S.C.] 242 could not be found" than officers who intended to "extort money from their victims under color of state authority." *Id.* at 1255. This Court further explained that even if the money was suspected contraband from illegal drug sales, the victims "were entitled to have the status of the seized property determined by due process." *Id.* at 1256; see also *United States* v. *Alonso*, 740 F.2d 862 (11th Cir. 1984) (conviction under 18 U.S.C. 242 for violation of due process rights of persons with ownership interests in drug trafficking proceeds upheld where police fraudulently removed funds from police department property room), cert. denied, 469 U.S. 1166 (1985); *United States* v.

*Albert*, 595 F.2d 283 (5th Cir.) (sufficiency of the indictment not at issue, but conviction under 18 U.S.C. 242 for violation of due process rights of narcotics offenders upheld where police officers stole money from victims), cert. denied, 444 U.S. 963 (1979); see also *United States* v. *Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (rejecting challenge to indictment charging defendant police officers with conspiracy to violate the Fourth Amendment and Fourteenth Amendment due process rights of suspected Buffalo drug dealers from whom defendants conspired to steal money in violation of 18 U.S.C. 241).

The due process violation at issue in this case is not a simple failure to adhere to procedural safeguards. Defendants used their authority as law enforcement officers to enrich themselves by conversion of private property to their own use. The deprivation of rights is the willful abuse of authority, not the state's failure to return the stolen property to its rightful owner. Thus, *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), (see Acosta's Br. 23-28), are not on point. The most relevant Supreme Court decision is *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990), which distinguishes the procedural due process claims of *Parratt* and *Hudson* from those resulting from "arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." (Internal quotation marks omitted.). The

violation is complete when the wrongful action is taken, and remedies available for restoring the property to its rightful owner are irrelevant. *Ibid.*

Even if Acosta were correct that the indictment fails to allege a Fourteenth Amendment violation, the indictment would still be valid. Acosta argues that Counts I, II and III must be dismissed because the alleged conduct does not state a Fourteenth Amendment violation. But "the initial difficulty with the argument is that [the 18 U.S.C. 242 counts are] not restricted, as [Acosta] wants to read [them]," to violations of the Fourteenth Amendment. *United States* v. *Wallach*, 979 F.2d 912, 919 (2d Cir. 1992), cert. denied, 508 U.S. 939 (1993). The indictment alleges violations of 18 U.S.C. 242 based upon deprivations of Fourteenth Amendment *and Fourth Amendment* rights. See *id.* at 920.

Taking money or property from an individual under color of law and converting it to one's own use constitutes a seizure of property without a legitimate law enforcement purpose, and thus violates the Fourth Amendment. See, *e.g.*, *United States* v. *Pindell*, 336 F.3d 1049 (D.C. Cir. 2003) (defendant police officer charged with numerous 18 U.S.C. 242 counts for stealing money from persons soliciting prostitution), cert. denied, 540 U.S. 1200 (2004); see also *Nelson* v. *Streeter*, 16 F.3d 145, 151 (7th Cir. 1994) (government officials unlawfully seizing private property is "so obvious[ly]" a Fourth Amendment violation). Indeed,

Acosta does not argue otherwise. Each of the counts "plainly states an offense." *Wallach*, 979 F.2d at 920. Acosta's challenge to the indictment on the ground it fails to state a cognizable offense is without merit. Cf. *United States* v. *Daniels*, 281 F.3d 168 (5th Cir. 2002) (that defendant's 18 U.S.C. 242 charge based on use of excessive force was erroneously stated in terms of the Eighth Amendment rather than Fourteenth Amendment was of no consequence, as 18 U.S.C. 242 speaks of *any* constitutional right), cert. denied, 535 U.S. 1105 (2002).

## III

## COUNT IX OF THE INDICTMENT DOES NOT SUBJECT ACOSTA TO DOUBLE JEOPARDY WITH RESPECT TO COUNTS VI AND VII

Acosta argues for the first time on appeal that his conviction on Count IX should be dismissed on double jeopardy grounds. Acosta Br. 39-41. He contends that if the jury found he used firearms in relation to Counts II and III (thereby giving rise to his convictions on Counts VI and VII), and if his participation in the events giving rise to Counts II and III contributed to his conspiracy conviction on Count V, then his use of firearms during Counts II and III may inappropriately be used as the basis for his 924(c) conviction on Count IX, which corresponds to Count V. Under these circumstances, he argues, Count IX violates the Double Jeopardy Clause because he is twice-charged with 924(c) for the same firearms

usage associated with Counts II and III. Acosta Br. 40. This argument is without merit.

At the outset, it is well-settled that "a substantive offense and the conspiracy to commit that offense are separate crimes." *United States* v. *Campbell*, 300 F.3d 202, 216 (2d Cir. 2002), cert. denied, 125 S. Ct. 427 (2005). Thus Acosta was charged with multiple firearms violations in relation to two separate crimes (*i.e.*, conspiracy to deprive (Count V) and actual deprivation of rights (Counts II and III)). The jury had before it evidence that Acosta joined in a conspiracy to deprive persons of their civil rights over several years, during which firearms were used throughout. See *United States* v. *Salameh*, 261 F.3d 271, 279 (2d Cir. 2001) (noting that defendant's conspiracy charge "involved a range of time and conduct far broader than" that comprising his substantive count), cert. denied, 536 U.S. 967 (2002). Counts VI and VII concern use of a firearm in connection with the unlawful entry and theft of property from Edgardo Berrios and Victor Miller, respectively. Acosta's conspiracy conviction, however, rested on additional instances of unlawful entry and/or theft of property, including the raids at the hotel and Johnny Reed's residence. The evidence demonstrated that on raids such as these, officers always had their guns drawn. Acosta's conspiracy conviction also rested on unlawful seizures, including the roadside assault of Johnny Reed. As

part of this unlawful seizure, Acosta and his co-conspirators threatened Johnny Reed with a weapon to ensure that he would provide Acosta and his co-conspirators with additional information to further the ends of the conspiracy. Thus, this is *not* a situation where the evidence supporting Count IX was identical to the evidence supporting Counts VI and VII. See *United States* v. *Lindsay*, 985 F.2d 666, 677 (2d Cir.) (vacating one of two 924(c) convictions that was based on the same exact use of a weapon in two charged crimes – one being a lesser included offense of the other), cert. denied, 510 U.S. 832 (1993); cf. *United States* v. *Coiro*, 922 F.2d 1008 (2d Cir.) (vacating one of two obstruction charges that were based on defendant's single meeting with two witnesses), cert. denied, 501 U.S. 1217 (1991). Acosta cannot reasonably argue that the only basis for his liability on Count IX was the specific acts that gave rise to liability on Counts VI and VII.

Moreover, Acosta did not request a jury instruction with respect to the 924(c) counts that would have limited the jury's consideration of Count IX to conduct other than that set forth in the substantive offenses in Counts II and III. Acosta's argument is best viewed as one of sufficiency: if the jury found that the

only times Acosta used[16] a firearm during a crime of violence were those instances set forth in Counts II and III, then the evidence would be insufficient to support the 924(c) charge in Count IX. This Court has held that, even in light of the *Stromberg* principle,[17] "where an impermissible basis of conviction arises from an insufficiency of the evidence and a valid basis remains on an alternative theory, a defendant must request the trial judge not to submit the invalid basis to the jury or else the objection will be deemed waived." *United States* v. *Washington*, 861 F.2d 350, 352 (2d Cir. 1988); see also *Salameh*, 261 F.3d at 279 n.6. Acosta thus waived the argument by failing to request that the jury's attention be precisely focused on evidence *other* than that presented in Counts II and III. *Ibid.*

## IV

## THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY REGARDING ACOSTA'S LIABILITY UNDER *PINKERTON* V. *UNITED STATES*

Acosta argues (Acosta's Br. 30-39) that his convictions for violating 18 U.S.C. 242, as charged in Counts I, II and III, must be set aside because the district

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[16] In this context, the government intends the term "use" to encompass the full range of conduct (*i.e.*, use, carry) sufficient to support a charge under 924(c) and 2.

[17] Where a conviction might rest on an impermissible basis, a conviction may not stand, despite the availability in the evidence of a valid basis for the conviction. *Stromberg* v. *California*, 283 U.S. 359 (1931).

court instructed the jury that he could be held liable for those offenses if they were the reasonable and foreseeable criminal actions of his co-conspirators.[18] See *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946). As an initial matter, we note that Acosta does not contend that there was insufficient evidence to support his convictions on those counts, nor could he. There was more than ample evidence for a reasonable jury to find that Acosta himself engaged in the criminal behavior recounted in Counts I, II and III. See, *e.g.*, S. A-736-737, 758-761 (Count I); S. A-597-598, 739-744, 758-761, 809, 840, 935-937 (Count II); S. A-603-604, 707, 747-748, 754, 759-761, 870-871, 1000, 1002-1004, 1486-1488 (Count III). Thus, the convictions on those counts do not depend on a *Pinkerton* theory of liability.

Acosta argues that the "*Pinkerton* charge" was nonetheless prejudicial because he was unaware that he could be found liable on Counts I, II and III under a *Pinkerton* theory of liability until the judge instructed the jury on that theory of

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[18] Specifically, the judge instructed the jury that liability under a *Pinkerton* theory required a finding that (1) the substantive crime was committed; (2) the person(s) who committed the crime were members of the conspiracy; (3) the substantive crime was committed pursuant to a common plan and understanding found to have existed among the conspirators; (4) the defendant was a member of the conspiracy at the time the substantive crime was committed; and (5) the defendant could have reasonably foreseen that the substantive crime might be committed by his co-conspirators. S. A-1675-1676.

liability. See generally Acosta Br. 30-33. This argument is without merit. It is well-settled that a conspirator "can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes." *United States* v. *Romero*, 897 F.2d 47, 51 (2d Cir. 1990) (internal quotation marks omitted), cert. denied, 498 U.S. 1092 (1991); see *Pinkerton*, 328 U.S. at 646-647.

Moreover, Acosta does not cite (and the government is unaware of) any decision of this Court that requires the government to include in an indictment charging a conspiracy and substantive offenses that the defendant may also be held criminally liable for the reasonably foreseeable actions of his co-conspirators. To satisfy the requirements of Federal Rule of Criminal Procedure 7(c)(1), "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States* v. *LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) (internal quotation marks omitted). It is sufficient if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Ibid.* (quoting *Hamling* v. *United States*, 418

U.S. 87, 117 (1974)). Here, the indictment expressly stated that "Acosta *and another*" committed the unlawful actions set forth in Counts I, II and III. S. A-20-23 (emphasis added). Acosta's exposure to criminal liability on Counts I, II and III under a *Pinkerton* theory is obvious from the description of Counts I, II and III, and is inherent in the conspiracy charge itself. *United States* v. *Thomas*, 34 F.3d 44, 50 (2d Cir.) ("Once a conspiracy is established, the liability of defendants extends to all acts of wrongdoing occurring during the course of and in furtherance of the conspiracy."), cert. denied, 513 U.S. 1007 (1994); see also *United States* v. *Ciambrone*, 787 F.2d 799, 809 (2d Cir.), cert. denied, 479 U.S. 1017 (1986) (same).

Acosta also argues that the *Pinkerton* charge constructively amended the indictment by making him liable under Counts I, II and III for the actions of others. Acosta Br. 33-36. Again, this argument is without merit. "A constructive amendment of an indictment occurs when 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify the essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States* v. *Bryser*, 954 F.2d 79, 86 (2d Cir.), cert. denied, 504 U.S. 972 (1992). The question a court must consider, then, is whether a jury

charge, viewed in its entirety, creates an unacceptable risk that the jury might convict the defendant of a crime *materially different* from the one alleged in the indictment. *United States* v. *Mucciante*, 21 F.3d 1228, 1234 (2d Cir.), cert. denied, 513 U.S. 949 (1994). Here, there was no risk that the jury might convict Acosta of crimes other than those charged in the indictment. He was charged with conspiring with others to deprive victims of constitutional rights, and he was charged with actually depriving victims of their constitutional rights, in violation of 18 U.S.C. 241, 242 and 2. S. A-20-26. The indictment included all the essential elements of the crimes charged. S. A-20-26; see *United States* v. *Berger*, 224 F.3d 107, 118 (2d Cir. 2000). Thus, the *Pinkerton* instruction did not subject Acosta to liability for a crime *other* than 18 U.S.C. 242; rather, it provided an additional, routinely recognized basis upon which criminal liability for 18 U.S.C. 242 may lie. *Thomas*, 34 F.3d at 50. There is little doubt that Acosta "was fully informed of the nature of the charges against him and was convicted of the crimes with which he was charged." *Berger*, 224 F.3d at 117.

Acosta's reliance on the Seventh Circuit's decision in *United States* v. *Pedigo*, 12 F.3d 618 (7th Cir. 1993) is misplaced. In that case, the defendant was charged in a three count indictment with conspiracy to distribute marijuana, possession of marijuana with intent to distribute, and with using a firearm in

relation to the crime "as alleged in [the possession count]." 12 F.3d at 629 (emphasis omitted). The indictment alleged that defendant alone committed the substantive possession count. *Ibid.* The court instructed the jury that the defendant could be found liable for using a firearm in relation to the drug trafficking offense as a principal, or if his co-conspirator used a firearm *in furtherance of the conspiracy*. *Id.* at 630. The Seventh Circuit held that this was an impermissible broadening of the indictment because the indictment specified that the firearm was used in relation to the particular crime set forth in the drug possession count – the *defendant's possession*, not the overall conspiracy. *Id.* at 631. Here, Acosta "and another" were charged in Counts I, II and III with three substantive civil rights offenses. S. A-20-23. The district court's *Pinkerton* instruction, which permitted the jury to hold Acosta liable for a co-conspirator's violation of the rights set forth in Counts I, II and III, in no way broadened the indictment to expose him to liability for a crime different from those with which he was charged. See *ibid.*

Acosta's reliance on *United States* v. *Cantone*, 426 F.2d 902 (2d Cir.), cert. denied, 400 U.S. 827 (1970), is equally misplaced. That case simply held that if liability for the substantive offense is based solely on a defendant's membership in a conspiracy (*i.e.*, *Pinkerton* liability alone), and there is insufficient evidence to support a finding that the defendant participated in the conspiracy, then the

substantive conviction must be reversed along with the conviction for conspiracy. *Id.* at 904-905. First, Acosta's liability on the substantive offenses is not based solely (indeed, need not be based at all) on a *Pinkerton* theory – there is more than sufficient evidence to support a finding that Acosta participated in the substantive offenses as either a principal or an aider and abettor. Second, the evidence here is more than sufficient to support a finding that Acosta participated in the conspiracy charged in Count V. See *supra*, Part I.A. The issue in *Cantone*, *i.e.* criminal liability based solely on a *Pinkerton* theory with insufficient evidence to support the conspiracy charge, is not present here.

## V

## THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE TERM "USE" AS IT IS USED IN 18 U.S.C. 242

Acosta contends (Acosta Br. 43-47) that the district court erred in instructing the jury on the definition of "use, attempted use, or threatened use of a dangerous weapon" for purposes of 18 U.S.C. 242 because it was broader than the definition of "use" for purposes of 18 U.S.C. 924(c). Acosta argues that if the jury found him guilty on Counts II and III based on an erroneous definition of "use," then his convictions on those Counts should be overturned. Under such circumstances, his convictions on Counts VI and VII would necessarily be overturned as well.

Acosta did not object to the definition of "use," as it relates to 18 U.S.C. 242, included in the jury instructions. Under these circumstances, this Court reviews the district court's instruction for plain error. *United States* v. *Carr*, 424 F.3d 213, 218 (2d Cir. 2005); see Fed. R. Crim. P. 52(b). For this Court to correct an error that was not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Carr*, 424 F.3d at 218. Acosta "bears the burden of persuasion to show that the district court's charge amounts to plain error." *United States* v. *Vasquez*, 267 F.3d 79, 87 (2d Cir. 2001), cert. denied, 534 U.S. 1148 (2002).

The district court's instructions to the jury were not erroneous. Even assuming they were, however, Acosta cannot establish prejudice because there was uncontroverted evidence before the jury that Acosta's co-conspirators used firearms during the commission of the crimes charged in Counts II and III.

*A. The Instruction Was Not Error*

The district court instructed the jury that for purposes of Acosta's 18 U.S.C. 242 charges, using, attempting to use or threatening the use of a dangerous weapon

means "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." S. A-1660. The district court explained that the jury could consider "the proximity of the defendant to the dangerous weapon in question, the usefulness of the dangerous weapon to the act being committed, and the circumstances surrounding the presence of the dangerous weapon." S. A-1661. This instruction differs slightly from that given with respect to using a firearm for purposes of 18 U.S.C. 924(c), wherein the district court informed the jury that there must have been "an active employment of a firearm" by the defendant during and in relation to Counts II and III. S. A-1680; see *Bailey* v. *United States*, 516 U.S. 137, 142 (1995). But the district court then explained, with respect to the 18 U.S.C. 242 charges, that it was "sufficient if the dangerous weapon was brandished, displayed, or referred to by the defendant so that the others present knew that the weapon was available if needed during the commission of the deprivation of a constitutional right." S. A-1661. With respect to the 18 U.S.C. 924(c) charges, the district court explained in nearly identical language that "[b]randishing, displaying, or * * * referring to the weapon so that the others present knew that the defendant had the firearm available if needed, all constitute the use of a firearm." S. A.-1681. The district court also explained that actually firing or attempting to use a weapon "will obviously constitute the use of a

weapon." S. A-1681.

First, Acosta does not cite (and the government is unaware of) any authority that holds that the term "use" in 18 U.S.C. 242 is intended to have the same meaning as "use" in 18 U.S.C. 924. Second, even if the district court's definition of "use" with respect to 18 U.S.C. 242 was incorrect – and the government in no way concedes that it was – this Court reviews "the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States* v. *Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989) (quoting *California* v. *Brown*, 479 U.S. 538, 541 (1987)). Viewed as a whole, the "use" instruction with respect to the 18 U.S.C. 242 charges was correct, especially given that the district court's explanations to the jury of what constituted "use" for purposes of 18 U.S.C. 242 and 18 U.S.C. 924(c) instructions were nearly identical. Compare S. A-1661 with S. A-1681. Thus, "[v]iewing the challenged language within the context of the charge as a whole rather than in artificial isolation," the instruction of "use" for purposes of 18 U.S.C. 242 was not plainly erroneous. *Carr*, 880 F.2d at 1555.

*B. Acosta Was Not Prejudiced*

Even assuming the district court's instruction was erroneous, Acosta cannot establish prejudice. The district court's instructions made clear that discharging, brandishing or displaying a firearm would satisfy the "use" element in both 18

U.S.C. 242 and 924(c). Acosta does not contest that his co-conspirator discharged a firearm during the search giving rise to Count II, and there is more than sufficient evidence to show that his co-conspirators had, *at the very least*, a shotgun and another firearm (*i.e.*, the shotgun assist) drawn and at the ready during the searches giving rise to Counts II and III. And given that Acosta could be held liable for Counts II and III as either a principal, an aider and abettor, or under a *Pinkerton* theory of liability for the actions of his co-conspirators, the evidence was more than sufficient to support the jury's finding that Acosta "used" a firearm to deprive persons of their civil rights under *any* definition of "use." Acosta cannot establish prejudice, and the court's instruction does not jeopardize the "fairness, integrity, or [the] public reputation of judicial proceedings." *Carr*, 424 F.3d at 219.

## VI

## A VIOLATION OF 18 U.S.C. 242 THROUGH THE USE, ATTEMPTED USE, OR THREATENED USE OF A DANGEROUS WEAPON, EXPLOSIVES, OR FIRE IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 924(c)(3)

Acosta contends (Acosta Br. 54-61) that 18 U.S.C. 242 is not a crime of violence and therefore his convictions on Counts II and III cannot serve as the predicate "crimes of violence" underlying his convictions on Counts VI and VII. Acosta's claim, which is subject to review for plain error because it is raised for the

first time on appeal, is without merit. Because Acosta is specifically charged in Counts II and III with violating persons' rights through "the use, attempted use, or threatened use of a dangerous weapon," 18 U.S.C. 242, the offense both includes as an element "the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(c)(3)(A), and involves a substantial risk that physical force may be used against his victims, 18 U.S.C. 924(c)(3)(B). Acosta was therefore properly convicted under Counts VI and VII. See *United States* v. *Williams*, 343 F.3d 423, 434 (5th Cir. 2003) (18 U.S.C. 242 is a crime of violence for purposes of 18 U.S.C. 924(c)), cert. denied, 540 U.S. 1093 (2003); cf. *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (42 U.S.C. 3631 is a predicate "crime of violence" under 924(c)(3) given instruction that required jury to find that defendant's conduct involved the "use or attempted use of fire" to interfere with housing rights), cert. denied, 529 U.S. 1089 (2000); *United States* v. *Contreras*, 950 F.2d 232, 241 n.11 (5th Cir. 1991) (summarily rejecting defendant's claim that violating 18 U.S.C. 242 was not a crime of violence in determining whether evidence was sufficient to support conviction on 924(c)), cert. denied, 504 U.S. 941 (1992).

## VII

## THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' MOTIONS TO DISMISS COUNT IX OF THE INDICTMENT

Defendants contend (Acosta Br. 47-54; Skinner Br. 30-33) that the district court erred in failing to dismiss Count IX of the indictment charging them with violating 18 U.S.C. 924(c) by carrying or using a firearm during and in relation to a crime of violence. Defendants contend that the district court should have dismissed Count IX because the predicate crime – conspiring to deny citizens their civil rights in violation of 18 U.S.C. 241 – is not a crime of violence.[19] What constitutes a "crime of violence" is a question of law that this Court must consider *de novo*. See, *e.g.*, *United States* v. *Adkins*, 937 F.2d 947, 950 n.2 (4th Cir. 1991);

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[19] Acosta also urges this Court to declare a new rule that "using or carrying a firearm can only trigger []924(c) liability when the defendant is performing an unlawful act." Acosta Br. 42-43. Acosta argues that without an overt act requirement in 18 U.S.C. 241, there is no predicate *act* upon which to base 924(c) liability. This argument is foreclosed by this Court's decision in *United States* v. *Patino*, 962 F.2d 263, 267 (2d Cir. 1992), which states that a conspiracy to commit a crime of violence qualifies as a crime of violence for purposes of 18 U.S.C. 924(c) liability. Moreover, the evidence overwhelmingly demonstrates that Acosta and his co-conspirators committed numerous unlawful acts in furtherance of the conspiracy. Finally, the plain language of 18 U.S.C. 241 demonstrates that an unlawful act may be part of a 241 violation. It provides an enhanced penalty "if death results *from the acts committed in violation*" of the statute or "*if such acts*" include additional crimes of violence. 18 U.S.C. 241. If the statute limited the offense conduct to an agreement, then the provision in the statute that provides greater punishment for certain "acts committed in violation of the statute" would be without effect.

*United States* v. *Amparo*, 68 F.3d 1222, 1225-1226 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996).

Defendants argue that 241 is not a crime of violence for purposes of 18 U.S.C. 924(c) because the "use, attempted use or threatened use of physical force" is not an element of 18 U.S.C. 241. Acosta Br. 49-51. The use of force, however, need not be an element of a predicate crime for it to be a crime of violence under 18 U.S.C. 924(c). Section 924(c)(3) defines a crime of violence as an offense that is a felony and "(A) has as an element the use, attempted use, or threatened use of force against the person or property of another, *or* (B) that by its nature, involves *a substantial risk* that physical force against the person or property of another *may be used* in the course of committing the offense." (emphasis added).

The Fifth Circuit has squarely addressed this issue and held that 18 U.S.C. 241 *is* a crime of violence for purposes of 924(c). *United States* v. *Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), cert. denied, 507 U.S. 962 (1993). By relying on the definitions of the terms used in 241 – "injure," "oppress," "threaten," and "intimidate" – which assume that force may be used in depriving citizens of their civil rights,[20] the Fifth Circuit reasoned that an agreement to injure, oppress,

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[20] See, *e.g.*, Merriam-Webster's Collegiate Dictionary, Tenth Edition (1999) (defining "injure" as "to inflict bodily hurt on [or] to inflict material damage or loss (continued...)

threaten, or intimidate another creates a *substantial risk* of the use of force. *Ibid.*; see also *United States* v. *Meachum*, Nos. 98-2494, 98-2495, 98-2531, 98-2567, 1999 WL 511431 (7th Cir. July 15, 1999) (holding that trial court did not err in instructing jury, under 924(c), that 18 U.S.C. 241 was a crime of violence), cert. denied, 528 U.S. 1056 (1999). Like the Fifth Circuit, (see *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir. 2003), cert. denied, 540 U.S. 1093 (2003)), this Court uses a categorical approach to determine whether an offense is a crime of violence. *Jobson* v. *Ashcroft*, 326 F.3d 367, 371-372 (2d Cir. 2003) (defining crime of violence for purposes of 18 U.S.C. 16(c), which has a definition nearly identical to 18 U.S.C. 924(c)(3)). This Court therefore looks "to the generic elements of the statutory offense." *Id.* at 371. The generic elements of 241 are (1) an agreement (2) to injure, oppress, threaten or intimidate another in the free exercise of civil rights. 18 U.S.C. 241. A person intent on depriving another of his civil rights (in this case, the right to be free from unreasonable searches and seizures and the right not to be deprived of property without due process of law) through injury, oppression, threats and intimidation, certainly poses a risk that

[20](...continued)
on"; defining "oppress" as "to crush or burden by abuse of power or authority"; defining threaten as "to utter threats against" or "to announce as intended or possible"; and defining intimidate as "to compel or deter by or as if by threats," and indicating that "intimidate implies inducing fear * * * into another").

force will be used.

Defendants' argument (Acosta Br. 51-54) that persons can violate 18 U.S.C. 241 without using force is of no consequence. In *Jobson*, this Court explained that "burglary is a crime of violence *even though no force is used in a particular instance*," because a person burglarizing a dwelling *risks having to use force* if the dwelling is occupied. 326 F.3d at 373 (emphasis added); see *Greer*, 939 F.2d at 1099. The *nature* of 18 U.S.C. 241 – depriving persons of civil rights through injury, oppression, threats and intimidation – creates a *substantial risk* that force will be used to accomplish the goal of the conspiracy and that is sufficient for purposes of 924(c). See *Jobson*, 326 F.3d at 373.

## VIII

## DEFENDANTS RECEIVED A FAIR TRIAL

Both defendants contend (Skinner Br. 41-43; Acosta Br. 61-63) that they were denied a fair trial because of actions taken by the district court in managing the trial. Defendants do not demonstrate that any of the district court's actions were error; nor do they explain how the court's questions and routine evidentiary rulings denied them a fair trial.

Skinner contends that the district court repeatedly interrupted and limited defense counsel's questioning of witnesses, and challenged witnesses' answers to

questions. Skinner Br. 42; S. A-173-174, 1382. Defendant did not object to these actions at trial and fails to explain why they were erroneous. The district court's actions at issue were limited to clarifying the lines of questioning, S. A-560-561, 788, 1382, ensuring the scope of Skinner's re-cross-examination did not exceed the scope of the government's re-direct, S. A-873-874, ensuring that a witness only testified to that which he knew, S. A-1156, and avoiding confusion, S. A-173-174. At no time did the district court "take[] over the role of the prosecutor" or "display[] bias." *United States* v. *Filani*, 74 F.3d 378, 385 (2d Cir. 1996). Moreover, the district court instructed the jury that it was to draw no inference from the fact that the court asked questions of certain witnesses, and explained that the purpose was "for clarification or to expedite matters." S. A-1624-1625. The court further explained that its questions "were not intended to suggest any opinions on [its] part as to the verdict." S. A-1625.

Skinner also argues that the district court improperly permitted government witnesses to testify to their opinions on several occasions, once over a hearsay objection. Skinner Br. 41-42; see S. A-708, 755, 1200-1201. The court's rulings, however, were correct, as a witness is permitted to testify to his opinions. See Fed. R. Evid. 701 (a lay witness may testify in the form of opinions or inferences which are "(a) rationally based on the perception of the witness, (b) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Fed. R. Evid.] 702"). Even if error (and the government does not concede error), Skinner fails to explain how such opinion testimony prejudiced him, especially in light of the curative instruction given with respect to objections and the court's rulings on admissibility. S. A-1626.

Skinner next contends that the district court erred in permitting the government to ask Captain Mark Morgan a series of questions which Skinner argues were impermissibly leading because they called for a yes or no answer. Skinner Br. 42; S. A-1371-1372. The district court did not abuse its discretion, however, because the questions did not suggest the particular answer desired. See *De Witt* v. *Skinner*, 232 F. 443, 445 (8th Cir. 1916); see also *United States* v. *Durham*, 319 F.2d 590, 592 (4th Cir. 1963).

Skinner also argues that the district court improperly prompted the government to object to a line of questioning which "conveyed to the jury a bias in favor of the government." Skinner Br. 42. But the colloquy between the attorneys and the judge took place outside the presence of the jury and the testifying witness, see S. A-626 (court excusing jury), S. A-627 (court excusing witness), and the court was simply asking the government to state its position. S. A-633.

Skinner also argues that the district court erred in cutting off a line of questioning by his defense counsel as eliciting hearsay and following it up with an explanation to Skinner's counsel. Skinner Br. 43; S. A-1272-1278. First, the district court's hearsay ruling was correct. See *United States* v. *Check*, 582 F.2d 668, 680-681 (2d Cir. 1978). Second, the court's explanation to defense counsel took place outside the presence of the jury. S. A-1272.

Acosta argues that the district court committed reversible error in its *preliminary* charge to the jury because it did not instruct the jury that it must find Acosta not guilty if the government fails to establish the elements of the crimes charged. Acosta Br. 62-63. The district court's jury instructions were not plainly erroneous. Federal Rule of Criminal Procedure 30 states that the court "may instruct the jury before or after the arguments are completed, or at both times." Fed. R. Crim. P. 30(c). In the instant case, the district court instructed the jury at the close of all evidence *no less than five times* that it must find the defendant not guilty if the government failed to meet its burden of proof. S. A-1628, 1644-1645, 1662, 1694. That this instruction was not given during the preliminary instructions is of no consequence. *Cf. United States* v. *Dilg*, 700 F.2d 620, 627 (11th Cir. 1983) (finding reversible error where judge gave instruction on presumption of innocence in preliminary instructions, but *not* after closing arguments, as then

required by Federal Rule of Criminal Procedure 30).

## CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions.

Respectfully submitted,

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**CERTIFICATE OF ANTI-VIRUS SCAN**

I hereby certify that, pursuant to Second Circuit Local Rule 32(a)(1)(E), I have scanned for viruses the PDF version of the BRIEF FOR THE UNITED STATES AS APPELLEE that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> using McAfee VirusScan Enterprise 8.0.0., and that no viruses were detected.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 9 software, the brief contains 15,718 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

A Motion To File An Oversize Brief As Appellee has been submitted with this brief.

____________________________
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DATED: January 17, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first class mail, postage prepaid, and one PDF version of the same was forwarded via electronic mail, on the following counsels of record:

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