

APPENDICES

APPENDIX A, *United States v Irizarry-Rosario*, 903 F.3d 151
(1st Cir. 2018)

APPENDIX B, Judgment of the Court of Appeals

APPENDIX C, Plea and Forfeiture Agreement

Appendix A

United States v. Irizarry-Rosario

United States Court of Appeals for the First Circuit

September 10, 2018, Decided

No. 17-1117

Reporter

903 F.3d 151 *; 2018 U.S. App. LEXIS 25593 **

UNITED STATES OF AMERICA, Appellee, v.
AXEL IRIZARRY-ROSARIO, Defendant,
Appellant.

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Francisco A. Besosa, U.S. District Judge.

Counsel: Richard B. Klibaner and Klibaner & Sabino on brief for appellant.

Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, John A. Mathews II, Assistant United States Attorney, and Rosa Emilia Rodríguez-Vélez, United States Attorney, on brief for appellee.

Judges: Before Howard, Chief Judge, Kayatta, Circuit Judge, and Torresen,* Chief U.S. District Judge.

Opinion by: TORRESEN

Opinion

[*152] **TORRESEN, Chief District Judge.** Defendant-Appellant Axel Irizarry-Rosario challenges his 84-month sentence for [*153] possession of firearms on the grounds that the government breached its plea agreement with him. Finding no error, we affirm.

I. Background

* Of the District of Maine, sitting by designation.

On September 15, 2016, Irizarry-Rosario pleaded guilty to a two-count indictment entered after a police search of his residence uncovered six guns, a significant amount of ammunition, and eighty-two small bags of cocaine. Count I of the indictment charged Irizarry-Rosario with possessing firearms in furtherance of a drug trafficking crime in violation of *18 U.S.C. § 924(c)(1)(A)(i)*. Count II charged the possession of cocaine with intent to distribute in violation of [**2] *21 U.S.C. § 841(a)(1)*.¹

For Count I, the parties' plea agreement stipulated that the government would recommend a sentence of sixty months, the minimum term of imprisonment required by *18 U.S.C. § 924(c)*. For Count II, the parties agreed that Irizarry-Rosario's Base Offense Level under *U.S.S.G. § 2D1.1* was twelve and that his Total Offense Level was ten. The parties did not stipulate to a Criminal History Category. However, the parties agreed that if the district court found that Irizarry-Rosario fell within Criminal History Category I, then under the sentencing guidelines Irizarry-Rosario's sentencing range would be six to twelve months. The plea agreement provided that Irizarry-Rosario would seek a sentence at the lower end of this range and that the government would argue for a sentence at the higher end. The parties also agreed that any recommendation by either party for a term of imprisonment below or above the stipulated sentence recommendations would constitute a

¹ Our discussion of the facts is drawn from the plea agreement and the transcript of the sentencing hearing. See *United States v. Arroyo-Maldonado*, 791 F.3d 193, 196 (1st Cir. 2015).

material breach of the plea agreement.

At Irizarry-Rosario's sentencing hearing, the government kept its arguments brief. The prosecution began by stating that the parties had entered into a plea agreement and that for Count I, "we are going to be requesting 60 months." [**3]

The following exchange ensued:

[THE GOVERNMENT]: However, for the cocaine count, the Defense can request 6 months and the Government can request up to 12 months. The Government encourages the Court to sentence the Defendant in the higher end of those 12 months based on the sheer volume and quantity of firearms that were seized, and the ammunition that was seized. We are not talking about self-defense —

THE COURT: The higher end of the drug charge because of the weapons?

[THE GOVERNMENT]: The weapons is 60 months minimum statutory. That's what we stand by. But, however, for the cocaine count, in which there is a spread — there is a range from 6 to 12 months — we encourage the Court to sentence him to the higher end of those 12 months based on the amount of firearms that were seized, the amount of ammunition, and the magazines that were seized in his house, Your Honor.

The government offered nothing further. At the close of the hearing, after finding that Irizarry-Rosario fell within Criminal History Category I, the district court rehearsed the relevant facts including the full list of firearms and the number of rounds that the police had found in Irizarry-Rosario's residence. The district [**4] court then addressed the government's recommended sentence on Count I:

Because of the significant number of weapons, some with obliterated serial numbers, and ammunition found, including [*154] assault rifles, large capacity magazines chocked full of ammunition, and additional ammunition in boxes, the Court finds that the sentence to

which the parties agreed does not reflect the seriousness of the offense, does not promote respect for the law, does not protect the public from further crimes by Mr. Irizarry[-Rosario], and does not address the issues of deterrence and punishment.

The district court went on to sentence Irizarry-Rosario to eighty-four months of imprisonment as to Count I and twelve months as to Count II, to be served consecutively.

II. Analysis

Irizarry-Rosario claims that the government breached the parties' plea agreement by arguing, albeit implicitly, that the agreed-upon sixty-month sentence for his weapons charge was too low. Because Irizarry-Rosario did not object to the government's alleged breach below, our review is for plain error. *United States v. Oppenheimer-Torres*, 806 F.3d 1, 4 (1st Cir. 2015). Irizarry-Rosario therefore must show: "(1) that an error occurred (2) which was clear and obvious and which not only (3) affected the defendant's [**5] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Marchena-Silvestre*, 802 F.3d 196, 200 (1st Cir. 2015)).

A defendant who enters into a plea agreement relinquishes significant constitutional rights. *United States v. Rivera-Rodríguez*, 489 F.3d 48, 57 (1st Cir. 2007). We therefore "hold prosecutors engaging in plea bargaining to 'the most meticulous standards of both promise and performance.'" *Id.* (quoting *United States v. Riggs*, 287 F.3d 221, 224 (1st Cir. 2002)). In short, "[t]he government must keep its promises or the defendant must be released from the bargain." *United States v. Kurkuler*, 918 F.2d 295, 297 (1st Cir. 1990).

At times, the government's obligation to adhere scrupulously to a plea agreement collides with its

equally firm obligation to provide relevant information to the sentencing court. *United States v. Ubiles-Rosario*, 867 F.3d 277, 283 (1st Cir. 2017). When these commitments conflict, we look to the plea agreement's terms "to 'help resolve the[] competing tugs.'" *Id. at 284* (quoting *United States v. Miranda-Martinez*, 790 F.3d 270, 275 (1st Cir. 2015)).

Here, Irizarry-Rosario acknowledges that the government facially complied with the plea agreement by requesting a sixty-month sentence for Count I, but he claims that the government then sought to undermine that recommendation. Irizarry-Rosario's support for his position is that during the plea colloquy the government twice referred to the large quantity of weapons and ammunition Irizarry-Rosario possessed at [**6] the time of his arrest. Through these references, Irizarry-Rosario contends, the government tacitly argued that the district court should impose a sentence above sixty months.

"We prohibit not only explicit repudiation of the government's [plea-bargain] assurances but also end-runs around those assurances." *United States v. Cruz-Vázquez*, 841 F.3d 546, 548 (1st Cir. 2016). There is, however, no indication here that the government took with one hand what it had given with the other. The government did not lament the plea agreement's terms or otherwise suggest that it would seek a different sentence if free to do so. See *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995); *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992). Instead, the government stated its recommendation on the weapons charge without any reservation, confirmed to the district court that its references to Irizarry-Rosario's weapons [*155] went only to the drug charge, and reiterated that it was recommending the sixty-month sentence on Count I to which the parties had agreed. This reflects adherence to the plea agreement, not a breach.

The prosecution also did not "gratuitously offer[] added detail garbed in implicit advocacy" that

might have led the district court to rethink the government's recommendation. *Miranda-Martinez*, 790 F.3d at 275 (citing *United States v. Gonczy*, 357 F.3d 50 (1st Cir. 2004)). The plea agreement provided that the government would seek a sentence [**7] at the higher end of the guidelines range for Count II. The government was entitled to explain that recommendation to the sentencing judge, and it did so briefly and interspersed with reaffirmations of the sixty-month sentencing recommendation for Count I. This was not a breach. See *Ubiles-Rosario*, 867 F.3d at 287 ("Having unequivocally and repeatedly stated that it was recommending a sentence of 300 months, the government was free to offer reasons supporting its recommendation." (quotation marks and citations omitted)); see also *United States v. Quiñones-Meléndez*, 791 F.3d 201, 204 (1st Cir. 2015) (no error from government's introduction of video showing the defendant fleeing from officers, where the defendant's plea agreement contemplated that the government could argue that the defendant's sentences for two counts should run consecutively); *United States v. Almonte-Nuñez*, 771 F.3d 84, 91 (1st Cir. 2014) (no error from the government's emphasis at sentencing on the vulnerability of the defendant's purported victim; "[t]he Agreement allowed the prosecutor to seek the upper end of the [guideline sentencing range] contemplated by the Agreement, and the AUSA was within fair territory in emphasizing facts that made a sentence at the low end of that [range] inappropriate").

Irizarry-Rosario insists that the government's references to firearms must [**8] have been ill-intentioned because the number of weapons he possessed was irrelevant to the calculation of his guideline range on Count II. This argument misses the mark. As we have recognized, under *18 U.S.C. § 3661* "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *Cruz-Vázquez*, 841 F.3d at 549 (quoting *18 U.S.C. § 3661*). It requires little imagination to

understand why a defendant's accumulation of a small arsenal might counsel in favor of a higher sentence on a drug distribution charge.

In sum, the government did not breach its plea agreement with Irizarry-Rosario and there is no error.

III. Conclusion

For the reasons set forth above, we affirm Irizarry-Rosario's sentence.

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Appendix B

United States Court of Appeals For the First Circuit

No. 17-1117

UNITED STATES OF AMERICA,

Appellee,

v.

AXEL IRIZARRY-ROSARIO,

Defendant, Appellant.

JUDGMENT

Entered: September 10, 2018

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Axel Irizarry-Rosario's sentence is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Richard B. Klibaner
Axel Irizarry-Rosario
Max J. Perez-Bouret
Mariana E. Bauza Almonte

Appendix C

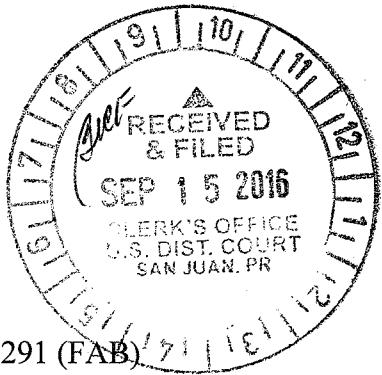
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

v.

AXEL IRIZARRY-ROSARIO,
Defendant.

CRIMINAL NO. 16-291 (FAB)



PLEA AND FORFEITURE AGREEMENT
(Pursuant to Fed. R. Crim. P. 11(c)(1)(B))

TO THE HONORABLE COURT:

COMES NOW, the United States of America, by and through its attorneys for the District of Puerto Rico: Rosa Emilia Rodríguez-Vélez, United States Attorney, Timothy Henwood, First Assistant United States Attorney, **Jenifer Y. Hernandez-Vega**, Assistant United States Attorney and Deputy Chief, Violent Crimes Unit, and Max Pérez-Bouret, Assistant United States Attorney, along with Defendant, **AXEL IRIZARRY-ROSARIO**, and his counsel, **Hector J. Dauhare**, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), state to this Honorable Court that they have reached a Plea and Forfeiture Agreement, the terms and conditions of which are as follows:

1. COUNTS TO WHICH DEFENDANT PLEADS GUILTY

Defendant agrees to plead guilty to Counts One and Two of the Indictment.

Count One:

On or about April 27, 2016, in the District of Puerto Rico and within the jurisdiction of this Court, the defendant herein, did knowingly possess firearms, that is, a Colt Carbine rifle, with an obliterated serial number, an M10 Rifle, Model 762 with serial number MA-3270-12-R-0, a .44

caliber Desert Eagle pistol, with obliterated serial number, a Smith and Wesson .38 caliber revolver, a Taurus .40 caliber pistol, model PT 24/7 PRO and a Astra .25 caliber pistol with serial number 863665, in furtherance of a drug trafficking crime, as charged in Count Two of the Indictment, which may be prosecuted in a Court of the United States, all in violation of Title 18, United States Code, Section 924(c)(1)(A)(i).

Count Two:

On or about April 27, 2016, in the District of Puerto Rico and within the jurisdiction of this Court, the defendant herein, did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectable amount of Cocaine, a Schedule II Controlled Substance. All in violation of Title 21, United States Code, Section 841(a)(1).

2. MAXIMUM PENALTIES

The maximum statutory penalty for the offense charged in Count One is a minimum mandatory term of imprisonment of five (5) years up to life, a fine not to exceed two hundred fifty thousand dollars (\$250,000) and a term of supervised release of not more than five (5) years.

The maximum statutory penalty for the offense charged in Count Two is a term of imprisonment of not more than twenty (20) years, a fine not to exceed two hundred and fifty thousand dollars (\$250,000.00); a supervised release term of not more than three (3) years.

3. SENTENCING GUIDELINES APPLICABILITY

Defendant understands that the sentence will be left entirely to the sound discretion of the Court in accordance with Title 18, United States Code, Sections 3551-86, and the United States Sentencing Guidelines (hereinafter “Guidelines”), which have been rendered advisory by the United States Supreme Court decision in United States v. Booker, 543 U.S. 220 (2005). Further,

Defendant acknowledges that parole has been abolished and that the imposition of his sentence may not be suspended.

4. SPECIAL MONETARY ASSESSMENT

Defendant agrees to pay a special monetary assessment of one hundred dollars (\$100.00), per count of conviction, to be deposited in the Crime Victim Fund, pursuant to Title 18, United States Code, Section 3013(a)(2)(A).

5. FINES AND RESTITUTION

Defendant is aware that the Court may, pursuant to U.S.S.G. § 5E1.2, order him to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation, or supervised release ordered. The Court may also impose restitution. The United States will make no recommendations as to the imposition of fines and restitution.

6. RULE 11(c)(1)(B) WARNINGS

Defendant is aware that his sentence is within the sound discretion of the sentencing judge and of the advisory nature of the Guidelines, including the Guidelines Policy Statements, Application, and Background Notes. Further, Defendant understands and acknowledges that the Court is not a party to this Plea and Forfeiture Agreement and thus, is not bound by this agreement or the sentencing calculations and recommendations contained. Defendant specifically acknowledges that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense to which Defendant is pleading guilty. Defendant is aware that the Court may accept or reject the Plea and Forfeiture Agreement, or may defer its decision whether to accept or reject the Plea and Forfeiture Agreement until it has considered the pre-sentence investigation report. See Fed. R. Crim. P. 11(c)(3)(A). Should the Court impose a

sentence up to the maximum established by statute, Defendant cannot, for that reason alone, withdraw his guilty plea, and will remain bound to fulfill all of the obligations under this Plea and Forfeiture Agreement. See Fed. R. Crim. P. 11(c)(3)(B).

7. APPLICABILITY OF UNITED STATES SENTENCING GUIDELINES

Defendant is aware that pursuant to the decision issued by the Supreme Court of the United States in United States v. Booker, 543 U.S. 220 (2005), the Guidelines are no longer mandatory and must be considered effectively advisory. Therefore, after due consideration of the relevant factors enumerated in Title 18, United States Code, Section 3553(a), the United States and Defendant submit the following advisory Guideline calculations:

SENTENCING GUIDELINE CALCULATION For Count I: 18 USC 924(c)

For Count One of the Indictment where defendant pleads guilty to possessing a firearm in furtherance of a drug trafficking crime, the guideline sentence is the minimum term of imprisonment (60 months) required by statute.	60 months
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SENTENCING GUIDELINE CALCULATION Count II: 21 USC 841(a)

For Count Two: Base Offense Level pursuant to the Drug Quantity Table in U.S.S.G. § 2D1.1. (Less than 50 grams of Cocaine).	12
Acceptance of Responsibility, U.S.S.G. § 3E1.1.	-2
Total Adjusted Offense Level	10
Should the Defendant be a Criminal History Category I	(6-12) months

8. NO STIPULATION AS TO CRIMINAL HISTORY CATEGORY

The parties do not stipulate as to any Criminal History Category for Defendant.

9. SENTENCE RECOMMENDATION

As to Count One, the parties agree to recommend a specific term of **sixty (60) months** of imprisonment. As to Count Two, the defendant will request a consecutive sentence of imprisonment at the lower end and the Government will request a consecutive sentence of imprisonment at the higher end of the applicable guideline range, based on a total offense level of 10. The parties agree that any recommendation by either party for a term of imprisonment below or above the stipulated sentence recommendation constitutes a material breach of the Plea and Forfeiture Agreement.

10. WAIVER OF APPEAL

Defendant hereby agrees that if this Honorable Court accepts this Plea and Forfeiture Agreement and sentences him according to its terms, conditions, and recommendations, Defendant waives and surrenders his right to appeal the judgment and sentence in this case.

11. NO FURTHER ADJUSTMENTS OR DEPARTURES

The United States and Defendant agree that no further adjustments or departures to Defendant's total adjusted base offense level and no variant sentence under Title 18, United States Code, Section 3553 shall be sought by the parties. The parties agree that any request by either party for an adjustment or departure will be considered a material breach of this Plea and Forfeiture Agreement, and either party will be free to ask for any sentence, either guideline or statutory.

12. SATISFACTION WITH COUNSEL

Defendant represents to the Court that he is satisfied with counsel, Hector J. Dauhare, and asserts that counsel has rendered effective legal assistance.

13. RIGHTS SURRENDERED BY DEFENDANT THROUGH GUILTY PLEA

Defendant understands that by entering into this Plea and Forfeiture Agreement he surrenders certain rights as provided in this agreement. Defendant understands that the rights of criminal Defendants include the following:

- a. If Defendant had persisted in a plea of not guilty to the charges, Defendant would have had the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if Defendant, the United States and the judge agree.
- b. If a jury trial is conducted, the jury would be composed of twelve lay persons selected at random. Defendant and Defendant's attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that Defendant is presumed innocent, that it could not convict Defendant unless, after hearing all the evidence, it was persuaded of Defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.
- c. If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count separately, determine whether or not the evidence established Defendant's guilt beyond a reasonable doubt.
- d. At a trial, the United States would be required to present its witnesses and other evidence against Defendant. Defendant would be able to confront those witnesses and Defendant's attorney would be able to cross-examine them. In turn, Defendant could present witnesses and other evidence on Defendant's own behalf. If the witnesses for Defendant would not appear voluntarily, Defendant could require their attendance through the subpoena power of the Court.
- e. At a trial, Defendant could rely on the privilege against self-incrimination to decline to testify, and no inference of guilt could be drawn from Defendant's refusal to testify. If Defendant desired to do so, Defendant could testify on Defendant's own behalf.

14. STIPULATION OF FACTS

The accompanying Stipulation of Facts signed by Defendant is hereby incorporated into this Plea and Forfeiture Agreement. Defendant adopts the Stipulation of Facts and agrees that the facts therein are accurate in every respect and, had the matter proceeded to trial, that the United States would have proven those facts beyond a reasonable doubt.

15. FIREARMS FORFEITURE

J,
A.T.R.

Pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), Defendant agrees to forfeit all of his right, title, and interest in the following property (hereafter, collectively, the "Property"): a Colt Carbine rifle, with an obliterated serial number, an M10 Rifle, Model 762 with serial number MA-3270-12-R-0, a .44 caliber Desert Eagle pistol, with obliterated serial number, a Smith and Wesson .38 caliber revolver, a Taurus .40 caliber pistol, model PT 24/7 PRO and a Astra .25 caliber pistol with serial number 863665, and any ammunition involved in the commission of the offense. Defendant acknowledges that he possessed the Property in violation of Title 18, United States Code, Section 924(c), as set forth in Count One of the Indictment, and that the Property is therefore subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

16. LIMITATIONS OF PLEA AND FORFEITURE AGREEMENT

This Plea and Forfeiture Agreement binds only the United States Attorney's Office for the District of Puerto Rico and Defendant. It does not bind any other federal district, state, or local authorities.

17. ENTIRETY OF PLEA AND FORFEITURE AGREEMENT

This written agreement constitutes the complete Plea and Forfeiture Agreement between the United States, Defendant, and Defendant's counsel. The United States has made no promises or representations, except as set forth in writing in this Plea and Forfeiture Agreement, and denies the existence of any other terms and conditions not stated herein.

18. AMENDMENTS TO PLEA AND FORFEITURE AGREEMENT

No other promises, terms or conditions will be entered unless in writing and signed by all parties.

19. VOLUNTARINESS OF GUILTY PLEA

Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

UNDERSTANDING OF RIGHTS

I have consulted with my counsel and fully understand all of my rights with respect to the Indictment pending against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines, Policy Statements, Application, and Background Notes which may apply in my case. My counsel has translated the plea agreement it to me in the Spanish language and I have no doubts as to the contents of the agreement. I have read this Plea and Forfeiture Agreement and carefully reviewed every part of it with my attorney. I fully understand this agreement and voluntarily agree to it.

Date: 1/15/16

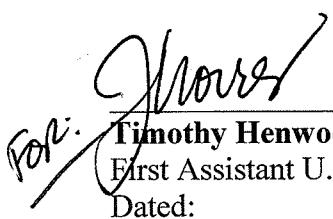
AXEL IRIZARRY ROSARIO
AXEL IRIZARRY-ROSARIO
Defendant

I am the attorney for Defendant. I have fully explained Defendant's rights to Defendant with respect to the pending Indictment. Further, I have reviewed the provisions of the Sentencing Guidelines, Policy Statements, Application, and Background Notes, and I have fully explained to Defendant the provisions of those guidelines which may apply in this case. I have carefully reviewed every part of this Plea and Forfeiture Agreement with Defendant. I have translated the plea agreement and explained it in the Spanish language to the defendant who has expressed having no doubts as to the contents of the agreement To my knowledge, Defendant is entering into this Plea and Forfeiture Agreement voluntarily, intelligently, and with full knowledge of all consequences of Defendant's plea of guilty.

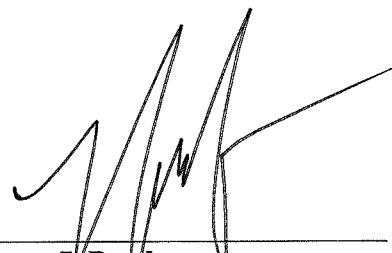
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Hector J. Daphare
Counsel for Defendant

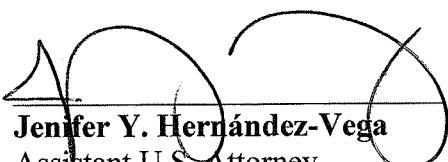
ROSA EMILIA RODRÍGUEZ-VÉLEZ
United States Attorney



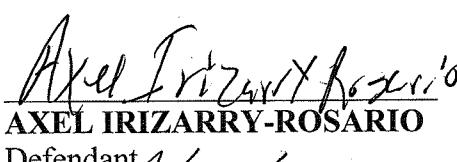
Timothy Henwood
First Assistant U.S. Attorney
Dated: _____



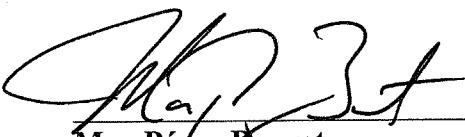
Hector J. Dauhure
Counsel for Defendant
Dated: 9-15-16



Jenifer Y. Hernández-Vega
Assistant U.S. Attorney
Chief, Violent Crimes Unit
Dated: 9/11/2016



AXEL IRIZARRY-ROSARIO
Defendant
Dated: 9/15/16



Max Pérez-Bouret
Assistant U.S. Attorney
Dated: Sept 7, 2016