No. 18- _____

In the

SUPREME COURT of the UNITED STATES

October Term, 2018

RUDY MENDOZA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEREMY GUTMAN
40 Fulton Street, 23rd Floor
New York, New York 10038
Jgutman@jeremygutman.com
(212) 644-5200
Counsel of Record
for Petitioner Rudy Mendoza

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. (This question is presently before the Court in *United States v. Davis*, No. 18-431.)

2. Whether, even if the Court ruled in *Davis* that § 924(c)(3)(B) is not unconstitutional, the application of that provision to Mendoza is nonetheless unconstitutional because the Second Circuit decided that a jury determination that Mendoza was guilty beyond a reasonable doubt as to each element of the offense of conviction could be dispensed with.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the following individuals were party to the proceeding before the court whose judgment is sought to be reviewed:

JUAN R. CLIMICO
MARCO CRUZ
FIDEL DEJESUS
JORGE LEYVA
RUBI MARTINEZ
ARTURO MEDINA-LOPEZ
YASMIN OSUNA
MARCOS REYES
WILLIAM ROJAS
LUISBI SANTOS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

No. 18- _____
In the
SUPREME COURT of the UNITED STATES
October Term, 2018

RUDY MENDOZA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rudy Mendoza ("Mendoza") respectfully petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, *United States v. Climico, et al*, No. 14-4304-cr (unofficially reported at 754 Fed.Appx. 25), dated October 29, 2018, appears as Appendix ("App.") A to this petition. The judgment of the district court, dated November 5, 2014, and entered November 18, 2014, is attached as App. B. The order of the Second Circuit on Mendoza's petition for

rehearing *en banc,* dated February 21, 2019, is attached as App. C. (This order is not officially or unofficially reported.)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 18, 2018. The petition for rehearing *en banc* was denied by that Court on February 21, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . ; . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

Section 924(c) of Title 18, United States Code, provides, as pertinent:

> (1)(A) . . . [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

> (i) be sentenced to a term of imprisonment of not less than 5 years; . . .
>
> * * * *
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and-
>
> (A) has as an element the use, attempted use, or threatened use of physical 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.

STATEMENT OF THE CASE

Background and Introduction

By judgment of the United States District Court for the Southern District of New York (McMahon, J.), entered on November 5, 2014, Mendoza was convicted, after a jury trial, on five of the six counts with which he had been charged in a fifteen count indictment. In addition to convictions for racketeering and narcotics conspiracies (not involved in this petition), his conviction involved three offenses arising from a sting operation: conspiracy to commit Hobbs Act robbery [18 U.S.C. § 1951(b)(3)], conspiracy to carry/use a firearm during and in relation to a "crime of violence" [18 U.S.C. § 924(c)(1)(A)(I)] (the subject matter of the present petition), and a narcotics conspiracy [21 U.S.C. § 846].

The indictment charged that Mendoza and others entered into an agreement to commit a robbery. The only overt act stated in the indictment was that Mendoza and some others "met . . . with an undercover agent posing as a drug courier for a narcotics-trafficking organization and discussed robbing the narcotics-traffickers for whom the undercover agent claimed to work."

The conviction on the firearm charge mandated five years of imprisonment consecutive to the remainder of the sentence imposed (240 months), making the aggregate sentence 300 months. Mendoza is currently incarcerated pursuant to that sentence.

The Second Circuit's Summary Order

A panel of the Second Circuit affirmed the judgment of the district court in its entirety. Its decision addressed the issue raised in this petition, as set forth in App. A, at pages 8-9. Mendoza's application for *en banc* consideration was denied without discussion, as set forth in App. C.

The panel noted that, based on this Court's decisions in *Johnson v. United States,* 576 U.S. ___, 135 S.Ct. 2551 (2015), and *Sessions v. Dimaya,* 584 U.S. ___, 138 S.Ct. 1204 (2018), Mendoza "argues that conspiracy to commit Hobbs Act robbery is not a 'crime of violence' under 18 U.S.C. § 924(c)(3)." (App. A, pp. 8-9) The Panel rejected that argument as follows:

1. Relying on *United States v. Barrett,* 903 F.3d 166 (2d Cir.), cert. pet. filed 18-6985, 2018), and also referencing *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018),

cert. denied, ___ U.S. ___, 2019 WL 113451 (2019) (which had held that Hobbs Act robbery, but not conspiracy to commit that offense, is "categorically" a crime of violence under § 924(c)(3)(A), the so-called "force" or "elements" clause), the panel held *conspiracy* to commit Hobbs Act robbery to be, categorically, a crime of violence under § 924(c)(3)(B) (the "residual" clause). It reached this conclusion in reliance on *Barrett's* holding [903 F.3d at 175] that the robbery conspiracy offense "by its 'very nature' presents a substantial risk of physical force, so as also to be a violent crime under [the residual clause]."(App. A, p. 9)[1]

2. The panel also concluded that conspiracy to commit Hobbs Act robbery is a "crime of violence" based on *Barrett*'s "conduct-specific application of" the residual clause. (*Id.*) The panel stated that it could avoid the constitutional impairment flowing from *Johnson* and *Dimaya* by having a jury determine "the nature of the predicate offense and the attending risk of physical force being used in its commission." (*Id.*) However, the Panel dispensed with this jury requirement on "harmless error" grounds.

Pending Matters Before this Court Regarding Section 924(c)

In the wake of *Johnson* and *Dimaya*, there have been a number of petitions for certiorari presented to the Court. The Court granted the petition arising from the Fifth

---

[1]The Second Circuit's analysis of this issue is found in *Barrett*, 903 F.3d at 175-177. It is based on substituting an "each case" approach for the "ordinary case" reading of the statute that forms the basis of this Court's *Johnson/Dimaya* jurisprudence, as discussed below. *See infra.*

Circuit's decision in *United States v. Davis,* No. 18-431, and heard oral argument shortly before the filing of this Petition. The government sought certiorari in a Tenth Circuit case, *United States v. Salas*, No. 18-428, and asked that the Court hold the petition pending the outcome in *Davis.* Additional petitions have been filed by defendants whose convictions were affirmed in courts of appeals. These include *Ovalles v. United States,* No. 18-8393, from the Eleventh Circuit, in which the government's response to the petition is presently pending; *Douglas v. United States,* No. 18-7331, a First Circuit case in which the government asked the Court to hold the petition pending disposition of *Davis*; and, perhaps most significantly, *Barrett v. United States,* No. 18-6985, the Second Circuit case on which the decision in this case largely rested and in which the government has also asked this Court to hold the petition pending the outcome of *Davis.*

In each of these petitions, the question presented includes whether, after *Dimaya,* the residual clause, § 924(c)(3)(B), is void for vagueness. This is also the central question presented in this Petition. The defendants in these cases urge that, because the language considered in *Dimaya* is identical to that before the Court here, it is also void. Although the government had originally advocated for the categorical approach (which focuses on an assessment of the "ordinary case" to determine the "risk" that the statute requires) that was invalidated in *Johnson* and *Dimaya,* it shifted gears in *Davis* and now urges that unconstitutionality can be avoided by considering the case under a conduct-specific approach focusing on the individual case. In addition, the petition in *Barrett* argues

against the Second Circuit's alternate holding that the statute can be saved by an "each case" approach that is found nowhere in the pending cases (or the government's advocacy) other than in *Barrett* and now, in reliance on *Barrett,* this case.[2] These issues are discussed in further detail in the following section.

REASONS FOR GRANTING THE WRIT

I. IF THE COURT VOIDS THE RESIDUAL CLAUSE CONTAINED IN SECTION 924(C)(3)(B) AND AFFIRMS THE JUDGMENT OF THE FIFTH CIRCUIT IN *DAVIS,* MENDOZA'S PETITION SHOULD BE SUMMARILY GRANTED, HIS SECTION 924 CONVICTION SHOULD BE VACATED, AND HIS CASE SHOULD BE REMANDED TO THE SECOND CIRCUIT

The sole issue presented in *Davis* – whether the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague – is dispositive of the present case if the Court affirms the decision below. There is no reasoned basis for distinguishing this case from *Davis* under such circumstance as any other result would leave Mendoza convicted of an offense that has been voided as unconstitutionally vague.

In *Davis,* the government acknowledged that, after *Dimaya,* the "categorical approach" to Section 924(c)(3)(B) that it had long advocated was no longer constitutionally available, but argued that this Court should instead evaluate (and constitutionally validate) the residual clause under what it termed a "case-specific"

---

[2]The possibility of such an approach was mentioned (but left for another case) by Justice Gorsuch in his concurring opinion in *Dimaya,* 138 S. Ct. at 1233.

approach. This is the same approach utilized by the Second Circuit in the present case (referred to as "a conduct-specific application"), as well as in *Barrett.* (*See* page 5*, supra*, and App. A, p. 9.) Accordingly, in the event *Davis* is affirmed, we ask that the Court summarily grant Mendoza's petition and vacate the judgment.[3]

II. IF THE COURT DOES NOT RULE THAT THE RESIDUAL CLAUSE, SECTION 924(C)(3)(B), IS UNCONSTITUTIONAL, THE SPECIAL CIRCUMSTANCES IN MENDOZA'S CASE (THAT WERE NOT BEFORE THE COURT IN *DAVIS* OR ANY OTHER PENDING PETITION) WARRANT GRANTING THE WRIT BECAUSE THE SECOND CIRCUIT DECIDED THAT A JURY DETERMINATION THAT MENDOZA WAS GUILTY BEYOND A REASONABLE DOUBT AS TO EACH ELEMENT OF THE OFFENSE OF CONVICTION COULD BE DISPENSED WITH, A CONCLUSION THAT DANGEROUSLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT REGARDING THIS IMPORTANT FEDERAL QUESTION

The present case differs markedly from all other § 924(c)(3)(b) petitions pending before the Court at the time this Petition is being filed. Mendoza was charged *only* with Hobbs Act conspiracy. Every other pending case involved substantive Hobbs Act offenses either alone or in combination with a conspiracy charge. This is of critical

---

[3]In both *Barrett* and the present case, the Second Circuit also proposed an alternative "categorical" approach that the government did not advocate in *Davis* and that no other court has followed. *See* pages 4-5, *supra*, and App. A, p. 9. In *Douglas,* 907 F.3d at 16, the First Circuit expressly disavowed this alternative approach and noted that the government disagreed with its reasoning as well. Because this alternative was not before the Court in *Davis*, its consideration by the Court would necessarily require that the petition (in this case and/or in *Barrett*) first be granted. However, because the government has never advocated this alternative, we submit that such consideration would not be warranted.

significance because, were the Court to affirm the Second Circuit and adopt the case-specific approach advocated by the government in *Davis* (applied to Mendoza via *Barrett*), it would be doing so without any jury determination whatsoever to support the essential finding on which Mendoza's conviction would rest. Consequently, certiorari would be required to correct the lower court's extreme violations of the Fifth and Sixth Amendments.

In *Barrett*, 903 F.3d at 178, the Second Circuit justified its conduct-specific approach by stating that:

> Section 924(c)(3)(B) can be applied to a defendant's case-specific conduct, with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission. Such a conduct-specific approach avoids both the Sixth Amendment right-to-trial and due process vagueness concerns identified in *Dimaya* and *Johnson*.

The requirement of a jury verdict is not doubted anywhere in the *Johnson, Dimaya, or Davis* line of cases. Even in dissent, Justice Thomas (in proposing an "underlying conduct" approach), recognized that a jury determination would be required to avoid constitutional deficiency:

> [I]in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant's prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. *See Johnson*, 576 U.S., at ----, 135 S.Ct., at 2579 (ALITO, J., dissenting).

Dimaya, 138 S. Ct. at 1256-57 (Thomas, J., dissenting).

Likewise, in its petition in *Davis,* the government also recognized the requirement of a jury determination:

> From a constitutional perspective, "this Court adopted the categorical approach in part to 'avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (opinion of Kagan, J.) (quoting *Descamps v. United States*, 570 U.S. 254, 267 (2013)) (brackets omitted).

Davis, Petition for Certiorari, page 19. The government went on to urge that its case-specific approach "could not invite any Sixth Amendment concerns; it would result in more jury findings, not fewer." *Id.* at 20.

All of these arguments rely implicitly if not explicitly on a recognition that, if the Court were to interpret the residual clause to allow a conduct-specific approach, a finding regarding the requisite conduct becomes an element of the offense that "must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Here, that would mean that the indictment had to allege, and the government had to prove to a jury beyond a reasonable doubt, that Mendoza's conduct presented a substantial risk of the use of physical force. In this case, the indictment makes no such allegation and the jury, far from being asked to determine anything about Mendoza's underlying conduct, was instructed expressly that the robbery conspiracy was a crime of violence as a matter of law. (Trial transcript, page 1281, found in the appeal appendix at A1726.) Thus, the conduct-based approach, as applied here, violates

Mendoza's constitutional rights to indictment, due process, and trial by jury under the Fifth and Sixth Amendments.

In *Neder v. United States*, 527 U.S. 1 (1999), which *Barrett* relies on for the proposition that failure to instruct on an element of an offense can be "harmless error," the Court found that the omitted element was both "uncontested" *and* "supported by overwhelming evidence." *Id.* at 17. Thus, *Neder* assumes that the defendant was on notice of the elements of the charged crimes and was afforded a full and fair opportunity to contest the omitted element. Mendoza was not. An omitted element of proof cannot be "uncontested" when Mendoza was not on notice that the element was essential to conviction on the firearms count. Had he received such notice, Mendoza might have offered evidence and arguments creating a basis for reasonable doubt as to whether the actual or threatened use of force was within the scope of his own understanding of the conspiracy. In the absence of such notice, the failure to treat the question whether his offense was a "crime of violence" as a jury question cannot be deemed "harmless."

The Second Circuit's reliance on its decision in *Barrett* to support the "harmless" determination would be faulty here even if, notwithstanding the infirmities discussed above, *Barrett* could pass constitutional muster. In *Barrett,*, as the court noted, 903 F.3d at 184, the defendant was charged with two substantive Hobbs Act robberies (among a host of other offenses) *in addition to* Hobbs Act conspiracy. Accordingly, in *Barrett*, the jury *had* determined that the defendant was guilty beyond a reasonable doubt of the

predicate offenses that the court found indicative of "a substantial risk of the use of physical force." *Id.*

The Second Circuit's attempt to apply "harmless error" analysis in the absence of any consideration by a jury of the risk of physical force follows precisely the path that this Court condemned as "utterly meaningless" in *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (emphasis and internal citations omitted):

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

In the present case, because there was no jury determination in relation to any predicate offense at all, the bare conspiracy conviction rests on nothing more than an appellate court's factual determination of what Mendoza's conduct was. When the court of appeals said that "Mendoza was convicted of a conspiracy to steal 20 to 25 kilograms of cocaine through the use of physical force, including forcing open the door at the robbery location and hitting, tying up, and pistol whipping the targets of the robbery," *id.*, those were judicial, not jury determined facts. The jury was not instructed that it needed to find

such facts in order to convict Mendoza (and indeed it was not legally required to find such facts).[4] The Second Circuit's invocation of the harmless error rule under these circumstances violated the Sixth Amendment.

Likewise, "an indictment is sufficient" only if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). If the "crime of violence" component of Mendoza's offense required proof of conduct establishing a substantial risk of physical force (as it does), the indictment here violated *Hamling* because it alleged no such conduct.

This is structural error. "[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215–16 (1960). Here, the grand jury alleged only that Mendoza used a firearm during a "crime of violence" defined categorically; it did not charge any conduct specifically that "by its nature" involved a substantial risk that physical force would be used. Moreover, as rehearsed above, there was no substantive offense as to which the jury made findings. Retroactive application of the conduct-specific approach,

---

[4]The Second Circuit's straightforward formulation of the proof required for Hobbs Act conspiracy, which does not require an overt act, demonstrates the inadequacy of the predicate offense finding made by the court of appeals in this case:

> [The] government needs to prove only that an agreement to commit [a Hobbs Act offense] existed."

United States v. Clemente, 22 F.3d 477, 480 (2d Cir. 1994).

even if otherwise lawful, would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Because "[d]eprivation of such a basic right is far too serious to be . . . dismissed as harmless error," *id.,* vacating the judgment is required.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Second Circuit, and upon such review, the order should be vacated and the decision reversed.

Respectfully submitted,

JEREMY GUTMAN
40 Fulton Street, 23rd Floor
New York, New York 10038
Jgutman@jeremygutman.com
(212) 644-5200
Counsel of Record
for Petitioner Rudy Mendoza

May 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand eighteen.

PRESENT: DENNIS JACOBS,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

- - - - - - - - - - - - - - - - - - -X
UNITED STATES OF AMERICA,
Appellee,

-v.- **14-4304-cr**

JUAN R. CLIMICO, aka Sealed Defendant, 1, aka Manuel Climico, aka Juan Clinico, aka Smiley, aka Juanito, MARCO CRUZ, aka Marco Antonio Cruz Bello, aka Marcos Cruz, aka Sealed Defendant, 2, aka Juan Bello, aka Freddo

Gomez, aka Burro, aka Mariguano, FIDEL DEJESUS, aka Sealed Defendant, 3, aka Duende, JORGE LEYVA, aka Sealed Defendant, 4, aka Cucha, JESUS MARTINEZ, aka Sealed Defendant, 5, aka Gafas, aka Tito, RUBI MARTINEZ, aka Sealed Defendant, 6, ARTURO MEDINA-LOPEZ, aka Sealed Defendant, 7, aka Arturo Medina, aka Marlboro, YASMIN OSUNA, aka Sealed Defendant, 9, aka La Mona, La Mono, MARCOS REYES, aka Sealed Defendant, 10, aka Marco Reyes, aka Cuervo, WILLIAM ROJAS, aka Sealed Defendant, 11, aka Willy, LUISBI SANTOS, aka Sealed Defendant, 12, aka Chorejas, aka Dumbo, aka Lulu,

Defendants,

RUDY MENDOZA, aka Sealed Defendant, 8, aka Raul Perez, aka Pedro Mendoza,

Defendant-Appellant.

----------X

FOR APPELLANT: GLENN A. GARBER, Glenn Garber, P.C. (Ezra Spilke, Law Offices of Ezra Spilke; Sarah Kunstler, Law Offices of Sarah Kunstler, on the brief), New York, New York.

FOR APPELLEE: AMY LESTER (Andrew Thomas, Karl Metzner, on the brief), Assistant United States Attorneys, for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (McMahon, Ch.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Rudy Mendoza appeals from the judgment of the United States District Court for the Southern District of New York (McMahon, Ch.J.), sentencing him principally to 300 months' imprisonment after conviction for (1) participation in the "Vagos Gang" racketeering conspiracy, in violation of 18 U.S.C. § 1962(d); (2) participation in a Vagos Gang-related conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(C), and 846; (3) participation in a conspiracy to commit Hobbs Act armed robbery of individuals believed to be in possession of 20 kilograms of cocaine, in violation of 18 U.S.C. § 1959; (4) use of a firearm in connection with the robbery conspiracy, in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (5) participation in a conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine, also in connection with the robbery conspiracy, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. Mendoza challenges the sufficiency of the evidence; the jury instructions; trial counsel's effectiveness; the procedural reasonableness of his sentence; and the applicability of § 924(c) to Hobbs Act robbery conspiracy. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

1. A defendant challenging the sufficiency of the evidence underlying his conviction at trial "bears a heavy burden": We "view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (citations omitted). We must uphold the judgment if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "The traditional deference accorded to a jury's verdict is especially important when reviewing a conviction for conspiracy

because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003) (internal quotation marks and ellipsis omitted).

Mendoza argues that the evidence was insufficient to prove his participation in the Vagos Gang racketeering conspiracy during the charged time frame (2009-2011). Viewed in the proper light, the evidence showed that Mendoza was associated with the Vagos Gang as early as 2001, was initiated in 2002, and was an active participant-member from that time and at essentially all subsequent times when not incarcerated[1]--including during the charged time frame. Mendoza was released from prison in March 2011 and quickly resumed his participation with the criminal organization. Mendoza sold cocaine to Juan Climico, the leader of the 110th Street subset of the Vagos Gang, on numerous occasions in 2011, as Mendoza admitted during his testimony. The jury heard recordings of numerous wiretapped telephone conversations between Mendoza and Climico between July 2011 and Mendoza's September 19 arrest, in which Mendoza inquired as to the activities of Climico's set of the Vagos Gang; made plans with Climico to extort and rob prostitution rings (a Vagos Gang activity in which Mendoza had been involved before his incarceration); offered and asked for guns; and discussed providing cocaine to Climico and other Vagos Gang members. In the calls, Mendoza referred to the Vagos Gang as "we" and spoke about wanting to increase its numbers; he also said that he wanted the Vagos Gang to have a large presence at an annual Mexican festival in September 2011 so that rival gangs would take notice. Mendoza's continued participation with the Vagos Gang was also evidenced by a reference to the 116th Street set of the Vagos Gang in the email address Mendoza associated with his 2011-activated Facebook page, and by several 2011 posts on that Facebook page. The evidence was more than sufficient to support the jury's finding that Mendoza agreed to

[1] Mendoza was incarcerated from approximately January 15, 2003, through March 9, 2004; August 15, 2005, through January 6, 2006; and March 13, 2009, through March 15, 2011.

(and did) participate in the Vagos Gang racketeering conspiracy during the charged time frame.[2]

As to the three counts relating to the Hobbs Act armed robbery conspiracy, Mendoza contends that the evidence was insufficient to prove that he had knowledge that the objective of the robbery conspiracy was to steal cocaine (as opposed to, e.g., cash) from an undercover agent posing as drug courier.[3] Three of Mendoza's co-conspirators (his uncle and cousins) had numerous conversations with the undercover agent about their plan to steal 20 to 25 kilograms of cocaine, and to split the cocaine 50/50 with the agent. Mendoza's

---

[2] Mendoza also argues that there was insufficient evidence of his connection to any two racketeering acts committed as part of the criminal enterprise. The RICO conspiracy count required proof that Mendoza agreed "with others (a) to conduct the affairs of an enterprise (b) through a pattern of racketeering." United States v. Basciano, 599 F.3d 184, 199 (2d Cir. 2010). "[A] conspirator charged with racketeering conspiracy need not commit or even agree to commit the predicate acts . . . ." United States v. Cain, 671 F.3d 271, 291 (2d Cir. 2012). "[T]he jury must consider the predicate acts charged against the defendant and his alleged co-conspirators to determine 'whether the charged predicate acts were, or were intended to be, committed as part of that conspiracy.'" Id. (quoting United States v. Yannotti, 541 F.3d 112, 129 n.11 (2d Cir. 2008)). In addition to the activities discussed on the 2011 wiretapped phone calls, the jury heard about a Vagos Gang-related attempted murder in June 2011. The jury could have easily found that Mendoza *or a co-conspirator* committed *or intended to commit* multiple, related acts of murder, extortion, robbery, and narcotics trafficking (the charged predicates) in connection with the enterprise.

[3] Mendoza appears to acknowledge that the evidence was sufficient to prove his intent to participate in a *robbery*. Indeed, Mendoza's recorded conversation with the undercover agent soon before the arrest demonstrated that Mendoza knew the plan was to commit a push-in robbery; comments on his Facebook page a few weeks prior to the robbery revealed that Mendoza had been looking for the opportunity to commit a robbery; and Mendoza and his co-conspirators were arrested with the tools (firearms and a rope) needed to carry out a robbery consistent with the previously made plans.

uncle told the agent that Mendoza knew what was going on, was ready to do "the job," "ready to do . . . what they have to do," and was one of his "trusted people." A674-78. An audio recording of Mendoza corroborates that he was an informed participant who knew quite well the robbery strategy previously discussed by the co-conspirators and the agent. Furthermore, Mendoza's involvement in cocaine trafficking during this period permits the inference that Mendoza agreed to commit this robbery in part because the target was cocaine. And a taped conversation during which Mendoza agreed to the manner of splitting proceeds can be reasonably interpreted to show that Mendoza knew the target of the robbery was drugs, not money.[4] The jury could have reasonably inferred from all of this evidence that Mendoza had been fully informed by his co-conspirators as to the armed robbery conspiracy, including that they planned to obtain 20 or more kilograms of cocaine. See United States v. MacPherson, 424 F.3d 183, 189-90 (2d Cir. 2005) ("The law . . . recognizes that the mens rea elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom.").

2. We review a challenge to jury instructions de novo and will reverse "only where the charge, viewed as a whole, 'either failed to inform the jury adequately of the law or misled the jury about the correct legal rule.'" United States v. Quinones, 511 F.3d 289, 314 (2d Cir. 2007) (quoting United States v. Ford, 435 F.3d 204, 209-10 (2d Cir. 2006)). Since Mendoza did not object to the challenged instruction before the submission of the case to the jury, we review for plain error.[5] See United States v. Botti, 711 F.3d 299, 308 (2d Cir. 2013).

---

[4] The agent used the word "they" and Mendoza's co-conspirator Jose Ramos used the phrase "our shit" when referring to the proceeds, A498-500; this language undermines Mendoza's contention that he might have thought the object of the robbery was money, rather than kilograms of cocaine.

[5] "Plain error review requires a defendant to demonstrate that '(1) there was error, (2) the error was plain, (3) the error prejudicially affected his substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings.'" United States v. Youngs, 687 F.3d 56, 59 (2d Cir. 2012) (quoting United States v. Flaherty, 295 F.3d 182, 195 (2d Cir. 2012)).

Mendoza asserts that the district court provided an incomplete instruction regarding the vertical (as opposed to horizontal) relatedness requirement of the predicate racketeering acts.[6] As to relatedness, the instruction was not, taken as a whole, misleading. The jury was instructed that racketeering acts must be "related to each other *by a common scheme or plan, such as furthering the ends or goals of the enterprise*." A1706. While it may be preferable to distinguish between horizontal and vertical relatedness, and to do so distinctly, this instruction sufficiently incorporated both requirements. See United States v. Daidone, 471 F.3d 371, 375 (2d Cir. 2006) (per curiam).

3. To prevail on a claim of ineffective assistance of counsel, a defendant must (1) "show that counsel's representation fell below an objective standard of reasonableness"; and (2) "affirmatively prove prejudice." Strickland v. Washington, 466 U.S. 668, 688, 693 (1984). "[A] petitioner cannot show prejudice if the claim or objection that an attorney failed to pursue lacks merit." Harrington v. United States, 689 F.3d 124, 130 (2d Cir. 2012).

---

[6] In passing, Mendoza also asserts that the district court erred in failing to instruct the jury as to the continuity requirement of the predicate acts. However, the substance of Mendoza's argument deals only with vertical relatedness, not continuity, so this does not suffice to preserve the issue. See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal. . . . Pursuant to this rule, we have held that . . . stating an issue without advancing an argument . . . did not suffice.").

In any event, there is no reasonable probability that an instruction as to continuity would have had any effect on the jury's verdict. See Cain, 671 F.3d at 277. In a case like this, involving a criminal, rather than lawful, enterprise, continuity is easily established. See H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 242-43 (1989) ("[T]he threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase 'organized crime.'"). The wiretapped conversations between Mendoza and Climico demonstrated that continuing criminal activity was intended.

Mendoza cites trial counsel's failure to challenge the racketeering acts jury instruction discussed above. The ineffectiveness claim fails because (inter alia) there was no error.[7] See United States v. Frampton, 382 F.3d 213, 222 n.8 (2d Cir. 2004) ("Having found no error in [the district court's jury] instruction, we hold [defendant's ineffective assistance] claim must fail.").

4. We review the procedural reasonableness of a sentence under a "deferential abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 41 (2007). This means that a district court's legal application of the Sentencing Guidelines is reviewed de novo and its underlying factual findings are reviewed for clear error. United States v. Cossey, 632 F.3d 82, 86 (2d Cir. 2011).

Mendoza challenges the district court's application of a two-point enhancement under U.S.S.G. § 3C1.1 for obstruction of justice. Mendoza fails to show procedural error. The district court applied the enhancement because it determined that Mendoza willfully had perjured himself on material issues at trial. The district court found that Mendoza "lied and lied and lied" about his knowing participation in the armed robbery conspiracy, as evidenced by the different version of events revealed by Mendoza's own words on the contemporaneous audio recording and by the undercover agent's testimony. This finding was not clearly erroneous and is a sufficient basis for applying the enhancement. See United States v. Salim, 549 F.3d 67, 73 (2d Cir. 2008); United States v. Lincecum, 220 F.3d 77, 80-81 (2d Cir. 2000) (per curiam).

5. Mendoza was convicted under 18 U.S.C. § 924(c) for use of a firearm in connection with a "crime of violence"; his underlying offense was conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951. He argues that conspiracy

---

[7] Although "in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance," Massaro v. United States, 538 U.S. 500, 504 (2003), we may resolve Mendoza's claim on direct appeal because no additional fact-finding is necessary and the claim can be resolved on the current record "beyond any doubt," United States v. Gaskin, 364 F.3d 438, 468 (2d Cir. 2004) (quoting United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003)).

to commit Hobbs Act robbery is not a "crime of violence" under 18 U.S.C. § 924(c)(3).

We held in United States v. Hill, 890 F.3d 51 (2d Cir. 2018), that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A). Conspiracy to commit such an offense, "by its 'very nature' presents a substantial risk of physical force, so as also to be a violent crime under" the subsection's "risk-of-force" clause, § 924(c)(3)(B). United States v. Barrett, 903 F.3d 166, 175 (2d Cir. 2018). Mendoza argues that Barrett and Hill were wrongly decided, and that Barrett's categorical application of 18 U.S.C. § 924(c)(3)(A) and § 924(c)(3)(B) is dubious in light of the Supreme Court's decisions in Johnson v. United States, 135 S. Ct. 2551 (2015), and Sessions v. Dimaya, 138 S. Ct. 1204 (2018). Nonetheless, Barrett is the law of this Circuit. Our precedent thus establishes that Mendoza's offense is categorically a "crime of violence" under § 924(c).

Mendoza's offense also qualifies as a crime of violence under a conduct-specific application of 18 U.S.C. § 924(c)(3)(B). This Court has held that § 924(c)(3)(B) "can be applied to a defendant's case-specific conduct, with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission. Such a conduct-specific approach avoids . . . due process vagueness concerns identified in Dimaya and Johnson." Barrett, 903 F.3d at 178. While a conduct-specific § 924(c)(3)(B) determination was not made by the jury here, any error in failing to require the jury to make such a finding was harmless beyond a reasonable doubt. Mendoza was convicted of a conspiracy to steal 20 to 25 kilograms of cocaine through the use of physical force, including forcing open the door at the robbery location and hitting, tying up, and pistol whipping the targets of the robbery. Indeed, the conspirators brought with them firearms and rope. Therefore, because the predicate offense of Mendoza's conviction entailed a "plan[] to use physical force," the "evidence can only support a finding that the charged conspiracy, by its nature, involved a substantial risk of the use of physical force." Id. at 184 (emphasis in original).

Accordingly, the district court did not err in applying the "crime of violence" sentencing enhancement to Mendoza's Hobbs Act robbery conspiracy conviction.

For the foregoing reasons, and finding no merit in Mendoza's other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
RUDY MENDOZA

JUDGMENT IN A CRIMINAL CASE

Case Number: S2 11 CR 974-08 (CM)

USM Number: 90731-054

Glenn Garber
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 (S2-1) , 2 (S2-6), 4 (S2-13), 5 (S2-14) and 6 (S2-15). (Counts were renumbered for Trial.) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1962(d)	Racketeering Conspiracy	11/30/2011	1
21USC846,841(b)(1)(C)	Consp. to Dist. & Poss. w/Intent to Dist. Cont. Substances	11/30/2011	2
18 USC 1951	Conspiracy to Commit Hobbs Act Robbery	9/19/2011	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 3 (S2-9)

☑ Count(s) in any open indictments ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/5/2014
Date of Imposition of Judgment

Signature of Judge

Colleen McMahon — U.S.D.J.
Name of Judge — Title of Judge

11/5/2014
Date

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 924(c)(1)(A)(i)	Carry/Use Firearm During&Relation to CrimeofViolence	9/19/2011	S2-5
21USC846,841(b)(1)(A)	Consp. to Dist. & Poss. w/Intent to Dist. Cocaine	9/19/2011	S2-6

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

THREE (300) MONTHS.
(Defendant is sentenced on Counts 1, 2, 4 & 6 to concurrent 240 Month terms of imprisonment. Defendant is sentenced on Count 5 to a term of 60 Months imprisonment, to run consecutive with the 240 Month sentences imposed on Counts 1, 2, 4 & 6. Thus, defendant's total sentence is 300 Months.)

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

FIVE (5) YEARS

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

ADDITIONAL SUPERVISED RELEASE TERMS

The Court recommends that the defendant be supervised in the district of residence.

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RUDY MENDOZA
CASE NUMBER: S2 11 CR 974-08 (CM)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 500.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of February, two thousand nineteen.

United States of America,

Appellee,

v.

ORDER

Docket No: 14-4304

Rudy Mendoza, AKA Sealed Defendant, 8, AKA Raul Perez, AKA Pedro Mendoza,

Defendant - Appellant.

Appellant, Rudy Mendoza, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk