APPENDIX

TABLE OF CONTENTS

Appendix Page

Unpublished Opinion of
The United States Court of Appeals
For the Eleventh Circuit
entered April 30, 2019 ..... 1a

Judgment in a Criminal Case
entered January 31, 2018 ..... 45a

Opinion and Order of
The United States District Court for
Middle District of Florida
entered November 28, 2017 ..... 51a

Opinion and Order of
The United States District Court for
Middle District of Florida
entered October 31, 2017 ..... 54a

Order of
The United States District Court for
Middle District of Florida
Re: Denying Defendant's Motion to Dismiss Superseding Indictment
entered July 20, 2016 ..... 64a

Order of
The United States Court of Appeals
For the Eleventh Circuit
Re: Denying Defendant's Petition for Rehearing and Rehearing *En Banc*
entered June 25, 2019 ..... 70a

Jury Verdict
filed October 31, 2017 ..... 72a

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10510

D.C. Docket No. 2:15-cr-00101-SPC-CM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DIOSME FERNANDEZ HANO,

REINALDO ARRASTIA-CARDOSO,
a.k.a. Reinaldo Arrastia,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(April 30, 2019)

Before WILLIAM PRYOR and NEWSOM, Circuit Judges, and ROSENTHAL,* District Judge.

---

* The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide two questions of first impression for our Circuit: (1) whether a five-year statute of limitations for a defendant implicated by DNA testing, 18 U.S.C. § 3297, permits indictment within five years of that testing regardless of whether the limitation period otherwise applicable to the offense has already expired; and (2) whether the Confrontation Clause of the Sixth Amendment, *see Bruton v. United States*, 391 U.S. 123 (1968), or the Due Process Clause of the Fifth Amendment prohibits use of the nontestimonial statements of a nontestifying criminal defendant against his codefendant in a joint trial. Diosme Fernandez Hano and Reinaldo Arrastia-Cardoso were convicted of Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951(a), (b)(1), for the robbery of $1.7 million from an armored truck. Hano argues that his indictment was returned after the applicable limitation period expired and that the later discovery of his DNA could not revive the running of the limitation period. Arrastia-Cardoso contends that the district court should have prohibited Ruben Borrego Izquierdo, to whom Hano admitted his crimes, from testifying. Hano also challenges a few of the evidentiary rulings, argues that insufficient evidence supports his convictions, and challenges the enhancement of his sentence for "otherwise using" a dangerous weapon in the robbery. Arrastia-Cardoso also

contends that the government improperly commented on his decision not to testify during closing arguments. All these arguments fail. We affirm.

I. BACKGROUND

On November 30, 2009, Hano and Arrastia-Cardoso robbed a Brink's armored truck outside of the Fifth Third Bank in Fort Myers, Florida. The operators of the truck that day were Jimmy Ortiz and Bernard Meaney. Ortiz served as the truck's messenger and Meaney was the driver.

Both the driver and the messenger on a Brink's armored truck are armed with guns. The messenger's primary role is to get in and out of the truck to collect and deliver currency, but he also is in command of the operation and supervises the driver. The messenger uses a route guide—a confidential list that includes stops, arrival and departure times, and the number of pieces to pick up or deliver—but he has the authority to amend the guide and add stops, including food or restroom breaks.

An armored wall with a bulletproof window partitions the driver's cabin from the back of the truck. The messenger sits with currency in a cabin in the back of the truck. The partition between the two cabins contains a gun port that allows the driver to shoot into the messenger's cabin in the event of a robbery.

On the day of the robbery, Ortiz and Meaney picked up currency from several businesses, including a casino where the value of pickups ordinarily ranged

between $1 million and $1.5 million. The Fifth Third Bank was the last scheduled stop of the day. Before reaching the bank, Ortiz decided that they should stop at a Burger King. Only Ortiz went inside. In spite of a zero-tolerance policy forbidding carrying cellphones on runs, Ortiz was carrying a cellphone. After spending six or seven minutes at Burger King, they continued to the Fifth Third Bank, which was roughly 30 minutes away.

Immediately after they arrived at the bank and Ortiz stepped out of the truck, a man wearing a ski mask approached Ortiz from behind, put an arm around his neck, held a gun to his head, and forced him back into the truck. Meaney, who was watching through the window in the partition between the two cabins, reached for his gun, but Ortiz told him not to fire. Meaney was afraid for Ortiz's safety, so he obeyed and put his gun down. A second masked man entered the truck, grabbed bags of money, and exited. The man who had grabbed Ortiz struck his head with the butt of a gun.

One of the masked men then entered a red Pontiac Grand Prix parked behind the Brink's truck. Another masked man loaded the trunk of the Pontiac with money and began to enter the car. Meaney saw the Pontiac behind him, shifted the truck in reverse, and rammed the car. He then drove the truck forward and rammed the Pontiac again. One of those collisions caused the masked man who had loaded the

money into the trunk of the Pontiac to fall down, and his mask came off as he fell. That man rose and entered the car, which then sped away.

Eyewitness accounts established that either two or three men carried out the robbery. A bank customer who witnessed the robbery said she saw two men of Hispanic or Caucasian appearance. She described the man whose mask came off as appearing to be in his twenties to early thirties, standing around 5 feet 6 inches, with a medium to somewhat heavy-set build, and short brown hair and no facial hair. Meaney said that, in addition to seeing the face of the man whose mask came off, he saw another man without a mask standing 20 to 30 feet from the red car. That man stood near the scene of the robbery waiting to be picked up and then got into the car. Meaney described that man as 5 feet 10 inches, 180 pounds, medium build, dark, and with a full head of hair and a mustache. Meaney said that the man who had held Ortiz at gunpoint appeared to be Hispanic based on his skin tone. Ortiz asserted that he saw only the man who had struck him with the butt of his gun, but that he did not see that man's face.

Investigators found a ski mask and a plastic gun grip at the crime scene. The gun grip did not have screws used on real firearms and likely came from a fake gun. An analyst tested the ski mask and the gun grip for the presence of DNA. The analyst discovered a major profile on the outside of the mask and on the gun grip. A major profile exists when there is significantly more DNA from one contributor

than any other in the mixture of DNA recovered and makes it possible to identify that contributor.

On the night of the robbery, investigators found the red Pontiac abandoned in a parking lot at a business near the Fifth Third Bank. The vehicle identification number plate had been removed from the car and the vehicle identification number on another part of the car had been scratched out. Investigators later learned that a Tampa mechanic named Camilo Hernandez had sold the vehicle to Arrastia-Cardoso in the month when the robbery took place. Another person had driven Arrastia-Cardoso to buy the car, but Hernandez did not see who the driver was.

The investigators initially suspected that Ortiz and a man named Mariano Duarte-Cardoso had been involved in the robbery. Duarte-Cardoso, who investigators later learned to be Arrastia-Cardoso's cousin and the spouse of Ortiz's sister, fled the country after a search of his home. At that time, the investigators were not focused on Hano or Arrastia-Cardoso.

Five years later, in September 2014, Ruben Borrego Izquierdo, who was facing unrelated state charges, came to the Federal Bureau of Investigation with information. Borrego Izquierdo stated that he grew up in the same village in Cuba with Hano and had known him for decades. Hano had recently told Borrego Izquierdo that he had robbed an armored truck with a man named "Reinaldo Arrastia" in 2009. Hano said that the plot to rob the truck included one of the

truck's guards, who was part of Arrastia's family, and included a cousin of Arrastia. Hano also described some of the key details of the robbery: that he had left the scene in a car he had purchased from Camilo Hernandez, that he had removed the vehicle identification number from the car, that he had taken the money from the robbery back to Cuba in a speedboat, and that he had spent the money on two houses and a car.

Borrego Izquierdo's story included details about the crime that had not been made public. No law enforcement agency had made known, for example, that the getaway car had been purchased in Tampa or that the vehicle identification number of the car had been removed. And investigators were able to corroborate Borrego Izquierdo's assertion that Hano traveled to Cuba after the robbery through a sworn statement that Hano provided to a border officer. In the statement, Hano said that he moved to the United States in 2008, but that in January 2010—a little more than a month after the robbery—he traveled to Cuba on a boat that departed from Texas. Hano returned to the United States in 2014.

After investigators heard Borrego Izquierdo's story, Arrastia-Cardoso and Hano became the primary suspects in the investigation. In 2015, federal investigators obtained DNA samples from them. Hano's DNA matched the major DNA profile from the ski mask. Arrastia-Cardoso's DNA matched the major profile on the gun grip. And the government's analyst determined that, for each

major DNA profile, the probability that the profile would match the DNA of a random person (the "random-match probability") was less than one in 700 billion.

On March 16, 2016, the United States indicted Hano and Arrastia-Cardoso for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. The jury convicted both men on all charges. Hano's presentence investigation report recommended a five-level enhancement to his offense level because he brandished or otherwise possessed a firearm during the robbery, United States Sentencing Guidelines Manual § 2B3.1(b)(2)(C) (Nov. 2015), when the defendants apparently disarmed Ortiz and stole his gun. Hano objected to this enhancement on the ground that the evidence at trial established only that the defendants used a fake gun to effectuate the robbery. He conceded that the Guidelines treat a fake gun as a "dangerous weapon," but argued that he should instead receive only a three-level enhancement for brandishing a weapon in the course of the offense, *id.* § 2B3.1(b)(2)(E). The district court applied a four-level enhancement because a dangerous weapon had been "otherwise used" during the robbery, *id.* § 2B3.1(b)(2)(D). The district court sentenced Hano to serve 121 months of imprisonment and Arrastia-Cardoso to 120 months of imprisonment.

II. STANDARD OF REVIEW

This appeal is governed by three standards of review. First, we review *de novo* the interpretation and application of a statute of limitations. *United States v.*

Farias, 836 F.3d 1315, 1323 (11th Cir. 2016). The same standard applies to alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Brester*, 786 F.3d 1335, 1338 (11th Cir. 2015). We also review the denial of a motion for a judgment of acquittal for insufficiency of the evidence *de novo*. *United States v. Flanders*, 752 F.3d 1317, 1329 (11th Cir. 2014). And although we review a district court's factual findings in applying the Sentencing Guidelines for clear error, we review the application of the guidelines to those facts *de novo*. *United States v. Bradley*, 644 F.3d 1213, 1283 (11th Cir. 2011). Second, "[w]e review a district court's evidentiary rulings for an abuse of discretion." *United States v. Eckhardt*, 466 F.3d 938, 946 (11th Cir. 2006). And we review the denial of a motion for a new trial based on the weight of the evidence for "clear abuse" of discretion. *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). Third, we review issues not raised in the district court for plain error. *United States v. Taohim*, 817 F.3d 1215, 1224 (11th Cir. 2013). "For there to be plain error, there must (1) be error, (2) that is plain, and (3) that affects the substantial rights of the party, and (4) that seriously affects the fairness, integrity, or public reputation of a judicial proceeding." *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1179 (11th Cir. 2002).

III. DISCUSSION

We divide our discussion in six parts. First, we reject Hano's argument that the indictment against him was not returned within the applicable limitation period. Second, we explain that the evidentiary issues raised by Hano and Arrastia-Cardoso do not merit reversal. Third, we explain that Hano has failed to establish that the denial of his motion to obtain the DNA profile of Mariano Duarte-Cardoso resulted in any prejudice. Fourth, we reject Hano's argument that the government failed to produce sufficient evidence to support his convictions. Fifth, we conclude that the government did not improperly comment on Arrastia-Cardoso's decision not to testify. And sixth, we explain that Hano "otherwise used" a dangerous weapon in the commission of the robbery so the district court was warranted in applying the four-level enhancement to his sentence.

A. The Indictment Was Returned Within the Applicable Limitation Period.

Before trial, Hano moved to dismiss the indictment on the ground that it was not returned within the five-year limitation period ordinarily applicable to federal noncapital crimes, 18 U.S.C. § 3282(a). The district court denied the motion and ruled that the indictment fell within a statutory exception for cases in which DNA testing implicates a person in a felony, *id.* § 3297. Section 3297 provides that "[i]n a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the

offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period." The district court reasoned that this exception applied to Hano's indictment because DNA testing did not implicate him in the charged crimes until June 26, 2015, which left the government with five years to indict Hano after that date. Because the indictment was returned in March 2016, the district court concluded that the indictment was returned well within the limitations period of section 3297.

Hano argues that this ruling was in error based on the following application note to section 3297: "The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section if the applicable limitation period has not yet expired." Justice for All Act, Pub. L. No. 108–405, § 204(c), 118 Stat. 2260, 2271 (2004). Although the district court reasoned that section 3297 provided a new five-year limitation period that began when Hano was first implicated by DNA testing, Hano reads the application note—in particular, the conditional phrase "if the applicable limitation period has not yet expired"—to mean that the exception to the ordinary limitation period applies to the prosecution of any offense committed after the date of enactment only if the otherwise applicable limitation period "has not yet expired" *at the time the defendant is implicated by DNA testing*. So on Hano's reading, the

implication of a defendant by DNA testing only *extends* a not-yet-elapsed limitation period.

The government contends that no error occurred based on the text of section 3297. And it argues that the application note only clarifies that section 3297 applies retroactively to any offense so long as the limitation period applicable to an offense by default had not yet expired *at the time of enactment*. We agree with the government.

Hano's argument would require us to disregard the plain meaning of section 3297, which provides that "no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time *following the implication of the person by DNA testing* has elapsed that is equal to the otherwise applicable limitation period." This language makes clear that a period of time "equal to the otherwise applicable limitation period" will run from "the implication of the person by DNA testing" regardless of whether the implication occurred within the ordinarily applicable limitation period. If Hano were right about the import of the application note, the codified text of section 3297 would instead say that no statute of limitations will preclude prosecution until a period of time has elapsed that is equal to the otherwise applicable limitation period *if the person is implicated by DNA testing while the otherwise applicable limitation period continues to run*. But that is not what the statute says, and "our

constitutional structure" does not permit us "to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016) (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005)).

Hano misreads the application note. The competing interpretations of the application note turn on the implicit temporal reference of the expression "has not yet expired," a verbal phrase in the present-perfect tense. The present perfect "denotes an act, state, or condition that is now completed or continues up to the present." Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 97 (2016). In the application note, the condition that "continues up to the present" is that the normal limitation period for an offense has not yet expired. And the most natural reading of the note is that the time up to which the limitation period's failure to expire continues is the time of enactment. After all, the conditional phrase directly follows a reference to "the date of the enactment of this section."

Indeed, the text of the application note does not provide any other plausible temporal anchor for the conditional clause. The note refers directly to three events: the "commi[ssion]" of "an[] offense," "the prosecution of [the] offense," and "the enactment of this section." Of the options in the text of the application note, only "the date of the enactment" makes sense as a temporal point of reference for the conditional clause. It makes no sense to say that section 3297 would apply unless

the limitation period expired the very same moment the offense was committed. And if the conditional clause were linked in time to the prosecution of the offense, then the application note would mean that section 3297 would apply only when a defendant was prosecuted within the original limitation period—a situation in which the extended period of section 3297 would have no work to do.

Hano does not argue that either the time of the prosecution or the time of the commission of the offense frames the conditional clause, but his preferred candidate—the time the defendant is implicated by DNA testing—is no more attractive. *That* event is described in section 3297, not the application note, so it would be unusual if it supplied the temporal reference point for the present-perfect verb in the application note. Such a reading might make sense if the application note incorporated section 3297 by reference in a way that also incorporated its temporal framework. But the application note does not do so. To be sure, the application note defines the circumstances in which section 3297 "shall apply." But the point is that the application note is a distinct sentence and stands on its own temporal ground. Nothing in the text or context of the application note provides any reason to think that the "present" to which the present-perfect phrase "has not yet expired" refers is any time other than that contemporaneous with the enactment of the text by Congress.

Our interpretation of section 3297 and the application note is also supported by persuasive authority. Hano cites no authority in support of his reading, and as the government points out, our sister circuits have consistently applied section 3297 even when the otherwise applicable limitation period has already expired. *See United States v. Lopez*, 860 F.3d 201, 206–07 (4th Cir. 2017) (applying section 3297 when crime occurred in February 2007 and DNA match occurred over five years later in June 2012); *United States v. Sylla*, 790 F.3d 772, 772–73 (7th Cir. 2015) (involving 2003 crime and 2010 DNA match); *United States v. Hagler*, 700 F.3d 1091, 1094 (7th Cir. 2012) (involving 2000 crime and 2008 DNA match).

Hano argues that our interpretation of the note threatens to read the word "after" out of the note in violation of the surplusage canon, which instructs us to give effect to every word in a provision if possible and to refrain from assigning an interpretation to a provision that causes a word "to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26, at 174 (2012). The note says that section 3297 shall apply to the prosecution of an offense "committed before, on, *or after* the date of the enactment" of the section "if the applicable limitation period has not yet expired." And Hano points out that obviously no limitations period for an offense committed *after* the enactment of the statute could have already expired *at the time when the statute was enacted*.

Hano's argument misses the mark. The word "after" in the application note is not devoid of legal effect. If the application note provided only that section 3297 "shall apply to the prosecution of any offense *before or on* the date of the enactment of this section if the applicable limitation period has not yet expired," the note would create the impression that section 3297 does not apply to offenses committed after the date of enactment. The inclusion of the word "after" in the note eliminates this misleading impression. True, the conditional clause of the note, which says that section 3297 applies "if the applicable limitation period has not yet expired," is necessarily satisfied when an offense was committed after the date of enactment. But that consequence does not render the word "after" or the conditional clause superfluous. The conditional clause—in conjunction with the word "before"—clarifies that section 3297 applies retroactively to offenses committed before the date of enactment if the otherwise applicable limitation period has yet to expire. The word "after" makes plain that section 3297 has prospective application. Both the word "after" and the conditional clause are necessary to clarify the full scope of application of section 3297.

Consider too the legal context of the enactment of section 3297 and its application note. Section 3297 was enacted in 2004, only one year after the Supreme Court held in *Stogner v. California*, 539 U.S. 607 (2003), that "a law enacted after expiration of a previously applicable limitations period violates the

Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." *Id.* at 632–33. *Stogner* explicitly distinguished a law that revives a prosecution that was previously precluded by the applicable statutory-limitation period from a statute that merely "extend[s] time limits for the prosecution of future offenses, or for prosecutions not yet time barred." *Id.* at 632. The language of the application note covers both categories of prosecutions while clarifying that section 3297 does not purport to revive prosecutions for offenses with limitation periods that had already expired when the statute was enacted. Instead of permanently limiting the operation of section 3297 to the extension of limitation periods still running when DNA testing implicates a suspect, the application note appears tailor-made to avoid the constitutional problem that would have resulted under *Stogner* if Congress had sought to apply section 3297 retroactively to renew limitation periods that had elapsed before the time of enactment. As a result, we conclude that the district court did not err in ruling that the indictment was returned within the limitation period applicable under section 3297.

B. The Evidentiary Issues Raised by Hano and Arrastia-Cardoso Do Not Merit Reversal.

Hano and Arrastia-Cardoso challenge three evidentiary rulings. First, they argue, on different grounds, that the district court erred in permitting Borrego Izquierdo to testify about his conversation with Hano who revealed that he participated in the robbery and that Arrastia-Cardoso was one of his

coconspirators. Second, Hano contends that the district court should not have permitted the government to introduce evidence that he traveled to Cuba shortly after the robbery. Third, Hano argues that the district court erred in ruling that the government could introduce DNA evidence obtained from the getaway vehicle even though the government ultimately decided not to introduce that evidence at trial. None of their arguments have merit.

1. The District Court Did Not Err in Permitting Borrego Izquierdo to Testify.

Arrastia-Cardoso contends that the admission of Hano's statements to Borrego Izquierdo violated his rights under *Bruton*, but Hano's statements were nontestimonial, which means they are beyond the scope of the *Bruton* doctrine. *Bruton* held that the Confrontation Clause prohibits the use of the confession of a nontestifying criminal defendant in a joint trial if the statement directly inculpates a codefendant, although it may be otherwise admissible against the confessing defendant. 391 U.S. at 126. And *Crawford v. Washington*, 541 U.S. 36 (2004), held that the Confrontation Clause prohibits the "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." *Id.* at 53–54. The Supreme Court has since clarified that the Confrontation Clause prohibits *only* the introduction of testimonial hearsay statements. *See Whorton v. Bockting*, 549 U.S. 406, 419–20 (2007) ("Under *Crawford*, . . . the Confrontation

Clause has no application to [out-of-court nontestimonial statements] and therefore permits their admission even if they lack indicia of reliability."); *Davis v. Washington*, 547 U.S. 813, 823–24 (2006) (same).

We have yet to hold in a published opinion that *Bruton* applies only to testimonial statements, but every one of our sister circuits to consider the issue has so held, *see Lucero v. Holland*, 902 F.3d 979, 987–88 (9th Cir. 2018); *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013); *United States v. Berrios*, 676 F.3d 118, 128–29 (3d Cir. 2012); *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009); *United States v. Avila Vargas*, 570 F.3d 1004, 1008–09 (8th Cir. 2009), and for good reason. The *Bruton* rule "presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place." *Figueroa-Cartagena*, 612 F.3d at 85. If no co-defendant "has a constitutional right to confront the declarant, none can complain that his right has been denied." *Id.* So the same principles that govern whether the admission of testimony violated the Confrontation Clause control whether the admission of the statements of a nontestifying codefendant against a defendant at a joint trial violate *Bruton*. As a result, "[t]he threshold question in every case" raising a *Bruton* issue "is whether the challenged statement is testimonial." *Id.* If it is not, the Confrontation Clause

does not apply. So the admission of Hano's statements through Borrego Izquierdo could have violated the rule of *Bruton* only if those statements were testimonial.

Hano's statements as related by Borrego Izquierdo were plainly nontestimonial. Statements made in the course of an out-of-court conversation are "testimonial" if "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). When Hano spoke with Borrego Izquierdo, no future prosecution was on the horizon. Hano was not presently under investigation and had no reason to believe that his statements to Borrego Izquierdo would ever be used in court. Borrego Izquierdo likewise had no ground to suspect that he would ever testify against Hano. What transpired between them was a friendly and informal exchange in which Hano happened to reveal evidence that would ultimately be critical to the government's case when Borrego Izquierdo decided to come forward years after the robbery.

In the alternative, Arrastia-Cardoso argues that we should adopt a rule that would extend the rule of *Bruton* to nontestimonial statements on procedural-due-process grounds. The government responds by arguing that plain-error review applies to Arrastia-Cardoso's alternative argument because he objected to Borrego Izquierdo's testimony on the basis of the Confrontation Clause, not the Due

Process Clause. And the government argues that Arrastia-Cardoso's proposed rule is not clearly established as the law of this Circuit. *United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015) ("'Plain' error means that the legal rule is clearly established at the time the case is reviewed on direct appeal.").

We conclude that there was no due-process error—plain or otherwise—in the admission of Borrego Izquierdo's testimony. In the substantive-due-process context, the Supreme Court has explained that "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (alteration adopted) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989); *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019). We see no reason why the same logic would not apply to procedural-due-process claims.

Under Arrastia-Cardoso's theory, the Due Process Clause would provide defendants with a right to confront witnesses more expansive than the right secured by the Confrontation Clause itself, reducing the Confrontation Clause to surplusage. In the Bill of Rights, the "Framers sought to restrict the exercise of arbitrary authority by the [g]overnment in particular situations." *Albright*, 510 U.S.

at 273 (plurality opinion). If the Due Process Clause contained all the protections of the Confrontation Clause and more, the Framers' decision to include that Clause in the Sixth Amendment would be mysterious. And needless to say, there is no reason to believe that the drafters of the Sixth Amendment included the Confrontation Clause "out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Scalia & Garner, *supra*, at § 26, at 177. As a result, "[w]e must analyze the claim under the standard appropriate to that specific provision, not under the rubric of" procedural due process. *Echols*, 913 F.3d at 1326 (alterations adopted) (citation and internal quotation marks omitted). And as we have explained, Arrastia-Cardoso's argument under the Confrontation Clause fails.

Arrastia-Cardoso's due-process theory would also render meaningless the limitation of *Crawford* and its progeny of the confrontation right to "testimonial statements of a witness" who "was unavailable to testify" where the defendant did not have "a prior opportunity for cross-examination." 541 U.S. at 53–54. On Arrastia-Cardoso's view, the bare fact that a defendant cannot ordinarily subject his codefendant's out-of-court statement to the rigors of cross-examination in a joint trial renders the statement inadmissible at trial, regardless of whether the statement was testimonial. But the apparent rationale for this proposed rule—that the admission of an out-of-court statement inherently deprives a defendant of a fair

trial if he had no opportunity to cross-examine the declarant—applies with equal force to statements of unavailable witnesses who are not codefendants at a joint trial. So Arrastia-Cardoso's theory—taken to its logical conclusion—would mean that the Due Process Clause prevents the introduction of any and all out-of-court statements at a criminal trial if the defendant did not have "a prior opportunity for cross-examination." *Id.* This theory would allow a defendant to avoid *Crawford*'s limitation of the confrontation right to testimonial statements by the simple expedient of labeling their claims under the Confrontation Clause as claims under the Due Process Clause. We will not adopt a rule that would permit defendants to make an end run around the strictures recognized by the Supreme Court's Confrontation Clause jurisprudence.

Arrastia-Cardoso also contends, albeit very briefly, that Hano's statement should have been excluded as inadmissible hearsay, but he is mistaken. The district court overruled Arrastia-Cardoso's objection to the admission of this statement on hearsay grounds and concluded that Hano's statement was admissible as a statement against interest under Federal Rule of Evidence 804(b)(3). On appeal, Arrastia-Cardoso concedes that "Hano's confession to his role in the robbery was against his own penal interest," but argues that "the balance of the statement remains hearsay inadmissible in accordance with [Federal Rule of Evidence] 802." In support of this contention, he relies on the principle that Rule 804(b)(3) "does

not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson v. United States*, 512 U.S. 594, 600–01 (1994). But Arrastia-Cardoso does not even attempt to identify any portion of Hano's statement that was not self-inculpatory, nor does he attempt to prove that the introduction of portions of Hano's statement that were not self-inculpatory prejudiced him, so we cannot reverse on this basis. *See United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007) ("No reversal will result if sufficient evidence uninfected by any error supports the verdict, and the error did not have a substantial influence on the outcome of the case." (citation and internal quotation marks omitted)).

For his part, Hano offers a third challenge to Borrego Izquierdo's testimony, arguing that it should have been excluded as prejudicial under Federal Rule of Evidence 403, but his argument fails as well. Under Rule 403, a district court has the discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger" of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." According to Hano, the district court should have prohibited Borrego Izquierdo from testifying altogether because he was not credible. But "Rule 403 does not permit exclusion of evidence because the judge does not find it credible." *United States v. Thompson*, 615 F.2d 329, 333 (5th Cir. 1980) (rejecting the argument that

Rule 403 gave the district court the authority to "protect" the jury from a witness's "contradictory testimony"). Credibility determinations are the "exclusive province" of the jury "and the court of appeals may not revisit this question unless it is incredible as a matter of law." *United States v. Feliciano*, 761 F.3d 1202, 1206 (11th Cir. 2014) (citation and internal quotation marks omitted). Testimony is incredible as a matter of law if and only if it is "unbelievable on its face, i.e., testimony as to facts the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *Id.* (citation and internal quotation marks omitted). Nothing of the kind could be fairly said of Borrego Izquierdo's testimony.

Hano also asserts that Borrego Izquierdo's testimony that Hano purchased two houses and a car in Cuba after the robbery should have been excluded because it was uncorroborated and appealed to class prejudice, but we disagree. Rule 403 does not license exclusion of evidence for want of corroboration, and "evidence of wealth or extravagant spending may be admissible when relevant to the issues in the case and where other evidence supports a finding of guilt." *Bradley*, 644 F.3d at 1271. The evidence of Hano's expenditures was relevant because it buttressed the inference that Hano had recently come into a large sum of money when he set sail for Cuba. The evidence was not admitted for the purpose of enticing the jury to convict Hano based on his wealth or socioeconomic status, and the government

never attempted to suggest anything along those lines. So Hano's argument fails to establish that the district court erred in permitting Borrego Izquierdo to testify.

2. The District Court Did Not Err in Admitting Evidence that Hano Left the United States for Cuba After the Robbery.

Before trial, Hano filed a motion in limine to exclude any evidence of his travel between the United States and Cuba, including his immigration file and the statement he made to a border officer in which he explained that he left for Cuba on a boat that departed from Texas in January 2010. Hano argued that the evidence should be excluded as prejudicial under Rule 403 and excluded under Rule 404(b) on the theory that "testimony regarding the details of [Hano's] immigration to and from the United States and Cuba may be considered a 'bad act.'" The district court denied the motion in part and granted it in part. It ruled that Rule 404(b) did not apply because Hano failed to establish that his entry into the United States was wrong or related to his character and that Hano's statement to the border officer concerning the timing and means of his exodus to Cuba had significant probative value that was not outweighed by the danger of unfair prejudice. The district court excluded all portions of Hano's immigration file that lacked clear probative value. At trial, the government introduced a redacted copy of Hano's immigration file and offered testimony from the border officer regarding Hano's statement about his travel to Cuba.

Hano argues that this evidence should have been excluded under Rule 403 because the evidence transformed a "case about a robbery and conspiracy" into "a case about immigration," but he is wrong. As the district court correctly concluded, "the timing of Hano's departure to Cuba, which was little more than a month after the robbery, as well as his description of the means and method of that departure" was probative of his "motivation to move between countries in the immediate aftermath of a crime" and "the potential avenue" by which he transported his "ill-gotten gains."

Hano's only argument for the existence of prejudice relies on a state-court opinion asserting that "[q]uestions regarding a defendant's immigration status are . . . irrelevant and designed to appeal to the trier of fact's passion and prejudice and are thus generally improper areas of inquiry," *Washington v. Avendano-Lopez*, 904 P.2d 324, 331 (Wash. Ct. App. 1995), but the government never suggested that Hano was illegally present in the United States. Indeed, the border officer testified that Hano legally entered the United States when he moved to this country in 2008 and in 2014 when he returned from his sojourn in Cuba. The government never invited the jury to find Hano guilty on the basis of immigration status. The import of the evidence about his travel was clear: it established that Hano was indeed in Cuba after the robbery, as Borrego Izquierdo testified, and that he had traveled there on a private person's boat that sailed from Texas—an unusual means of

international travel that might be appealing if one were carrying hundreds of thousands of dollars obtained by a robbery.

Hano's argument under Rule 404(b) fares no better. Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 404(b)(2) clarifies that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." We have explained that Rule 404(b) is a rule "of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity." *United States v. Sanders*, 668 F.3d 1298, 1314 (11th Cir. 2012). And the government made no attempt to use the evidence of Hano's travel to Cuba to prove that he had a propensity to cross the border unlawfully or otherwise violate the law. The purpose of the evidence was to show that, on a particular occasion, Hano fled the United States with the proceeds of the robbery. The district court acted well within its discretion in denying Hano's motion to exclude the evidence of when and by what means he traveled to Cuba.

3. The Question Whether the District Court Abused its Discretion in Denying Hano's Motion to Prohibit DNA Evidence from the Getaway Car Is Moot.

Before trial, Hano moved to exclude DNA evidence obtained from the getaway car that purportedly established that he was a possible contributor to the

DNA sample obtained from the car. Hano argued that the introduction of this evidence would violate his rights under *California v. Trombetta*, 467 U.S. 479 (1984), because the government had destroyed the car and Hano would have no capacity to test the vehicle. The district court denied this motion because local investigators destroyed the car before Hano became a suspect, the evidence had no exculpatory value at the time of its destruction, and Hano had failed to prove that the local investigators acted in bad faith in destroying the car. Nevertheless, the government never offered this evidence at trial.

Hano reiterates his challenge to this ruling on appeal, but the issue is now moot. *See United States v. Diecidue*, 603 F.2d 535, 561 (5th Cir. 1979) ("Since the Government did not introduce these items into evidence, the issue is moot."). As a result, we have no authority to examine the merits of this ruling. *See Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) ("Any decision on the merits of a moot case or issue would be an impermissible advisory opinion." (citation and internal quotation marks omitted)).

Hano argues that the officer who examined the getaway car mentioned in her trial testimony that she looked for and attempted to collect DNA samples from the vehicle, but the officer gave no indication of the result of the analysis of the samples or suggested that the samples implicated Hano in the robbery in any way. Instead, she stated only that she "look[ed] for touch DNA" samples and that

"[t]ouch DNA swabs were collected off of the exterior and interior" of the vehicle. These incidental references did not introduce the DNA analysis challenged by Hano in his pretrial motion.

C. The District Court Correctly Denied Hano's Motion to Obtain the DNA Profile of Mariano Duarte-Cardoso.

Hano filed a pretrial motion for the district court to issue a nonparty subpoena to the Federal DNA Database Unit for the DNA profile of Mariano Duarte-Cardoso—Arrastia-Cardoso's cousin and the spouse of Ortiz's sister. Duarte-Cardoso's DNA profile was in the database because of an earlier unrelated conviction. Hano argued that he had a right to access Duarte-Cardoso's profile under *Brady*, because the DNA of other "potential donors" had been discovered on the ski mask recovered from the crime scene, and in Hano's view, the profile "could potentially exculpate [him] . . . by further inculpating [Duarte-]Cardoso." The government opposed the motion on the ground that federal privacy protections prohibited the disclosure of Duarte-Cardoso's DNA profile and that his profile was not exculpatory because even if his DNA was on the ski mask, it would do nothing to explain away the presence of Hano's DNA on the mask. The district court held a hearing on the motion in which a supervisor of the Federal DNA Database Unit testified. The district court denied Hano's motion because even if Duarte-Cardoso's DNA were found on the ski mask, it "could not conceivably impact a trial."

On appeal, Hano reiterates his argument that the government's failure to produce Duarte-Cardoso's DNA profile violated *Brady*, but the district court was right to reject it. "To establish a *Brady* violation," a defendant must "prove that the prosecution withheld favorable evidence and that he was prejudiced as a result." *Brester*, 786 F.3d at 1339. To establish prejudice, a defendant must "prove that there is 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Hano cannot prove prejudice.

As the government argues, even if Hano had Duarte-Cardoso's profile, he would be unable to prove that Duarte-Cardoso's DNA was on the ski mask. The evidence established that Hano was the source of the only major DNA profile on the mask. At most, Hano could have attempted to prove that Duarte-Cardoso was a possible contributor to a mixture of DNA found on the mask, but as the government's expert explained, "the frequency of the occurrence of the mixed DNA profile" obtained from the mask in the general population of "unrelated individuals" was such that "approximately one in six individuals" would have "a DNA profile that could be included in that mixture." So although a comparison of Duarte-Cardoso's profile with the mixed profile derived from the mask could have

excluded Duarte-Cardoso as a contributor of DNA to the mask, it could not have proved that his DNA was present on the mask.

More importantly, even if Hano were somehow able to prove that Duarte-Cardoso's DNA was on any of the evidence obtained from the crime scene, the most it would have proved was that Duarte-Cardoso had also come into contact with those items. This conclusion would do nothing to undermine the principal value of the DNA evidence, which was to prove that *Hano* had worn the mask. If anything, the presence of Duarte-Cardoso's DNA on the mask would have corroborated Hano's admission to Borrego Izquierdo that Arrastia-Cardoso's cousin had been involved in the conspiracy. So Hano has failed to establish the existence of a "reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

Hano also argues for the first time on appeal that the government violated Federal Rule of Criminal Procedure 16, which requires the government to disclose items that are "material to preparing the defense" if they are "within the government's possession, custody, or control," Fed. R. Crim. P. 16(E)(i), but this argument fails for the same reasons as Hano's argument based on *Brady*. As we have explained, a defendant must prove "prejudice to substantial rights" to establish that a violation of Rule 16 warrants reversal. *United States v. Mosquera*,

886 F.3d 1032, 1045 (11th Cir. 2018). For the reasons discussed above, Hano cannot establish that the failure to produce the profile was prejudicial.

D. The District Court Did Not Err in Denying Hano's Motions for a Judgment of Acquittal and for a New Trial.

Hano argues that the district court erred in denying his motions for a judgment of acquittal and for a new trial. "When conducting the review of the record" to determine "[w]hether the record contains sufficient evidence to support the jury's verdict," "we view 'the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict.'" *United States v. To*, 144 F.3d 737, 743 (11th Cir. 1998) (quoting *United States v. High*, 117 F.3d 464, 467 (11th Cir. 1997)). "We must uphold the jury's verdict whenever a reasonable factfinder could conclude that the evidence establishes guilt beyond a reasonable doubt." *Id.* at 743–44.

Hano contends that there was insufficient evidence that he was one of the robbers, but the evidence amply supports the jury's finding. Hano admitted to committing the crime with Arrastia-Cardoso to Borrego Izquierdo. Hano's DNA matched the only major DNA profile on the ski mask recovered from the crime scene. Shortly after the robbery, Hano traveled to Cuba under suspicious circumstances. And the evidence that independently implicated Arrastia-Cardoso in the robbery—for example, that his DNA was on the gun grip found at the scene of the robbery and that he purchased the getaway car from Camilo Hernandez—

also tended to establish Hano's guilt because it corroborated his admission to Borrego Izquierdo that he had robbed the armored truck with Arrastia-Cardoso.

Hano responds that the three eyewitnesses to the robbery were unable to say with certainty that he was one of the robbers, but the failure of the witnesses to conclusively identify someone they had only seen for a brief moment years earlier hardly suffices to undermine the jury's inference of guilt. One of the witnesses, Ortiz, said that he never saw the face of the robber who held an apparent gun to his head because he was wearing a mask, so it is unsurprising that he could not identify Hano at trial. The second witness who saw one of the robbers—a bank customer—disclaimed any ability to conclusively identify the man she saw because it had "been a very long time." But she did describe the robber as a "Caucasian male or light Hispanic male" who was "a little heavy set" and had "short brown hair" and no facial hair, and this description appears to match Hano well.

True, the third witness who saw the robber, Meaney, gave a different description. He said that the robber was "dark," had a "full head of hair," and a "mustache," but this discrepancy does not undermine the jury's verdict. Meaney saw the robber from 20 to 30 feet away and was in the midst of a stressful encounter with apparently armed robbers—and he had, after all, just rammed the getaway car and was "winded . . . because of the impact." It is also entirely

possible that the robber Meaney described was not Hano, but instead one of the other robbers. After all, he testified that there were probably three different robbers. And in any case, in the light of the DNA evidence, Borrego Izquierdo's testimony, and one apparently positive witness identification, the jury could have reasonably found that Hano was one of the robbers even if it discounted Meaney's identification.

Hano also argues that Borrego Izquierdo's testimony did not provide a reasonable basis for the jury to reach any finding regarding his involvement in the robbery because that testimony was "resoundingly impeached" on cross-examination, but this argument fails. The "uncorroborated testimony of an accomplice is sufficient to support a conviction in the Federal Courts if it is not on its face incredible or otherwise insubstantial." *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir. 1991) (citation and internal quotation marks omitted). Borrego Izquierdo's testimony was not incredible on its face and was supported by powerful corroborating evidence, so the jury was entitled to render its own assessment of Borrego Izquierdo's credibility. As we have explained, "[t]o the extent that" a defendant's "argument depends upon challenges to the credibility of witnesses, the jury has exclusive province over that determination and the court of appeals may not revisit this question." *United States v. Kelley*, 412 F.3d 1240, 1247 (11th Cir. 2005) (citation and internal quotation marks omitted).

Hano also contends that the evidence was insufficient to support his conviction for Hobbs Act robbery because it failed to establish that he took property "by means of actual or threatened injury," but we are not persuaded. "The two required elements for a substantive Hobbs Act conviction are robbery and an effect on interstate commerce." *United States v. Taylor*, 480 F.3d 1025, 1026–27 (11th Cir. 2007) (alteration adopted) (citation and internal quotation marks omitted). Robbery is defined as including "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will" through "actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property . . . of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(b)(1). As Hano sees it, the government failed to present sufficient evidence for the jury to infer that Hano seized the cash through "actual or threatened force, or violence, or fear of injury" because Ortiz was an inside man who was never actually threatened with violence and Meaney "was located behind a glass division" and "testified to the jury that he was only concerned for Ortiz's safety." Although Meaney is apparently a brave man—he did ram the getaway car repeatedly in an effort to disable it—it is a stretch to say that the robbers did not at least implicitly threaten his safety by apparently threatening Ortiz's life, and this threat enabled the robbers to effectuate their crime without

interference by deterring Meaney from leaving the cabin or using his weapon against them. And, in any event, so long as Meaney reasonably believed that Ortiz's personal safety was threatened, it does not matter whether Ortiz was really in danger or not.

Third, Hano argues that the evidence was insufficient to support his conviction for conspiracy to commit Hobbs Act robbery because, in his view, the government failed to introduce any evidence that he had "ever met, spoke[n], or otherwise communicated" with Arrastia-Cardoso, but this argument fails. To prove a Hobbs Act conspiracy, the government must establish that: "(1) two or more persons agreed to commit a robbery encompassed within the Hobbs Act; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in helping to accomplish the goal." *To*, 144 F.3d at 747–48. "[D]irect evidence of an agreement is unnecessary" to prove conspiracy. *United States v. McNair*, 605 F.3d 1152, 1195 (11th Cir. 2010). "Indeed, because the crime of conspiracy is predominantly mental in composition, it is frequently necessary to resort to circumstantial evidence to prove its elements." *United States v. Garcia*, 405 F.3d 1260, 1270 (11th Cir. 2005) (citation and internal quotation marks omitted). And circumstantial evidence supported an inference that Hano committed a robbery in cooperation with Arrastia-Cardoso and perhaps other accomplices, and that the robbery required advance planning, including the purchase of guns,

masks, and a getaway car. These facts alone are sufficient to infer an agreement between Hano and Arrastia-Cardoso. And Hano's own statements, as related through Borrego Izquierdo, confirmed that he had planned and executed the robbery in conjunction with Arrastia-Cardoso and likely others. It follows that the evidence was sufficient to support both of Hano's convictions.

E. The Government Did Not Improperly Comment During Closing Argument on Arrastia-Cardoso's Decision Not to Testify.

Arrastia-Cardoso contends that the government impermissibly commented on his decision not to testify when, during closing arguments, the prosecutor mentioned that "while the burden of proof is not on the defendants to prove anything, there was actually no evidence introduced during the trial explaining an alternative reason why the DNA was on the items" recovered from the scene of the robbery. Arrastia-Cardoso did not object to this remark at trial, so we review for plain error. *United States v. Foley*, 508 F.3d 627, 637 (11th Cir. 2007). We conclude that Arrastia-Cardoso has failed to identify any error, plain or otherwise, resulting from this remark during closing arguments.

Because "the government in a criminal proceeding has the burden of proving every element of the charged offense beyond a reasonable doubt," "prosecutors must refrain from making arguments that improperly shift the burden of proof to the defendant." *United States v. Nerey*, 877 F.3d 956, 970 (11th Cir. 2017). "Nor may the prosecution comment on the defendant's failure to testify." *United States*

v. Bernal-Benitez, 594 F.3d 1303, 1315 (11th Cir. 2010). "A prosecutor impermissibly comments on a defendant's right to remain silent where: (1) the statement was *manifestly intended* to be a comment on the defendant's failure to testify; or (2) the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. McGarity*, 669 F.3d 1218, 1241 (11th Cir. 2012) (citation and internal quotation marks omitted). "[T]he question is not whether the jury possibly or even probably would review the remark in this manner, but whether the jury *necessarily* would have done so." *Id.* (citation and internal quotation marks omitted). "A prosecutor's statements to the jury constitute misconduct only if: (1) the remarks were improper, and (2) the remarks prejudicially affected the substantial rights of the defendant." *Taohim*, 817 F.3d at 1224. "To warrant a new trial, there must be a reasonable probability that 'but for the remarks, the outcome would be different.'" *Id.* (citation omitted).

The government did not impermissibly comment on Arrastia-Cardoso's decision not to testify. It instead argued that the jury should infer that the most reasonable explanation of the presence of the defendants' DNA on the mask and gun grip recovered from the scene of the robbery was that the defendants used these items in committing the robbery because no evidence presented at trial undermined that explanation. A prosecutor is entitled to "comment 'on the failure

by defense counsel, as opposed to the defendant, to counter or explain evidence.'" *Bernal-Benitez*, 594 F.3d at 1315 (quoting *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998)). And even if the jury might have "possibly" inferred that the government was arguing that Arrastia-Cardoso should have taken the stand himself and explained why his DNA was found on items recovered from the scene of the robbery, we cannot say that the jury "necessarily" would have interpreted the remark that way. *McGarity*, 669 F.3d at 1241. Arrastia-Cardoso's argument fails because the government's "comment[] in closing arguments [was] made in the context of the prosecutor's accurate reminder to the jury about the burden of proof" and so "cannot establish plain error." *Foley*, 508 F.3d at 638.

F. The District Court Did Not Err in Increasing Hano's Offense Level for "Otherwise Using" a Firearm During the Commission of the Robbery.

Hano argues that the district court erred in enhancing his offense level by four levels because he "otherwise used" a dangerous weapon in the commission of the robbery, U.S.S.G. § 2B3.1(b)(2)(D). The Sentencing Guidelines provide that "if a dangerous weapon was otherwise used" in the commission of a robbery offense, the defendant's offense level increases by four levels. *Id.* If a dangerous weapon was only "brandished or possessed," the offense level increases by three levels. *Id.* § 2B3.1(b)(2)(E). Under the definitions provided in the application notes for the Guidelines, a defendant "brandished" a dangerous weapon if "all or part of the weapon was displayed, or the presence of the weapon was otherwise made

known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person." *Id.* § 1B1.1 cmt. n.1(C). A defendant "otherwise used" a dangerous weapon if the "conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." *Id.* § 1B1.1 cmt. n.1(I).

Hano argues that his conduct did not amount to anything more than brandishing a dangerous weapon because neither he nor his coconspirators ever actually threatened anyone with a weapon when they committed the robbery. According to Hano, because Ortiz was actually an "inside individual" who was in on the plot, when Ortiz pointed an apparent firearm at his head and struck him with it, that conduct was nothing more than an elaborate charade. Hano also argues that the weapon was only a "toy gun" and that he did not directly threaten anyone other than Ortiz. And although Meaney witnessed the whole sequence of events, Hano suggests that Meaney was only "a spectator to a performance in which Ortiz was acting as though he had been struck in order to assist in the robbery and avoid suspicion."

We conclude that Hano "otherwise used" a dangerous weapon in the commission of the robbery. Whether Hano used a toy gun is of no moment, as we have held that "defendants who otherwise use an object which appears to be a dangerous weapon will be subject to a four-level enhancement" under the relevant

guideline, *id.* § 2B3.1(b)(2)(D). *United States v. Miller*, 206 F.3d 1051, 1053 (11th Cir. 2000). The residual question is whether Hano's conduct amounted to more than "brandishing" a dangerous weapon, and the answer must be "yes." Our precedent establishes that the "use of a firearm to make an explicit or implicit threat against a specific person constitutes 'otherwise use' of the firearm." *United States v. Verbitskaya*, 406 F.3d 1324, 1339 (11th Cir. 2005).

The "key consideration" in applying the rule that pointing a weapon at a person and issuing a threat or order to facilitate the commission of an offense constitutes "otherwise using" a dangerous weapon is "whether a gun (or other weapon) was pointed at a specific person in an effort to create fear so as to facilitate compliance with a demand, and ultimately to facilitate the commission of the crime." *United States v. Yelverton*, 197 F.3d 531, 534 (D.C. Cir. 1999). The answer to this question does not depend on whether "the gun was pointed at the same person in whom fear was sought to be instilled, or even that the person sought to be coerced was the victim of the crime, as opposed to a third party whose complicity the perpetrator sought to ensure." *Id.* A perpetrator who points a gun at a person to coerce another into compliance with a criminal scheme has done more than merely "display[]" a weapon "to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person." U.S.S.G. § 1B1.1 cmt. n.1(C).

Regardless of whether Hano actually intended to harm Ortiz when he put what appeared to be a gun to his head, Hano pointed what qualifies as a "dangerous weapon" under our precedent at a specific person, namely Ortiz, with the intent to cause Meaney to fear that Ortiz's safety would be endangered if Meaney failed to comply with Hano's demands. Hano's conduct amounted to "otherwise using" a dangerous weapon in the commission of the robbery, regardless of whether Ortiz or Meaney were actually in danger. *Cf. Yelverton*, 197 F.3d at 534 n.2 (explaining that threatening to "shoot one person in order to extort action from another" qualifies as otherwise using a dangerous weapon).

That said, Hano also implicitly threatened Meaney. An explicit threat to one person may constitute an implicit threat to others present if they reasonably believe in that circumstance that the same threat extends to them and that the perpetrator intends to secure their compliance with his demands through the use of the explicit threat against the third-party. *Cf. United States v. Douglas*, 489 F.3d 1117, 1129 (11th Cir. 2007) (holding that kidnapper's explicit threat to harm a child's mother was an implicit threat to the child because "he was unable to act independently of [her] and [she] believed that they were both in danger of physical harm"). The same rule should apply even if the explicit "threat" was only a mock threat. In either case, the perpetrator's conduct is calculated to induce compliance on the part of those who were not explicitly threatened through the use of an apparent threat

that communicates that those who fail to comply with his demands will be harmed. And under this rule, Hano's conduct amounted to "otherwise using" a dangerous weapon because his "threat" on Ortiz's life was calculated to induce Meaney's compliance by demonstrating that weapons would be used against any member of the crew of the truck who refused to comply with his demands. The district court committed no error when it enhanced Hano's offense level by four levels because he "otherwise used" a dangerous weapon in the robbery.

IV. CONCLUSION

We **AFFIRM** the convictions and sentences of Hano and Arrastia-Cardoso.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

DIOSME FERNANDEZ HANO

Case Number: 2:15-cr-101-FtM-38CM

USM Number: 08369-104

Joseph A. Davidow, CJA
851 5th Ave N, Ste. 301
Naples, FL 34102

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Counts One and Two of the Superseding Indictment. The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1951	Conspiracy to Commit Robbery	November 30, 2009	One
18 U.S.C. § 1951 and § 2	Robbery	November 30, 2009	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, 543 US 220 (2005).

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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:

January 29, 2018

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

January 31, 2018

Diosme Fernandez Hano
2:15-cr-101-FtM-38CM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **121 months, each count concurrent**.

The Court makes the following recommendations as to incarceration:

The Court recommends to the Bureau of Prisons that the defendant participate in the Institution Hearing Program of the Federal Bureau of Prisons to determine his removal status while incarcerated.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

Diosme Fernandez Hano
2:15-cr-101-FtM-38CM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years, each count concurrent.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

Diosme Fernandez Hano
2:15-cr-101-FtM-38CM

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within **72 hours**.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:_____ Date:_____

Diosme Fernandez Hano
2:15-cr-101-FtM-38CM

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall provide the probation officer access to any requested financial information.

2. If the defendant's removal status is not resolved while he is incarcerated, then pursuant to 18 U.S.C. §3583(d), the defendant is to be delivered, upon release from imprisonment, to a duly authorized immigration official to determine if deportation is appropriate. Should deportation be ordered, the defendant is to remain outside the United States, unless authorized by the Secretary for the Department of Homeland Security or the appropriate immigration authority.

3. The defendant shall submit to a search of his person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

4. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

5. The mandatory drug testing requirements of the Violent Crime Control Act are waived.

Diosme Fernandez Hano
2:15-cr-101-FtM-38CM

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	JVTA Assessment [1]	Fine	Restitution
TOTALS	**$200.00**	**$0.00**	**$0**	**$1,773,395.11**

The defendant must make restitution (including community restitution) to the following payees in the amount listed below. The interest requirement is hereby **WAIVED**.

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 in full prior to the United States receiving payment.

Name of Payee	Total Loss**	Restitution Ordered
Brinks, Inc. Attn: Blanca Hastings 555 Dividend Drive Coppell, Texas 75019	1,773,395.11	$1,773,395.11

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of 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, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Joint and Several

Restitution shall be paid jointly and severally with Reinaldo Arrastia-Cardoso.

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

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** 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.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

VS. CASE NO: 2:15-cr-101-FtM-38CM

DIOSME FERNANDEZ HANO

OPINION AND ORDER[1]

This matter comes before the Court on Diosme Fernandez Hano's Motion for Judgment of Acquittal, or in the alternative, Motion for New Trial (Doc. 227), which was filed on November 14, 2017. The Government filed a Response in Opposition (Doc. 228) on November 27, 2017. Consequently, the matter is ripe for review.

On October 31, 2017, following a seven-day trial, Hano and co-defendant Reinaldo Arrastia-Cardoso were found guilty of conspiracy to interfere with commerce by robbery and of interference with commerce by robbery. (Doc. 220). Prior to that verdict, Hano had orally moved for a judgment of acquittal both at the end of the Government's case and after the defense rested. Now, Hano renews his motion under Federal Rule of Criminal Procedure 29, and requests a new trial under Rule 33. (Doc. 227). As grounds, he argues that the evidence presented at trial was insufficient to support a jury verdict of guilt beyond a reasonable doubt. (Doc. 227 at 2-7).

---

[1] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

Rule 29 states that when ruling on a motion for a judgment of acquittal after a jury verdict of guilty, "the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c). When evaluating a motion seeking such relief, the Eleventh Circuit outlined the following legal principles:

> In considering a motion for the entry of a judgment of acquittal, a district court must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. The prosecution need not rebut all reasonable hypotheses other than guilt. The jury is free to choose between or among the conclusions to be drawn from the evidence presented at trial, and the district court must accept all reasonable inferences and credibility determinations made by the jury. The [d]istrict [c]ourt's determination that the evidence introduced at trial was insufficient to support the jury's verdict of guilt is [an] issue of law entitled to no deference on appeal.

U.S. v. Miranda, 425 F.3d 953, 959 (11th Cir. 2005) (internal citation omitted). Indeed, "[a] jury's verdict cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *U.S. v. Friske,* 640 F.3d 1288, 1291 (11th Cir. 2011) (quoting *U.S. v. Herrera*, 931 F.2d 761, 762 (11th Cir. 1991)). Under this standard, the Court finds the Government met its burden as to all elements for the conspiracy charge and for the substantive offense of robbery.

Next, the Court turns to Hano's argument that a new trial should be granted. Rule 33 provides that "[u]pon [a] defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Inherently, this allows a court to weigh the evidence and consider the credibility of the witnesses presented at trial. *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). That said, a court may not "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Id*. at 1312-1313. As such, to grant a motion for new trial, the "evidence must preponderate heavily against the verdict, such

that it would be a miscarriage of justice to let the verdict stand." *Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004) (quoting *Martinez*, 763 F.2d at 1313). Against this backdrop, the Court is satisfied that the evidence presented at trial was sufficient to sustain the verdicts rendered by the jury, and thus that no miscarriage of justice will result by virtue of the Court's denial of the instant Motion.

Accordingly, it is now

ORDERED:

Diosme Fernandez Hano's Motion for Judgment of Acquittal, or in the alternative, Motion for New Trial (Doc. 227) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 28th day of November, 2017.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

VS. CASE NO: 2:15-cr-101-FtM-38CM

DIOSME FERNANDEZ HANO and
REINALDO ARRASTIA-CARDOSO

OPINION AND ORDER[1]

This matter comes before the Court upon review of Defendant Diosme Fernandez Hano's Motions in Limine (Doc. 179) filed on October 10, 2017. The Government filed its Response in Opposition on October 13, 2017. (Doc. 185). The Court held a final pretrial conference on October 19, 2017. The trial commenced October 23, 2017. For the reasons stated on the record, as well as those stated herein, the Court rules on the motions in limine as follows:

BACKGROUND

This case centers on the robbery of a Brink's Armored Vehicle on November 30, 2009, where multiple individuals absconded with over $1,700,000.00, leaving behind multiple pieces of DNA-based evidence. (Docs. 3 at ¶¶ 8-9; 179 at 11; 185 at 5). One of the Defendants, Hano, then departed the United States for Cuba via a private boat on or

---

[1] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

about January 13, 2010. (Doc. 185 at 6). In April 2014, Hano attempted to re-enter the United States from Mexico through the Gateway to the Americas Bridge in Laredo, Texas. (Doc. 185 at 6). In the process, he submitted a sworn statement detailing the means and manner of his travel between the United States, Cuba, and Mexico. (Doc. 185 at 6). Subsequently, Hano and Co-Defendant Reinaldo Arrastia-Cardoso were indicted. (Doc. 49).

A. HANO'S FIRST MOTION IN LIMINE

Hano initially moves the Court to preclude the Government from introducing testimony from the Government's expected witness, Ruben Borrego-Izquierdo, about Hano's purported spending in Cuba because (1) it is hearsay and (2) its probative value is substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. This testimony can be broken into two distinct categories. The first category consists of statements made by Hano to Borrego-Izquierdo, wherein Hano discussed his activities in Cuba and allegedly incriminated himself in the robbery in this case. The second category consists of Borrego-Izquierdo's recollection of statements made by Hano's relatives and various people in Cuba that Hano came to Cuba with a great deal of money in 2010, and that he spent lavishly on the island.

Hano argues that the Government should be precluded from introducing both categories of statements because they are hearsay. In response, the Government argues that the statements Hano made to Borrego-Izquierdo are not hearsay because they are statements of a party opponent. The Government also argues that Borrego-Izquierdo's statements recounting what he had heard from Hano's relatives and individuals in Cuba should be admissible because they will not be introduced for the truth of the matter

asserted, but rather that the statements will be introduced to add context to the conversation between Borrego-Izquierdo and Hano, and to show the effect on Hano when Borrego-Izquierdo told him what he had heard about Hano's spending habits and inquired about where he had received the money to finance the same. (Doc. 185 at 2-3).

Hearsay is an out of court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c)(1)-(2). A statement is an oral or written assertion, or nonverbal conduct if the actor intended it as an assertion. FED. R. EVID. 801(a). Hearsay within hearsay, or double hearsay, exists when there is a hearsay statement that contains another hearsay statement within it. *See Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1456 (11th Cir. 1997). Double hearsay "is admissible only if each part of the combined statements conforms with an exception to the hearsay rule." *United States v. Robinson*, 239 F. App'x 507, 508 (11th Cir. 2007). Notably, statements made by a party and subsequently offered against that party are not hearsay. FED. R. EVID. 801(d)(2). By the same token, "an out-of-court statement admitted to show its effect on the hearer is not hearsay." *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015). This is true because it is offered as a basis for inferring something *other* than the matter asserted. *See United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986); *see also United States v. Manati*, 2017 WL 2570005, No. 14-15294, at *3 (11th Cir. June 14, 2017) (finding that a statement is not hearsay when it was offered not to prove the truth of the matter asserted, but instead to explain a subsequent course of conduct).

Turning back to the matter at hand, Hano's comments to Borrego-Izquierdo constitute statements of a party opponent and are admissible as non-hearsay. That said,

the admissibility of the statements that Borrego-Izquierdo made regarding what he heard from Hano's relatives or "a lot of people" in Cuba is hearsay and inadmissible.

Next, Hano argues that the testimony about his purported spending in Cuba would foment class prejudice within the jury, and thus should be excluded under Federal Rule of Evidence 403. The Government counters that the evidence it intends to offer will be highly probative and is admissible to prove a sudden acquisition and use of wealth following an alleged robbery, even if the source of that wealth has not yet been verified. *See United States v. White*, 589 F.2d 1283, 1286 n. 7 (5th Cir. 1979).[2] The Court agrees.

The Eleventh Circuit has held that "a court's determination of whether wealth evidence is relevant under Rule 401, Fed. R. Evid., and whether the evidence's probative value is substantially outweighed by its unfair prejudice under Rule 403, Fed. R. Evid., must turn on the specific facts of the case." *United States v. Hope*, 608 F. App'x 831, 838 (11th Cir. 2015). Pursuant to Rule 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. FED. R. EVID. 401(a)-(b). Pursuant to Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ." FED. R. EVID. 403.

Here, the robbery occurred on November 30, 2009, and Hano allegedly fled to Cuba on or about January 13, 2010 on a private boat. Given that the testimony will allegedly touch on Hano's purported spending in Cuba, which occurred subsequent to and in close temporal proximity to the robbery, such evidence will have a decided

[2] The Eleventh Circuit has adopted, as binding precedent, all Fifth Circuit decisions made prior to the close of business on Sept. 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

tendency to make his participation in the robbery more likely, and will be of consequence in this action. Similarly, it is plain that the probative nature of this information outweighs any threat of unfair prejudice. As such, the Court will allow statements made by Hano to Borrego-Izquierdo.

B. HANO'S SECOND MOTION IN LIMINE

Hano moves to preclude the Government from introducing testimony regarding his character and criminal history on the grounds that it is both hearsay and improper character evidence based on alleged prior bad acts. But the Government states that it does not intend to introduce any such evidence unless Hano were to take the stand and put his character in issue. Because Hano's argument depends on events that have not yet occurred, the request is denied as moot.

C. HANO'S THIRD MOTION IN LIMINE

Next, the Government intends to include various documents from Hano's immigration file at trial, including a sworn statement, biographical immigration documents, and a document entitled "Cuban Intelligence Survey." Hano moves to preclude any references to same, arguing that any statements that he allegedly made to Customs and Border Protection ("CBP") Officers regarding his immigration or travel history are inadmissible because: (1) they are hearsay; (2) because the records would violate the "best evidence rule" pursuant to Federal Rule of Evidence 1002; (3) because the history would be unfairly prejudicial and confusing under Federal Rule of Evidence 403; and (4) because of the potential that his immigration history could be considered a bad act that should be excluded under Federal Rule of Evidence 404(b). The Government disagrees

with Hano, contending that evidence of Hano's immigration history is not hearsay, is highly probative, and that neither the best evidence rule nor Rule 404(b) apply here.

As a threshold matter, Hano's hearsay objection does not withstand scrutiny. The Eleventh Circuit has held that routinely and mechanically kept immigration records do not violate the public records exception to hearsay. *United States v. Agustino-Hernandez*, 14 F.3d 42, 43 (11th Cir. 1994). And, pertinently, the public records exception also does not exclude police records "prepared in a routine non-adversarial setting." *Id*.

Against this backdrop, because Hano's immigration history was prepared long before Hano was charged with the alleged offense, and was prepared in a routine, non-adversarial setting, it is admissible here. Similarly, Hano ineffectively objects to the introduction of statements he made to immigration officials. Because the Government is offering statements that Hano himself made, they are not hearsay and are admissible as statements of a party opponent. *See* FED. R. EVID. 801(d)(2)(A).

Next, Hano argues that his immigration history should be precluded from being introduced by the Government because of the best evidence rule. In response, the Government argues that the introduction of Hano's immigration file will not violate the best evidence rule because the documents they intend to introduce are duplicates, and are therefore admissible.

The best evidence rule requires "[a]n original writing, recording, or photograph" to prove the content of a document being offered in to evidence. FED. R. EVID. 1002. That said, an exception to this rule is found where a party intends to offer a duplicate, which is "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." FED. R. EVID.

1001(e); *see also* FED. R. EVID. 1003. Because Hano does not address the existence, authenticity, fairness, or admissibility of the Government's duplicate of documents from his immigration file, the Court finds no merit in his objection that the use of same would violate the best evidence rule.

Next, Hano argues that the Government should be precluded from introducing documents from his immigration file because it would be unfairly prejudicial or confusing. The Court cannot agree in total. Rule 403 grants federal courts the discretion to exclude relevant evidence where the probative value would be substantially outweighed by the threat of unfair prejudice or confusion of the issues. FED. R. EVID. 403. As to Hano's sworn statement, there are portions of testimony for which the Court does not see immediate relevance. Accordingly, the parties conducted an argument on the record wherein the Government agreed to redact various parts of Hano's sworn statement. Among other things, the proffered version of the sworn statement concerns the timing of Hano's departure to Cuba, which was little more than a month after the robbery, as well as his description of the means and method of that departure. This information circumstantially relates to the motivation to move between countries in the immediate aftermath of a crime, and the potential avenue to transport ill-gotten gains. As such, the sworn statement's probative value is high. Moreover, Hano does not indicate why he would incur any unfair prejudice by giving a truthful accounting of his immigration activities. Consequently, to the extent than Hano does incur any unfair prejudice as a result of the entry of the redacted sworn statement, it is outweighed by probative value.

In addition, the Government argues that the biographical immigration forms and the Cuban Intelligence Survey have probative value in the form of documenting Hano's

and Arrastia-Cardoso's presence in the United States over a period of time prior to the robbery. While the Court recognizes the probative value of such information in the biographical immigration forms, it notes that the purpose and sweep of the Cuban Intelligence Survey is unclear. For that reason, and because the status of both Hano and Arrastia Cardoso is already established by the biographical immigration forms, the Court finds that while the biographical immigration forms are admissible, the Cuban Intelligence Survey is not.

Lastly, Hano argues that the Government should be precluded from introducing his immigration history because it could be construed as a prior bad act under Federal Rule of Evidence 404(b). This is the case, Hano argues, because the imagery associated with immigration could be construed negatively and be confusing to the jury. But this characterization departs from the rule. Rule 404(b)(1) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). With this in mind, Hano has not alleged that his entry to the United States was either wrong or illegal. Nor has he shown how his entry to the United States would reasonably relate to his character in the context of the robbery he is accused of committing in this case. Consequently, Hano's request must be denied.

D. HANO'S FOURTH MOTION IN LIMINE

Next, Hano seeks to preclude the Government from introducing a DNA profile, created using DNA recovered from the alleged getaway vehicle, from being introduced into evidence. The vehicle's door handle was swabbed by the Florida Department of Law Enforcement for DNA, and at least three DNA profiles were detected. (Doc. 179 at 11).

The vehicle was thereafter destroyed by the Lee County Sheriff's Office prior to Hano becoming a suspect. (Doc. 185 at 8).

Hano argues that his rights under the Due Process Clause of the Fifth Amendment have been violated because the vehicle has been lost or destroyed by authorities, and he has been deprived of the ability to examine same. He also contends that the DNA evidence is not reliable and should be excluded because there were three DNA profiles found on the vehicle, and because the profile associated with Hano had a match frequency of one in twenty people. By contrast, the Government argues that no due process violation will occur by virtue of the admission of the DNA evidence.

On this issue, the Government's duty to preserve evidence:

> must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

California v. Trombetta, 467 U.S. 479, 488-89 (1984) (internal citation omitted). Moreover, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

As the Court mentioned above, the vehicle was destroyed before Hano became a formal suspect. Consequently, the Government could not have known the exculpatory value of that evidence to Hano before its destruction. Also, Hano has proffered no argument or evidence that the Government's actions were in bad faith. Thus, because

the car did not possess an apparent exculpatory value at the time it was destroyed, and because Hano has made no showing of bad faith, Hano's objection will be denied.[3]

E. HANO'S FIFTH MOTION IN LIMINE

Finally, Hano moves to exclude any evidence of Arrastia-Cardoso's arrest by Immigration and Customs Enforcement at Miami International Airport and any related findings. In response, the Government argues that not only does Hano not have standing to mount this argument, but also that it does not intend to introduce any such evidence unless Arrastia-Cardoso were to testify. Consequently, the request is denied as moot.

Accordingly, it is now

ORDERED:

1. Defendant's First Motion in Limine is **GRANTED in part, and DENIED in part**.
2. Defendant's Second Motion in Limine is **DENIED as moot**.
3. Defendant's Third Motion in Limine is **GRANTED in part, and DENIED in part**.
4. Defendant's Fourth Motion in Limine is **DENIED**.
5. Defendant's Fifth Motion in Limine is **DENIED as moot**.

DONE AND ORDERED at Fort Myers, Florida, this day the 31st of October, 2017.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: Counsel of Record

[3] This evidence objection is now moot as the Government did not seek to introduce the DNA profile from the vehicle door handle.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. Case No: 2:15-cr-101-FtM-99CM

DIOSME FERNANDEZ HANO
_____/

ORDER[1]

This matter comes before the Court on Defendant Diosme Fernandez Hano's Motion to Dismiss the Superseding Indictment dated May 31, 2016. (Doc. #94). The Government filed its response on June 6, 2016. (Doc. #99). This matter is ripe for review.

BACKGROUND

On November 30, 2009, two Hispanic males robbed an armored vehicle by gunpoint in a bank parking lot in Fort Myers, Florida, taking approximately $1.7 million. (Doc. #99 at 1). The Lee County Sherriff's Office (LCSO) did not immediately apprehend the individuals responsible, but was able to collect evidence from the scene. (*Id*. at 2). There, a ski mask and gun grip were located and sent for examination to the Florida Department of Law Enforcement (FDLE). (*Id*. at 2-3). FDLE conducted a deoxyribonucleic acid (DNA) profile of the evidence. (*Id*. at 3). Years later, after the execution of a search warrant, Federal Bureau of Investigation (FBI) agents located

[1] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

Defendant Hano and swabbed his mouth with buccal swabs. (*Id*.). FDLE received the swabs, and a Crime Laboratory Analyst created a profile and compared Defendant Hano's DNA to a separate profile created from the ski mask. (*Id*.). Results confirmed that the DNA taken from the ski mask matched that of Defendant Hano. (*Id*.).

Consequently, on August 5, 2015, a federal grand jury returned an indictment (Doc. #7) against Defendant Hano. On March 16, 2016, a grand jury returned a superseding indictment (Doc. #49) against Defendant Hano and Defendant Reinaldo Arrastia-Cardoso.

STANDARD OF REVIEW

An "indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government." Fed. R. Crim. P. 7(c)(1). "An indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *U.S. v. Steele*, 178 F.3d 1230, 1233-34 (11th Cir. 1999) (internal citation omitted). A "district court [must] "dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *U.S. v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983). "Denials of motions to dismiss the indictment are reviewed for abuse of discretion, but underlying legal errors … are reviewed *de novo*." *U.S. v. Robison*, 505 F.3d 1208, 1225 n. 24 (11th Cir. 2007) (citation omitted).

DISCUSSION

Defendant Hano argues that the superseding indictment should be dismissed for two reasons: (1) the superseding indictment is invalid because it falls outside the five-year statute of limitations pursuant to 18 U.S.C. § 3282(a); and (2) the Government failed to expressly set forth an exception to the § 3282(a) limitation period in the indictment. (Doc. #94 at ¶ 6). In response, the Government contends: (1) 18 U.S.C. § 3297 provides an exception to the limitation period set forth in § 3282(a) if an individual is later implicated by DNA testing; and (2) a statute of limitations defense is an affirmative defense, which the Government need not anticipate in an indictment.[2] The Court will address each argument in turn.

A. 18 U.S.C. § 3297

Defendant Hano first argues that the indictment and superseding indictment must be dismissed because they are outside the five-year statute of limitation period provided under 18 U.S.C. § 3282(a). The Government disagrees. It asserts that the indictment and superseding indictment are within the § 3282(a) limitation period because the FDLE lab report did not implicate Defendant Hano until June 26, 2015. (Doc. #99 at 5). The Court agrees with the Government.

Section 3297 provides an exception to criminal statute of limitation periods, including those found in § 3282(a), when DNA testing implicates a defendant:

> In a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the

[2] The Government also contends that raising a statute of limitations defense in a pre-trial motion under Fed. R. Crim. P. 12(b)(3)(A) has recently been called into question. The Court need not address this issue today, however.

> implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.

18 U.S.C. § 3297. In applying § 3297 to an indictment, the Court finds *U.S. v. Moore*, No. 15-20552, 2016 WL 2591874, at *1 (E.D. Mich. May 5, 2016), illustrative. In *Moore*, the defendant filed a motion to dismiss his indictment because over a ten-year period passed between the date of the offenses and the date of the charges. *Id*. at *2. The court denied the defendant's motion, finding that § 3297 provides "an exception to the general limitations period based on the distinctive reliability of DNA testing." *Id*; *see also U.S. v. Kiel*, Nos. 1:13CR51-LG-RHW-2, 1:14-CR1-LG-JMR-2, 2014 WL 2710955, at * 2 (S.D. Miss. June 16, 2014).

Turning to this action, the subject offense occurred over six years prior to the date of the superseding indictment. But this time period is not fatal to the indictment. To be sure, DNA testing did not implicate Defendant Hano until June 26, 2015, which means that the limitation period under § 3282(a) did not begin to run until this date. Accordingly, both the indictment and superseding indictment are well within the five-year limit. (Doc. #99 at 5).

B. STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE

Defendant Hano further argues that the indictment is invalid because it did not expressly state an exception to the limitations period. (Doc. #94 at 3). In response, the Government argues that a statute of limitations defense is an affirmative defense, and the Government need not anticipate an affirmative defense in an indictment. (Doc. #99 at 10-11). The Court agrees with the Government.

A statute of limitations defense "does not divest a district court of subject matter jurisdiction, but rather constitutes an affirmative defense, which the defendant can waive."

U.S. v. Najjar, 283 F.3d 1306, 1309 (11th Cir. 2002) (citation omitted). When addressing such defenses, the Supreme Court has held that it is unnecessary, for sufficiency purposes, that the Government anticipate affirmative defenses in an indictment. *U.S. v. Sissons*, 399 U.S. 267, 288 (1970).

Although the Eleventh Circuit has not addressed a factually similar case, the Government cites to *U.S. v. Titterington*, 374 F.3d 453, 457 (6th Cir. 2004), which the Court finds illustrative here. In *Titterington*, 17 defendants received an 89-count indictment. *Id*. at 455. In response, the "[d]efendants moved to dismiss the indictment, arguing that an indictment must allege that an offense occurred within the applicable statute-of-limitations period." *Id*. The court held "that the statute of limitations is an affirmative defense that the Government need not specifically plead in a criminal indictment." *Id*. at 454. The court reasoned that such a defense "does not impose a pleading requirement on the Government, but merely creates an affirmative defense for the accused." *Id. at 457*.

Here, it is clear that the § 3282(a) limitations period is an affirmative defense. As such, the Government was not required to include this defense in the indictment or superseding indictment. Therefore, Defendant's argument fails.

Accordingly, it is now

ORDERED:

Defendant Diosme Fernandez Hano's Motion to Dismiss the Superseding Indictment (Doc. #94) is **DENIED**.

DONE and **ORDERED** in Fort Myers, Florida, this day of 20th day of July, 2016.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 25, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10510-JJ
Case Style: USA v. Diosme Fernandez Hano
District Court Docket No: 2:15-cr-00101-SPC-CM-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10510-JJ

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DIOSME FERNANDEZ HANO,
REINALDO ARRASTIA-CARDOSO,
a.k.a. Reinaldo Arrastia,

Defendants - Appellants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR and NEWSOM, Circuit Judges, and ROSENTHAL,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

* The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

ORD-42

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO: 2:15-cr-101-FtM-38CM

DIOSME FERNANDEZ HANO and
REINALDO ARRASTIA-CARDOSO

VERDICT

COUNT ONE

As to Count One of the Superseding Indictment, which charges that from a date unknown, to on or about November 30, 2009, in the Middle District of Florida, Defendants Diosme Fernandez Hano and Reinaldo Arrastia-Cardoso a/k/a "Reinaldo Arrastia," did knowingly and willfully combine, conspire, confederate, and agree together and with other persons, known and unknown to the Grand Jury, to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by robbery, by the unlawful taking of United States currency from the person and presence of a Brink's employee, in violation of Title 18, United States Code, Section 1951(a),

We, the Jury, unanimously find the Defendant Diosme Fernandez Hano:

_____ NOT GUILTY

_✓_ GUILTY

We, the Jury, unanimously find the Defendant Reinaldo Arrastia-Cardoso:

_____ NOT GUILTY

_✓_ GUILTY

COUNT TWO

As to Count Two of the Superseding Indictment, which charges that on or about November 30, 2009, in the Middle District of Florida, Defendants Diosme Fernandez Hano and Reinaldo Arrastia-Cardoso a/k/a "Reinaldo Arrastia," did knowingly and unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in such commerce, by robbery, in that the defendants did knowingly and unlawfully take and obtain the property of another, that is, United States currency, from the person and in the presence of an armed guard employed by Brink's, who, at the time of said robbery, was working as the driver of a Brink's armored van, against the employee's will by means of actual and threatened force, violence, and fear of injury, immediate and future, to the employee's person, in violation of Title 18, United States Code, Section 1951(a) and Section 2,

We, the Jury, unanimously find the Defendant Diosme Fernandez Hano:

_____ NOT GUILTY

__✓__ GUILTY

We, the Jury, unanimously find the Defendant Reinaldo Arrastia-Cardoso:

_____ NOT GUILTY

__✓__ GUILTY

SO SAY WE ALL, this 31 day of October 2017.

W Gaskell

FOREPERSON