

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 17-3402

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UNITED STATES OF AMERICA

v.

CHRISTOPHER MARK HEATH,  
Appellant

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Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Criminal Action No. 1-16-cr-00075-001)  
District Judge: Honorable Yvette Kane

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Submitted Under Third Circuit L.A.R. 34.1(a)  
June 18, 2019

Before: AMBRO, RESTREPO, and FISHER, Circuit Judges

(Opinion filed: June 20, 2019)

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OPINION\*

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AMBRO, Circuit Judge

\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Christopher Mark Heath appeals his conviction under 18 U.S.C. § 924(c) for possession of a firearm “in furtherance of” a drug-trafficking crime. He argues that there was insufficient evidence to support the conviction. We disagree and affirm the District Court’s decision to deny his motion for acquittal notwithstanding the verdict.

### **Background**

Throughout 2015 Heath worked with his brother-in-law, Tyler Long, to grow, transport, and sell large quantities of marijuana to customers in Pennsylvania and Florida. At this time Heath was employed as a deputy sheriff in California. He contributed to the amount of marijuana sold both by growing his own plants and by taking marijuana that had been seized by the sheriff’s department from his workplace. In late 2015, based on information from a confidential informant, the York County Drug Task Force set up a controlled purchase in which the informant and an undercover officer planned to buy marijuana from Heath and Long.

In December 2015, Heath, Long, and Ryan Falsone drove from California to York County, Pennsylvania to complete the sale. Expecting to earn \$100,000 from the trip, Heath drove alone in a pickup truck, carrying marijuana in garbage and duffel bags in the bed of his truck. The total amount of the marijuana transported in Heath’s truck was 89 kilograms (approximately 200 pounds). Long and Falsone drove in a separate truck, and the three conspirators arrived at the informant’s house around 11:30 p.m. on December 28, 2015. After the informant and undercover officer began unloading bags of marijuana from Heath’s truck, other law enforcement officers appeared and arrested Heath, Long, and Falsone.

Once Heath was in custody, police officers searched his truck and discovered a loaded semi-automatic pistol and an extra loaded magazine. Officers found the gun and magazines in the outside zipper compartment of a suitcase that was on the floor of the second row of seats directly behind the driver's seat. Heath owned the gun legally and was authorized to carry it off-duty and out of state.

Based on the discovery of the gun in Heath's truck, he was indicted for possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). He was also indicted for: conspiracy to manufacture, distribute, and possess with intent to manufacture and distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 846; conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); and manufacturing, distributing, and possessing with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1).

At trial, after the close of the prosecution's case, Heath moved for judgment of acquittal on the firearm charge. The District Court denied the motion. The jury found him guilty on all counts, at which point he again moved for judgment of acquittal notwithstanding the verdict on the firearm charge. The Court denied this motion as well.

### **Standard of Review**

We review *de novo* the denial of a motion for judgment of acquittal and independently apply the standard used by the District Court. *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006). Our review of the sufficiency of evidence is “particularly deferential.” *United States v. Mercado*, 610 F.3d 841, 845 (3d Cir. 2010). We review the

evidence in the light most favorable to the prosecution and affirm unless no rational trier of fact could find guilt. *Id.*

### **Discussion**

A conviction under § 924(c) requires that the defendant possess a firearm “in furtherance of” a drug-trafficking crime. 18 U.S.C. § 924(c)(1)(A). The Government must prove more than the “mere presence” of a firearm; instead, the weapon must have “advanced or helped forward a drug[-]trafficking crime.” *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004). To determine whether the firearm advanced the crime, we consider eight nonexclusive factors:

The type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found.

*Id.* (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-415 (5th Cir. 2000)). In evaluating these factors, it is not necessary that all weigh in favor of conviction if a rational jury could find that some or most are determinative. *United States v. Walker*, 657 F.3d 160, 173 (3d Cir. 2011). Balancing these factors, we conclude there is enough evidence to support the jury’s conviction for possession of a firearm in furtherance of a drug-trafficking conspiracy.

To start, the type of drug activity in which Heath was engaged was the cross-country transportation of nearly 200 pounds of marijuana for sale. As compensation for this activity, Heath expected to receive \$100,000. Although he claims that a weapon would not be useful during this kind of sale, the jury could properly infer, based on the

high stakes of the transaction, that Heath brought the gun to protect himself, the drugs, and his expected proceeds. *Cf. United States v. Woodard*, 531 F.3d 1352, 1362 (11th Cir. 2008) (explaining that, because the defendant had approximately 100 pounds of marijuana worth “a considerable sum of money,” the jury could reasonably conclude that he brought a gun to protect the valuable stock of drugs).

Further, Heath’s weapon was loaded and easily accessible. The loaded semi-automatic handgun and extra magazine were in an outer zipper pocket of a suitcase directly behind the driver’s seat. Heath could easily access the weapon if necessary, either by reaching behind his seat or opening the second-row door when he left the truck for the sale. *Cf. United States v. Smith*, 481 F.3d 259, 264 (5th Cir. 2007) (finding that the accessibility factor weighed in favor of conviction when the gun was tucked under the passenger seat of the car). Heath points out that the gun was not in the truck’s glove compartment or center console, which would have been more accessible locations, but it does not need to be in the most accessible location for a § 924(c) conviction if it is strategically located. *See Sparrow*, 371 F.3d at 853–54 (affirming conviction even though police needed to pry up floor tiles with a crowbar to access the weapon because the gun was strategically located for protection when the defendant retrieved drugs or money from the compartment). Even if Heath’s weapon was not immediately accessible, a rational factfinder could find that it was placed so that he could quickly remove it from the suitcase’s outer pocket if the drug deal turned violent.

The weapon’s proximity to the drugs likewise weighs in favor of conviction. Heath stored the weapon in the second row of the cab, only a few feet away from the

marijuana in the truck bed. *Cf. United States v. Nunez-Sanchez*, 478 F.3d 663, 669 (5th Cir. 2007) (concluding that the proximity factor weighed in favor of conviction when cocaine under the defendant's bed was only about two feet away from the gun next to the bed). The separation between the cab and the bed of the truck is not significant because the distance is so short that Heath could have quickly and easily accessed the gun to protect the marijuana if necessary. *See also United States v. Iglesias*, 535 F.3d 150, 157 (3d Cir. 2008) (concluding that the proximity factor weighed in favor of conviction when the gun in question was stored in a briefcase in the same room as a small amount of methamphetamine and the same house as a large quantity); *United States v. Yanez Sosa*, 513 F.3d 194, 197, 201 (5th Cir. 2008) (concluding that the proximity factor weighed in favor of conviction when the gun was in the bedroom nightstand and the drugs were behind the drywall of the bedroom closet).

The timing and circumstances under which the gun was found — late at night following a purchase of marijuana — could also indicate that Heath brought the weapon for protection. *See Walker*, 657 F.3d at 173 (describing the circumstances weighing in favor of conviction as a drug sale, in which the defendant possessed the weapon throughout the course of the transaction); *United States v. Seymour*, 519 F.3d 700, 715 (7th Cir. 2008) (noting that transporting the weapon after 11:00 p.m. contributed to the timing and circumstances that indicated possession in furtherance of the drug-trafficking crime). In this context, the type of weapon possessed was ideal for protection of the marijuana: Heath brought a small semi-automatic handgun that could easily be carried,

stored, and concealed in his car. *See United States v. Mitten*, 592 F.3d 767, 777 (7th Cir. 2010).

Even if Heath's co-conspirators did not know that he had a gun, their ignorance would not negate the factors weighing in favor of conviction. Heath, Long, and Falsone agreed to deliver and sell the marijuana in Heath's truck. Based on this agreement, Heath could further the conspiracy without the others knowing specifically how he planned to do so. The additional requirements that Heath urges — that the possession be both within the scope, and a reasonably foreseeable consequence, of the agreement — are necessary only if Heath was convicted for one of his co-conspirator's actions, not his own. *See United States v. Bailey*, 840 F.3d 99, 112 (3d Cir. 2016); *see also United States v. Pinkerton*, 328 U.S. 640, 647–48 (1946).

In sum, most factors support a rational jury's finding of guilt. Even though Heath owned the gun legally and it was not stolen, the jury could have found that these two factors do not outweigh the other six. The prosecution presented enough evidence to support Heath's § 924(c) conviction. As such, the District Court was correct to deny his motion for acquittal. Thus we affirm.

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3                   UNITED STATES OF AMERICA                   :  
4   : Case No. 1:16-CR-075  
5                   vs.   :  
6   : (Judge Kane)  
7                   CHRISTOPHER MARK HEATH,                   :  
8   : Defendant   :  
9

10                   TRANSCRIPT OF JURY SELECTION & TRIAL PROCEEDINGS  
11   VOLUME 1  
12   PAGES 1 THROUGH 178

13                   BEFORE THE HONORABLE YVETTE KANE  
14                   UNITED STATES DISTRICT COURT JUDGE  
15                   MAY 8, 2017; 10:15 A.M.  
16                   HARRISBURG, PENNSYLVANIA  
17

18                   FOR THE GOVERNMENT:

19                   Meredith A. Taylor, Assistant United States Attorney  
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29                   Lori A. Shuey  
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36                   Proceedings recorded by mechanical stenography; transcript  
37                   produced by computer-aided transcription.

1                   MS. TAYLOR: Your Honor, I believe we've asked for the  
2 admission of all our exhibits, at least if I've been keeping  
3 proper track of it, and with that, the government would rest.

4                   THE COURT: Ms. Ulrich.

5                   MS. ULRICH: Your Honor, I have a motion I need to  
6 make.

7                   THE COURT: All right. Ms. Weida, would you take the  
8 jury out so that I can hear the motion.

9                   *(Jury leaves courtroom.)*

10                  THE COURT: Ms. Ulrich.

11                  MS. ULRICH: Your Honor, at this point I'm moving for  
12 a judgment of acquittal on Count 19 of the indictment. The  
13 government has charged that on or about December 28th, that  
14 Mr. Heath intentionally, knowingly, and unlawfully possessed,  
15 used, and carried a firearm, this Glock, two loaded magazines,  
16 in furtherance of drug and in relation to drug trafficking.  
17 And there's a lot of reasons for that.

18                  One, the government, all they presented was that there  
19 were drugs, a lot of drugs, and I'm not going to deny that, a  
20 lot of drugs in the bed of a truck and that this gun was in a  
21 suitcase, in a zippered part of the suitcase, loaded, and there  
22 was, apparently, a second loaded magazine.

23                  Their witness, Tyler Long, really the mastermind of  
24 this whole thing, the one who had the connect in Pennsylvania,  
25 the one who had the connect in Florida, said they had a meeting

1 before they even went to Pennsylvania, and no one, no one  
2 discussed bringing a gun, that that gun was -- in fact, in his  
3 own words, I asked him, did you discuss, you know, the gun to  
4 assist with the delivery? No. Did you discuss using the gun  
5 to advance the delivery? No. To promote the delivery? No.  
6 Their own witness who set up this whole transaction had no idea  
7 there was a gun in that truck.

8 What that says is, number one, that gun was not  
9 possessed in furtherance of drug trafficking. Was it  
10 possessed? Yeah, it was his gun. It was his lawfully owned  
11 gun that he has had since 2004, that the sheriff's department,  
12 Yuba County, was well aware of. He followed all the  
13 regulations in carrying it, carrying it concealed, carrying his  
14 badge. And he qualified it from 2004, and just days before  
15 this trip it was qualified by the Yuba County Sheriff's  
16 Department.

17 It was a lawfully owned, lawfully carried firearm, and  
18 there was absolutely no reference to this gun during any of the  
19 trips to Florida, during the trips to Pennsylvania. In the  
20 ordinary sense, was it possessed? Yes. In the ordinary sense,  
21 was it carried? Yes. But that's not enough for a conviction  
22 for possession of a firearm in furtherance of drug trafficking.

23 It has to have -- for in furtherance of, it has to  
24 have -- you know, it has to be in relation to the trafficking,  
25 bolster it. I can't remember the exact language. It has to

1 advance or promote the goals of drug trafficking, and the  
2 government presented no evidence of that.

3 All they had were the fact that the drugs were found  
4 and that the gun was found. Their own witness didn't say  
5 anything about the gun. And the officers who found the gun on  
6 December 28th found the gun, and they never even asked  
7 Mr. Heath about the gun. That's how insignificant it was to  
8 him.

9 And so, I mean, just because there is a gun doesn't  
10 mean there's a 924(c), which is why the government charged it,  
11 but it's their burden to prove that it was possessed in  
12 furtherance of drug trafficking or that it was used -- well, it  
13 definitely wasn't use, because for use, you have to have the  
14 active employment of the firearm, which I think it's clear  
15 there's definitely no use here.

16 So it comes down to whether he carried it during and  
17 in relation to or whether he possessed it. And if you look at  
18 all the factors, including accessibility, was it accessible, I  
19 mean, sure, he had to reach around, unzip it, and get the gun.  
20 But when they got to Pennsylvania, at the time when probably  
21 the risk was the highest, that gun never came out of that  
22 suitcase, and there was never even a reference to the gun.

23 I asked the officer, the officer, Agent Shearer who  
24 was there at the scene, did he say, hey, don't worry, I got  
25 this, I got a gun, like, this is all safe, no worries. Nobody,

1 not one single person during any of this drug trafficking knew  
2 anything about this gun.

3 It was not a stolen gun, it was a lawfully possessed  
4 firearm, Your Honor. We are asking for a judgment of acquittal  
5 on Count 19 for those reasons.

6 *THE COURT:* All right. Ms. Taylor.

7 *MS. TAYLOR:* Your Honor, certainly the fact that the  
8 officers, once the defendant was arrested, did not ask him  
9 about it is irrelevant to the defense's motion. They didn't  
10 ask him about it because they're local officers, to which those  
11 questions are irrelevant for the local charges.

12 This wasn't a federal case when the defendant was  
13 arrested and a 924(c) wasn't contemplated. For local charges,  
14 those questions weren't at the forefront of their mind, and so,  
15 no, those questions weren't asked.

16 But in terms of what Mr. Long said, he certainly said  
17 that he did not discuss whether the defendant had a gun at the  
18 time of the Pennsylvania trip, but what Ms. Ulrich failed to  
19 mention is that what he actually testified to was that he was  
20 an officer and he carried it concealed and I always assumed he  
21 had it. That's what he said.

22 So, no, he had no reason to talk to him about it  
23 either at that meeting, at an earlier time, or, quite frankly,  
24 when they were traveling to Pennsylvania or once they got here.  
25 I mean, there's no reason to believe that he would have any

1 type of conversation like that with him.

2                   In terms of the facts that were presented as to the  
3 factors that the court can give the jury, a wealth of  
4 information was provided that the jury can consider as to that.  
5 Detective Bruckhart did testify as to how accessible it was to  
6 the defendant. It was not in the very back of the truck in the  
7 bed, in the inside of a suitcase where it would not have been  
8 easily accessible.

9                   He even demonstrated for the jury how it was in the  
10 rear floorboard portion of the backseat of the truck where he  
11 could reach around from the driver's seat and access the  
12 suitcase. It was in the outer pocket of the suitcase, not in  
13 the inner portion. I think it was clearly accessible and  
14 within the defendant's power to control it.

15                   Obviously it wasn't stolen. I mean, I don't think  
16 Mr. Heath is your typical drug dealer given that he was a law  
17 enforcement officer who was transporting a truckload full of  
18 marijuana across the country. I mean, it was his duty weapon  
19 that he had. You wouldn't expect it to be stolen.

20                   Mr. Long gave plenty of information about his  
21 involvement with Mr. Heath on a variety of trips, not just the  
22 Pennsylvania trip, but the trips to Florida where he's  
23 delivered marijuana on other occasions.

24                   And I think that based on not only where the gun was  
25 found, the fact that it was loaded at the time, the fact that

1 there was one round in the chamber, that there were two loaded  
2 magazines with it, that it was in close proximity to Mr. Heath,  
3 that he was the only one in the truck, that the other two  
4 individuals with him purposely did not ride with him, rode in a  
5 different vehicle, there was no marijuana in that truck, I  
6 mean, all of these things are -- all of these circumstances are  
7 factors that the jury could consider in making a determination,  
8 using their common sense, as to whether this gun, whether he  
9 was a deputy sheriff at the time or not, is something that he  
10 possessed in furtherance of drug trafficking. I'd ask the  
11 court to deny the motion.

12           *THE COURT:* I do think we have a jury question here.  
13 Obviously there's no direct evidence on this point, and we  
14 wouldn't expect that there would be direct evidence on the  
15 issue of possession in furtherance.

16           All we know is that the defendant made a conscious  
17 decision to take control of the drugs, that he preferred to fly  
18 solo. Even though he had two defendants accompanying the trip  
19 to Pennsylvania, he chose and announced that he was comfortable  
20 and preferred to ride alone because of his law enforcement  
21 status. It's unspoken that he may also have preferred to ride  
22 alone because he was armed.

23           But we know, also, from the testimony that the gun was  
24 loaded and accessible, and from those facts, I believe a  
25 reasonable jury could conclude that the gun was possessed in

1 furtherance of drug trafficking. So I will allow the count to  
2 go to the jury, along with the others.

3 Counsel, before we call the jury back, I want to make  
4 sure that we have agreement on the verdict form and the jury  
5 charge.

6 *MS. ULRICH:* We're in agreement. I mean, I agree. I  
7 have no issues.

8 *THE COURT:* All right. We've made revisions to the  
9 jury charge at Page 47, I believe. The gun charge has been  
10 revised. Forty-eight.

11 Ms. Ulrich, would you take a quick look at that and  
12 make sure it's satisfactory to the defendant. I know you had  
13 concerns.

14 *MS. ULRICH:* Your Honor, no, we -- they're good,  
15 they're good.

16 *THE COURT:* Okay. Ms. Taylor?

17 *MS. TAYLOR:* We had no objection, as well, Your Honor.

18 *THE COURT:* All right.

19 *MS. ULRICH:* I have another matter I need to bring to  
20 the court's attention.

21 *THE COURT:* Please.

22 *MS. ULRICH:* The government has represented throughout  
23 this trial that Government Exhibit 5 was found in the glove  
24 compartment of Mr. Heath's truck, and they never introduced a  
25 witness that said that they found it in the glove compartment

1 of the truck, and that's something that's been represented  
2 throughout this trial. So I am going to have a problem with  
3 Government Exhibit 5, and I want the parties to know that.

4           *THE COURT:* What is five?

5           *MS. ULRICH:* It's the Best Western notes. They had a  
6 couple people testify or I think it was Trooper, Agent Shearer  
7 testified it was found in the glove compartment, although he  
8 acknowledged he wasn't the one that found it. And they never  
9 put on the officer who did, in fact, say that's where it was  
10 found.

11           There's definitely a problem with Exhibit 5. They  
12 represented it was found in Mr. Heath's truck, and there is no  
13 evidence that it was found in Mr. Heath's truck.

14           *MS. TAYLOR:* Well, Your Honor, that exhibit was  
15 admitted -- I mean, it was admitted, and there was no objection  
16 to any of that when Sergeant Shearer testified about it. I  
17 mean, we've rested, and I'm not sure what we're supposed to do  
18 with that at this point.

19           *THE COURT:* Mr. Long identified the exhibit.

20           *MS. ULRICH:* Well, no, it was identified, but nobody  
21 testified as to where it was found. That's definitely a chain  
22 of custody, a chain of custody problem.

23           *MS. TAYLOR:* Well, Your Honor, at this point --

24           *THE COURT:* It's not a chain of custody problem. It's  
25 not something that's perishable. Mr. Long identified it.

1 the defendant is not likely to flee or pose a danger to the  
2 community.

3 So it can't just be a clear and convincing finding  
4 that he's not likely to flee. The government would have to  
5 recommend that we're not going to seek a sentence of  
6 imprisonment, and the court would have to make that clear and  
7 convincing finding because he's been found guilty of counts  
8 that call for a sentence of up to life imprisonment and a  
9 controlled substance offense with a ten-year maximum or more.  
10 That's what that section calls for.

11 *MS. ULRICH:* Your Honor has made the ruling. I'm not  
12 going to sit here and fight over it. But, you know, that would  
13 mean everybody that's convicted would be detained that's going  
14 to jail, and that doesn't happen. That tells me the court has  
15 some discretion. I just had a trial in March where Judge Rambo  
16 released a gentleman who was convicted right after trial, and  
17 he's not facing a probationary sentence, he's facing jail time.

18 *THE COURT:* I appreciate what you're saying, and I  
19 know that there are instances when the government doesn't  
20 object. And maybe that's what happened in the case that --

21 *MS. ULRICH:* No, the government wanted him detained.

22 *THE COURT:* All right. Well, without knowing the  
23 circumstances of that case, I'm just going to assume that Judge  
24 Rambo exercised good judgment under all of the circumstances.

25 *MS. ULRICH:* She did.

1                   *THE COURT:* But I think in this case, everything  
2 points to detention. And if it will help you, we'll work with  
3 you on the sentencing date. The proposed date is August 16th,  
4 but if you want to move that up and we can accomplish that for  
5 you, we'll make that happen.

6                   *MS. ULRICH:* Just for the record, and I just want to  
7 put this on the record in case -- to preserve it. I'm moving  
8 for judgment of acquittal notwithstanding the verdict on  
9 possession in furtherance of -- possession of the firearm in  
10 furtherance of drug trafficking.

11                  And I do that because I think then we don't have to do  
12 post-trials on sufficiency. Just as a cautionary, I just want  
13 to put that I am moving for a judgment of acquittal  
14 notwithstanding the verdict on the possession of the firearm in  
15 furtherance of drug trafficking.

16                  *THE COURT:* Okay. Are you going to supplement that  
17 with any sort of written --

18                  *MS. ULRICH:* Well, I guess if the court is not going  
19 to rule on it, then I probably would have to do post-trials.

20                  *THE COURT:* I'm happy to rule on it now, unless you're  
21 telling me you have a submission that you want to make.

22                  *MS. ULRICH:* No, I'm expecting you to rule on it now,  
23 actually.

24                  *THE COURT:* The motion is denied. All right. Is  
25 there anything else for the record?

1           MS. TAYLOR: Not from the government, Your Honor.

2       Thank you.

3           THE COURT: Ms. Ulrich?

4           MS. ULRICH: I have nothing else.

5           THE COURT: All right. Thank you, counsel.

6           MS. TAYLOR: Thank you, Your Honor.

7       *(Whereupon, the proceedings were adjourned at 11:45 a.m.)*

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 17-3402

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UNITED STATES OF AMERICA

v.

CHRISTOPHER MARK HEATH,  
Appellant

---

Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Criminal Action No. 1-16-cr-00075-001)  
District Judge: Honorable Yvette Kane

---

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,  
HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS,  
PORTER, MATEY, and FISHER\*, Circuit Judges

**SUR PETITION FOR REHEARING**

The petition for rehearing filed by Appellant in the above-entitled case having  
been submitted to the judges who participated in the decision of this Court and to all the  
other available circuit judges of the circuit in regular active service, and no judge who  
concurred in the decision having asked for rehearing and a majority of the judges of the  
circuit in regular service not having voted for rehearing, the petition for rehearing by the  
panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: July 24, 2019  
kr/clw/cc: All Counsel of Record

\* Senior Judge Fisher is limited to panel rehearing only.