

Appendix A



Neutral

As of: December 30, 2019 9:51 PM Z

United States v. Rupak

United States Court of Appeals for the Ninth Circuit

June 12, 2019, Argued and Submitted, Pasadena, California; July 2, 2019, Filed

No. 17-50381

Reporter

772 Fed. Appx. 591 *; 2019 U.S. App. LEXIS 19798 **; 2019 WL 2865057

UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
ACHARAYYA **RUPAK**, AKA Kevin Thomas Rudolph
Matthews, AKA Rudolph Matthews, AKA **Rudy Rupak**,
Defendant-Appellant.

Federal Rule, continuance, restitution, commercial
bribery, fail to comply, factual basis, plain error,
Sophisticated, factors

Notice: PLEASE REFER TO *FEDERAL RULES OF
APPELLATE PROCEDURE RULE 32.1* GOVERNING
THE CITATION TO UNPUBLISHED OPINIONS.

Counsel: For UNITED STATES OF AMERICA, Plaintiff
- Appellee: Christopher Paul Tenorio, Esquire, Assistant
U.S. Attorney, Helen H. Hong, Assistant U.S. Attorney,
Nicole Ries Fox, Assistant U.S. Attorney, Office of the
US Attorney, San Diego, CA.

Subsequent History: Rehearing denied by, En banc,
Rehearing denied by [United States v. Rupak, 2019 U.S.
App. LEXIS 30399 \(9th Cir. Cal., Oct. 10, 2019\)](#)

For ACHARAYYA **RUPAK**, AKA Kevin Thomas
Rudolph Matthews, AKA Rudolph Matthews, AKA **Rudy
Rupak**, Defendant - Appellant: John Carl Lemon, II,
Attorney, LAW OFFICES OF JOHN C. LEMON, San
Diego, CA.

Prior History: **[**1]** Appeal from the United States
District Court for the Southern District of California. D.C.
No. 3:16-cr-01333-BAS-1. Cynthia A. Bashant, District
Judge, Presiding.

Judges: Before: FERNANDEZ, WARDLAW, and
BYBEE, Circuit Judges.

[United States v. Rupak, 2018 U.S. App. LEXIS 35780
\(9th Cir. Cal., Dec. 19, 2018\)](#)

Disposition: AFFIRMED.

Opinion

[*592] MEMORANDUM*

Defendant-Appellant Acharayya **Rupak** appeals his
conviction by guilty plea for one count of violating the
[Travel Act](#), [18 U.S.C. § 1952\(a\)\(3\)](#). We have jurisdiction
under [28 U.S.C. § 1291](#) and [18 U.S.C. § 3742\(a\)](#), and
we affirm.

Core Terms

district court, plea agreement, sentencing, guilty plea,

*This disposition is not appropriate for publication and is not
precedent except as provided by [Ninth Circuit Rule 36-3](#).

JOHN LEMON

1. The district court did not err in concluding that the government did not breach the plea agreement. The government's inclusion of a paragraph on the "Sophisticated Means" enhancement was a "typographical error" that was cured by the government's prompt amendment. See [United States v. Alcala-Sanchez](#), 666 F.3d 571, 576 (9th Cir. 2012). Nor did the government breach the plea agreement with regard to restitution because the government **[**2]** never actually requested a restitution amount greater than that agreed upon in the plea agreement. Finally, the government's discussion of the facts underlying the case, including the vulnerability of **Rupak**'s victims, the "sophisticated" nature of his actions, and the actual amount of restitution was not an implicit violation of the plea agreement because the factual discussion served a practical purpose. See [United States v. Heredia](#), 768 F.3d 1220, 1231-32 (9th Cir. 2014); [United States v. Whitney](#), 673 F.3d 965, 971 (9th Cir. 2012). The discussion supported the government's proposed sentence in opposition to the large downward departure recommended by **Rupak**. See [United States v. Moschella](#), 727 F.3d 888, 892 (9th Cir. 2013).

2. The district court did not abuse its discretion by denying **Rupak**'s request to continue sentencing a second time in order to substitute a new attorney. "To establish a [Sixth Amendment](#) violation based on the denial of a motion to continue," we consider the following factors: "(1) whether the continuance would inconvenience witnesses, the court, counsel, or the parties; (2) whether other continuances have been granted; (3) whether legitimate reasons exist for the delay; (4) whether the delay is the defendant's fault; and (5) whether a denial would prejudice the defendant." [United States v. Turner](#), 897 F.3d 1084, 1102 (9th Cir. 2018) (citation omitted). Here, the district court appropriately considered the effect of **[**3]** an additional continuance on the victims of the crime, the fact that sentencing had already been continued once, **Rupak**'s failure to explain why he waited until five days before the scheduled sentencing hearing to request a substitution of counsel, and the ability of **Rupak**'s current attorney to adequately represent him at sentencing. We find no abuse of discretion because the majority of the [Turner](#) factors supports the district court's decision.

3. The district court did not commit plain error by accepting **Rupak**'s guilty plea to a commercial bribery offense. The appellate waiver provision in **Rupak**'s plea agreement does not preclude him from **[*593]** challenging the sufficiency of the factual basis for his

plea and the district court's compliance with [Federal Rule of Criminal Procedure 11\(b\)\(3\)](#). We have "decline[d] to enforce an appeal waiver . . . if the district court failed to comply with [Federal Rule of Criminal Procedure 11](#)" [United States v. Brizan](#), 709 F.3d 864, 866 (9th Cir. 2013); see [United States v. Mendez-Gonzalez](#), 697 F.3d 1101, 1103 (9th Cir. 2012) ("[A]n appeal waiver will not apply if . . . a defendant's guilty plea failed to comply with [Federal Rule of Criminal Procedure 11](#)." (quoting [United States v. Bibler](#), 495 F.3d 621, 624 (9th Cir. 2007))). Because **Rupak** failed to raise his claim of factual insufficiency before the district court, however, the standard of review is plain error. See [United States v. Monzon](#), 429 F.3d 1268, 1271 (9th Cir. 2005). Here, even if the district court erred in deeming the alleged factual basis sufficient **[**4]** to satisfy the elements of California's commercial bribery statute, [Cal. Penal Code § 641.3\(d\)\(3\)](#), we conclude that any such error was not plain.

AFFIRMED.

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