APPENDIX

United States v. Veloz

United States Court of Appeals for the First Circuit

January 24, 2020, Decided

No. 17-2136

Reporter
948 F.3d 418 *; 2020 U.S. App. LEXIS 2290 **; 111 Fed. R. Evid. Serv. (Callaghan) 464; 2020 WL 401801

UNITED STATES OF AMERICA, Appellee, v. DANNY VELOZ, a/k/a MAESTRO, a/k/a JOIL RIVERA, Defendant, Appellant.

Subsequent History: As Corrected January 28, 2020.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Richard G. Stearns, U.S. District Judge.

United States v. Veloz, 2017 U.S. Dist. LEXIS 112271 (D. Mass., July 19, 2017)

United States v. Veloz, 109 F. Supp. 3d 305, 2015 U.S. Dist. LEXIS 72638 (D. Mass., June 4, 2015)

Case Summary

Overview
HOLDINGS: [1]-A district court properly denied defendant's motion suppress evidence law enforcement seized from his apartment where the special agent's affidavit accompanying the warrant application supported the finding that a confidential informant's tip was reliable; [2]-A motion for a Franks hearing was properly denied where the reliable information provided by the informant was so substantial that the omitted information defendant pointed to was not material, and the fact that the informant was a coconspirator did not undermine the basis for probable cause; [3]-Admitting a transcript of a recording of another coconspirator's statements was proper under Fed. R. Evid. 804(b)(3) as the statements were not testimonial, and the statements that allegedly fell outside the exception were not included in the revised transcript.

Outcome
Conviction affirmed.

Counsel: Mark W. Shea, with whom Shea & LaRocque, LLP was on brief, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

Judges: Before Barron, Selya, and Boudin, Circuit Judges.

Opinion by: BARRON

Opinion

[*425] BARRON, Circuit Judge. Danny Veloz challenges on various grounds his 2017 conviction for conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(c), for which he received a prison

sentence of life. Finding no merit to his challenges, we affirm.

I.

Veloz's conviction stems from his alleged role as the mastermind of a Massachusetts-based scheme to kidnap drug dealers and hold them for ransom. On July 23, 2012, a victim of the scheme, Manuel Amparo, alerted law enforcement that he had just escaped from having been kidnapped. Three men were initially arrested in connection with that crime, one of whom, Henry Maldonado, began cooperating with the authorities.

Maldonado informed the authorities that Veloz was the head of the kidnapping crew. Maldonado told them that Veloz would attach GPS devices to the cars of potential kidnapping **[**2]** victims in order to track their movements. Once Veloz learned a victim's typical driving routine, Maldonado also recounted, Veloz would instruct his crew to abduct the victim and hold the victim for ransom.

Further investigation revealed that Amparo had a GPS device unknowingly attached to his car. The Federal Bureau of Investigation ("FBI") then secured a warrant to search Veloz's residence from a United States magistrate judge. The search turned up, among other things, computers and cell phones related to the scheme.

The operative indictment was handed up on September 27, 2012, by a grand jury in the District of Massachusetts. The indictment charged Veloz and six co-defendants with conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(c). Veloz's co-defendants each pleaded guilty. Veloz chose to proceed to trial, which commenced on August 7, 2017. The jury returned a guilty verdict against Veloz on August 21, 2017, and the District Court sentenced Veloz to life in prison on November 17, 2017. That same day, Veloz timely filed a notice of appeal.

II.

Veloz first challenges the District Court's denial of his motion to suppress the evidence that law enforcement authorities seized from his apartment. **[**3]** Veloz argues that the District Court erred in denying this motion because the application for the warrant that led to the seizure failed to establish the requisite probable cause.

When reviewing "the denial of a suppression motion, we assess the district court's factfinding for clear error, and review legal questions (such as probable cause . . .) de novo." United States v. Ackies, 918 F.3d 190, 197 (1st Cir.), cert. denied, 140 S. Ct. 662, 205 L. Ed. 2d 443, 2019 WL 6833480 (2019). We employ a "totality-of-the-circumstances analysis" to see if the government established "a fair probability that contraband or evidence of a crime will be found in a particular place," Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), and "accord 'considerable deference to reasonable inferences [that] the [issuing judge] may have drawn from the attested facts,'" United States v. Tiem Trinh, 665 F.3d 1, 10 (1st Cir. 2011) (alteration in original) (quoting United States v. Zayas-Diaz, 95 F.3d 105, 111 (1st Cir. 1996)).

Veloz's first ground for challenging the denial of his motion to suppress focuses on the affidavit that accompanied the application that FBI Special Agent John Orlando ("SA Orlando") submitted for the search warrant. The affidavit relied largely **[*426]** on information from a confidential informant. Veloz contends that, because the affidavit did not describe the informant as having provided credible information to law enforcement in the past, the warrant was not supported **[**4]** by probable cause. We disagree.

"[A]n informant's tip can establish probable cause even though the affidavit does not contain information about the informant's past reliability," United States v. Greenburg, 410 F.3d 63, 67 (1st Cir. 2005), as a "probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced," id. at 69. "We apply a 'nonexhaustive list of factors' to examine the affidavit's probable cause showing" when it is based on a tip. United States v. Gifford, 727 F.3d 92, 99 (1st Cir. 2013) (quoting Tiem Trinh, 665 F.3d at 10). These factors include:

> (1) whether the affidavit establishes the probable veracity and basis of knowledge of persons supplying hearsay information; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable or practicable (e.g., through police surveillance); and (4) whether a law enforcement affiant assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's provided information.

Id.

In this case, the first two factors that we have set forth above point in favor of finding the tip reliable. SA Orlando's affidavit represented that the confidential informant had **[**5]** provided a detailed description of the illegal scheme's operations and Veloz's role in them. His affidavit also made clear that the confidential informant's description of those operations was based, in part, on his having been inside Veloz's residence.

The third factor further indicates that the tip in this case was reliable because SA Orlando's affidavit identified a number of key respects in which the informant's tip had been corroborated. For example, his affidavit stated that the apartment building that the informant had identified as Veloz's place of residence had a mailbox in it with Veloz's name on it; that law enforcement had observed a car parked in front of that residence -- a brown Cadillac -- that matched the description that the informant had previously given of Veloz's vehicle; and that FBI agents had observed a red van that belonged to one of Veloz's co-conspirators parked outside of that same apartment building. Moreover, an attachment to the warrant application stated that, in accord with the confidential informant's claim that Veloz had used GPS devices to monitor his victims, the investigation into the July 23, 2012, kidnapping revealed that a GPS device had been **[**6]** attached to the victim's car.

The fourth factor, which relates to the experience of the law enforcement officer seeking the warrant, reinforces the reliability of the tip here. SA Orlando represented in his affidavit that the information that he had obtained from the confidential informant accorded with what he had learned from investigating kidnappings in the nearby area over the course of the previous year. See Zayas-Diaz, 95 F.3d at 111 (explaining that a search warrant application is strengthened when "a law-enforcement affiant included a professional assessment of the probable significance of the facts related by the informant, based on experience or expertise").

Finally, in this case, "the [informant] was known to the police and could be held responsible if his assertions proved inaccurate **[*427]** or false." United States v. Barnard, 299 F.3d 90, 93 (1st Cir. 2002) (citing Florida v. J.L., 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)). Thus, this fact provides further support for a finding that the confidential informant's tip was reliable. Id.

Veloz has a fallback argument in challenging the District Court's denial of his motion to suppress. He contends that the District Court erred by mistakenly finding that SA Orlando's affidavit stated that the informant "admitted to his role in the kidnapping." But, because the warrant application **[**7]** establishes the reliability of the confidential informant's tip whether or not the informant was himself involved in the kidnapping scheme, we may affirm the District Court's probable cause ruling on that basis. See Ackies, 918 F.3d at 197.[1]

III.

Veloz's next set of challenges also relies on what he claims are deficiencies in the search warrant application. Here, however, Veloz does not contend that the deficiencies required the suppression of the evidence at issue. Rather, he contends that due to what he describes as "omissions and misstatement[s] in the search warrant affidavit," the District Court erred in refusing his pretrial motion to hold a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Thus, he contends, the conviction must be vacated for this reason.

A Franks hearing affords a defendant an opportunity to show, "by a preponderance of the evidence," that the warrant application "contains false statements or omissions, made intentionally or with reckless disregard for the truth, and that a finding of probable cause would not have been made without those false statements or omissions." United States v. Arias, 848 F.3d 504, 510-11 (1st Cir. 2017). To be entitled to a Franks hearing, the defendant must first make:

> a "substantial preliminary showing" of the same two requirements that he **[**8]** must meet at the hearing — that "a false statement or omission in the

[1] In light of our rejection of Veloz's challenge to the search of his apartment, his challenge to the subsequent searches of his electronic devices, made pursuant to a new warrant that relied in part on information gleaned from the apartment search, lacks merit. Veloz does separately argue that this evidence should be suppressed because there was a "permanent and endless government search" for over eighteen months. Veloz fails to explain, however, why the delay in retuning the search warrant requires suppression of the evidence. This argument is thus waived for lack of adequate development. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

> affidavit was made knowingly and intentionally or with reckless disregard for the truth" and that the false statement or omission was "necessary to the finding of probable cause."

Id. at 511 (quoting United States v. McLellan, 792 F.3d 200, 208 (1st Cir. 2015)).

Veloz contends that the District Court erred in denying his motion for a Franks hearing because he had made the required substantial preliminary showing that SA Orlando knew and omitted key facts from his affidavit about Maldonado's criminal history, previous addiction to heroin, bipolar disorder diagnosis, and some false statements that Maldonado made regarding the kidnappings. Because this challenge is preserved, we review the District Court's factual determinations in denying a motion for a Franks hearing for clear error, and its determination of **[*428]** whether the defendant has made a substantial preliminary showing that the omitted information was material to the finding of probable cause de novo, see id.

Here, because the information in the warrant application that supported a finding that the confidential informant's tip was reliable was so substantial, the omitted information that Veloz points to was not material to "the probable **[**9]** cause calculus." United States v. Stewart, 337 F.3d 103, 106 (1st Cir. 2003). That is especially so because "magistrate judges . . . often know, even without an explicit discussion of criminal history, that many confidential informants 'suffer from generally unsavory character' and may only be assisting police to avoid prosecution for their own crimes." United States v. Avery, 295 F.3d 1158, 1168 (10th Cir. 2002) (quoting United States v. Novaton, 271 F.3d 968, 985 (11th Cir. 2001)).

We also are unpersuaded by Veloz's separate challenge to the District Court's denial of a Franks hearing based on what he contends was SA Orlando's false statement in his affidavit that the confidential informant "picked Danny Veloz out of a photo binder on July 24, 2012." According to Veloz, his picture was not included in a photo array until August 2, 2012, and Veloz contends that the statement about when his photo was picked out of the binder was a "critical fact relied on by the magistrate judge in finding probable cause . . . as it was a critical detail offered to confirm the informant's knowledge of Veloz[.]"

Veloz first made the argument that he was entitled to a Franks hearing, however, in a motion for reconsideration. Thus, Veloz preserved only his challenge to the denial of that motion. Our review of the denial of such a motion is only for abuse of discretion, see United States v. Fanfan, 558 F.3d 105, 106-07 (1st Cir. 2009), and **[**10]** Veloz makes no argument that the District Court abused its discretion in denying that motion. Nor do we see how he could, given that he was not presenting new evidence in that motion, see United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009), as, prior to Veloz's motion for reconsideration on November 3, 2016, the District Court had already laid out the accurate version of events in its June 4, 2015, decision to deny a Franks hearing.

Insofar as Veloz means to press this argument as a basis for challenging the District Court's original decision to deny his motion for a Franks hearing, we may only review it for plain error. See United States v. Tanco-Pizarro, 892 F.3d 472, 479 (1st Cir.) ("[A]rguments unveiled for the first time in a reconsideration motion are not preserved for appeal."), cert. denied, 139 S. Ct. 354, 202 L. Ed. 2d 250 (2018). But, given the other information in the warrant application, this one representation, even if Veloz could show that SA Orlando knew that it was false, is not of a kind that could make plain that Veloz had made the requisite preliminary showing that the statement was material to a finding of probable cause.

We come, then, to Veloz's contention that the District Court erred in denying his motion for a Franks hearing because the affidavit from SA Orlando failed to reveal that the confidential informant **[**11]** to whom it referred was, in fact, Maldonado. As Veloz puts it, the application failed to "identify Maldonado . . . , instead referring to him as 'CI-1,' and describ[ing] him as a 'confidential informant working with the FBI's North Shore Gang Task Force.'"

The government does not dispute that Maldonado was the confidential informant or that the warrant application failed to disclose that fact. We do not see, though, how this omission could be thought to undermine **[*429]** the basis for finding probable cause. As we have explained, the warrant application provides ample support for finding the informant's tip to be reliable whether or not the informant was involved in the conspiracy. In fact, the inclusion of the fact that Maldonado was the informant would appear to provide additional support for finding the tip reliable, given that it would provide a basis for finding that the informant was relaying firsthand knowledge.

In any event, our review of this contention is only for

plain error, because Veloz did not press this ground for requesting a Franks hearing below. Yet, Veloz "fails to even attempt to explain how the plain error standard has been satisfied." United States v. Severino-Pacheco, 911 F.3d 14, 20 (1st Cir. 2018); see also United States v. Pabon, 819 F.3d 26, 33 (1st Cir. 2016) ("[Appellant] has waived **[**12]** these challenges because he has not even attempted to meet his four-part burden for forfeited claims.").

IV.

The next pretrial ruling that Veloz challenges relates to the District Court's grant of the government's motion to strike Special Agent Jeffrey Rolands ("SA Rolands") from his witness list. In his initial opposition to the government's motion, Veloz argued to the District Court that he did not need to provide any justification for including the persons on his witness list that he did, and that, in the alternative, every witness on his list should be allowed to appear because they could "offer[] evidence regarding . . . the flaws in the investigation and the deficiencies in the securing of evidence." The District Court nevertheless granted the government's motion to strike, stating that it was necessary to "protect the jury from testimony that is irrelevant, cumulative, or confusing" and because SA Rolands had "been transferred to Washington DC" In a motion for reconsideration, Veloz contended that the decision to strike SA Rolands interfered with his ability to present his defense, as he intended to call SA Rolands in order to cast doubt on the integrity of the government's investigation. **[**13]**

The parties dispute whether Veloz adequately preserved his challenge to the District Court's initial decision to grant the government's motion. But, we need not resolve that dispute because Veloz's challenge, even if preserved as to the District Court's initial decision, still fails.

Veloz bases his challenge on his federal constitutional right, as a matter of procedural due process, to call witnesses in his defense. See Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). To show that this right has been violated, however, Veloz must demonstrate that the District Court abused its discretion in excluding SA Rolands from his list of witnesses. See United States v. Occhiuto, 784 F.3d 862, 867 (1st Cir. 2015) (reviewing the defendant's constitutional challenge regarding the denial of his request to call a particular witness for "abuse of discretion"). Yet, under Washington, it is not an abuse of discretion for a district court to bar a witness -- as the District Court barred the witness here -- from testifying due to the cumulative nature of the testimony that he would provide. See United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); United States v. Sabean, 885 F.3d 27, 40 (1st Cir. 2018) ("Trial courts enjoy 'considerable latitude' to exclude evidence that is 'admittedly relevant' **[**14]** but also 'cumulative.'" (quoting Hamling v. United States, 418 U.S. 87, 127, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974))). As Veloz does not **[*430]** explain what SA Rolands' testimony would have provided that would render the District Court's determination that it was cumulative of other evidence in the record an abuse of discretion, we reject this contention.

V.

We turn, then, to Veloz's contention that the District Court reversibly erred by admitting into evidence a transcript of a recording of statements by Gadiel Romero, one of Veloz's co-conspirators, which purported to confirm Veloz's role in the kidnapping scheme. The statements set forth in the transcript were made during a conversation that Romero had with Maldonado while both men were in prison and that Maldonado had secretly recorded with equipment the government had provided to him.

On September 29, 2016, the government filed a motion in limine to admit, pursuant to Federal Rule of Evidence 804(b)(3), a transcript of the statements that Romero made during this recorded conversation, notwithstanding that they otherwise would have been inadmissible as hearsay. Federal Rule of Evidence 804(b)(3) allows for the admission of hearsay statements that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary **[**15]** to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to

expose the declarant to criminal liability.

The District Court granted the government's motion on October 28, 2016. Veloz then moved for the District Court to reconsider that ruling. In response, the government offered to admit a revised transcript that contained only certain excerpts from the conversation between Romero and Maldonado. Veloz objected to the admission into evidence of the revised transcript. The District Court overruled the objection. Veloz now argues on appeal that the District Court erred in permitting the revised transcript to be admitted into evidence.[2]

Veloz first contends that, wholly apart from whether the statements at issue are admissible via the revised transcript pursuant to Rule 804(b)(3), their admission violated the Confrontation Clause of the Sixth Amendment under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and Lilly v. Virginia, 527 U.S. 116, 139, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). Our review of a preserved Confrontation Clause challenge is de novo. See United States v. Phoeun Lang, 672 F.3d 17, 21 (1st Cir. 2012).

In considering Confrontation Clause challenges, "[t]he threshold **[**16]** question **[*431]** in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause 'has no application.'" United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010) (quoting Whorton v. Bockting, 549 U.S. 406, 420, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)). Because Romero's statements set forth in the revised transcript were not testimonial, Veloz's Confrontation Clause challenge necessarily founders -- even under the de novo standard of review -- on that threshold question. See Davis v. Washington, 547 U.S. 813, 825, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (noting that "statements made unwittingly to a Government informant" are "clearly nontestimonial" (citing Bourjaily v. United States, 483 U.S. 171, 181-84, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987))).

Veloz next contends that, contrary to the District Court's ruling, the exception to the hearsay bar that is set forth in Federal Rule of Evidence 804(b)(3) does not apply to the statements at issue. To make that case, he asserts that some of the statements that Romero made during the recorded conversation were made to "minimize [Romero's] involvement in the conspiracy" and thus were not made against his penal interest. Veloz also points to certain other statements that Romero made during the recorded conversation that he contends a jury could have interpreted to be self-exculpatory, as the statements suggested that Romero believed that "no one else placed him at the scene of the kidnapping" and that "some of the co-defendants [did not] know him."

We review preserved challenges to evidentiary **[**17]** rulings under the Federal Rules of Evidence for abuse of discretion, see Ackies, 918 F.3d at 205, and the government concedes that this standard applies here, even though Veloz first objected to the revised transcript's admission in a motion for reconsideration, see Trenkler v. United States, 536 F.3d 85, 96 (1st Cir. 2008) ("Where a trial court chooses to overlook the belated nature of a filing and adjudicate the tardy claim or defense on the merits, that claim or defense may be deemed preserved for purposes of appellate review."). Even under the abuse of discretion standard of review, however, the challenge fails for a simple reason: the government did not include in the revised transcript of the recording that was admitted into evidence the statements that Veloz identifies as the ones that failed to fall within the Rule 804(b)(3) exception. See United States v. Barone, 114 F.3d 1284, 1295 (1st Cir. 1997) (noting that the Rule 804(b)(3) inquiry narrowly focuses on whether a specific remark could be deemed self-inculpatory, making exclusion only appropriate, "in light of all the surrounding circumstances," for those particular statements that are "collateral," "non-self-inculpatory statements" (quoting Williamson v. United States, 512 U.S. 594, 600, 604, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994))).

Relatedly, Veloz contends that the government failed to demonstrate, as Federal Rule of Evidence 804(b)(3)(B) requires, that there were "corroborating circumstances" with respect to **[**18]** the statements from Romero that were included in the revised transcript. For this exception to the bar on the admission of hearsay to apply, however, there need only be "evidence that clearly indicates that the statements are worthy of belief,

[2] "Typically, litigants offer recordings as evidence and use transcripts as interpretive aids for the jurors' benefit. The recordings control in the event that they differ from the proffered transcripts." United States v. Kifwa, 868 F.3d 55, 60 (1st Cir. 2017) (internal citation omitted). However, when confronted with a conversation in a foreign language, such as the one between Romero and Maldonado, "the parties may agree to forgo having jurors listen to foreign-language recordings that they do not understand," and instead admit into evidence "transcripts containing translations of such recordings . . . as long as they are reliable and properly authenticated." Id. Neither Veloz nor the government appears to have objected to the use of the transcript.

based upon the circumstances in which the statements were made." Id. at 1300. Thus, there is no merit to this challenge because Veloz fails to explain why the statements made here, which were to a "fellow inmate," are not of that sort, see United States v. Pelletier, 666 F.3d 1, 8 (1st Cir. 2011).

[*432] Finally, Veloz argues that the District Court erred in failing to exercise its supervisory powers to prevent Romero's statements from being admitted into evidence via the revised transcript. He contends that the court order that allowed Maldonado to use the government's equipment to record his conversation with Romero permitted him to do so only if Maldonado avoided raising the subject of the kidnapping conspiracy. Veloz then contends that the transcript of the recorded conversation reveals -- in his view, contrary to the dictates of the court order -- that Maldonado brought up that topic and that Romero made statements about Veloz's role in the conspiracy only at that point in the conversation. Accordingly, he contends **[**19]** that the District Court was required to exclude the statements at issue as a means of enforcing the court order.

We review preserved challenges to the failure to exercise supervisory powers for abuse of discretion. See United States v. Black, 733 F.3d 294, 301 (9th Cir. 2013) ("We review for abuse of discretion the district court's decision not to use its supervisory powers to dismiss an indictment."). The draft transcript of the conversation does show that Maldonado brought up the kidnapping scheme to Romero. But, the court order that permitted Maldonado to record his conversation with Romero merely required the government to instruct Maldonado not to raise that topic. Because Veloz does not dispute that the government did so instruct Maldonado, we see no basis for ruling that, to enforce the government's compliance with the court order, the District Court was obliged to exercise its supervisory powers to exclude the transcript insofar as it contained the statements from Romero that Veloz finds objectionable. See United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992) ("Absent a violation of a recognized right under the Constitution, a statute, or a procedural rule, a district court is not entitled to exclude evidence as a sanction against government practices disapproved of by the court."); **[**20]** United States v. Osorio, 929 F.2d 753, 763 (1st Cir. 1991) ("Without a nexus between improper prosecutorial practice and prejudice to the defendant, misconduct must be characterized as harmless error, and thus beyond the scope of redress under supervisory powers by dismissal or reversal.").

Independent of the challenges that he brings that focus on the fact that the revised transcript included Romero's statements, Veloz also contests the admission of the revised transcript on the ground that it included a statement by Maldonado that conveyed certain information that he had learned from investigators. The contention seems to be that this statement from Maldonado was hearsay and thus was inadmissible for that reason. But, Maldonado's statement was admitted into evidence solely to identify the statement to which Romero was responding in making a statement of his own that the revised transcript included and not for its truth. Thus, the District Court did not err in permitting the admission of that statement via the revised transcript. See United States v. Walter, 434 F.3d 30, 34 (1st Cir. 2006).[3]

VI.

We turn now to Veloz's contention that the District Court reversibly erred at **[*433]** trial because it permitted the admission of certain evidence and testimony that concerned U.S. Fleet Tracking's GPS data. U.S. Fleet Tracking produces the GPS devices that Veloz allegedly used to track his victims.

Veloz first argues that the District Court erred in permitting this data to be admitted under the hearsay exception for business records that is set forth in Federal Rule of Evidence 803(6). Rule 803(6) states that:

> A record of an act, event, condition, opinion, or diagnosis [can be admitted into evidence] if:
> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;

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[3] Maldonado's statement that was admitted into evidence reads as follows:

> 'Cause you, when they told me is that these n****s, right, they had them under surveillance already for a long time, that these n****s been doing burning and f***ing stabbing, and f***ing n****rs up for the **[**21]** longest time, right? You think Cano and Danny will say: "Yo, we are hot," you know what I mean?

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show **[**22]** that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

Veloz trains his focus initially on the requirements that are set forth in subsections (A)-(C). Veloz contends that, because the GPS data that was admitted into evidence was prepared in anticipation of litigation, these requirements were not met. But, while the government's trial exhibit that set forth the GPS data was so prepared, the government showed that U.S. Fleet Tracking created and stored the GPS data itself contemporaneously with Veloz's conduct and thus not in preparation for the litigation. We thus reject Veloz's first ground for claiming that the business records exception did not encompass the data in question.

Veloz next focuses on subsection (D). He argues that the government failed to provide a "qualified witness" to testify that the relevant conditions had been met for admitting the GPS data under the business records exception. Veloz focuses solely on the testimony of Task Force Officer Jason Sutherland. Veloz contends that Sutherland was not qualified within the meaning of the provision in part because he could not explain some discrepancies in the GPS data. But, the government also offered **[**23]** the testimony of Bill Eichhorn, an executive at U.S. Fleet Tracking. Eichhorn was clearly a qualified witness whose testimony sufficed to show the conditions in Rule 803(6) were met here. Nor does Veloz argue otherwise. Thus, this challenge fails, too.

VII.

We move on to Veloz's challenge to the District Court's decision at trial to admit certain testimony offered by Eichhorn, the U.S. Fleet Tracking representative, and Elisabeth Lenehan, an FBI staff operations specialist. Here, too, we find no merit to Veloz's challenges.

Veloz contends that the District Court erred by permitting Eichhorn to recount hearsay when he "introduced the purchase orders and information from other companies" than U.S. Fleet Tracking, which we understand to be a reference to certain records relating to AT&T, Brickhouse Security, and FedEx to which Eichhorn had referred in his testimony. Our review is for **[*434]** abuse of discretion. See Ackies, 918 F.3d at 205.

The problem with this contention is that it rests upon a mistaken understanding of the facts. Our review of the record shows that the documents to which Eichhorn referred in his testimony were emails and records pulled from U.S. Fleet Tracking's own recordkeeping system. To the extent that the **[**24]** record can be read to the contrary, moreover, any error would have been harmless, given the substantial independent evidence of Veloz's guilt. Nor does Veloz develop any argument to the contrary.

Veloz's challenges with respect to Lenehan's testimony also lack merit. Veloz first contends that the District Court reversibly erred by permitting her to testify to the contents of her conversation with T-Mobile regarding a phone seized from Veloz's apartment and that one of the co-conspirators had listed Maldonado in his phone as "H."

But, Veloz similarly fails to develop any argument about why the admission of the T-Mobile testimony, even if improper, was not harmless, given the evidence as a whole. See Zannino, 895 F.2d at 17. And, the record indicates that the testimony about "H" was harmless, as a co-conspirator had already appeared at trial and testified to the same effect. See United States v. Valdivia, 680 F.3d 33, 46 (1st Cir. 2012) (finding the admission of hearsay harmless when it "is cumulative of other evidence in the record"). Nor does Veloz explain how Lenehan's testimony about "H" was prejudicial.

Veloz next claims that the District Court erred by allowing Lenehan to offer improper opinion testimony on matters that included "what nicknames and letters meant. **[**25]** . . . [and] extraction reports she had not written." Veloz asserts that this testimony enabled Lenehan "to link the alleged conspirators . . . with her speculative interpretations" of the contact list and phone numbers on a co-conspirator's phone. But, as Veloz fails to identify the specific statements that he contends that Lenehan was not qualified to interpret, the challenge is waived for lack of development. See id.

VIII.

We now turn to a challenge that Veloz brings to events that occurred on the fifth day of the trial, when the District Court conducted the voir dire of Eichhorn, outside the presence of the jury, to determine his

qualifications as an expert witness. The record shows the following: Veloz's counsel asked the District Court whether Veloz was available to attend the voir dire. The District Court responded both that it did not know and that it was not necessary to have Veloz present for that portion of the proceedings. Veloz's counsel did not then further press the point, and Veloz was not present for the voir dire.

On appeal, Veloz contends that he was excluded from the voir dire and that this exclusion violated his rights under the Due Process Clause and the Confrontation Clause to be present "at all critical **[**26]** stages of the trial." Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (per curiam).[4] The government responds **[*435]** that, because Veloz did not press the point below, he must satisfy the plain error standard, see United States v. Karmue, 841 F.3d 24, 27 (1st Cir. 2016), which is a point that Veloz disputes.

Insofar as Veloz must satisfy the demanding plain error standard, his challenge cannot succeed because he makes no attempt to show how any error was plain, see Severino-Pacheco, 911 F.3d at 20. But, even if we were to review his challenge de novo, see Karmue, 841 F.3d at 26, we do not see how it has merit.

The Due Process Clause "requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence,'" Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting Snyder v. Massachusetts, 291 U.S. 97, 108, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). Veloz appears to have been in no position to assist his counsel with respect to any factual disputes regarding Eichhorn's qualifications. Nor does Veloz offer any examples of the objections that he would have made or assistance that he would have offered had he been present at the voir dire. Thus, Veloz fails to show how his presence at Eichhorn's voir dire would have been necessary to ensure that it was a fair and just proceeding. See id. at 747 (ruling against a defendant, in part, because he gave "no indication that his presence at the competency hearing . . . would have been useful in ensuring a **[**27]** more reliable determination").[5]

IX.

That brings us to the suite of challenges that Veloz brings to certain comments that the prosecutor made during his closing argument and his rebuttal. Veloz chiefly contends, as he did below, that the prosecutor made the improper comments by: (1) engaging in "burden shifting" during rebuttal; (2) referring to Romero; (3) characterizing "the U.S. Fleet [data and records] as business records"; (4) characterizing "Romero as the pillar of the case"; (5) stating that Veloz's counsel "[went] after Eichhorn"; and (6) claiming that Romero did not know he was being recorded.

We may "vacate a conviction only if the [prosecutor's improper] remarks 'so poisoned the well that the trial's outcome was likely affected.'" United States v. French, 904 F.3d 111, 124 (1st Cir. 2018) (quoting United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011)). "In assessing this question, we consider the severity of the conduct and whether it was deliberate, the context, the presence of curative instructions and their likely effect, and the strength of the prosecution's case." Id.

We review preserved challenges to the propriety of a prosecutor's remarks de novo. See United States v. Zarauskas, 814 F.3d 509, 514 (1st Cir. 2016). We may assume that Veloz's objections to each of these statements were timely made because, even on that assumption, there is no **[**28]** basis for finding that the District Court reversibly erred in overruling them.

[*436] We have already explained why Veloz's challenges to the admission of Romero's statements via the revised transcript and to the U.S. Fleet Tracking data lack merit. In light of that same reasoning, there was nothing improper in the prosecutor referring to Romero's statements in the revised transcript, given that the statements were properly admitted, or to the GPS data being business records, given that they were

[4] Though Veloz fails to cite it in his brief, we note that Federal Rule of Criminal Procedure 43(a) codifies this Due Process right. See United States v. Iverson, 897 F.3d 450, 466 (2d Cir. 2018). Rule 43 provides, in pertinent part, that "the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing." The rule also states that a defendant need not be present when "[t]he proceeding involves only a conference or hearing on a question of law." Fed. R. Crim. P. 43(b)(3).

[5] Nor do we see any Confrontation Clause violation -- insofar as Veloz means to contend that there was one -- resulting from Veloz's absence from the voir dire. Veloz had an "opportunity for full and effective cross-examination" of Eichhorn with regard to his background during the trial. Stincer, 482 U.S. at 744.

properly so deemed under Federal Rule of Evidence 803(6). Nor do we see how, given the substantial evidence against Veloz, these statements by the prosecutor were so prejudicial as to affect the trial's outcome. That is especially so given that the District Court instructed the jury, both before and after closing arguments began, that "[w]hat the lawyers say, what I say as far as any factual matter in the case goes, does not matter. You, as the jury, are the sole judges of the facts." In fact, Veloz fails to develop anything more than a cursory argument that the comments just described were so prejudicial as to warrant overturning the conviction.

There remains to address only the other comments by the prosecutor that Veloz identifies **[**29]** as problematic. But, as to these comments, too, Veloz fails to demonstrate how any of them caused the requisite prejudice. Thus, his challenges based on those comments are meritless as well, even if we were to assume that any of these comments were somehow improper.[6]

X.

Next up is Veloz's penultimate challenge. It is to the District Court's instruction to the jury, just before it began its deliberations, that Maldonado's "recording was obviously made without Mr. Romero's knowledge." Veloz argues that the District Court's instruction "decided an issue of fact for the jury, and clearly injected the court's opinion into evaluating the evidence." In other words, Veloz contends, the instruction "eliminated the possibility that the jurors could reject the transcript outright as untrustworthy."

The government points out that, although Veloz made an objection to a draft form of the instruction in the morning on the day that jury was charged, he failed to renew that objection after the jury was charged. Veloz responds that he did not renew his objection at that time because the District Court stated that it would consider the objections from that morning preserved. But, Federal Rule of Criminal Procedure 30, which governs objections **[**30]** to jury instructions, "require[s] the appellant to renew his objection after the jury has been charged when the court has given the parties that opportunity," United States v. Henry, 848 F.3d 1, 13 (1st Cir. 2017), and we have held that the fact that a district court made a statement "after the charge that objections made prior to it will be saved does not absolve the attorney from following the strictures of the rule," id. (citation omitted).

Even if we were to treat the challenge as preserved, it still would fail. The District Court repeatedly advised the jury that it was the "sole judge[] of the facts." Moreover, Veloz does not dispute that Romero was unaware that Maldonado was recording his conversation with him, and the record provides no basis from which a reasonable juror could conclude otherwise. Thus, we fail to see how the District Court's statement in the instruction was sufficiently prejudicial to constitute reversible error.

XI.

Veloz's final ground for challenging his conviction concerns a ruling **[*437]** that the District Court made after the jury rendered its verdict that Veloz was guilty of the charged offense. At that time, the District Court denied Veloz's motion pursuant to Federal Rule of Criminal Procedure 33 for a new trial based on his allegation that "evidence **[**31]** was tampered with, thereby denying [him] a fair trial."[7] We review a "denial of a Rule 33 motion for manifest abuse of discretion with the respect due to the presider's sense of the ebb and flow of the recently concluded trial." United States v. Tull-Abreu, 921 F.3d 294, 301-02 (1st Cir.) (internal citation and quotation marks omitted) (alterations omitted), cert. denied, 140 S. Ct. 424, 205 L. Ed. 2d 241 (2019). But, a district court "must exercise that discretion sparingly and in the most extraordinary circumstances, and only in order to avert a perceived miscarriage of justice. In short, the ultimate test for granting a new trial pursuant to [the Rule] is whether letting a guilty verdict stand would be a manifest injustice." United States v. Gramins, 939 F.3d 429, 444 (2d Cir. 2019) (internal citations and quotation marks omitted).

Veloz's arguments concerning the District Court's asserted error in denying his Rule 33 motion are not easy to follow. As best we can tell, Veloz points to five instances of alleged mishandling or tampering with evidence that he contends were set forth in his Rule 33

[6] The same is true as to Veloz's challenges to yet other comments that the prosecutor made that Veloz, for the first time on appeal, now contends were also improper.

[7] Rule 33 states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

motion: (1) someone tampered with data on one of the laptops seized from the apartment of Luis Reynoso's, a co-conspirator, apartment; (2) a laptop seized from Veloz's apartment showed that Veloz accessed a photo on July 23, 2012, that did not come into existence until July 24, 2012; **[**32]** (3) GPS data on the phone of Jose Guzman's, a co-conspirator, phone was "altered between November 5 and November 15, 2012"; (4) two phones taken from Jose Matos, a co-conspirator, were lost or destroyed during the investigation; and (5) SA Orlando "returned crucial evidence to a cooperator's wife without copying the materials first."

Veloz appears to be arguing that the evidence offered against him was so unreliable, on account of these alleged problems with the way evidence against him was handled, that there was insufficient evidence upon which to convict him of the charged offense. The District Court found, however, that Veloz's counsel laid out each of these asserted problems with the way that the government had handled the investigation to the jury and that the jury, fully cognizant of those alleged problems, nonetheless found Veloz guilty. Veloz does not challenge the finding that the contentions that he raises in his Rule 33 motion were ones that the jury was given a full opportunity to consider. Nor does he succeed in demonstrating that the contentions are such as to compel a finding that, in consequence of them, the evidence against him did not suffice to support the conviction, let alone that **[**33]** the District Court manifestly abused its discretion in finding against him on that point. As a result, this challenge to the denial of his motion for a new trial fails. See United States v. Merlino, 592 F.3d 22, 32 (1st Cir. 2010)(stating that relief under Rule 33 for a sufficiency challenge may only be granted "where the evidence preponderates heavily against the verdict" (quoting United States v. Wilkerson, 251 F.3d 273, 278 (1st Cir. 2001)).

XII.

The conviction is **affirmed**.

End of Document

United States v. Veloz

United States District Court for the District of Massachusetts

June 4, 2015, Decided; June 4, 2015, Filed

CRIMINAL ACTION NO. 12-10264-RGS

Reporter
109 F. Supp. 3d 305 *; 2015 U.S. Dist. LEXIS 72638 **

UNITED STATES OF AMERICA v. DANNY VELOZ et al. MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

Subsequent History: Motion denied by United States v. Veloz, 2016 U.S. Dist. LEXIS 149103 (D. Mass., Oct. 27, 2016)

Motion granted by United States v. Veloz, 2017 U.S. Dist. LEXIS 60421 (D. Mass., Apr. 20, 2017)

Motion granted by, in part United States v. Veloz, 2017 U.S. Dist. LEXIS 112271 (D. Mass., July 19, 2017)

Motion denied by United States v. Veloz, 2017 U.S. Dist. LEXIS 117627 (D. Mass., July 27, 2017)

Decision reached on appeal by United States v. Romero, 906 F.3d 196, 2018 U.S. App. LEXIS 28822 (1st Cir. Mass., Oct. 12, 2018)

Affirmed by United States v. Veloz, 948 F.3d 418, 2020 U.S. App. LEXIS 2290 (1st Cir. Mass., Jan. 24, 2020)

Motion denied by United States v. Wallace, 2020 U.S. Dist. LEXIS 90765 (D. Mass., May 23, 2020)

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Judges: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Stearns

Opinion

[*308] MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

STEARNS, D.J.

The above-captioned case was transferred to this session of the court on November 4, 2014. Several motions to suppress are pending. The first three **[**2]** involve the identifications of defendants Danny Veloz, Jose Matos, and Gadiel Romero by cooperating witnesses.[1] In addition, Veloz objects to the search of his residence pursuant to a warrant issued by Magistrate Judge Marianne Bowler,[2] the subsequent search of hard drives and memory chips taken from computers and cell phones seized at his home, and to a later search of email accounts held in his name by Google and Apple.[3] The court heard oral argument on the legal issues on May 13, 2015. As there are no material facts in dispute, the court declines to hold an evidentiary hearing, and will instead address each motion on its merits.

BACKGROUND

The FBI and various local law enforcement agencies had undertaken a joint investigation of Joloperros (which roughly translates **[**3]** to "stick-up men") involved in violent kidnappings and home invasions in the Lawrence, Massachusetts area. Joloperros "crews" frequently targeted local drug dealers. The crews would surreptitiously attach global positioning system (GPS) units to their victims' vehicles, track their movements, and after a successful hostage-taking, demand ransom payments from the kidnap victims and their families.

On July 23, 2012, Lawrence police responded to a 9-1-1 call at 67 Allston Street, after Minerva Amparo reported having witnessed a white minivan follow her husband's car into their driveway. **[*309]** Three men wearing masks and black T-shirts emblazoned with the word "Police" (and shouting "Police!") had held her husband Manuel Amparo and another man (Jose Castro) at gunpoint, forcing them into the van and driving away. Lawrence police and the FBI recovered a white zip tie (used as a handcuff) next to Manuel Amparo's car, as well as a small GPS device that had been attached to the rear side bumper of his car.

Early the following morning, Manchester, New Hampshire police responded to a 9-1-1 call at 859 Clay Street, after a homeowner reported that a man standing on his porch claimed to have been a kidnapping **[**4]** victim. Manuel Amparo, displaying visible injuries, had escaped from his captors and run for help. He told police that he had been kidnapped in Lawrence the day before by four masked men in a white Toyota minivan. He had been take to New Hamphire where he was punched, kicked, burned with an iron, and held for ransom.[4] He led police to 890 Clay Street, where Castro and three of the kidnappers were still on the premises. Officers arrested Henry Maldonado, Thomas Wallace, and Jose Guzman, and, after obtaining a search warrant for the house and the minivan, seized a handgun, police paraphernalia, a GPS device, and several heating irons. Police also discovered blood stains in the interior of the minivan.

After initially denying his involvement, one of the arrested men (identified as CW-2) begin cooperating with the government. On the evening of July 24, 2012, CW-2 gave a lengthy, recorded, post-*Miranda* statement in which he admitted to his role in the kidnapping. *See* Dkt. No. 309-9. CW-2 related that he met the members of **[**5]** the crew (Guzman, Wallace, Gadiel Romero also known as "TC," and Luis Reynoso) at the Veloz residence, and drove to Matos also known as "Boyca"'s apartment to gather firearms and police shirts. They then drove to Amparo's home in the white minivan. There, dressed in police regalia, they had abducted Amparo and Castro and taken them to New Hampshire. CW-2 named Veloz as the chief of the crew and described the location and interior layout of his home. CW-2 explained that Veloz tracked the movements of his potential victims (mostly drug dealers referred to Veloz by other drug dealers who paid him for protection) by attaching GPS units to their cars. CW-2 stated that he had personally observed Veloz monitoring the movements of his victims on a laptop computer attached to a large-screen television and a cellular phone in his home.[5] In addition, CW-2 accurately described Veloz as light-skinned and in his 30's; that he had a black belt in

[1] While designated as confidential by the government, at the hearing it became apparent that the actual identities of the informants are no secret to counsel involved in the case.

[2] Veloz also seeks a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), claiming that the agent-affiant omitted material information regarding the informant's truthfulness in the warrant affidavit.

[3] Romero has withdrawn a motion to suppress statements that he made to a jailhouse informant.

[4] While a captive, Manuel Amparo was put on the phone with an individual later identified as Veloz who threatened to kill him if he did not arrange the payment of a ransom.

[5] In his grand jury testimony in August of 2012, CW-2 testified that Veloz recruited him for the kidnapping crew in the spring of 2012, and that he had met with the other crew members at Veloz's residence approximately three times to plan the July 23 kidnapping.

martial arts, numerous martial arts trophies in his apartment, and had once owned a karate shop in Lawrence; that he had spent a year in the Middleton Jail on gun charges; that he lived with his wife and two young children; and that he owned a beige/gold **[**6]** Cadillac CTS. CW-2 also noted that Veloz had a distinctive tattoo of a tiger face on his right arm.[6]

Prior to his initial appearance in Boston, CW-2 rode with agents to 443-447 Andover Street in Lawrence, where he identified **[*310]** Apartment #9 as Veloz's residence.[7] A Cadillac sedan and CW-2's personal car were parked on the street in front of Veloz's home. On the basis of CW-2's information, on July 25, 2012, FBI Special Agent John Orlando obtained and executed a search warrant at Veloz's apartment. The search recovered two laptops, a tablet computer, two thumb drives, and seven cellular phones.

On August 2, 2012, FBI Special Agent Kathryn Earle obtained **[**7]** a supplemental search warrant for the contents of the seized devices. On August 6 and 7, 2012, agents downloaded data from the thumb drives and the cellular phones.[8] On August 13, 2012, a forensic examiner searched and imaged the laptop computers. Over the following months, agents analyzed the copied data and determined that one of the laptops was used in the kidnappings. An email address contained in the laptop (palomo.1025@gmail.com)[9] listed to a Juan Pablo Durarte,[10] and a telephone number (978-876-2897),[11] were determined to have been used in connection with the purchase of a GPS unit. The laptop also contained GPS satellite images of the streets in and around Amparo's home.

Also on August 2, 2012, CW-2 was shown a three-ring binder containing 37 photographs (without any identifying information) labeled 1-37.[12] He accurately identified photograph 30 as that of Veloz. During his grand jury testimony, he also accurately identified photos of Guzman (also known as "Cano"), Wallace, Reynoso, and Romero. On August 31, CW-2 identified Matos from an array of 6 photos.

CW-3 also began to cooperate with law enforcement shortly after the July 23 kidnapping. In August of 2012, he told the grand jury that he had met Maldonado at a methadone clinic in 2007 and had begun selling pills with him, supplied by Veloz, in or about January of 2012. In the spring of 2012, Maldonado approached CW-3 about participating in a hostage-taking and introduced CW-3 to Guzman. Maldonado and Guzman referred to Veloz as "Maestro" because of his role in orchestrating **[**9]** the kidnappings. CW-3 also testified about Veloz's use of GPS devices to track potential victims. Prior to the July 23 kidnapping, CW-3 met with Veloz and other crew members at Veloz's apartment approximately five times. CW-3 accurately described the exterior and interior of Veloz's residence, and related that Veloz had purchased a Cadillac with the proceeds of a prior successful kidnapping. CW-3 also described meeting with Matos at the Veloz residence, that Matos's apartment served **[*311]** as the "stashhouse" for the operation, and described Matos physically.

On July 30, 2012, CW-3 was shown a loose-leaf binder containing 36 numbered photographs without identifying information. He identified photograph 30 as Veloz. During his grand jury testimony, he accurately identified photographs of Guzman, Maldonado, and two photos of Veloz. On August 29, 2012, CW-3 also identified Matos from an array of 6 photos.

Like CW-2 and CW-3, CW-5 pled guilty to conspiracy to commit kidnapping and agreed to cooperate with the government. He told the grand jury in July of 2013 that he had met Veloz and Romero while they were inmates at the Middleton Jail in late 2010/early 2011. Veloz recruited CW-5 and Romero to **[**10]** join his

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[6] CW-2 stated that Matos ("Boyca") stored the firearms and paraphernalia used in the kidnappings in his apartment and physically attached the GPS units to victims' cars.

[7] CW-2 also directed agents to 17-19 Tyler Street in Lawrence, where he indicated that Matos ("Boyca") lived on the second floor.

[8] The Boston FBI office lacked the technical capacity to search the tablet computer, and sent it to an outside laboratory for forensic examination.

[9] In June and September of 2014, agents also executed search warrants addressed to Google and Apple for information associated with this and another email address discovered on Veloz's laptop. Veloz seeks to suppress the fruits of these searches as well.

[10] The address associated with Juan Pablo Durarte is Matos's address at 17 Tyler Street in Lawrence.

[11] Veloz had also given this **[**8]** number as his home telephone when being booked by police.

[12] During or after the July 24 interview, CW-2 was shown a single Registry of Motor Vehicles photo, also without any identifying information, which CW-2 correctly identified as Veloz. CW-2 was also shown a binder containing photographs 1-28, which did not include a photo of Veloz.

kidnapping crew. Veloz had explained to CW-5 the use of GPS units to track potential ransom victims (usually drug dealers). CW-5 testified that he had either participated in or had knowledge of seven different kidnappings carried out by the Veloz crew. For example, CW-5 admitted to taking part in the kidnapping of a target named "Majimbe" with Veloz, Romero, and Matos. CW-5 had observed Matos put a GPS device on Majimbe's vehicle prior to the kidnapping, and participated in the remote tracking of Majimbe's car from Veloz's apartment. CW-5 met with other members of the crew on multiple occasions at Veloz's residence and accurately described its interior.

In November of 2012, CW-5 was shown individual photographs taken from the binder kept by the FBI and accurately identified two photos of Veloz, as well as photos of Romero, Matos, Maldonado, Wallace, and Reynoso. During his grand jury testimony he identified photos of Veloz and Romero.

DISCUSSION

1. Motions to suppress photographic (mugshot) identifications by cooperating witnesses of Veloz (#238), Matos (#270), and Romero (#276-1)

Defendants argue that the conduct of the photographic identifications was deficient because: (1) **[**11]** the agents did not employ a double blind or blinded procedure; (2) the cooperating witnesses were not told that they were not required to make an identification; and (3) were not asked how certain or confident they were when they did make an identification. Veloz and Matos also contend that some of the arrays shown were of an unconstitutionally small size (arrays of 6 photos were shown to identify Matos, while CW-2 during his initial interview was shown a single photograph of Veloz).

While the policy arguments over best practices in conducting a photographic identification are of interest, they are of no constitutional import. The arguments are principally derived from dicta in a Supreme Judicial Court (SJC) decision, *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 797, 906 N.E.2d 299 (2009) (while "[w]e have yet to conclude that an identification procedure is unnecessarily suggestive unless it is administered by a law enforcement officer who does not know the identity of the suspect (double-blind procedure), . . . we acknowledge that it is the better practice . . . ."). The SJC's further ruminations on the desirability of instructing a person being asked to view an array that the alleged wrongdoer may or may not be depicted, and asking her at time of the identification **[**12]** how certain she is, *id.* at 797-798, were adopted as recommended "best practices" by a Study Group appointed by the SJC to delve into the issue of misidentifications. *See* SJC Study Group of Eyewitness Evidence, Report **[*312]** and Recommendations to the Justices (July 23, 2013), at 89-90. While the SJC appears inclined to adopt most, if not all, of the recommendations of the Study Group,[13] this does not affect federal practice (although it may ultimately have persuasive appeal).

The use of photographs for identification purposes in federal investigations is governed by due process considerations of fairness. The test to be applied is whether the methods used by police to elicit an identification were "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). It is generally held that an array of at least six photos (the suspect and five fillers) is acceptable,[14] although there is no *per se* rule barring the use **[**13]** of a single photo. *See Nassar v. Vinzant*, 519 F.2d 798, 801 (1st Cir. 1975); *compare United States v. Mears*, 614 F.2d 1175, 1177 (8th Cir. 1980) (improper to include defendant twice in an array of seven photos) *with United States v. Sanchez*, 24 F.3d 1259, 1262 (10th Cir. 1994) ("[W]e believe that the number of photographs in an array is not itself a substantive factor, but instead is a factor that merely affects the weight given to other alleged problems or irregularities in an array.").

There is no reason, however, to belabor the issue — what distinguishes this case is the fact that each of the cooperating witnesses had prior familiarity with the person or persons they identified — indeed, they were literal "partners in crime." It is uniformly held by state and federal courts, that where a witness is shown to have had prior familiarity with a defendant, a due process hearing need not be held, as no amount of

[13] The SJC has expressed skepticism regarding one of the recommendations (sequential viewing), *see Commonwealth v. Walker*, 460 Mass. 590, 602, 953 N.E.2d 195 (2011), and has repeatedly held that the failure to use techniques like blinded viewing, goes to the weight and not the admissibility of identification evidence. *See id.*

[14] This also was the minimum number endorsed by the SJC Study Group. *See* Report and Recommendations to the Justices, at 89.

police suggestion is likely to have influenced the witness's identification. *See People v. Rodriguez*, 79 N.Y.2d 445, 450, 593 N.E.2d 268, 583 N.Y.S.2d 814 (1992) (the "known to one another" exception); *Commonwealth v. Pressley*, 390 Mass. 617, 619, 457 N.E.2d 1119 (1983) (a judge need not instruct on the possibility of good faith mistake where "the parties are so well known to each other or so closely related that . . . the identification by the victim is either true or the victim **[**14]** is lying."); *United States v. Henderson*, 320 F.3d 92, 101 (1st Cir. 2003) ("Nor need we dwell too long on Powers' identification of defendant. There was evidence from which it could be found that she had known Henderson going back to 1994."); *United States v. Drougas*, 748 F.2d 8, 27 (1st Cir. 1984), *holding modified on other grounds by United States v. Piper*, 35 F.3d 611 (1st Cir. 1994) ("As a fellow conspirator in the smuggle, the government witness certainly had the opportunity and incentive to accurately identify Ellis."); *see also Mears*, 614 F.2d at 1177 (despite improperly including two photos of defendant in the photo array, witness's in-court identification of defendant was reliable because of their prior mutual business dealings).[15]

2. Motion to suppress search of electronic equipment by Veloz (#264)

Veloz contends that after seizing his computer, cell phones, and thumb **[*313]** drives, the government did not complete the search of their contents until some 18 months later.[16] He contends that the delay was constitutionally unreasonable, and that the government violated Fed. R. Crim. P. 41, which places a 14-day time limit on the return of a warrant. The latter argument is the easier to dispose of as the procedural requirements for the return of a warrant under Rule 41 are "basically ministerial," *United States v. Dauphinee*, 538 F.2d 1, 3 (1st Cir. 1976), and absent any **[**15]** showing of prejudice, "do[] not provide grounds for the suppression of the evidence obtained pursuant to the warrant." *United States v. Gerald*, 5 F.3d 563, 567, 303 U.S. App. D.C. 311 (D.C. Cir. 1993).

With respect to the former argument, Veloz conflates the forensic examiner's search of a device — where data is copied for further review — with the review of the already seized data. *See United States v. Habershaw*, 2002 U.S. Dist. LEXIS 8977, 2002 WL 33003434, at *8 (D. Mass. May 13, 2002) ("Further forensic analysis of the seized hard drive image does not constitute a second execution of the warrant or a failure to 'depart the premises' as defendant claims, any more than would a review of a file cabinet's worth of seized documents."). Although reports reflecting on-going analysis of the seized data were generated in March of 2014, there is no dispute that the government copied or attempted to copy the data from the devices almost immediately after their seizure. "The Fourth Amendment itself contains no requirements about *when* the search or seizure is to occur or the *duration*." *United States v. Syphers*, 426 F.3d 461, 469 (1st Cir. 2005) (internal quotation marks omitted). "A delay in execution of the warrant under Rule 41 does not render inadmissible evidence seized, absent a showing of prejudice to the defendants resulting from the delay. . . . Courts have permitted some delay in the **[**16]** execution of search warrants involving computers because of the complexity of the search." *Id.*

Given the impracticalities of conducting a forensic examination in a person's home or office, the creation of a mirror image of a suspect computer hard drive for later analysis has become a common and constitutionally permissible practice. *See United States v. Ganias*, 755 F.3d 125, 135-136 (2d Cir. 2014) (collecting cases). "[C]omputer searches are not, and cannot be subject to any rigid time limit because they may involve much more information than an ordinary document search, more preparation and a greater degree of care in their execution." *United States v. Triumph Capital Grp., Inc.*,211 F.R.D. 31, 66 (D. Conn. 2002).

Where problems have arisen is in instances in which the government fails to expeditiously return non-responsive information found on a seized or mirrored hard drive. *See Ganias*, 755 F.3d at 140-141 (suppression called for where government agents retained computer documents that were beyond the scope of the original warrant for almost two-and-a-half years). But, even in these instances, a rule of reasonableness applies. Where, as here, the government acted reasonably in seeking outside forensic expertise, and there is no allegation that wrongfully seized and later discovered material of an exculpatory nature was willfully retained, the on-going off-site **[**17]** analysis of the contents of Veloz's hard drives raises no Fourth Amendment or due process issue.

3. Motion to suppress fruits of search and seizure and for a *Franks* hearing by Veloz (#208 and #225)

[15] Moreover, CW-2 accurately identified Veloz by his distinctive tattoo as well as his photo.

[16] The return of the search warrant was filed on March 12, 2014.

(a) Veloz's contentions

Veloz contends that there was no probable cause to issue the warrant to search his **[*314]** home. He maintains that the information provided by CW-2 was not corroborated in any meaningful sense, that the evidence of a car belonging to an arrested coconspirator on a public street near his house was not material, that the agent's expertise regarding kidnapping techniques was not connected in any real sense to this case, and that the agents omitted material information from the warrant affidavits, notably, that immediately after being arrested, CW-2 gave false information about his involvement in the crime.[17]

(b) Probable cause

Probable cause means "reasonable cause," something significantly less exacting than "more likely than not" or "by a preponderance of the evidence." *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979). Probable cause "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (*plurality opinion*) (internal citation omitted). In assessing probable cause, federal courts are to adhere to the flexible "totality of the circumstances" test of probable cause approved by the Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 230-231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (stressing that probable cause is a fluid concept — "not readily, or even usefully, reduced to a neat set of legal rules"). Whether a warrant in fact issued on a showing of probable cause is a matter of law to be determined by the court. *Beck v. Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

It has long been the rule that probable cause may be established solely through hearsay information provided by a confidential informant. In **[**19]** *Gates*, the Supreme Court rejected any "rigid" application of the "two-pronged" test of an informant's tip drawn from *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). *Gates* involved an anonymous tip implicating a local couple in drug trafficking. The officer who prepared the warrant succeeded in corroborating a number of largely innocent details and in confirming predictions contained in the tip, but had no means of establishing the informant's identity and thus, the basis of his or her knowledge of the couple's criminal activity. Applying the *Aguilar-Spinelli* test, the Illinois Supreme Court found the affidavit wanting.

The Supreme Court reversed. Conceding that the *Aguilar* factors of "veracity," "reliability," and "basis of knowledge" are "highly relevant," the Court nonetheless rejected the notion that "these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case." *Gates*, 462 U.S. at 230. The Court concluded that

> it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has **[*315]** informed probable-cause determinations. . . . The task of the issuing magistrate is **[**20]** simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 238-239.

Although *Gates* suggests a likely finding of probable cause even were CW-2 an anonymous informant, that is simply not the case. Veloz's legal argument, which is based on the law governing anonymous tips, *see* Def.'s Br. at 7, founders on this point. CW-2, far from being anonymous, was not only known to police — he was in fact one of Veloz's coconspirators. In *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971), Chief Justice Burger, in discussing *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), noted that "Jones never suggested that an averment of previous reliability was necessary," and

[17] The government for its part contends that there was probable cause because the confidential witness's information revealed highly detailed knowledge of illegal activities and was therefore self-authenticating, that the information was corroborated by other information such as the identification of other coconspirators, the identification of Veloz's home address, car, wife, and the description **[**18]** of the use of GPS units on victims' cars, and by the identification of a coconspirator's car parked in front of Veloz's home.

held that an informant's admissions of his own criminal involvement — his "declarations against penal interest" — carried their own indicia of credibility. *Harris*, 403 U.S. at 581-582, 594. "People do not lightly admit a crime and place critical evidence in the hands of the **[**21]** police in the form of their own admissions." *Id.* at 583; *see also United States v. Schaefer*, 87 F.3d 562, 566 (1st Cir. 1996) ("The fact that an informant's statements are against his or her own penal interest adds credibility to the informant's report."); *United States v. Campa*, 234 F.3d 733, 738 (1st Cir. 2000) ("Bullon's own admission of complicity, and the risk of police retaliation for giving false information, added to the likelihood of his veracity." (internal citations omitted)).[18]

(c) The *Franks* Issue

While a judicial ruling on a motion to suppress is ordinarily confined to the "four corners" of the affidavit, there are circumstances in which a defendant may challenge the truthfulness of statements made by the affiant. *See Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *cf. United States v. Southard*, 700 F.2d 1, 7 (1st Cir. 1983) (a facially sufficient affidavit is entitled to a presumption of validity). To be entitled to a *Franks* hearing, a defendant must make a "substantial preliminary showing" that an affidavit contains intentionally false or recklessly untrue statements that are material to a finding of probable cause. *Franks*, 438 U.S. at 155-156, 170.

> [T]he challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. **[**22]** There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

[*316] *Id.* at 171. A showing of simple factual error or negligent omission is insufficient to trigger a *Franks* hearing. *See United States v. Monaco*, 700 F.2d 577, 580 (10th Cir. 1983); *United States v. Baldwin*, 691 F.2d 718, 720 n.1 (5th Cir. 1982); *United States v. Tanguay*, 787 F.3d 44, 2015 U.S. App. LEXIS 8556, 2015 WL 2445764, at *9 (1st Cir. May 22, 2015).

If a hearing is warranted, the defendant must prove the knowing falsity or recklessness of the affiant's statements by a preponderance of the evidence. *Franks*, 438 U.S. at 156. If the showing is made, the offending statement is excised from the affidavit, which is then reexamined for probable cause. *Id.* at 171-172; *United States v. Veillette*, 778 F.2d 899, 903-904 (1st Cir. 1985).

The reckless omission of material information from the affidavit also raises a *Franks* issue. *See United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989); *see also United States v. Hall*, 113 F.3d 157, 158 (9th Cir. 1997) (reckless omission of the "absolutely critical" fact that the informant had been previously convicted for falsely reporting a crime); *cf. United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997) ("[A]n affidavit which omits potentially exculpatory information is less likely to present a question of **[**23]** impermissible official conduct than one which affirmatively includes false information.").

On the other hand, the omission of a fact that does not cast doubt on the existence of probable cause is not a material misrepresentation. *United States v. Dennis*, 625 F.2d 782, 791 (8th Cir. 1980); *see also United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (an omission must be made with the intent to mislead); *United States v. Moscatiello*, 771 F.2d 589, 603 (1st Cir. 1985), *vacated on other grounds sub. nom. Carter v. United States*, 476 U.S. 1138, 106 S. Ct. 2241, 90 L. Ed. 2d 688 (1986) (the omission of irrelevant facts is no basis for suppression); *United States v. Reivich*, 793 F.2d 957, 962-963 (8th Cir. 1986) (the failure to apprise the magistrate of the fact that informants had been promised leniency did not diminish the showing of probable cause); *United States v. Calisto*, 838 F.2d 711, 714-716 (3d Cir. 1988) (affiant's failure to disclose that certain information in the affidavit had been transmitted by fellow officers did not detract from the showing of probable cause). There may also be circumstances, although they would appear rare, in which the failure to include information not known to the affiant might give rise to a *Franks* violation. *See Tanguay*, 2015 U.S. App. LEXIS 8556, 2015 WL 2445764, at *8 (asking whether certain "red flags" about an informant's history of mental instability might have created "a duty of further inquiry"). Where there is a finding that the affiant intentionally or recklessly omitted material facts from the affidavit, the

[18] Here there is no dispute as to CW-2's "basis of knowledge" — he claimed to have seen first-hand what he reported. *See United States v. Del Toro Soto*, 676 F.2d 13, 19-20 (1st Cir. 1982) (informant watched defendants steal mail).

reviewing court should determine whether the omitted information, **[**24]** had it been included, would have defeated the finding of probable cause. *United States v. Cole*, 807 F.2d 262, 267-268 (1st Cir. 1986).

The *Franks* hearing is limited to material impeaching the veracity and care of the affiant. *Franks*, 438 U.S. at 171. The credibility of a confidential informant or cooperating witness is tested by the rules set out in *Aguilar, Spinelli*, and *Gates*, and not by way of a *Franks* hearing. *See United States v. Carmichael*, 489 F.2d 983, 989 (7th Cir. 1973); *In re Search Warrant Dated July 4, 1977*, 667 F.2d 117, 137, 215 U.S. App. D.C. 74 (D.C. Cir. 1981), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Stated differently, the issue is not whether a non-governmental informant gave false or misleading information, but whether the affiant fabricated the informant, **[*317]** misrepresented the informant's statements, or recklessly relied on the informant's report. *See Lawmaster v. United States*, 993 F.2d 773, 775 (10th Cir. 1993); *cf. Illinois v. Rodriguez*, 497 U.S. 177, 185-186, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) ("[W]hat is generally demanded of the many factual determinations that must be regularly made by agents of the government . . . is not that they always be correct, but that they always be reasonable."); *compare People v. Lucente*, 116 Ill. 2d 133, 506 N.E.2d 1269, 1277, 107 Ill. Dec. 214 (Ill. 1987) ("The greater the showing that the informant blatantly lied to the officer-affiant or that the information from the informant is substantially false, the greater is the likelihood that the information was not appropriately accepted by the affiant as truth and the greater the probability that the affiant in putting **[**25]** forth such information, exhibited a reckless disregard for the truth.").

Here, the only potentially material omission advanced by Veloz is the fact that CW-2, when first arrested, gave a self-exculpatory and false version of the facts, a version that he quickly recanted. An experienced Magistrate Judge would not be surprised to learn that a defendant-informant had initially denied involvement in a crime. *See Rumney*, 867 F.2d at 720 ("Nassoura's denials of involvement were made, predictably, before he was confronted with evidence linking him to the robbery. Once the police gathered enough information to arrest Nassoura, he changed his story. That the police chose not to include Nassoura's denials along with the reason for his recantation is not material to a finding of probable cause.").

4. Motion to suppress email searches by Veloz (#370)

Veloz contends that the search of his email accounts hosted Apple and Google servers should be suppressed as "fruits of the poisonous tree." Because the argument is premised on the alleged illegal search of his laptop computer (from which the email addresses were taken), it fails with the denial of his motion to suppress that search.[19],[20]

ORDER

For the foregoing reasons, the motions to suppress are DENIED. The Clerk will set the case for trial.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

End of Document

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[19] Where CW-2's information was authenticated **[**26]** by the evidence discovered at Veloz's residence pursuant to the original search warrant, it is of no consequence that subsequent warrant affidavits did not indicate that CW-2 may be bipolar, or may have committed other unrelated bad acts. *See Tanguay*, 2015 U.S. App. LEXIS 8556, 2015 WL 2445764, at *5.

[20] An additional motion to suppress by Veloz (#210 and #226) is premised on a typographical error suggesting that searches of Veloz's home occurred on July 24, 2012 (the day before the warrant issued) and also on July 25, 2012. The parties do not dispute that the home was searched but once on July 25.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
DANNY VELOZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 12-10264-RGS-4

USM Number: 94746038

Mark W. Shea
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1s
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1201(c)	Conspiracy to Commit Kidnapping	7/24/2012	1s

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

11/17/2017
Date of Imposition of Judgment

Richard G. Stearns
Signature of Judge

Honorable Richard G. Stearns
Name and Title of Judge

11/17/2017
Date

DEFENDANT: DANNY VELOZ
CASE NUMBER: 12-10264-RGS-4

IMPRISONMENT

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

LIFE

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DANNY VELOZ
CASE NUMBER: 12-10264-RGS-4

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

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

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* 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.

DEFENDANT: DANNY VELOZ
CASE NUMBER: 12-10264-RGS-4

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

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

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

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

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

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

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

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.