United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 5, 2019 Decided January 31, 2020

No. 18-3019

UNITED STATES OF AMERICA,
APPELLEE

v.

ELIU ELIXANDER LORENZANA-CORDON,
APPELLANT

Consolidated with 18-3033

Appeals from the United States District Court
for the District of Columbia
(No. 1:03-cr-00331-CKK-13)
(No. 1:03-cr-00331-CKK-14)

Robert E. Cappell argued the cause and filed the briefs for appellants.

Michael A. Rotker, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was *Arthur G. Wyatt*, Chief, Narcotic and Dangerous Drug Section. *Ross*

B. Goldman and *Charles Miracle*, Attorneys, and *Elizabeth Trosman*, Assistant U.S. Attorney, entered appearances.

Before: TATEL, MILLETT, and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Following a three-week trial, a jury convicted Eliu Lorenzana-Cordon and Waldemar Lorenzana-Cordon—brothers and Guatemalan nationals—of conspiring to traffic wholesale quantities of cocaine into the United States. Now challenging their convictions, the brothers argue that the government's trial evidence materially diverged from the indictment and that the district court erred by refusing to give a multiple conspiracies jury instruction. Reviewing the record, we find no grounds for reversal: no material divergence occurred and, even if a multiple conspiracies instruction was in order, its omission inflicted no prejudice.

I.

In 1995, Otto Herrera—a Guatemalan narcotics trafficker who worked for the Sinaloa Cartel, a Mexican drug syndicate—approached members of the Lorenzana-Cordon family with a proposal to turn the family's properties in Guatemala into makeshift airfields and warehouses where drug organizations "could store and safeguard cocaine shipments . . . until the Mexican drug traffickers could come pick them up." Trial Tr. 27 (Mar. 1, 2016, 2:00 PM). In exchange, traffickers would pay the family a fee for each load held at the properties. The family, including brothers Eliu and Waldemar, met with Herrera and approved the deal. Colombian suppliers then began transporting thousands of kilograms of cocaine to a farm owned by the Lorenzana-Cordon family for delivery to Mexican purchasers. Although aware of the arrangement, the brothers were initially uninvolved in the trafficking activities.

That changed in 1998, when Herrera moved the operation to a different farm owned by the family, at which point the brothers took on more active roles. Following the move, the brothers facilitated several cocaine transactions, with Eliu offloading shipments and Waldemar serving as a lookout—the cocaine ultimately destined for the United States by way of Mexico and the Sinaloa Cartel. Around this time, the brothers, through Herrera, also struck a deal with Colombian suppliers to purchase a portion of the cocaine being stored on the family's properties in order to resell it to their own customers. The arrangement proved profitable, with both Eliu and Waldemar buying and then selling hundreds of kilograms of cocaine.

In 2003, the family's arrangement with Herrera abruptly ended when U.S. law-enforcement officials discovered the location of Herrera's stash house in Guatemala. Local law-enforcement officials executed a search of the house, recovering a cache of weapons and U.S. currency. The raid effectively ended Herrera's trafficking activities.

Needing fresh supplies of cocaine, in 2004, the brothers met with Marllory Chacon, a Guatemalan woman who laundered money for Colombian cartels and who offered the brothers the opportunity to acquire over a ton of cocaine from Colombian suppliers. The brothers agreed to purchase the cocaine, with Eliu fronting the money and Waldemar arranging the logistics. Additional purchases followed, but the arrangement ended after the brothers made late payments to the Colombians. In 2008, Eliu and Waldemar reconnected with Chacon, enlisting her help to launder and transfer millions of dollars out of Guatemala.

Some years earlier, in either 2005 or 2006, the brothers also purchased cocaine from Jose Handal, a Honduran

trafficker. The brothers met with David Andrade, Handal's intermediary, at a farm in Honduras where they loaded several hundred kilograms of cocaine into the hidden compartment of a cattle truck and then drove the truck across the border into Guatemala. Several days later, the brothers returned to Honduras to deliver several million dollars as payment.

Throughout this period, Eliu and Waldemar continued selling wholesale quantities of cocaine to various customers. But they typically did so separately. For example, Walter Merida, a Guatemalan involved in trafficking cocaine and manufacturing ephedrine, purchased thousands of kilograms of cocaine from Eliu though he never bought from Waldemar. The brothers even occasionally competed for sales. Sebastiana Cotton, a Guatemalan trafficker who purchased cocaine from both Eliu and Waldemar, testified that, at one point, Waldemar offered to undercut Eliu's prices.

Eventually, the brothers came to the attention of U.S. law-enforcement officials, and, in 2009, a federal grand jury issued a sealed indictment charging Eliu and Waldemar, among others, with one count of conspiring to "import into the United States" and to "manufacture and distribute" for import into the United States five kilograms or more of cocaine in violation of 21 U.S.C. §§ 952, 959, 960(b)(1)(B)(ii), and 963. Third Superseding Indictment (Indictment), Joint Appendix (J.A.) 457–58. The Indictment further specified that the brothers conspired "with each other, and with other co-conspirators, both known and unknown to the Grand Jury" in "the Republic of Colombia, El Salvador, Guatemala, Mexico, and elsewhere." *Id.* Guatemala extradited the brothers to the United States and, following a trial at which they were the sole co-defendants, a jury convicted both Eliu and Waldemar on the conspiracy count.

The brothers filed a host of post-trial motions before the district court, seeking various forms of relief including new trials and the unsealing of the Indictment. The brothers also filed petitions for relief with this court, seeking to unseal various trial and grand jury materials pending appeal. The district court and a motions panel of this court denied the brothers' requests. The district court sentenced both Eliu and Waldemar to life imprisonment, and this consolidated appeal followed.

II.

Despite the flurry of post-trial motions, the brothers advance only two arguments on appeal: that the evidence presented at trial materially diverged from the charges contained in the Indictment and that the district court erred by refusing to give a multiple conspiracies instruction to the jury. We address each in turn.

A.

Our court recognizes two types of impermissible divergences between indictment and proof: variances and amendments. We explained the difference between the two in *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969):

> An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Id. at 1071 (internal citations omitted). Whereas "[a]n amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury," "[a] variance is thought to be bad because it may deprive the defendant of notice of the details of the charge against him and protection against reprosecution." *Id.* at 1071–72. Amendments and variances have their "own standards governing prejudice." *Id.* at 1071. Variances warrant reversal only when "the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Baugham*, 449 F.3d 167, 174 (D.C. Cir. 2006) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). But "the concept of harmless error has not been applied to amendments," requiring reversal even absent a showing of prejudice. *Gaither*, 413 F.2d at 1072; *see Baugham*, 449 F.3d at 175 (same).

Here, the brothers contend that the government's evidence materially diverged from the Indictment's charges in four ways: (1) whereas the government presented evidence of the brothers' activities in Honduras, the Indictment never specified that the conspiracy occurred there; (2) whereas the government presented evidence of the brothers' transactions with Cotton, Chacon, Andrade, and Merida, the Indictment never identified those individuals as the brothers' co-conspirators; (3) whereas the government presented testimony of Merida's involvement in manufacturing ephedrine, the Indictment never charged the brothers with conspiring to manufacture ephedrine; and (4) whereas the government presented testimony of Chacon's money laundering, the Indictment never charged the brothers with conspiring to launder money. Complicating our review of these claims, the brothers refer to the four purported divergences interchangeably as variances and amendments throughout their briefs. Fortunately, we need not determine whether the brothers' divergence claims are best understood as

amendments or variances because, however framed, the arguments fail on the merits.

The brothers' first two divergence claims—premised on the government's evidence regarding where and with whom they conspired—fall at the first hurdle because such evidence did not even diverge from the Indictment. Evidence that the brothers conspired with individuals unnamed in the Indictment (Cotton, Chacon, Andrade, and Merida) and in locations unenumerated in the Indictment (Honduras) fell squarely within the charged conduct—specifically, those portions of the Indictment charging the brothers with conspiring with persons "both known *and unknown* to the Grand Jury" in "the Republic of Colombia, El Salvador, Guatemala, Mexico, *and elsewhere*." Indictment, J.A. 457–58 (emphasis added). Because the charging terms encompassed the government's evidence, no divergence occurred, much less an amendment or variance. Of course, indictments must contain sufficient detail for defendants "to understand the charges, to prepare a defense, and . . . to be protected against retrial on the same charges," *United States v. Mejia*, 448 F.3d 436, 445 (D.C. Cir. 2006) (internal quotation marks omitted), and the Indictment met that threshold here, *see United States v. Camara*, 908 F.3d 41, 47 (4th Cir. 2018) (holding that an indictment's use of "and others" provided adequate notice); *United States v. Roman*, 728 F.2d 846, 853 (7th Cir. 1984) (concluding that an indictment's use of "and elsewhere" provided adequate notice).

The brothers' remaining divergence claims—premised on Merida's testimony regarding ephedrine and Chacon's testimony regarding money laundering—fare no better.

First, such evidence did not alter "the charging terms of the indictment . . . either literally or in effect." *Gaither*, 413 F.2d at 1071. No "literal" amendment of the Indictment

occurred because the charging terms remained unchanged "after the grand jury . . . last passed upon them." *Id.* Nor did the government's evidence "effect[ively]" alter the Indictment—commonly called a "constructive amendment." *Id.* at 1071–72. "To support a claim of constructive amendment," the defendant must "show that the evidence presented at trial *and* the instructions given to the jury so modif[ied] the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment." *United States v. Toms*, 396 F.3d 427, 436 (D.C. Cir. 2005) (internal quotation marks omitted). Here, the district court specifically instructed the jury that

> for you to find a defendant guilty of conspiracy, the Government must prove . . . that the defendant knowingly and willfully joined and participated in the conspiracy with the specific intent to commit a criminal objective, namely, to import cocaine into the United States, or to manufacture or distribute cocaine for the purpose of the unlawful importation into the United States.

Trial Tr. 21–22 (Mar. 17, 2016). Thus, regardless of Merida and Chacon's testimony, no constructive amendment occurred because "[t]he instructions . . . required the jury to find that [the brothers] w[ere] engaged in a conspiracy to [import cocaine or manufacture and distribute cocaine for import], as alleged in the indictment." *Toms*, 396 F.3d at 436; *cf. United States v. Shmuckler*, 792 F.3d 158, 162 n.4 (D.C. Cir. 2015) (explaining that the government charges in the conjunctive and the court instructs in the disjunctive).

Second, Merida and Chacon's testimony did not materially vary from the Indictment. As noted, only variances that have a "substantial and injurious effect or influence in determining the

jury's verdict" warrant reversal. *Baugham*, 449 F.3d at 174 (internal quotation marks omitted). Neither Merida nor Chacon's testimony so prejudiced the brothers. They suffered no harm from Merida's testimony because, as the government points out, "the[] witness[] w[as] testifying about [his] *own* criminal conduct" and nothing in the record connected the brothers to Merida's ephedrine manufacturing. Appellee's Br. 44. And although Chacon, unlike Merida, implicated the brothers by testifying about their money laundering, "it simply was not the case that the jury here was substantially likely to consider against the [brothers] evidence of [money laundering] not charged in the indictment," given the overwhelming evidence of cocaine trafficking, which dwarfed Chacon's passing testimony regarding money laundering, and given the district court's instructions regarding the permissible grounds for conviction. *United States v. Straker*, 800 F.3d 570, 593 n.4 (D.C. Cir. 2015) (per curiam).

B.

This leaves the brothers' claim that the district court erred by rejecting their request for a multiple conspiracies jury instruction. "We review de novo th[e] failure to provide a requested jury instruction." *United States v. Hurt*, 527 F.3d 1347, 1351 (D.C. Cir. 2008). In *United States v. Cross*, 766 F.3d 1 (D.C. Cir. 2013), we explained that, "[a]s with any other theory-of-defense instruction, a multiple conspiracies instruction 'is in order if there is sufficient evidence from which a reasonable jury could find for the defendant on his theory.'" *Id.* at 4 (quoting *United States v. Moore*, 651 F.3d 30, 78 (D.C. Cir. 2011) (per curiam)). But the refusal to give a requested charge "requires reversal of a conviction only if the defendant suffered prejudice as a consequence." *Id.* at 5.

The brothers contend that, even if the government's evidence established the single conspiracy charged in the Indictment, the record also contained enough evidence of separate conspiracies to warrant a multiple conspiracies instruction. As evidence that multiple conspiracies existed, the brothers point out that they sold cocaine separately and sourced cocaine from diverse suppliers. Although we have held that a single conspiracy to distribute narcotics exists even where co-conspirators "sometimes competed with each other for sales," *United States v. Graham*, 83 F.3d 1466, 1471 (D.C. Cir. 1996), and even where co-conspirators relied on "different suppliers," *United States v. Maynard*, 615 F.3d 544, 554 (D.C. Cir. 2010), we have also observed that such evidence can indicate a lack of interdependence among purported co-conspirators, warranting a multiple conspiracies instruction, *see, e.g.*, *United States v. Mathis*, 216 F.3d 18, 24–25 (D.C. Cir. 2000) (finding multiple conspiracies instruction warranted where evidence showed no interdependence among competing suppliers of narcotics).

But we need not decide whether the record here required a multiple conspiracies instruction because even if one was in order, reversal is unwarranted given that the brothers fail to "show that the [error] substantially prejudiced them." *Id.* at 25 (internal quotation marks omitted). In *Cross*, we explained that defendants may be prejudiced by the failure to give a multiple conspiracies instruction where: (1) "insufficient evidence [existed] for a reasonable jury to find [the defendants] guilty of the conspiracy charged in the indictment beyond a reasonable doubt;" (2) a lack of notice "interfere[d] with either . . . the accused['s ability] . . . to present his defense" or to "protect[] against another prosecution for the same offense;" or (3) evidence "spill[ed] over" from "one [defendant] to another" or from "one conspiracy . . . [to] another." *Cross*, 766 F.3d at 5–7 (internal quotation marks and citations omitted).

According to the brothers, "[t]he prejudice in this case was lack of notice," as they were unable "to present their defense and not be surprised at trial" and unable to "protect[] in the future from prosecution for the same offense." Appellants' Br. 29. This claim finds no support in the record.

First, "[w]hile [the brothers] assert that they were unable to prepare a defense, they fail to say how this was so." *United States v. Morris*, 700 F.2d 427, 430 (1st Cir. 1983). The Indictment apprised the brothers of the "precise offense[] of which [they were] accused" and "'set forth all the elements necessary to constitute the offence,'" *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)), putting the brothers on notice of the need to defend against the charge at trial. Moreover, they had "notice of the scope of the evidence that would be used against [them] at trial," *United States v. Sanders*, 778 F.3d 1042, 1050 (D.C. Cir. 2015), because, per order of the district court, the government provided defense counsel with Jencks materials several days before testifying witnesses took the stand. And the brothers "ha[ve] not provided any reason for us to conclude that the government's evidence" tending to show multiple conspiracies "prejudiced [their] ability to" cross-examine the government's witnesses or otherwise prepare a defense. *United States v. Emor*, 573 F.3d 778, 787 (D.C. Cir. 2009).

Second, the Indictment contains sufficient detail to permit the brothers "to plead it in the future as a bar to subsequent prosecutions," thereby protecting them from further prosecution for any "narrower and more limited" conspiracy "included" within the Indictment's broad scope. *Miller*, 471 U.S. at 131, 135. Accordingly, the brothers suffered no notice-related prejudice from the district court's refusal to give the requested instruction.

The brothers raise no other claims of prejudice. "Nor do we," reviewing the record on our own, "discern any of the kinds of prejudice that we typically associate with" the omission of a multiple conspiracies instruction. *Cross*, 766 F.3d at 6.

For starters, the record supports the jury's verdict: whatever else the government's evidence showed, it established that, at the very least, the brothers conspired "with each other" to traffic over five kilograms of cocaine into the United States, as alleged in the Indictment. Indictment, J.A. 457; *cf. Miller*, 471 U.S. at 131 (explaining no prejudice arises where "a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme"). Indeed, the brothers raise no challenge to the jury's verdict.

Nor did the brothers suffer any spillover prejudice—i.e., any risk that one brother's conviction impermissibly rested on evidence of the other's guilt or that evidence from one conspiracy "spill[ed] over onto the jury's assessment of another conspiracy." *Cross*, 766 F.3d at 7. As we have explained, no risk of spillover prejudice exists where the government tries only a handful of alleged co-conspirators and where the district court gives a clarifying instruction to the jury. *United States v. Celis*, 608 F.3d 818, 845–46 (D.C. Cir. 2010) (per curiam). That was the case here: the brothers were the only defendants tried and the district court specifically instructed the jury that "[e]ach defendant is entitled to have the issue of his guilt of the crime for which he's on trial determined from his own conduct and from the evidence which applies to him, as if he were being tried alone." Trial Tr. 34 (Mar. 17, 2016).

Thus, regardless of whether the district court should have given the multiple conspiracies instruction in the first place, no

prejudice arose from the charge's omission, dooming the brothers' instructional claim.

III.

For the foregoing reasons, we affirm Eliu and Waldemar's convictions.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, v. ELIU LORENZANA-CORDON, Defendant.	**Criminal Action No. 03-331-13 (CKK)**

MEMORANDUM OPINION
(August 24, 2015)

This matter comes before the Court upon Defendant's [598] Motion to Modify Conditions of Pretrial Detention. Upon consideration of the Parties' submissions,[1] case law, and applicable statutory authority, the Court shall DENY Defendant's Motion for the reasons expressed below.

I. BACKGROUND

On April 2, 2009, a federal grand jury returned an indictment charging Defendant Eliu Elixander Lorenzana-Cordon with conspiracy to import over five kilograms of cocaine into the United States in violation of 21 U.S.C. §§ 952, 959, 960, and 963. The indictment also carries a criminal forfeiture allegation pursuant to 21 U.S.C. §§ 853 and 970. Defendant remained a fugitive for approximately two-and-a-half years in Guatemala and was arrested on this indictment in Guatemala on November 8, 2011. After fighting extradition for approximately three-and-a-half years, Defendant was extradited to Washington, D.C. on April 30, 2015. Defendant made an initial appearance before Magistrate Judge Alan Kay on May 1, 2015. At the initial appearance, the Government moved to commit Defendant to the custody of the U.S. Attorney General. Defendant

[1] Defendant's Motion to Modify Conditions of Pretrial Detention ("Def.'s Mot."), ECF No. [598]; Government's Opposition to Defendant's Motion to Modify Conditions of Pretrial Release ("Gov't. Opp'n"), ECF No. [602]; Defendant's Reply to Government's Opposition to Defendant's Motion to Modify Conditions of Pretrial Detention ("Def.'s Reply"), ECF No. [607].

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did not contest pretrial detention at the time and waived his right to a detention hearing. Accordingly, Magistrate Judge Kay ordered Defendant detained. Following the initial appearance, Defendant was paroled into the United States for the purposes of this case and an immigration detainer was placed on Defendant. Defendant has been detained pending trial at the Central Detention Facility of the District of Columbia Department of Corrections.

Defendant filed the present Motion to Modify Conditions of Pretrial Detention on July 7, 2015, requesting less restrictive supervision. Specifically, Defendant requests that he be permitted to be restricted to a local extended stay hotel under the following conditions: (1) electronic monitoring, (2) surrender of passport, (3) reporting to pretrial services, and (4) participation in the high intensity supervision program. Def.'s Mot., at 1. Although Defense Counsel characterizes Defendant's request as a request for "detention outside of a D.C. jail-cell," Def.'s Reply, at 1, Defendant is in fact asking to be released under certain conditions. Accordingly, the Court will review Defendant's Motion as a request for release. As the Government filed its Opposition on July 10, 2015, moving for a permanent order of detention, and Defendant filed a Reply on July 17, 2015, Defendant's Motion is now ripe for the Court's review.

II. LEGAL STANDARD

A person ordered detained by a magistrate judge may seek review of the detention order in this Court. 18 U.S.C. § 3145. The Court reviews the detention issue *de novo*. 18 U.S.C. § 3142(e). Pursuant to Section 3142(e)(3)(A) of Title 18 of the United States Code, if there is probable cause to believe the defendant committed an offense under the Controlled Substances Act for which the maximum term of imprisonment is ten years or more, the Court presumes—subject to rebuttal by defendant—that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." To determine whether a defendant has overcome this presumption, the Court takes the following factors into consideration

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a controlled substance;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

See 18 U.S.C. § 3142(g).

III. DISCUSSION

A. Nature and circumstances of the offense charged

Defendant has been charged with a conspiracy to distribute five kilograms or more of cocaine for importation into the United States, subjecting him to a mandatory minimum sentence of 10 years and a maximum sentence of life imprisonment. Accordingly, the Court presumes that no condition or combination of conditions will reasonably assure Defendant's appearance as required and the safety of any person and the community. 18 U.S.C. § 3142(e)(3)(A).

More specifically, from approximately March 1996 to at least November 2007, Defendant is alleged to have been an organizer and leader in an international scheme of cocaine trafficking from Colombia to El Salvador, Guatemala, Mexico, and, ultimately, into the United States with an estimated retail value of more than a billion dollars. Gov't Opp'n, at 3. The Government proffers that once the cocaine reached Guatemala it was "received, inventoried, stored and further distributed for importation into the United States on properties owned and utilized by the [trafficking organization], including the Defendant." *Id.* The trafficking organization would also utilize "cocaine-laden aircraft which would land on clandestine airstrips located on or near properties owned and utilized by the [trafficking organization], including the Defendant, to receive inventory, store, and further distribute the cocaine for importation into the United States." *Id.* The Government further proffers that Defendant

> would personally negotiate, receive loads of cocaine on behalf of the [trafficking organization] on properties owned and utilized by the Defendant, as well as sell these loads of cocaine to other drug traffickers. Further, the Defendant would use warehouses on his property to store and inventory the cocaine for further importation into the United States. The Defendant had multiple responsibilities over the course of the conspiracy, including . . . coordinating, overseeing, and supervising other members of the [trafficking organization] to ensure the safe transportation of shipments of cocaine to Mexican drug traffickers in Guatemala knowing or intending that it would be further distributed to the United States.

Id. In addition, the Government anticipates introducing evidence at trial that Defendant and other members of the conspiracy carried weapons during their operations. *Id.* at 4.

Narcotics trafficking is a serious charge and carries with it serious penalties. Defendant faces a mandatory minimum sentence of ten years if convicted and, given his alleged leadership role and the large quantity of narcotics trafficked, he faces an estimated Advisory Guidelines range of life imprisonment. *Id.* at 8 (citing USSG § 2d1.1). Defendant has not pointed to any evidence to rebut this characterization of the nature and circumstances of the offense charged. Such severe penalties provide Defendant a substantial incentive to flee the United States. *See United States v. Hong Vo*, 978 F. Supp. 2d 41, 43 (D.D.C. 2013) (holding that the serious nature and circumstances of the offenses charged against defendant and the punishments provided for those offenses strongly favor detention because of the significant incentive to flee the United States). Accordingly, the Court finds that this factor favors detention.

B. Weight of the evidence against the Defendant

Where the weight of evidence of guilt is strong, it provides a defendant additional incentive to flee. *See United States v. Medina Coronado*, 588 F. Supp. 2d 3, 4-5 (D.D.C. 2008) (finding detention warranted where government's evidence was strong against the defendant); *see also United States v. Vergara*, 612 F.Supp.2d 36, 37-38 (D.D.C. 2009). Defendant contends that the Government's evidence against Defendant is not strong because it is stale, does not link Defendant to past seizures of narcotics, does not establish Defendant's specific intent to distribute cocaine to

the United States, and "relies heavily on cooperating witnesses seeking sentence reductions." Def.'s Reply, at 2. The Court finds, to the contrary, that the Government's evidentiary proffer for the purposes of this motion establishes that the weight of the evidence against Defendant favors detention. The evidence the Government will introduce at trial is not "over 15 years old," as Defendant contends, Def.'s Mot., at 5, but "goes up to and includes 2009," Gov't Opp'n, at 9. In addition, the Government intends to introduce "numerous co-conspirators who will testify about multiple drug transactions that they conducted with the Defendant personally." *Id.* Testimony from these co-conspirators will not be the only evidence introduced by the Government, as the Government will also introduce evidence from "Guatemalan judicially authorized wiretap[s], and the seizure of various drug ledgers, among other evidence." *Id.* To the extent that the Government has not, at this stage, proffered specific evidence as to certain elements of the offense, the Court notes that the indictment alone provides probable cause to believe that Defendant committed the charged offense. *See United States v. Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (acknowledging the government's reliance on an indictment to demonstrate probable cause and holding that "the indictment alone would have been enough to raise the rebuttable presumption that no condition would reasonably assure the safety of the community"). Moreover, absent any contradictory evidence from the defendant, the D.C. Circuit has approved the government's use of an evidentiary proffer in support of a Defendant's detention. *See id.* Accordingly, the Court finds that the second factor also weighs in favor of detention.

C. History and characteristics of the Defendant

With regard to the third factor, federal courts have long recognized that "flight to avoid prosecution is particularly high among persons charged with major drug offenses," because "drug traffickers often have established substantial ties outside the United States . . . [and] have both the resources and foreign contacts to escape to other countries." *United States v. Alatishe*, 768 F.2d

364, 370 n.13 (D.C. Cir. 1985) (citing S. Rep. No. 98-225 at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3203)). Here, Defendant is a Guatemalan citizen who has no immigration status in the United States and no known contacts in the United States other than possibly those involved in the drug trafficking conspiracy. Gov't Opp'n, at 10. By contrast, Defendant has extensive contacts in Guatemala and access to substantial amounts of money due to his leadership role in the billion-dollar drug trafficking conspiracy. Moreover, Defendant previously was a fugitive for two-and-a-half years and the Government proffers that witnesses will testify that Defendant's father previously paid officials to secure Defendant's release from custody. *Id.* at 2-3, 4. Although Defendant's father is now detained in the United States, some of Defendant's close family members remain fugitives in this case. *Id.* at 3. In short, Defendant has the motive and means to flee the United States.

Defendant notes that Defendant's family business is dedicated to agriculture and cattle and "is a proud tradition that sustained hundreds of families that worked for, or based their businesses on the success of the Lorenzana family." Def.'s Reply, at 4. Defendant also notes that he is "a respected member of his community and does not present himself to this Court with any allegations of substance abuse" and "no allegations of previous criminal convictions." *Id.* Even accepting Defendant's assertions as true, the Court does not find that they change the Court's analysis and finding that Defendant's financial resources and ties to Guatemala increase Defendant's risk of flight. Accordingly, the Court finds that this factor weighs in favor of detention. *See Hong Vo*, 978 F. Supp. 2d at 46 (finding detention warranted where defendant had access to substantial assets overseas and connections to Vietnam, demonstrating her ability to flee the United States).

D. Nature and seriousness of the danger to any person or the community

Finally, federal courts have long recognized that narcotics trafficking and distribution pose a serious danger to the community. *See, e.g., United States v. McDonald*, 238 F.Supp.2d 182, 186

(D.D.C. 2002) ("the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the 'safety of any other person or the community'" (quoting S. Rep. No. 98-225)). Courts have also recognized that drug traffickers are likely to continue engaging in drug-related activities if released. *See id.* In addition to the danger posed by Defendant given the nature of his crime, the Government also notes that Defendant was arrested with weapons and has been known to bribe Guatemalan officials. Gov't Opp'n, at 12. The Government further proffers that witnesses will testify "that they are fearful for their own and their family's safety."[2] *Id.* at 3. Accordingly, the Court finds this factor weighs in favor of Defendant's detention.

Defendant contends that the release conditions he proposes "would ensure his continued appearance for all court matters," Def.'s Mot., at 4, and cites to two cases where the defendants overcame the statutory presumption in favor of detention at issue here and were released on the condition, among others, that they would be subject to electronic monitoring, *id.* (citing *United States v. Hudspeth*, 143 F.Supp.2d 32 (D.D.C. 2001) and *United States v. Karni*, 298 F.Supp.2d 129 (D.D.C. 2004)). The Court finds the two cases cited by Defendant are by no means persuasive. Unlike the present case, the defendant in *Hudspeth* had substantial personal and familial ties to the District of Columbia and the evidence proffered against him was weak. *Hudspeth*, 143 F.Supp.2d at 37. In *Karni*, although the defendant, like Defendant here, did not have any ties to the District, the defendant was not charged with a crime of violence and was in no way linked with any violent

[2] The Government also notes that "Defendant's family have approached the family members of a cooperating witness in Guatemala and threatened the cooperating witnesses' [*sic*] family." Gov't Opp'n, at 12. Defendant contends that unless the government can proffer specific evidence and "identif[y] a witness who was allegedly threatened," the Government cannot rely on this information. Def.'s Reply, at 3. At this time, the Court will not request additional evidentiary proffers of the Government because the Court finds the Government has presented sufficient grounds for denying Defendant's request to modify the conditions of pretrial release. Should the alleged threats to witnesses became an important issue, the Court will request that additional information about the witness threats be provided to the Court under seal.

crimes or weapons use. *Karni*, 289 F.Supp.2d at 132. Here, Defendant has been charged with a dangerous crime, was arrested with weapons on hand, has strong evidence inculpating him, and does not have any ties to the United States. Although electronic monitoring is a method for monitoring a defendant's whereabouts, it does not prevent a defendant from absconding. Therefore, Defendant's proposed conditions do not obviate the risk that Defendant might flee, nor the danger Defendant presents to the community.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Defendant Eliu Elixander Lorenzana-Cordon has failed to rebut the presumption that no condition or set of conditions can reasonably assure Defendant's presence at trial and the safety of the community. Accordingly, the Court DENIES Defendant's [598] Motion to Modify Condition of Pretrial Detention.[3] An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

[3] Although not a factor in the Court's decision to deny Defendant's release, the Court also notes that Defendant is subject to an immigration detainer and thus would be subject to immigration detention if released.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3019 **September Term, 2019**

1:03-cr-00331-CKK-13
1:03-cr-00331-CKK-14

Filed On: August 31, 2020

United States of America,

Appellee

v.

Eliu Elixander Lorenzana-Cordon,

Appellant

Consolidated with 18-3033

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the petition of Eliu Lorenzana in No. 18-3019 for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Additional material from this filing is available in the Clerk's Office.