# United States Court of Appeals
## For the First Circuit

Nos. 18-1188, 19-1010

UNITED STATES,

Appellee,

v.

CARLOS VELAZQUEZ-FONTANEZ,

Defendant, Appellant.

No. 18-1215

UNITED STATES,

Appellee,

v.

RUBEN COTTO-ANDINO, a/k/a Ruben El Negro,

Defendant, Appellant.

No. 18-2265

UNITED STATES,

Appellee,

v.

JOSE D. RESTO-FIGUEROA, a/k/a Tego,

Defendant, Appellant.

"APPENDIX-A"

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Howard, Chief Judge,
Thompson and Kayatta, Circuit Judges.

Maria Soledad Ramirez-Becerra, with whom Maria Soledad Ramirez Becerra Law Office was on brief, for appellant Carlos Velazquez-Fontanez.

José Luis Novas Debién for appellant Ruben Cotto-Andino.

Michael R. Hasse for appellant Jose D. Resto-Figueroa.

Michael A. Rotker, Attorney, Criminal Division, Appellate Section, with whom W. Stephen Muldrow, United States Attorney, Victor O. Acevedo-Hernandez, Assistant United States Attorney, Alberto R. Lopez-Rocafort, Assistant United States Attorney, and Brian C. Rabbitt, Acting Assistant Attorney General, Criminal Division, were on brief, for appellee.

July 27, 2021

**KAYATTA, Circuit Judge.** A federal grand jury in the District of Puerto Rico returned an indictment charging 105 individuals with various criminal offenses connected to La Rompe ONU, a drug trafficking organization that operated from 2007 until at least July 17, 2015, in San Juan, Puerto Rico. Following a trial, three of the indicted defendants -- Carlos Velazquez-Fontanez, Jose D. Resto-Figueroa, and Ruben Cotto-Andino -- were convicted on every count charged against them. On appeal, they challenge their convictions on several grounds. For the reasons that follow, we affirm Velazquez-Fontanez's and Resto-Figueroa's convictions; we vacate Cotto-Andino's convictions; and we remand for further proceedings consistent with this opinion.

## I. BACKGROUND

We begin with the essential background facts. In 2004, drug traffickers in San Juan, Puerto Rico, formed "La Organización de Narcotraficantes Unidos" ("La ONU"), a cartel designed to reduce conflicts between traffickers and to avoid police scrutiny. By 2008, La ONU had splintered into two rival gangs, La ONU and La Rompe ONU ("La Rompe"). The two groups have since waged war over control of San Juan's most profitable drug distribution territory. At drug distribution "points" under its control, La Rompe sold marijuana, cocaine, crack cocaine, heroin, and prescription drugs.

To secure and finance La Rompe's drug-trafficking activities, its members committed robberies, carjackings, and contract killings.

La Rompe's leaders decided who could sell drugs in its territory, ordered lower-ranking members to commit robberies or killings, and authorized La Rompe members to kill fellow members when intra-gang disputes arose. Members rose up La Rompe's ranks by hunting down and killing members of La ONU.

The indictment claimed that Cotto-Andino, Velazquez-Fontanez, and Resto-Figueroa were members of La Rompe. It charged them with racketeering conspiracy in violation of 18 U.S.C. § 1962(d) based on numerous acts of drug trafficking and several murders, and with conspiracy to possess with intent to distribute cocaine, crack cocaine, heroin, and marijuana within 1,000 feet of a public-housing facility in violation of 21 U.S.C. §§ 841(a)(1), 846, and 860. The indictment also charged Velazquez-Fontanez with drive-by-shooting murder in furtherance of a major drug offense in violation of 18 U.S.C. § 36(b)(2)(A) and with using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), (j)(1)-(2). In connection with a separate incident, the indictment charged Resto-Figueroa with drive-by-shooting murder in furtherance of a major drug offense in violation of 18 U.S.C. § 36(b)(2)(A) and with using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), (j)(1)-(2).

Velazquez-Fontanez, Resto-Figueroa, and Cotto-Andino were tried together. The jury returned guilty verdicts on every count against each defendant.[1] These timely appeals followed.

## II. DISCUSSION

We address defendants' appellate challenges to their convictions in the following order: (A) the defendants' sufficiency of the evidence arguments; (B) Cotto-Andino's evidentiary objections; (C) Resto-Figueroa's mistrial motion; (D) Resto-Figueroa's instructional error claims; and (E) Velazquez-Fontanez's and Resto-Figueroa's challenges to the district court's responses to questions asked by the jury during its deliberations.

### A. Sufficiency of the Evidence

Each defendant timely moved pursuant to Fed. R. Crim. P. 29 to challenge the sufficiency of the evidence against him. Reviewing de novo the denial of these motions, see United States v. Millán-Machuca, 991 F.3d 7, 17 (1st Cir. 2021), we view the trial record in the light most favorable to the verdict and draw all reasonable inferences in the verdict's favor, see United States v. Meléndez-González, 892 F.3d 9, 17 (1st Cir. 2018). Our task is to determine "whether 'any rational trier of fact could have found

[1] Both Velazquez-Fontanez and Resto-Figueroa were also charged with and convicted of an additional section 924(c) count, but those convictions were subsequently dismissed.

the essential elements of the crime beyond a reasonable doubt.'" United States v. Bailey, 405 F.3d 102, 111 (1st Cir. 2005) (quoting United States v. Henderson, 320 F.3d 92, 102 (1st Cir. 2003)).

Unlike his two co-defendants, Cotto-Andino challenges several of the district court's evidentiary rulings. When we review those rulings in a later section, we adopt a "balanced" approach, "objectively view[ing] the evidence of record." United States v. Amador-Huggins, 799 F.3d 124, 127 (1st Cir. 2015) (quoting United States v. Burgos-Montes, 786 F.3d 92, 99 (1st Cir. 2015)). For now, though, we present the facts relevant to Cotto-Andino's sufficiency challenge in the light most favorable to the verdict.

**1. 18 U.S.C. § 1962(d)**

The Racketeer Influenced and Corrupt Organizations Act makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The elements of a substantive RICO offense consist of "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." Salinas v. United States, 522 U.S. 52, 62 (1997). RICO also makes it "unlawful for any person to conspire to" commit a substantive RICO offense. 18 U.S.C. § 1962(d). To prove a RICO

conspiracy offense, the government must show that "the defendant knowingly joined the conspiracy, agreeing with one or more coconspirators 'to further [the] endeavor, which, if completed, would satisfy all the elements of a substantive [RICO] offense.'" United States v. Rodríguez-Torres, 939 F.3d 16, 23 (1st Cir. 2019) (alterations in original) (quoting Salinas, 522 U.S. at 65).

Unsurprisingly, none of the defendants contends that the government failed to prove the existence of a far-ranging RICO enterprise and conspiracy. Eyewitness testimony described in detail the rise of La Rompe as a coordinated and hierarchal organization, with members bound together by shared hand signals, meetings, drug distribution, and the use of violence to maintain power and control over drug points in the face of competition from La ONU. Each defendant challenges instead the sufficiency of the proof that he was a member of that RICO conspiracy.

The Supreme Court has made clear that holding a particular person responsible for the acts of a RICO conspiracy does not require the government to prove that that person committed or even agreed to commit two or more racketeering acts. See Salinas, 522 U.S. at 65. Rather, "the government's burden . . . is to prove that the defendant agreed that at least two acts of racketeering would be committed in furtherance of the conspiracy." Millán-Machuca, 991 F.3d at 18 (quoting United States v.

Leoner-Aguirre, 939 F.3d 310, 317 (1st Cir. 2019), cert. denied, 140 S. Ct. 820 (2020)).[2]

So, for each defendant, we ask whether the government presented evidence from which a reasonable jury could have concluded that each defendant knowingly agreed that at least two racketeering acts would be committed in furtherance of La Rompe's ends.

**a. Cotto-Andino**

Three cooperating witnesses testified that Cotto-Andino controlled La Rompe's drug point at the Jardines de Cupey public-housing facility, and two of those three also testified that Cotto-Andino ran La Rompe's drug point at the Brisas de Cupey public-housing facility. To avoid attracting the attention of the police, Cotto-Andino delegated day-to-day responsibility for

[2] This court has on occasion stated that a RICO conspiracy conviction requires proof that a defendant agreed to commit, or in fact committed, two or more predicate offenses. See United States v. Ramírez-Rivera, 800 F.3d 1, 18 (1st Cir. 2015); United States v. Shifman, 124 F.3d 31, 35 (1st Cir. 1997); United States v. Hurley, 63 F.3d 1, 8-9 (1st Cir. 1995); Libertad v. Welch, 53 F.3d 428, 441 (1st Cir. 1995); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1561 (1st Cir. 1994); Miranda v. Ponce Fed. Bank, 948 F.2d 41, 47-48 (1st Cir. 1991); Feinstein v. Resol. Tr. Corp., 942 F.2d 34, 41 (1st Cir. 1991); United States v. Boylan, 898 F.2d 230, 241 (1st Cir. 1990); United States v. Torres Lopez, 851 F.2d 520, 528 (1st Cir. 1988); United States v. Angiulo, 847 F.2d 956, 964 (1st Cir. 1988); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981). We more recently made clear that those statements are inconsistent with the Supreme Court's 1997 holding in Salinas. See Leoner-Aguirre, 939 F.3d at 317; Millán-Machuca, 991 F.3d at 18 n.3; United States v. Sandoval, No. 18-1993, 2021 WL 2821070, at *3 n.1 (1st Cir. July 7, 2021). We follow, as we must, Salinas.

running the Jardines de Cupey drug point to the Morales Castro brothers, known as Nestor and Bimbo. In return, Nestor and Bimbo paid Cotto-Andino a portion of the drug point's proceeds -- referred to as "rent" or a "ticket." Cotto-Andino made a similar arrangement with Nestor and Bimbo for the Brisas de Cupey drug point. In addition to interacting with Cotto-Andino, Nestor and Bimbo also attended meetings with La Rompe's supreme leader, "Mayito."

Given La Rompe's raison d'être, i.e., to provide revenue from drug sales for its leaders, Cotto-Andino's control of two La Rompe drug points provided ample evidence that he had agreed that drugs would be repeatedly sold in furtherance of La Rompe's conspiracy. Indeed, this evidence placed him at or at least near the heart of the conspiracy.

Cotto-Andino points to evidence establishing an alternative explanation for his admitted involvement at or near the drug points, i.e., he worked lawfully as a construction contractor on jobs in Jardines de Cupey and Brisas de Cupey. For purposes of our sufficiency analysis, however, we can presume that the jury rejected that view of his conduct in favor of witness testimony identifying Cotto-Andino, Nestor, and Bimbo as leaders of La Rompe and its drug trafficking operation in Jardines de Cupey and Brisas de Cupey. See, e.g., United States v. Nueva, 979 F.2d 880, 884 (1st Cir. 1992) (explaining that an appellate court will

not disturb a jury verdict "simply because the defense posited a story at odds with that of the government"). Cotto-Andino alternatively argues that the evidence did not establish that he knowingly participated in an overarching conspiracy involving La Rompe, as opposed to a smaller, independent conspiracy with Nestor and Bimbo. But, when viewed favorably to the verdict, the evidence was sufficient to bely any notion that there existed an independent drug point in La Rompe's territory.

**b. Velazquez-Fontanez**

Velazquez-Fontanez served as a municipal police officer in San Juan. He supplied guns and ammunition to La Rompe members, including his brother, Bebo, a La Rompe enforcer who ran several drug points. When Bebo was incarcerated in 2011, Velazquez-Fontanez helped manage Bebo's drug points. Velazquez-Fontanez delivered packages of marijuana and cocaine to Quija, a "runner" who moved drugs to and from one of Bebo's drug points. Velazquez-Fontanez transported drug point proceeds as well.

The testimony of two cooperating witnesses -- Luis Ivan Yanyore-Pizarro and Oscar Calviño-Acevedo -- also implicated Velazquez-Fontanez in a drive-by shooting. On June 25, 2011, while he was in jail, Bebo used a contraband cell phone to call Quija. Bebo told Quija to go to a business in Caimito (one of San Juan's subdivisions) and kill five men present there, one of whom was

known as Prieto-Pincho. Bebo wanted Prieto-Pincho dead because he took control of several of Bebo's drug points. Later that evening, Velazquez-Fontanez called Quija and told him that Prieto-Pincho and his men were outside of the business washing their cars. After one of La Rompe's leaders gave the green light to kill Prieto-Pincho and his men, several members of La Rompe, including Yanyore-Pizarro and Calviño-Acevedo, drove toward the business. As they approached their destination, Yanyore-Pizarro called Velazquez-Fontanez, who confirmed that the men were there and that Prieto-Pincho was "the big guy, who's the one who is speaking over the phone." Yanyore-Pizarro responded that he "already s[aw] them," told Velazquez-Fontanez to "listen to the show," and kept the phone line open as the men exited the car and opened fire, killing Prieto-Pincho and three others. The next day, Velazquez-Fontanez saw Yanyore-Pizarro in person and told Yanyore-Pizarro that "that sounded awesome" and that "the part [that Velazquez-Fontanez] liked the most was when the rifle continued shooting at the end."

Velazquez-Fontanez argues that the shooting on June 25, 2011, cannot support his RICO conspiracy conviction because it was solely motivated by Bebo's personal desire for revenge against Prieto-Pincho. The jury was entitled to reject this account and instead credit the government's evidence that the shooting was carried out to further La Rompe's ends. So, too, was the jury

free to reject Velazquez-Fontanez's argument that he was not guilty because he had a legitimate job as a police officer and was legally permitted to own weapons and ammunition.

Velazquez-Fontanez next points out that some witnesses who cooperated with the government did not identify him as a member of La Rompe. But even the uncorroborated testimony of a single cooperating witness may be sufficient to support a conviction, so long as the testimony is not facially incredible. See United States v. Cortés-Cabán, 691 F.3d 1, 14 (1st Cir. 2012) (collecting cases). Here, multiple witnesses described Velazquez-Fontanez's participation in La Rompe's criminal activities; it matters not for purposes of our sufficiency review that others did not do so.

Velazquez-Fontanez also asserts that the cooperating witnesses' testimony implicating him in La Rompe's activities should not have been admitted because it was inadmissible hearsay not subject to the co-conspirator exception. See generally United States v. García-Torres, 280 F.3d 1 (1st Cir. 2002). He notes a few instances where witnesses testified about out-of-court statements by Bebo and Quija. But he makes no attempt to explain how these statements were not in furtherance of the conspiracy or why the evidence that he transported guns, money, and drugs for Bebo and Quija does not show that all three belonged to the same conspiracy. See, e.g., United States v. Piper, 298 F.3d 47, 52 (1st Cir. 2002) (conditioning the admission of statements in

furtherance of a conspiracy under Fed. R. Evid. 801(d)(2)(E) on the introduction of "extrinsic evidence . . . sufficient to delineate the conspiracy and corroborate the declarant's and the defendant's roles in it"). This lack of development dooms his argument. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Finally, Velazquez-Fontanez argues that a conspiracy to commit a controlled substance offense in violation of section 846 cannot serve as a predicate offense for the RICO charge. We see no reason to accept this argument. The fact that section 846 limits its own object offenses simply does not suggest that a section 846 offense itself cannot be the object or predicate for another offense. And Velazquez-Fontanez offers no other reason why a section 846 conspiracy cannot serve as the predicate or object for a RICO offense.[3] See id.

In sum, there was ample and competent testimony which, if believed, directly tied Velazquez-Fontanez to La Rompe and established that he knew his fellow gang members would engage in at least two RICO predicate offenses.

[3] Velazquez-Fontanez makes this same argument regarding his convictions under 18 U.S.C. § 36(b)(2) and 18 U.S.C. § 924(c)(1)(A), (j)(1)-(2). We reject it in both instances for the same reason.

**c. Resto-Figueroa**

The trial record supports Resto-Figueroa's RICO conspiracy conviction as well. Cooperating witnesses testified that Resto-Figueroa was a La Rompe enforcer who carried firearms, sold marijuana and crack cocaine for the gang, and stored its weapons at his home.

Cooperator testimony also implicated Resto-Figueroa in a drive-by shooting that ended an intra-gang feud. The feud began when Pollo, a La Rompe member, killed another member over a dispute about payment for marijuana. The slain member's brother, Oreo, obtained permission from La Rompe's leaders to kill Pollo. Oreo then enlisted Resto-Figueroa and several other La Rompe members to assist with the killing. On August 28, 2012, members dressed up as police officers and drove SUVs equipped with tinted windows, police lights, and sirens away from Resto-Figueroa's house to Pollo's neighborhood, the Jardines de Cupey housing project. After their mock police raid of Pollo's apartment turned up nothing, Resto-Figueroa and the others drove through the housing project until they spotted Pollo on the street. Some men in the SUVs opened fire on Pollo, and others, including Resto-Figueroa, exited the SUVs and began running toward Pollo. By the time that Resto-Figueroa reached Pollo, Pollo was dead. After the shooting, the men returned to the SUVs and drove to Resto-Figueroa's house.

Resto-Figueroa asserts that this evidence did not establish his knowing participation in La Rompe's enterprise. At most, he contends, the evidence establishes a smaller conspiracy in which he was brought in as an "outside contractor" to kill Pollo. Resto-Figueroa's account downplays evidence of the extent of his connection to La Rompe, specifically his drug selling and storage of La Rompe weaponry. That evidence of Resto-Figueroa's sustained and knowing connection to La Rompe's activities provides ample support for a rational jury's conclusion that Resto-Figueroa agreed to join the charged RICO conspiracy with knowledge that at least two racketeering acts would be committed.

In challenging the evidence's sufficiency, Resto-Figueroa also argues that one prominent La Rompe member-turned-cooperator -- Yanyore-Pizarro -- did not mention Resto-Figueroa and another -- Calviño-Acevedo -- is unworthy of credence. These contentions miss the mark on appeal because they go to the evidence's weight and credibility, not its sufficiency. See, e.g., United States v. Noah, 130 F.3d 490, 494 (1st Cir. 1997).

* * *

In sum, the evidence against all three defendants was sufficient to support their RICO conspiracy convictions.

### 2. 21 U.S.C. § 846

All three defendants were also convicted of conspiring to possess with intent to distribute controlled substances within 1,000 feet of a public-housing facility. See 21 U.S.C. §§ 841(a), 846, 860. To prove this offense, the government had to establish the existence of a conspiracy to possess cocaine, crack cocaine, heroin, and/or marijuana with intent to distribute it within 1,000 feet of a protected area, such as real property comprising a housing facility owned by a public housing authority, and that the defendant knowingly and willfully joined in that conspiracy. Id. §§ 841(a), 846, 860. Each defendant offers a slightly different argument for why the proof of such a conspiracy was insufficient as to him. We review each set of arguments in turn.

#### a. Cotto-Andino

In challenging his section 846 conspiracy conviction, Cotto-Andino repurposes his contention that the government proved only a small conspiracy (among him, Nestor, and Bimbo). We have already explained why this argument fails. See supra Part II.A.1.a.

#### b. Velazquez-Fontanez

Velazquez-Fontanez argues that his conviction cannot stand because he did not sell drugs for the conspiracy. But, taken in the light most favorable to the verdict, the evidence established that Velazquez-Fontanez furthered the drug

conspiracy's activities by couriering proceeds and drugs between members. And, despite its lack of corroboration through photo, video, or phone record evidence, the testimony of the cooperating witnesses, reviewed above in Part II.A.1.b, provided adequate proof of his involvement in a conspiracy to possess drugs for distribution. See Cortés-Cabán, 691 F.3d at 14.

**c. Resto-Figueroa**

Resto-Figueroa argues that the evidence did not establish that he knowingly participated in La Rompe's drug-trafficking conspiracy. But, as we have already noted, see supra Part II.A.1.c, a rational jury viewing the evidence could have concluded that Resto-Figueroa's sales of drugs and joint activity with La Rompe members show that he was a knowing participant in La Rompe's drug conspiracy, not just a "hired gun."

**3. 18 U.S.C. § 36(b)(2)**

Both Velazquez-Fontanez and Resto-Figueroa were convicted of violating 18 U.S.C. § 36(b)(2)(A). That statute imposes penalties on any person who, "in furtherance . . . of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of two or more persons and who, in the course of such conduct, kills any person," where the killing "is a first degree murder." 18 U.S.C. § 36(b)(2)(A). One who aids or abets another in the commission of a crime may be punished as a principal. 18 U.S.C. § 2.

**a. Velazquez-Fontanez**

A reasonable jury could have concluded that Velazquez-Fontanez aided and abetted the drive-by shooting of Prieto-Pincho and others. The government presented evidence that Velazquez-Fontanez directed La Rompe members to the location where Prieto-Pincho and four other people could be found and described Prieto-Pincho's appearance. See supra Part II.A.1.b. A reasonable jury could have inferred that Velazquez-Fontanez did so to facilitate Prieto-Pincho's murder, which La Rompe's leaders ordered at the request of Velazquez-Fontanez's brother. And that inference becomes stronger when the foregoing evidence is considered alongside testimony that Velazquez-Fontanez listened to and later expressed approval of the shooting.

According to Velazquez-Fontanez, other members of La Rompe made the plans to kill Prieto-Pincho and his associates, and the evidence did not establish a connection between those plans and Velazquez-Fontanez's words and actions. The evidence that he spoke to the shooters, he argues, does not establish that he did anything more than "answer[] a call made by Yanyore-Pizarro." Velazquez-Fontanez essentially asks us to disregard our obligation to draw all reasonable inferences in the verdict's favor. See Meléndez-González, 892 F.3d at 17. That deferential standard of review, as applied here, leads to the conclusion that the evidence adequately supported the verdict. And Velazquez-Fontanez errs in

claiming that the government's reliance on cooperating witness testimony necessarily undermines the sufficiency of the evidence. See Cortés-Cabán, 691 F.3d at 14.

Velazquez-Fontanez also argues that the government failed to prove that a weapon was fired. This contention is meritless. By returning a general verdict that Velazquez-Fontanez was guilty beyond a reasonable doubt of aiding and abetting a drive-by shooting in violation of section 36(b)(2)(A), the jury necessarily found that a person "fire[d] a weapon into a group of two or more persons." The evidence establishing this element was overwhelming.

**b. Resto-Figueroa**

A reasonable jury could have likewise concluded that Resto-Figueroa aided and abetted the drive-by shooting of Pollo and others on August 28, 2012. As described above, see supra Part II.A.1.c, ample witness testimony established that Resto-Figueroa, along with others, traveled to Jardines de Cupey to find and kill Pollo.

Resto-Figueroa's initial challenge to his drive-by shooting conviction proceeds from a mistaken premise. He asserts that he did not act with the requisite enterprise motive to be convicted of a violent crime in aid of racketeering. See 18 U.S.C. § 1959(a) (punishing certain crimes committed "for the purpose of gaining entrance to or maintaining or increasing position in an

enterprise engaged in racketeering activity"). But Resto-Figueroa was not charged with an offense under section 1959. To the extent that Resto-Figueroa's brief may be read to challenge the sufficiency of the evidence that the drive-by shooting was "in furtherance . . . of a major drug offense," 18 U.S.C. § 36(b)(2), this argument also fails. As described above, La Rompe's leaders authorized Pollo's killing to settle an intra-gang feud. A reasonable jury could have found that Resto-Figueroa intended to further La Rompe's drug-trafficking activity by helping Oreo kill Pollo. Finally, Resto-Figueroa's argument that the government's witnesses lacked credibility falls flat on sufficiency review. See Noah, 130 F.3d at 494.

For these reasons, sufficient evidence supported the drive-by shooting convictions of Velazquez-Fontanez and Resto-Figueroa.

**4. 18 U.S.C. § 924(c)**

Based on the predicate offense of a drive-by shooting murder in violation of section 36(b)(2)(A), Velazquez-Fontanez was convicted of aiding and abetting the use of a firearm during and in relation to a crime of violence.[4] See 18 U.S.C. § 924(c)(1)(A).

[4] Resto-Figueroa was also convicted of a section 924(c) offense predicated on a violation of section 36(b)(2)(A). Apart from his challenge to his conviction for the predicate offense, see supra Part II.A.3.b, Resto-Figueroa does not challenge his section 924(c) conviction on appeal.

A "crime of violence" is defined as a felony offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another," (the "elements clause") or "(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "residual clause"). 18 U.S.C. § 924(c)(3)(A)-(B). Because United States v. Davis held that the residual clause was unconstitutionally vague, a felony offense must qualify under the elements clause to serve as a predicate offense for a conviction for use of a firearm during and in relation to a crime of violence. 139 S. Ct. 2319, 2336 (2019). Velazquez-Fontanez claims that Davis undermines his section 924(c) conviction because his section 36(b)(2)(A) predicate offense does not satisfy the elements clause.

Davis does not help Velazquez-Fontanez. To assess whether a violation of section 36(b)(2)(A) satisfies the elements clause, we apply the categorical approach, "consider[ing] the elements of the crime of conviction, not the facts of how it was committed, and assess[ing] whether violent force is an element of the crime." United States v. Cruz-Rivera, 904 F.3d 63, 66 (1st Cir. 2018) (quoting United States v. Taylor, 848 F.3d 476, 491

(1st Cir. 2017)). The language of section 36(b)(2)(A)[5] easily satisfies section 924(c)(3)'s elements clause. The act of "fir[ing] a weapon" involves the use of violent force. See Johnson v. United States, 559 U.S. 133, 140 (2010) (defining "physical force" as "force capable of causing physical pain or injury to another person"); United States v. Edwards, 857 F.3d 420, 426 (1st Cir. 2017) (remarking that it would be "absurd[]" to conclude that "'pulling the trigger on a gun' involves no '"use of force" because it is the bullet, not the trigger, that actually strikes the victim'" (quoting United States v. Castleman, 572 U.S. 157, 171 (2014))). And a violator of section 36(b)(2) must undertake that violent force "with the intent to intimidate, harass, injure, or maim," satisfying the elements clause's mens rea requirement. See United States v. García-Ortiz, 904 F.3d 102, 108-09 (1st Cir. 2018) (explaining that a general intent crime satisfies section 924(c)(3)(A)'s mens rea requirement); see also Borden v. United States, 141 S. Ct. 1817, 1826 (2021) (plurality opinion) (observing that ACCA's elements clause "obvious[ly]" applies to "[p]urposeful" forceful conduct). For these reasons,

[5] Section 36(b)(2)(A) imposes penalties on any person who, "in furtherance . . . of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of two or more persons and who, in the course of such conduct, kills any person . . . if the killing . . . is a first degree murder."

Velazquez-Fontanez's section 36(b)(2)(A) offense meets the requirements of section 924(c)(3)'s elements clause.

**B. Cotto-Andino's Evidentiary Objections**

We consider next several related challenges by Cotto-Andino to the district court's evidentiary rulings. When a defendant preserves an objection, we generally review a district court's evidentiary ruling for abuse of discretion. See United States v. Appolon, 715 F.3d 362, 371 (1st Cir. 2013). A harmless evidentiary error does not require reversal. See Kotteakos v. United States, 328 U.S. 750, 765 (1946).

This court reviews challenges related to the enforcement of subpoenas under the Sixth Amendment's Compulsory Process Clause for abuse of discretion. See United States v. DeCologero, 530 F.3d 36, 74-75 (1st Cir. 2008).[6] A defendant's conviction will stand if a non-structural constitutional error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

**1. Uncharged Murder Evidence**

As part of its case-in-chief, the government presented the testimony of Oscar Calviño-Ramos, a cooperating witness. He

[6] But see United States v. Galecki, 932 F.3d 176, 184-85 (4th Cir. 2019) ("With regard to compulsory process claims, our sister circuits apply both de novo and abuse of discretion standards of review, even at times applying different standards within the same circuit without explanation.").

asserted that Cotto-Andino killed Cano Ingram -- a rival drug dealer -- and Carlos Tomate -- someone who had previously forced Cotto-Andino out of a housing project. In support of the assertion that Cotto-Andino murdered Cano Ingram, Calviño-Ramos claimed that Cotto-Andino said in 1995 that he would kill Cano Ingram if he had any problems with him, and that the killing took place in 1995 or 1996. According to the government, the two killings allowed Cotto-Andino to consolidate power over drug points in the Jardines de Cupey and Brisas de Cupey housing projects.

Cotto-Andino timely objected to this evidence as improper character evidence offered only to suggest that Cotto-Andino was a very bad guy. See Fed. R. Evid. 404(b)(1). The government, though, pointed out that the evidence provided important and properly relevant proof of how Cotto-Andino came to be in a position to demand and receive a percentage of the sales proceeds from two La Rompe drug points. See Fed. R. Evid. 404(b)(2). This theory of relevance did not rely on any claim of propensity, either explicitly or implicitly, see United States v. Henry, 848 F.3d 1, 15 (1st Cir. 2017) (Kayatta, J., concurring). Rather, it was the government's attempt to provide an origin story to show how Cotto-Andino came to be in a position to exact "rent" from Nestor and Bimbo for sales from those two drug points, the allegation central to the government's RICO and drug distribution conspiracy charges against Cotto-Andino. In

this sense, the evidence was like the scenes of De Niro's young Vito Corleone in The Godfather Part II, explaining how Brando's Don Vito was in the position of power in which the viewer found him at the beginning of The Godfather.

This properly relevant evidence by its nature reflected poorly on Cotto-Andino's character, obligating the district court to balance its probative value against the potential for unfair prejudice. Fed. R. Evid. 403; United States v. Rodríguez-Berríos, 573 F.3d 55, 64 (1st Cir. 2009). But we see no abuse of discretion in the district court's balancing analysis. The evidence provided an important rebuttal to Cotto-Andino's defense that he associated innocently with La Rompe members or was merely present at its drug points. As to the murder of Cano Ingram in particular, Calviño-Ramos's testimony relied in part on a threat allegedly made by Cotto-Andino himself, a party admission carrying significant probative force. Cf. United States v. Ford, 839 F.3d 94, 110 (1st Cir. 2016) (questioning whether evidence with "negligible probative value" should have been excluded pursuant to Rule 403). And the district court took the precaution of telling the jurors that they "may not use this evidence to infer that, because of his character, he carried out the acts charged in this case." See United States v. Pelletier, 666 F.3d 1, 6 (1st Cir. 2011) (observing that limiting instructions can cabin unfair prejudice).

Of course, the admission of evidence that Cotto-Andino had killed two people to acquire control of two drug points opened the door to any reasonable rebuttal. Cotto-Andino relied on cross-examination alone to challenge the testimony about Carlos Tomate's death, but he sought to rebut the allegation that he killed Cano Ingram by proffering a witness and some records indicating that Cano Ingram was alive until 2001. Specifically, Cotto-Andino sought to call Jose Franco-Rivera, an attorney, as a witness to testify that from 1997 to 1998, he represented a person indicted for robbery under the name of "Antonio Vazquez-Pagan, also known as Cano Ingram." In the alternative, Cotto-Andino asked the court to take judicial notice of a published opinion that referred to the lawyer's client as "Cano Ingram." He also sought to introduce a death certificate indicating that Vazquez-Pagan died on March 29, 2001.

After holding a Rule 104 hearing, the district court concluded that the relevance of the proffered evidence hinged on an insufficiently proven assumption that there were not two Cano Ingrams -- one who was killed in the mid-90s by Cotto-Andino and one who died in 2001. See Fed. R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."). The district court observed that there was no evidence that Vazquez-Pagan a/k/a Cano Ingram was engaged in drug sales or

was active in Jardines de Cupey. The district court added that admitting the evidence might "confuse the jurors." See Fed. R. Evid. 403.

Seeking more support for his assertion that Antonio Vazquez-Pagan and the person identified as Cano Ingram by Calviño-Ramos were one and the same, Cotto-Andino served a subpoena on the Criminal Investigation Corps of the Commonwealth of Puerto Rico. The subpoena sought "[a]ll booking and criminal profiling documentation regarding Antonio Vazquez-Pagan," which Cotto-Andino expected to yield a criminal dossier containing Vazquez-Pagan's aliases, addresses, and information about criminal conduct. When the custodian of records did not appear pursuant to the subpoena, the district court declined to enforce it, expressing doubt that the documents produced would be admissible under any hearsay exception or relevant absent proof that there were not two Cano Ingrams. The net result was that the district court precluded Cotto-Andino's effort to cast doubt on the government's claim that he killed Cano Ingram.

The government would have us view the excluded evidence as bearing on only a side-show debate about the timing of Cano Ingram's death that could not properly be explored through extrinsic evidence. Not so. Proof that the person identified by Calviño-Ramos as Cano Ingram was alive for five to six years after Cotto-Andino supposedly killed him would have called into question

the very claim that Cotto-Andino killed Cano Ingram. And, in so doing, it would have cast doubt on a central pillar holding up the government's origin story and Calviño-Ramos's testimony as a whole.[7]

So we turn our attention to the reasons given by the district court for excluding the proffered evidence. District courts "have wide discretion in deciding whether an adequate foundation has been laid for the admission of evidence." Veranda Beach Club Ltd. P'ship v. W. Sur. Co., 936 F.2d 1364, 1371 (1st Cir. 1991) (quoting Real v. Hogan, 828 F.2d 58, 64 (1st Cir. 1987)). Deference to that discretion is particularly apt here given the district court's greater understanding of the context for a dispute about the prevalence in Puerto Rico of a nickname such as Cano Ingram.[8] And, in finding that Cotto-Andino had failed to show that the two witnesses were testifying about the same person, the district court reasonably emphasized Vazquez-Pagan's lack of demonstrated connections to Jardines de Cupey and the discrepancy in suspected criminal activity. So we may assume (without deciding) that the district court did not abuse its discretion in finding that Cotto-Andino's proffered evidence did

[7] Nor would Fed. R. Evid. 608(b) bar the evidence's introduction because it was not offered to prove a specific instance of Calviño-Ramos's conduct.

[8] The parties tell us that "Cano Ingram" combines a term for a blond man and the common name for a type of firearm.

not reliably establish that Antonio Vazquez-Pagan was the same person described in Calviño-Ramos's testimony, at least based on the existing record before the district court when it ruled.

More problematic is the district court's refusal to aid Cotto-Andino's effort to add to that record by obtaining information about Vazquez-Pagan's aliases, addresses, and criminal activity. Under the Sixth Amendment's Compulsory Process Clause, a defendant has "the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987). By refusing to enforce the subpoena, the district court denied Cotto-Andino the opportunity to provide the links that the district court found to be missing in its Rule 104(b) ruling.

To be sure, Cotto-Andino does "not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). But given the significance of Cano Ingram's death to the government's case against Cotto-Andino, the district court too readily assumed that none of the subpoenaed records would provide admissible evidence corroborating Franco-Rivera's proposed testimony and supporting

Cotto-Andino's effort to contradict Calviño-Ramos's testimony.[9] Indeed, Cotto-Andino's subpoena sought booking information, a type of evidence that the government may offer in criminal cases when it consists of "ministerial, non-adversarial information." See United States v. Dowdell, 595 F.3d 50, 72 (1st Cir. 2010); Fed. R. Evid. 803(8)(A)(ii). If the subpoena yielded information suggesting that Vazquez-Pagan was the Cano Ingram to whom Calviño-Ramos had referred, that would have eliminated any concern about the defense evidence under Rule 104(b). Nor can we agree that the evidence would have confused the jury unless we were to say -- incorrectly -- that casting reasonable doubt on the central thrust of testimony by a government witness equates to creating impermissible confusion. See United States v. Collorafi, 876 F.2d 303, 306 (2d Cir. 1989) (explaining that "[a] mere statement that evidence would be confusing is not enough" to justify exclusion on Rule 403 grounds because "factual controversy breeds confusion"); United States v. Evans, 728 F.3d 953, 966 (9th Cir. 2013) (observing that an "increased . . . chance[] that the jury would acquit" cannot be attributed to jury confusion without "prejudg[ing] the 'correct' outcome of the trial before it occurs").

[9] The government's brief on appeal does not identify any reason why the proffered evidence or the subpoenaed records would be inadmissible as hearsay not subject to any exception.

Importantly, aside from pointing out the already-mentioned gaps in Franco-Rivera's testimony, the government provided no information tending to negate the assertion that Vazquez-Pagan and Cano Ingram were one and the same. And it seems most likely that the government and its witness could have proved that there were two Cano Ingrams much more easily than Cotto-Andino could have proven the opposite, especially without enforcement of the subpoena.

For the foregoing reasons, we conclude that, because the district court exercised its discretion to preclude the proffered evidence of Cano Ingram's 2001 death as dependent on an unproven fact, the district court erred in then refusing to enforce a subpoena reasonably calculated to prove that fact. The remaining question is whether the government has shown that the error was harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24.

We think not. The case against Cotto-Andino was strong, but not overwhelming given its heavy dependence on cooperating witnesses. See United States v. Wright, 937 F.3d 8, 31 (1st Cir. 2019) (observing, in the constitutional-error context, that cooperating-witness evidence "is rarely deemed to be overwhelming on its own"). Calviño-Ramos's allegation that Cotto-Andino was a murderer was, if believed, a big deal that operated on two levels: It made it more plausible that Cotto-Andino had the control and reputation necessary to play the role alleged in the conspiracy,

and it painted him as a bad guy. The government convinced the district court -- and this court -- that the obvious and substantial prejudice inherent in evidence that Cotto-Andino murdered someone did not substantially outweigh its proper relevance. But that very success places the government in a weak position in claiming now that the evidence that Cotto-Andino was precluded from rebutting was of no substantial moment.

We faced an analogous situation in United States v. Rosario-Pérez, 957 F.3d 277 (1st Cir. 2020). There, the government successfully secured the admission of an allegation that the defendant had committed an uncharged murder. Id. at 289. When the defendant then sought to counter that allegation, the trial court erroneously excluded the exculpatory evidence. Id. at 290-94. We found such an exclusion to be cause for vacating the verdict, reasoning that "to allow evidence that [the defendant] murdered [a drug seller indebted to him] and disallow plausible evidence that he did not based on erroneous rulings is an unacceptable result." Id. at 294.

For similar reasons, we cannot deem harmless the district court's decision to deny Cotto-Andino the opportunity to gather and present evidence to rebut Calviño-Ramos's allegation. By cutting off Cotto-Andino's efforts to gather evidence relevant to establishing when Cano Ingram died, the district court undercut the defendant's attempt to kill three birds with one stone:

Cotto-Andino did not kill Cano Ingram, Calviño-Ramos is a liar, and the government has not explained how Cotto-Andino could have possessed the role in La Rompe alleged by the government.

In sum, the district court's constraint of Cotto-Andino's attempt to rebut the government's uncharged murder evidence exceeded the bounds of the court's discretion, was not harmless, and requires vacatur of Cotto-Andino's convictions.

**2. Flight Evidence**

Cotto-Andino also argues that evidence that he fled to avoid arrest should have been excluded. Over Cotto-Andino's objection, Elvin Cruz-Castro testified that Cotto-Andino came to Cruz-Castro's home in Hallandale Beach, Florida, in April 2016 and told Cruz-Castro that "he needed a place to stay for a few days because he was being wanted by the authorities." Two days after Cotto-Andino arrived at Cruz-Castro's home, federal agents arrested Cotto-Andino.

Citing United States v. Benedetti, 433 F.3d 111 (1st Cir. 2005), Cotto-Andino argues the government did not "present sufficient extrinsic evidence of guilt to support an inference that [his] flight was not merely an episode of normal travel but, rather, the product of a guilty conscience related to the crime alleged." Id. at 116. He claims that his request to stay with Cruz-Castro is not indicative of a guilty conscience because Cotto-Andino moved to Florida in 2013, well before his indictment in

July 2015. He also argues that the evidence should have been excluded under Rule 403.

Because this same evidentiary issue is likely to arise at any retrial, we consider this argument now. In so doing, we review for abuse of discretion the district court's determinations that there existed a sufficient factual predicate to support an inference that the flight reflected consciousness of guilt of the alleged offense, see United States v. West, 877 F.3d 434, 438 (1st Cir. 2017), and that Rule 403 did not bar the flight evidence's admission, see id. at 439.

There was no abuse of discretion here. The government presented evidence to support the inference that Cotto-Andino's consciousness of guilt of the alleged offenses prompted his travel to Cruz-Castro's home. Multiple cooperating witnesses testified that Cotto-Andino controlled two La Rompe drug points. That alleged criminal activity formed the basis of the July 2015 indictment against Cotto-Andino, and he was subject to arrest on that indictment when he contacted Cruz-Castro in April 2016. Cotto-Andino's own words establish that the authorities' pursuit motivated his request to stay with Cruz-Castro. Cf. United States v. Candelaria-Silva, 162 F.3d 698, 705-06 (1st Cir. 1998) (emphasizing, among other evidence establishing requisite factual predicate for flight evidence's introduction, defendant's admission following arrest in Massachusetts that "he knew he was

wanted in Puerto Rico"). The district court reasonably found that this evidence could support the inference that Cotto-Andino's travel to Hallandale Beach reflected consciousness of guilt of the crimes alleged in the indictment. See Benedetti, 433 F.3d at 117 (finding sufficient factual predicate based on evidence of defendant's unlawful firearm possession and broken promise to surrender voluntarily after indictment). Cotto-Andino's presence in Florida prior to his indictment in July 2015 perhaps offered a basis for claiming that he sought to stay with Cruz-Castro several months later for purposes other than flight. But it certainly did not compel such a finding given Cruz-Castro's testimony.

Cotto-Andino has not shown that the district court's Rule 403 balancing analysis inadequately accounted for his presence in Florida before April 2016. Moreover, the district court prudently cautioned the jury that "there could be reasons . . . for defendant's actions that are fully consistent with innocence," reducing any risk of unfair prejudice. See United States v. Fernández-Hernández, 652 F.3d 56, 70 n.11 (1st Cir. 2011) (noting that district court provided limiting instruction and finding no abuse of discretion).

**3. Gun Possession at Time of Arrest**

Cotto-Andino next challenges the admission of evidence that he possessed a gun at the time of his arrest, arguing that it had no special relevance and, alternatively, that any probative

value it possessed was substantially outweighed by unfair prejudice. See Fed. Rs. Evid. 404(b), 403. It is not certain that this issue will arise again at any retrial. Moreover, its resolution depends in part upon an exercise of discretion in assessing both the proffered relevance and the potential prejudice in the context of the case as a whole. We therefore see little benefit to addressing the issue further beyond referring to our guidance tendered in Henry, 848 F.3d at 9.

**4. Possession of Cell Phones at Time of Arrest**

Finally, Cotto-Andino argues that the district court improperly permitted Jason Ruiz, an agent of the Bureau of Alcohol, Tobacco, and Firearms, to provide lay opinion testimony about the circumstances of Cotto-Andino's arrest. On direct examination, Ruiz testified that law enforcement found Cotto-Andino with three cell phones, two of which were flip phones. On cross-examination, Cotto-Andino asked Ruiz whether there was anything illegal, uncommon, or meaningful about having multiple cell phones. Over Cotto-Andino's objection, Ruiz testified on redirect that, based on his experience investigating narcotics cases, defendants often carry multiple cell phones and use flip phones as temporary "burner" phones to evade law enforcement efforts to track and intercept drug-related communications. Later in the trial, Eddie Vidal-Gil was qualified as an expert on drug trafficking based on his experience as a police officer. Vidal-Gil's testimony about

the possession of multiple cell phones and use of flip phones was essentially identical to Ruiz's testimony.

On appeal, the parties' briefing on this issue focused on whether Ruiz's lay opinion testimony was properly admitted pursuant to Fed. R. Evid. 701. That question is largely academic where, as here, a qualified expert witness gave substantially identical testimony. We have no reason to think that an expert would not provide similar testimony at any retrial. Nor do we have any reason to think that cross-examination of Ruiz at any retrial would invite such lay opinion testimony, as it arguably did here. Cf. United States v. Valdivia, 680 F.3d 33, 51 (1st Cir. 2012) (explaining that defendant challenging improper expert testimony "cannot earnestly question the government's attempt to re-forge inferential links that [the defendant] sought to sever" during preceding cross-examination). We therefore see no reason to say more now on this issue.

**C. Resto-Figueroa's Mistrial Motion**

We turn now to Resto-Figueroa's argument that he was denied a fair trial because he relied to his detriment on an inaccurate grand jury transcript provided by the government. We review the district court's denial of a motion for a mistrial for "manifest abuse of discretion." United States v. Chisholm, 940 F.3d 119, 126 (1st Cir. 2019) (quoting DeCologero, 530 F.3d at 52).

The transcript in question consists of grand jury testimony given by Oscar Calviño-Acevedo. As a tape recording of that testimony confirms, Calviño-Acevedo testified that Resto-Figueroa (known as "Tego") was one of the participants in the August 28 shooting of Pollo and others. This testimony was more or less identical to statements Calviño-Acevedo made previously, including in a trial based on the same indictment. The transcript of the grand jury testimony, however, erroneously used the nickname of another person, "Bebo," rather than "Tego."

When Calviño-Acevedo testified at trial that Tego was involved in the shooting, defense counsel began a line of cross-examination by asking whether Calviño-Acevedo told the grand jury that Tego was involved. Counsel went to sidebar where a long conversation ensued, during which defense counsel pointed to the transcript of Calviño-Acevedo's grand jury testimony. At that point, government counsel (who had conducted the grand jury questioning and who knew that Bebo had been incarcerated at the time of the shooting) realized that the grand jury transcript erroneously named Bebo rather than Tego. It also became apparent that counsel could get from the court reporter an audio tape of the pertinent grand jury testimony.

Counsel for Resto-Figueroa moved for a mistrial, contending that a misleading transcript had led him to adopt a trial strategy that now would backfire, making counsel rather than

the witness appear deceptive. The district court denied the motion but allowed counsel to use the transcript to continue the cross-examination if he so wished.

When the sidebar conference concluded, Resto-Figueroa proceeded with cross-examination. He asked Calviño-Acevedo about the list of people who went to Jardines de Cupey, reading the names from the grand jury transcript that did not include Tego. Calviño-Acevedo said those were the names he provided, but he insisted that he mentioned Tego, too. After reviewing the grand jury transcript, Calviño-Acevedo agreed that the transcript did not include Tego's name.

The next day, while Calviño-Acevedo was still on the witness stand, the government produced a recording of his grand jury testimony. Both Resto-Figueroa and the government agreed that the recording showed that Calviño-Acevedo had indeed mentioned Tego in his grand jury testimony. Because Resto-Figueroa had probed the point on cross, the government sought to introduce the recording on redirect as a prior consistent statement admissible under Fed. R. Evid. 801(d)(1)(B). Resto-Figueroa then renewed his mistrial motion, arguing that he would suffer prejudice because he relied in good faith on the disclosed grand jury transcript's accuracy. The district court denied the motion.

Before the government conducted its redirect examination, the district court consulted the parties about a

special instruction to the jury. The instruction explained that the grand jury transcript contained an error that had, until then, gone undetected, emphasized that Resto-Figueroa's counsel asked his initial questions "on a good-faith basis," and told the jury "not [to] make any adverse inferences against him or his client . . . because of that cross-examination that was held." Resto-Figueroa continued to press his request for a mistrial but assented to the instruction's wording. The government then played the recording as part of its redirect examination.

Resto-Figueroa argues on appeal that he suffered acute prejudice from the transcript error because the government's case against him turned on the jury's evaluation of the credibility of cooperating witnesses with lengthy criminal records. Rather than helping him exploit that potential vulnerability in the government's proof, Resto-Figueroa's reliance on the transcript ultimately underscored Calviño-Acevedo's inculpatory testimony when the government introduced the recording.

The district court did not abuse its discretion in denying Resto-Figueroa's motion for a mistrial. Defense counsel learned that the transcript was likely in error before he used it to impeach the witness. He can hardly cry foul about the district court then allowing the government to use the recording to rehabilitate the witness. The district court informed the jury of the circumstances and carefully instructed against drawing any

adverse inferences against counsel based on his earlier cross-examination. Importantly, there is no evidence of any wrongdoing by the government. Neither counsel noticed the error in the transcript until sidebar, at which point government counsel brought it to the attention of the court and opposing counsel. This was, in short, one of the nettlesome surprises that can easily arise in a trial. To the extent the events played out to enhance Calviño-Acevedo's credibility as compared to that of defense counsel, they did so because defense counsel, aware of the likely error, pressed a strong attack that presumed there was no error. In sum, the transcript error does not present "extremely compelling circumstances" that would warrant reversal of the district court's denial of a mistrial in Resto-Figueroa's favor. United States v. Georgiadis, 819 F.3d 4, 16 (1st Cir. 2016) (quoting United States v. Freeman, 208 F.3d 332, 339 (1st Cir. 2000)).

**D. Instructional Error**

Resto-Figueroa also argues that the jury instructions were erroneous in several ways. We address his arguments in turn.

Resto-Figueroa first claims the instructions did not require the jury to find that the alleged RICO enterprise actually existed or that the enterprise's activities actually affected interstate commerce. Instead, the instructions told the jury that the government need only prove that these elements "would" be satisfied. Resto-Figueroa did not object when these instructions

were given, so our review is for plain error. Henry, 848 F.3d at 13. The evidence that La Rompe existed and affected interstate commerce is so overwhelming that Resto-Figueroa cannot prove that the challenged "would" instructions caused any prejudice. For that reason, we see no basis to upset the verdict based on this instruction, whether or not it was correct. See Rodríguez-Torres, 939 F.3d at 35-36 (finding proof of La Rompe's existence so overwhelming as to render unprejudicial any potential error in similar instruction).

Next, Resto-Figueroa contends that the instructions did not require the jury to find actual association between the defendant and anyone involved with the enterprise. This unpreserved argument also fails. Read as a whole, the district court's charge required the jury to find that Resto-Figueroa associated with the enterprise with knowledge of its nature and its extension beyond his own role.[10] See United States v. Gomez,

[10] The district court explained that "a person is 'associated with' an enterprise when, for example, he joins with other members of the enterprise and he knowingly aids or furthers the activities of the enterprise, or he conducts business with or through the enterprise." The district court later instructed the jury that "it is sufficient that the government prove beyond a reasonable doubt that at some time during the existence of the enterprise as alleged in the indictment, the conspirator was or would be 'employed by' or 'associated with' the enterprise within the meaning of those terms as I have just explained and that he knew or would know of the general nature of the enterprise, and knew or would know that the enterprise extended beyond his own role in the enterprise."

255 F.3d 31, 38 (1st Cir. 2001) (emphasizing that individual instructions "may not be evaluated in isolation"). The instruction given on association was not clearly erroneous.

Finally, Resto-Figueroa asserts for the first time on appeal that the instructions did not require the jury to find that a defendant knowingly joined a conspiracy to commit a substantive RICO violation. Resto-Figueroa cannot clear the plain error hurdle here. The district court told the jury that "the agreement to commit a RICO offense is the essential aspect of a RICO conspiracy offense" and gave an instruction on this issue that tracked Salinas.[11] See supra Part II.A.1. This instruction was not clearly erroneous.

**E. Responses to Jury Questions**

During its deliberations, the jury used notes to communicate questions to the district court on three occasions. Upon receipt of each question, the district court informed counsel of the jury's message and gave them an opportunity to articulate their views regarding a proper response. See United States v. Sabetta, 373 F.3d 75, 78 (1st Cir. 2004) (describing best practices for responding to a jury's message).

[11] The district court explained that agreement could be shown by proof "beyond a reasonable doubt that the defendant agreed to participate in the enterprise with the knowledge and intent that at least one member of the RICO conspiracy (who could be, but need not be, the defendant himself) would commit at least two racketeering acts in conducting affairs of the enterprise."

First, the jury sent a note stating, "We, the jurors, request the witnesses' testimonies transcripts." Resto-Figueroa argued that the jurors have a right to request a read-back of the testimony and asked the district court to "inquire if they are asking for a read-back of the totality of the trial or just have a particular witness." Velazquez-Fontanez joined Resto-Figueroa's request. Cotto-Andino sought "a read-back of the testimony, sans sidebars and objections." The district court rejected these proposals, responding that: "You are to rely on your collective memory of the witnesses' testimonies. Transcripts are not evidence." Velazquez-Fontanez and Resto-Figueroa argue that the district court erred in doing so.

Our review is for abuse of discretion. United States v. Vázquez-Soto, 939 F.3d 365, 375 (1st Cir. 2019). We discern no abuse of discretion here. See United States v. Akitoye, 923 F.2d 221, 226 (1st Cir. 1991) (advising district courts facing similar requests to consider the scope of the jury's request; what obstacles, if any, would impair the request's fulfillment; and the amount of time the desired action would take). As the district court discussed with counsel on the record, the transcripts had not yet been completed. Moreover, any transcript would need to be redacted to exclude sidebar conversations between the district court and counsel. The jury specifically asked for transcripts of "the witnesses' testimonies." Another trial judge might well have

endeavored to see if their request might be greatly narrowed. On the other hand, such an attempt at a give-and-take with a twelve-member jury might itself have involved the court too much in the jury's deliberations, or perhaps itself taken much time. See United States v. Aubin, 961 F.2d 980, 983-84 (1st Cir. 1992) (finding no abuse of discretion in the district court's refusal to inform a jury that it could request a read-back based in part on concerns about "out-of-context testimony" and potential "difficulty agreeing to the scope of what should be read back"). In any event, a district court does not abuse its discretion by requiring the jury to proceed as most juries usually proceed. See Vázquez-Soto, 939 F.3d at 377 (observing that a jury "does not have the right to a rereading" of testimony (quoting Aubin, 961 F.2d at 983)).

Second, the jurors wrote: "[W]e, the jurors, request further clarification on what conspiracy means in Count Two. Also, does aiding and abetting apply to Count Two, Four and Five?" The district court responded to the jury by saying, "Please refer to Instruction Number 32 for clarification on what conspiracy means in Count Two. Aiding and abetting does not apply to Count Two. It applies to Counts Four and Five." In doing so, the district court declined Resto-Figueroa's request to "inquire further" of the jurors.

Velazquez-Fontanez argues that the district court's response regarding the meaning of conspiracy did not provide the clarification the jury requested. Resto-Figueroa adopts Velazquez-Fontanez's argument by reference, and he adds that the district court's RICO conspiracy instruction was "generally incomprehensible." We review for abuse of discretion a district court's decision on whether to give a supplementary jury instruction. See United States v. Monteiro, 871 F.3d 99, 114 (1st Cir. 2017).

The defendants did not object to or seek to modify the district court's initial conspiracy instruction. Nor did they suggest an alternative instruction that the district court should have provided in response to the note. Even where a defendant does offer an alternative, we typically do not fault a district court for declining to expand upon its "initial, entirely correct instructions" and instead "refer[ring] the jury to the original formulation." United States v. Roberson, 459 F.3d 39, 46 (1st Cir. 2006) (quoting Elliott v. S.D. Warren Co., 134 F.3d 1, 7 (1st Cir. 1998)). Defendants have not shown that the district court abused its discretion by sticking to the instruction given here without objection.

Third, the jurors wrote, "[W]e, the jurors, request further clarification on Instruction Number 44 regarding the meaning of being present." The government asserted that, although

it had agreed to the instruction, the instruction "is highly confusing" because its theory posited "that he was handling everything through phone." The government requested a supplementary instruction stating: "Presence does not require actual physical presence. Please refer to instruction on aiding and abetting in regards to that." Velazquez-Fontanez requested that the district court "refer them to [the] instructions as they are." The district court proposed a response that said: "Please refer to Instruction Number 44 in conjunction with Instruction Number 34, 'Aid and Abet,' in light of all the evidence presented in the case." Velazquez-Fontanez responded that he had "[n]o objection" to the district court's proposal.

Velazquez-Fontanez argues on appeal that this supplementary jury instruction was improper. But this challenge goes nowhere. Velazquez-Fontanez waived his objection when he affirmatively stated that he had "[n]o objection" to the district court's proposed response, which aligned with Velazquez-Fontanez's request that the district court refer the jury to the existing instructions. See United States v. Corbett, 870 F.3d 21, 30-31 (1st Cir. 2017) (holding that challenge to response to juror note was waived where defendant said that proposed response "restates the instruction already given, so I have no problem"); United States v. Acevedo, 882 F.3d 251, 264 (1st Cir. 2018) (holding that challenge to revised jury instruction was waived where defendant

stated he had no objection and changes were made in light of defendant's concerns).

## III. CONCLUSION

For the foregoing reasons, we affirm the convictions of Carlos Velazquez-Fontanez and Jose Resto-Figueroa. We vacate the convictions of Ruben Cotto-Andino and remand his case for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

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| UNITED STATES OF AMERICA<br>PLAINTIFF, | * | Appellate No. 19-1010 |
| versus | * | Cause No. 15-CR-462 (JAG) |
| CARLOS VELAZQUEZ-FONTANEZ (66)<br>DEFENDANT. | * | December 7, 2018 |

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RESENTENCING PROCEEDINGS BEFORE THE
HONORABLE JAY A. GARCIA-GREGORY
UNITED STATES DISTRICT JUDGE

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02:13 Proceedings recorded by mechanical stenography using
02:13 computer-aided transcription software.

"APPENDIX-B"

***** RESENTENCING HEARING *****

**(December 7, 2018)**

04:33 **THE DEPUTY CLERK:** 15-462, United States of America versus Carlos Velazquez-Fontanez. Case called for resentencing hearing. Appearing on behalf of the government, Assistant U.S. Attorney Victor Acevedo-Hernandez; and appearing on behalf of the defendant, Attorney Victor Chico-Luna. Defendant is present in court and being assisted by the official court interpreter.

**AFPD CHICO:** Good afternoon, Your Honor.

**AUSA ACEVEDO:** Good afternoon Your Honor.

**THE COURT:** Okay. Okay. This sentence had already happened.

**AFPD CHICO:** Yes, Your Honor.

**THE COURT:** Okay. And in view of a ruling I made in the companion case of Jose Resto-Figueroa, I -- you know, we recalled the sentence from the First Circuit to come back for resentencing purposes. So, they are waiting for our sentence, you know, in order to continue with the proceedings on appeal.

**AFPD CHICO:** Yes, Your Honor.

**THE COURT:** Okay? So, at that time, you know, I imposed on defendant a minimum of 40 years. Okay? But in view of the dismissal in this case of Count Three, I believe it is --

**AFPD CHICO:** Yes, Count Three, Your Honor.

**THE COURT:** Count Three, that, obviously, is going to have an impact on the sentencing. Okay? So, what is your position, you know, concerning the resentencing at this time?

**AFPD CHICO:** Your Honor, we would request a 15-year mandatory minimum, which is now the mandatory minimum of the sentence. The arguments that we presented in the sentencing memorandum as to deterrence and the low recidivism rate, because his Criminal History 1 still holds, he will be now released at 48 years of age; and he would have a 42 percent recidivism rate at age of release, according to the statistics by the Sentencing Commission. That is the third lowest rate.

In the meantime, Your Honor, while he's been serving, he's taken courses related to woodworking, anger management. He's taken some psychology courses; and he's successfully completed a drug course, which he doesn't have a history of substance abuse, but he took as part of his preparation. And he's also been working in the institution as a plumber, Your Honor.

**THE COURT:** Okay. Where was he designated?

**AFPD CHICO:** Terre Haute.

**THE COURT:** Indiana.

**AFPD CHICO:** Indiana.

**THE COURT:** Terre Haute, Indiana. And would you like for me to --

**AFPD CHICO:** Your Honor, we would request a

recommendation for Coleman; and if the Court could also recommend that he remain in Puerto Rico until he is reclassified, because if the Court follows our recommendation, the 40-year sentence placed him in a maximum security prison. Now, if the Court lowers that sentence, he would be reclassified; and he could go to a medium or maybe a low because he doesn't have any criminal history. So, we would request that recommendation be made to the Bureau of Prisons so they don't have him going around prisons while they reclassify him. So, that would be our request, Your Honor.

**THE COURT:** Okay. Well, all right.

**AUSA ACEVEDO:** Yes, Your Honor. First, the United States respectively objects to the Court's decision to dismiss Count Three as to the determination that he is subject to a mandatory minimum of 15 years. We submit again, respectfully, that that is a mistake.

The jury found that he was guilty of a driveby shooting, which the specific language is that he aimed a weapon and fired at two or more people. That's a jury finding that the Court has to make; and under *Apprendi*, that's certainly enough for the discharge element of the 924(j), given that the 924(j) is predicated on the driveby shooting.

So, we would submit that he is -- that he is subject to a mandatory minimum sentence of 20 years, not 15. So, with that in mind as to the sentence --

**THE COURT:** Is that how the charge reads?

**AUSA ACEVEDO:** Yes, Your Honor, the statute that --

**THE COURT:** The Five, Count Five.

**AUSA ACEVEDO:** The statute on Count Five is the 924(j). It's the use of a firearm to commit a murder; and it's predicated on a driveby shooting, which they also found him guilty, which requires them to find that he fired upon -- a weapon was fired into a group of two or more persons. So, they made a finding that he is responsible in the aiding and abetting, or not the aiding and abetting modality, into firing a firearm into a group of two or more people. So, that certainly satisfies *Apprendi*.

That decision -- the jury made that decision; and by subjecting him to a mandatory sentence of five years, you are basically -- the Court would be basically disregarding a finding by the jury.

**THE COURT:** So, you believe that, you know, it should go up to ten years minimum because of the element of being used -- the gun being used or brandished --

**AUSA ACEVEDO:** Discharged.

**THE COURT:** -- or fired or discharged?

**AUSA ACEVEDO:** Yes, fired.

**THE COURT:** Even though the charge doesn't say that?

**AUSA ACEVEDO:** Well, the charge says "use, carry --" I have to -- let me look at the charge real fast.

04:38 **THE COURT:** Is it the same charge as to Count Nine with respect to Mr. Resto, the same language?

04:38 **AUSA ACEVEDO:** Same language. It's the same language, but different counts.

04:39 **THE COURT:** Did the verdict form have that language?

04:39 **AUSA ACEVEDO:** The jury instruction --

04:39 **THE COURT:** Well, the jury instruction; but the verdict form, when they found him guilty, didn't have that.

04:39 **AUSA ACEVEDO:** But it doesn't matter because it required them to make a finding. Just by finding him guilty of a driveby shooting and then having the 924(j) predicated on that driveby shooting, they didn't have to make a separate finding: Do you find that he fired, that he aided and abetted in the firing of the weapon? That's redundant, given the fact that they just found him guilty of the count of the driveby, which requires specifically as an element of the offense -- and I'm reading -- "fired a weapon into a group of two or more persons."

04:39 **THE COURT:** And the aiding and abetting in the firing.

04:40 **AUSA ACEVEDO:** True. It can be aiding and -- even if it's stating --

04:40 **THE COURT:** Even if he didn't fire it, himself.

04:40 **AUSA ACEVEDO:** It would be sufficient. It doesn't matter if -- If it was any other case where you have a

driveby-shooting count where the statute doesn't specifically provide or has as the element the finding of the shooting, then a verdict form under *Apprendi* would have to have a specific finding of brandishing, firing, et cetera. But in this case, it would have been redundant; and that's why the verdict form -- that's why we didn't object to the verdict form during the trial and the verdict form that the Court made was proper because, if not, it would be like admitting that our verdict form that we submitted to the jury was faulty, which it wasn't. It was proper because --

**THE COURT:** Well, that -- that is something that is going to be taken up on appeal, I guess.

**AUSA ACEVEDO:** I understand, but our argument is that --

**THE COURT:** Make sure that you are going to be arguing that on appeal, no?

**AFPD CHICO:** Yes, Your Honor.

**AUSA ACEVEDO:** Yes. Our argument was that the Court did a proper verdict form and that under *Apprendi* the jury has made a sufficient finding that a firearm -- in fact, he is responsible for the firing of a firearm, the 924(j). So, that's why we're saying it's a 20-year mandatory minimum.

As to the specific sentence that should be provided, we submit -- we stand by our previous recommendation --

**THE COURT:** The guideline. You stand by the guideline.

**AUSA ACEVEDO:** We stand by the guideline; and we can point, Your Honor, that sentencing, for example, this defendant to 15 years, as the defense is arguing for, is a severe sentencing disparity when you compare him to people that have been sentenced in this case and other cases like this.

Just to give an example, Defendant No. 23, who didn't even participate in a murder, who didn't go to trial, accepted responsibility, he was sentenced to 210 months. He's asking you to sentence him less than a person that committed an act of violence. And you have to remember that the person before you was a police officer when he did all this. The amount of danger that he put the society to is extreme. So, we respectively submit that it shouldn't be taken lightly.

If you look at every single one of La Rompe Onu defendants that went to trial in the case prior to the one that we held before Your Honor, if you look at everyone who was found guilty of the driveby shooting murder, Los Paseos massacre, which was one where other people were killed, all those defendants received life or near life sentences. So, if this defendant, a police officer at the time, gets a more lenient sentence, what would be the message that we would be sending as to the deterrence and avoiding sentencing disparities?

So, that's why we ask the Court to -- basically, we don't think it should change his prior sentence; but we submit that there are factors here for the sentence that was imposed.

**THE COURT:** Okay. Well, you will be arguing on appeal, you know, the dismissal, you know, together with the sentence, okay, when it comes up --

**AUSA ACEVEDO:** Yes.

**THE COURT:** -- because everything is going to go up at the same time. I mean he's going to -- he's going to be retrieved by the -- by the Court of Appeals, you know, for his appeal to continue. Okay?

**AUSA ACEVEDO:** Sure, Your Honor.

**THE COURT:** Okay. Do you have anything to say with respect to that minimum?

**AFPD CHICO:** Your Honor, I just want to add that Count Five -- I read the addendum -- it's use and carry. It's not discharge. So, I would just stand by the five-year mandatory minimum.

And as to the issue of disparity of sentences, Your Honor, we can see that, for example, Mr. Yanyore-Pizarro, who had many murders -- I know he cooperated; but he got ten years. And my client is still facing a sentence that's 50 percent above that, and he's a Criminal History 1. I don't know the comparison between other defendants; but in his case,

he's a Criminal History 1. He's never -- this is his first criminal case. So, I believe a 15-year sentence would be enough to meet the 3553 factors.

And in addition, Your Honor, the prosecutor brought up the deterrence; and the National Institute of Justice has pointed out -- and it's in my sentencing memo at Paragraph 23 -- that it's the certainty of being caught that deters a person from committing crime, not the fear of being punished or the severity of the punishment. He was caught; and that would aid in general deterrence as to that 3553 factor, Your Honor. So, we submit again 15 years is more than enough for Mr. Velazquez-Fontanez.

**THE COURT:** Well, we'll see about that. Okay?

I have prepared a very carefully crafted statement of reasons. Okay? With respect to sentencing disparity, you know, remember, it's not just for the case. It's national level. Okay? And I was not given too much support for that.

So, I would like for, you know, defendant, if he wishes to speak again, you know, before we resentence him.

**THE DEFENDANT:** God bless you. First of all, last time I was here before you, I gave a message that was given to me by God to you. I know the word of God doesn't come back empty; and the reason for which it was sent by him, whatever sentence he would bring to me, give to me now.

I would like to ask again what I asked you before, that you be merciful with me, as an innocent man that I am, and allow me to be with my people to do what God sent me to do. I know this is not usual, but I would like to know if I can, inasmuch as this is your courtroom, sing to my parents.

**THE COURT:** Okay. I don't see why not.

(Defendant sings in Spanish language.)

**THE DEFENDANT:** Thank you.

**THE COURT:** Was that recorded somehow? Was that recorded? It was recorded.

(Discussion off the record.)

**THE COURT:** Well, it will be -- the song will form part of the record. It has -- it has been, you know, taped. So, it will -- she will -- the interpreter will translate it and put it on the record. Okay? So, make sure that it's there. Okay?

**AFPD CHICO:** Okay.

**THE COURT:** Very well. I'm going to read -- you know, make a summary here, you know, of what I'm going to do with respect to the sentence; but there is a statement of reasons, you know, that I have prepared which is being filed in this case, okay, which is quite lengthy. So, that's why I'm not going to read it out.

On November 9, 2016, defendant, Carlos Velazquez-Fontanez, was found guilty by jury trial as to Counts

One, Two, Three, Four, and Five of the indictment filed in Criminal Case No. 15-462 charging violations of Title 18, U.S. Code Sections 1962(d), 1963, 924(c)(1)(A) and -- 36(b)(2)(A)? Is that correct? There is something missing there. Okay?

**PROBATION OFFICER:** Let me check, Your Honor. It is correct, 36(b)(2)(A).

**THE COURT:** Okay. 36(b)(2)(A) and 21 U.S. Code Sections 846, 841(a)(1), and 860, all Class A felonies.

On March 7, 2018, a notice of appeal was filed by defendant in the present case. On August 7, 2018, at Docket No. 368, defendant filed an informative motion requesting a stay of the appeal proceedings so that the District Court could consider the dismissal of Count Three in the instant case. The appeal was stayed, and the case was remanded to the U.S. District Court for further proceedings concerning resentencing.

The November 1, 2018, edition of the United States Sentencing Guidelines has been used to apply the advisory guideline adjustments, pursuant to the provisions of Guideline Section 1B1.11(a).

Counts One, Two, and Four are grouped for guideline purposes, pursuant to U.S. Sentencing Guideline Section 3D1.2(d). Pursuant to U.S. Sentencing Guideline Section 3D1.3(b), when the counts involve offenses of the same and general type which -- which different guidelines apply, the offense guideline that produces a higher offense level is

applied.

The guideline for a Title 18, U.S. Code Section 1962 offense is found in U.S. Sentencing Guideline Section 2E1.1(a)(2), which takes into the account the offense level applicable to the underlying racketeering activity. In this case there is more than one underlying racketeering activity. Therefore, pursuant to Application Note No. 1, and based on the murders, the applicable guideline is found in U.S. Sentencing Guideline Section 2A1.1. Therefore, a base offense level of 43 is established.

As to Counts Two and Four, the guideline for 21 U.S. Code Sections 846, 841(a)(1), and 860, and 18, U.S. Code Section 36(b)(2)(A) is found in U.S. Sentencing Guideline Section 2D1.2(d)(1). That section provides a cross-reference since a victim was killed under circumstances that would constitute murder under 18, U.S. Code Section 1111, had such murder taken place within the territorial or maritime jurisdiction of the United States, U.S. Sentencing Guideline Section 2A1.1, first-degree murder applied -- is applied because the resulting offense level is greater than the one determined under U.S. Sentencing Guideline Section 2D1.1. Thus, for either count, the established base offense level is 43, pursuant to U.S. Sentencing Guideline Section 2A1.1(a). There are no other applicable guideline adjustments.

Based on a total offense level of 43 and a

Criminal History Category of 1, the guideline-imprisonment range is life with a fine range of 25,000 to $20 million and a supervised release term of at least ten years as to Count Two, and not more than five years as to Count One and Four.

And as to Count Five, pursuant to U.S. Sentencing Guideline Section 2K2.4, Chapters 3 and 4 of the sentencing guidelines manual do not apply to Count Five; and the guideline sentence of said count is a minimum term of imprisonment required by statute, which is in this case five years, to run consecutive to Counts One, Two, and Four; and there is a fine of $250,000, plus a supervised release term of not more than five years.

The Court has reviewed the advisory guideline calculations and finds that the presentence-investigation report has adequately applied those computations. The guideline computations satisfactorily reflect the components of the offense by considering its nature and circumstances. Furthermore, the Court has considered the other sentencing factors set forth in Title 18, U.S. Code 3553(a).

Mr. Velazquez-Fontanez is 34 years old, a resident of Guaynabo, Puerto Rico, who is divorced with two children, but presently in a consensual relationship with one child. Defendant has completed an associates degree in nursing and was employed as a municipal officer at the time of his arrest. Defendant suffers from hypertension and dermatitis.

He's mentally and emotionally healthy; and further, Mr. Velazquez-Fontanez does not have a reported history of substance abuse. This is Mr. Velazquez-Fontanez' second known arrest, but first conviction. He was previously arrested for conjugal abuse. However, no probable cause was found.

Lastly, the Court has taken into consideration the elements of the offense and Mr. Velazquez-Fontanez' participation. Mr. Velazquez was a San Juan municipal officer while at the same time a member of La Rompe Onu. As a member of the organization, he delivered packages of drugs and also supplied ammunition to other members.

Further, on or about June 25, 2011, Luis F. Alicea-Colon, also known as Trenza, Enano, Luis Trenza, ordered that Hervin Valcarcel Martinez, also known as Prieto, a member of a rival drug trafficking organization, be killed. The defendant wanted Prieto and his henchmen to be murdered because they had taken over the drug points of his brother Bebo. On that date, the defendant informed members of La Rompe Onu that Hervin Valcarcel-Martinez, also known as Prieto, was at a business washing cars with his associates. The defendant was the person who identified Prieto as the main target to be killed at Tortugo ward in Caimito, San Juan. With that information, Oscar A. Calvino-Acevedo, William Zambrana-Sierra, Xavier Castro-Vega, and Luis Yanyorre-Pizarro drove to the business and shot and killed Edwin Diaz Cruz, Hervin

Valcarcel-Martinez, Javier Catala-Bermudez, and Orlando Melendez-Villegas. The next day, defendant and other members of the gang celebrated the murders.

As the Court has previously indicated, there is -- it's filing simultaneously with this sentence a complete statement of reasons that goes one-by-one with respect to the sentencing factors found in 18, U.S. Code 3553. Okay? And, you know, it takes into account also that defendant was a police officer, you know; and, therefore, there was a measure of trust, you know, in the discharge of his duties. So, you know, it was -- you know, this was not something that happened haphazardly. There was some planning and premeditation.

So, it is the judgment of this Court that Mr. Carlos Velazquez-Fontanez will be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 240 months as to Count One, Count Two, Count Four, to run concurrently with each other, to be followed by a consecutive term of 60 months of imprisonment as to Count Five, for a total of 300 months of imprisonment.

Upon release from confinement, defendant shall be placed on supervised release for a term of 15 years as to Count Two and 5 years as to Count One, Four and Five, to be served concurrently with each other under the following terms and conditions: Defendant shall not commit another federal, state, or local crime and shall observe the standard conditions

of supervised release recommended by the U.S. Sentencing Commission and adopted by this Court. Defendant shall not unlawfully possess controlled substances. Defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

The defendant shall participate in a program or course of study aimed at improving educational level or complete a vocational training program. In the alternative, he shall participate in a job-placement program recommended by the U.S. probation officer. Defendant shall provide the probation officer access to any financial information upon request. Defendant shall cooperate in the collection of a DNA sample, as directed by the U.S. probation officer, pursuant to the Revised DNA Collection Requirements and Title 18, U.S. Code 3563(a)(9).

Defendant shall submit his person, property, house, vehicle, papers, computers, as defined in 18, U.S. Code 1030(e)(1), other electronic communication or data storage devices, and media, to a search conducted by the U.S. Probation Officer at a reasonable time, in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

Defendant shall cooperate with child-support

enforcement authorities and pay child support as required by law.

The Court finds that the conditions imposed are reasonably related to the offense of conviction and to the sentencing factors set forth in Title 18, U.S. Code 3553. Further, the Court finds that the conditions imposed are consistent with the pertinent policy statements issued by the Sentencing Commission pursuant to Title 28, U.S. Code 994(a) and that there is no greater deprivation of liberty than what is reasonably necessary to fulfill all of the sentencing objectives, including rehabilitation, positive reintegration into the community, just punishment, and deterrence.

Having considered Mr. Velazquez-Fontanez' financial condition, a fine will not be imposed. However, the special monetary assessment in the amount of $100 per count must be imposed, as required by law, totaling $400.

And, of course, you have a right to appeal this resentencing, as you were found guilty after a plea of guilty, even though this will be a resentence that is supplementing a record already on appeal. And the notice of appeal will -- would have to be filed within 14 days of today before judgment of the Court will be entered. I don't know if that is really necessary.

**AFPD CHICO:** Your Honor, I discussed it with appellate counsel; and she informed me that I should file the

notice; and then eventually in the appeals court they will consolidate.

**THE COURT:** Very well. Okay. And they should be consolidated, you know, with the record now before the First Circuit.

You have a right to apply for leave to appeal in forma pauperis, if you are unable to pay the cost of an appeal. If you are represented by court-appointed counsel, he will continue to represent you through appeal, if any, unless a substitute counsel is later appointed. And you will be given credit towards your sentence for any days spent in federal custody in connection with the offenses for which sentence has been imposed.

The Court directs that the transcript of the sentencing proceedings be forwarded to the Sentencing Commission, U.S. Bureau of Prisons, as well as probation within the 30 days.

Mr. Velazquez, you know, I heard what you had to say. I believe that, you know, you really sung yourself out, you know, with the help of God before this Court, for which I appreciated very much. But remember what I said the first time: This is a Court of justice, you know, on earth. There is another Court up in heaven. They deal differently. It's a Court of pure mercy. And I'm sure that the good Lord will be with you forever.

You know, as Isaiah says, even though I should reject the child in the womb -- the womb -- would reject the child in the womb, I will never abandon you. And you rest assured that he will be with you all the time that you may be in prison. And I wish you the best on your appeal process. Okay? It's still pending. So, we'll be praying for whatever outcome the good Lord wants.

**AFPD CHICO:** Thank you, Your Honor. Permission to withdraw?

**AUSA ACEVEDO:** For the record, we are objecting to the determination that it's a five-year mandatory minimum. This is for appellate purposes. We submit that it's a ten-year mandatory minimum, and we object to the final sentence imposed. We submit that the nature and circumstances of the offense, which include his role as a drug-point owner, a person that participated in murder and supplied ammunition, warrants a life sentence; as well as a life sentence would have reflected the seriousness of the offense, would have afforded adequate deterrence, would have protected the crimes -- would have protected the public from further crimes of this defendant, and would have taken into consideration the guidelines. Thank you, Your Honor.

**THE COURT:** Very well. And as I stated before, the statement of reasons, you know, which will become part of the record, you know, here at the sentencing, is being filed

simultaneously, you know, with the sentence I have just read in open court. Okay? So, I guess now the record goes back to the Court of Appeals, you know; and the appeal process may continue. Okay? And so, with respect to your -- counsel, with respect to your objections, they will be all taken up on appeal.

**AUSA ACEVEDO:** Yes, Your Honor. That was just to preserve the argument on appeal.

**THE COURT:** Very well.

**AFPD CHICO:** Thank you, Your Honor. Permission to withdraw?

(Proceeding adjourned.)

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**CERTIFICATE**

I, Donna A. Goree, CSR, RPR, CRR, Official Court Reporter for the United States District Court, District of Puerto Rico, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.

*s/ Donna A. Goree*
Donna A. Goree, CSR, RPR, CRR
Official Court Reporter