No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RUDY MENDOZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeal For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE GOVERNMENT MUST PROVIDE NOTICE TO A DEFENDANT PRIOR TO UNILATERALLY DEPORTING THE SOLE WITNESS AND SOLE ALLEGED VICTIM OF A PENDING CRIMINAL CASE, THEREFORE AFFORDING DEFENDANT A REASONABLE OPPORTUNITY TO INTERVIEW THE INDIVIDUAL PRIOR TO DEPORTATION AND PRIOR TO DEFENDANT'S TRIAL?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

1. United States v. Jesus Chavez, No. 3:18-CR-122, U.S. District Court for the Middle District of Pennsylvania. Judgement entered on December 3, 2019.

2. United States v. Jesus Chavez, No. 19-3913, U.S. Court of Appeals for the Third Circuit. Judgment entered September 27, 2021.

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IN THE
SUPREME COURT OF THE UNITED STATES

RUDY MENDOZA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Rudy Mendoza, by and through his undersigned attorney, respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix.

JURISDICTION

On September 27, 2021, the Court of Appeals entered its judgment affirming the judgment of the District Court. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The pertinent constitutional provisions include the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.

STATEMENT OF THE FACTS

On April 10, 2018, Rudy Mendoza was charged in an indictment with assault with a dangerous weapon, in violation of 18 U.S.C. § 113(a)(3); and possession of contraband in prison, in violation of 18 U.S.C. §§ 1791(a)(2) and (b)(3). The indictment alleges that Rudy Mendoza and co-defendant Jesus Chavez, both inmates at United States Penitentiary Canaan ("USP Canaan") did intentionally assault another inmate at USP Canaan. The alleged victim in this case was a federal inmate named Rogelio Rojas-Flores. The alleged assault took place in Mr. Mendoza's cell on June 17, 2017 and the only individuals present in

the cell during the time of the alleged assault were Mr. Mendoza, Mr. Chavez, and Mr. Rojas-Flores. There was video evidence showing the three (3) individuals walking into Mr. Mendoza's cell; however, there is no video evidence of what occurred inside the cell during the alleged assault.

On or about October 5, 2018, the Government deported the alleged sole victim and eyewitness to Mexico upon completion of his sentence. The Government deported the alleged victim and sole eyewitness without providing any notice whatsoever to Defendant or Defendant's counsel. The Defendant and his counsel did not have an opportunity to question or interview Mr. Rojas-Flores prior to the Government deporting Mr. Rojas-Flores to Mexico.

On June 24, 2019, the Government responded on the record before the District Court as to why Mr. Rojas-Flores was deported without any notice to the defense. The Government stated that in an interview with the Government on September 1, 2017, Mr. Rojas-Flores "refused to identify his assailants" and "[h]e was offered the opportunity to participate in an intelligence debrief and he refused." Mr. Rojas-Flores also informed the Government that he was an active Surenos gang member. The Government further claimed that Mr. Rojas-Flores was "deported in due course [and] there is no indication at all that he had anything exculpatory to say that would have helped [the defense]." Furthermore, the Government acknowledged that they "could have held [Mr. Rojas-Flores] here."

On April 23, 2019, a Superseding Indictment was filed adding the charge of conspiracy to commit assault with a dangerous weapon. On June 4, 2019, Defendant wrote a letter to the District Court Judge requesting to proceed *pro se* and said letter was filed to the docket on June 17, 2019.

On or about June 17, 2019, federal prosecutors along with unidentified federal agents and Defendant's prior counsel arrived at USP Canaan for a meeting with Defendant without Defendant having any prior knowledge of said meeting. Defendant was caught off-guard when he was taken to a meeting at USP Canaan with federal prosecutors and federal agents waiting due to the immediate appearance of impropriety that would be cast upon him by other federal inmates finding out such a meeting had occurred which would literally put Mr. Mendoza's life in jeopardy.[1]

On June 19, 2019, a hearing took place in which Defendant expressed his displeasure with his prior counsel and Defendant requested to proceed *pro se*. On June 21, 2019, an Order was entered terminating Defendant's prior counsel and

[1] The Government was fully aware that Mr. Mendoza is a member of the Surenos gang, and Undersigned Counsel argued in the Defendant's Sentencing Memorandum and at the sentencing hearing that this meeting immediately put Mr. Mendoza's life in danger because it is widely known that federal inmates, let alone gang-affiliated federal inmates, do not meet with Government agents regardless of the context of the meeting; therefore, the Government did not afford Mr. Mendoza the ability to take a plea and accept responsibility because from this point forward Mr. Mendoza was forced to go to trial in order to protect his livelihood inside the federal prison system. The District Court Judge agreed with Undersigned Counsel's argument at sentencing and Mr. Mendoza was awarded a two (2) level reduction for acceptance of responsibility due to the conduct of the Government.

allowing Mr. Mendoza to proceed *pro se* with the assistance of undersigned counsel as stand-by counsel for the trial.

Trial commenced on June 24, 2019. The alleged victim, Mr. Rojas-Flores, was not present during the trial. Mr. Mendoza and his co-defendant, Mr. Chavez, did not take the stand to testify. The evidence produced at trial was that Mr. Mendoza, Mr. Chavez, and Mr. Rojas-Flores all entered Mr. Mendoza's cell voluntarily, and sometime after all three (3) leave the cell and Mr. Rojas-Flores is bloody with multiple stab wounds. There was no eyewitness testimony as to what occurred inside Mr. Mendoza's cell and therefore no direct evidence of what occurred inside Mr. Mendoza's cell was produced at trial.

The jury ultimately found Mr. Mendoza guilty on the charge of assault with a dangerous weapon with intent to do bodily harm (Count II) and on the charge of knowingly possessing a prohibited object (Count III). The jury found Mr. Mendoza not guilty on the charge of conspiracy to commit assault with a dangerous weapon with intent to do bodily harm (Count I). Mr. Mendoza was sentenced to serve a term of imprisonment of fifty (50) months on each of Count II and Count III to run concurrently.

Mr. Mendoza filed a timely appeal with the Court of Appeals for the Third Circuit arguing that the judgement of conviction should be vacated, and the case remanded due to a violation of Mr. Mendoza's constitutional rights. On September

27, 2021 the Court of Appeals for the Third Circuit entered a judgment affirming the judgment of the District Court.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN DETERMINING THAT MR. MENDOZA HAS NOT MADE A PLAUSIBLE SHOWING THAT THE TESTIMONY OF THE DEPORTED WITNESS WOULD HAVE BEEN MATERIAL AND FAVORABLE TO THE DEFENSE.

The Government's unilateral deportation of a witness constitutes a violation of a defendant's constitutional rights when the defendant can make "some showing that the evidence lost would be both material and favorable to the defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982). Furthermore, this Court reasoned that a "defendant cannot be expected to render a detailed description of [a deported witness's] lost testimony." Id. This Court explained that when a witness is deported without the defendant having an opportunity to interview the witness, it would be unreasonable to expect that the defendant could determine precisely what favorable evidence the deported witness possess. Id. Therefore, this Court held that sanctions may be imposed on the Government for deporting witnesses if the defendant makes a "*plausible showing*" that the testimony of the deported witness would have been material and favorable to the defense. Id. (*emphasis added*).

Regarding the Governments unilateral deportation of a witness, the Fifth

Circuit has held "that defendants have a constitutional right to interview such witnesses, and must be given reasonable notice before their deportation." United States v. Avila-Dominguez, 610 F.2d 1266, 1270 (5th Cir. 1980). Mr. Mendoza was given no notice that the Government was deporting the sole witness and sole alleged victim in his pending federal criminal case.

Mr. Mendoza argued to the Third Circuit that the deported witness might have testified that he and not Mr. Mendoza was the aggressor. The Third Circuit agreed that this testimony would be material and favorable to the defense; however, the Third Circuit held that Mr. Mendoza did not explain why it is plausible that the deported witness would have so testified. Appendix A at 7. Mr. Mendoza asserts that he has made as plausible a showing as possible that the deported witness would have testified materially and favorably to the defense given the fact that the Government deprived Mr. Mendoza the ability to interview Mr. Rojas-Flores prior to deportation.

Mr. Mendoza argued to the Third Circuit that it is plausible that Mr. Rojas-Flores could have testified for the defense since Mr. Rojas-Flores was in the same gang as Mr. Mendoza and Mr. Rojas-Flores refused to cooperate with the Government. The Third Circuit stated that "[t]his speculation does not render Mendoza's account plausible." Id. Mr. Mendoza notified the District Court that he intended to present a self-defense argument at the trial. Without Mr. Mendoza

having had the opportunity to interview Mr. Rojas-Flores prior to deportation it is impossible to determine exactly to what extent Mr. Rojas-Flores' testimony would have been helpful to Mr. Mendoza.

Mr. Mendoza's situation is distinguishable from the facts considered by this Court in Valenzuela-Bernal. In Valenzuela-Bernal this Court specifically addressed that in order to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment for the Government's deportation of a witness the criminal defendant must make "a plausible showing that the testimony of the deported witness would have been material and favorable to his defense, *in ways not merely cumulative to the testimony of available witnesses*." United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (*emphasis added*).

In Valenzuela-Bernal, this Court specifically reasoned that the plausible showing of the testimony of the deported witness could not merely be cumulative to the testimony of other witnesses. Id. The fact that the Government in Valenzuela-Bernal deported two (2) of the three (3) alleged witnesses and kept one (1) in the United States to testify at trial was a critical factor this Court considered. Id. at 861. This Court reasoned that the witness the Government kept in the United States for the Valenzuela-Bernal trial was the only witness relevant to the defense for the actual charge in the indictment. Id. at 871. In Mr. Mendoza's case, the

Government took it upon their own volition to deport the sole witness and sole alleged victim without providing Mr. Mendoza any notice.

In Valenzuela-Bernal, this Court further stated that the defendant "made no attempt to explain how the deported [witnesses] could assist him" in his defense. Id. at 861. Mr. Mendoza has made many attempts that amount to much more than "some showing" or a "plausible showing" that the evidence and/or testimony of Mr. Rojas-Flores would have been favorable to his defense.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

Date: December 21, 2021

/s/ Christopher Opiel

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IN THE
SUPREME COURT OF THE UNITED STATES

RUDY MENDOZA,

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v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Christopher R. Opiel, hereby certify that on this 21st day of December 2021, I served copies of the Motion for Leave to Proceed in Forma Pauperis and the Petition for a Writ of Certiorari in the above-captioned case were mailed, first class postage prepaid to the following:

Solicitor General of the United States
Room 5616
Department of Justive
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Patricia S. Dodszuweit, Clerk
United States Court of Appeals for the Third Circuit
601 Market Street
Room 21400
Philadelphia, PA 19106-1790

Todd K. Hinkley, Esq.
Office of the United States Attorney
235 N. Washington Avenue
Scranton, PA 18503

Rudy Mendoza
Reg. No. 90731-054
USP Florence ADMAX
U.S. Penitentiary
PO BOX 8500
Florence, CO 81226

I certify that all parties required to be served have been served.

Respectfully Submitted,

Date: December 21, 2021

/s/ Christopher Opiel

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CERTIFICATIONS

I, Christopher R. Opiel, Esq., hereby certify that:

1. I am an attorney appointed under the Criminal Justice Act of 1964.
2. The text of the documents electronically filed with the Court are identical to the text of the paper copies mailed to the Court.
3. A virus check was performed on the electronic documents with AVG software, and the documents are virus free.
4. On December 21, 2021, one copy of the foregoing Petition for Writ of Certiorari was placed in the United States mail, first class, postage pre-paid addressed to: Todd K. Hinkley, Esq., Assistant United States Attorney, U.S. Attorney's Office, William J. Nealon Federal Building, Suite 311, 235 N. Washington Avenue, Scranton, PA 18503.
5. On December 21, 2021, ten copies of the same were placed in the United States mail, first class, postage pre-paid, address to: Supreme Court of the United States, Office of Clerk, 1 First Street NE, Washington, D.C. 20543.

Date: December 21, 2021

/s/ Christopher Opiel

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 19-3913 & 19-3917

_____

UNITED STATES OF AMERICA

v.

JESUS CHAVEZ,
Appellant in No. 19-3913

_____

UNITED STATES OF AMERICA

v.

RUDY MENDOZA,
Appellant in No. 19-3917

_____

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(Nos. 3:18-cr-00122-001 & 002)
District Judge: Hon. A. Richard Caputo

_____

Submitted Pursuant to Third Circuit LAR 34.1(a)
on September 20, 2021

_____

Before: CHAGARES, HARDIMAN, and MATEY, Circuit Judges

(Opinion Filed: September 27, 2021)

OPINION*

CHAGARES, Circuit Judge.

Jesus Chavez and Rudy Mendoza were indicted in connection with the assault of another inmate at United States Penitentiary ("USP") Canaan. Before their trial, the assault victim completed his sentence and was removed to Mexico before either defendant could interview him. Also pre-trial, Mendoza decided to conduct his own defense pro se, leading Chavez to move for severance of their cases. The District Court denied the motion, Chavez and Mendoza were tried together, and both were convicted. They now seek relief from their convictions, Mendoza on the ground that the removal of the assault victim violated his constitutional rights, and Chavez on the ground that the trials should have been severed. We will affirm.

I.

We write primarily for the parties so our summary of the facts is brief. On July 17, 2017, a video camera at USP Canaan captured footage of the assault victim walking from the first floor of the cell block up to the second. The victim greeted Mendoza outside the latter's cell, and they went inside and shut the door. Meanwhile, Chavez crossed from the opposite side of the cell block's second level and stood outside of Mendoza's cell with his back to the door. A few minutes later, Chavez entered Mendoza's cell. After Chavez entered, video footage shows rapid movements through

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

the window of Mendoza's cell. Mendoza, Chavez, and the victim remained in the cell for approximately twelve minutes. Chavez eventually left the cell, followed quickly by Mendoza. Mendoza was bare chested and changing into a new shirt; he appeared to be covered in water. Chavez entered a nearby cell and, with the assistance of another inmate, changed his shirt. When the victim then left the cell, a correctional officer on rounds noticed him and ordered him to get down on the floor. The victim and his clothes were covered in blood.

The officer ordered all inmates in the cell block to "lock in," meaning enter their cells so the cell block could be secured. Chavez Appendix ("App.") 162. USP Canaan officers and investigators secured the scene and searched the cells of Mendoza, Chavez, and the inmate who helped Chavez change his clothes. Mendoza's cell was covered in blood, with bloody clothing on the floor, and a shank (a homemade metal weapon suitable for stabbing) was recovered from his toilet. No bloody clothing or other evidence was recovered from the other cells.

Chavez, Mendoza, and the victim were escorted away from the cell block and examined for injuries by an emergency medical technician. The victim had stab wounds and cuts on his head, neck, chest, back, and forearm, as well as a piece of metal embedded in a laceration on his head. Mendoza had two abrasions on his leg, a circular laceration on and swelling of his thumb, and decreased ability to grip. Chavez had one abrasion on the back of his left hand and another to his lower left leg.

Mendoza and Chavez were indicted in April 2018. A year later, a grand jury returned a superseding indictment charging them with assault with a deadly weapon,

conspiracy to commit assault with a deadly weapon, and knowingly possessing an object prohibited to federal inmates, namely a shank.

The Government interviewed the victim in September 2017. He said that he was assaulted by other inmates because he had been disciplined by prison officials "for engaging in sexual acts." Mendoza App. 80. But he refused to identify his attackers, claiming that he would be killed if he did so due to his and his assailants' gang affiliation. He also refused to participate in an intelligence debrief. The Government removed the victim to Mexico in October 2018 without notice to the defendants. Chavez filed a motion in limine seeking to preclude any evidence of an assault on the victim given his unavailability for trial, while Mendoza wrote a letter to the District Court from prison that expressed concern about his constitutional right to confront his accuser.

Mendoza's letter also expressed dissatisfaction with appointed counsel and asked permission to represent himself at trial. The court held an ex parte hearing on that issue shortly before trial and granted Mendoza's request. During the hearing, Mendoza again noted that he would like to question his accuser and suggested that the victim's absence could hinder his ability to argue self-defense and would render his trial unfair.

After the court issued its order allowing Mendoza to represent himself, Chavez moved to sever their cases on the ground that Mendoza's pro se defense in a joint trial was "pregnant with the possibility of prejudice." Chavez App. 31 (quoting United States v. Veteto, 701 F.2d 136, 139 (11th Cir. 1983)). Chavez argued that the case against him was significantly weaker than the case against Mendoza and that the probability that

Mendoza would make otherwise inadmissible testimonial statements in his capacity as counsel created an unacceptable risk of prejudice to Chavez.

The court denied Chavez's motion and the defendants proceeded to trial jointly. At the outset, the court instructed the jury that Mendoza was representing himself and that his questions, statements, and arguments were not evidence. Both Mendoza and counsel for Chavez admitted in their opening and closing statements that "something," some kind of "incident" or "event" or "altercation," occurred inside Mendoza's cell. Chavez App. 133-34, 210, 214. The Government put on several witnesses from USP Canaan and introduced video and photographic evidence from the time of the assault. Mendoza cross-examined the Government's witnesses largely without objection. Chavez renewed his motion for severance after the Government rested; the court "saw no prejudice to Mr. Chavez" and again denied the motion. Chavez App. 193. In giving the jury its final instructions, the District Court reminded them that Mendoza was representing himself and that what advocates say is not evidence. The jury convicted both Mendoza and Chavez of assault and Mendoza alone of possessing a shank. Following sentencing and the resolution of various post-trial motions, both defendants timely appealed.

II.[1]

Mendoza argues that his conviction should be vacated because, by removing the victim of the assault to Mexico without notice, the Government deprived him of the opportunity to obtain potentially favorable testimony and thereby violated the Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause. Chavez argues his conviction should be vacated because Mendoza, acting pro se, made incriminating, testimonial statements that would have been inadmissible against Chavez in a severed trial and that "prevented the jury from rendering an impartial judgment." Chavez Br. 6. We consider these arguments in turn.

A.

To prevail, Mendoza "must show: First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." Mills, 956 F.2d at 446; see also id. at 445 n.4 (noting that same analysis is used for due process and compulsory process cases). It is not enough that the absent witness's testimony might have provided a "conceivable benefit" to Mendoza; rather, he must "make some plausible

[1] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review Compulsory Process Clause, Confrontation Clause, and Due Process Clause errors of the kind asserted by Mendoza for harmless error. Gov't of V.I. v. Mills, 956 F.2d 443, 448 (3d Cir. 1992); see also Crane v. Kentucky, 476 U.S. 683, 691 (1986) (Compulsory Process Clause); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (Confrontation Clause). We review the denial of a motion to sever for abuse of discretion. United States v. Urban, 404 F.3d 754, 775 (3d Cir. 2005).

showing of how the[] testimony would have been both material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 866-67 (1982).

Mendoza has not made such a showing. He argues that the victim might have testified that he and not Mendoza was the aggressor. This testimony would have been material and favorable to Mendoza's defense,[2] but Mendoza has not explained why it is plausible that the victim would have so testified. When interviewed by the Government, the victim said that he was assaulted by other inmates after being disciplined "for engaging in sexual acts." Mendoza App. 80. He refused to identify his attackers or participate in an intelligence debrief and gave no indication that he was the aggressor. Mendoza suggests that the victim's refusal to cooperate with the Government might mean that he would be willing to testify for the defense. This speculation does not render Mendoza's account plausible. See United States v. Schaefer, 709 F.2d 1383, 1386 (11th Cir. 1983) ("A defendant cannot simply hypothesize the most helpful testimony the deported witness could provide."). Mendoza has not shown that his right to either compulsory or due process was violated.

B.

We next consider whether Chavez's conviction should be vacated because his trial was not severed. Our criminal justice system favors the joint trial of jointly indicted defendants, but also recognizes that even properly joined cases may result in prejudice. See Zafiro v. United States, 506 U.S. 534, 538-39 (1993); Urban, 404 F.3d at 775. To

[2] Self-defense, also known as "justification" or "necessity," is an affirmative defense to assault. See United States v. Taylor, 686 F.3d 182, 186, 192, 194 (3d Cir. 2012); Third Cir. Model Crim. Jury Instr. § 8.04.

that end, Federal Rule of Criminal Procedure 14 provides that "[i]f the joinder of . . . defendants in . . . a consolidation for trial appears to prejudice a defendant . . . the court may . . . sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). This Rule does not mandate severance if a party proves prejudice; "rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro, 506 U.S. at 539. Severance is appropriate only in the event of a "serious risk" that an unsevered trial will "prevent the jury from making a reliable judgment about guilt or innocence" or otherwise "compromise" some specific right of a defendant. Id. Even where there is such a risk, however, limiting instructions or other "less drastic measures" will often be sufficient to neutralize possible prejudice, id., and the defendant bears the "heavy burden" of demonstrating both an "abuse of discretion in denying severance" and that this abuse "would lead to 'clear and substantial prejudice resulting in a manifestly unfair trial,'" Urban, 404 F.3d at 775 (citations omitted).

When reviewing the denial of a severance motion, we "determine from the record, as it existed when the motion was made, what trial developments were then reasonably foreseeable, and in that light decide whether the district court abused its discretion." United States v. Blunt, 930 F.3d 119, 124 (3d Cir. 2019) (quoting United States v. McGlory, 968 F.2d 309, 340 (3d Cir. 1992)). Chavez argues that the District Court should have severed the trials due to the risk, which he says came to pass, that Mendoza would make testimonial statements incriminating Chavez that would be inadmissible in a trial of Chavez alone. See Zafiro, 506 U.S. at 539 (noting this as one scenario that might

warrant severance). We see no abuse of discretion here. At the time Chavez moved to sever, Mendoza had done nothing to indicate that any risk of prejudice from his pro se defense could not be managed by limiting instructions and other "less drastic measures." Id.; compare Mendoza App. 77 (denying motion to sever in part because the District Court could "control matters") with United States v. Maxwell, No. 5:15-CR-35-2, 2017 WL 6055785, at *1 (M.D. Ga. Feb. 2, 2017) (granting motion to sever where pro se defendant had a history of disruptive behavior).

Even if the District Court had abused its discretion, we do not see any "clear and substantial" prejudice to Chavez that resulted in a "manifestly unfair trial." Blunt, 930 F.3d at 125 (quoting Urban, 404 F.3d at 775). Chavez's chief complaint is that "Mendoza essentially admitted that he had committed the assault – arguing only that the victim had instigated the 'incident,'" and "confirmed" that both Chavez and Mendoza were in Mendoza's cell during the assault. Chavez Br. 8. These statements by Mendoza may have been notionally incriminating to Chavez, but no more so than Chavez's trial counsel's own admissions to the same effect. See Chavez App. 133, 210 ("no doubt" that Chavez, Mendoza, and the victim "went into that cell," or that the victim "came out of that cell with multiple stab wounds"; "I acknowledge[] . . . that [the victim] exited that cell soaked in blood"). Chavez will not now be heard to complain about prejudice from a strategy employed by his own trial counsel — and that was eminently justifiable in light of the video evidence showing just what Mendoza and Chavez's counsel admitted to. Nor do we see any clear and substantial prejudice to Chavez in the rest of Mendoza's statements in his capacity as counsel. If anything, Mendoza's statements tended to

exculpate Chavez of the conspiracy charge. See, e.g., Chavez App. 135 ("The video never shows me or Chavez going looking for this dude."). Finally, any prejudice to Chavez was mitigated by the District Court's repeated instructions to the jury that Mendoza's statements were not evidence. See Urban, 404 F.3d at 776 ("We presume that the jury follows such instructions.").[3] Chavez has not met his heavy burden to show both an abuse of discretion and "clear and substantial prejudice resulting in a manifestly unfair trial." Id. at 775.

III.

For the foregoing reasons, we will affirm the judgments of the District Court.

[3] To the extent Chavez argues that the evidence was not sufficient to support the jury's verdict, see Chavez Reply 2, that argument is made only in passing and is forfeited. See Barna v. Bd. of Sch. Dirs., 877 F.3d 136, 145-46 (3d Cir. 2017).

UNITED STATES DISTRICT COURT

Middle District of Pennsylvania

UNITED STATES OF AMERICA
v.
RUDY MENDOZA

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:CR-18-122-02

USM Number: 90731-054

Christopher R. Opiel, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 2 and 3 of the Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:113(a)(3)	Assault of Another Inmate with a Dangerous Weapon with Intent to do Bodily Harm	6/17/2017	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 1 of the Superseding Indictment

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

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

12/3/2019
Date of Imposition of Judgment

Signature of Judge

A. Richard Caputo, United States District Judge
Name and Title of Judge

December 3, 2019
Date

DEFENDANT: RUDY MENDOZA
CASE NUMBER: 3:CR-18-122-02

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18:1791(a)(2)	Possession of a Prohibited Object (Shank) by an Inmate	6/17/2017	3

DEFENDANT: RUDY MENDOZA
CASE NUMBER: 3:CR-18-122-02

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Fifty (50) months on each of Counts 2 and 3 to run concurrently. This term shall run consecutively to the sentences imposed on Docket Number 11-cr-974-08 in the United States District Court for the Southern District of New York.

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RUDY MENDOZA
CASE NUMBER: 3:CR-18-122-02

ADDITIONAL IMPRISONMENT TERMS

In determining this sentence, I have considered the Sentencing Guidelines as well as the purpose of Title 18 U.S.C. § 3553(a) namely -
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence I impose
(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment of the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(4) the need to provide restitution to any victims of the offense.
Moreover, I find the sentence imposed is reasonable.

You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. With few exceptions, any notice of appeal must be filed within 14 days after sentence is imposed on you.

If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the Clerk of the Court will prepare and file a notice of appeal on your behalf.

DEFENDANT: RUDY MENDOZA
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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

No term of supervised release imposed.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: RUDY MENDOZA
CASE NUMBER: 3:CR-18-122-02

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$	$	$	$

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

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

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

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

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RUDY MENDOZA
CASE NUMBER: 3:CR-18-122-02

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

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

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

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

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

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

F ☑ Special instructions regarding the payment of criminal monetary penalties:
IT IS HEREBY ORDERED that a Special Assessment of $100 on each count is payable to the Clerk of Court, United States District Court, and is due immediately. The Court further finds that the Defendant does not have the ability to pay a fine.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.