APPENDIX

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 20-2876, 20-2912, and 20-2938

[Filed March 8, 2023]

UNITED STATES OF AMERICA)
)
v.)
)
ANTOINE CLARK a/k/a RICH)
Appellant in No. 20-2876)
)
GERALD SPRUELL)
Appellant in No. 20-2912)
)
DANIEL ROBINSON,)
Appellant in No. 20-2938)
)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 2-19-cr-00015-001,
2-19-cr-00015-002, and 2-19-cr-00015-004)
District Judge: Honorable Gerald J. Pappert

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 24, 2023

Before: HARDIMAN, KRAUSE, and MATEY,
Circuit Judges.

(Filed: March 8, 2023)

OPINION[*]

MATEY, *Circuit Judge.*

Appellants Antoine Clark, Gerald Spruell, and Daniel Robinson challenge their convictions and sentences for drug trafficking. Seeing no prejudicial error, we will affirm the District Court's judgments.

I.

Clark, Spruell, Robinson, and six other defendants were charged with conspiracy to distribute cocaine base ("crack") and heroin in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), and various other drug-related offenses. The charges stemmed from a drug trafficking operation using a phone (the "4400 phone") to receive and arrange orders for crack and heroin.

While Appellants' co-conspirators pleaded guilty to the charges against them, Clark, Spruell, and Robinson chose a jury trial and were convicted on all counts. Each received a sentence of at least 25 years' imprisonment and each sought post-trial relief. The District Court denied Appellants' motions, and this

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

consolidated appeal followed. Finding no prejudicial error, we will affirm.[1]

II.

Appellants, both collectively and individually, challenge wiretap evidence obtained from the 4400 phone, the sufficiency of the Government's evidence in support of their conspiracy convictions, and the calculation of their sentences. We address those arguments, and the standard under which we review them, in turn.

A. Title III Wiretap

Clark and Robinson argue the District Court erred when it denied the motion to suppress the Title III wiretap of the 4400 phone.[2] They claim the Government failed to establish necessity for the wiretap. The necessity requirement, 18 U.S.C. § 2518, ensures that phone surveillance "be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *United States v. Bailey*, 840 F.3d 99, 114 (3d Cir. 2016) (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)). Because wiretaps are "not to be routinely employed as the initial step in criminal investigation," *id.* (quoting *Giordano*, 416 U.S. at 515),

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291.

[2] We review the District Court's approval of a wiretap application for clear error, "while exercising plenary review over its legal determinations." *United States v. Bailey*, 840 F.3d 99, 113 (3d Cir. 2016).

the Government's wiretap application must show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," *id.* (quoting 18 U.S.C. § 2518(3)(c)). But the Government need not "exhaust all other investigative procedures before resorting to" a wiretap. *United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997) (citations omitted).

Here, the Government carried its burden under Title III. The affidavit in support of the wiretap application adequately identified alternative investigative techniques and explained the reasons for their insufficiency. Confidential informants, for instance, could not infiltrate the higher ranks of Appellants' organization, while physical surveillance and pole cameras provided only limited information. Trash collection at Appellants' residences would have been impractical since garbage was commingled in communal dumpsters. And inquiries into Appellants' financial records proved inconclusive. Even if the Government failed to "exhaust *all* . . . investigative procedures," *id.* (emphasis added), it has adequately demonstrated that "normal investigative procedures" have failed or appear "unlikely to succeed if tried." 18 U.S.C. § 2518(3)(c). Nothing more is required.

B. Sufficiency of the Evidence

Spruell and Robinson also challenge the sufficiency of the Government's evidence in support of their conspiracy convictions.[3] They raise three issues:

[3] Our review of the District Court's sufficiency determination is "highly deferential," and we view "the evidence in the light most

(1) Spruell contends that the evidence failed to show that he and his co-defendants were anything more than "independent contractors"; (2) Spruell and Robinson claim the Government improperly aggregated drug weights to meet the threshold of 21 U.S.C. § 841(b)(1)(A); and (3) Robinson challenges the Government's evidence of the drug weights distributed, based on testimony of FBI Agent Charles Simpson. None of these claims is availing.

To prove a conspiracy to distribute drugs, the Government must show that Appellants had (1) "a shared unity of purpose," (2) "an intent to achieve a common goal," and (3) "an agreement to work together toward that goal." *Bailey*, 840 F.3d at 108 (citation omitted). At trial, the Government presented ample evidence that for over two years Appellants shared a phone to service a joint customer base for narcotics, working around the clock, with Spruell even describing himself as the "night man." Spruell Opening Br. 14. Recordings of conversations from the 4400 phone confirmed as much, revealing that Appellants arranged shift changes to cover phone orders, facilitated drug sales as a group, and warned one another of law enforcement detection. All of which provided a more than sufficient basis to support the jury's finding of conspiracy.[4]

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favorable to the prosecution." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424, 430 (3d Cir. 2013) (en banc) (quotation omitted).

[4] Spruell and Robinson also challenge the Government's occasional references during trial to non-trial co-defendants as co-conspirators. But even if the District Court abused its discretion

The Government also properly aggregated drug weights to support Appellants' drug-related convictions. Along with conspiracy, Appellants were charged and convicted under 21 U.S.C. § 841(b)(1)(A), which penalizes the manufacturing, distribution, or possession with intent to manufacture or distribute at least one kilogram of heroin and at least 280 grams of crack. Spruell and Robinson allege that the Government, to meet that threshold, improperly aggregated Appellants' individual drug transactions in violation of our precedent. But the case on which they rely, *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), does not apply. In *Rowe*, we rejected aggregation of drug weights as to a single defendant arrested for selling about 200 grams of heroin but convicted of distributing and possessing with intent to distribute 1,000 grams, meeting the threshold of § 841(b)(1)(A). *Id.* at 756. Spruell and Robinson, unlike the defendant in *Rowe*, were part of a conspiracy, not independent contractors in the criminal enterprise. Here, the Government also charged and established a conspiracy involving Spruell, Clark, and Robinson—a distinction we addressed in *United States v. Williams*, 974 F.3d 320 (3d Cir. 2020). There, we confirmed that drug quantities involved in 21 U.S.C. § 841(a) violations involving multiple conspirators "may be aggregated for determining the mandatory minimum of any one

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in allowing the co-conspirator language, in light of Appellants' conspiracy charges, any error was harmless, as the jury was properly instructed on the elements of conspiracy as well as on the Government's burden of proof. And we presume that jurors "follow the instructions given them by the court." *Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014).

conspirator," as long as the quantities were "reasonably foreseeable" to that conspirator. *Id.* at 366. Nothing in the record or in the caselaw suggests that the aggregation theory was misapplied below.[5] Spruell and Robinson, as members of the conspiracy, were responsible for the entire, reasonably foreseeable volume of drugs distributed among the group to its customers—a result on which *Rowe* has no effect.

Nor does the evidence point to any error in the Government's calculation of the drug quantities stemming from the conspiracy. Robinson takes particular issue with FBI Agent Simpson, who testified about his extensive review of six weeks of wiretapped phone calls comprising 40 "shifts" on the 4400 phone. Using his findings from that investigation, Agent Simpson extrapolated the quantities and proportion of drugs sold during those shifts to the full two-year stretch of the conspiracy. Robinson claims that

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[5] Relatedly, Robinson also argues the jury instructions aggregating the weights constructively amended the superseding indictment in violation of the Fifth Amendment. Not so. Because this objection was not preserved at trial, we review it for plain error. *United States v. Boone*, 279 F.3d 163, 174 n.6 (3d Cir. 2002). The District Court explained to the jury that should it find Appellants guilty of conspiracy (based on the elements the Court outlined), it should subsequently consider "all the crack that the members of the conspiracy possess[ed] with *intent to distribute, distributed or intended to distribute*, and which was reasonably foreseeable to [Robinson]." Robinson App. 2750 (emphasis added). The instruction as to the quantity of heroin was substantively identical. The instruction simply made clear the jury could consider the drugs Appellants distributed *and* the drugs they possessed with intent to distribute—all offenses charged in the indictment. *See Williams*, 974 F.3d at 366. There was no constructive amendment.

methodology was speculative and arbitrary, but he ignores the plethora of evidence supporting Agent Simpson's testimony. The Government also presented proof of Appellants' participation in 20 controlled drug purchases, showed evidence of Appellants' coordination of a large re-supply of crack, and offered testimony from a co-defendant. All of which combined, even without Agent Simpson's testimony, proved that Appellants' drug quantities exceeded the threshold of 21 U.S.C. § 841(b)(1)(A). Agent Simpson's testimony merely "tied together and confirmed what the underlying evidence had already established." Clark App. 30.[6]

C. Sentencing Calculations

Spruell and Robinson raise a series of challenges to their sentences. But none show prejudicial error.

First, Spruell argues that his prior drug convictions in Pennsylvania do not qualify as § 841(b)(1)(A) predicates because Pennsylvania's drug schedules are broader than the offenses covered by the Controlled

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[6] The same conclusion applies to arguments raised by Spruell and Robinson challenging the summary drug weight evidence used by the District Court at sentencing. As the District Court explained, its findings drew from the evidence adduced at trial, including Agent Simpson's testimony, the "hundreds of recordings" showing Appellants' drug activities, and the thousands of calls intercepted about drug sales. Clark App. 28–29. By any measure, Appellants fail to establish that the Court's findings were "completely devoid of minimum evidentiary support displaying some hue of credibility," as they must do to succeed. *United States v. Williams*, 898 F.3d 323, 332 (3d Cir. 2018) (citation omitted).

Substances Act ("CSA").[7] We have concluded 35 Pa. C.S. § 780-113(a)(30) is divisible, so we apply the modified categorical approach. *United States v. Abbott*, 748 F.3d 154, 158 (3d Cir. 2014).

Section 780-113(a)(30) prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." As the Supreme Court has instructed, any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are considered elements of the crime. *Abbott*, 748 F.3d at 159 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 (2013)). Under Pennsylvania law, the type of controlled substance involved in the offense alters the prescribed range of penalties, meaning "the type of drug" is an element of the crime. *Id.*

So we look to the charging document to determine which controlled substance (i.e., which element of the statute) was involved in the defendant's offense. Spruell's prior conviction for cocaine[8] qualified as a

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[7] We exercise plenary review over legal questions, including challenges to the application of § 841(b) enhancements. *See United States v. Henderson*, 841 F.3d 623, 626 (3d Cir. 2016) (citation omitted).

[8] The Government acknowledges that Spruell's marijuana offense under 35 Pa. C.S. § 780-113(a)(30) was not a serious drug felony because it carried a maximum term of imprisonment of less than ten years. *See* 35 Pa. C.S. § 780-113(f)(1), (2); §§ 780-104(1)(iv), 780-102(b). That makes the enhancement in § 841(b)(1)(A) inapplicable. *See* 21 U.S.C. §§ 802(57), 841(b)(1)(A); 18 U.S.C. § 924(e)(2). As a result, Spruell's mandatory minimum term of imprisonment was 15 years, not 25 years as calculated in the presentence report and adopted by the District Court at

"serious drug felony" under § 841(b)(1)(A), and thus a predicate offense for a sentencing enhancement under § 841(b)(1)(A).

Next, Spruell questions the career offender offense level calculation in his presentence report. As the Government concedes, the calculation was improperly based on his conspiracy conviction. *United States v. Nasir*, 17 F.4th 459, 468, 469 n.10 (3d Cir. 2021) (en banc) (holding that inchoate crimes, including conspiracy, are not predicate offenses for a career offender enhancement). But the error played no role in the District Court's computation of Spruell's sentence. Under the sentencing guidelines, the career offender offense level governs the sentencing calculation only if it is *greater* than the offense level otherwise applicable. U.S.S.G. § 4B1.1(b). Spruell's *non-career* base offense level of 38 was greater than the incorrectly calculated career offender offense level of 37. So the latter was a nullity in the District Court's sentencing decision.[9]

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sentencing. But as we discuss below that error is harmless. The enhancements in § 841(b) did not alter Spruell's Guidelines range or his actual sentence because Spruell's controlling non-career offender offense level was higher than the career offender calculations.

[9] Robinson made a similar argument on Reply. Normally we find such arguments forfeited. *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003). But since the Government acknowledged the mistake, we will address the error in Robinson's career offender offense level calculation. Robinson's non-career offender offense level was 36, producing a Guidelines range of 324 to 405 months, below the range the Court considered (360 months to life). This error is harmless because the Court sentenced Robinson to 324 months, the bottom of the correct Guidelines range. Given the Court's

Finally, Spruell argues that the District Court erred in computing his criminal history category. He claims that two prior offenses for which he was arrested on the same day—for a drug crime and for threatening a police officer—should have been treated as only one conviction for purposes of his criminal history score. Spruell's position is foreclosed by the clear language of U.S.S.G. § 4A1.2(a)(2). Prior sentences are counted separately under that provision "if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Spruell was arrested for possessing with the intent to deliver narcotics, and after arriving at the police station for processing, threatened several officers—a separate crime for which he was also charged. So the record is clear that Spruell was arrested for the drug offense *prior to* committing the second offense, threatening the officers. His prior sentences were properly counted separately.

III.

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

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downward variance, there is no reasonable probability that Robinson's sentence would have been different had the correct Guidelines range applied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case Number: DPAED2:19CR00015-002

[Filed September 9, 2020]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
GERALD SPRUELL	)
	)

JUDGMENT IN A CRIMINAL CASE

USM Number: 76813-066

Thomas F. Burke, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1s, 2s, 4s, 16s, 17s, 18s, 23s, 24s, 41s, 47s, 52s, 62s, and 63s.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21:846-841 (a)(1),(b)(1) (A),(b)(1)(B), (b)(1)(C) See page 2.	CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCES	6/21/2016	1s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984;

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

☒ Count(s) 29s ☒ 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.

9/9/2020
Date of Imposition of Judgment

/s/ Gerald J. Pappert
Signature of Judge

Gerald J. Pappert, United States District Judge
Name and Title of Judge

9/9/2020
Date

CC: Thomas Burke, Esq
Jason Grenell, AUSA
Matthew Newcomer, AUSA
U.S. Marshal
Probation
Pretrial Services
Flu

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21:841(a)(1), (b)(1)(C); 18:2	DISTRIBUTE COCAINE BASE ("CRACK") AND HEROIN - AIDING AND ABETTING	6/21/2016	18s.

21:841(a)(1), (b)(1)(C)	DISTRIBUTION OF HEROIN	6/21/2016	16s, 17s, 24s 62s, 63s.
21:841(a)(1), (b)(1)(C)	POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE AND HEROIN	6/21/2016	47s.
21:841(a)(1), (b)(1)(C)	POSSESSION WITH INTENT TO DISTRIBUTE HEROIN	6/21/2016	52s.
21:841(a)(1), (b)(1)(C)	DISTRIBUTION OF COCAINE BASE ("CRACK") AND HEROIN	6/21/2016	2s, 4s, 23s.
21:841(a)(1), (b)(1)(C)	POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE ('CRACK")	6/21/2016	41s.

IMPRISONMENT

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

312 months. This term consists of 312 months on each of Counts 1s, 2s, 4s, 16s, 17s, 18s, 23s, 24s, 41s, 47s,

52s, 62s, and 63s, all such terms to be served concurrently.

☐ 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

SUPERVISED RELEASE

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

Ten years. This term consists of ten years on Count 1s and six years on each of Counts 2s, 4s, 16s, 17s, 18s, 23s, 24s, 41s, 47s, 52s, 62s, and 63s, all such terms to run concurrently.

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.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you

must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the

change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall refrain from the illegal possession and or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall participate in drug treatment and abide by the rules of any such program until satisfactorily discharged.

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	$ 1,300.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ 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.

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* 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.

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:

SCHEDULE OF PAYMENTS

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

*** 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.

A ☒ Lump sum payment of $ 1,300.00 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 further ordered that the defendant shall pay to the United States a total special assessment of $1300, which shall be due immediately.

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.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION NO. 19-00015-1, 2, 4

[Filed September 3, 2020]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ANTOINE CLARK, *et al.*,	)
Defendants.	)
	)

PAPPERT, J. **September 3, 2020**

MEMORANDUM

A jury convicted Antoine Clark, Daniel Robinson and Gerald Spruell of a variety of drug crimes. The defendants have filed several post-trial motions, each of which the Court denies.

I

A grand jury returned an indictment charging Clark, Robinson, Spruell and others with conspiring to distribute 280 grams or more of crack cocaine and 1,000 grams or more of heroin. (Superseding Indictment 2–21, ECF No. 143.) The indictment also charged each defendant with distributing or possessing

crack or heroin on specific dates. *See, e.g.*, (*id.* at 22–25). Of the nine persons indicted in the drug-trafficking conspiracy, only Clark, Robinson and Spruell went to trial.

A

At trial, the government showed how the defendants ran a "drug delivery service" akin to "a pizza delivery service." (Trial Tr., Vol. I, at 15:15–16, ECF No. 386.) A customer would call a phone—dubbed "the 4400 phone"—order crack or heroin and arrange a place to meet. (*Id.* at 15:17.) Clark, Robinson, Spruell or another conspirator would then "drive to the location and deliver the drugs." (*Id.* at 15:20–21.) To keep the business running nonstop, "the Defendants staffed the 4400 phone in shifts.". (*Id.* at 15:17–22.) The person with the phone "would take orders and make drug deliveries" and then "pass the phone onto the next Defendant." (*Id.* at 15:25–16:3.)

Though they put the government to its burden of proof on all counts, the defendants in many instances did not deny that they sold drugs. *See, e.g.*, (*id.* at 23:5–10, 29:7–9); (*id.*, Vol. IX, at 58:5–7, 67:9–12, 95:20–22, ECF No. 394). But they disputed the government's theory that they conspired together to distribute drugs. *See, e.g.*, (*id.* at 53:3–5, 86:18–19). Playing on the government's pizza analogy, the defendants compared themselves to Uber drivers working independently rather than as members of a single distribution system. *See, e.g.*, (*id.* at 88:3–90:14). And even if a conspiracy did exist, the defendants argued, the government could not prove beyond a reasonable doubt that it involved at

least 280 grams of crack cocaine and 1,000 grams of heroin. *See, e.g.*, (*id.* at 86:8–12).

1

The jury heard eight days of evidence.[1] Over the first few days, FBI agents recounted the more than twenty controlled drug buys they arranged with the defendants through the 4400 phone. *See, e.g.*, (*id.*, Vol. I, at 69:13–87:23). For each buy, the government introduced audio or video recordings, laboratory reports, property receipts, physical drugs or surveillance photographs to support the agents' testimony. *See, e.g.*, (*id.*); (Gov't Exs. 16-5, 16-6, 16-8, 16-9). In total, the government recovered about sixty-four grams of crack and nine grams of heroin from these controlled buys. *See* (Gov't First Resp. 9, ECF No. 426); *see also* (Trial Tr., Vol. VI, at 138:23–157:9, ECF No. 391) (stipulation as to weights and identity of most of the seized drugs).

On the fourth day of trial, Christopher Verticelli, a co-defendant who had pleaded guilty, testified. He told the jury that he "continuously called" the 4400 phone to buy crack and heroin from the defendants. (*Id.*, Vol. IV, at 146:6, ECF No. 389.) Almost every day, Verticelli recalled, he bought "10 rocks of crack cocaine and 3 to 5 bundles of heroin." (*Id.* at 146:10–11.) Expressed as weights, Verticelli's near-daily order came to about two grams of crack and more than a

[1] Unless specifically noted otherwise, all testimony and evidence discussed in this section were admitted without objection either before or during trial. *See* Fed. R. Evid. 103(a) (discussing how to preserve a claim of error in the admission or exclusion of evidence).

gram of heroin. *See* (*id.* at 188:4–6); (*id.*, Vol. VIII, at 28:22–31:1, 32:22–33:22, ECF No. 393). Phone records, government surveillance and Verticelli's testimony suggested that he bought at least 276 grams of crack and 173 grams of heroin from the defendants in a seven-month period. *See* (*id.*, Vol. V, at 81:25–82:5, ECF No. 390); (*id.*, Vol. IX, at 39:24–40:15). Evidence of other high-volume customers showed that Verticelli's experience was not unique. *See, e.g.*, (*id.*, Vol. V, at 71:4–73:12, 75:19–89:18).

Verticelli also detailed how the defendants' drug delivery service worked. As he recalled, he "could always call [the 4400 phone], and they would always be around." (*Id.*, Vol. IV, at 153:12–13.) Depending on the time of day, the person who answered the phone would vary, Verticelli recounted. *See* (*id.* at 153:14–154:10). That said, he remembered that Clark usually worked mornings, Robinson nights and Spruell some of both. *See* (*id.* at 154:20–155:8). But no matter who was working, someone "pretty much always answered." (*Id.* at 153:24.)

Throughout the trial, the government presented the evidence gathered from a pen register and wiretap of the 4400 phone. For example, FBI Special Agent Charles Simpson, the lead investigator, told jurors about the "shocking" number of calls the 4400 phone received each day. (*Id.*, Vol. V, at 54:1.) The wiretap showed more of the same; it captured over 8,000 phone calls, nearly all of which concerned a drug sale. *See* (*id.* at 191:21–22); (*id.*, Vol. VIII, at 116:10–15). Having listened to each call "multiple times," (*id.*, Vol. V, at 191:25), Simpson identified Clark as the speaker on

about 23%, Robinson around 18% and Spruell roughly 17% of the calls, *see* (*id.* at 192:22–193:22); (Gov't Ex. 39A-15). The jury listened to over 100 of these recordings. *See, e.g.*, (Trial Tr., Vol. V, at 183:16–184:5); (Gov't Ex. 54-1). Though most calls involved relatively small quantities of drugs, *see, e.g.*, (Gov't Ex. 70-1); (Trial Tr., Vol. VI, at 55:3–56:11), a series of recordings showed the defendants working together to buy fifty-six grams of cocaine to convert into crack, *see* (*id.*, Vol. V, at 196:6–229:3); (*id.*, Vol. VI, at 37:13–41:11); (Gov't Exs. 64-1–14).

Simpson summarized the evidence gleaned from the wiretap. *See* (Trial Tr., Vol. VIII, at 114:19–133:18, 138:12–169:5). Given the volume of material, Simpson limited his analysis to forty "shifts" from the six weeks the wiretap was active. *See* (*id.* at 115:4–10). He defined a "shift" as the period one person worked the 4400 phone before handing it off to another person. *See* (*id.* at 115:17–23). To determine when one shift ended and another began, Simpson listened for when the voice answering the 4400 phone changed and cross-checked the audio against photo surveillance, text messages and other evidence. *See* (*id.* at 115:17–116:2). He then selected forty shifts that reflected the defendants' typical practices—that is, he included short and long shifts. *See* (*id.* at 140:24–141:8).

For these forty shifts, Simpson listened to every call and recorded "the amount of drugs that were being sold." (*Id.* at 115:9.) His assessments of the quantities sold erred on the conservative side. Determining the amounts was simple if a caller asked for three bags of crack; he simply "noted that drug and that amount."

(*Id.* at 118:14.) But if a caller asked for crack without specifying the quantity, Simpson assumed the sale was for just one bag of crack. *See* (*id.* at 119:5–10). When a caller asked for multiple bags but did not name a definite quantity, Simpson treated it as a sale of two bags. *See* (*id.*). And if a caller did not say which drug he wanted, Simpson alternated recording crack and heroin. *See* (*id.* at 120:11–121:4). Over no objections, the Court admitted into evidence Simpson's notes identifying the type and weight of the drugs sold on each shift. *See* (*id.* at 127:7–12); (Gov't. Ex. 119-1).

The defendants did, however, object to a key part of Simpson's testimony. *See* (Trial Tr., Vol. VIII, at 135:16–137:14). They argued that Simpson lacked foundation for his methodology of identifying drug type and weight "when he couldn't tell what transpired" from the recordings. (*Id.* at 135:17–18.) So the testimony regarding sales for which the recordings did not specify a drug and quantity should have been "stricken as speculative," the defendant reasoned.[2] (*Id.* at 135:21.) In response, the government argued that it had laid a sufficient foundation by playing over 100 calls showing the jury "what happens when these calls are made." (*Id.* at 136:15.) The government added that it was "up to the jury to decide ultimately whether [to] credit Agent Simpson." (*Id.* at 136:16–17.) The Court agreed with the government, overruling the objection and noting that the defendants were free to challenge Simpson's credibility and the accuracy of his

[2] By objecting on this limited basis, the defendants forfeited all other objections to Simpson's testimony and the accompanying exhibits 119-1 and 119-2. *See* Fed. R. Evid. 103(a).

assumptions during cross-examination. (*Id.* at 136:22–137:6.)

When testimony resumed, Simpson ran through the drug quantities he determined the defendants sold during each shift. *See* (*id.* at 138:12–141:10). By his calculations, the defendants sold 257.3 grams of crack and 69.42 grams of heroin over the forty shifts he reviewed. *See* (*id.* at 154:24–155:4). On a per-shift basis, this amounted to just under 6.5 grams of crack and about 1.7 grams of heroin. *See* (*id.* at 155:5–17). Using these figures, Simpson extrapolated that the defendants sold about 180 grams of crack and almost fifty grams of heroin per week. *See* (*id.* at 161:1–5). For the six-week life of the wiretap, then, Simpson opined that the defendants sold over 1,000 grams of crack and 290 grams of heroin. *See* (*id.* at 162:2–6). Applying these calculations to the life of the conspiracy, Simpson surmised that the defendants sold over 17,000 grams of crack and at least 4,500 grams of heroin. *See* (*id.* at 162:10–169:4). To help the jury follow this testimony, the government introduced, with no defense objection, an exhibit showing Simpson's calculations and estimates. *See* (154:13–16); (Gov't Ex. 119-2).

The defendants vigorously cross-examined Simpson. *See* (Trial Tr., Vol. VIII, at 169:12–214:21). They challenged whether forty shifts were representative of a conspiracy lasting several years. *See* (*id.* at 169:21–171:22). They implied that Simpson may have used longer-than-average shifts in his analysis. *See* (*id.* at 172:17–174:16). They emphasized for the jury that the wiretap was active for just six weeks, so Simpson could not say for certain what volume of sales occurred

during the rest of the alleged conspiracy. *See* (*id.* at 174:17–175:18). They probed the soundness of Simpson's decisions to alternate evenly between crack and heroin when assigning a drug type to an indeterminate sale. *See* (*id.* at 192:2–195:6). They pressed Simpson on whether his methodology was truly as conservative as he presented it to be. *See* (*id.* at 198:13–199:16). And they doubted that the defendants' modest lifestyles fit with the scale of the drug trafficking operation Simpson's testimony supported. *See* (*id.* at 201:6–214:21).

2

After the government rested its case, the defendants moved for acquittal on the conspiracy charge. *See* (*id.* at 258:19–259:2); (Defs.' First Mot. for Acquittal, ECF No. 320). Relying on *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), the defendants argued that the government could not aggregate separate drug sales to prove that they conspired to distribute at least 280 grams of crack and 1,000 grams of heroin. *See* (*id.* at 1–4). In the alternative, they claimed that there was "a fatal variance in the Indictment." (*Id.* at 6.) The *Rowe* and variance theories were the only bases for acquittal the defendants offered. *See* (*id.*); (Trial Tr., Vol. VIII, at 258:19–279:24). Though the Court expressed skepticism, it took the motion "under advisement." (*Id.* at 279:21.)

In the meantime, the parties delivered closing statements and the jury retired to deliberate. After deliberating for more than a day, the jury found each defendant guilty of conspiring to distribute 280 grams or more of crack cocaine and 1,000 grams or more of

heroin. *See* (Jury Verdict Forms, EFC Nos. 329, 330, 331). The jury also found each defendant guilty on the individual distribution and possession charges. *See* (*id.* at 2–5).

B

The Court set April 24 as the deadline for post-trial motions. *See* (Trial Tr., Vol. X, at 68:16–19, ECF No. 395); (First Deadline Order, ECF No. 327). The Court later extended the deadline to June 29 to accommodate difficulties associated with the onset of COVID-19. (Second Deadline Order, ECF No. 354.) A few days before the June deadline, the Court granted Robinson's request for another thirty days. *See* (Robinson Mot. for Extension, ECF No. 375); (Order Granting Setting Robinson Mot. for Extension, ECF No. 376). Neither Clark nor Spruell joined in Robinson's request or sought an extension of his own.

Robinson filed two timely post-trial motions. *See* (Robinson Mot. for Acquittal, ECF No. 412); (Robinson Mot. for New Trial, ECF No. 413). In the first, he argues that the government failed to present sufficient evidence to convict him on the conspiracy charge or on four of the individual distribution charges. *See* (Robinson Mot. for Acquittal 4). In his second motion, Robinson reiterates that the jury's verdict on the conspiracy charge ran contrary to the evidence, and he argues that evidentiary errors infected the jury's deliberations. *See* (Robinson Mot. for New Trial 19–22).

Only after Robinson's deadline had lapsed did Clark and Spruell try to join Robinson's motion for a new

trial.[3] *See* (Mots. for Joinder, ECF Nos. 414, 425). A week or so later, Spruell filed two motions for acquittal—one by counsel and one *pro se*. *See* (Spruell First Mot. for Acquittal, ECF No. 424); (Spruell Pro Se Mot. for Acquittal, ECF No. 429).

II

A

Rule 29 of the Federal Rules of Criminal Procedure provides that a court, "on the defendant's motion[,] must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Evidence is insufficient if no "rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc) (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)). This standard is "highly deferential." *Id.* It requires courts to view the entire record—not just isolated parts—"in the light most favorable to the prosecution." *Id.* (quoting *Brodie*, 403 F.3d at 133). Courts "must be ever vigilant not to usurp the role of the jury by weighing credibility and assigning weight to the evidence." *Id.* (ellipsis omitted) (quoting *Brodie*, 403 F.3d at 133). And to avoid "act[ing] as a thirteenth juror," a court must uphold any verdict that "does not "'fall below the threshold of bare rationality.'" *Id.* at 431

[3] To the extent these motions for joinder could somehow be considered timely, the Court could have granted them and then rejected the arguments they adopted. But because the Court denies Robinson's motion, it denies them as moot.

(quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)).

B

A more deferential standard of review applies to motions for a new trial under Rule 33. That rule permits district courts to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Courts need "not view the evidence favorably to the Government," *United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). That said, Rule 33 motions are "disfavored and should be 'granted sparingly and only in exceptional cases.'" *Id.* (quoting *Gov't of Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)). For example, a court may "order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) (quoting *Johnson*, 302 F.3d at 150). And a court may grant a new trial to cure an error at trial only if the defendant proves that the error (or errors) "had a substantial influence on the outcome of the trial." *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019) (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)).

III

A

At the close of the government's case, the defendants moved for acquittal on the conspiracy charge on two bases. *See* (Defs.' First Mot. for Acquittal). They first argued that *Rowe* barred the government from aggregating separate drug sales to get to 280 grams of crack and 1,000 grams of heroin. *See* (*id.* at 1–6). And because the government could not point to any single sale involving those amounts, the defendants reasoned that they must be acquitted. *See* (*id.*) Alternatively, they claimed that there was "a fatal variance in the Indictment," which led to the same result. (*Id.* at 6.) Having reserved judgment, *see* (Trial Tr., Vol. VIII, at 279:21), the Court now rejects both arguments.

1

To start, *Rowe* is inapposite. Charged with selling 1,000 grams of heroin, the defendant there conceded that he had sold about 200 grams. *See* 919 F.3d at 756. To get to 1,000 grams, the government elicited testimony from an informant and a Drug Enforcement Administration agent; it also proffered a notebook recovered from the defendant during his arrest. *See id.* at 757. But none of this evidence suggested that the defendant ever sold 1,000 grams or more in a single transaction. *See id.* at 757–58. This was a problem, the Third Circuit reasoned, because "separate acts of distribution of controlled substances are distinct offenses . . . , as opposed to a continuing crime." *Id.* at 759 (quotation omitted). Seeing no evidence of a sale

exceeding 1,000 grams, the Court of Appeals vacated the defendant's conviction. *See id.* at 761.

Here, the government charged the defendants with conspiring to distribute drugs—in addition to distributing and possessing with the intent to distribute. *See* (Superseding Indictment 2–21). Conspiracy, unlike the crimes involved in *Rowe*, "is a continuing offense." *Smith v. United States*, 568 U.S. 106, 111 (2013). As a result, each defendant is responsible for "the entire quantity of drugs that pass[es] through the conspiracy." *United States v. Gibbs*, 190 F.3d 188, 215 (3d Cir. 1999). And in calculating that amount, the jury (or court at sentencing) may "aggregate multiple drug transactions."[4] *United States v. Gori*, 324 F.3d 234, 237

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[4] *See also United States v. Yellow Horse*, 774 F.3d 493 (8th Cir. 2014) ("When calculating drug quantity in the context of a narcotics trafficking conspiracy, the sentencing court may consider all transactions known or reasonably foreseeable to the defendant that were made in furtherance of the conspiracy." (quotation omitted)); *United States v. Ramirez-Negron*, 751 F.3d 42, 53–54 (1st Cir. 2014) (affirming sentence for conspiracy to distribute crack based on aggregation of individual sales); *United States v. Law*, 528 F.3d 888, 906 (D.C. Cir. 2008) ("Here, the conspiracy was dealing drugs, and thus the entire sum of the drugs within the conspiracy constituted a single conspiracy violation. Accordingly, the district court did not commit plain error by relying on the jury's aggregated drug quantity determination . . . ."); *United States v. Pressley*, 469 F.3d 63, 65–67 (2d Cir. 2006) (holding that "the District Court properly aggregated all the drug transactions attributable to [the defendant] throughout the 11-year scheme"); *United States v. Turner*, 319 F.3d 716, 723–24 (5th Cir. 2003) (affirming conviction for conspiracy to distribute five kilograms of cocaine even though the defendant "dealt in one-kilogram quantities only").

(3d Cir. 2003). *Rowe* did not upset that basic tenet of conspiracy law. *See Britt v. United States*, No. CV 18-16357 (PGS), 2020 WL 3249118, at *11 (D.N.J. June 16, 2020) (reaching the same conclusion); *United States v. Kendrick*, No. CR 17-143-4, 2019 WL 2248631, at *1–2 (W.D. Pa. May 17, 2019) (same); *United States v. Perin*, No. 2:14-CR-205-2, 2019 WL 3997418, at *4 (W.D. Pa. Aug. 23, 2019) (same).

2

Nor is there "a fatal variance in the Indictment." (Defs.' First Mot. for Acquittal at 6.) The defendants claim that the evidence at trial revealed many separate conspiracies to distribute drugs. *See* (*id.* at 6–7). But the indictment charged them with a single, overarching conspiracy run through the 4400 phone. That discrepancy, the defendants reason, constitutes a fatal variance. *See* (*id.*)

No variance exists if, "viewing the evidence in the light most favorable to the government, a rational trier of fact could have concluded from the proof adduced at trial the existence of the single conspiracy alleged in the indictment." *United States v. Greenridge*, 495 F.3d 85, 93 (3d Cir. 2007) (citation omitted). To determine if one or multiple conspiracies exist, courts first "examine whether there was a common goal among the conspirators." *Id.* (quoting *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989)). They next "look at the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators." *Id.* (quoting *Kelly*, 892 F.2d at 259). Finally, courts asses "the extent to which

the participants overlap in the various dealings." *Id.* (quoting *Kelly*, 892 F.2d at 259).

A rational jury could conclude that the defendants operated a single conspiracy. The evidence showed that the defendants shared the common goal of distributing as much crack and heroin as they could through the 4400 phone. *See, e.g.*, (Trial Tr., Vol. V, at 196:6–229:3); (*id.*, Vol. VI, at 37:13–41:11); (Gov't Exs. 64-1–14). Though they often worked independently, the defendants were bound together through the 4400 phone, which they passed from one to the other to coordinate sales and resupply efforts. *Cf. United States v. Adams*, 759 F.2d 1099, 1109–10 (3d Cir. 1985) (holding no variance existed for scheme run from a single physical location). This conspiracy could not have continued without the defendants' continued cooperation. As Clark himself noted, the defendants "do shifts" on the 4400, (Gov't Ex. 39A-1), and could not maintain the stream of drugs sold using that phone unless they all took their turn, *see* (Trial Tr., Vol. IV, at 153:12–13). And the defendants' activities significantly overlapped; for instance, they banded together to replenish their supply of crack. *See* (*id.*, Vol. V, at 196:6–229:3); (*id.*, Vol. VI, at 37:13–41:11); (Gov't Exs. 64-1–14). Because the evidence supports a finding that a single conspiracy existed, there was no variance in the indictment.

B

1

In his Motion for Acquittal, Robinson challenges his conviction for conspiring to distribute at least

280 grams of crack and 1,000 grams of heroin. *See* (Robinson Mot. for Acquittal 4–17). He does not deny that the evidence showed that he conspired to distribute crack and heroin. *See, e.g.*, (*id.* at 4–5) (taking as a given that a conspiracy existed). Rather, Robinson claims that the government failed to prove that the conspiracy involved at least 280 grams of crack and 1,000 grams of heroin. *See* (*id.* at 20–21). The only evidence suggesting these significant quantities, Robinson argues, was Simpson's shift-review testimony and the accompanying exhibits. *See* (*id.* at 5–17). But that evidence, he posits, was so flawed and so speculative that no reasonable juror could convict him on those quantities. *See* (*id.*)

Even without Simpson's shift-review testimony, there was ample evidence supporting the jury's verdict on the conspiracy charge. The jury heard hundreds of recordings showing Robinson and others selling drugs. *See, e.g.*, (Trial Tr., Vol. V, at 183:16–184:5); (Gov't Ex. 54-1). Special Agent Simpson's uncontradicted testimony established that nearly all of the 8,000 plus intercepted calls to the 4400 phone involved a drug sale. *See* (Trial Tr., Vol. V, at 191:21–22); (*id.*, Vol. VIII, at 116:10–15). The pen-register evidence revealed a "shocking" number of additional calls to the phone, which a rational juror could infer also concerned drug sales. (*Id.*, Vol. V, at 54:1.) The same juror could find that Verticelli alone bought at least 276 grams of crack and 173 grams of heroin from the defendants over about seven months. *See* (*id.* at 81:25–82:5); (*id.*, Vol. IX, at 39:24–40:15). And Verticelli was not the defendants' only high-volume customer. *See* (*id.*, Vol. V, at 71:4–73:12, 75:19–89:18). From just twenty or so

controlled buys, the government recovered about sixty-four grams of crack and nine grams of heroin. *See* (Gov't First Resp. 9); (Trial Tr., Vol. VI, at 138:23–157:9). Given all this evidence, it would hardly "fall below the threshold of bare rationality" to conclude that the conspiracy involved at least 280 grams of crack and 1,000 grams of heroin. *Coleman*, 566 U.S. at 656.

In arguing otherwise, Robinson invokes *United States v. Pauling*, 256 F. Supp. 3d Cir. 329 (S.D.N.Y. 2017). The defendant there was convicted of conspiring to distribute at least 100 grams of heroin. *Id.* at 333. At trial, the government could account for just eighty-nine grams. *Id.* at 337. To bridge the gap, the government relied on a wiretap recording on which a customer asked for the "same thing as last time" when buying fourteen grams of heroin. *Id.* The government asked the jury to infer from this comment that the customer had previously ordered another fourteen grams. *See id.* But the only evidence of a prior sale to this customer showed him buying "only a single gram." *Id.* At bottom, the government tried "to fabricate transactions of which there is no evidence." *Id.* at 338 (quoting *United States v. Hickman*, 626 F.3d 756, 769 (4th Cir. 2010). That was a step too far for the district court, which granted the defendant's Rule 29 motion. *See id.*

Pauling is inapposite. The jury here heard hundreds of recorded drug transactions, learned of at least twenty controlled buys and listened to a repeat customer describe the near-constant flow of drugs through the 4400 phone—a flow that the government proved lasted for several years. *See, e.g.*, (Trial Tr., Vol. I, at 45:19–23); (*id.*, Vol. V, at 55:7–8, 112:5–7,

203:6–15); (*id.*, Vol. VI, at 159:20–25, 243:13–16). Unlike in *Pauling*, the government had no need to fabricate transactions; there were thousands to choose from. That the government did not play every recording or pile kilograms of drugs in front of the jury is of no moment. After all, "in calculating the amounts involved in drug transactions, some degree of estimation must be permitted." *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992) (noting this necessity in context of sentencing). And relatively little estimation was necessary here, because the government laid a solid evidentiary foundation—even without Simpson's shift review—for the jury to find that the defendants conspired to sell at least 280 grams of crack and 1,000 grams of heroin.

Simpson's shift review tied together and confirmed what the underlying evidence had already established. Simpson explained his methodology—and its limitations—at length. *See* (Trial Tr., Vol. VIII, at 114:19–133:18, 138:12–169:5, 169:12–214:21). The government laid the foundation for this testimony by playing over 100 calls for the jury and showing how the defendants' distribution system worked over the course of several years. *See, e.g.*, (*id.*, Vol. V, at 155:7–8, 112:5–7, 83:16–184:5, 203:6–15). It was up to the jury to decide whether to credit Simpson's testimony. *See United States v. Tyler*, 956 F.3d 116, 122–23 (3d Cir. 2020); *United States v. Salahuddin*, 756 F.3d 329, 348–49 (3d Cir. 2014). The defendants had their chance to undermine that testimony through cross-examination. *See* (Trial Tr., Vol. VIII, at 169:12–214:21). That the jury apparently credited Simpson's shift review is no basis for acquittal under

Rule 29. *Cf. United States v. Bey*, No. CR 17-208-1, 2019 WL 1236057, at *4–7 (E.D. Pa. Jan. 24, 2019).

2

Robinson also challenges the sufficiency of the evidence used to convicted him of four individual distribution charges—Counts 11, 12, 50 and 53. *See* (Robinson Mot. for Acquittal 18–19). Count 11 charged Robinson with distributing less than one gram of heroin and under five grams of crack on November 13, 2014. (Superseding Indictment 31.) Testimony at trial recounted how an FBI informant bought fourteen bags of heroin and one bag of crack from Robinson that day. *See* (Trial Tr., Vol. I, at 152:15–169:16, 210:24–211:1). FBI reports, property receipts, audio recordings and the physical drugs themselves, among other evidence, corroborated this testimony. *See* (Gov't Exs. 26-8, 26-8P, 26-12). On top of this, the parties stipulated that a laboratory analysis showed that the heroin recovered from the controlled buy was indeed heroin. *See* (Trial Tr., Vol. VI, at 143:12–22). Though the stipulation did not cover the crack, Robinson never suggested that the substance the jury saw was anything other than crack cocaine. *See* (*id.* Vol. I, at 152:15–169:16, 210:24–211:1). And the jury had ample evidence from which to infer that all drugs involved were genuine. *See, e.g.*, (*id.* Vol. VI, at 139:2–157:9, 227:12–229:6). Thus, Robinson's argument that "no reasonable jury could have convicted him of distributing crack on November 13, 2014," founders. (Robinson Mot. for Acquittal 18); *see Griffin v. Spratt*, 969 F.2d 16, 22 n.2 (3d Cir. 1992) (Alito, J.) ("Identification of a controlled substance does not require direct evidence if available

circumstantial evidence establishes its identity beyond a reasonable doubt." (quotation omitted)); *see also United States v. Sanapaw*, 366 F.3d 492, 496 (7th Cir. 2004) ("[N]either expert testimony nor a chemical test of the substance sold is required to prove distribution of a controlled substance.")

It is a similar story with Counts 50 and 53. Both counts charged Robinson with distributing crack on specific dates. *See* (Superseding Indictment 70, 73). On Count 50, the jury heard a recording on which Robinson arranged a drug sale. *See* (Trial Tr., Vol. VI, at 60:1–23). FBI surveillance confirmed that Robinson met the buyer and completed the transaction. *See* (*id.* at 60:25–61:25). And a Philadelphia police officer testified that he arrested the customer and recovered a packet of crack. *See* (*id.*, Vol. VIII, at 111:15–113:6). With respect to Count 53, a recording again showed Robinson arranging a drug sale, surveillance captured Robinson at the sale and a vehicle stop of the customer recovered crack. *See* (*id.*, Vol. VI, at 81:14–88:8). Despite this evidence, Robinson claims no reasonable jury could have convicted him of distributing crack because there was no laboratory report proving that the substances sold were crack. *See* (Robinson Mot. for Acquittal 19). As noted, the jury had every reason to believe that the substances were crack and no reason to think otherwise. That the government did not introduce a chemical analysis does not undermine Robinson's conviction. *See Griffin*, 969 F.2d at 22 n.2; *Sanapaw*, 366 F.3d at 496.

Robinson's argument on Count 12 is equally meritless. Though it charged him with distributing

both crack and marijuana on a certain date, (Superseding Indictment 32), the government did not seek a conviction on the marijuana portion, *see* (Verdict Sheet 3, ECF No. 331). Thus, Robinson's complaint that "no reasonable jury could have convicted him of distributing marijuana" is irrelevant because no jury in fact convicted him of doing so. (Robinson Mot. for Acquittal 18.)

C

Robinson also moves for a new trial. His argument is two-fold. First, he claims that Simpson's shift review was so flawed that it led the jury to the unsupported conclusion that the conspiracy involved at least 280 grams of crack and 1,000 grams of heroin. *See* (Robinson Mot. for New Trial 20). Second, Robinson argues that he Court erred by even allowing the shift-review testimony and admitting the accompanying exhibits. *See* (*id.* at 20–22).

1

The first argument retreads old ground. As noted earlier, Simpson explained his methodology—and its limitations—at length. *See* (Trial Tr., Vol. VIII, at 114:19–133:18, 138:12–169:5, 169:12–214:21). An avalanche of evidence supported his key assumptions. For instance, Verticelli's testimony, the pen register and other evidence bolstered the premise that the drug activity on the 4400 phone was consistent over the conspiracy. *See* (*id.*, Vol. IV, at 146:4–11, 149:14–16, 153:12–24, 243:13–16); (*id.*, Vol. V, at 55:7–8, 112:5–7, 203:6–15). The scores of recordings played for the jury laid the foundation for Simpson's basic method of

tracking drug sales by listening to the calls. *See, e.g.*, (*id.* at 183:16–184:5). Independent FBI surveillance augmented Simpson's conclusions as to when one shift ended and another began. *See* (*id.*, Vol. VIII, at 115:17–116:2). Simpson's personal knowledge—having listened to every call—allowed him to testify that nearly all 8,000 calls captured by the wiretap concerned a drug sale. *See* (*id.* at 116:10–15); (*id.*, Vol. V, at 191:21–22). The quantities recovered from the twenty or so controlled buys comported with the quantities in Simpson's notes. *See* (*id.*, Vol. VI, at 138:23–157:9). Simply put, the shift review had a solid basis in the evidence.

That the defendants claim that their independent, after-the-fact review of the recordings conflicts at points with Simpson's is immaterial. *See* (Robinson Mot. for New Trial 5–19). They had every opportunity at trial to challenge Simpson's credibility and his assumptions; indeed, they did so at length. *See* (Trial Tr., Vol. VIII, at 169:12–214:21). All the supposed flaws they now identify were fodder for cross-examination. *See* (Gov't First Resp. 15 n.9) (attesting that Simpson's notes and the underlying recordings were produced during discovery). Yet the defendants elected not to raise (or put greater emphasis on) these points at trial. They do not get a do-over just because that choice did not pay off.

Whatever the defendants might think of Simpson's shift review, there is "no serious danger that a miscarriage of justice has occurred." *Salahuddin*, 765 F.3d at 346 (quoting *Johnson*, 302 F.3d at 150). Say the defendants are correct that Simpson's analysis is

inflated by twenty-five, fifty or even seventy-five percent. *See* (Robinson Mot. for New Trial 5–19). Even then, the conspiracy would have involved at least 4,250 grams of crack and 1,125 grams of heroin. *See* (Trial Tr., Vol. VIII, at 162:10–169:4); (*id.*, Vol. IX, at 38:22–39:23). Or scrap the shift review entirely and the jury still had enough evidence to find beyond a reasonable doubt that the defendants conspired to distribute at least 280 grams of crack and 1,000 grams of heroin. *See supra* at 14–16.

2

Robinson next claims that the Court erred in allowing Simpson's shift-review testimony and admitting the accompanying exhibits. *See* (Robinson Mot. for New Trial 20–22). For starters, he reasons, Simpson's methodology was so speculative as to mandate its exclusion. *See* (*id.* at 20). He also argues—for the first time—that "Simpson's testimony was inadmissible lay witness testimony." (*Id.*) Either way, Robinson concludes, these errors "so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." (*Id.* at 19) (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)).

The shift review and accompanying exhibits were properly allowed into evidence. Again, Simpson's testimony was not unduly speculative or lacking in foundation. *See supra*, at 14–16; *cf. Bey*, 2019 WL 1236057, at *4–7, *11–12. Nor did that testimony (or the exhibits) constitute improper lay opinion testimony. A lay witness may opine on topics "rationally based on the witness's perception" if doing so helps the jury

understand his testimony or resolve "a fact in issue" and is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Simpson's testimony (and the exhibits) satisfy each criterion. He based his opinions on his perception in listening to every recorded call, his experience as an FBI agent, his past encounters with the defendants and his vast knowledge of the defendants' distribution system. *See, e.g.*, (Trial Tr., Vol. I, at 40:13–17); (*id.*, Vol. III, at 152:13–18); (*id.*, Vol. V, at 192:22–193:22, 212:4–6); (*id.*, Vol. VIII, at 121:13–17, 125:19–23, 198:25–199:3, 203:16–18); *cf. United States v. Savage*, --- F.3d ----, No. 14-9003, 2020 WL 4691500, at *48 (3d Cir. Aug. 11, 2020). His opinions and the exhibits helped the jury contextualize other testimony, such as Verticelli's, and assess the scope of the defendants' conspiracy as reflected by the mountain of recorded calls. Likewise, Simpson's opinions did not usurp the jury's role as factfinder. *See* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."); *cf. United States v. Holovacko*, 781 F. App'x 100, 103–05 (3d Cir. 2019) (unpublished).

C

Spruell has filed two motions for acquittal—one through counsel, another *pro se*. *See* (ECF Nos. 424, 429). Both motions are untimely. *See* (Second Deadline Order 1) (setting deadline at June 29, 2020). And neither motion offers good cause for the missed deadline. *See* Fed. R. Crim. P. 45(b).

The question is whether the Court has jurisdiction to consider Spruell's untimely motions. *See Guerra v.*

Consolidated Rail Corp., 936 F.3d 124, 132 (3d Cir. 2019). Some time limits are jurisdictional and others are so-called "claim-processing rules." *Eberhart v. United States*, 546 U.S. 12, 13 (2005) (per curiam). The difference between the two is "critical." *Id.* (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)). The former "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). By contrast, "properly invoked" claim-processing rules "must be enforced, but they may be waived or forfeited." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. ----, 138 S. Ct. 13, 17 (2017). And for courts, whether a motion violates a jurisdictional or claim-processing rule determines whether it must be dismissed for lack of jurisdiction or merely denied. *See, e.g.*, *United States v. Kalb*, 891 F.3d 455, 457 (3d Cir. 2018).

Distinguishing jurisdictional from claim-processing rules is, in theory, simple. "If the Legislature clearly states that a [rule] count[s] as jurisdictional," then it is jurisdictional. *Fort Bend Cty. v. Davis*, 587 U.S. ----, 139 S. Ct. 1843, 1850 (2019) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006)). And if "Congress does not rank a [rule] as jurisdictional, courts should treat the restriction as nonjurisdictional." *Fort Bend*, 139 S. Ct. at 1850 (quoting *Arbaugh*, 546 U.S. at 515–16).

Rule 29 falls on the claim-processing side of the line. Nothing in the rule indicates that Congress intended its time limits to be jurisdictional. *See* Fed. R. Crim. P. 29(c). Indeed, a 2005 amendment to Rule 45 deleted language barring courts from extending "the time to take any action under Rules 29 [and] 33." Fed. R. Crim. P. 45(b)(2) (2004). That amendment, the advisory

committee remarked, empowered defendants to "seek an extension of time to file" a Rule 29 (or Rule 33) motion. Fed. R. Crim. P. 45(b)(2) advisory committee's note to 2005 amendment. Also, under the revised Rule 45, a court may, "on its own," extend the deadline a Rule 29 motion. Fed. R. Crim. P. 45(b)(1). That a court may *sua sponte* or on a party's motion extend Rule 29's deadlines shows that those deadlines are not jurisdictional. Rule 45 aside, the Supreme Court has specifically noted that "Rule 33, like Rule 29 . . . , is a claim-processing rule." *Eberhart*, 546 U.S. at 19. Taken together, Rule 29's text, Rule 45(b)(2)'s effect and *Eberhart*'s dictum all point to Rule 29 being a claim-processing rule.[5]

Third Circuit precedent is not to the contrary. In *United States v. Knight*, 700 F.3d 59 (3d Cir. 2012), the Court of Appeals considered whether "the District Court erred in denying [the defendant's] motion for acquittal." 700 F.3d at 64. The district court had denied

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[5] *See United States v. Smith*, 467 F.3d 785, 788 (D.C. Cir. 2006) (describing *Eberhart* as holding "that the time limit on Rules 29, 33, 34 and 35 . . . [was] no more than a claim-processing rule"); *see also United States v. Zertuche*, 565 F. App'x 377, 381 n.3 (6th Cir. 2014) (treating Rule 29(c)'s time limit "as a mandatory claims-processing rule") (unpublished); *United States v. White*, 597 F. Supp. 2d 1269, 1278 (M.D. Ala. 2009) ("*Eberhart* . . . makes clear that Rule 29 is not jurisdictional . . . ."); *United States v. Alexander*, 436 F. Supp. 2d 190, 193 n.5 (D. Me. 2006) ("Recent Supreme Court case law clarified that Rules 29 and 33 are 'inflexible claim-processing rule[s]'. . . ." (quoting *Eberhart*, 546 U.S. at 14)); *United States v. Cunningham*, No. CR 05-601-02, 2006 WL 8446206, at *2 (E.D. Pa. Aug. 17, 2006) ("The Supreme Court has determined that the time limitations of Rule 29 and Rule 33 are 'claim-processing rules'. . . ." (quoting *Eberhart*, 546 U.S. at 19)).

the motion as untimely without mentioning jurisdiction. *See United States v. Knight*, No. 1:09-CR-00005, 2011 WL 703924, at *4–5 (D.V.I. Feb. 18, 2011). In affirming, the Third Circuit noted that "[a] district court has no jurisdiction . . . to consider a motion for acquittal that is untimely." 700 F.3d at 64. But *Knight*'s disposition—affirming the district court's denial of the Rule 29 motion—suggests that the appellate court used the term "jurisdiction" in a loose sense, as many courts have over the years. *See Kontrick*, 540 U.S. at 454 ("Courts, including this Court, . . . have been less than meticulous" in using the term "jurisdiction").

Even if *Knight* had used "jurisdiction" in the strict, technical sense, the Court need not follow that dictum. For the proposition that an untimely Rule 29 deprives a district court of jurisdiction, *Knight* cited a single case—*United States v. Gaydos*, 108 F.3d 505 (3d Cir. 1997). *See* 700 F.3d at 64. *Gaydos*, in turn, relied exclusively on *Carlisle v. United States*, 517 U.S. 416 (1996). In *Carlisle*, the Supreme Court considered "whether a district court ha[d] authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c)." 517 U.S. at 417–18. Interpreting the then-operative language in Rule 45(b)(2), which prohibited district courts from extending the time for a Rule 29 motion, the Court held that the district court lacked authority to grant an untimely Rule 29 motion. *See id.* at 420–21, 433. Though *Carlisle* said nothing about jurisdiction, *Gaydos* read that case as treating Rule 29's time limit as jurisdictional. *See* 108 F.3d at 512. The Supreme

Court, however, later clarified that its "holding in *Carlisle* did not 'characterize Rule 29 as jurisdictional.'" *Eberhart*, 546 U.S. at 18 (alteration and some internal quotation marks deleted). To the contrary, it analogized to *Carlisle* in holding that Rule 33's time limits were claim-processing rules. *See id.*

Rule 29's time limits are claim-processing rules and thus do not deprive the Court of jurisdiction to consider Spruell's motions. That said, the government has neither forfeited nor waived the timeliness issue, and Spruell fails to offer any reason—let alone good cause—for his late motions. *See* (Gov't Second Resp. 5–6); (Gov't Third Resp. 7–8, ECF No. 439). The Court must therefore deny Spruell's motions as untimely. *See Hamer*, 138 S. Ct. at 18 ("Claim-processing rules ensure relief to a party properly raising them, but do not compel the same result if the party forfeits them." (alterations and quotation in original omitted)); *id.* at 18 n.3 (reserving "whether mandatory claim-processing rules may be subject to equitable exceptions"); *Knight*, 700 F.3d at 64 (affirming the district court's denial of defendant's Rule 29 motion as untimely).

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION NO. 19-00015-1, 2, 4

[Filed September 3, 2020]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ANTOINE CLARK, *et al.*,	)
Defendants.	)
	)

ORDER

AND NOW, this 3rd day of September 2020, upon consideration of the pending post-trial motions (ECF Nos. 320, 412, 413, 414, 424, 425, 429), the government's responses (ECF Nos. 426, 432, 439) and Daniel Robinson's reply (ECF No. 433), it is **ORDERED** that:

(1) The Defendants' First Motion for Acquittal (ECF No. 320) is **DENIED**;

(2) Daniel Robinson's Motion for Acquittal (ECF No. 412) is **DENIED**;

(3) Daniel Robinson's Motion for New Trial (ECF No. 413) is **DENIED**;

(4) Gerald Spruell's and Antoine Clark's Motions for Joinder (ECF Nos. 414, 425) are **DENIED as moot** given the denial of ECF No. 413;

(5) Gerald Spruell's First Motion for Acquittal (ECF No. 424) is **DENIED** as untimely; and

(6) Gerald Spruell's *Pro Se* Motion for Acquittal (ECF No. 429) is **DENIED** as untimely.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2912

[Filed April 4, 2023]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
GERALD SPRUELL,	)
Appellant	)
	)

(E.D. Pa. No. 2-19-cr-00015-002)

SUR PETITION FOR PANEL REHEARING

Present: HARDIMAN, KRAUSE, and MATEY, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby **ORDERED** that the petition for rehearing by the panel is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: April 4, 2023
Tmm/cc: Jason Grenell, Esq.
Matthew T. Newcomer, Esq.
Cheryl J. Sturm, Esq.