No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

ADELFO RODRIGUEZ-MENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-1422

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UNITED STATES OF AMERICA

v.

ADELFO RODRIGUEZ-MENDEZ,
a/k/a MEXICAN MIKE,
Appellant

_____

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 1-17-cr-00015-001)
District Judge: Honorable Stephanie L. Haines

_____

Submitted Under Third Circuit L.A.R. 34.1(a)
January 9, 2023

Before: JORDAN, PHIPPS and ROTH, *Circuit Judges*

(Filed: May 11, 2023)

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OPINION*

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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.

JORDAN, *Circuit Judge*.

Adelfo Rodriguez-Mendez appeals numerous aspects of the criminal proceedings leading to his conviction and sentencing for dealing drugs. For the following reasons, we will affirm.

I. BACKGROUND

In 2010, Rodriguez-Mendez opened an auto repair shop in Erie, Pennsylvania, called East Coast Monster Garage ("Monster Garage"), and at some point thereafter began using the garage as a front for trafficking drugs. He was running Monster Garage when law enforcement, with the help of a confidential informant ("C.I."), executed two "controlled buys" there in July 2016 and March 2017. The government indicted Rodriguez-Mendez and four confederates in June 2017.[1] Federal law enforcement officials then arrested Rodriguez-Mendez near the U.S.-Mexico border in Southern California. (District Court Docket Item ("D.I.") 100 at 3.)

While detained pending trial, Rodriguez-Mendez filed various motions germane to this appeal. He filed two motions to dismiss the charges against him, one in July 2020, alleging that he was arrested on an unsigned warrant, and another in May 2021, arguing that the four-year-long delay in going to trial violated his speedy-trial rights. The District Court denied both motions. He also filed various motions in limine raising evidentiary

[1] The government filed a superseding indictment in July 2017, adding a new count of an alleged money-laundering conspiracy between Rodriguez-Mendez and a newly introduced co-defendant, Gaudalupe Beserra. The government ultimately dismissed that additional count on the eve of trial, but the superseding indictment remained as the operative indictment.

and constitutional objections to the admission of undercover audio recordings of the C.I., primarily because the C.I. had since died and thus could not confirm the authenticity of the recordings or be cross-examined. The District Court granted in part and denied in part the motions in limine. Essentially, the court prohibited the introduction of any and all statements made by the deceased C.I. to law enforcement as inadmissible hearsay, and all testimonial statements made by the C.I. to law enforcement as violations of the Sixth Amendment. But the Court reserved ruling on the authentication of the undercover recordings pending a proffer of evidence from the government at trial and denied Rodriguez-Mendez's request to exclude the undercover recordings as violations of the Sixth Amendment because we had already held in *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005), that undercover recordings are not testimonial for purposes of *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, the Court concluded that the proffer of testimony of the undercover agent involved in the recording, in addition to a cooperating defendant, met the government's burden under Federal Rule of Evidence 901(a) for authentication, and, accordingly, the recordings were admitted in evidence.

After Rodriguez-Mendez's two-day trial, the jury returned a verdict convicting him of three counts in the superseding indictment: Count I, Conspiracy to Possess with Intent to Distribute and to Distribute Less than Five Hundred (500) Grams of a Mixture and Substance Containing a Detectable Amount of Cocaine, and Counts II and V, both of which charged Possession with Intent to Distribute and Distribution of Less than Five

Hundred (500) Grams of a Mixture and Substance Containing a Detectable Amount of Cocaine.[2]

Rodriguez-Mendez moved for a judgment of acquittal before the case was submitted to the jury, but the District Court denied that motion as well. After the guilty verdict was handed down, Rodriguez-Mendez renewed his motion for acquittal and also moved for a new trial on the ground that the Court had erred in admitting the undercover recordings. The Court denied both motions, holding that the evidence adduced at trial was sufficient to support the jury verdict and that the admission of undercover recordings did not necessitate a new trial since the recordings were adequately authenticated.

Finally, at sentencing, the District Court increased Rodriguez-Mendez's sentencing range based on a finding that, by a preponderance of the evidence, Rodriguez-Mendez had trafficked between 5 and 15 kilograms of cocaine during the conspiracy.

II. DISCUSSION[3]

A. The District Court properly denied Rodriguez-Mendez's motion to dismiss the Superseding Indictment.[4]

Rodriguez-Mendez argues that the warrant used to arrest him was somehow constitutionally defective under the Fourth Amendment because it was unsigned by the

[2] Count II was based on the July 2016 controlled buy; Count V was based on the March 2017 controlled buy.

[3] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

[4] "We apply a mixed standard of review to a district court's decision on a motion to dismiss an indictment, exercising plenary review over legal conclusions and clear error

clerk of the court, and therefore the charges against him should have been dismissed.[5] In *United States v. Crews*, 445 U.S. 463 (1980), the Supreme Court, in addressing whether an in-court identification of a defendant by a victim should be suppressed as the fruit of a defendant's unlawful arrest, held that "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." *Id.* at 474. The Court went on to discuss how the exclusionary rule is a citizen's protection against police misconduct but that the defendant was "not himself a suppressible fruit, and [that] the illegality of [a defendant's] detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." *Id.* (internal quotations omitted). Thus, even if an arrest is unsupported by probable cause, the exclusionary rule in the form of suppressed evidence, not dismissal of the indictment, is the remedy. *Id*. Here, Rodriguez-Mendez does not dispute that probable cause supported his arrest. Nor does he contend that any unlawfully obtained evidence was admitted against him. Therefore, even if the arrest warrant were technically deficient, his conviction would still stand because the arrest was amply supported by probable cause. In any event, however, it appears the warrant was in fact signed by the clerk.

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review over factual findings." *United States v. Stock*, 728 F.3d 287, 291 (3d Cir. 2013).

[5] Federal Rule of Criminal Procedure 9 governs arrest warrants on an indictment, which provides that such arrest warrants "must be signed by the clerk." Fed. R. Crim. P. 9(b)(1).

Although the initial public docket reflected an unsigned arrest warrant (D.I. 56), the Deputy Clerk testified under oath that standard procedure in the clerk's office after receiving an order to issue a warrant was to generate the warrant, "print three copies … sign them … and give them to the [United States] [M]arshals[,]" after which an unsigned copy was then filed on the public docket. (Supp. App. Vol. II at 791-94.) She also testified that a signed arrest warrant does not appear on the docket until after it is returned executed by the U.S. Marshals. (*See id*. at 797.) That process was evidently followed here. (*See id*. at 790-97; *see also* App. Vol. I at 42.) The record clearly shows that the warrant was signed by the clerk on the same day the warrant issued but was not publicly filed until after it was executed, per standard procedure. (D.I. 100). Based on this, the District Court did not clearly err when it relied on the Deputy Clerk's credible, uncontradicted testimony to hold that Rodriguez-Mendez's arrest warrant comported with Rule 9 of the Federal Rules of Criminal Procedure. And Rodriguez-Mendez has not pointed to any authority indicating that a properly signed warrant left under seal somehow violates Federal Rule of Criminal Procedure 9, or the Constitution. Thus, we will affirm the Court's denial of Rodriguez-Mendez's motion to dismiss his superseding indictment based on an allegedly faulty warrant.

B. The government did not violate Rodriguez-Mendez's Sixth Amendment right to a speedy trial.[6]

Rodriguez-Mendez does not appeal the District Court's determination that his 49-month pretrial delay did not violate the Speedy Trial Act; he appeals only the Court's

[6] In assessing a constitutional speedy trial claim, "[w]e review the District Court's

Sixth Amendment ruling. The District Court held that while the delay in bringing this case to trial was lengthy, the delay was "understandable and excusable." (App. Vol. 1 at 69.) Upon review of the record and the District Court's constitutional analysis, we agree.

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court laid out a four-factor balancing test to assess constitutional speedy trial claims. The *Barker* inquiry focuses on: "(1) the length of the delay before trial; (2) the reason for the delay and, specifically, whether the government or the defendant is more to blame; (3) the extent to which the defendant asserted his speedy trial right; and (4) the prejudice suffered by the defendant." *United States v. Velazquez*, 749 F.3d 161, 174 (3d Cir. 2014) (citing *Barker*, 407 U.S. at 530-31). "No one factor is dispositive nor talismanic." *Id.* (cleaned up).

The first factor is generally considered a "triggering mechanism" or gateway to analyzing the remaining three factors, *Barker*, 407 U.S. at 530, and the parties agree that the 49-month delay at issue here is sufficiently lengthy to trigger a speedy trial analysis. Turning to the second *Barker* factor, the delay in this case stemmed primarily from the multiple continuances filed by the defendants and the District Court's order suspending jury trials because of the Covid-19 global pandemic. Rodriguez-Mendez argues that those factors were outside of his control since his co-defendants filed the majority of the extensions without his consent,[7] and he certainly did not cause a global pandemic.

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factual findings for clear error and [its] legal conclusions de novo. *United States v. Shulick*, 18 F.4th 91, 102 (3d Cir. 2021).

[7] *See* App. Vol. I at 49-57 (setting forth the District Court's detailed recital of the lengthy procedural history of this case, including the multiple continuances).

While it is true that Rodriguez-Mendez did not join in many of the requests for extensions, neither did he file any objections to them nor a motion to sever. He also does not point us to where in the record he expressed concern over the multiple extensions. As to the pandemic delays, *Barker* clarifies that deliberate attempts to delay trial to hamper the defense are weighted heavily against the government while more neutral reasons ("such as negligence or overcrowded courts") are weighted "less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* at 531. The *Barker* Court noted, however, that valid reasons ("such as a missing witness") may justify appropriate delay. *Id.*

We have not addressed a Sixth Amendment speedy trial claim in the context of the delays engendered by the Covid-19 pandemic, but it is plain that the suspension of jury trials fits into the category of justifiable delay. There is no indication that the government used the delay to its advantage or to hamper Rodriguez-Mendez's defense. Regardless, even a delay for neutral reasons, as the *Barker* Court instructed, is still something that must be considered, though weighed less heavily. Given the dramatic countervailing considerations associated with the pandemic, we accord this factor very little weight.

As to the third factor, the record shows, and Rodriguez-Mendez does not contest, that he did not assert his speedy trial rights until May 2021, well after the height of the pandemic, and nearly four years after his arrest and just two months before his trial. This factor weighs against Rodriguez-Mendez since, as *Barker* states, "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.*

The fourth factor in *Barker* instructs that prejudice should be assessed in light of the general interests that defendants share and that the speedy trial guarantee was meant to protect, such as the need "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. Rodriguez-Mendez claims that, during what he describes as an oppressively long pretrial incarceration, he experienced "great anxiety" while being in lock down conditions, lost his business, was separated from his children, and witnesses disappeared or died before trial. (Opening Br. at 10-11.) He asserts that these occurrences caused him "immense prejudice[,]" and curtailed his ability to mount his defense. (Opening Br. at 11.) Without taking his arguments lightly, we nonetheless find them unpersuasive.

As stated earlier, Rodriguez-Mendez waited nearly four years to assert his speedy trial rights, thus undermining the assertion that he suffered "immense prejudice" throughout. Furthermore, the "business" that Rodriguez-Mendez claims he lost was, in fact, the central hub of the criminal conspiracy. And, the witnesses who disappeared or died while awaiting trial were actually the government's witnesses, and, if anything, their absence helped rather than hurt his case. It is difficult to see how these collateral effects of the delay prejudiced him. Of course, pretrial detention is naturally rife with the anxiety of living "under a cloud of suspicion[,]" *Barker*, 407 U.S. at 534, but, as just noted, the delay at issue here was due to his codefendants' requests for multiple extensions (without objection by him), his own filings for extensions, and a global

pandemic that was outside any parties' control and implicated weighty public health concerns.

Finally, we are persuaded by our sister circuits that "it will be an unusual case in which the [Speedy Trial] Act is followed but the Constitution violated." *See United States v. Rice*, 746 F.3d 1074, 1081 (D.C. Cir. 2014) (internal quotation marks omitted) (citing *United States v. Bieganowski*, 313 F.3d 264, 284 (5th Cir. 2002)).[8] In other words, a violation of the Speedy Trial Act is generally a necessary condition for a holding that there has been a Constitutional violation. Rodriguez-Mendez does not even argue that his Speedy Trial Act rights were violated, and given the foregoing *Barker* analysis, we do not consider this to be the "unusual" case where the Constitution is nevertheless violated. Therefore, we hold that the delay between indictment and trial here did not so prejudice Rodriguez-Mendez's Sixth Amendment rights as to warrant relief.

C. The District Court did not err in its denial of Rodriguez-Mendez's motion for a new trial based on the admission of the undercover recordings.[9]

Rodriguez-Mendez relies heavily on our decision in *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), to assert that the government did not meet its burden in

[8] *See also United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982), *United States v. Thirion*, 813 F.2d 146, 154 (8th Cir. 1987), *United States v. Davenport*, 935 F.2d 1223, 1238-39 (11th Cir. 1991), *United States v. O'Dell*, 247 F.3d 655, 666-67 (6th Cir. 2001), and *United States v. Munoz–Amado*, 182 F.3d 57, 61 (1st Cir. 1999).

[9] Review of a decision on a motion for a new trial is for "abuse of discretion unless the court's denial of the motion is based on application of a legal precept, in which case our review is plenary." *Curley v. Klem*, 499 F.3d 199, 206 (3d Cir. 2007). Because the District Court denied the motion based on its legal interpretation of the Federal Rules of Evidence, we exercise plenary review. *See Sharif v. Picone*, 740 F.3d 263, 267, 272

authenticating the undercover recordings of a now-deceased C.I. who was unavailable to testify at trial. In *Starks*, we adopted a "clear and convincing" standard for authenticating recordings, identifying seven factors for consideration:

> (1) the recording device was capable of taking the conversation … offered in evidence.
> (2) the operator of the device was competent to operate the device.
> (3) the recording is authentic and correct.
> (4) changes, additions or deletions have not been made in the recording.
> (5) the recording had been preserved in a manner that is shown to the court.
> (6) the speakers are identified.
> (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

See id. at 121 n.11 (citing *United States v. McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958)).

The government argues that, because Federal Rule of Evidence 901(a) was adopted after *Starks,*[10] it necessarily supersedes *Starks*, and thus its less rigid authentication standard should apply. Since the government wins under either standard, we need not decide that question.

Because the *Starks* standard is more exacting, we begin and end our analysis there. To begin, the parties do not dispute that the first and fifth *Starks* factor were satisfied. As

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(3d Cir. 2014) ("A district court's interpretation of the Federal Rules of Evidence is reviewed de novo").

[10] *Starks* was decided in April 1975, just a few months before the effective date of the Federal Rules of Evidence. The Rules were adopted by the Supreme Court of the United States on Nov. 20, 1972, and, by Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1926, were enacted, with amendments made by Congress to take effect on July 1, 1975.

to the other factors, Rodriguez-Mendez argues primarily that only the "operator" of the recording device – i.e., the C.I. – could authenticate competent operation of the device; he also argues that since the recording was in Spanish, the English-speaking undercover agent recording the conversation could not attest to the recording's accuracy, and the government's attempt to use a Spanish-speaking cooperating defendant to attest to its accuracy – as well as to identify the speakers – was inadequate. During trial, the government countered those arguments by offering the combined testimony of Pennsylvania State Police Corporal Kristen Beattie, who directed the controlled buys, and cooperating co-defendant Geneva Gore, one of Rodriguez-Mendez's co-conspirators, to authenticate the recordings.

Beattie, based on her four years of experience working with undercover recording technology, testified to the capabilities of the technology, that the C.I. was competent to operate the device and voluntarily did so, that the recording, even if in a different language, "accurately captured the conversations that she heard live during the controlled buys," that the recordings were complete, uninterrupted, without breaks, edits, cuts or disruptions, and that they were preserved.[11] (Answering Br. at 31.) Beattie also testified that she saw Rodriguez-Mendez outside the Monster Garage when the C.I. arrived and then saw him walk into the garage with the C.I. Gore testified that she has known Rodriguez-Mendez since 2011, saw him multiple times a week, spoke on the phone with him on most days, and accordingly could and did identify his voice on the recordings.

[11] Notably, Rodriguez-Mendez stipulated that the translations of the recordings were accurate.

She also clarified in her testimony that, even though she did not recognize one of the voices on the recording, she could distinguish the C.I. and Rodriguez-Mendez's voices from the unrecognized voice, and she did so at trial. Taken together, the testimony given by Beattie and Gore is more than sufficient evidence to support a finding that the recordings were what the government claimed them to be, and thus sufficiently satisfied both *Starks* and Rule 901(a).

Rodriguez-Mendez still insists that Gore's testimony could not authenticate the recordings since she was not in the room when the deal happened and that she could not recognize every voice in the recording. But, the bar for voice identification is not high, as explained in Federal Rule of Evidence 901(b)(5), which provides that "[a]n opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker" satisfies authentication. Nothing in *Starks* is inconsistent with that, and Rodriguez-Mendez has cited no authority for us to think otherwise. Gore's testimony identifying Rodriguez-Mendez's voice on the incriminating recordings, when combined with Beattie's testimony that the recordings accurately represented what occurred during the transactions along with her witnessing Rodriguez-Mendez enter the garage with the C.I., is evidence sufficient to meet even the clear and convincing standard for authentication under *Starks*.

Rodriguez-Mendez also argues that his Sixth Amendment Confrontation Clause rights were violated because he could not cross-examine the deceased C.I. According to his argument, the statements made by the C.I. in the undercover recordings were

testimonial because they were intended "to elicit statements that would be, and were, used in a later court proceeding[,]" (Opening Br. at 16), in violation of *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (holding that "[t]estimonial statements of witnesses absent from trial" are barred from being introduced unless "the declarant is unavailable, and … the defendant has had a prior opportunity to cross-examine."). We have already held, however, in *United States v. Hendricks*, that surreptitiously monitored conversations and statements contained in undercover recordings are nontestimonial for *Crawford* purposes. 395 F.3d 173, 184 (3d Cir. 2005) (holding that if statements are made "as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant['s] … nontestimonial statements into context"). Rodriguez-Mendez recognizes that *Hendricks* is fatal to his position but avers simply that "[t]he fundamental premise of *Hendricks* is flawed and it should be overruled[.]" (Opening Br. at 15.) But, of course, *Hendricks* is still binding on us, 3d Cir. I.O.P. 9.1, and we will affirm the District Court's denial of Rodriguez-Mendez's motion for a new trial.

D. Rodriguez-Mendez's convictions were supported by sufficient evidence.[12]

Rodriguez-Mendez contends that the government failed to adduce sufficient evidence to support his conviction. He says that the government merely proved that he

[12] We apply plenary review to whether enough evidence supported a conviction. *United States v. Repak*, 852 F.3d 230, 250 (3d Cir. 2017). We construe the evidence in the light most favorable to the prosecution and draw all reasonable inferences in favor of

"kept 'bad company' or was present for some illegal activities." (Opening Br. at 17.) He points out that the government never saw him hand anyone drugs and that the evidence proved only that he "was passively aware that others were using his garage for drug transactions." (Opening Br. at 17.)

The most damning evidence that Rodriguez-Mendez must, but cannot, overcome are his admissions in the undercover recordings that plainly demonstrate he was the primary source of drugs for the C.I. Although the C.I. was dead by the time of trial, the officer who outfitted the C.I. with a wire testified about the functionality of the recording equipment, and a cooperating co-defendant confidently identified Rodriguez-Mendez's voice on the recording. What is more, additional witnesses testified that they regularly exchanged money for drugs with Rodriguez-Mendez at Monster Garage and that Rodriguez-Mendez was the leader of the conspiracy. Viewing all this evidence in the light most favorable to the prosecution and drawing all reasonable inferences in its favor, it is clear that sufficient evidence supports the verdict.

E. The District Court did not err in its application of the Sentencing Guidelines.

Rodriguez-Mendez argues that the District Court imposed a "fundamentally unfair" sentence when it sentenced him based on facts developed at sentencing that were not proven beyond a reasonable doubt.[13] (Opening Br. at 25-26.) In other words, while

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the jury's verdict. *United States v. Trant*, 924 F.3d 83, 86 n.1 (3d Cir. 2019).

[13] He makes a number of accompanying arguments with this primary claim, including a violation of his Sixth Amendment right to be informed of the nature and cause of the accusation against him; a violation of his Fifth Amendment indictment

the jury verdict found him guilty of distributing "less than 500 grams of cocaine," (Opening Br. at 20), the District Court, after applying U.S.S.G. § 1B1.3, sentenced him based on 5 to 15 kilograms of distribution.[14] Rodriguez-Mendez alleges that his range would have been 78-97 months if he was sentenced based only on the charges he was convicted of. With the additional drug attribution, his range jumped to 188-235 months, and he was ultimately sentenced to 210 months.

It is well-established that sentencing judges may consider "conduct that is not formally charged or is not an element of the offense of conviction" in "the determination of the applicable guideline sentencing range." *See United States v. Booker*, 543 U.S. 220, 251-52 (2005) (quoting U.S.S.G. § 1B1.3, comment. (background) (Nov. 1995)) (cleaned up). And these sentencing facts may be found by the judge upon a preponderance of the evidence. *United States v. Grier*, 475 F.3d 556, 568 (3d Cir. 2007) (en banc). Only facts

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presentment right; and a violation of Federal Rule of Criminal Procedure 7(c)(1), which requires an indictment to contain a plain, concise, and definite written statement of the essential facts constituting the offense charged. We need not address these arguments in detail but note that they were reviewed and are without merit.

[14] U.S.S.G. § 1B1.3 is titled "Relevant Conduct (Factors that Determine the Guideline Range)" and provides that courts may determine base offense levels based on "all acts and omissions committed … by the defendant … that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]" U.S.S.G. § 1B1.3(a)(1)(A). The first Application Note under this section in the Guidelines clarifies that *"[t]he principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. …* [T]he focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense …." U.S.S.G. § 1B1.3, comment. (n.1) (emphasis added).

that increase a statutory minimum or a maximum sentence must be submitted to a jury and found beyond a reasonable doubt, as described in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) and *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Rodriguez-Mendez's crimes did not invoke a mandatory minimum sentence, and his statutory maximum of 240 months did not increase with the District Court's attribution of additional drugs to him. Thus, the concerns involved in *Apprendi* and *Alleyne* do not apply. Rodriguez-Mendez nevertheless asks us to reject precedent and require a jury to decide facts beyond a reasonable doubt that increase the *guideline* sentencing range of a criminal defendant. That we cannot and will not do.

Thus, we are left to review the District Court's factual findings for clear error and its application of the sentencing guidelines for abuse of discretion.[15] Upon review of the record, the District Court did not clearly err when it attributed between 5 and 15 kilograms of cocaine distribution to Rodriguez-Mendez throughout the conspiracy. Multiple witnesses testified that they bought kilogram amounts of cocaine from

[15] Our analysis addresses mixed questions of law and fact, but, consistent with our precedent, we utilize a "unitary abuse-of-discretion standard," *United States v. Wise*, 515 F.3d 207, 217 n.5 (3d Cir. 2008) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990)), by accepting findings of fact by the District Court (unless clearly erroneous), and granting "due deference[,]" *id.* at 218, to the District Court's application of the guidelines to the facts. *See* 18 U.S.C. § 3742(e); *see also United States v. Tomko*, 562 F.3d 558, 567-68 (3d Cir. 2009) (en banc) ("[A]n abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion."). We exercise plenary review over a District Court's interpretation of the Sentencing Guidelines, *United States v. Bell*, 947 F.3d 49, 54 (3d Cir. 2020), but, based on the parties' briefing, the issue here concerns the District Court's *application* – not legal interpretation – of the Sentencing Guidelines.

Rodriguez-Mendez on a weekly or bi-weekly basis (typically one half to three kilograms were sold during each transaction). And Gore, one of the cooperating co-defendants, testified that the drug conspiracy brought at least two kilograms of cocaine into Monster Garage every two weeks during the timeframe of the conspiracy (approximately 22 months). Consequently, the District Court did not abuse its discretion when it applied guideline § 1B1.3 to increase Rodriguez-Mendez's sentencing range and subsequently impose a within-guidelines sentence.[16]

III. CONCLUSION

For the foregoing reasons, we will affirm Rodriguez-Mendez's judgment of conviction and sentence.

[16] Rodriguez-Mendez contends also that his sentence was substantively unreasonable, but a within-guidelines sentence is presumptively reasonable, and he has not rebutted that presumption. S*ee Rita v. United States*, 551 U.S. 338, 347 (2007) (reviewing courts "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines"). Rodriguez-Mendez's sentence of 210 months as compared to some of his co-defendants' lesser sentences is easily explained by his role as the leader of the conspiracy and his decision not to benefit from the bargain of a plea deal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1422

UNITED STATES OF AMERICA

v.

ADELFO RODRIGUEZ-MENDEZ,
a/k/a MEXICAN MIKE,
Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 1-17-cr-00015-001)
District Judge: Honorable Stephanie L. Haines

Submitted Under Third Circuit LAR 34.1(a)
January 9, 2023

Before: JORDAN, PHIPPS, and ROTH, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on January 9, 2023. On consideration whereof,

It is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered March 3, 2022, is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: 11 May 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1422

UNITED STATES OF AMERICA

v.

ADELFO RODRIGUEZ-MENDEZ,
a/k/a MEXICAN MIKE,
Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 1-17-cr-0015-001)
District Judge: Honorable Stephanie L. Haines

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and ROTH,* 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 and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: 6 June 2023

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*Judge Roth's vote is limited to panel rehearing only.

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:17-15-1
	)	Judge Stephanie L. Haines
ADELFO RODRIGUEZ-MENDEZ	)	

OPINION AND ORDER

Adelfo Rodriguez-Mendez ("Defendant") stands charged by superseding indictment with conspiracy to distribute and to possess with intent to distribute cocaine, possession with intent to distribute and distribution of cocaine, and conspiracy to commit money laundering. Presently before the Court is Defendant's motion to dismiss the superseding indictment and motion to compel discovery [Doc. 246]. The Government has filed a response to that motion [Doc. 249], Defendant has filed a reply [Doc. 272], and the Government has responded to Defendant's reply [Doc. 273]. On January 5, 2021, the Court held a hearing on this matter and took the motion under advisement [Doc. 274]. Upon review of the parties' papers, and the evidence and argument presented at the hearing, for the following reasons, Defendant's motion to dismiss the superseding indictment will be denied. Defendant's motion to compel discovery will be granted in part and denied in part.

I. Motion to Dismiss Superseding Indictment

Defendant has filed a motion to dismiss the superseding indictment on the ground that his arrest violated the Fourth Amendment because the arrest warrant issued and filed on the docket [Doc. 56] was not signed at the time it was executed as required by Federal Rule of Criminal Procedure 9(b)(1). In response, the Government argues that the evidence shows that the warrant in fact was signed by a deputy clerk prior to its execution, and that, even if it had not been, dismissal

nevertheless would not be warranted based on what amounts to nothing more than a technical violation of Rule 9(b)(1).

A. Procedural Background

On July 11, 2017, a grand jury returned a six-count superseding indictment against defendant and four other individuals. Defendant was charged at Count One with conspiracy to possess with intent to distribute and to distribute less than 500 grams of cocaine in violation of 21 U.S.C. § 846; at Counts Two and Five with possession with intent to distribute and distribution of less than 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and, at Count Six with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) [Doc. 49].

Also on July 11, 2017, the Government filed a motion for a warrant for Defendant's arrest based upon the superseding indictment [Doc. 51]. On that same day, United States Magistrate Judge Lisa Pupo Lenihan granted the motion and ordered that an arrest warrant be issued for defendant's apprehension [Doc. 52]. The docket sheet indicates that the arrest warrant was issued on July 12, 2017 [Doc. 56]. The arrest warrant filed on the public record is unsigned [Doc. 56].

On July 17, 2017, Defendant was arrested in Southern California. Defendant was arraigned on August 25, 2017, and pled not guilty [Doc. 97]. On August 29, 2017, the arrest warrant was returned executed on July 17, 2017 [Doc. 100]. The returned warrant bears the printed name and signature of Deputy Clerk Jennifer Dash and bears a stamp indicating that it was received by the United States Marshals on July 13, 2017.

B. Analysis

Federal Rule of Criminal Procedure 4(b)(1) provides that an arrest warrant on a criminal complaint must: (A) contain the defendant's name; (B) describe the offense charged; (C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge;

and, (D) be signed by a judge. Federal Rule of Civil Procedure 9(b)(1) provides that an arrest warrant on an indictment "must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged" in the indictment.

In this case, it is not disputed that the arrest warrant conforms to Rule 4(b)(1), in that it contains defendant's name and commands that he be arrested and brought forthwith to the nearest magistrate. Nor can it be argued that the warrant fails to describe the offenses charged in the superseding indictment. Rather, Defendant's sole contention is that the arrest warrant is invalid because it was not signed by the clerk at the time it was executed, as evidenced by the unsigned copy filed at Docket Number 56.

However, Defendant's position that the warrant was not signed when executed is belied by the record. Although the copy of the arrest warrant issued on July 12, 2017, and filed on the public record clearly is not signed [Doc. 56], Deputy Clerk Jennifer Dash testified under oath that filing an unsigned copy on the record is standard procedure in the Erie Clerk's Office.

Deputy Clerk Dash testified that she has been a deputy clerk in the Erie Clerk's Office for over 15 years. She stated that the procedure followed in the Clerk's Office upon receipt of an order from a magistrate judge to issue a warrant is to input the relevant information, print the warrant, sign it, and give 3 signed copies to the United States Marshals. An unsigned copy is then filed on the public docket. She further testified that this is the standard procedure that she follows in every case, including this one. When she received the order from Judge Lenihan, she prepared and printed the warrant, signed and dated it on July 12, 2017, gave three signed copies to the United States Marshals, and filed an unsigned copy on the docket [Doc. 56]. Although she could not recall this warrant specifically, she noted that it does contain her signature and it is part of her job,

so she knows she signed it on the date reflected of July 12, 2017. She also testified that the only time a signed copy of an arrest warrant appears on the docket is after it is returned executed.

Deputy Clerk Dash's testimony is credible and uncontradicted. Moreover, the arrest warrant returned executed on July 17, 2017, and filed on the record on August 29, 2017 [Doc. 100], conclusively supports her testimony. The returned warrant bears a stamp indicating that it was received by the United States Marshals on July 13, 2017, the day after it was issued, and this stamp is placed *over* the printed name and signature of Deputy Clerk Dash. It was this signed copy of the warrant that was executed on July 17, 2017, with Defendant's arrest, not the unsigned copy placed on the public record as a matter of procedural course on July 12, 2017 [Doc. 56]. The signed warrant returned as executed then was filed on the record on August 29, 2017 [Doc. 100], per standard clerk's office procedure.

Based on the testimony of Deputy Clerk Dash and the record as a whole, the Court is satisfied that the copy of the arrest warrant that was returned executed by the United States Marshals and filed on August 29, 2017 [Doc. 100] is the warrant that was used to effectuate Defendant's arrest on July 17, 2017, and that the warrant was in fact signed at the time of its execution. Accordingly, Defendant's motion to dismiss the superseding indictment is without merit.

In any event, even had the arrest warrant not been signed, the Court still would not be inclined to dismiss the superseding indictment on that basis. While a clerk's failure to sign an arrest warrant technically would violate Rule 9(b)(1), the Court is not persuaded that such a violation would justify such a severe sanction as dismissal of a superseding indictment founded on probable cause.

It is well-settled that a "mere technical error does not automatically invalidate [a] warrant." *United States v. Carter*, 756 F.2d 310, 313 (3d Cir. 1985)(arrest not invalidated by warrant which incorrectly set forth date of alleged crime); *see also United States v. Crews*, 445 U.S. 463, 474 (1980)("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."). Rather, "the true inquiry . . . is . . . whether there has been such a variance as to affect the substantial rights of the accused." *Carter*, 756 F.3d at 313.

Here, even assuming the warrant had not been signed, the failure of a clerk to sign an arrest warrant, a purely administrative task, is not so substantial as to warrant the dismissal of the indictment. Judge Lenihan, based on probable cause established by the superseding indictment, ordered that an arrest warrant be issued for Defendant's apprehension [Doc. 52]. Defendant does not dispute that fact. The arrest warrant was prepared in accordance with standard clerk's office procedure, and it contained all of the relevant information identifying Defendant and advising him of the charges upon which the warrant was based. It was delivered to the United States Marshals pursuant to Judge Lenihan's order, and later was returned as executed. Based on the totality of circumstances, the Court cannot find that the mere absence of a clerk's signature would have affected Defendant's substantial rights in any meaningful way.

Furthermore, Defendant has advanced no authority, and the Court has found none, suggesting that the failure of a clerk to sign an arrest warrant is such a substantial deprivation of a defendant's rights as to warrant the dismissal of an indictment. Instead, Defendant relies heavily on *Rogers v. Powell*, 120 F.3d 446 (3d Cir. 1997), a civil rights case in which the Third Circuit Court of Appeals held that an arrest was unlawful because the arresting officer had no knowledge of any facts or circumstances to support his own independent determination that probable cause to arrest existed, but instead relied on the mistaken assumption that a warrant had been issued.

Rogers clearly is inapposite. In *Rogers*, there was no warrant, and the officer did not otherwise have probable cause to make an arrest. In this case, probable cause was established by the superseding indictment, and a magistrate judge entered an order directing that an arrest warrant for Defendant be issued. The arresting officers in this case relied on the superseding indictment and Judge Lenihan's order to effectuate a lawful arrest. Moreover, even assuming the arrest here had been unlawful, there is nothing in *Rogers* to suggest that the remedy for such a violation should be dismissal of the superseding indictment.

C. Conclusion

For the foregoing reasons, the evidence establishes that the arrest warrant in this case in fact was signed by Deputy Clerk Dash on July 12, 2017, prior to its execution on July 17, 2017, and the Court so finds. Moreover, even had the warrant not been signed prior to its execution, the Court would find that the failure of a clerk to sign the warrant would amount to no more than a technical violation of Rule 9(b)(1) that would not justify the dismissal of the superseding indictment, in light of the fact that probable cause existed to arrest Defendant, and Magistrate Judge Lenihan had so ordered. Accordingly, Defendant's motion to dismiss the superseding indictment will be denied.

III. Motion to Compel Discovery

Defendant's motion also contains a request to compel discovery, specifically requesting the following materials discoverable under Rule 16: (1) a Pennsylvania state criminal complaint with accompanying affidavit of probable cause; (2) the Pennsylvania State Police arrest warrant and/or investigative reports; (3) photos of the alleged drugs; and, (4) a Federal criminal complaint and affidavit of probable cause [Doc. 246].

Governmental disclosure of evidence in criminal cases is governed by Fed. R. Crim. P. 16(a)(1). The United States Court of Appeals for the Third Circuit has recognized that discovery in criminal cases is limited to those areas delineated in Rule 16(a)(1), "with some additional material being discoverable in accordance with statutory pronouncements and the due process clause of the Constitution." *United States v. Ramos*, 27 F.3d 65, 68 (3d Cir. 1994). As a general matter, these other areas are limited to the Jencks Act[1] and materials available pursuant to the "*Brady* doctrine." *Id.* citing *Brady v. Maryland*, 373 U.S. 83 (1963).

Here, the Government represents that it already has supplied Defendant with all discoverable Rule 16 material in this case. As to the specific items requested by Defendant, the government has produced all relevant investigative reports. However, as to the remainder of Defendant's specific requests, the government indicated at oral argument that none of the requested material exists. There is no Pennsylvania State Police complaint or affidavit of probable cause, there is no state arrest warrant, there are no photographs of the drugs, and there is no Federal criminal complaint or affidavit of probable cause. Nevertheless, the Government has acknowledged its responsibilities and obligations under Rule 16(a), the Jencks Act, and the *Brady* doctrine, and has indicated that it will continue to comply with those requirements.

As the Government is cognizant of its discovery obligations, Defendant's request to compel discovery will be **granted in part and denied in part** as follows:

- The Government shall disclose all Rule 16(a) material and *Brady* exculpatory material **forthwith**;

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1 The Jencks Act, 18 U.S.C. §3500(b), requires the Government to disclose prior recorded statements of its witnesses, when related to the subject matter of their testimony, after each witness testifies on direct examination. *United States v. Weaver*, 267 F.3d 231, 245 (3d Cir. 2001). According to 18 U.S.C. §3500(a), "no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case*." (emphasis added). There is no authority by which courts can order the Government to provide Jencks Act statements prior to the time a witness has testified on direct examination at trial.

- The Government shall disclose all *Brady* impeachment material no later than **three (3) calendar days before trial**;

- The Government shall disclose all Jencks material in accordance with 18 U.S.C. §3500(b), but with encouragement to disclose such material no later than **three (3) calendar days before trial**; and

- To the extent the discovery request seeks any other material falling outside the scope of Rule 16, *Brady*, or the Jencks Act, it will be **denied**.

An appropriate order will follow.

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:17-15
	)	Judge Stephanie L. Haines
ADELFO RODRIGUEZ-MENDEZ	)	

ORDER OF COURT

AND NOW, this 16th day of July, 2021, upon due consideration of Defendant's Motion in Limine to Exclude Statements Made/Heard by the Confidential Informant as Inappropriate Hearsay [Doc. 293], and the Government's Response thereto [Doc. 304], IT IS ORDERED that Defendant's Motion in Limine to Exclude Statements Made/Heard by the Confidential Informant as Inappropriate Hearsay [Doc. 293] hereby is **granted in part**; and,

IT FURTHER IS ORDERED that to the extent Defendant's motion seeks the exclusion from the Government's case-in-chief of any and all statements made by the Confidential Informant to law enforcement officers as inadmissible hearsay, which the Government does not contest, the motion is **granted**, and the Government hereby is prohibited from eliciting and/or introducing any and all statements made by the Confidential Informant to law enforcement; and,

IT FURTHER IS ORDERED that to the extent Defendant's motion seeks the exclusion of any recording and/or transcription of any and all statements made by Defendant to the Confidential Informant, and any recording and/or transcription of any and all statements made by the Confidential Informant to Defendant, the Court will reserve ruling pending a proffer of evidence from the Government, outside the presence of the jury, by which it intends to authenticate said recordings/transcripts without the Confidential Informant.

Stephanie L. Haines
United States District Judge

cc/ecf: All counsel of record

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:17-15
	)	Judge Stephanie L. Haines
ADELFO RODRIGUEZ-MENDEZ	)	

ORDER OF COURT

AND NOW, this 16th day of July, 2021, upon due consideration of Defendant's Motion in Limine to Exclude Statements Made/Heard by the Confidential Informant Based on the Sixth Amendment [Doc. 294], and the Government's Response thereto [Doc. 305], IT IS ORDERED that Defendant's Motion in Limine to Exclude Statements Made/Heard by the Confidential Informant Based on the Sixth Amendment [Doc. 294] hereby is **granted in part and denied in part**; and,

IT FURTHER IS ORDERED that to the extent Defendant's motion seeks the exclusion from the Government's case-in-chief of testimonial statements made by the Confidential Informant to law enforcement officers as violative of the Sixth Amendment, the motion is **granted**, and the Government hereby is prohibited from eliciting and/or introducing any and all testimonial statements made by the Confidential Informant to law enforcement, *see Davis v. Washington*, 547 U.S. 813, 822 (2006); and,

IT FURTHER IS ORDERED that to the extent Defendant's motion seeks the exclusion of any recording and/or transcription of any and all statements made by Defendant to the Confidential Informant, and any recording and/or transcription of recorded conversations between the Confidential Informant and Defendant, the motion is **denied**. *See United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005) (surreptitiously monitored conversations and statements contained in

wiretap recordings are not "testimonial" for purposes of *Crawford v. Washington*, 541 U.S. 36 (2004)).

Stephanie L. Haines
United States District Judge

cc/ecf: All counsel of record

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:17-15-1
	)	Judge Stephanie L. Haines
ADELFO RODRIGUEZ-MENDEZ	)	

OPINION AND ORDER

On July 11, 2017, a grand jury returned a superseding indictment charging Adelfo Rodriguez-Mendez ("Defendant") with conspiracy to distribute and to possess with intent to distribute cocaine (Count One) and two counts of possession with intent to distribute and distribution of cocaine (Counts Two and Five) [Doc. 49].[1] Defendant proceeded to a jury trial. At the close of the Government's case, the Court denied Defendant's oral motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). On July 21, 2021, the jury returned a verdict of guilty as to each of Counts One, Two and Five [Doc. 355].

Presently before the Court is Defendant's renewed motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c)(1) [Doc. 360]. Defendant also has filed a motion for new trial pursuant to Federal Rule of Criminal Procedure 33(a) [Doc. 361]. The Government has filed an omnibus response to those motions [Doc. 363]. For the following reasons, both of Defendant's motions will be denied.

I. Renewed Motion for Judgment of Acquittal

Defendant moves for a judgment of acquittal under Rule 29(a). He argues that the Government failed to present sufficient evidence as to each element of the charged offenses of

[1] Defendant was also charged at Count Six of the Superseding Indictment with conspiracy to commit money laundering. Prior to trial, Count Six was dismissed as to Defendant upon Government motion on July 13, 2021 [Doc. 335].

conspiracy to distribute and possess with intent to distribute cocaine, and possession with intent to distribute cocaine.

Specifically, as to the conspiracy count, Defendant argues that the evidence was insufficient to support a finding that he was a member of a conspiracy to distribute cocaine or that he knowingly joined any kind of agreement knowing of that objective. Instead, Defendant avers that, at best, the evidence merely established that he kept "bad company," or that he was present when illegal activities occurred. As to the possession with intent to distribute counts, Defendant argues that the Government failed to show that he had control over any cocaine that was distributed; rather, the evidence only established that others, such as Geneva Gore or the Moyer brothers, had control over it.

A. Standard

"'[T]he Rule 29 judgment of acquittal is a substantive [judicial] determination that the prosecution has failed to carry its burden.'" *United States v. John-Baptiste*, 747 F.3d 186, 200 (3d Cir. 2014) (quoting *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005)). A defendant "challenging the sufficiency of the evidence" pursuant to Rule 29 "bears a heavy burden." *John-Baptiste*, 747 F.3d at 201 (quoting *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992)).

In deciding whether to grant a motion for acquittal, the trial court is required to view the evidence in the light most favorable to the prosecution and to draw all reasonable inferences in the Government's favor. *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984). The court "must determine whether the government has adduced sufficient evidence respecting each element of the offense charged to permit jury consideration." *United States v. Giampa*, 758 F.2d 928, 934-35 (3d Cir. 1985). A reviewing court "must be ever vigilant . . . not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [its] judgment for

that of the jury." *United States v. Caraballo–Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)). The jury's verdict must be assessed from the perspective of a reasonable juror, and the verdict must be upheld as long as it does not "fall below the threshold of bare rationality." *Caraballo-Rodriguez*, 726 F.3d at 431 (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)).

B. Analysis

Defendant first challenges the jury's verdict as to the conspiracy count. In order to prove a conspiracy, the Government must show: (1) a shared unity of purpose; (2) an intent to achieve a common illegal goal; and (3) an agreement to work toward that goal. *Caraballo-Rodriguez*, 726 F.3d at 425. The Government must establish each element beyond a reasonable doubt. *Id*. And, although the prosecution must prove a defendant's knowledge of the conspiracy's specific objective, that knowledge need not be proven by direct evidence. *Id.* at 431. Indeed, the Government may prove the existence of a conspiracy entirely through circumstantial evidence. *United States v. Williams*, 974 F.3d 320, 370 (3d Cir. 2020) (citing *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986)).

Here, the crux of Defendant's argument is that the Government's evidence established nothing more than that he kept "bad company" with the likes of Geneva Gore and John and Jason Moyer, and that he may have been present at his garage while others distributed cocaine from it, without his knowledge. While it is true that mere presence at the scene of a crime or associating with criminals is not in itself sufficient evidence of a conspiracy, *see*, *e.g.*, *United States v. Tyson*, 653 F.3d 192, 211 (3d Cir. 2011) ("our conspiracy jurisprudence does not sanction guilt by association"), the evidence presented at trial in this case, as well as the inferences that rationally

can be drawn from it, goes well beyond simply "keeping bad company," or Defendant's "mere presence" at the crime scene.

Instead, the Government presented testimony not only from Gore, but from Joseph Seelinger and Steven Spearman, all of whom testified as to Defendant's knowledge of, and active participation in, the drug distribution activities occurring at the East Coast Monster Garage. The testimony from these individuals detailing events involving Defendant that took place over multiple years suggested a longstanding pattern of illicit activity between them and Defendant, and others, from which a rational juror could conclude that Defendant understood that he was participating in a drug distribution conspiracy. *See*, *e.g.*, *United States v. Claxton*, 685 F.3d 300, 310 (3d Cir. 2012) ("[A]lthough the number of transactions here does not, on its own, prove [defendant's] knowledge of the character of the conspiracy, it does make it more likely that he knew the business he was about").

It is well-settled that witness credibility determinations must be made by the jury. *United States v. Lewis*, 284 F. App'x 940, 942 (3d Cir. 2008). The jury in this case clearly found the testimony of Gore, Seelinger and Spearman to be credible, and their credibility determination was rational in light of the evidence. The Court is satisfied that there was more than sufficient evidence presented at trial from which a reasonable juror could find beyond a reasonable doubt that the Government proved that Defendant was a member of a conspiracy, that the object of that conspiracy was to distribute cocaine, and that Defendant himself conspired to distribute, and to possess with the intent to distribute, cocaine.

As to the possession with intent to distribute counts, Defendant argues that the Government failed to produce sufficient evidence that he had control over the cocaine involved in the

transactions underlying those counts. Rather, he contends that the evidence showed only that other people, such as Geneva Gore and the Moyer brothers, had control over that cocaine.

The essential elements of the substantive offense of possession of a controlled substance with intent to distribute are that the defendant: (1) knowingly possessed a controlled substance with (2) the intent to distribute it. *United States v. Iglesias*, 535 F.3d 150, 156 (3d Cir. 2008) (citation omitted). A jury may convict on such a charge if it concludes that the defendant actually or constructively possessed the controlled substance. *Id*.

Here, Counts Two and Five of the superseding indictment charged Defendant with possession with intent to distribute cocaine on July 1, 2016 and March 22, 2017, respectively [Doc. 49]. As to these counts, the Government offered into evidence an audio recording which detailed Defendant discussing and selling cocaine to a confidential informant on the dates specified in the superseding indictment. In addition, the Government presented the testimony of Corporal Kristen Beattie and Special Agent Derrick Bassler, who both testified as to their surveillance of the controlled buys between Defendant and the confidential informant on those dates, corroborating the transactions discussed on the audio recordings. Viewing the evidence presented at trial in the light most favorable to the Government, the Court finds that there was more than sufficient evidence by which the jury rationally could conclude that Defendant possessed with the intent to distribute cocaine on the dates set forth in the superseding indictment.

C. Conclusion

The Third Circuit Court of Appeals has made clear that "[i]t is up to the jury—not the district court judge or our Court—to examine the evidence and draw inferences. Unless the jury's conclusion is irrational, it must be upheld." *Caraballo-Rodriguez*, 726 F.3d at 432. Here, based on the evidence before it, the jury's conclusion that Defendant was involved in a conspiracy to

distribute and possess with intent to distribute cocaine clearly was rational. Likewise, the jury's conclusion that Defendant possessed with intent to distribute cocaine on the dates specified in the superseding indictment was rational based on the evidence presented at trial. Because the jury's guilty verdict on all three counts did not fall below the "threshold of bare rationality," it must be upheld. Accordingly, Defendant's motion for judgment of acquittal will be denied.

II. Motion for New Trial

Defendant also has filed a motion for new trial pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure. Defendant seeks a new trial based on the admission into evidence of the audio recordings generated by the deceased confidential informant. He challenges the admission of those recordings on two grounds: (1) that they were not adequately authenticated; and (2) that the audio recordings contained hearsay from an unavailable declarant and the admission of those recordings therefore violated his Sixth Amendment right to confront the witnesses against him.

A. Standard

Federal Rule of Criminal Procedure 33(a) permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." The decision to grant or deny a motion for new trial lies within the court's discretion. *United States v. Vitillo*, 490 F.3d 314, 325 (3d Cir. 2007). In considering a motion for new trial, this Court must "exercise great caution in setting aside a verdict reached after fully-conducted proceedings," and particularly so where "the action has been tried before a jury." *United States v. Kelly*, 539 F.3d 172, 182 (3d Cir. 2008) (*quoting United States v. Kamel*, 965 F.2d 484, 493 (7th Cir. 1992)).

Even if a trial court improperly admits evidence, this "does not automatically mandate a new trial. There must be prejudice that affects a substantial right of the defendant." *United States v. Giampa*, 904 F. Supp. 235, 302 (D.N.J. 1995) (quoting *United States v. Newby*, 11 F.3d 1143,

1147 (3d Cir. 1993)). Accordingly, a district court may order a new trial "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. Staten*, 557 F. App'x 119, 121 (3d Cir. 2014) (quoting *United States v. Silveus*, 542 F.3d 993, 1004–05 (3d Cir. 2008).

B. Analysis

Defendant first argues that the audio recordings were improperly admitted into evidence because they were not adequately authenticated under the seven-part test set forth in *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975).[2] Specifically, Defendant contends that the confidential informant was unable to testify as to whether he was capable of operating the device; that no person who participated in the conversations testified as to whether the recordings were authentic or correct or whether changes, additions or deletions were made; and that the Government failed to produce evidence indicating that the recording was made in good faith without any inducement.

The authentication of evidence is governed generally by Rule 901 of the Federal Rules of Evidence. Under Rule 901(a), in order to satisfy the requirement of authenticating or identifying an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." While the burden rests on the proponent, the Third Circuit has held that "[t]he burden of proof for authentication is slight." *United States v. Ligambi*, 891 F. Supp. 2d 709, 717 (E.D. Pa. 2012) (quoting *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 328 (3d Cir. 2005). Ultimately, Rule 901 requires only a foundation from which the fact-finder could

[2] In *Starks*, the Third Circuit Court of Appeals favorably noted a seven-part test for establishing a foundation for the admission of a sound recording: (1) that the recording device was capable of taking the conversation now offered in evidence; (2) that the operator of the device was competent to operate the device; (3) that the recording is authentic and correct; (4) that changes, additions or deletions have not been made in the recording; (5) that the recording had been preserved in a manner that is shown to the court; (6) that the speakers are identified; (7) that the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *Starks*, 515 at 121 n. 11.

legitimately infer that the evidence "is what it is claimed to be." *United States v. Credico*, 718 F. App'x 116, 119 (3d Cir. 2017).

In this case, the authentication issue involves audio recordings of conversations between Defendant and a now-deceased confidential informant, and others. In order to lay a foundation for authenticating the recordings, the Government presented testimonial evidence from Corporal Beattie, who testified as to her familiarity with the recording equipment and, based on her experience, as to its reliability in accurately recording conversations. She further testified that, although she does not speak Spanish, the audio appeared to be in the same form as when she first heard it while listening in real time, and that there were no gaps or interruptions during the recording process. The Government further strengthened the foundation through the testimony of Geneva Gore, who stated that she had known Defendant since 2011, that she spoke to him in person multiple times a week and on the phone nearly daily, and that she also knew and was familiar with the voices of the confidential informant and the Moyer brothers. Based on her familiarity with all of the speakers, Gore was able to identify each voice, in both English and Spanish, on the recording.

In light of the testimony of Beattie and Gore, the Court determined that the Government met its burden of authentication under Rule 901, and admitted the audio recordings. The Court does not believe this ruling was in error. Beattie testified as to the operation and reliability of the equipment and that the recording appeared to be authentic and correct with no modifications from what she had heard while listening to the conversations in real time. Gore was able to identify the voices of all of the participants on the recordings in both English and Spanish based on her familiarity with those voices. *See* F.R.E. 901(b)(5) (an opinion identifying a person's voice on a recording may be based on hearing the voice at any time under circumstances that connect it with

the alleged speaker); *see also Ligambi*, 891 F. Supp. 2d at 717-18 (voice identification may be established by lay opinion from a person who has heard and is familiar with the voices of the speakers).

In *Lexington Insurance*, the Third Circuit reaffirmed the standard for authentication, stating:

> The showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.

Id. at 329 (quotation omitted).

Here, the Government presented evidence to authenticate the audio recordings through Gore's voice identification of the speakers, corroborated by the testimony of Beattie who had heard the conversations in real time. Accordingly, the Court is satisfied that the Government laid an adequate foundation from which a fact-finder could legitimately infer that the "evidence is what its proponent claims it to be," the minimal showing required for authentication under Rule 901. As such, the audio recordings properly were admitted for consideration by the jury.

To the extent Defendant contends that the admission of the recordings fails to meet the strict standards of *Starks*, the Court disagrees. In the first instance, the Third Circuit has explained that *Starks* was not intended to establish "a uniform standard equally applicable to all cases." *Credico*, 718 F. App'x at 119. Instead, "within reason," whether the "proof of facts creat[es] a sufficient foundation for the admission of a tape recording is a matter to be decided by the trial court." *Id*. (quotation omitted). Thus, some courts have chosen not to apply the *Starks* factors as a rigid standard, but instead to determine "whether the proof of facts creates a sufficient foundation

for the admission of a tape recording," using the burden of proof for authentication under Rule 901 generally. *See*, *e.g.*, *United States v. Madera*, No. 3:CR-17-298, 2019 WL 2509896, at *3 (M.D. Pa. June 14, 2019). In any event, the Court does not believe that its ruling is contrary to *Starks*. Rather, the Court is satisfied that under either the more rigid standards of *Starks* or the more minimal standard of Rule 901, the testimony of Beattie and Gore was more than sufficient to lay an adequate foundation for the authentication and admission of the audio recordings in this case.

Defendant next challenges the admission of the audio recordings on constitutional grounds, arguing that the recordings contain hearsay statements, and that the admission of those recordings violated his Sixth Amendment right to confront the witnesses against him, entitling him to a new trial. Defendant's argument is unavailing.

Initially, the recorded conversations do not constitute hearsay. As the Government aptly notes, the recordings contain statements not only by the confidential informant, but by Defendant himself. Defendant's statements on the recordings are admissions by a party opponent, which are not hearsay under Federal Rule of Evidence 801(d)(2)(A). In turn, the statements of the confidential informant likewise are not hearsay, because they were not offered for the truth of the matter asserted, but to provide context to Defendant's statements. See *United States v. Lee*, 339 F. App'x 153, 157 (3d Cir. 2009) (recording of a conversation between the defendant and a confidential informant did not contain hearsay – the defendant's statements were admissions of a party opponent, and the confidential informant's statements were not offered for truth of matters asserted).

Moreover, Defendant's argument that the admission of the recordings violated his Sixth Amendment rights is foreclosed by the decision of the Third Circuit Court of Appeals in *United States v. Hendricks*, 395 F.3d 173, 179 (3d Cir. 2005). Defendant contends that the purpose of

the recordings was to elicit statements that later could be used against him in court, and that therefore the admission of those statements violated his right to confrontation under the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that testimonial hearsay statements may not be introduced against a defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant).

However, because "[t]he lynchpin of the *Crawford* decision . . . is its distinction between testimonial and nontestimonial hearsay," the rule announced in *Crawford* applies only to testimonial hearsay. *Hendricks*, 395 F.3d at 179. The *Hendricks* court explicitly determined that surreptitiously monitored conversations and statements contained in wiretap recordings are not "testimonial" for purposes of *Crawford*, and held that "if a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context." *Id*. at 184.

Defendant acknowledges *Hendricks*, but nevertheless asserts that its holding is "flawed." Defendant cites no authority from this, or any other, jurisdiction in support of his interpretation, and, notwithstanding his critique, *Hendricks* remains binding on this Court. The Court's ruling that the admission of the audio recordings was permissible under the Sixth Amendment is in accord with the law of this circuit, and Defendant's disagreement with that law is an insufficient basis to grant a new trial.

C. Conclusion

The Third Circuit Court of Appeals has recognized that motions for a new trial under Rule 33 "are not favored and should be granted sparingly and only in exceptional cases." *United States*

v. Wrensford, 866 F.3d 76, 93 n. 9 (3d Cir. 2017) (*quoting United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008)). This is not an exceptional case. Defendant has failed to show any error relating to the admission of the audio recording, let alone an error so significant as to create a danger that a miscarriage of justice occurred. Instead, the Court stands by its ruling that the audio recording properly was authenticated under Rule 901, and properly was admitted into evidence in accord with the controlling case law in this circuit. Because Defendant has failed to show a new trial is required in the interest of justice, his motion for new trial will be denied.

An appropriate order will follow.

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

UNITED STATES OF AMERICA
v.
ADELFO RODRIGUEZ-MENDEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 1:17-15-01

USM Number: 62721-298

D. Robert Marion, Jr., 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) 1, 2, and 5 of the Superseding Indictment by a Jury after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute and to Distribute Less than Five Hundred (500) Grams of a Mixture and Substance Containing a Detectable Amount of Cocaine	3/22/2017	I

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) _____ ☐ 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.

2/28/2022
Date of Imposition of Judgment

Stephanie L. Haines
Signature of Judge

STEPHANIE L. HAINES, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 2, 2022
Date

DEFENDANT: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute and Distribution of Less than Five Hundred (500) Grams of a Mixture and Substance Containing a Detectable Amount Cocaine	7/1/2016	II
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute and Distribution of Less than Five Hundred (500) Grams of a Mixture and Substance Containing a Detectable Amount of Cocaine	3/22/2017	V

DEFENDANT: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

IMPRISONMENT

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

210 months at each of Counts 1, 2 and 5, to be served concurrently.

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

The Court recommends placement in the Residential Drug Treatment Program that is part of the BOP's Drug Treatment Program and also recommends that the Defendant be placed in a federal facility as close as possible to Clymer, New York.

☑ 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: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

SUPERVISED RELEASE

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

3 years at each of Counts 1, 2, and 5, to be served 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.

DEFENDANT: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

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 _____

DEFENDANT: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

ADDITIONAL SUPERVISED RELEASE TERMS

The Defendant shall be deported if, after notice and hearing pursuant to the Immigration and Naturalization Act, the Attorney General demonstrates by clear and convincing evidence the alien is deportable. The Defendant shall not re-enter the United States of America, unless authorized in advance by the Secretary of the Department of Homeland Security or the Attorney General of the United States.

The Defendant shall participate in a program of testing and, if necessary, treatment for substance abuse, said program to be approved by the probation officer, until such time as the Defendant is released from the program by the Court. Further, the Defendant shall be required to contribute to the costs of services for any such treatment in an amount determined by the probation officer but not to exceed the actual cost. The Defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

It is further ordered that the Defendant shall not intentionally purchase, possess and/or use any substances designed to simulate or alter in any way Defendant's own urine specimen. In addition, the Defendant shall not purchase, possess and/or use any devices designed to be used for the submission of a third party urine specimen.

The Defendant shall submit his person, property, house, residence, vehicle, papers, business or place of employment to a search, conducted by a United States Probation or Pretrial Services Officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The Defendant shall inform any other residents that the premises may be subject to searches pursuant to this condition.

It is further Ordered that the Defendant shall pay to the United States a mandatory Special Assessment of $300, which shall be paid to the United States District Court Clerk forthwith.

The Court finds the Defendant does not have the ability to pay a fine and therefore the imposition of a fine is waived in this case.

DEFENDANT: ADELFO RODRIGUEZ-MENDEZ
CASE NUMBER: CR 1:17-15-01

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	$ 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.

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: ADELFO RODRIGUEZ-MENDEZ
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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 $ 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:

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.