NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2023

ANGEL LUIS CONCEPCION-ROSARIO,

Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals for the Third Circuit

United States District Court for the Eastern District of Pennsylvania

I was appointed by the United States Court of Appeals for the Third Circuit to represent Angel Luis Concepcion-Rosario, pursuant to the Criminal Justice Act in his appeal from a judgement of conviction entered by the United States District Court for the Eastern District of Pennsylvania.

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UNITED STATES OF AMERICA,

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

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PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Did the district court error in not suppressing the physical evidence and the statement?

   Suggested Answer: Yes.

2. Did the district court error in not granting the petitioner's motion for mistrial?

   Suggested Answer: Yes.

3. Did the district court error in not granting petitioner's motion for judgement of acquittal?

   Suggested Answer: Yes.

4. Did the district court error in allowing the Government to impeach the petitioner's credibility through prior convictions?

   Suggested Answer: Yes.

5. Was the petitioner's sentence harsh and excessive?

   Suggested Answer: Yes.

PARTIES TO THE PROCEEDING

The petitioner is:

Angel Luis Concepcion-Rosario

The respondent is:

United States of America

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner Angel Luis Concepcion-Rosario's Judgement of Conviction.

STATEMENT OF JURISDICTION

Angel Luis Concepcion-Rosario seeks review of the May 23, 2024, Order of the United States Court of Appeals for the Third Circuit. Jurisdiction of this Court to review the judgement of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural History

On June 17, 2017, a Grand Jury for the Eastern District of Pennsylvania indicted Angel Luis Concepcion-Rosario on Count I, possession with intent to distribute 40 grams or more of fentanyl, in violation of 21 U.S.C. § 841(a)(1),(b)(1)(B), and aiding and abetting in violation of 18 U.S.C. § 2.

On November 19, 2018, the Government filed an Information charging prior offenses pursuant to 21 U.S.C. § 851. Thereafter, the Petitioner was tried before a jury and the Honorable Joseph F. Leeson, Jr. The Petitioner was found guilty of Count I and sentenced to 327 months. Thereafter, a timely Notice of Appeal was filed.

Statement of Facts

DEA Agent Joshua Romig testified that he received information from a confidential source pertaining to drug traffickers in the Allentown and Bethlehem area of Lehigh County. Agent Romig got an order to intercept the electronic communication of Miguel Bierga Colon and Santiago Correa. Mr. Correa was the heroin and cocaine source for Mr. Colon.

Ms. Norma Navarette was on the wire tap. Agent Romig has known Ms. Navaretta since 2015 and she resides at 877 North Jasper Street.

Additionally, Santiago Correa was on the wiretap and Agent Romig has known him since 2015.

Since the language spoken by the targets was Spanish, translators were used and they translated to English for Agent Romig. Based upon the information provided to him, Agent Romig believed that Santiago Correa was going to 877 North Jasper Street to pick up 200 grams of heroin from Carlos Ferra and Norma Navarette.

Agent Romig set up surveillance at Correa's and Navarette's houses. Also, Agent Romig contacted Pennsylvania State Police Trooper Reed to make a possible stop of a vehicle the next morning.

On June 17, at 10:30 a.m., the Petitioner appeared at Norma Navarette's house at 877 North Jasper Street.

Agent Romig advised Trooper Reed of the license plate number, make, and model of the car. Also, Agent Romig advised Trooper Reed to establish his own probable cause for the stop. If he could not, proceed to stop and search the vehicle because Agent Romig had his own probable cause that would justify the stop and search of the vehicle.

Trooper Reed stopped and searched the vehicle. Trooper Reed located the drugs in the air filter of the car and transported the Petitioner back to the Reading State Police Barracks.

Agent Romig was present when the Petitioner was given his Miranda warning in English and Spanish. The Petitioner told Agent Romig that the drugs were his. Agent Romig believed that the Petitioner did not want to cooperate any further and that was the end of the interview.

Pennsylvania State Trooper Daniel Reed testified that on June 16 and 17, 2017, he was advised by DEA Agent Romig of an ongoing drug investigation. On June 17, Trooper Reed was advised to stop and search a 2011 red Hyandi Sonata, plate number JKK718.

Trooper Reed stopped the vehicle for lane violations. Trooper Reed observed the Petitioner's two phones and an overwhelming odor of air fresheners. Trooper Reed refers to the two phones as "burner" phones. Trooper Reed observed the Petitioner as being overly nervous.

Trooper Reed asked for the Petitioner's driver's license, registration, and insurance card. Further, the Petitioner told Trooper Reed that he lived in Reading and was coming from the Sands Casino. According to Trooper Reed, the time line did not make sense because the Petitioner would have driven 1 ½ hours to gamble at the Sands Casino for 45 minutes.

Trooper Reed presented the Petitioner with a consent to search form and explained to him his rights. The Petitioner signed the Spanish side of the form. A

K-9 search of the vehicle revealed suspected CDS found in the Petitioner's vehicle air filter.

Trooper Mark Quesada testified that he read the Petitioner his Miranda warning in Spanish. Additionally, he was present when the Petitioner was read his Miranda warning in English. Trooper Quesada observed the Petitioner answering the question in both English and Spanish. The Petitioner told Trooper Quesada in English, that the drugs were his and did not want to cooperate.

Pennsylvania Trooper William Everett testified that on July 24, 2014, he stopped the Petitioner's vehicle which contained a female occupant. Trooper Everett observed the Petitioner transfer a bag with white powder to the female passenger.

The bag was found to be cocaine. The Petitioner was convicted of possession with intent to deliver cocaine. Trooper Everett does not speak Spanish and had a limited conversation with the Petitioner in English.

Pennsylvania State Trooper Joseph Carlson testified on July 24, 2014, he was on duty with Trooper Everett and stopped the Petitioner's vehicle. Trooper Carlson approached the Petitioner's vehicle and asked for his license, registration, and insurance card. Trooper Carlson made the request in English and the Petitioner responded in English. Trooper Carlson had no problem speaking to the Petitioner in English.

The Petitioner testified that he is from Reading and was in Allentown, on June 17, 2017, to loan a friend who was being evicted, $300.00. He was driving a wine colored Hyundai.

The Petitioner denies being on Wyoming Street. The Petitioner met with his friend and spoke to her and then told her that he had to leave and go to work. Next, the Petitioner was stopped by a State Trooper on Route 222 near Reading. The Trooper told the Petitioner he was stopped for crossing the yellow line twice and the white line once. The Petitioner denied this fact. The Petitioner provided his license and registration and was told by the Trooper that he would get a warning.

The Petitioner denied being asked by the Trooper to search his vehicle or giving him permission to search his vehicle. The Petitioner observed the Trooper raise the hood to his vehicle and the dog search. Thereafter, the Petitioner was arrested for drug possession.

The Petitioner did not see Trooper Reed recover drugs from his vehicle. The Petitioner denied waving his Miranda rights and making a statement. According to the Petitioner, he did sign the Miranda warning statement to stop all questioning. The Petitioner denied telling the Trooper that the drugs were his. Further, the Petitioner observed the alleged drugs being tested and they were determined to be negative. Additionally, the Trooper never asked the Petitioner if

there were drugs in the car. The Petitioner was questioned in English and he told the Troopers that he did not speak English only Spanish.

REASONS FOR GRANTING THE WRIT

POINT I

THE DISTRICT COURT ERRED IN NOT SUPPRESSING THE PHYSICAL EVIDENCE AND THE STATEMENT.

Suppression Motion Statement of Facts

Pennsylvania State Trooper Daniel Reed testified that on June 16, 2017, DEA Special Agent Joshua Romig told him to stop a vehicle involved in a current drug trafficking investigation. On June 17, 2017, Agent Romig conducted a surveillance of a residence and determined a red 2011 Hyundai Sonata needed to be stopped. Agent Romig asked Trooper Reed to develop his own probable cause but, if he can not, the DEA had its own probable cause to justify the stop.

At 11:09 a.m. Trooper Reed encountered the red Hyundai Sonta and observed the vehicle cross the median line a few times and the white shoulder line at least twice. Trooper Reed activated his emergency lights and pulled the vehicle over approximately a mile north of the Route 737 exit.

Trooper Reed approached the car on the driver's side and asked the Petitioner for his driver's license, registration, and proof of insurance. The Petitioner provided Trooper Reed with a valid Pennsylvania driver's license and registration for the car.

When Trooper Reed approached the vehicle, he immediately smelled an overwhelming odor of air fresheners emanating from inside of the vehicle. Additionally, Trooper Reed observed two phones, one phone inside the center console's cup holder and an additional white cell phone on the front passenger seat. Trooper Reed testified that based upon his training, education, and experience, he knew that drug traffickers used prepaid "burner" phones to make it harder for law enforcement to identify the user of the phone in wiretap investigations. Trooper Reed also knew that drug traffickers used air fresheners to mask the odor of drugs or contraband from canine detection.

During the traffic stop, Trooper Reed observed that the blood vessels in Petitioner's neck were throbbing, and that the Petitioner appeared nervous even after Trooper Reed told him that he was only going to get a warning for a vehicle code violation and not a ticket.

The Petitioner told Trooper Reed that he left his home in Reading at 8:30 a.m. and was on his way back from the Sands Casino in Bethlehem, Pennsylvania. The time line the Petitioner provided was suspicious, since the Petitioner would make a round trip of two hours and 45 minutes to spend 45 minutes at the casino.

The Petitioner had $400.00 cash in his pockets and had no proof that he went to the casino. Further, Trooper Reed had information from DEA Agent

Romig that the Petitioner was observed at a residence in Allentown during the time he would have been at or traveling back from the casino.

Trooper Reed was able to speak with the Petitioner in English though he realized that Spanish was the Petitioner's primary language. Trooper Reed ordinarily calls Trooper Quesada to translate when he encounters a Spanish speaker. Trooper Reed did not feel the need to call Trooper Quesada.

Trooper Reed asked the Petitioner if he had criminal history or active arrest warrants. The Petitioner responded that he was arrested once for cocaine possession which was inaccurate.

The Petitioner advised Trooper Reed that he may search the vehicle prior to Trooper Reed asking permission to search. Trooper Reed asked the Petitioner to sign the Spanish side of the consent to search form after explaining to him his rights regarding the search. Thus, approximately 31 minutes had elapsed between the initial stop of the Petitioner's vehicle and the Petitioner signing the consent to search form in Spanish.

After the Petitioner signed the consent to search form, Trooper Reed conducted a canine search of the car with his partner Canine Edo. The canine search produced suspected drugs. The Petitioner was taken into custody and his two phones were seized.

The Petitioner was taken to the Pennsylvania State Police Reading Barracks where Troopers Reed and Quesada advised him of his Miranda rights in English and Spanish. No threats were made to get the Petitioner to waive his Miranda rights. Trooper Reed offered the Petitioner water and the use of the bathroom.

At approximately 1:00 p.m., an hour and twenty minutes had passed since the Petitioner signed his waiver of rights form. After the Petitioner signed the form, he admitted that the drugs were his. Trooper Quesada testified that he had no doubt that the Petitioner could understand English. Trooper Reed testified that he did not plant the drugs in the Petitioner's car nor did he see anyone else do so back at the barracks or when they were entered into evidence. DEA Agent Romig proceeded to the Reading Barracks and asked the Petitioner if he wanted to cooperate. The Petitioner would not acknowledge one way or the other if he wanted to cooperate. The Petitioner refused to tell Agent Romig his source for the drugs.

Legal Argument

In addressing issues pertaining to motions to suppress physical evidence, the District Court's factual findings are reviewed for clear error and its legal determination for plenary review. *United States v. Lewis*, 672 F.2d 233, 237 (3rd Cir. 2012). Should the Court's reasoning differ in some respects from that of the

District Court, it may affirm on any ground supported by the records. *Tourscher v. McCullough*, 184 F.3d 236, 240 (3rd Cir. 1999).

The Government bears the burden of showing and presenting evidence that the traffic stop was reasonable. *United States v. Benoit*, 730 F.3d 289, 288 (3rd Cir. 2013). The evidence presented is viewed most favorable to the District Court's ruling. *United States v. Cook*, 277 F.3d 82, 84 (1st Cir. 2002).

As to the motion to suppress statements, the District Court's factual findings are reviewed for clear error and plenary standard to the application of the law to the facts. *United States v. Lafferty*, 503 F.3d 293, 298 (3rd Cir. 2007).

It is well established that a law enforcement officer conducting a traffic stop "may consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot" *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The Supreme Court has not reduced "reasonable suspicion" to a "net set of legal rules," preferring instead a "totality of the circumstances" approach focused on "whether the detaining officer has a particularized and objective basis for suspecting illegal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). "This process allows officers to draw on their own experience and specialized training to make inferences from deductions about the cumulative information available to them that might well elude an untrained person." *Id.* at 273.

Suspicion must be based on more than a "mere hunch" to be reasonable, but "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short in satisfying a preponderance of the evidence standard." *Id.* at 274 (internal quotation marks omitted). See, *United States v. Cortez*, 449 U.S. 411, 417 (1981).

A detention must be temporary and last no loner than necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges. *United States v. Dortch*, 199 F.3d 193, 198 (5th Cir. 1999).

While the Circuits have recognized that it is legal for a highway patrolman to examine a motorist's license, registration, and rental papers, *United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004), this recognition does not extend to detentions, searches and interrogations after the investigation of the traffic stop is complete.

Trooper Reed observed the Petitioner's vehicle cross the median line twice. He observed this from a distance of seven or eight cars behind the Petitioner's vehicle. This observation does not constitute reasonable suspicion because it is not a motor vehicle violation to cross the median line on two occasions.

The stop of the Petitioner's vehicle constituted a pretextual stop and was unduly tainted by Agent Romig's telephone call to the Trooper.

While "reasonable suspicion" must be more than an inchoate "hunch," "the likelihood of criminal history need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). The Fourth Amendment requires only that the police articulate some minimal, objective justification for the investigation. *United States v. Givan*, 320 F.3d 458 (3rd. Cir. 2003). Reasonableness is determined in light of the totality of the circumstances. *Id. Arvizu*, the Supreme Court explained that the totality of the circumstances inquiry "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person.'" 534 U.S. 266, 273 (2002).

Trooper Reed did not observe the Petitioner's vehicle violate any motor vehicle laws.

The Petitioner provided Trooper Reed with his identification, a valid Pennsylvania Drivers License along with the appropriate vehicle documentation.

Trooper Reed indicated to the Petitioner that he would only receive a warning for failure to stay in a lane.

At that point, the interaction with the officer was over and the Petitioner should have been free to leave. This is what this Court has referred to as the

"Rodriguez" moment. See, *Rodriguez v. United States*, 135 S.Ct 1609, 1614-19 (2015).

The Trooper did not possess any other facts that would lead him to believe criminal activity was afoot or a vehicle search was justified. In short, the Trooper could not extend the scope of the stop because he did not establish a reasonable, articulable suspicion of criminal activity pursuant to *United States v. Givan*, 320 F.3d 452, 459 (3rd Cir. 2003); *United States v. Clark*, 902 F.3d 404, 409-411 (3rd Cir. 2018).

The nervousness of the Petitioner nor his failure to include every criminal offense in his criminal history does not permit the trooper to conduct a search. Moreover, judicial precedent has established that conflicting stories from a driver and passenger, driver's nervousness, and the fact that neither were listed on the rental agreement did not give rise to a reasonable suspicion of drug trafficking. *United States v. Valdez*, 267 F.3d 395, 397-98 (5th Cir. 2001). In *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2001), the Court held that the driver's admission that he was previously arrested for crack did not support a finding of reasonable suspicion. Although Trooper Reed testified that during the stop he detected an overwhelming odor of air fresheners, the Petitioner appeared nervous, his carotid artery was pulsating and he appeared to be clammy, and observed a black burner flip cellular phone and a white Samsung cellular phone on the front passenger

seat, those observations do not support the reasonable suspicion that a search requires.

The Petitioner did not consent to a search of his vehicle or waive his Miranda rights because he does not speak English well enough to do so. It is well recognized that a Petitioner can consent to a search of his vehicle. *United States v. Chavez-Villareal*, 3 F.3d 124 (5th cir. 1993). Likewise, a Petitioner can waive his Miranda rights provided the waiver is intelligently, knowingly, and voluntarily made. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Trooper Reed's testimony that Concepcion-Rosario understood English and voluntarily agreed to allow a search of his vehicle is not consistent with the trooper's testimony on cross-examination, where he said he asked the Petitioner to search the vehicle. It is also inconsistent with other testimony and begs the question of why Trooper Mark Quesada was summoned to the barracks to help translate because there "seemed to be a communication barrier." Trooper Quesada also testified he translated the Miranda waiver form, and read the Miranda rights to Petitioner in Spanish.

Trooper Quesada explained that he spoke to the Petitioner in English and Spanish but he did not know if the Petitioner understood everything in English. The trooper said that when English was being spoken he was nodding and shaking

his head. "I don't know if he understood everything," he reiterated. This clearly shows that even fellow officers were unable to confirm whether the Petitioner understood what he was being asked to do. Accordingly, the Petitioner's waiver of his rights was not knowing as required and all evidence obtained as a result must be excluded.

Two factors determine whether or not Concepcion-Rosario did not waive his Miranda rights; first, the relinquishment of the right must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

As a means of protecting the Fifth Amendment privilege against self-incrimination, a suspect is constitutionally entitled to receive Miranda warnings if he or she (i) is in police custody and (ii) is interrogated by the police. "Custody" has been defined as either arrest or "a restraint on freedom of movement associated with formal arrest." "Interrogation" is defined as questioning or its

functional equivalent--that is, statements intended to elicit an incriminating response by the subject. See, *Rhode Island v. Innis*, 446 U.S. 291 (1980).

There is no violation of the Fifth Amendment where a suspect makes a "spontaneous" statement to police, not in response to interrogation. Before any custodial statement, made in response to police interrogation, is admissible at trial, the suspect must execute a voluntary waiver of his or her rights. See, *Miranda v. Arizona*, 384 U.S. 436 (1966). Judicial precedent is clear that where a Petitioner asserts his right to remain silent, all police questioning must cease. *Michigan v. Mosley*, 423 U.S. 96, 96, S.Ct. 321 (1975). Before any further questions can be asked, law enforcement officers must wait for a period of time, provide a fresh Miranda warning and obtain a knowingly voluntary waiver of rights.

In the instant case, the Petitioner maintains that his Miranda Rights were never properly given to him. Concepcion-Rosario maintains that he did not waive his right to remain silent. In addition, he contends that a law enforcement officer told him he would in effect be going home because there were no illegal drugs seized. Since the Petitioner argues he did not waive his right to remain silent, there could be no interrogation and therefore no admission by him. As such, any information obtained from this interrogation is improper and inadmissible.

Consequently, for the reasons stated, the Petitioner respectfully requests that the physical evidence and statement be suppressed.

POINT II

THE DISTRICT COURT ERRED IN NOT GRANTING THE PETITIONER'S MOTION FOR MISTRIAL.

At the conclusion of Agent Romig's testimony, the Petitioner made a motion for mistrial arguing that the agent improperly commented upon the Petitioner's invocation of his right to remain silent. The District Court made the following findings:

> I reviewed and listened to the recording of Agent Romig's testimony from Tuesday. When asked what the Petitioner said at the State Police barracks, Agent Romig responded "not much." He said that they were his drugs and that he did not get them for anyone. Agent Romig gave his interpretation of the statement and explained, quote, "I interpreted that to mean that he didn't want to cooperate any further."
>
> He explained what happened next, stating that after the Petitioner's two statements that, quote "that was the end of the interview. It was a two-question interview. I explained to the Petitioner that I wanted him to cooperate, that I wanted him to tell us who his source of supply was, and I wanted him to help the government and help our case. Based on the Petitioner's answer to the question, that they were his drugs and he got them from no one, I determined that to be his answer; that he did not want to cooperate with law enforcement. So the interview stopped at that point." App. 449-450.

The District Court concluded that the agent's comments did not infringe upon the Petitioner's right to remain silent. Agent Romig's comments reflect his own understanding of the conversation with the Petitioner. The District Court

concluded that they were not impermissible comments on the Petitioner's exercise of his Fifth Amendment rights.

The standard of review for a mistrial motion based upon prejudicial comment is abuse of discretion. In *United States v. Riley*, 621 F.3d 312, 335-36 (3rd. Cir. 2010), this Court considered three factors: "(1) whether the witness's remarks were pronounced and persistent, creating a likelihood they would mislead and prejudice the jury; (2) the strength of the other evidence; and (3) curative action taken by the District Court." *Id* at 336. Where a limiting instruction is provided, the Petitioner must show that the testimony was so prejudicial that it devastated the Petitioner's case and was incurable by anything short of a mistrial. *United States v. Lore*, 430 F.3d 190, 207 (3rd Cir. 2005).

Here, the statement stressed the Petitioner's refusal to cooperate with authorities which ran counter to his penal interest. In essence, the Government's comment condemned the Petitioner for not cooperating with the Government. This constitutes a direct attack on the Petitioner's Fifth Amendment right to remain silent.

Therefore, the Petitioner's motion for a mistrial should be granted.

POINT III

THE DISTRICT COURT ERRED IN NOT GRANTING THE PETITIONER'S MOTION FOR JUDGEMENT OF ACQUITTAL.

At the end of the Government's case the Petitioner requested a Judgement of Acquittal due to insufficient evidence.

The Petitioner moved for a Judgement of Acquittal on the following grounds: (1) that he has no knowledge regarding the drugs and the drugs were not his; (2) the Government has failed to produce any evidence that the Petitioner knowingly possessed the drugs.

Federal Rule of Criminal Procedure 29 provides, in pertinent parts: after the Government closes its evidence or after the close of all evidence, the court, on the Petitioner's motion, must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may, on its own, consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgement of acquittal at the close of the Government's evidence, the Petitioner may offer evidence without having reserved the right to do so.

In reviewing a Rule 29 Motion for Judgement of Acquittal, a district court must review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a

reasonable doubt based on the available evidence. *United States v. Wolfe*, 245 F.3d 257, 262 (3d. Cir. 2001). The court is required to "draw all reasonable inferences in favor of the jury verdict." *United States v. Anderskow*, 88 F.3d 245, 251 (3d. Cir. 1996). Thus, a finding of insufficiency should "be confined to cases where the prosecution's failure is clear." *United States v. Leon*, 739 F.2d 885, 891 (3d. Cir. 1984).

"This Court will uphold a jury's verdict unless no reasonable juror could accept the evidence as sufficient to support the Petitioner's guilt beyond a reasonable doubt." *United States v. Fattah*, 914 F.3d 112, 183 (3d. Cir. 2019).

The Petitioner argues that the evidence is insufficient to demonstrate that he possessed the drugs. The Government failed to present direct evidence that the Petitioner was involved in the drug conspiracy. All of the communications between the targets did not involve the Petitioner and the Petitioner was never mentioned by any of the targets.

Therefore, the evidence was insufficient and all charges must be dismissed.

POINT IV

THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO IMPEACH THE PETITIONER'S CREDIBILITY THROUGH PRIOR CONVICTION.

After hearing arguments, the District Court allowed the Government to impeach the Petitioner with a 2015 Pennsylvania State conviction for possession with intent to deliver a controlled substance and conspiracy. This Court reviewed the District Court's decision regarding the admissibility of evidence for abuse of discretion. *United States v. Gilmore*, 553 F.3d 266, 271 (3rd. Cir. 2009). To prove an abuse of discretion, a party "must show the district court's action was arbitrary, fanciful, or clearly unreasonable." *Stecyk v. Bell Helicopter Textron, Inc.* 295 F.3d 408, 412 (3rd. Cir. 2002).

Rule 609 of the Federal Rules of Evidence governs the admissibility of the Petitioner's prior convictions. Here the Petitioner's prior convictions are not crimes involving dishonesty or false statement. *United States v. Barnes*, 622 F.2d 107 (5th Cir. 1980).

Accordingly, these convictions are admissible for impeachment purposes only if their probative value outweighs their prejudicial effect to the Petitioner. Fed. R. Evid. § 609(a)(1). *Green v. Bock Laundry Machine Co.*, 490 U.S.504, 109 S.Ct. 1981 (1989). This rule reflects a heightened balancing test and has

observed that structuring the balancing in this manner creates a "predisposition toward exclusion." Wright & Gold, *Federal Practice and Procedure* § 6132, at 216. "An exception is made only where the prosecution shows that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present." *Id.* § 6132, at 217.

This Court has recognized four factors that should be considered when weighing the probative value against the prejudicial effect under this heightened test. These factors include: "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the [Petitioner's] testimony to the case; [and] (4) the importance of the credibility of the Petitioner." *Gov't of Virgin Islands v. Bedford*, 671 F.2d 758, 761 n.4 (3d. Cir. 1982).

When evaluating the first factor--the kind of crime involved--courts consider both the impeachment value of the prior conviction as well as its similarity to the charged crime. The impeachment value relates to how probative the prior conviction is to the witness's character for truthfulness. Jack B. Weinstein & Margaret A. Berger, Weinstein's *Federal Evidence and Procedures* § 609.06[3][b] (2d ed. 2011). Crimes of violence generally have lower probative value in weighing credibility, but may still be admitted after balancing the other factors. In contrast, crimes that by nature imply some dishonesty, such as theft,

have greater impeachment value and are significantly more likely to be admissible. *Id.*

With respect to the similarity of the crime to the offense charged, the balance tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the Defendant is being tried. As the Fourth Circuit has explained.

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying Defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the Defendant committed the similar offense for which he is currently charged. The generally accepted view, therefore, is that evidence is currently charged. The generally accepted view, therefore, is that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all.

United States v. Sanders, 964 F.2d 295, 297-98 (4th Cir. 1992) (quoting *United States v. Beahm*, 664 F.2d 414, 418-19 (4th Cir. 1981)); see also Weinstein's *Federal Evidence* § 609.05[3][d] ("[P]rior convictions for the same or similar crimes are admitted sparingly."); Wright & Gold, *Federal Practice and Procedures* § 6134, at 253 ("[T]he danger of unfair prejudice is enhanced if the witness is the accused and the crime was similar to the crime now charged, since this increases the risk that the jury will draw an impermissible inference"); *United States v. Hans*, 738 F.2d 88, 94 (3rd Cir. 1984) (finding that district court did not

abuse its discretion by excluding evidence of prior crime because it was "too similar" to the charged offense).

On February 20, 2015, the Petitioner was convicted of possession with intent to deliver a controlled substance and conspiracy.

The Courts have held that drug convictions, including for possession with intent to distribute, may be considered more prejudicial than probative and be excluded under Rule § 609(1) to impeach a Defendant. See *United States v. Smith,* 2006 WL 618843 (E.D. Pa. 2006).

The second factor is the age of the prior conviction. Convictions more than ten years old are presumptively excluded and must satisfy the special balancing requirements in Rule § 609(b) to overcome this presumption. But even where the conviction is not subject to the ten-year restriction, "the passage of a shorter period can still reduce [prior conviction's] probative value." Wright & Gold, *Federal Practice and Procedure* § 6134, at 258. The age of a conviction may weigh particularly in favor of exclusion "where other circumstances combine with the passage of time to suggest a changed character." *Id.* Convictions for which a Defendant was released from custody more than 10 years before trial are admissible if the Court finds "that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b), [P]ermissible questioning typically is limited to the number of

convictions, and the nature, time, and date of each." *United States v. Faulk*, 53 Fed. Appx. 644, 645 (3rd Cir. 2002), citing *McCormick on Evidence*, 42 at 167 (5th ed., 1999). The trial court can reserve making its final ruling on this issue until after the Defendant testifies. See *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *Luce v. United States*, 469 U.S. 38, 41-42 (1984).

Here, although the government asserts that both the Petitioner's convictions are within the ten-year window, Petitioner disputes this assertion. His probationary period should not be considered "confinement" under this analysis. Even if this court accepts the position that both the Petitioner's convictions are within the ten-year window, Petitioner avers that both convictions are substantially prejudicial and, therefore, should be prohibited from being admitted as evidence.

The third factor inquires into the importance of the Petitioner's testimony to his defense at trial. "The tactical need for the accused to testify on his or her own behalf may mitigate against use of impeaching convictions. If it is apparent to the trial court that the accused must testify to refute strong prosecution evidence, then the court should consider whether, by permitting conviction impeachment evidence, the court in effect prevents the accused from testifying." Glenn Weissenberger & James J. Duane, Weissenberger's *Federal Evidence* § 609.2 (4th ed. 2001); see also Weinstein's *Federal Evidence* § 609.05[3][e] ("A Defendant's decision about whether to testify may be based in part on whether his prior

convictions will be admitted for impeachment purposes. Thus, the fact that a Defendant's testimony is important to demonstrate the validity of his or her defense constitutes a factor weighing against the admission of a prior conviction."). "If, on the other hand, the defense can establish the subject matter of the Defendant's testimony by other means, the Defendant's testimony is less necessary, so a prior conviction is more likely to be admitted." Weinstein's *Federal Evidence* § 609.05[3][e]; see also *United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (noting that prejudicial impact diminished where defendant "did not obviously need to testify to raise his various defenses" because several other defense witnesses provided the same testimony). Here, the Petitioner was traveling alone in his vehicle when Trooper Reed executed a traffic stop. There are no other potential defense witnesses that can articulate most, if not all, the facts favorable to the accused. In short, if the Petitioner intends to contradict and discredit the government's version of the incident, it is he alone that is capable of testifying to this alternate version. Accordingly, the defense believes the Petitioner's testimony is not only important, but essential.

To the contrary, the government has testimonial, expert and physical evidence on the issue of guilt or innocence.

The final factor concerns the significance of the Petitioner's credibility to the case. "When the Petitioner's credibility is a central issue, this weighs in favor of admitting a prior conviction." Weinstein's *Federal Evidence* § 609.05[3][f]. See *United States v. Johnson*, 302 F.3d 139, 153 (3rd Cir. 2002) (affirming admission of prior conviction under Rule 609(a) because the defendant's credibility was important). Conversely, the probative value of a defendant's prior conviction may be diminished "where the witness testifies as to inconsequential matters or facts that are conclusively shown by other credible evidence." Wright & Gold, *Federal Practice and Procedure* § 6134, at 258.

It is the Petitioner's position that the Government has failed to carry its burden of showing that the probative value of Concepcion-Rosario's prior convictions outweighs their prejudicial effect under Rule § 609(a)(1)(B). The only factor the Government identified in favor of admission is that the Petitioner's credibility was a central feature of the case. Much like the accused in *Caldwell*, "at its core, this case was a "he said, they said" battle between [Petitioner]'s version of events and that of the detectives." See Wright & Gold, *Federal Practice and Procedure* § 6134, at 256 ("[W]here a case is reduced to a swearing contest between witnesses, the probative value of conviction is increased."). However, this issue was directly addressed in Caldwell, namely that this single factor is not enough to warrant admission of the prior convictions where all others

favor exclusion. Much like Caldwell, the Petitioner's prior convictions(s) were quite similar to the charged offense. Under *Caldwell*, that should make the defendant's "priors" highly prejudicial. The Government also failed to show that the probative value of the evidence was not diminished by the passage of time. Again, like Caldwell, Mr. Concepcion-Rosario's testimony is fundamentally important to his defense. Only he can offer his version of events. As the court explained in *Caldwell*.

> As already noted, the jury was required to choose between Caldwell's version of events and that provided by the officers. Given the consistency of the officers' accounts, Caldwell would have taken a great risk by failing to testify in his defense. When the burden of satisfying the heightened balancing test set out in Rule 609(a)(1)(B). Based on our review of the record before us, the Government failed to establish that "the probative value of the evidence outweighs its prejudicial effect." Fed. R. Evid. 609(a)(1)(B). Accordingly, Rule 609 was not a proper alternative basis for admitting Caldwell's prior convictions.

United States v. Caldwell, 760 F.3d 267, 283-85 (3rd Cir. 2014).

Thus, the singular argument that the Petitioner's credibility is at issue should not survive the lack of accompanying factors. Likewise, the prejudicial nature of these offenses may not be offset by the potential probative value of same.

Therefore, the District Court erred in permitting the Government to impeach the Petitioner's testimony with prior convictions.

POINT V

THE PETITIONER'S SENTENCE WAS HARSH AND EXCESSIVE.

The court reviews factual determinations during sentencing for "clear error" and the sentencing decision for "abuse-of-discretion," assessing both whether the district court committed a "significant procedural error" and "substantive reasonableness of the sentence." *United States v. Larksen*, 629 F.3d 177, 181 (3rd Cir. 2010). If the district court committed no procedural error, the sentence will be affirmed unless no reasonable sentencing court would have imposed the same sentence on the particular petitioner for the reasons that the district court provided. *United States v. Tomko*, 562 F.2d 558, 568 (3rd . Cir. 2009). Additionally, absent a "legal error," the district court's discretionary decision to deny a sentencing departure will not be reviewed. *United States v. Cooper*, 437 F.3d 324, 332 (3rd Cir. 2006).

The Petitioner objected to his classification as a career offender since his conviction in Puerto Rico of murder in the second degree and his conviction in Pennsylvania of possession with intent to deliver did not qualify as a "crime of violence" under the "element clause " of U.S.S.G. § 4B1.2(a)(1) or the "enumerated clause" under U.S.S.G. § 4B1.2(b). The Government contends that the Third Circuit has ruled that the Puerto Rico statute of murder in the second

degree qualifies as a prior felony conviction under the categorical approach as a "crime of evidence."

For support of its position, the Government relies on *United States v. Benitey-Beltran*, 892 F.3d 462 (1st Cir. 2018) and *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020). The cases cited by the Government did not specifically address career criminal but rather other enhancements. Secondly, the Government contends that the Pennsylvania statute of possession with intent to deliver a controlled substance qualifies under the categorical approach as a "controlled substance" offense. *United States v. Glass*, 904 F.3d 319 (3rd Cir. 2018). The Petitioner contends that the Pennsylvania statute is too broad and does not qualify.

A review of the factual determination demonstrates clear error and an abuse of discretion, concluding that the District Court committed a "significant procedural error" by enhancing the Petitioner four levels. *United States v. Larksen*, 629 F.3d 177, 181 (3rd. Cir. 2010).

Further, the Petitioner argues that the sentence imposed is substantively unreasonable and that no sentencing court would have imposed the same sentence on him for the reasons the District Court stated.

Therefore, the Petitioner respectfully submits that the sentencing court abused its discretion and committed a significant procedural error in imposing a substantively unreasonable sentence, requiring a remand for re-sentencing.

CONCLUSION

For the reasons cited, a Writ of Certiorari should be issued.

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Dated: May 28, 2024

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3082

UNITED STATES OF AMERICA

v.

ANGEL LUIS CONCEPCION-ROSARIO,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5:18-cr-00181-001)
District Judge: Honorable Joseph F. Leeson, Jr.

Submitted Under Third Circuit L.A.R. 34.1(a)
on March 14, 2024

Before: BIBAS, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the U.S. District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit L.A.R. 34.1(a) on March 14, 2024.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on November 3, 2022, is **AFFIRMED**. Costs will not be taxed. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 23, 2024

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3082

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v.

ANGEL LUIS CONCEPCION-ROSARIO,
Appellant

On Appeal from the United States District Court
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District Judge: Honorable Joseph F. Leeson, Jr.

Submitted Under Third Circuit L.A.R. 34.1(a)
on March 14, 2024

Before: BIBAS, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*

(Filed: May 23, 2024)

OPINION*

BIBAS, *Circuit Judge.*

Angel Luis Concepcion-Rosario picked up 200 grams of fentanyl, got pulled over, let a cop search his car, and admitted that the drugs found in the search were his. Because his conviction and sentence were proper, we will affirm.

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

In 2017, DEA agents learned that a large drug deal was about to happen in Allentown, Pennsylvania. Based on this information, they set up surveillance at a known stash house. Once there, they saw a man pick up what looked like a package of drugs and followed him home. The next morning, Concepcion-Rosario showed up at the man's house and picked up a white grocery bag.

After the handoff, the DEA asked a state trooper to pull Concepcion-Rosario over. When the trooper tracked him down, he saw him swerve between lanes and noticed that his license plate was slightly obscured. Based on these traffic violations, the trooper pulled him over. During the stop, Concepcion-Rosario signed a consent-to-search form and let the trooper search his car. The trooper found a package of fentanyl inside and arrested him. At the police station, he waived his *Miranda* rights and admitted that the drugs were his.

Concepcion-Rosario then moved to suppress the drugs and his post-arrest statement. After a hearing, the District Court denied his motion. It found that the traffic stop was lawful, that there was reasonable suspicion to extend the search, and that Concepcion-Rosario had validly consented to the search. It also refused to suppress his post-arrest statement because he had validly waived his *Miranda* rights.

At trial, the jury convicted Concepcion-Rosario of possession with intent to distribute more than forty grams of fentanyl. The District Court sentenced him to a little more than twenty-seven years' imprisonment—the top of the Guidelines range. He now appeals, raising a laundry list of challenges. All fail.

First, the traffic stop, car search, and post-arrest statement were all lawful. We review the District Court's findings of fact for clear error and its application of law to those facts

de novo. *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). The trooper had reasonable suspicion to pull Concepcion-Rosario over because he had violated two traffic laws. *United States v. Lewis*, 672 F.3d 232, 237 (3d Cir. 2012). He also had reasonable suspicion to extend the stop because Concepcion-Rosario seemed nervous, had a burner phone, lied about his travel plans, and understated his criminal history. Also, his car smelled overwhelmingly of air freshener, which could mask the smell of drugs. He then consented to the search of his car knowingly and voluntarily. Though he now claims not to understand English, the evidence shows otherwise. Plus, he signed a consent-to-search form in his native language, Spanish. Lastly, he offers no reason to question his *Miranda* waiver. In short, the court properly denied his motions to suppress.

Second, the prosecution never violated the Fifth Amendment. Though Concepcion-Rosario argues otherwise, the prosecution never "manifestly intend[ed] to comment on his silence, nor would the jury naturally and necessarily have taken it that way." *United States v. Titus*, 78 F.4th 595, 602 (3d Cir. 2023) (cleaned up). Plus, we review the District Court's denial of a motion for mistrial for an abuse of discretion. *United States v. Weaver*, 267 F.3d 231, 245 (3d Cir. 2001). We see none here.

Third, the evidence was more than enough to prove guilt. We review the sufficiency of the evidence "highly deferential[ly]." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc). The evidence included the DEA investigation, the drugs found in Concepcion-Rosario's car, and his incriminating statement. As a reasonable juror could conclude that this proved his guilt beyond a reasonable doubt, it sufficed. *Id.* at 430–31.

Fourth, the District Court properly admitted Concepcion-Rosario's 2015 drug conviction under Federal Rules of Evidence 404(b) and 609. We review for abuse of discretion. *United States v. Butch*, 256 F.3d 171, 175 (3d Cir. 2001); *United States v. Johnson*, 302 F.3d 139, 152 (3d Cir. 2002). Under Rule 404(b), the court correctly admitted that conviction for the limited purposes of proving his knowledge and intent. Under Rule 609, it also properly let that conviction be used to impeach him. Then, to guard against prejudice, it gave a limiting instruction, which we presume the jury followed. *See Samia v. United States*, 599 U.S. 635, 646 (2023).

Fifth, Concepcion-Rosario's sentence was procedurally and substantively reasonable. We review claims of procedural error for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). The District Court properly applied the career-offender enhancement: Concepcion-Rosario's drug-crime conviction is a controlled-substance offense. *United States v. Glass*, 904 F.3d 319, 322–24 (3d Cir. 2018). Plus, his second-degree murder conviction in Puerto Rico is a crime of violence because it required malice aforethought. *United States v. Baez-Martinez*, 950 F.3d 119, 128–29 (1st Cir. 2020); *United States v. Marrero*, 743 F.3d 389, 397–401 (3d Cir. 2014) (holding that an analogous Pennsylvania crime is a crime of violence). Thus, the career-offender enhancement applies here.

We review the sentence's substantive reasonableness for abuse of discretion. *United States v. Tomko*, 562 F.3d 558, 561 (3d Cir. 2009) (en banc). Given the seriousness of the crime and Concepcion-Rosario's extensive criminal history, his sentence was reasonable.

Because there was no error, we will affirm the District Court's judgment.