APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1530

UNITED STATES OF AMERICA

v.

KEVIN COLES,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1:16-cr-00212-001)
District Judge: Honorable Christopher C. Conner

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 29, 2024

Before: HARDIMAN, PHIPPS, and FREEMAN, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record on appeal from the United States District Court for the Middle District of Pennsylvania and was submitted on October 29, 2024. On consideration whereof,

It is now hereby **ORDERED** and **ADJUDGED** by this Court that the judgment of the United States District Court for the Middle District of Pennsylvania entered on

March 16, 2023, is hereby **AFFIRMED**. Costs shall not be taxed in this matter. All of the above in accordance with the Opinion.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: April 7, 2025

April 29, 2025

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 23-1530, 23-2002 & 23-3221

_____

UNITED STATES OF AMERICA

v.

KEVIN COLES,
Appellant in No. 23-1530

UNITED STATES OF AMERICA

v.

NICHOLAS PREDDY,
Appellant in No. 23-2002

UNITED STATES OF AMERICA

v.

JOHNNIE JENKINS-ARMSTRONG,
Appellant in No. 23-3221

_____

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Nos. 1:16-cr-00212-001, 1:16-cr-00212-008 & 1:16-cr-00212-009)
District Judge: Honorable Christopher C. Conner

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 29, 2024

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Before: HARDIMAN, PHIPPS, and FREEMAN, *Circuit Judges*

(Filed: April 7, 2025)

OPINION*

PHIPPS, *Circuit Judge*.

This consolidated appeal addresses challenges by three of many coconspirators who dealt drugs and/or participated in a triple murder designed to retaliate against an informant. The appellants here – Kevin Coles, Johnnie Jenkins-Armstrong, and Nicholas Preddy – were prosecuted in the District Court, *see* 18 U.S.C. § 3231, and they now dispute their convictions and/or their sentences on various grounds. For the reasons below, we will affirm each of the challenged judgments and disputed sentences.

In March 2016, Wendy Chaney, who lived in Hagerstown, Maryland, was arrested for possessing controlled substances discovered in her car following a traffic stop. Based on the quantity of drugs recovered from a search incident to her arrest, Chaney faced criminal liability for more serious drug offenses and began cooperating with law enforcement at a police station in Montgomery County, Maryland. Over the next three months, she provided information about several drug traffickers in the Hagerstown area. One of the persons whom she outed was Kevin Coles, with whom she previously had a relationship.

Coles, himself subject to an outstanding New York administrative warrant issued by the New York State Division of Parole for violating the conditions of his probation on an arson conviction, began to suspect that Chaney was cooperating with law enforcement and providing information about him. He directed his then-girlfriend to find out whether

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

Chaney had any pending criminal charges in Maryland and therefore a motive to cooperate with authorities.

By June 2016, Chaney had become confident that Coles knew that she was an informant and that he was planning to kill her. On June 23, Chaney told a police officer that Coles and others knew that she was cooperating. Over the next two days, she told at least two other people, including her son, that Coles would try to kill her.

Chaney's fears were well founded. The plot against her took shape on June 25. That day, a gang member with whom she was in a romantic relationship at the time induced her to go to a farmette in Mercersburg, Pennsylvania, owned by another drug dealer, Phillip Jackson. Meanwhile, Coles sent two men, one of whom was Jerell Adgebesan, to Baltimore, to recruit members of the Black Guerilla Family gang to help with the murder. The would-be recruits were told they could take the $20,000 in cash, along with drugs and guns, that they would find at the farmette as compensation for killing Chaney. That recruiting trip was successful, and after the gang members arrived in Hagerstown, there was a meeting, without Coles present, to plan Chaney's murder.

Again without Coles, several gang members, including Johnnie Jenkins-Armstrong and Nicholas Preddy, then drove to the farmette in Mercersburg. They found Chaney outside the barn and two men inside: Jackson, who owned the property, and Brandon Cole. The gang members subdued Chaney and the two men and held the three at gunpoint and zip-tied them. Some gang members then searched the property for the promised bounty. Finding nothing, they went back to the barn and beat Jackson unconscious. Not satisfied to have come up empty-handed, they next forced Chaney, still zip-tied, to accompany them around the property and search again for the loot. While that was taking place, Jackson regained consciousness, and despite being zip-tied, he charged at the gang members

guarding him. He was shot in the head. So was the other detained man, Brandon Cole. When the gang members who had sought their reward returned with Chaney and no loot, they found Jackson and Cole – both shot in the head. Then, two gang members, one of whom was Jenkins-Armstrong, shot Chaney. The gang members then doused the three bodies with gasoline and lit them on fire.

When the Pennsylvania State Police arrived, they found Chaney and Cole dead. But Jackson was still alive. He was airlifted to a hospital, where he died hours later.

A. Kevin Coles

Before the murders, Coles made no secret of his intention to eliminate Chaney. He told multiple fellow gang members that Chaney "was running her mouth too much," so "she had to go down." Coles Day 8 Trial Tr. 109:12–13 (Coles Suppl. App. 1159); *see also id.* 110:11–16 (Coles Suppl. App. 1160). And the day of the murder, he told his then-girlfriend that "[Chaney] was going to be killed that night" because he was "tired of her running her mouth, starting up trouble." *Id.* 119:12–14 (Coles Suppl. App. 1169).

After so informing his then-girlfriend, Coles made sure she had an alibi. He told her to go to the movies and how long to stay. He confirmed that she had done so by having her send him photographs.

Coles did not have a solid alibi himself. His then-girlfriend did not know where he was that night, and he arrived home drunk after midnight. After he went to sleep, he said he was sorry again and again.

Coles later told his then-girlfriend about his involvement in the murders. He provided her with the specifics of the killings before those details were public. He also revealed to her the motive for the murder: Chaney was killed "to shut people up, to tie them

up and then torture them to teach them to be quiet, to teach them a lesson." *Id.* 124:16–18 (Coles Suppl. App. 1174).

Four days after the murders, Pennsylvania law enforcement officers investigating the triple murder applied for two electronic search warrants for Coles' cell phone. The Court of Common Pleas in Franklin County, Pennsylvania, granted those requests. The resulting electronic surveillance orders, issued pursuant to 18 Pa. Cons. Stat. §§ 5743 and 5773, required that the telephone carriers disclose, among other things, Coles' internet and data usage, the cell site location information for the phone for the prior thirty and next sixty days, logs of calls and text messages, and the contents of text messages.

With the benefit of the cell site location information, Pennsylvania police were able to identify Coles' likely location – a motel in Hagerstown. They forwarded that information to the Maryland State Police, who were aware of Coles' outstanding administrative warrant from New York.

On July 7, 2016, Maryland law enforcement officers went to the motel, intending to apprehend Coles in his room. Before they approached, they observed Coles leave the building with a large white garbage bag. He waited at the motel's entrance for several minutes until a crossover SUV pulled up, and he entered through the rear passenger-side door. Maryland police stopped the vehicle in the motel parking lot, ordered Coles out, and arrested him. They found a cell phone on his person, another in the vehicle, and they saw a third fall to the ground as Coles exited the vehicle.

One of the other passengers in that vehicle provided incriminating information about Coles. She told the officers that she had seen Coles with a gun on multiple occasions. She also reported that the night before his arrest, she and Coles had been in that same crossover SUV when Hagerstown police officers approached. She related that Coles had provided a

false name and fled the scene. Relying on those statements, along with information provided by Pennsylvania law enforcement, the Maryland officers successfully applied for a warrant to search the crossover SUV. In executing that warrant, they discovered several cell phones, a tablet, a trash bag containing clothing, and two bags containing approximately twenty grams of heroin.

The recovered electronic devices contained evidence implicating Coles in Chaney's murder. Searches of those devices revealed text messages from Coles describing Chaney as a "dead issue" the day before her murder, Coles Day 10 Trial Tr. 40:17 (Coles Suppl. App. 1503), as well as messages from Coles to his then-girlfriend ensuring that she had an alibi the night of the murders. One of the phones also contained post-murder internet searches for articles about the murders.

Even after Coles' arrest, he made no secret of his connection to the triple homicide. He discussed his role in the murders in a call from jail. He told one inmate that "he had to do what he had to do." Coles Day 9 Trial Tr. 28:4–9 (Coles Suppl. App. 1259). He told another inmate he "knew how to get some dudes from Baltimore" to kill Chaney. *Id.* 62:22–25 (Coles Suppl. App. 1293). He boasted to another that he had hidden his involvement in the killings, and he bragged to yet another that he had ordered Chaney killed for acting as an informant.

In addition to investigating Coles for the murders, law enforcement officers looked into his drug trafficking. They learned that Coles had twice sold heroin leading to overdoses – once about six months beforehand and once again the day before his arrest.

On August 3, 2016, a federal grand jury in Pennsylvania indicted Coles, and through a later superseding indictment, he was charged with sixteen counts related to the murders and his drug trade. Coles moved to suppress any evidence gathered incident to his arrest

in Maryland on the grounds that there was no probable cause to arrest him and that the administrative warrant was impermissibly used as a search warrant. He also moved to suppress the evidence discovered pursuant to the two Pennsylvania electronic surveillance orders on the grounds that those warrants were illegal under Pennsylvania law and that they were issued without probable cause. After holding evidentiary hearings on those motions, the District Court denied them.

Coles later moved to dismiss twelve of the sixteen counts in the third superseding indictment against him. As part of that motion, he disputed the four counts premised on the commission of a crime of violence, *see* 18 U.S.C. § 924(c), (j), (o), on the theory that none of the identified predicate offenses qualified as crimes of violence. The District Court rejected that contention, reasoning that the two identified predicate offenses – Hobbs Act robbery, *see id.* § 1951(a), and killing a federal witness, *see id.* § 1512(a)(1) – both qualified as crimes of violence.

The case went to trial in April 2022, and it lasted about three weeks. Coles raised several objections to the Government's evidence. He challenged the Government's use of prior out-of-court statements by Yolanda Diaz, the daughter of one of the Government's witnesses and the sometimes-girlfriend of Coles' partner in drug-dealing. On direct examination, the Government asked Diaz whether she recalled an interview about the case with the Drug Enforcement Agency on January 24, 2017 – more than five years before her April 20, 2022, testimony in court. She said she did not; it had "been so long." Coles Day 7 Trial Tr. 217:15 (Coles App. 293). So, in an effort to refresh her recollection, the Government began to read passages of the DEA agent's report of that interview and, over defense counsel's objection, asked if she recalled each statement. Diaz admitted to making some of the statements, and she averred that they were in fact true. But as the prosecution

continued that same approach for statements attributed to her in the report that suggested Coles' guilt, she denied making them and denied their truth. The prosecution nonetheless continued the same approach, which led to Diaz denying that she said that Coles had access to multiple firearms, denying that he was part of the drug trafficking activities at issue here, denying that she said that Wendy Chaney was one of his runners, and denying that Chaney was one of his runners. Although the District Court overruled Coles' objections, it did issue a limiting instruction for the prior contradictory statements, as requested by Coles, that the jury consider Diaz's prior statements to the DEA only to assess her credibility, not for their truth.

For his own defense at trial, Coles attempted to shift the blame to a codefendant. To support his theory, he sought to introduce a prior out-of-court statement that Chaney's mother gave to a police officer when she was questioned about Chaney's murder. The Government objected on the grounds that the statement was hearsay and not subject to any exceptions, and the District Court sustained that objection.

The jury returned guilty verdicts on all sixteen counts. Coles contested that outcome through a motion for acquittal under Federal Rule of Criminal Procedure 29(c), in which he argued that the evidence was insufficient to support a conviction beyond a reasonable doubt. The District Court granted that motion for one count – possession with intent to distribute heroin and cocaine base – but otherwise denied it.

In sentencing Coles, the District Court set the sentences for eight of the offenses to run concurrently and the sentences for the remaining seven offenses to run consecutively to each other as well as to the concurrent sentences. The concurrent sentences consisted of

four life sentences,[1] three 240-month sentences,[2] and one 238-month sentence.[3] The consecutive sentences consisted of three life sentences,[4] three 120-month sentences,[5] and one 60-month sentence.[6] Altogether, Coles was sentenced to four consecutive lifetimes and an additional consecutive 420 months in prison.

After filing a notice of appeal to invoke this Court's appellate jurisdiction, Coles now challenges several of the District Court's rulings. *See* 28 U.S.C. § 1291. He contests the denials of his suppression motions; the rejection of his motion to dismiss the indictment; the evidentiary rulings at trial with respect to Diaz and Chaney's mother; and the partial denial of his post-trial motion for acquittal. For the reasons below, each of those arguments fail.

1. The District Court Did Not Err in Denying Coles' Motion to Suppress Evidence Seized in a Search Incident to His Arrest.

Coles disputes the District Court's denial of his motion to suppress evidence obtained in effectuating the outstanding administrative warrant. He argues, as he did in District Court, that the warrant – issued by the New York State Division of Parole rather

[1] He received life sentences for conspiracy to commit murder-for-hire, *see* 18 U.S.C. § 1958; conspiracy to kill a federal witness, *see id.* § 1512(k); conspiracy to distribute and possess with intent to distribute one hundred grams or more of heroin, *see* 21 U.S.C. §§ 841(a)(1), 846, and possessing heroin with intent to distribute and causing serious bodily injury, *see id.* § 841(a)(1) and (b)(1)(C).

[2] The 240-month sentences were for conspiracy to commit Hobbs Act robbery, *see* 18 U.S.C. § 1951(a); Hobbs Act robbery, *see id.*; and conspiracy to use a firearm during a crime of violence resulting in death, *see id.* § 924(o).

[3] The 238-month sentence was for possessing heroin, cocaine base, and cocaine hydrochloride, *see* 21 U.S.C. § 841(a)(1).

[4] These life sentences were for three counts of killing a federal witness, *see* 18 U.S.C. § 1512(a)(1)(C).

[5] The 120-month sentences were for three counts of discharging a firearm during a crime of violence resulting in death, *see* 18 U.S.C. § 924(j).

[6] The 60-month sentence was for possessing a firearm in furtherance of drug trafficking, *see* 18 U.S.C. § 924(c).

than a court – was impermissibly used as a search warrant and consequently any information obtained as a result of his arrest was acquired unconstitutionally. The premise for Coles' argument is a principle articulated in *Abel v. United States*, 362 U.S. 217 (1960), that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Id.* at 226. That principle stands in contradistinction to much of Fourth Amendment jurisprudence, which evaluates police action from an objective perspective – not based on an officer's subjective rationale.[7] But *Abel*, like this case, involved an *administrative* warrant, and so under the *Abel* principle, it is permissible to consider subjective motives to determine whether the officers intended to exceed the legitimate bounds of the administrative warrant. Even still, to violate the *Abel* principle requires a showing of "bad faith," *viz.*, that the warrant was used for "entirely illegitimate purposes." *Id.* And in *Abel*, such a showing of bad faith could not be made because the use of the warrant, whatever else it achieved, was a "bona fide preliminary step in a deportation proceeding." *Id.* at 230.

As in *Abel*, there is no evidence of bad faith here. The Maryland law enforcement officer who stopped Coles outside of the motel testified that he did so only to effectuate the administrative warrant and Coles' extradition to New York:

> Q: And the only reason that you stopped that car was because Kevin Coles was in it and you believe that Kevin Coles would be extradited by New York, is that right?

[7] *See generally Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (describing Fourth Amendment reasonableness as "predominantly an objective inquiry" because "the Fourth Amendment regulates conduct rather than thoughts" and explaining that an objective inquiry "promotes evenhanded, uniform enforcement of the law" (first quoting *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000); then citing *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); and then citing *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004))); *Whren v. United States*, 517 U.S. 806, 812 (1996) ("Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.").

A: Yes.

Suppression Hr'g Tr. 16:4–7 (Coles App. 425). On the basis of that testimony, and even though, as Coles points out, the Maryland police never extradited Coles to New York after seizing him, it was not clear error for the District Court to conclude that the *Abel* principle was not violated here.[8]

Coles presses his point further by contending that the motivations of the Pennsylvania police also matter. They were interested in Coles as a suspect for the murders, and they shared his likely location with the Maryland police. So, Coles asserts, the Pennsylvania officers were also responsible for the misuse of the administrative warrant, and their subjective motives were not related to the enforcement of the administrative warrant.

Coles overreads *Abel*. Although *Abel* allows an inquiry into the potential bad faith of officers who execute administrative warrants, it was careful not to undermine the "rightful cooperation" between law enforcement agencies. *Abel*, 362 U.S. at 228. Thus, *Abel* does not stand for the proposition that bad faith arises when one law enforcement agency has a different, but independently legitimate, interest in facilitating the execution of an administrative warrant by another. And here, where there is no question that the Pennsylvania police were suspicious about Coles' involvement in the murders, the subjective motives of the Pennsylvania police do not taint the effectuation of the administrative warrant by the Maryland officers, who had independent and subjectively

[8] *See generally United States v. Mallory*, 765 F.3d 373, 381 (3d Cir. 2014) (holding that a district court's factual findings in deciding a suppression motion are reviewed for clear error); *Marshak v. Treadwell*, 595 F.3d 478, 488 (3d Cir. 2009) (explaining that under clear-error review, a court "accept[s] the ultimate factual determination of the fact-finder unless that determination . . . either (1) [is] completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data" (internal quotation marks omitted) (quoting *Frett-Smith v. Vanterpool*, 511 F.3d 396, 400 (3d Cir. 2008))).

reasonable grounds for locating and detaining Coles. Accordingly, the District Court did not err in denying Coles' suppression motion.

2. The District Court Did Not Commit Any Error in Denying Coles' Motion to Suppress the Data from His Cell Phones.

Coles also argues that the electronic information from his cell phones, which included the cell site location information and his text messages, should have been suppressed.

He starts by identifying potential violations of Pennsylvania law in the issuance of the electronic surveillance orders under Sections 5743 and 5733 of Title 18 of the Pennsylvania Consolidated Statutes. According to Coles, the Court of Common Pleas should not have issued those orders because they were overbroad in scope and duration.

But suppression under the exclusionary rule is a remedy for violations of federal constitutional rights. *See United States v. Rickus*, 737 F.2d 360, 363–64 (3d Cir. 1984). *See generally Herring v. United States*, 555 U.S. 135 (2009). And so, the exclusionary rule does not apply to failures to follow state procedures when those procedures are not constitutionally required. *See United States v. Bedford*, 519 F.2d 650, 654 n.1 (3d Cir. 1975). Here, without an argument from Coles that those alleged violations of Pennsylvania law were themselves of constitutional moment, there was no basis for applying the exclusionary rule as a remedy for those alleged violations.

Apart from his reliance on Pennsylvania law, Coles argues that both warrants violated the Fourth Amendment because they were not supported by probable cause. *See Carpenter v. United States*, 585 U.S. 296, 309–10 (2018) (holding that gathering cell site location information constitutes a search under the Fourth Amendment). But an impartial magistrate issued the warrants, and as a general rule, that prevents application of the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 922–23 (1984). And the good-

faith exception applies because the officers complied with then-existing binding precedent. *See United States v. Goldstein*, 914 F.3d 200, 204 (3d Cir. 2019) (applying the good-faith exception to a pre-*Carpenter* collection of cell site location information).

To avoid that outcome for the § 5773 warrant, through which law enforcement obtained Cole's cell site location information, Coles invokes the *Franks* exception. That exception applies when an affidavit in support of the search warrant contains a "deliberate falsehood or . . . reckless disregard for the truth." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). He argues that there were two material omissions in the affidavit in support of the warrant: it did not reveal (a) that one of the human sources of information was also a prime suspect in the homicides or (b) that the same source had failed a polygraph test. But Coles fails to provide evidence that the affiant either knew or had reason to know of those two facts at the time he signed the affidavit. And without any evidence of deliberate falsehood or reckless disregard of the truth, Coles cannot satisfy the *Franks* exception.

3. The District Court Did Not Err in Refusing to Dismiss Counts Three Through Six of the Third Superseding Indictment.

Coles also contests a portion of the District Court's order that denied his motion to dismiss the third superseding indictment. Counts three through six of that indictment charged Coles with the use of a firearm during or in relation to a crime of violence, *see* 18 U.S.C. § 924(c), the killing of a person with a firearm in the course of using a firearm during or in relation to a crime of violence, *see id.* § 924(j), and conspiracy to discharge a firearm during or in relation to a crime of violence, *see id.* § 924(o). Each of those charges identified two predicate offenses of violence: Hobbs Act robbery, *see id.* § 1951(a), and killing a federal witness, *see id.* § 1512(a)(1). Coles now argues that Hobbs Act robbery is not a crime of violence, and from there he posits that he should not have been indicted under § 924(c) at all. But his contention is incomplete: § 924(c) requires only *a* predicate

crime of violence. *See id.* § 924(c)(1)(A) (governing using or carrying a firearm "during and in relation to *any* crime of violence" (emphasis added)). So, to demonstrate that his indictments under § 924(c) were improper, Coles would have to show that both predicates – Hobbs Act robbery and killing a federal witness – are not crimes of violence. And he has made no attempt to make that showing with respect to killing a federal witness. Given the scope of his arguments, he cannot show that the District Court erred in denying his motion to dismiss those counts.

4. The District Court Did Not Abuse Its Discretion in Allowing Yolanda Diaz to Testify.

Coles also contests the District Court's rulings allowing the Government to impeach Yolanda Diaz on direct examination through the use of statements attributed to her in a DEA report. Coles argues that the Government's true motive in reciting the DEA report was not to impeach Diaz but rather to use the report as "an impermissible back door to get otherwise inadmissible hearsay in front of the jury." Appellant Coles Opening Br. 59.

The purpose for offering evidence is often critical to its admissibility. *See generally* Fed. R. Evid.; 1 McCormick on Evid. § 51 (9th ed. 2025). And with respect to impeaching a witness, although, as a general matter, a party may impeach its own witness, *see* Fed. R. Evid. 607, this Court has made clear that impeachment may not be done for the purpose of evading the hearsay rules:

> It is well established . . . that witnesses may not be called for the purposes of circumventing the hearsay rule by means of Rule 607.

United States v. Sebetich, 776 F.2d 412, 429 (3d Cir. 1985). Thus, to succeed on the argument he makes on appeal, Coles must demonstrate that the Government attempted to impeach Diaz as a means of evading the hearsay rules.

Coles has not made that showing. Under questioning, Diaz admitted that she made many of the statements in the report and that they were true. But when it came to the Government's questions regarding her purported statements about drugs and guns, she denied making all of them. Thus, the impeachment was necessarily line by line: if Diaz would have admitted that she had made a statement about guns or drugs, that would have been beneficial to the prosecution, and if she did not, then that was grounds for doubting her credibility. As the District Court remarked, it was a "fair examination by the prosecution." Coles Day 7 Trial Tr. 225:1 (Coles App. 301). That conclusion was not an abuse of discretion. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749 (3d Cir. 1994) ("A district court's ruling on admissibility of evidence is reviewed for abuse of discretion . . . .").[9]

5. The District Court Did Not Abuse Its Discretion by Excluding Out-of-Court Statements Made by Chaney's Mother.

Coles also renews another of his evidentiary challenges at trial: his request to admit an out-of-court statement by Chaney's mother, which he claims would have shifted blame to one of his codefendants. Coles does not contest that the statement constitutes hearsay; instead, he argues that it should have been admitted under the residual hearsay exception. *See* Fed. R. Evid. 807. One of the required showings under that exception is that the hearsay statement be "supported by sufficient guarantees of trustworthiness." *Id.*

[9] Coles argues for the first time on appeal that the inquiries were needlessly cumulative, *see* Fed. R. Evid. 403, but that fails under the first prong of plain-error review – whether there was an error, analyzed under an abuse-of-discretion standard for these evidentiary rulings. *See United States v. Adair*, 38 F.4th 341, 355–56 (3d Cir. 2022); *United States v. Friedman*, 658 F.3d 342, 352 (3d Cir. 2011) ("Evidentiary rulings are reviewed for abuse of discretion . . . ."). It would not have been an abuse of discretion to allow, over a cumulativeness objection, the questioning about the *different* statements in the DEA report, especially since Diaz admitted she made some statements attributed to her and denied making others.

807(a)(1). To meet that standard, Coles argues that the statement is reliable because it was made just days after the murder and Chaney's mother would have been motivated to provide an accurate account to a law enforcement officer seeking to solve her daughter's murder. But the residual hearsay exception is to be used "only rarely, and in exceptional circumstances," *United States v. Turner*, 718 F.3d 226, 233 (3d Cir. 2013) (citations omitted), and it requires "*exceptional* guarantees of trustworthiness," *United States v. Bailey*, 581 F.2d 341, 347 (3d Cir. 1978) (emphasis added). Although there were some reasons to trust the substantive reliability of Chaney's mother's statements, the District Court did not abuse its discretion in concluding that the statements by Chaney's mother did not satisfy the demanding standard for the residual hearsay exception.

6. Coles' Challenges to the Denial of His Motion for Acquittal Lack Merit.

Coles' final challenge is to the sufficiency of the evidence. He argues that he was found guilty by association and that the jury's verdict as to fourteen of the fifteen counts (everything except possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)) should be set aside.

In challenging the counts related to the triple murder and witness tampering, Coles makes no headway. The jury heard that Coles told multiple people that Chaney had to be disposed of for informing. There was also evidence that Coles told his then-girlfriend to check whether Chaney had pending charges in Maryland and instructed her to create an alibi for the night of the murders. And there was testimony that on the night of the murders, he came home after midnight, repeatedly "saying he was sorry in his sleep." Coles Day 8 Trial Tr. 123:2–8 (Coles Suppl. App. 1173). Moreover, the jury heard that Coles told people that Chaney was killed to teach a lesson and that he discussed his role in the murder in a call from jail. In addition, there was evidence that, while incarcerated, Coles told one

inmate that he knew how to hire killers in Baltimore, another that he had hidden his involvement, and a third that he had ordered Chaney killed for informing.

Together, those pieces of evidence provide ample support for a rational juror to find that Coles wanted Chaney dead to prevent her from communicating with federal law enforcement, that he conspired in her killing, and that he hid his involvement.

Coles' efforts at second-guessing the jury's verdict on the drug charges are similarly meritless. Viewed in the light most favorable to the prosecution, there was no shortage of evidence to support the conclusion that Coles conspired to distribute heroin and intended to distribute heroin, causing serious bodily injury. A woman testified that she overdosed after taking heroin from Coles and his partner. There was also evidence that two people who had bought heroin from Coles and his partner shared the heroin with an acquaintance who nearly died from the resulting overdose. The jury also heard that both overdose victims were revived with Narcan. In short, there was sufficient evidence to support the two drug convictions.

For these reasons, on *de novo* review of the record in the light most favorable to the prosecution, a rational trier of fact could have convicted Coles of each of those offenses. *See United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005).

B. Johnnie Jenkins-Armstrong

Johnnie Jenkins-Armstrong, who was convicted and sentenced for his involvement in the events surrounding Chaney's murder, also now appeals. He was nineteen at the time he attended the meeting in Hagerstown to plan the murder. He also traveled to the Pennsylvania farmette with a firearm, forced a zip-tied Chaney to look for valuables, and shot her. For those actions, a federal grand jury in Pennsylvania indicted him on thirteen counts.

Instead of proceeding to trial, Jenkins-Armstrong entered into a plea agreement. In accordance with that agreement, Jenkins-Armstrong pleaded guilty to two offenses – one count of Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), and one count of use and discharge of a firearm "during and in relation to a[] crime of violence," *id.* § 924(c). Because Jenkins-Armstrong had not previously been charged with a § 924(c) offense, he agreed to waive an indictment for that count, and the information which charged him with the § 924(c) offense identified the predicate offense as Hobbs Act robbery, *see id.* § 1951(a). In return, the Government agreed to drop the other charges against him.

The plea agreement did not include any promise by the Government to recommend a particular sentence, *cf.* Fed. R. Crim. P. 11(c)(1)(B), or to agree to a particular sentence, *cf. id.* 11(c)(1)(C). Instead, the Government expressly reserved the right to recommend the maximum sentence allowed by law, which was life imprisonment. *Cf. id.* 11(c)(1)(A).

Consistent with that reservation of rights, at sentencing, the Government advocated for the maximum penalty for the § 924(c) count – life imprisonment – despite that being above the Guidelines recommended sentence of 360 months.

At sentencing, the District Court, as required by statute, *see* 18 U.S.C. § 924(c)(1)(D)(ii), imposed consecutive sentences for the two counts. For Hobbs Act robbery, *see id.* § 1951(a), it sentenced Jenkins-Armstrong to 240 months' imprisonment. And for the § 924(c) offense, in agreement with the Government's position, the District Court imposed a life sentence.

Through a notice of appeal, Jenkins-Armstrong invoked this Court's appellate jurisdiction to raise two challenges. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742. First, he argues that the District Court abused its discretion in imposing the life sentence because it did not meaningfully account for the mitigating circumstances he presented. Second, he

contends that Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), does not constitute a 'crime of violence,' making his § 924(c) conviction for the use and discharge of a firearm during or in relation to a crime of violence invalid as a matter of law.

1. The Sentence Is Not Procedurally Unreasonable.

The standard for appellate review of a challenge to the procedural reasonableness of a sentence depends on whether the argument was preserved. And here, if Jenkins-Armstrong did raise the argument in District Court, then the ruling would be reviewed for an abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007) (holding that sentencing decisions are reviewed for abuse of discretion). If he did not, then he must satisfy the four-part plain-error standard. *See Puckett v. United States*, 556 U.S. 129, 133–34 (2009) (holding that objections to sentencing proceedings that are not preserved are reviewed for plain error); *United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2014). Either way, plain error's first step – evaluating whether an error occurred – "uses the standard of review that would have applied had the argument been preserved," so Jenkins-Armstrong must demonstrate that the District Court abused its discretion. *United States v. Adair*, 38 F.4th 341, 356 (3d Cir. 2022).

Relying on an error-by-omission theme, Jenkins-Armstrong attempts to make that showing. He contends that the District Court abused its discretion by not meaningfully considering mitigating factors when it sentenced him to life in prison. *See United States v. Friedman*, 658 F.3d 342, 359 (3d Cir. 2011) (explaining that "district courts should engage in 'a true, considered exercise of discretion . . . including a recognition of, and response to, the parties' non-frivolous arguments'" (quoting *United States v. Jackson*, 467 F.3d 834, 841 (3d Cir. 2006))); *accord United States v. Merced*, 603 F.3d 203, 215 (3d Cir. 2010). He identifies several pieces of mitigating evidence that he claims the District Court did not

consider: that he was born addicted to cocaine; that his mother was addicted to crack cocaine; that he grew up without a strong attachment to a primary caregiver; that his father was killed when he was three; that he attended at least seven different schools; that he grew up in a violent and impoverished neighborhood; and that he had joined the Black Guerilla Family in prison for protection.

The District Court was not persuaded by those mitigating factors, but that alone does not mean that it failed to give them meaningful consideration. *See United States v. Seibert*, 971 F.3d 396, 401–02 & n.4 (3d Cir. 2020) (distinguishing the procedural error of "ignor[ing] the § 3553(a) factors" from the substantive error of affording "inadequate weight" to them), *amended by* 991 F.3d 1313 (3d Cir. 2021); *United States v. Bungar*, 478 F.3d 540, 546 (3d Cir. 2007) ("[A] district court's failure to give mitigating factors the weight a defendant contends they deserve [does not] render[] the sentence unreasonable."). To the contrary, the District Court explained that it "read very carefully all of the materials [Jenkins-Armstrong] submitted," including "the character reference letters[and] the mitigation report" provided by defense counsel. Jenkins-Armstrong Sent'g Hr'g Tr. 15:8–11 (Jenkins-Armstrong JA349). Moreover, it "carefully studied the trial transcripts" and became "very familiar with the facts of Mr. Jenkins-Armstrong's individual case[and] his background." *Id.* 26:23–27:2 (Jenkins-Armstrong JA360–61). And after considering those mitigating factors, it concluded "that the only appropriate sentence in this case," involving the "deliberate premeditated murder of a federal witness and the collateral murders of two innocent individuals," was life in prison. *Id.* 29:17–19, 30:5–11 (Jenkins-Armstrong JA363–64). Thus, the District Court did not abuse its discretion in so sentencing Jenkins-Armstrong.

2. Jenkins-Armstrong Has Not Provided a Persuasive Basis for Setting Aside His § 924(c) Conviction.

The predicate crime of violence for Jenkins-Armstrong's § 924(c) conviction – for which he received his life sentence – was a conviction under the Hobbs Act robbery statute, *see* 18 U.S.C. § 1951(a). Jenkins-Armstrong now attacks his § 924(c) conviction on the ground that under the categorical approach, a conviction under the Hobbs Act robbery statute is not a crime of violence because it does not have as an element "the use, attempted use, or threatened use of physical force." *United States v. Taylor*, 596 U.S. 845, 850 (2022) (quoting 18 U.S.C. § 924(c)(3)(A)).

The three challenges he presents are not successful. His first two arguments assert that completed Hobbs Act robbery is not a categorical match with a 'crime of violence' as defined in § 924(c)(3)(A) because it may be committed by threatening economic harm or *de minimis* force against tangible property. But those contentions cannot be squared with this Court's holding in *United States v. Stoney*, 62 F.4th 108 (3d Cir. 2023), that completed Hobbs Act robbery categorically satisfies the elements clause in § 924 for a crime of violence. *See id.* at 111, 114.

Jenkins-Armstrong's final contention rests on the premise that the Hobbs Act robbery statute is indivisible. From there, he reasons that after the Supreme Court held in *United States v. Taylor* that a conviction under the attempt provision of the Hobbs Act robbery statute, *see* 18 U.S.C. § 1951(a), does not qualify as a § 924(c) predicate offense, *see Taylor*, 596 U.S. at 851, no conviction for Hobbs Act robbery can meet the definition of 'crime of violence.' But that asks too much: if the Hobbs Act robbery statute, 18 U.S.C. § 1951(a), *were* indivisible, then there would have been no reason for the Supreme Court to have considered only the attempt prong – it could have looked at the least culpable conduct under the statute or identified the attempt prong of Hobbs Act robbery as the least

culpable conduct under that statute. *See Borden v. United States*, 593 U.S. 420, 424 (2021) ("If any – even the least culpable – of the acts criminalized do not entail that kind of force [needed for 'violence'], the statute of conviction does not categorically match the federal standard, and so cannot serve as [a] predicate."). Moreover, after *Taylor*, this Court in *United States v. Stevens*, 70 F.4th 653 (3d Cir. 2023), held that conspiring to commit completed Hobbs Act robbery – at least under a *Pinkerton* theory of liability – is a crime of violence. *Id.* at 655, 662–63.[10] Again, that would not have been possible after *Taylor* if the Hobbs Act robbery statute were indivisible. And although the Hobbs Act robbery statute imposes the same penalties for each identified infraction, *see* 18 U.S.C. § 1951(a), it employs several disjunctive constructions, *see id.*, so against the backdrop of *Taylor* and *Stevens*, it should not be viewed as an indivisible statute. But Jenkins-Armstrong does not set forth how the statute, treated as divisible for the conspiracy offense (and not charged on a *Pinkerton* theory), would be treated as a categorical mismatch with the crime-of-violence elements of § 924(c). Without doing so, Jenkins-Armstrong has not provided a cogent reason for setting aside his § 924(c) conviction.

C. Nicholas Preddy

Another member of the Black Guerilla Family, Nicholas Preddy, was involved in the triple homicide. He was at the planning meeting in Hagerstown, and he traveled with the coconspirators to the farmette, where he acted as their lookout during the murders.

Almost a year later, in the spring of 2017, after another coconspirator, Jerell Adgebesan, told gang members that he had been contacted by investigators about the

[10] *See generally United States v. Lopez*, 271 F.3d 472, 480 (3d Cir. 2001) (explaining that *Pinkerton* "permits the government to prove the guilt of one defendant through the acts of another committed within the scope of and in furtherance of a conspiracy of which the defendant was a member, provided the acts are reasonably foreseeable as a necessary or natural consequence of the conspiracy"); *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

murders, Preddy and other gang members believed that Adgebesan was a 'snitch.' In May 2017, Preddy and other gang members tracked Adgebesan down in Baltimore and pulled him into a car as part of a plot to kill him. Their efforts failed, and Adgebesan escaped.

For his actions related not only to the triple homicide but also to his later attack on Adgebesan, a federal grand jury in Pennsylvania indicted Preddy on thirteen counts.[11] Under the terms of the plea agreement that Preddy entered, the Government agreed to drop all of the charges against him except for witness tampering. *See* 18 U.S.C. § 1512(a)(1)(A), (C); Fed. R. Crim. P. 11(c)(1)(A). Preddy then pleaded guilty to that offense, which required that he was motivated by a desire to prevent Adgebesan from *communicating* with law enforcement – not necessarily that Adgebesan was actually *cooperating* with the Government. *See United States v. Tyler*, 732 F.3d 241, 252 (3d Cir. 2013).

For that one charge, Preddy's base offense level was 33, and he had a criminal history category of III. Together, those yielded a Guidelines range of 135 to 168 months' imprisonment.

But as part of the plea agreement, the Government reserved the right to request the statutory maximum sentence of 360 months. *Cf.* Fed. R. Crim. P. 11(c)(1)(A). And at sentencing, the Government moved pursuant to Guideline § 5K2.21 for a seven-level upward departure so that he would receive the statutory maximum term of imprisonment. Section 5K2.21 is a policy statement that allows upward departures based on conduct underlying a dismissed or unpursued charge:

[11] The witness tampering occurred in Baltimore, but as stated in the third superseding indictment, Adgebesan would have been called "before a federal grand jury in Harrisburg." 3d Superseding Indictment 37 (D.C. Dkt. No. 499); *see* 18 U.S.C. § 1512(i) (allowing prosecuting "in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected").

> The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

U.S. Sent'g Guidelines Manual § 5K2.21 (U.S. Sent'g Comm'n 2021); *see* 18 U.S.C. § 3553(a)(5)(A) (requiring consideration of "any pertinent policy statement . . . issued by the Sentencing Commission").

In evaluating the applicability of § 5K2.21, the District Court considered the prior trial testimony of two coconspirators – one facing a capital sentence, the other life imprisonment. The District Court recounted that Preddy "joined together with several co-conspirators to travel from Baltimore, Maryland, to Mercersburg, Pennsylvania, to kill a known federal informant." Preddy Sent'g Hr'g Tr. 12:23–25 (Preddy App. 13). Preddy objected to the District Court's reliance on their testimony because he denied their account and because Jenkins-Armstrong told investigators that Preddy was not present for or involved in the triple homicide. The District Court, however, overruled that objection and determined that the Guidelines range did not account for Preddy's involvement in the triple homicide. Rather, from the District Court's perspective, this was "the quintessential case in which the guidelines range fails to adequately capture the full scope of, and therefore fails to reflect, the actual seriousness of . . . Preddy's criminal conduct." *Id.* 14:8–11 (Preddy App. 15). So, based on a preponderance of the evidence that Preddy had engaged in the uncharged conduct, the District Court departed upward and imposed the 360-month, statutory-maximum sentence. *See* U.S. Sent'g Guidelines Manual ch. 5 pt. A (U.S. Sent'g Comm'n 2021) (setting forth a 292-to-365-month sentencing range for a total offense level of 38 and a Category III criminal history); 18 U.S.C. § 1512(a)(3)(B)(ii) (setting a 30-year maximum sentence). *See generally United States v. Grier*, 475 F.3d 556, 568 (3d Cir.

2007) (en banc) (explaining that a preponderance-of-the-evidence standard governs factual findings at sentencing).

Preddy invoked this Court's appellate jurisdiction to challenge the procedural reasonableness of his sentence. *See* 18 U.S.C. § 3742. In his appeal, he argues that the District Court erred by crediting the testimony of the two coconspirators because he denied their accounts and because he did not have the ability to cross-examine those witnesses, who, as interested codefendants, were untrustworthy – especially in light of statements to law enforcement by another coconspirator, Jenkins-Armstrong, that Preddy was not present for or involved in the triple homicide.

Assuming *arguendo* that Preddy did enough to preserve an objection to the seven-level departure,[12] the District Court's decision to impose that enhancement is reviewed for an abuse of discretion. *See Gall*, 552 U.S. at 49 (holding that sentencing decisions are reviewed for abuse of discretion). Even accounting for concerns that the two testifying codefendants were unreliable because of their interest in getting lighter sentences by shifting blame to Preddy, their mutually corroborating statements, both based on personal knowledge, were accompanied by more than the "minimal indicium of reliability beyond mere allegation," *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007) (citation omitted), "sufficient . . . to support [their] probable accuracy," U.S. Sent'g Guidelines § 6A1.3(a) (U.S. Sent'g Comm'n 2024). *See United States v. Smith*, 751 F.3d 107, 116 (3d Cir. 2014); *United States v. Miele*, 989 F.2d 659, 665 (3d Cir. 1993). And although Preddy denied his involvement in those killings, the District Court was not required to believe his testimony or even the statements made to investigators by Jenkins-Armstrong.

[12] *See generally Spireas v. Comm'r*, 886 F.3d 315, 321 (3d Cir. 2018) (explaining that a party need only invoke "the same legal rule or standard" and "the same facts" to preserve an objection (quoting *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013))).

See United States v. Rodriguez, 342 F.3d 296, 300 n.5 (3d Cir. 2003) ("[T]he District Court is under no obligation to accept as true the defendant's own characterization of his role in the criminal scheme . . . ."). Thus, it was not an abuse of discretion for the District Judge to credit the accounts of the two coconspirators presented at trials over which he presided and that provided him an opportunity to observe and assess the credibility of those witnesses and their accounts. *See United States v. Hart*, 273 F.3d 363, 379 (3d Cir. 2001) ("[T]he sentencing judge may rely on extrinsic evidence in sentencing, even that from another trial.").

Nor does Preddy's inability to cross-examine those two witnesses at sentencing undercut the procedural reasonableness of the sentencing process. The right of confrontation attaches to "criminal *prosecutions*," U.S. Const. amend. VI (emphasis added), which do not include sentencing hearings, *see Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) ("[O]nce the guilt of the accused has been properly established, the sentencing judge . . . may, consistently with the Due Process Clause[,] . . . consider responsible . . . 'out-of-court' information . . . ."); *see also Robinson*, 482 F.3d at 246 ("Both the Supreme Court and this Court of Appeals have determined that the Confrontation Clause does not apply in the sentencing context and does not prevent the introduction of hearsay testimony at a sentencing hearing.").

Similarly, Preddy's concerns about the introduction of those statements as hearsay at sentencing are unfounded. He did not raise any such objection in District Court, but even if he had, it would not have been an abuse of discretion for the District Court to have denied it because the Federal Rules of Evidence do not apply to sentencing hearings. *See* Fed. R. Evid. 1101(d)(3) ("These rules . . . do not apply to . . . miscellaneous proceedings, such as: . . . sentencing . . . .").

For these reasons, the District Court did not abuse its discretion in considering the uncharged conduct and coconspirators' statements, nor did it otherwise err in finding them reliable.[13]

* * *

For the foregoing reasons, we will affirm the District Court's judgments with respect to all matters appealed.

[13] Without any abuse of discretion, Preddy has no credible cumulative-error argument. *See Collins v. Sec'y Pa. Dep't Corr.*, 742 F.3d 528, 542 (3d Cir. 2014) ("The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process.").

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

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:16-CR-212**
	:	
v.	:	**(Judge Conner)**
	:	
KEVIN COLES,	:	
	:	
Defendant	:	

MEMORANDUM

Defendant Kevin Coles moves the court to suppress evidence and statements obtained by law enforcement during the initial stages of their investigation into the triple homicide and other crimes charged in this case.[1] We will grant in part and deny in part Coles' motions.

I. Factual Background and Procedural History

The criminal investigation and charges in this case originate with a triple homicide and robbery on June 25, 2016. The third superseding indictment identifies the homicide victims as Wendy Chaney,[2] Phillip Jackson, and Brandon Cole. The murders and robbery occurred in a barn on Jackson's farm, located at 11026 Welsh Run Road in Mercersburg, Franklin County, Pennsylvania. The

[1] In addition to the four motions addressed herein, Coles also moves the court to suppress evidence obtained from a search warrant executed on his cell at Adams County Prison, while he was held there as a pretrial detainee. We will address that motion in a separate memorandum.

[2] The third superseding indictment uses two different spellings for this victim's last name, switching between "Chaney" and "Cheney." We use "Chaney" in this memorandum, which we understand to be the correct spelling.

alleged events leading up to the triple homicide and robbery have been detailed in the court's prior opinions in this case and are incorporated herein by reference.

Relevant here, on June 30, 2016, Franklin County Court of Common Pleas Judge Angela R. Krom granted two applications filed by the District Attorney of Franklin County seeking to collect information from Coles' cell phone. The first order, issued under 18 PA. CONS. STAT. § 5743, required listed telecommunications providers to disclose records for Coles' cell phone for the past 90 days including, *inter alia*, call detail records for incoming and outgoing calls and text messages, internet and data usage, historical cell-site location information ("CSLI"), text message content, and subscriber information for phone numbers interacting with Coles' phone. (See Doc. 821-1 at 8-12). The second order, issued under 18 PA. CONS. STAT. § 5773, authorized disclosure of 30 days of historical CSLI and 60 days of real-time CSLI for Coles' phone. (See Doc. 823-2 at 6-12). We refer to these orders as the Section 5743 order and Section 5773 order, respectively.

At some point during their investigation, law enforcement learned that Coles was wanted on an arrest warrant issued by the New York State Division of Parole on July 10, 2015. (See Doc. 811-1; 7/18/17 Tr. 10:20-11:16, 12:3-13, 26:2-27:2). Using real-time CSLI collected under the Section 5773 order, the Maryland State Police fugitive apprehension team, in conjunction with local police, tracked Coles to a Days Inn hotel in Hagerstown, Maryland, where he was arrested, searched, and taken into custody on the New York state parole warrant. See United States

v. Coles, 264 F. Supp. 3d 667, 671 (M.D. Pa. 2017)[3]; (see also Doc. 867 at 5; Doc. 875 at 3). Officers recovered one cell phone from Coles' person and another from the rear seat of the vehicle that Coles had entered just before his arrest. See Coles, 264 F. Supp. 3d at 671. Detective Jesse Duffy of the Hagerstown Police Department then applied for and received a search warrant for the vehicle; the ensuing search produced, among other things, several cell phones, a tablet, a plastic bag containing suspected heroin, and a white trash bag containing clothing. See id. at 672; (see also Doc. 867 at 6).

Coles was transported to the Hagerstown Police Department, where he was met by Pennsylvania State Police ("PSP") Corporal Paul Decker and PSP Trooper Antwjuan Cox. See Coles, 264 F. Supp. 3d at 672; (Doc. 819-2). Trooper Cox read Coles his Miranda rights, and Coles indicated he understood those rights. (See Doc. 819-2 at 2:13-3:7).[4] Coles spoke with the PSP officers and initially answered their questions. (See id. at 3:8-7:14). Three minutes and 54 seconds into the interview, however, Coles invoked his right to an attorney, stating, "Well, I think I would like to ask for a lawyer at this point in time." (Id. at 7:15-16). Questioning continued for roughly six more minutes—during which Coles repeated his request for counsel

[3] On September 28, 2017, we issued a memorandum opinion granting in part and denying in part various motions to suppress evidence filed by Coles through his former counsel. See generally Coles, 264 F. Supp. 3d 667.

[4] The court's citations are to the written transcript of the video-recorded interview. Counsel have also submitted a flash drive containing the video as an exhibit, and the court has reviewed the video to confirm the accuracy of the cited portions of the transcript as well as to confirm relevant timestamps.

and also invoked his right to remain silent—before the officers eventually terminated the interview. (See id. at 7:21-14:18).

The instant prosecution commenced with the filing of an indictment against Coles and codefendant Devin Dickerson charging various drug-trafficking offenses in August 2016. The grand jury has since returned three superseding indictments, adding new defendants as well as capital charges along the way. The case is now proceeding on a third superseding indictment, which charges Coles as follows:

- Count One: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and Pinkerton v. United States, 328 U.S. 640 (1946);
- Count Two: Hobbs Act robbery, and aiding and abetting same, in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2;
- Counts Three, Four, and Five: using, brandishing, and discharging a firearm during and in relation to a crime of violence (Hobbs Act robbery and killing a witness) resulting in the deaths of Phillip Jackson, Brandon Cole, and Wendy Chaney, respectively, and aiding and abetting same, in violation of 18 U.S.C. § 924(c) and (j) and 18 U.S.C. § 2;
- Count Six: conspiracy to use, brandish, and discharge a firearm during and in relation to a crime of violence (Hobbs Act robbery and killing a witness) resulting in the death of Chaney, in violation of 18 U.S.C. § 924(c), (j), and (o);
- Count Seven: conspiracy to commit murder for hire in violation of 18 U.S.C. § 1958 and Pinkerton;
- Counts Eight, Nine, and Ten: murder of witnesses (Chaney, Jackson, and Cole, respectively), and aiding and abetting same, in violation of 18 U.S.C. § 1512(a)(1)(C) and 18 U.S.C. § 2;
- Count Eleven: conspiracy to murder witnesses (Chaney, Jackson, and Cole) in violation of 18 U.S.C. § 1512(k);

- Count Fourteen: conspiracy to distribute and possess with intent to distribute at least 100 grams of heroin and at least 28 grams of cocaine base and cocaine hydrochloride in violation of 21 U.S.C. § 846;

- Count Fifteen: possession with intent to distribute heroin, cocaine hydrochloride, and cocaine base, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;

- Count Seventeen: possession with intent to distribute heroin and cocaine base, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;

- Count Eighteen: distribution of heroin resulting in serious bodily injury, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2; and

- Count Nineteen: possession of firearms in furtherance of a drug-trafficking crime, and aiding and abetting same, in violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 2, and Pinkerton.

(See Doc. 499 at 8-24, 28-32, 34-36).

After the government filed its notice of election not to pursue the death penalty on June 4, 2020, we established a pretrial and trial schedule, including separate phases of pretrial motions practice. Coles timely filed the four suppression motions addressed herein on March 3, 2021. The motions are fully briefed and ripe for disposition.

II. Discussion

Coles raises multiple arguments in his motions to suppress evidence and statements. We begin with his challenge to authorities' use of the New York state parole warrant to arrest him on July 7, 2016.[5]

A. Administrative Warrant

The Fourth Amendment protects individuals from unreasonable searches and seizures. See U.S. CONST. amend. IV; Horton v. California, 496 U.S. 128, 133 (1990). The constitutional default is that an arrest must usually be "effectuated with a warrant based on probable cause." See United States v. Torres, 961 F.3d 618, 622 (3d Cir. 2020) (quoting United States v. Robertson, 305 F.3d 164, 167 (3d Cir. 2002)). So too for searches: a warrant supported by probable cause is typically required. See Payton v. New York, 445 U.S. 573, 586 & n.25 (1980) (citations omitted); see also Illinois v. Gates, 462 U.S. 213, 238 (1983). The United States Supreme Court has carved an exception, however, for certain administrative searches: "government investigators conducting searches pursuant to a regulatory scheme need not adhere

[5] The government takes issue with Coles raising new challenges to evidence already tested by his former counsel during the first round of suppression motion practice in this case. (See Doc. 875 at 7-9); see generally Coles, 264 F. Supp. 3d 667. The government likens Coles' recast arguments to a motion for reconsideration and urges the court to reject them as untimely and failing to meet the high bar for such motions. We will exercise our discretion to allow Coles to raise his instant theories. As Coles notes, the nature of this case has fundamentally shifted: it is no longer just a drug-trafficking case and now includes charges for triple homicide, robbery, and attempted murder. Indeed, the government itself acknowledges the significance of this shift, reporting that, due to "the additional charges brought," it will now seek to introduce evidence previously considered unnecessary. (See Doc. 875 at 4 n.2).

to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting Camara v. Mun. Ct. of City & Cnty. of S.F., 387 U.S. 523, 538 (1967)).

We held, during the first round of suppression motion practice in this case, that the New York state parole warrant provided a valid basis for Coles' arrest on July 7, 2016, and that the search of his person incident to that arrest was likewise lawful. See Coles, 264 F. Supp. 3d at 675-76 (citing Arizona v. Gant, 556 U.S. 332, 335 (2009)). Coles does not challenge that holding directly in his instant motion. Rather, he contends that the warrant was administrative in nature and issued by a government agency on less than probable cause; hence, criminal investigators in Maryland could not use it to arrest him if their "primary purpose" was to ask him about the triple homicide and robberies committed on June 25, 2016. (See Doc. 815 at 8-9). According to Coles, his arrest violated the Fourth Amendment and all evidence derived therefrom must be suppressed as fruit of the poisonous tree. The government does not dispute that the parole warrant was administrative in nature. (See Doc. 875 at 19-20). It does dispute Coles' claim, however, that authorities could not arrest him on the parole warrant if they were separately and primarily interested in him for the triple homicide and robbery. (See id. at 20-23).

The foundation for Coles' theory is the Supreme Court's decision in Abel v. United States, 362 U.S. 217 (1960). There, noncitizen Rudolf Ivanovich Abel was arrested on an administrative arrest warrant issued by United States Immigration

and Naturalization Service ("INS") officials who believed Abel was in the country illegally. See Abel, 362 U.S. at 221. The officials had been alerted to Abel's illegal immigrant status by agents of the Federal Bureau of Investigation ("FBI"), who suspected he had committed espionage but lacked sufficient evidence to arrest or indict him. See id. An INS official signed an administrative arrest warrant to facilitate Abel's deportation, and INS and FBI agents coordinated on a plan for executing it: FBI agents would escort INS agents to Abel's hotel and interview him about his suspected espionage, and if Abel was not cooperative with the FBI agents, the INS agents would arrest him on their warrant. See id. at 222-23. Abel did not cooperate, so the INS agents arrested him and searched the hotel room for weapons or evidence of immigration status. See id. at 223-24. Abel was then handcuffed and taken into INS custody, where his property was searched more thoroughly. See id. at 224-25. The FBI agents remained on scene, obtained permission from hotel staff to search the vacated hotel room, and conducted an extensive search of the room. See id. at 225. Abel remained in an immigration detention center for several weeks before being charged with, tried for, and eventually convicted of conspiracy to commit espionage. See id.

At trial and on appeal, Abel claimed the immigration warrant "was a pretense and sham" to allow law enforcement to conduct a search without probable cause, in an attempt to circumvent the Fourth Amendment. See id. at 225-26. The Supreme Court upheld the search, relying on the lower courts' findings that the INS agents arrested Abel in good faith, the FBI did not direct or supervise the

arrest, and the administrative arrest proceeded no differently than it would have for any other deportable noncitizen. See id. at 226-28. The Court contrasted the permissible interagency cooperation before it with an impermissible situation in which immigration authorities merely act "as the cat's paw" of law enforcement investigators. See id. at 229-30 (citing Colyer v. Skeffington, 265 F. 17 (D. Mass. 1920)). The Court nonetheless noted that, had Abel's position been substantiated by the record, "it would indeed reveal a serious misconduct by law-enforcing officers," cautioning that "deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." Id. at 226. In closing, the Court articulated a test for assessing whether such misuse has occurred, tasking courts to ask "whether the decision to proceed administratively . . . was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." Id. at 230.

Coles frames out his argument with legal principles developed in the administrative search context. He notes, for example, the Supreme Court's holding in Michigan v. Clifford, 464 U.S. 287 (1984) (plurality opinion), which concerned fire officials' post-fire search of a residence. The Court explained that an administrative search warrant will suffice if "the primary object" is administrative in nature—*e.g.*, to identify the cause and origin of a fire—but a criminal search warrant supported by probable cause is required when the primary object is to investigate a potential crime—*e.g.*, to search the entire home for evidence of suspected arson. See Clifford, 464 U.S. at 294. Coles also notes, *inter alia*, the Ninth Circuit Court of Appeals'

decision in United States v. Grey, 959 F.3d 1166 (9th Cir. 2020), where, under the guise of a "protective sweep" before city officials executed a property inspection warrant, nine armed deputies arrested the homeowner and searched the residence for at least 15 to 20 minutes, even though they had yet to develop probable cause in their own criminal investigation. See Grey, 959 F.3d at 1182-83. The court of appeals held that, because law enforcement's "primary purpose" was not to assist the city inspectors but to "gather evidence in support of an ongoing criminal investigation," their conduct violated the Fourth Amendment. See id. at 1183-84.

Coles' motion rests on a fusion of these lines of authority, but chiefly on Abel. He claims that law enforcement's primary object in arresting him on the New York state parole warrant was not to apprehend and extradite him to New York, but to take him into custody and question him about the triple homicide and robbery in Pennsylvania. As a threshold matter, that proposition is flatly refuted by the record from the first suppression hearing in this case, during which Detective Duffy testified that the only reason Coles was stopped on July 7, 2016, was to be arrested on the New York state parole warrant for extradition to New York. (See 7/18/17 Tr. 16:4-7 (Q: "And the only reason that you stopped that car was because Kevin Coles was in it and you believe that Kevin Coles would be extradited by New York, is that right?" A: "Yes.")). Detective Duffy detailed the process by which the Maryland State Police fugitive apprehension team had alerted him to Coles' presence in Hagerstown and requested local assistance in apprehending him. (See id. at 16:7-12). That Detective Duffy also knew Coles was a person of interest in a homicide

investigation does not change the fact that his primary purpose on July 7, 2016, was to apprehend a known fugitive. (See id. at 7:10-12; see also id. at 12:20-25 (Q: "So he wasn't in custody for the murders, correct?" A: "No, sir. The warrant." Q: "He wasn't in custody for any drug offense, correct?" A: "Correct." Q: "You arrested him on a New York warrant, correct?" A: "Yes, sir.")).

More problematic for Coles, however, is that the circumstances animating Abel's admonitory *dicta* are absent here. The Court in Abel faced a claim that FBI agents had influenced INS officials to *issue* an immigration arrest warrant for Abel to circumvent the Fourth Amendment when the FBI could not get its own criminal espionage investigation off the ground. The Court asked whether INS's decision to "proceed administratively toward deportation" had been influenced by the FBI's separate agenda. See Abel, 362 U.S. at 230; id. at 226 (noting relevant inquiries as "[w]hat the motive was of [INS] officials who determined to arrest petitioner, and whether [INS] in doing so was not exercising its powers in the lawful discharge of its own responsibilities but was serving as a tool for the FBI"). In this case, *per contra*, the decision to "proceed administratively" as to Coles—to issue a warrant for his arrest for an alleged parole violation—was made by New York state parole officials in July 2015. The triple homicide occurred nearly one year later, in June 2016. Coles' entire bad-faith theory thus rests on the implausible premise that New York state parole officers are clairvoyants: that, when issuing their administrative

warrant in 2015, they acted as the "cat's paw" for a criminal investigation that had not yet begun, into a triple homicide that had not yet occurred. Cf. id. at 230.

Nor are we persuaded by Coles' reliance on cases exploring the permissible scope of administrative searches. Those decisions involve entirely different facts, legal principles, and rationales. In Clifford, for example, the Supreme Court found a Fourth Amendment violation when an arson investigator entered a fire-damaged home to conduct a criminal investigation hours after first responders extinguished the fire and left the scene. See Clifford, 464 U.S. at 289-90, 294-95. The Court held that, while the exigent circumstances exception to the warrant requirement allows fire officials to enter a home to extinguish a blaze and to remain for "a reasonable time" to conduct an "administrative search" as to its cause, see id. at 293-94 (citing Michigan v. Tyler, 436 U.S. 499, 510 (1978)), the arson investigator exceeded the scope of that exception when he returned to the scene well after any exigency had abated, see id. at 296-98. Likewise, Grey involved law enforcement officers whose conduct greatly exceeded the permissible scope of a "protective sweep" purportedly undertaken to assist city officials in their execution of an administrative inspection warrant. See Grey, 959 F.3d at 1182-83. Other cases cited by Coles are similarly distinguishable. See, e.g., United States v. Russo, 517 F. Supp. 83, 83-84, 86 (E.D. Mich. 1981) (officers exceeded scope of warrant to conduct administrative audit of physician's records and equipment when they had already initiated criminal investigation and sought evidence of criminal activity); United States v. Lawson,

502 F. Supp. 158, 164-65 (D. Md. 1980) (similar when law enforcement deliberately employed administrative search warrant with its lesser standard of probable cause to search pharmacy for evidence of criminal activity).

Coles extracts the "primary purpose" and "primary object" language from these administrative search decisions, positing that his arrest was unlawful because officers were not primarily concerned with him as a fugitive, but as a suspect in the triple homicide. The analogy simply does not fit. Administrative *search* cases necessarily involve questions of scope and a balancing of administrative objectives with Fourth Amendment privacy interests; when the primary purpose of the search shifts from administrative to criminal, the Fourth Amendment requires a warrant supported by full probable cause. See Clifford, 464 U.S. at 294-95; see also Grey, 959 F.3d at 1183 (discussing scope of administrative searches and observing that, even in cases of improper motive, there is no Fourth Amendment violation if that motive "did not affect the scope of the search or the manner in which a warrant was executed"). This makes good sense, because the scope of a physical search, and its degree of intrusiveness relative to the privacy interests implicated, can and does vary.

Coles has not identified any authority extending the rationales of these administrative search cases to the preexisting arrest warrant context. His briefs are likewise devoid of decisional law supporting his contention that, because Maryland and Pennsylvania investigators were also interested in him for a triple homicide, the Fourth Amendment prohibited them from arresting him on that preexisting

warrant. Nor has our research uncovered any. This is unsurprising, since the scope of an arrest, unlike the scope of a search, is binary: officers either do or do not have lawful authority to arrest a person. And as we have already concluded in this case, the officers who arrested Coles had in their possession a valid warrant authorizing his arrest. See Coles, 264 F. Supp. 3d at 675-76. We thus reiterate our prior conclusion that the parole warrant provided a lawful basis for Coles' arrest, and for the search of his person incident to his arrest, on July 7, 2016. See id. at 676. We will deny Coles' motion to suppress evidence obtained following his arrest pursuant to the New York state parole warrant.

B. Section 5743 and Section 5773 Orders

We turn next to Coles' challenges to two related orders: the Section 5773 order, authorizing real-time CSLI tracking of his cell phone, and the Section 5743 order, authorizing disclosure of historical CSLI and various other records from his cell phone.[6] Both orders were issued by Franklin County Court of Common Pleas Judge Angela R. Krom on June 30, 2016. Coles argues that the applications for the orders, and the orders themselves, fail to satisfy state statutory requirements and federal constitutional standards and, as to the Section 5773 order, the affidavit of probable cause deliberately or recklessly omitted material information within the

[6] The Section 5773 order also appears to authorize disclosure of Coles' historical CSLI. We agree with Coles that historical CSLI is governed by Section 5743, not Section 5773. Because law enforcement sought and obtained an order for disclosure of historical CSLI under Section 5743 as well, the overbreadth of the Section 5773 order is immaterial.

scope of Franks v. Delaware, 438 U.S. 154 (1978). We address these arguments *seriatim*.

1. *Statutory Requirements*

Coles first marches through the statutory requirements for Section 5743 and Section 5773 and contends that the applications for both orders conflate and ultimately fail to meet several of them. (See Doc. 868 at 5-8); see also 18 PA. CONS. STAT. §§ 5743, 5773. He maintains that all evidence gathered as a result of those orders must be suppressed for failure to "meet the requirements" set forth in or to "comply with" the respective Pennsylvania statutes. (See Doc. 867 at 7-10; Doc. 868 at 5-8).

The two applications and resulting orders do not fully comply with the applicable Pennsylvania statutes. In federal prosecutions, however, admissibility of evidence is tested by its conformity to federal, not state, law. See United States v. Rickus, 737 F.2d 360, 363-64 (3d Cir. 1984); United States v. Stiver, 9 F.3d 298, 300 (3d Cir. 1993) (quoting Rickus, 737 F.2d at 363-64). That is, "evidence obtained in accordance with federal law is admissible in federal court—even though it was obtained by state officers in violation of state law." Rickus, 737 F.2d at 363 (citing United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975)). Consequently, law enforcement's noncompliance with Pennsylvania's statutory requirements does not *ipso facto* fell the challenged orders. We will deny Coles' motion to the extent it is

based on perceived violations of state law, and will instead consider whether the orders meet applicable federal standards.[7]

[7] Coles claims Rickus does not apply here because that case concerned searches prohibited under Pennsylvania constitutional law, whereas the instant motions concern orders authorized under Pennsylvania statutory law. Coles has not cited any authority invalidating state process in federal court for failure to comply with state statutory requirements. The court of appeals in Rickus suggested that the source of the state rule is not dispositive. See Rickus, 737 F.2d at 364 (finding "no authority for" district court's inverse holding "that an exception exists where state agents have violated state constitutional, as opposed to state statutory, law"). And it has repeatedly held that alleged violations of state statutory law are not of concern in federal court, "[s]o long as the information was lawfully obtained under federal law and met federal standards of reasonableness." United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975) (warrantless recording of phone call where only one party consented, which would be violation of Pennsylvania statute, admissible since it is "perfectly proper under federal law"); see Shaffer, 520 F.2d at 1371-72 (similar for Delaware statute). Coles attempts to distinguish those cases by emphasizing that here, a state statute was "the vehicle to obtain certain evidence," (Doc. 900 at 4), as opposed to an alleged bar to it. But the Third Circuit has applied Rickus to challenges to process "applied for, issued, and executed by state officers" under state law. See, e.g., Stiver, 9 F.3d at 300; see also United States v. Williams, 570 F. App'x 137, 141-42 & n.4 (3d Cir. 2014) (nonprecedential) (state search warrant's "failure to comply" with state rules not dispositive in federal court). We note that one of our sister courts has specifically applied this principle to a Section 5743 order. See United States v. Wilson, 216 F. Supp. 3d 566, 588-89 (E.D. Pa. 2016) (failure to meet statute's probable cause standard not dispositive when there was no search under federal law). We are also unpersuaded by Coles' reliance on United States v. Bedford, 519 F.2d 650 (3d Cir. 1975), where the court observed in a footnote that a "warrant, *assuming proper issuance under state law*, need only conform to federal constitutional requirements," see Bedford, 519 F.2d at 654 n.1 (emphasis added), since Bedford predates Rickus by nearly a decade. Finally, Coles invokes United States v. McClellan, 350 F. App'x 767 (3d Cir. 2009) (nonprecedential), for the proposition that "the Third Circuit has applied state law in analyzing similar questions." (Doc. 900 at 5). The defendant in McClellan challenged the state judge's jurisdiction to authorize a pen register, so the panel examined state law to determine the scope of the issuing judge's jurisdiction. See McClellan, 350 F. App'x at 769-70 (citing Commonwealth v. Bethea, 828 A.2d 1066, 1074 (Pa. 2003)). That analysis is consistent with Rickus, because issuance of a warrant without jurisdiction raises a Fourth Amendment problem. See, e.g., United States v. Werdene, 883 F.3d 204, 209-10 (3d Cir. 2018). Indeed, we relied on Pennsylvania state law to answer the exact same jurisdictional challenge during the first round of motion practice in this case. (Doc. 217 at 3 & n.1 (citing Bethea, 828 A.2d at 1074)).

2. *Constitutional Requirements*

Coles asserts that both the Section 5743 order (which sought his historical CSLI, call detail records, internet and data access, and subscriber information for phones interacting with his phone) and the Section 5773 order (which sought his real-time CSLI) are invalid for lack of probable cause.[8] (See Doc. 867 at 10-12; Doc. 868 at 11-13). The Section 5743 application and order make no mention of probable cause and appear to have been grounded in Section 5743's requirement that the information sought be "relevant and material to an ongoing criminal investigation." See 18 PA. CONS. STAT. § 5743(d); (Doc. 821-1 at 2-6, 8-11). Coles argues that not only do the application and order fail to supply the probable cause now required for historical CSLI collection under Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018), they fail to meet the statute's lesser "relevant and material" standard. (See Doc. 868 at 6 n.5, 11-13). Coles acknowledges the Section 5773 order includes a finding of probable cause, but argues the accompanying affidavit does not support it. (See Doc. 867 at 10-12).

a. **Section 5743 Order**

The Supreme Court held in Carpenter that law enforcement must obtain a warrant supported by probable cause to collect a defendant's historical CSLI. See Carpenter, 138 S. Ct. at 2221. It is indisputable that the Section 5743 order is not a warrant, is not premised upon a finding of probable cause, and thus violates the

[8] Coles raises this same argument with respect to the Section 5743 order's apparent authorization for T-Mobile to turn over the content of his text messages. The government reports that T-Mobile did not turn over any text messages. (See Doc. 875 at 14). We will thus deny this aspect of Coles' motion as moot.

Fourth Amendment. See United States v. Goldstein, 914 F.3d 200, 203 (3d Cir. 2019). Importantly, however, Carpenter was not the law at the time the Section 5743 order issued. As we observed in our first suppression opinion in this case, before Carpenter, the Third Circuit Court of Appeals had held repeatedly that CSLI collection was not a search for purposes of the Fourth Amendment. See Coles, 264 F. Supp. 3d at 674-75 (citing United States v. Stimler, 864 F.3d 253, 266-67 (3d Cir. 2017) (citing *In re* Application, 620 F.3d 304, 312-13 (3d Cir. 2010))). For this reason, the court of appeals has concluded that "the good faith exception applies when the government obtained CSLI data without a warrant prior to Carpenter." Goldstein, 914 F.3d at 204-05 ("Excluding evidence obtained through methods that complied with the law at the time of the search cannot serve any deterrent purpose.").

That holding squarely applies here. At the time authorities applied for the Section 5743 order, federal law only required them to show "reasonable grounds to believe" that Coles' historical CSLI (and other call detail records)[9] were "relevant and material to an ongoing criminal investigation." See Stimler, 864 F.3d at 266-67. The Section 5743 order unquestionably meets this standard. The application establishes that law enforcement were investigating a triple homicide at Jackson's farm during which Chaney, Jackson, and another individual were killed; that Coles was the "estranged boyfriend" of Chaney; that Coles "threatened to hurt Chaney in the past"; that Chaney believed Coles had broken into her apartment a week prior

[9] Coles does not claim that a higher standard applies to the other information sought by the Section 5743 order. (See Doc. 868 at 7-8); cf. Smith v. Maryland, 442 U.S. 735, 742-46 (1979) (no reasonable expectation of privacy in call detail records).

to her murder; and that Chaney had sent a text message to Jackson "that if she ended up dead, 'Kevin' did it." (Doc. 821-1 at 3). On these facts, Judge Krom could readily find that information about Coles' location and contacts in the weeks and months preceding Chaney's murder was relevant and material to the ongoing criminal investigation into her death.[10] The government thus "complied with the law at the time of the search," see Goldstein, 914 F.3d at 204-05, and we will deny Coles' motion to suppress the historical CSLI and other records obtained pursuant to the Section 5743 order.

b. Section 5773 Order

Coles also challenges the Section 5773 order, which authorized collection of his real-time CSLI, for lack of probable cause. The Supreme Court did not address in Carpenter whether collection of real-time CSLI data is a search subject to the Fourth Amendment's warrant requirement, see Carpenter, 138 S. Ct. at 2220 ("We do not express a view on matters not before us: real-time CSLI or 'tower dumps.'"), and our court of appeals has not yet confronted that question. The Seventh Circuit has suggested Carpenter should be read narrowly to apply only to historical and not real-time CSLI. See United States v. Hammond, 996 F.3d 374, 389-92 (7th Cir. 2021) (noting Carpenter's particular concern with the "retrospective quality" of historical CSLI and finding defendant had no reasonable expectation of privacy in six hours

[10] We agree with the government that the Section 5743 order's failure to make an explicit finding of materiality is not fatal. It can be reasonably inferred from Judge Krom's references to Section 5743 in issuing the order that she found the requirements of both relevance and materiality to be satisfied. (See Doc. 821-1 at 8, 10 (citing 18 PA. CONS. STAT. § 5743)).

of real-time CSLI (quoting Carpenter, 138 S. Ct. at 2218)). Assuming *arguendo* that a heightened probable cause standard applies to both historical and real-time CSLI, we find it to be met here.

Our Supreme Court views probable cause as an amorphous concept, "not readily, or even usefully, reduced to a neat set of legal rules." See Ornelas v. United States, 517 U.S. 690, 695-96 (1996) (quoting Gates, 462 U.S. at 232). In reviewing the probable cause finding *sub judice*, our job is "not to decide probable cause *de novo*," but to assess whether Judge Krom "had a substantial basis for concluding that probable cause existed." United States v. Stearn, 597 F.3d 540, 554 (3d Cir. 2010) (quoting Gates, 462 U.S. at 238). Probable cause for a Fourth Amendment search exists when, "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. (quoting Gates, 462 U.S. at 238).

Judge Krom had a substantial basis for concluding that probable cause existed to believe information relevant to the triple homicide investigation would be obtained by collecting Coles' real-time CSLI. The Section 5773 application was accompanied by an affidavit of probable cause authored by PSP Trooper Jeffrey Baney. (See Doc. 823-1). Trooper Baney's affidavit explains that three victims (Chaney, Jackson, and Cole[11]) were shot and killed at Jackson's farm on June 25, 2016. (Id. at 2). The affidavit then provides information about Coles, specifically:

[11] The affidavit of probable cause misspells Brandon Cole's last name as "COLES." (Doc. 823-1 at 2). Given the context supplied by the affidavit, we do not believe Trooper Baney's conflation of defendant *Coles*' name with victim *Cole*'s name impacted the finding of probable cause.

- According to Chaney's mother, Coles and Chaney had been in a romantic relationship, Chaney "was afraid of" Coles, Coles "had threatened to hurt" Chaney in the past, and Chaney believed Coles had broken into her apartment one week before her murder. (See id.)

- According to codefendant Torey White, Chaney had introduced Coles to Jackson, Coles and Jackson exchanged drugs, Jackson "sold weapons" to Coles in the past, and Chaney had related to White "that if she were to be killed COLES would be the one to do it." (See id. at 2-3).

- According to Jackson's widow, she had observed Coles and Jackson "shooting weapons at the residence where the incident occurred," and, after the triple homicide, she checked the gun safe located in the barn where "weapons are normally kept" and reported that "they are unaccounted for." (See id. at 3).

These allegations provide a substantial basis for Judge Krom to find probable cause to believe evidence related to the triple homicide at Jackson's farm would be gleaned from collecting Coles' real-time CSLI. The affidavit links Coles to two of the three victims (Chaney and Jackson) and establishes that Coles had threatened Chaney and that she believed he would harm—indeed, would *kill*—her. (See id. at 2-3). It also establishes that Coles engaged in illegal activities (drug-trafficking and possibly unlawful sale of weapons) with Jackson at the farm and that Chaney was aware of Coles' illegal activities, establishing a potential motive. (See id.) In addition, it reveals that Coles had been seen shooting firearms with Jackson at the crime scene and that the firearms regularly stored there were missing after the triple homicide. (See id.) These facts supply a substantial basis for Judge Krom's conclusion that there was probable cause to believe real-time CSLI from Coles' cell

phone would provide information relevant to the triple homicide investigation, including but not limited to Coles' physical location.[12]

3. *Material Omission*

Coles further argues that the Section 5773 affidavit omitted information material to the assessment of probable cause. Specifically, Coles claims Trooper Baney knowingly or recklessly omitted from his affidavit that codefendant Torey White—one of three witnesses whose statements feature in the affidavit—was a prime suspect in the triple homicide and had displayed reactions "indicative of deception" during a polygraph examination about the triple homicide two days prior. (See Doc. 867 at 4, 12-15).

A criminal defendant may challenge the truthfulness of factual statements in an affidavit of probable cause through what is commonly known as a Franks hearing. If a defendant makes "a substantial preliminary showing" that the affidavit in question contains a false statement or omission which was both knowingly or recklessly made and material to the probable cause finding, the court must conduct an evidentiary hearing to examine the sufficiency of the affidavit. See United States v. Aviles, 938 F.3d 503, 508 (3d Cir. 2019) (citing Franks, 438 U.S. at

[12] The cases Coles cites to support his claim that this affidavit creates nothing more than "mere suspicion" are distinguishable. See Wong Sun v. United States, 371 U.S. 471, 479-80 (1963) (no probable cause to arrest defendant James Wah Toy when only information available was statement from first-time informant that "a person described only as 'Blackie Toy,' the proprietor of a laundry somewhere on Leavenworth Street, had sold one ounce of heroin"); United States *ex rel.* Campbell v. Rundle, 327 F.2d 153, 163 (3d Cir. 1964) (no probable cause to search when affidavit alleged no facts and no crime and officer stated only that he had "just cause to suspect that articles and instruments to procure abortions are possessed" in the property to be searched).

155-56); United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006)). However, if the information challenged by the defendant is immaterial—that is, unnecessary to the finding of probable cause—no hearing is required. See id. at 508-09; see also United States v. Gordon, 664 F. App'x 242, 245 (3d Cir. 2016) (nonprecedential).

As a threshold matter, Coles does not allege, much less make a "substantial preliminary showing," that Trooper Baney *knew* White was a prime suspect in the triple homicide investigation or had provided deceptive answers during a polygraph examination on June 27, 2016, two days prior to the Section 5773 application. The PSP officers who attended the examination (Corporal Nicholas Bloschichak and Trooper Jeremy Matas) plainly were aware of it, (see Doc. 823-2 at 2-4), but Coles does not allege in his motion or brief that *Trooper Baney* knew about it when he signed his affidavit on June 29, 2016, (see Doc. 823-4 ¶¶ 2-5; Doc. 867 at 2-4, 12-14). Moreover, the polygraph report itself is dated August 2, 2016—three days *after* the Section 5773 affidavit. (See Doc. 823-2 at 2). There is no indication in the report that Trooper Baney was present during or aware of the polygraph examination and no indication in the record that he was made aware of the results before the report was approved. Accordingly, Coles has not made a substantial preliminary showing that Trooper Baney knowingly or recklessly omitted information about White's status as a suspect or his polygraph results from his Section 5773 affidavit.

Assuming *arguendo* that the omission was knowingly or recklessly made, Coles also has not shown that the omitted information was material.[13] We assess materiality of an omission by inserting the missing information and determining whether the "corrected" affidavit would still establish probable cause. See Yusuf, 461 F.3d at 383-84; see also Dempsey v. Bucknell Univ., 834 F.3d 457, 470 (3d Cir. 2016) (instructing courts to perform "literal, word-by-word reconstructions of challenged affidavits").

Reconstructing the affidavit to include the omitted information still supplies probable cause to support the Section 5773 order. The reconstructed affidavit would read:

> 2. On 06/25/16 at approximately 2327 hours, PSP Chambersburg was notified by Torey WHITE that his brother was "tied up and bleeding" in a barn at the address of 11026 Welsh Run Rd. Montgomery Twp., Franklin County.
>
> 3. Upon arrival of PSP Troopers to the scene, it was found that there were two deceased persons and one person severely injured. There was also a fire in the barn. Upon further examination it was found that the individual that was severely injured was Philip JACKSON (occupant of residence). He was flown to York Hospital with life threatening injuries. Jackson later died of his injuries. Inside of the barn a black male identified as Brandon

[13] We agree with Coles, and the government apparently does not dispute, that it would be material to the review of a warrant application to learn that one of three witnesses whose accounts were relied upon in the probable cause affidavit had failed his own polygraph two days prior and was himself a prime suspect in the investigation. Cf. United States v. Glover, 755 F.3d 811, 817 (7th Cir. 2014) (holding affiant's "complete omission of known, highly relevant, and damaging information about [witness's] credibility" deprived judge of information material to probable cause determination). If the information about White's credibility was known to Trooper Baney, it should have been included in his affidavit.

COLES, B/N-M, 47 YO was found bound and deceased. A second individual inside of the barn was also located and identified as, Wendy CHANEY, W-N/F, 39 YO, that was found bound and deceased. It was later determined all three individual [sic] had been shot.

4. Through the course of this investigation various interviews have been conducted with the victim's families and associates. During the course of an interview with Lucille Maria CHANEY who is the mother of one of the victims Wendy CHANEY it was discovered that Wendy was in a romantic relationship with an individual identified as Kevin COLES B-N/M, 30 YO. Lucille CHANEY also related in the same interview that Wendy believed approximately one week prior to this incident COLES had broken into her apartment and stole an iPad. Lucille went on to relate that Wendy had related that she was afraid of COLES and that he had threatened to hurt her in the past.

5. During the course of an interview with Torey WHITE information was discovered indicating that COLES had known two of three victims. WHITE related that Wendy CHANEY had introduced COLES to Philip JACKSON. WHITE went on to further relate that he too was in a romantic relationship with Wendy CHANEY. WHITE related that CHANEY had told him that COLES and JACKSON would exchange drugs. WHITE related that JACKSON at one point also sold weapons to COLES. WHITE added that CHANEY related that if she were to be killed COLES would be the one to do it. WHITE related that he told CHANEY at various times to avoid COLES. *It should be noted that WHITE is also a prime suspect in the triple homicide and that WHITE provided responses deemed deceptive by the polygraph examiner during a polygraph examination on June 27, 2016, about his involvement in the triple homicide.*

6. During the course of an interview with Philip JACKSON's wife Amber JOHNSON it was discovered that JOHNSON had observed COLES with JACKSON shooting weapons at the residence where the incident occurred. During the course of JOHNSON checking the residence to account for missing items she related that a gun safe located in the barn where the incident occurred

> was empty. JOHNSON related that weapons are normally kept in that safe and they are unaccounted for. During a search of the residence by the Pennsylvania State Police the weapons were not located either.

(See Doc. 823-1 at 2-3 (reconstructed additions in italics)).

The information about White's credibility, while relevant, does not defeat a finding of probable cause. It is not at all clear that Judge Krom would have outright rejected *all* statements attributable to White based on this information. Most of his relevant statements are generally corroborated by two additional witness accounts set forth in the affidavit. See, e.g., United States v. Carney, 717 F. App'x 185, 187 (3d Cir. 2018) (nonprecedential) (omission of information about informant's credibility immaterial when other facts corroborated informant's statements); United States v. Brooks, 358 F. Supp. 3d 440, 475 (W.D. Pa. 2018) (omission of alleged impeaching information about complainants immaterial when, *inter alia*, corroborated by other physical evidence). White's statement that Chaney suspected Coles might kill her, for example, is consistent with Chaney's mother's statement that Chaney was afraid of Coles, that he had threatened Chaney previously, and that Chaney suspected he had broken into her apartment a week before the triple homicide. (See Doc. 823-1 at 2-3). Similarly, White's statement that Jackson sold weapons to Coles is consistent with Jackson's wife's statement that she observed Coles and Jackson shooting weapons on the property. (See id.)

Moreover, even if we were to fully extract White's statements, the affidavit still contains enough facts to establish probable cause to believe Coles' cell phone might contain information about the triple homicide, namely: that Coles was in a

romantic relationship with one victim (Chaney) and was associated with another (Jackson), that Coles had threatened Chaney in the past and had possibly broken into her apartment a week prior to her murder, and that Chaney was found shot to death on a property with which Coles was familiar and where Coles had been observed shooting firearms with another of the victims. (See id.) We will thus deny Coles' motion to the extent it is premised on an alleged material omission.

4. *Good Faith Exception*

Finally, even if we found merit in Coles' principal arguments, the good-faith exception to the exclusionary rule would apply. As we recently noted in addressing a codefendant's suppression motion, (see Doc. 906 at 26), courts will not suppress evidence obtained through a subsequently invalidated search warrant if officers acted in good faith, that is, "in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." United States v. Leon, 468 U.S. 897, 918 (1984); see Stearn, 597 F.3d at 560 (quoting Leon, 468 U.S. at 918). The test is "whether a reasonably well trained officer would have known that the search was illegal despite the [judge's] authorization." United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001) (quoting United States v. Loy, 191 F.3d 360, 367 (3d Cir. 1999) (quoting Leon, 468 U.S. at 922 n.23)). Our court of appeals has recognized four "rare" exceptions to this rule, only one of which is relevant here: evidence will be suppressed if "the warrant was based on an affidavit so lacking in indicia of

probable cause as to render official belief in its existence entirely unreasonable."[14] See United States v. Pavulak, 700 F.3d 651, 664 (3d Cir. 2012) (quoting Stearn, 597 F.3d at 561 & n.19 (internal quotation marks and citations omitted)).

Trooper Baney's belief that probable cause existed to support real-time CSLI tracking of Coles' phone was reasonable under the circumstances. The supporting affidavit included information about Coles' relationship with Chaney and Jackson, two of the three victims; his connection to the scene of the triple homicide; and his threats to Chaney, his suspected recent burglary of her apartment, and her fear of him as reported to multiple people. The affidavit offers enough information to permit a reasonable law enforcement officer to believe—and to lead Judge Krom to conclude—that probable cause to collect Coles real-time CSLI existed. Cf. Hodge, 246 F.3d at 307-08 (noting "mere existence of a warrant typically suffices to prove that an officer conducted a search in good faith and justifies application of the good faith exception" (citing Leon, 468 U.S. at 922)).

We also agree with the government that the drastic sanction of exclusion would net little deterrent value under these circumstances. The Supreme Court has explained that "the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." Davis v. United States, 564 U.S. 229, 238 (2011) (quoting Herring v. United States, 555 U.S. 135, 143 (2009)). The sanction of

[14] A second exception applies when "the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit." See Pavulak, 700 F.3d at 664 (quoting Stearn, 597 F.3d at 561 & n.19 (internal quotation marks and citations omitted)). We found *supra* that Coles has not made a showing that the omitted information was either deliberately or recklessly omitted from the affidavit.

exclusion "is appropriate only where law enforcement conduct is both 'sufficiently deliberate' that deterrence is effective and 'sufficiently culpable' that deterrence outweighs the costs of suppression." United States v. Katzin, 769 F.3d 163, 171 (3d Cir. 2014) (quoting Herring, 555 U.S. at 144). As a general rule, only when police "exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" will the deterrent value of exclusion "tend[] to outweigh the resulting costs." Davis, 564 U.S. at 238 (quoting Herring, 555 U.S. at 144) (internal quotation marks omitted).

There is no indication of deliberate, reckless, or grossly negligent conduct in this case. *Per contra*, law enforcement officers objectively and reasonably believed their conduct was lawful—based on the facts set forth in the affidavit of probable cause and judicial approval of the search. Under such circumstances, "exclusion cannot 'pay its way.'" Id. (quoting Leon, 468 U.S. at 907 n.6). We thus hold, in the alternative, that the good-faith exception to the exclusionary rule applies to the real-time CSLI order.[15]

[15] Coles remonstrates that this case presents "an important opportunity" to communicate to state court prosecutors that noncompliance with state statutory procedures will not be tolerated in federal court. (See Doc. 900 at 7-8). We reiterate what our court of appeals observed in Rickus: "We are not insensitive to the claim that we should not encourage state officials to violate principles central to the state's social and governmental order. But sanctions already exist to control the state officer's conduct. He is 'punished' by the exclusion of evidence in the state criminal trial, and the state can, if it chooses, enforce its policies with respect to its own officers by permitting civil suits. We are persuaded that the additional deterrent effect to be gained from excluding this evidence in federal trials for federal offenses is small, and is far outweighed by the costs to society of excluding the evidence." See Rickus, 737 F.2d at 364 (internal citations omitted).

C. Post-Arrest Statements

Finally, Coles moves to suppress all statements made to PSP investigators during his post-arrest interview on July 7, 2016. We detailed the legal landscape concerning statements made during custodial interrogation in our first suppression opinion in this case. See Coles, 264 F. Supp. 3d at 681-83. Relevant to Coles' instant motion, statements made by a suspect during custodial interrogation are admissible only if police apprise the suspect of their rights under Miranda v. Arizona, 384 U.S. 436 (1966), and the suspect chooses to waive them knowingly and voluntarily. See Miranda, 384 U.S. at 444, 475. Once a suspect invokes the right to counsel, police must immediately cease interrogation until counsel is present. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

After Coles' arrest on the New York state parole warrant on July 7, 2016, officers transported him to the Hagerstown Police Department, where he was met and interviewed by PSP Corporal Decker and Trooper Cox. Trooper Cox began the interview by reading Coles his Miranda rights. (See Doc. 819-2 at 2:18-3:7). Coles proceeded to speak with the PSP officers and answer their questions for a few minutes. (See id. at 3:9-7:14). Three minutes and 54 seconds into the interview, Coles invoked his right to counsel, stating, "Well, I think I would like to ask for a lawyer at this point." (Id. at 7:15-16). Despite this clear invocation, Corporal Decker and Trooper Cox continued to ask Coles questions for roughly six minutes before terminating the interview. (See id. at 7:21-14:19).

The government appropriately concedes that the interrogation should have ceased at the moment Coles invoked his right to counsel. (See Doc. 875 at 24). We

agree. Coles clearly and unequivocally invoked his right to counsel, and Corporal Decker and Trooper Cox failed to scrupulously honor that invocation—indeed, to honor it at all. Instead, they proceeded to question him for another six minutes, during which Coles repeatedly invoked his Miranda rights. (See Doc. 819-2 at 9:9-11 ("I'm definitely stoppin' this question."); id. at 10:4-6 ("At this point in time, I'm definitely invokin' my right to what you call it, you know, to a lawyer.")). This post-invocation questioning constitutes a plain violation of Coles' constitutional rights. We will thus grant Coles' motion to the extent it seeks to suppress any statement Coles made after he invoked his right to counsel.

For his part, Coles concedes that no statement made after he waived his Miranda rights but before he invoked his right to counsel violated the Sixth Amendment. (See Doc. 900 at 13). And Coles does not suggest that there were any other constitutional infirmities with the interview up to that point. (See id. at 13-14; see also Doc. 869 at 2-5). He contends, however, that any statements made during that approximately four-minute window must nonetheless be suppressed based on arguments raised in his other motions—that the arrest on the New York state parole warrant and the orders authorizing CSLI collection were unlawful. (See Doc. 900 at 13-14). We have rejected those arguments above, and thus reject this contingent argument now. For these reasons, we will deny Coles' motion to suppress statements made prior to his invocation of his right to counsel during the July 7, 2016 interview.

III. Conclusion

The court will grant in part and deny in part Coles' motions (Docs. 811, 819, 821, 823-4) to suppress evidence. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: August 2, 2021

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

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:16-CR-212**
	:	
v.	:	**(Judge Conner)**
	:	
KEVIN COLES,	:	
	:	
Defendant	:	

MEMORANDUM

In April of this year, a jury found defendant Kevin Coles guilty of all 16 counts charged against him. Those convictions reflect the jury's unanimous and unequivocal determination that the government had proved beyond a reasonable doubt its theory of this prosecution, namely, that Coles was a major drug trafficker in southcentral Pennsylvania and in Maryland and that he conspired with others to murder a woman who had begun cooperating with authorities about those drug-trafficking activities. Coles now moves for judgment of acquittal on most counts of conviction or, in the alternative, for a new trial. We will grant in part and deny in part Coles' motion for judgment of acquittal and deny his motion for a new trial.

I. Factual Background & Procedural History

The criminal investigation and charges in this case originate with a triple homicide and robbery on June 25, 2016. The third superseding indictment identifies the homicide victims as Wendy Chaney,[1] Phillip Jackson, and Brandon

[1] The third superseding indictment uses two different spellings for this victim's last name, switching between "Chaney" and "Cheney." We use "Chaney" in this memorandum, which we understand to be the correct spelling.

Cole. The murders and robbery occurred in a barn on Jackson's farm, located at 11026 Welsh Run Road in Mercersburg, Franklin County, Pennsylvania.

The evidence at trial established that Coles and codefendants Devin Dickerson and Torey White were distributing heroin, cocaine base, and cocaine hydrochloride in the Chambersburg and Mercersburg areas of Pennsylvania, as well as in Hagerstown, Maryland. Chaney and Jackson each had drug-trafficking relationships with Coles in the spring of 2016. Chaney was also in a personal relationship with Coles for part of that time.

Chaney was arrested for possessing controlled substances in Maryland on March 30, 2016, and immediately began cooperating with law enforcement in the hope of having her charge dropped. Over the next three months, Chaney named many drug traffickers in the Hagerstown community, including Coles, Dickerson, White, and others, and detailed the relationships between them. Word of Chaney's cooperation soon reached Coles, who became angry and told several people Chaney was "running her mouth," "talking too much," and "had to go now." (See 4/21/22 Tr. 109:6-111:4). On the evening of June 25, 2016, Coles told another girlfriend of his, Llesenia Woodard, that Chaney was going to be killed that night; Coles ignored Woodard's entreaties not to go through with it, instead ordering Woodard to secure an alibi for herself by going to the movies. The jury heard evidence that, in the days before and on the day of her death, Chaney told others she believed Coles was going to kill her.

Defendants Christopher Johnson and Michael Buck provided harrowing testimony about the plot to murder Chaney and what happened on the evening of

June 25. Johnson told the jury he was approached in Baltimore late that afternoon by defendants Jerell Adgebesan and Kenyatta Corbett—who sold drugs in some of the same communities as Coles, Dickerson, and White—about a murder-for-hire opportunity. Johnson relayed that he and defendants Nicholas Preddy and Johnnie Jenkins-Armstrong, along with Adgebesan, Corbett, and unindicted coconspirator DeAndre Coleman, travelled to Buck's home in Hagerstown to discuss a plan for the hit. According to Johnson, it was at this point he learned the target of the hit was a woman who was cooperating with authorities, the location would be a farm in Pennsylvania, and there would be a safe at the farm containing cash, drugs, and guns Johnson could keep as payment for the killing. Buck testified that White arrived separately from the others and assured the group Chaney would be at Jackson's farm that night.

Johnson, Adgebesan, Corbett, Preddy, Jenkins-Armstrong, and Coleman then drove to Jackson's farm, where all but Corbett exited their vehicles and approached the barn. Johnson testified that they came across Chaney outside of the barn and forced her inside, where they encountered Jackson and third victim Brandon Cole. Johnson and his crew held the three victims at gunpoint and tied their hands behind their backs using zip ties, before ransacking the barn looking for the cash, drugs, and guns they had been promised. Jackson insisted the property had been cleared out because it was under surveillance; Johnson did not believe him and beat him into unconsciousness trying to find his promised bounty. In the meantime, Jenkins-Armstrong and Coleman took Chaney to the main house to search there for any cash, drugs, or guns they could steal.

At some point, Jackson regained consciousness and charged at Johnson, who shot Jackson in response. Johnson then shot Cole execution-style in the back of the head. When Jenkins-Armstrong and Coleman returned to the barn with Chaney, Johnson told Jenkins-Armstrong "she has to go, too." (See 4/13/22 Tr. 57:22-57:8). Jenkins-Armstrong shot Chaney as directed; Johnson shot her a second time because he thought Jenkins-Armstrong had missed. Before fleeing the scene, the group lit the victims' clothing on fire in attempt to burn down the barn and destroy any evidence.

Woodard testified that Coles came home drunk in the early morning hours of June 26. She recalled Coles "kept apologizing, saying he was sorry" in his sleep, and that he was gone before she awoke the following day. (See 4/21/22 Tr. 123:7-13). Woodard also testified that Coles shared details of how the three victims were killed long before those details were made public in the media.

Coles was arrested on drug charges in Maryland on July 6, 2016, less than two weeks after the triple homicide. At trial, the government introduced prison phone recordings of conversations Coles had with Dickerson and Woodard after his arrest, in which Coles sought information about the murder investigation. Coles asked Dickerson about the "Wendy situation" and learned from him that someone "[o]utside of us" had been picked up for the murders. (See id. at 39:16-40:8). Three days later, Coles asked Woodard to confirm if "they had another actor for the off Broadway play that I was playing in." (See Gov't Exs. 38.21, 38.22; 4/21/22 Tr. 43:20-44:6, 127:11-25). Woodard testified that this was code for Coles' involvement in the triple homicide. (See 4/21/22 Tr. 127:11-25). Multiple jailhouse informants testified

that Coles spoke openly to them about the killings and his role in ordering the hit. According to one of these witnesses, Coles bragged that he intentionally structured the contract killing so the trigger man could not identify him.

A federal grand jury returned a five-count indictment in August 2016 charging Coles and Dickerson with various drug-trafficking and firearms offenses. The grand jury has since returned three superseding indictments. In April 2022, Coles proceeded to trial on the operative third superseding indictment, which charged him as follows:

- Count One: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and Pinkerton v. United States, 328 U.S. 640 (1946);
- Count Two: Hobbs Act robbery, and aiding and abetting same, in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2;
- Counts Three, Four, and Five: causing the deaths of Jackson, Cole, and Chaney, respectively, by using, brandishing, and discharging a firearm during and in relation to a crime of violence (Hobbs Act robbery and killing a witness), and aiding and abetting same, in violation of 18 U.S.C. § 924(c) and (j) and 18 U.S.C. § 2;
- Count Six: conspiracy to cause the death of Chaney by using, brandishing, and discharging a firearm during and in relation to a crime of violence (Hobbs Act robbery and killing a witness), in violation of 18 U.S.C. § 924(c), (j), and (o);
- Count Seven: conspiracy to commit murder for hire in violation of 18 U.S.C. § 1958 and Pinkerton;
- Counts Eight, Nine, and Ten: murder of witnesses (Chaney, Jackson, and Cole, respectively), and aiding and abetting same, in violation of 18 U.S.C. § 1512(a)(1)(C) and 18 U.S.C. § 2;
- Count Eleven: conspiracy to murder witnesses (Chaney, Jackson, and Cole) in violation of 18 U.S.C. § 1512(k);

- Count Fourteen: conspiracy to distribute and possess with intent to distribute at least 100 grams of a mixture and substance containing a detectable amount of heroin, and at least 28 grams of a mixture and substance containing a detectable amount of cocaine base and cocaine HCL, resulting in serious bodily injury to another person, in violation of 21 U.S.C. § 846;

- Count Fifteen: possession with intent to distribute a mixture and substance containing a detectable amount of heroin, and a mixture and substance containing a detectable amount of both cocaine HCL and cocaine base, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;

- Count Seventeen: possession with intent to distribute a mixture and substance containing a detectable amount of heroin and a mixture and substance containing a detectable amount of cocaine base, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;

- Count Eighteen: distribution of a mixture and substance containing a detectable amount of heroin resulting in serious bodily injury to another person, and aiding and abetting same, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2; and

- Count Nineteen: possession of firearms in furtherance of a drug-trafficking crime, and aiding and abetting same, in violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 2, and Pinkerton.

Trial began with jury selection on April 11, 2022. After ten days of evidence, and less than four hours of deliberation, the jury found Coles guilty on all 16 counts.

II. Legal Standards

A. Rule 29 Motion for Judgment of Acquittal

On motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, the court must decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" based on the evidence presented at trial. See United States v. Caraballo-Rodriguez, 726 F.3d 418, 431 (3d Cir. 2013) (*en banc*) (quoting Jackson v. Virginia, 443 U.S. 307, 319

(1979)); see also United States v. Freeman, 763 F.3d 322, 343 (3d Cir. 2014). The court must view the evidence in the light most favorable to the prosecution and must deny the motion "if there is substantial evidence . . . to uphold the jury's decision." See Caraballo-Rodriguez, 726 F.3d at 430 (quoting United States v. Gambone, 314 F.3d 163, 170 (3d Cir. 2003)). Under this highly deferential standard of review, it is not the court's task to "act as a thirteenth juror," weigh credibility, assign weight to evidence, or "substitut[e] [its] judgment for that of the jury." See id. (citations omitted). A court may only overturn a conviction for insufficient evidence "where the prosecution's failure is clear," see United States v. Leon, 739 F.2d 885, 890-91 (3d Cir. 1984) (quoting Burks v. United States, 437 U.S. 1, 17 (1978)), or where the verdict is "so insupportable as to fall below the threshold of bare rationality," see Caraballo-Rodriguez, 726 F.3d at 431 (quoting Coleman v. Johnson, 566 U.S. 650, 656 (2012)).

B. Rule 33 Motion for New Trial

Under Federal Rule of Criminal Procedure 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a). Granting or denying a motion for a new trial "lies within the discretion of the district court." See United States v. Cimera, 459 F.3d 452, 458 (3d Cir. 2006) (citing United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2000)). A court evaluating a Rule 33 motion does not view the evidence in a light favorable to the government but instead must "exercise[] its own judgment in assessing the Government's case." United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (citations omitted). Rule 33 motions are disfavored and should be "granted sparingly and only in exceptional

cases." United States v. Silveus, 542 F.3d 993, 1005 (3d Cir. 2008) (quoting Gov't of V.I. v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987)). Exceptional cases include those in which trial errors "so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." United States v. Thornton, 1 F.3d 149, 156 (3d Cir. 1993) (citing United States v. Hill, 976 F.2d 132, 145 (3d Cir. 1992)).

III. Discussion[2]

A. Motion for Judgment of Acquittal: Counts One Through Eleven

Coles challenges the sufficiency of the evidence for each of the murder-related charges (Counts One through Eleven) in addition to raising a legal challenge to Count Six. We begin our discussion with Coles' "general" challenge to Counts One through Eleven. (See Doc. 1386 at 8).

1. *General Challenge to Counts One Through Eleven*

Coles' challenge to Counts One through Eleven reprises an argument he made to the court and to the jury at trial. According to Coles, the government's evidence "[a]t most . . . shows [he] wanted Ms. Chaney to be killed and knew that Ms. Chaney was going to be murdered." (Doc. 1386 at 9). Coles claims there was

[2] At first blush, we considered summarily denying the instant motion pursuant to our criminal practice order. (See Doc. 959 ¶ 10(f) ("The court will summarily deny any motion for which the supporting brief fails to adequately describe the factual background for the motion, fails to cite legal authority supporting the requested relief, or otherwise offers only conclusory assertions or rationale.")). Coles offers no legal support for many of his assertions, nor citations to the record. Myriad arguments are conclusory and underdeveloped, compelling the court to do the work of unpacking and analyzing them in the context of an extensive trial record. Moreover, we previously considered and rejected variations of most of these arguments in denying Coles' Rule 29 motion. For the sake of completeness, we incorporate that analysis herein in full. (See 4/26/22 Tr. 135:2-148:23). This memorandum will echo and supplement our earlier analysis.

no proof he acted on that desire; he cites the lack of "evidence of an agreement" between himself and trigger man Christopher Johnson and avers this failure of proof fells all murder-related conspiracy counts (and presumably, likewise defeats the Pinkerton theory supporting the nonconspiracy murder counts). (See id. at 8-9).

To the extent Coles believes the law requires direct proof of an agreement to murder Chaney, he is mistaken. Our court of appeals has repeatedly held the government may prove a conspiratorial agreement by circumstantial evidence. See United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007) (collecting cases). Indeed, the court has recognized it is the *rare* conspiracy that will explicitly reduce its nefarious objectives to a written or verbal contract. See id. A conspiratorial agreement therefore "can be, and almost always is, an implicit agreement among the parties to the conspiracy." See id. (citing United States v. Price, 13 F.3d 711, 728 (3d Cir. 1994)). The question is whether the record contains enough circumstantial evidence from which the jury could infer, based on "actions and statements of the conspirators" and "the circumstances surrounding the scheme," that there was an implicit conspiratorial agreement to murder Chaney, and that Coles was a part of it. See id.

The answer to that question is a resounding yes. Llesenia Woodard, Coles' former girlfriend, provided a damning, detailed account of Coles' conduct in the days and hours before Chaney's death. During the week preceding the murders, Woodard overheard Coles in conversations with defendant Devin Dickerson (his drug-trafficking partner) and with someone named "Unc" in which Coles said Chaney "had to go now" because she was "talking too much" and "running her

mouth." (See 4/21/22 Tr. 109:6-111:4). Woodard told the jury Coles had her perform a case search to confirm whether Chaney had pending criminal charges. (See id. at 107:11-109:5). And she testified that, on the night of the triple homicide, Coles told her Chaney "was going to be killed that night, that he was basically tired of her running her mouth, starting up trouble." (See id. at 119:10-14). Woodard "told [Coles] no," but "[h]e did it anyway." (See id. at 119:15-18).

Woodard further explained that Coles directed her to set up an alibi for herself by going to the movies, and that he checked in with her to make sure she had done as she was told. (See id. at 119:19-122:18). Woodard relayed that Coles came home after midnight on the night Chaney died, that he was drunk, and that he kept saying he was "sorry" in his sleep. (See id. at 122:22-123:10). Finally, Woodard testified that Coles shared details about the murders soon afterward, long before media coverage made them publicly accessible. (See id. at 123:19-124:11). Coles told Woodard: "[T]hat's how OGs[3] do it to shut people up, to tie them up and then torture them to teach them to be quiet, to teach them a lesson." (See id. at 124:14-18).

Woodard's recounting of Coles' conduct and exact words would arguably support the verdict on its own. But hers was not the only testimony establishing Coles' role in the murders. The government's witnesses wove a cohesive narrative during the two-week trial, confirming Chaney was a known cooperator, Coles knew and was angry about her cooperation, and many people either knew or suspected—

[3] "OG" stands for "original gangster." (See id. at 124:12-13).

consistent with what Coles told Woodard—that he was going to do something about it. As we explained in our initial Rule 29 ruling, the government's evidence included, but was not limited to:

- testimony from Washington County Drug Task Force Agents Thomas Cox and Brian Hook that in the days and weeks before her death, Chaney provided information to them about drug-trafficking activities of Coles and Dickerson, as well as defendant Torey White, Jermaine Foye (also known as "Boogie"), and others with whom they were associated, (see generally 4/13/22 Tr. 179:3-210:5; 4/14/22 Tr. 51:23-67:11);

- testimony from defendant Michael Buck that it was generally known in the spring of 2016 that Chaney was an informant, (see 4/14/22 Tr. 145:19-151:12);

- testimony from Zach Bowie that, according to victim Phillip Jackson, in the days before Chaney's murder, Coles had become increasingly suspicious regarding potential cooperators and started acting "uneasy," asking Jackson questions and treating Jackson like "the police," after which Jackson twice expressed to Bowie he did not "have a good feeling" and believed "something is fitting to happen to Wendy," (see 4/18/22 Tr. 67:18-69:1);

- a text message exchange from the afternoon of June 24, 2016, in which Coles shared with Foye a screenshot of text messages from Chaney and then told Foye, "[N] we can talk, but she is a dead issue," (see 4/26/22 Tr. 40:15-17);

- cell phone records revealing Chaney texted White on June 24, 2016, that "This dude has got a loaded gun and he's trying to kill me," and "If I end up dead, Kevin did it," (see id. at 41:3-18);

- further testimony from Buck that defendant Kenyatta Corbett twice stated Chaney was "no good" and "she's gotta fucking go," and that, also on the day of the murders, Corbett said Chaney was "telling on his boys Drop [White's nickname] and K [Coles' nickname]," she was "getting ready to fuck a lot of shit up," and "a lot of shit's getting ready to go down. Like she's gotta go," (see 4/14/22 Tr. 147:15-151:12, 152:25-153:19);

- testimony from Task Force Agent Cox that, two days before her murder, Chaney expressed fear via text messages that Coles knew she was cooperating, (see 4/13/22 Tr. 196:8-203:17);

- further testimony from Bowie that on the day of the triple homicide, he overheard Jackson on the phone with a male who sounded "frantic," and after the call, Jackson reiterated his belief that something was about to happen to Chaney, (see 4/18/22 Tr. 65:7-66:8);

- testimony from Chaney's son, Tyler, that on the morning of the murders, she told him "K and Drop was trying to kill her. She thought that they was trying to kill her," (see 4/14/22 Tr. 199:5-200:10); and

- a recorded phone call between inmate Ronald Armstead and Chaney, from less than an hour before her death, in which Chaney told Armstead she had been "running scared" for two days, she was afraid Coles was going to kill her, and she was out in the woods, in the country, with White, whom she referred to as her "brother," (see 4/26/22 Tr. 72:18-74:25; Gov't Exs. 11.3, 11.4).

The jury also heard from Coles himself—albeit indirectly—about his involvement in Chaney's murder. Coles did not testify at trial, but the government introduced two recorded prison phone calls in which Coles spoke with Dickerson and Woodard about his role in the murders. During the call between Coles and Dickerson on July 12, 2016, the pair discussed the "Wendy situation" and their belief that someone else—in Coles' words, "[o]utside of us"—had been picked up for the murder charges. (See 4/21/22 Tr. 39:16-40:8). In another prison phone call just three days later, Coles asked Woodard whether it was true "they had another actor for the off Broadway play that I was playing in." (See Gov't Exs. 38.21, 38.22; 4/21/22 Tr. 43:20-44:6, 127:11-25). Woodard told the jury this was "code" for Coles' involvement in the triple homicide. (See 4/21/22 Tr. 127:17-25).

Lastly, the jury heard from a parade of jailhouse informant witnesses, all of whom Coles bragged to at various times during his pretrial detention about his involvement in the triple homicide. Richard Walker testified that Coles told him

a woman Walker knew only as Coles' "baby mom" was cooperating against "Shy Money" (Dickerson), that Coles said "he had to do what he had to do," that Coles spoke with Dickerson about the situation, and that Dickerson "contacted this guy named Basehead [defendant Jerell Adgebesan], and Basehead just basically ordered the hit." (See 4/25/22 Tr. 27:3-31:13). Cordaress Rogers testified that a white woman Coles had been in a relationship with owed Coles money and was cooperating with the DEA; per Rogers, Coles said he had to "run down on" her because of it but could not do it himself because of their relationship, so "he was going to find somebody else to do it." (See id. at 61:3-64:9). Rogers testified that Coles "had to get with the dude Shy Mack, and they knew how to get some dudes from Baltimore to do something to [the white] girl," and ultimately "him and Shy Mack got the people from Baltimore" to murder her. (See id.) Both men explained to the jury that, per their recollection of Coles' comments, the plan was for these people from Baltimore to kill the woman by cutting her throat; Rogers added that they were also supposed to burn down the scene to destroy any evidence. (See id. at 39:12-40:5, 63:23-64:19).

Another prisoner witness, Eric Jackson, testified that Coles said a woman he was in a relationship was a "cop or a CI" and she "had to go" and "had to be dealt with." (See id. at 107:7-20, 108:23-109:2, 109:21-23). Jackson testified that Coles "said he put the push through" on this woman by putting "some guy named B'More [Adgebesan] . . . on to a lick . . . [o]ut in the sticks in a barn." (See id. at 109:21-112:7). Coles says this testimony at most proves he arranged a robbery—Jackson explained a "lick" is essentially a robbery. (See id. at 110:1-12). But when

asked by the prosecution if "the push" had "anything to do with anything more than just a robbery," Jackson clarified that Coles said "the girl had to be outed, the girl had to be dealt with." (See id. at 111:18-21). Jackson's testimony also answers Coles' claim that the jury could not convict him of the murders because the trigger man did not know who he was. According to Jackson, this was no accident: Coles intentionally structured the hit to distance himself from the shooter.[4] (See id. at 110:15-111:3 ("[H]e told me that . . . the people who did it, that they wasn't going to be able to point him out because they don't know he put the push through.")).

Finally, Sirvonn Taylor testified that Coles told him a woman named Wendy had been "snitching" on Coles and Dickerson and the pair agreed "we gotta kill her because she's snitching." (See id. at 136:11-138:17). Coles did not tell Taylor "how it was arranged," but he did share "in depth details" about the night of the murders and emphasized, per Taylor, "they weren't supposed to kill the dude that owned the house." (See id. at 140:8-141:7). Coles also told Taylor he was not worried about getting caught because police could not find his second cell phone. (See id. at 139:19-140:7). According to Taylor, Coles said "if they found his second phone that they would have him red handed, but since they didn't find the second phone, they don't have nothing on him, because the second phone is where the texts from Shy Mack came about killing her and everything." (See id.)

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[4] Moreover, "[i]t is well-established that one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." United States v. Fattah, 914 F.3d 112, 166 n.19 (3d Cir. 2019) (quoting United States v. Riccobene, 709 F.2d 214, 225 (3d Cir. 1983), abrogated on other grounds by Griffin v. United States, 502 U.S. 46 (1991)).

A rational juror could *easily* find from this evidence that Coles not only wanted Chaney dead, but also orchestrated her contract killing and intentionally structured it to avoid getting caught. The government may not have Coles, in his words, "red handed," but circumstantial evidence of his guilt is overwhelming. The record establishes Coles had a strong motive to kill Chaney; he told others he was going to have her killed; he knew when Chaney would die, how she was to die (and how she ultimately died), and other details about the killing before they were made public; and he had his former girlfriend establish an alibi to insulate herself on the night of the murders. Most critically, the record also establishes Coles spoke with at least half a dozen people—Woodard, Dickerson, Walker, Rogers, Jackson, and Taylor—after Chaney's murder and admitted, with varying degrees of specificity, his role in bringing it about and why he thought he would get away with it. This trial record, construed, as it must be, in the light most favorable to the government,

provides ample evidence to uphold the jury's verdict.[5] We will deny Coles' motion to the extent it seeks judgment of acquittal as to Counts One through Eleven generally.

2. *Specific Challenges to Counts One through Five and Count Eight*

Coles next raises specific challenges to Counts One through Five and to Count Eight. We address these arguments *seriatim*.

a. Count One

Count One charges Coles with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). Coles asserts the government failed to produce evidence at trial that Coles "entered into an agreement with anyone to rob Jackson." (See Doc. 1386 at 10). As explained *supra*, the government is not required to produce direct evidence of a conspiratorial agreement to obtain a

[5] Coles also raises a general challenge to the murder-related counts based on Johnson's testimony that he shot Jackson first, after Jackson charged at him during the robbery. Coles claims this one line of testimony undoes the entire theory of the prosecution, establishing that Jackson was killed because he attacked Johnson (not because he was a potential witness to the planned killing of Chaney) and that Cole and Chaney were killed only because they witnessed Jackson's murder. (See Doc. 1386 at 9-10). In Coles' view, Johnson unilaterally dissolved the conspiracy to murder Chaney the instant he shot Jackson; that Chaney nonetheless was killed moments later was, at least as to Coles, just a bit of good luck. (See id.) Coles cites nothing for his theory that he is off the hook for orchestrating what ultimately was a successful murder for hire simply because the federal-witness target was killed last. Moreover, Johnson confirmed on redirect the plan always was to kill Chaney due to her status as a potential government informant, along with anyone else who may witness her murder. As far as Johnson was concerned, "it didn't matter . . . if Phil Jackson hadn't charged [him] or Brandon Cole hadn't seen it or Wendy Chaney hadn't been the third one in"—Johnson was "there to kill" Chaney. (See 4/13/22 Tr. 92:4-16). Any rational juror could believe Johnson's testimony and find he was hired to kill Chaney because she was cooperating with law enforcement, he planned to leave no witnesses to Chaney's murder, and he accomplished these objectives.

conspiracy conviction. See McKee, 506 F.3d at 238. Johnson testified he was to be paid for Chaney's murder with $20,000 in cash as well as any drugs and guns he could steal from Jackson's farm, (see 4/13/22 Tr. 33:22-34:4), and a jailhouse informant testified that Coles said he "put his homies onto a lick" (*i.e.*, robbery) at the farm when he "put the push through" for Chaney's murder, (see 4/25/22 Tr. 109:21-110:12). From this evidence, the jury could reasonably infer Coles was part of, and in fact initiated, the Hobbs Act robbery conspiracy.

b. Count Two

Count Two charges Coles with Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). The jury selected both aiding-and-abetting and Pinkerton theories of criminal responsibility to support the guilty verdict on this count. Coles contests only the aiding-and-abetting theory, positing the government did not produce evidence he "was involved in" or in any way assisted or furthered the robbery at Jackson's farm. (See Doc. 1386 at 10-11). We disagree for the reasons just stated: plenty of record evidence supports the conclusion that Coles offered the robbery ("lick") at Jackson's farm as compensation for Chaney's contract killing. See *supra* pp. 16-17. A rational juror could conclude from this evidence that Coles "acted to facilitate" or "to promote" the robbery as part and parcel of his murder-for-hire scheme. See United States v. Centeno, 793 F.3d 378, 387 (3d Cir. 2015) (quoting United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010)).

c. Counts Three and Four

Counts Three and Four charge Coles with causing the death of victims Phillip Jackson and Brandon Cole, respectively, through the use of a firearm during

and in relation to Hobbs Act robbery and murder of a witness, in violation of 18 U.S.C. 924(j). The jury chose both aiding-and-abetting and Pinkerton theories of criminal responsibility for these counts as well. Coles again challenges the aiding-and-abetting basis alone, contending the government did not adduce proof he aided and abetted anyone in killing Jackson or Cole. (See Doc. 1386 at 10-11).

We agree with Coles that, as to aiding and abetting, the evidence fails to support the verdict.[6] To convict a defendant of aiding and abetting a crime, the jury must find beyond a reasonable doubt that the defendant, *inter alia*, "knew of the commission of the substantive offense and acted to facilitate it." See Centeno, 793 F.3d at 387 (quoting Mercado, 610 F.3d at 846). Our court of appeals requires "proof that the defendant had the specific intent to facilitate the [principal's] crime" for aiding-and-abetting liability to attach. See id. (citing Mercado, 610 F.3d at 846). For Counts Three and Four, that standard requires the government to prove Coles knew of and acted with specific intent to facilitate the use of a firearm in the killings of Jackson and Cole, respectively. And because the government proceeded on a second-degree murder theory as to all victims (rather than first-degree felony or premeditated murder), we instructed the jury that, to convict Coles of aiding and abetting the Section 924(j) murders of Jackson and Cole, it must find that Coles had

[6] The government presumably abandons the aiding-and-abetting theory for these convictions; its brief fails to respond directly to this argument. (See generally Doc. 1432 at 19-22). Its only contention on the subject goes to the Pinkerton verdict, not the aiding-and-abetting verdict. (See id. at 18 ("Christopher Johnson's killing of Phillip Jackson and Brandon Cole was a natural and foreseeable consequence of the original mission.")).

advance knowledge of both the principal's intent to use a firearm *and* his intent to cause the victim's death. (See 4/28/22 Tr. 48:12-51:8).[7]

Abundant evidence at trial established Coles knew of and intended *Chaney's* death, supporting the jury's guilty verdict on both aiding-and-abetting and Pinkerton theories as to Chaney's murder. But there was a dearth of evidence that Coles knew of, intended, and acted in some way to bring about *Jackson's* or *Cole's*

[7] The government requested a jury instruction based on the Tenth Circuit's decision in United States v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000), that Coles did not need to know the principal was going to use the firearm to kill someone; he only needed to know about the crime of violence and the presence of the firearm. As we explained during the charge conference, Chanthadara is a Section 924(j) case involving first-degree felony murder, and felony-murder case law is clear that the principal does not need a specific intent to kill; therefore, an accomplice likewise does not need to have a specific intent to kill. See Chanthadara, 230 F.3d at 1252; see also United States v. Morales-Machuca, 546 F.3d 13, 22 (1st Cir. 2008). We read the case law to mean courts must look to the *mens rea* required for the type of murder charged in determining the requisite *mens rea* for an accomplice to that murder. In the instant matter, the government proceeded on a second-degree murder theory only. We held that, because second-degree murder requires proof of malice on the part of the principal, the government must also prove malice on the part of an alleged aider and abettor. (See 4/25/22 Tr. 220:14-222:23). We noted this understanding of Section 924(j) aiding-and-abetting liability accords with the United States Supreme Court's decision in Rosemond v. United States, 572 U.S. 65 (2014). Rosemond spoke to Section 924(*c*), not Section 924(*j*), but its discussion of accomplice liability more broadly suggests Section 924(j) liability should only attach—at least for second-degree murder—if the accomplice was aware of the murder. The Court emphasized, for example, that an accomplice's intent "must go to the *specific and entire crime* charged." See Rosemond, 572 U.S. at 76 (emphasis added). In other words, an aider and abettor must "join in the criminal venture . . . *with full awareness of its scope*." See id. at 77 (emphasis added). For Section 924(c), that means knowledge "that the plan calls not just for a drug sale, but for an armed one." See id. at 77-78. For Section 924(j) second-degree murder, it means Coles, as an alleged aider and abettor, must have had full knowledge of the underlying crime of violence, the use of a firearm, and the resulting death. We further observed that the higher stakes accompanying a Section 924(j) conviction—a potential death sentence, contrasted with Section 924(c)'s life maximum—suggest the former should carry a higher standard of proof. (See 4/25/22 Tr. 222:16-19).

murders. Indeed, the only evidence on the subject was to the contrary—Coles told jailhouse informant Sirvonn Taylor the group from Baltimore was *not* supposed to kill Jackson, (see 4/25/22 Tr. 140:8-141:7), and Woodard testified Coles was "upset" by Jackson's death and told her "Phillip wasn't supposed to be there," (see 4/21/22 Tr. 124:2-8). As to aiding and abetting, then, "the prosecution's failure is clear": there is no evidence to support the charge that Coles aided and abetted Jackson's or Cole's murder. See Leon, 739 F.2d at 891 (quoting Burks, 437 U.S. at 17).

Coles' convictions on Counts Three and Four still stand, however, because the jury also found Coles guilty of Cole's and Jackson's murders on a Pinkerton theory of criminal responsibility. Coles does not address the Pinkerton verdict for these counts in his posttrial briefing, presumably because the record contains ample support for it. The jury easily could have found the murders of anyone else present at the farm on June 25, 2016, were reasonably foreseeable and committed in furtherance of the conspiracy to kill Chaney, and Coles was responsible for those murders as a member of that conspiracy. Johnson confirmed for the jury "that's just what happens" in a murder-for-hire situation; he explained if "someone else is there, then everybody becomes a victim or a witness at that point," so "[m]ost likely" anyone else present is "going to die." (See 4/13/22 Tr. 43:3-13, 92:14-16). We will therefore grant Coles' motion only to the extent it seeks judgment of acquittal on the aiding-and-abetting theories supporting Counts Three and Four.

d. Counts Five and Eight

Count Five charges Coles with causing the death of Chaney through the use of a firearm during and in relation to Hobbs Act robbery and murder of a

witness, in violation of 18 U.S.C. § 924(j), and Count Eight charges Coles with murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(C). Coles posits that, because Chaney resigned as an informant two days before she died, his convictions on Count Eight as well as on Count Five, to the extent premised on murder of a witness as the predicate crime of violence, must be vacated. (See Doc. 1386 at 11).

Section 1512(a)(1)(C) of Title 18 makes it a federal crime "to kill[] or attempt[] to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." See 18 U.S.C. § 1512(a)(1)(C). Coles cites nothing for his suggestion that only an active informant can qualify as a "person" for purposes of this statute. The government correctly observes no such limitation exists, either in the statutory language or its legislative history. *Per contra*, when Congress enacted Section 1512 as part of the Victim and Witness Protection Act, it sought to *broaden* protections available to witnesses, informants, victims, and others. See United States v. Hernandez, 730 F.2d 895, 898 (2d Cir. 1984) (explaining statute encompasses even "'potential' witnesses and those witnesses whose testimony might not be admissible at trial"); United States v. DiSalvo, 631 F. Supp. 1398, 1402 (E.D. Pa. 1986) (citing Hernandez, 730 F.2d at 897-99, and explaining revised statute is intended to "offer greater protection to those with knowledge of criminal activity and to thereby encourage them to testify in official proceedings").

Chaney plainly qualifies as a "person" within the scope of Section 1512(a)(1)(C). The record is replete with evidence Chaney was working as an

informant (or "source of information") in the spring of 2016, providing information to federal drug task force agents about the drug-trafficking activities of several individuals, including Coles, Dickerson, and White. (See, e.g., 4/13/22 Tr. 97:21-103:11, 136:25-137:16, 138:6-139:14, 171:25-175:22; see generally id. at 179:3-210:5 (task force agent Sergeant Thomas Cox discussing Chaney's cooperation in May and June 2016 in extensive detail)). Although Chaney withdrew from her formal informant status two days before her murder—specifically because she was afraid Coles was going to kill her—she certainly remained a potential federal witness. To adopt Coles' construction of Section 1512(a)(1)(C) would work the absurd result of absolving him of responsibility for Chaney's murder simply because he succeeded in intimidating her. We will deny Coles' motion for judgment of acquittal on Counts Five and Eight.

3. *Specific Challenge to Count Six*

Count Six charges Coles with conspiring to cause the death of Chaney through the use of a firearm during and in relation to Hobbs Act robbery and murder of a witness, in violation of Section 924(c), (j), and (o).[8] Coles invokes the United States Supreme Court's recent decision in United States v. Taylor, 596 U.S. ___, 142 S. Ct. 2015 (2022), in which the Court held attempted Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical

[8] Coles erroneously states Count Six charged a substantive violation of Section 924(c). (See Doc. 1446 at 6-7). Count Six charges *conspiracy* to violate Section 924(c) under Section 924(*o*); it does not charge a freestanding Section 924(c) offense. (See Doc. 499 at 18). However, Coles does stand convicted of substantive Section 924(c) offenses at Counts Three, Four, and Five. We therefore address his Taylor argument with respect to all potentially impacted counts.

force and thus does not qualify as a crime of violence for purposes of Section 924(c). See Taylor, 142 S. Ct. at 2020-21. Coles contends that, under the reasoning of Taylor, conspiracy to commit Hobbs Act robbery likewise does not qualify as a Section 924(c) crime of violence. (See Doc. 1446 at 6-7). He further contends, cursorily and without explicitly grounding his claim in Taylor, that conspiracy to murder a witness is not a crime of violence. (See id. at 7).

Coles misunderstands the third superseding indictment and the jury's verdict. We will assume *arguendo* Taylor applies equally to conspiracy offenses and a conspiracy crime cannot serve as the underlying crime of violence for a Section 924(c) offense. The problem for Coles is the indictment does not charge *conspiracy* to commit Hobbs Act robbery or *conspiracy* to murder a witness as the crimes of violence underlying Count Six. Rather, it charges the completed offenses, "that is, (1) Hobbs Act robbery in violation of Title 18, United States Code, Section 1951(a), and (2) killing of a witness, in violation of Title 18, United States Code, Section 1512(a)(1)." (See Doc. 499 at 18). So too for Counts Three, Four, and Five, which charge substantive Section 924(c) and (j) offenses. (See id. at 12-17). The verdict form likewise was limited to the completed crimes, instructing the jury to "identify the crime of violence that you unanimously find the firearm was used, brandished, or discharged during and in relation to (select all that apply)" and identifying "Hobbs Act robbery" and "Killing a witness" as the only options. (See Doc. 1337 at 2-5). Consistent with the plain language of the indictment, the court's instructions to the jury referred to *commission*—*i.e.*, completion—of the underlying crimes of violence. (See, e.g., 4/28/22 Tr. 46:3-9 (instructing jury it could find Coles guilty as

aider and abettor on Counts Three, Four, and Five if principal "committed" charged crimes of violence and used and carried a firearm "during and in relation to the commission of those crimes").

We held earlier in this case that the completed crime of Hobbs Act robbery is categorically a crime of violence for purposes of Section 924(c). See United States v. Coles, No. 1:16-CR-212, 2021 WL 308831, at *9-11 (M.D. Pa. Jan. 29, 2021) (Conner, J.) (citing United States v. Monroe, 837 F. App'x 898, 900-01 (3d Cir. 2021) (nonprecedential)).[9] No party has yet asked us to consider whether the completed offense of murder of a witness likewise qualifies as a crime of violence; nonetheless, we note our agreement with courts to have concluded it does. See, e.g., United States v. Smith, No. 99-445, 2022 WL 541608, at *2 (E.D. Pa. Feb. 23, 2022).[10] For all of these reasons, we will deny Coles' motion for judgment of acquittal based on Taylor.

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[9] Our court of appeals held in United States v. Walker, 990 F.3d 316 (3d Cir. 2021), that both completed Hobbs Act robbery and attempted Hobbs Act robbery are categorically crimes of violence for purposes of Section 924(c). See Walker, 990 F.3d at 325-30. The Supreme Court later vacated the court of appeals' decision in Walker in light of its conclusion in Taylor that attempted Hobbs Act robbery is not a crime of violence. See Walker v. United States, 142 S. Ct. 2858 (2022) (mem.). The parties in Walker then negotiated a resolution of the case, so the court of appeals did not issue a new decision. See United States v. Walker, No. 15-4062, 2022 WL 3209540 (3d Cir. Aug. 9, 2022) (nonprecedential) (*per curiam*). Accordingly, at present, there is no binding precedent in the Third Circuit on the status of completed Hobbs Act robbery as a crime of violence.

[10] Smith involved both attempt offenses and completed offenses. The court of appeals vacated the district court's decision in Smith and remanded the case for further proceedings in light of Taylor's holding as to attempt offenses. See United States v. Smith, No. 22-173, 2022 WL 16570531, at *1 (3d Cir. Aug. 12, 2022). We adopt the Smith decision as persuasive only to the extent it pertains to the completed offense of murder of a witness.

B. Motion for Judgment of Acquittal: Counts Fourteen, Fifteen, Seventeen, and Eighteen

Coles raises sufficiency-of-the-evidence and legal challenges to the controlled-substance convictions, Counts Fourteen, Fifteen, Seventeen, and Eighteen. We take each argument in turn.

1. *Count Fourteen: Drug Weights*

Count Fourteen charges Coles with conspiracy to distribute, and to possess with intent to distribute, at least 100 grams of a mixture and substance containing a detectable amount of heroin and at least 28 grams of a mixture and substance containing a detectable amount of cocaine base and cocaine hydrochloride. The jury answered special interrogatories and found beyond a reasonable doubt that the amount of cocaine involved in Count Fourteen was 28 grams or more and the amount of heroin involved in Count Fourteen was 100 grams or more. Coles asserts the proof of drug weight at trial "was purely based on unreliable speculation of lay witnesses that were admittedly addicted to drugs in 2016," suggesting the testimony of addict witnesses cannot alone support a jury's drug-weight finding. (See Doc. 1386 at 12).

Coles devotes just one sentence to this argument in his supporting brief, and he cites no legal support for his suggestion the government cannot rely solely on drug-addicted witnesses to prove mandatory-minimum-triggering drug weights. (See id.) We reject this hollow argument. True, the bulk of the drug-weight evidence at trial came from witnesses who were current or former drug addicts. But that does not render their testimony "unreliable" *per se*. These witnesses, all of

whom were sequestered, offered strikingly consistent testimony, describing the ins and outs of Coles and Dickerson's drug operation, detailing quantities purchased (for personal use and, for some witnesses, to sell) and frequency of purchases, and recounting tragic addiction histories which allowed them to estimate drug quantities with precision.

For example, Lorisha Adams, with whom Dickerson lived and who was familiar with Coles and Dickerson's drug-trafficking enterprise, testified that Dickerson kept a package of heroin the size of a "golf ball" and at least an ounce of cocaine in her home at any given time in the spring of 2016, and that the drugs were replenished approximately every three to five days. (See 4/19/22 Tr. 101:10-102:24).[11] Kylie Owens, a customer of Coles and Dickerson who later became a driver for their operation, testified that Coles supplied her with roughly three grams of heroin per week for nearly a year, for an aggregate of more than 100 grams during the course of their dealings; she estimated she bought "double that" from Dickerson, since she dealt with him longer. (See 4/14/22 Tr. 224:13-226:3, 230:21-231:12). The testimony of these two witnesses alone would support the drug-weight special interrogatory responses, but the jury had quite a bit more to rely upon in reaching their verdict. (See, e.g., 4/19/22 Tr. 48:18-22, 53:16-54:22 (Courtney Smith testifying Coles supplied her between four and eight grams of heroin at a time and with more than an ounce

[11] The government erroneously claims Adams was not a drug addict. (See Doc. 1432 at 25). Adams testified that she "had a problem" with powder cocaine at the time Dickerson was living with her and storing his and Coles' drugs in her home, and that she "was dipping and dabbing in crack cocaine also." (See 4/19/22 Tr. 88:10-89:7). She described her powder cocaine addiction as "really bad" and a "daily battle" for "[f]our years . . . possibly five." (See id.)

of cocaine overall); 4/20/22 Tr. 21:5-22:1 (Trent Smith testifying he saw Coles delivering six or seven grams of crack and of heroin to Smith's apartment "[a] couple" times); 4/19/22 Tr. 195:12-17 (Krysta Rockwell testifying to having seen Coles in possession of "softball" size quantities of crack cocaine and heroin); 4/18/22 Tr. 158:3-159:5 (Jessica Ita testifying Coles and Dickerson directed her to conceal "softball" size bag of heroin in her person during traffic stop)).

Although the court is not required to provide an addict-witness instruction, see United States v. Miles, 53 F. App'x 622, 628 (3d Cir. 2002) (nonprecedential), we nonetheless instructed the jury it should weigh the testimony of these witnesses "with great care and caution," (see 4/28/22 Tr. 20:3-20); see also THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS 4.21. The jury presumably credited at least some of their testimony in reaching its drug-weight calculation, and we must not second guess those credibility determinations or otherwise "substitut[e] [our] judgment for that of the jury." See Caraballo-Rodriguez, 726 F.3d at 430 (citations omitted) (second alteration in original).

In any event, as the government notes, the jury was not relying on addict testimony alone in reaching its drug-weight calculations. Llesenia Woodard did not use controlled substances, and she testified that Coles possessed heroin and cocaine in her home. (See 4/21/22 Tr. 87:8-89:24, 90:4-91:14). The jury also heard from law enforcement officers who testified about the quantity of drugs seized from Coles and Dickerson's vehicle when they were arrested in early July 2016. (See 4/20/22 Tr. 180:15-181:10 (Hagerstown Police Department Sergeant Jesse Duffey testifying officers seized 17.73 grams of heroin from vehicle)).

The record provides ample support for the jury's special interrogatory responses as to drug weight. Indeed, it supports weights far in excess of those minimum amounts found by the jury. We will deny Coles' motion to the extent it challenges the drug-weight special interrogatory responses for Count Fourteen.

2. *Counts Fourteen and Eighteen: Serious Bodily Injury*

Count Fourteen also charges that heroin Coles conspired to distribute caused "serious bodily injury" to two individuals, Krysta Rockwell and Harrell Hazelton, and Count Eighteen charges Coles with a substantive distribution offense for the transaction with Hazelton. Coles avers the government did not prove either individual suffered a cognizable serious bodily injury, and, as to Hazelton, failed to prove it was Coles who distributed the heroin that caused the overdose or that the product ingested by Hazelton was heroin at all. (See Doc. 1386 at 12-16).

a. Serious Bodily Injury[12]

An individual convicted of conspiring to distribute or distributing a controlled substance is subject to enhanced penalties if the jury finds beyond a reasonable doubt that "death or serious bodily injury result[ed]" from use of the substance. See 21 U.S.C. § 841(b)(1)(B), (C); Burrage v. United States, 571 U.S. 204, 210 (2014). A "serious bodily injury . . . involves . . . a substantial risk of death; . . . protracted and obvious disfigurement; or . . . protracted loss or impairment of the

[12] Coles argues in his opening brief that a serious-bodily-injury allegation must be charged in the indictment as a separate, standalone offense and cannot be charged as an enhancement to a conspiracy offense. (See Doc. 1386 at 16). Coles concedes in his reply brief that Third Circuit precedent forecloses this argument. (See Doc. 1446 at 7-8 n.1 (citing United States v. Robinson, 167 F.3d 824, 832 (3d Cir. 1999))).

function of a bodily member, organ, or mental faculty." See 21 U.S.C. § 802(25). The Third Circuit Court of Appeals has not yet considered whether or under what circumstances an overdose might constitute a serious bodily injury. We confronted that question in United States v. Piaquadio, No. 4:15-CR-249, 2019 WL 3337063 (M.D. Pa. July 25, 2019) (Conner, C.J.), aff'd, No. 20-2841, 2021 WL 2946472 (3d Cir. July 14, 2021) (nonprecedential), and predicted our court of appeals would agree with the Eighth Circuit Court of Appeals to conclude "an overdose posing a serious risk of death without medical intervention constitutes serious bodily injury." See Piaquadio, 2019 WL 3337063, at *5 (citing United States v. Seals, 915 F.3d 1203 (8th Cir. 2019); United States v. Lewis, 895 F.3d 1004 (8th Cir. 2018)).

Coles asserts the phrase "without medical intervention" establishes a high standard of proof, tasking the government to prove with "medical evidence" that the victim received "professional" medical treatment. (See Doc. 1386 at 14-16; Doc. 1446 at 8-9). This reading distorts our holding. Piaquadio did involve "medical evidence" (specifically, medical expert testimony about the victim's symptoms) and "professional" medical treatment (specifically, paramedic transport and emergency-room medical care). See Piaquadio, 2019 WL 3337063, at *2-4. To claim both are *required* to prove serious bodily injury, however, improperly conflates context and conclusion. We concluded only that the government must prove the overdose victim was at "serious risk of death without medical intervention." See id. That the government met this standard in Piaquadio with expert testimony about the victim's professional medical treatment does not *ipso facto* mean it can *only* meet its

burden with such evidence. We neither held nor implied as much in Piaquadio, and we are unaware of any decisional law adopting Coles' higher standard.[13]

We conclude, as we did at trial, that the evidence was sufficient to permit the jury to find both Rockwell and Hazelton suffered serious bodily injury. As to Rockwell, the jury heard testimony from those present during her overdose; per their account, Rockwell went gray in the face and the lips, her eyes rolled back into her head, she was "lethargic" and "not responding," and her breathing was "very slow." (See 4/19/22 Tr. 130:17-131:10, 165:3-13). They heard from Rockwell herself

[13] Coles invokes another federal statute, 42 U.S.C. § 280g-1(e)(4), which he admits is "obviously much different" than Section 802(25)—it appears in the Public Health Service Act and defines "medical intervention" in the context of detecting, diagnosing, and treating hearing loss in children. (See Doc. 1446 at 9). Section 280g-1(e)(4) defines "medical intervention" as "the process by which a physician provides medical diagnosis and direction," see 42 U.S.C. § 280g-1(e)(4), and Coles argues this "illustrates that when Congress is referring to 'medical intervention,' it means intervention by a medical professional." (See Doc. 1446 at 9). Coles' argument is decidedly unpersuasive. Initially, the criminal statute that defines "serious bodily injury" for purposes of certain mandatory minimum drug penalties, 21 U.S.C. § 802(25), does not use the term "medical intervention"; that standard evolved in the case law, not in Congress. See Lewis, 895 F.3d at 1007; Piaquadio, 2019 WL 3337063, at *5-6 (citing, *inter alia*, Lewis, 895 F.3d at 1007). Moreover, the contexts are poles apart; one could not reasonably believe the Eighth Circuit in Lewis or this court in Piaquadio was contemplating the Public Health Service Act's definition of "medical intervention" for hearing loss in children when using the term in a federal drug prosecution. Speaking only for this court, we can say without reservation that we were not. Coles comes closer with his invocation of the United States Sentencing Guidelines, which provide a general definition of "serious bodily injury" for all offenses as "injury . . . requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." See U.S.S.G. § 1B1.1 cmt. 1(M) (U.S. SENT. COMM'N 2018). Even so, the Guidelines commentary is nonbinding, the phrase "such as" implies the list is nonexhaustive, and we are disinclined to hold, absent clear authority to the contrary, that administration of lifesaving medication in the field cannot qualify as "medical intervention." We further note neither of Coles' cited authorities supports his second proposition—that the fact of the overdose can only be proven by expert testimony.

that the only thing she remembered was Dickerson saying "she's going to die." (See id. at 210:11-18). And they heard testimony that initial efforts to revive Rockwell by putting her in the shower failed, and that she recovered only after Dickerson administered Narcan—a medication intended to reverse opioid overdoses. (See id. at 131:11-132:24, 165:20-166:6). Viewing this evidence in the light most favorable to the government, especially in the broader context of a trial record embroidered with tragic testimony about heroin overdoses, the jury reasonably could find Rockwell was at serious risk of death by overdose had Dickerson not intervened with Narcan.

The evidence with respect to Hazelton was even more compelling. Jessica Ita testified that she got out of the shower to find Hazelton "passed out on the bed," that he "wasn't moving," "wasn't really breathing," "[h]is lips were blue," and "[h]is breathing was really, really shallow." (See 4/18/22 Tr. 129:16-130:17). She relayed that Hazelton's pulse slowed to the point she could no longer detect it. (See id. at 130:13-17). Ita attempted CPR and administered two doses of Narcan. (See id. at 130:17-131:25). Her efforts failed to revive Hazelton, so she called 911. (See id. at 131:16-19). Police arrived on scene and administered a third dose of Narcan, but Hazelton remained unconscious. (See id. at 200:22-201:23). When EMS arrived, they "bagged" Hazelton ("provid[ed] ventilation via [a] bagged valve mask") and inserted a nasal airway to supply supplemental oxygen, to no immediate effect. (See id. at 201:23-202:7, 217:1-218:6). It was not until he was being carried out of the hotel room by stretcher that Hazelton came to. (See id. at 218:14-220:9). Hazelton was then transported to the hospital. (See id. at 220:10-23).

Coles all but concedes this meets even his higher "professional" medical intervention standard; he takes issue only with the government's failure to adduce medical expert testimony as to Hazelton's oxygen saturation rate and precise risk of death or brain injury. (See Doc. 1386 at 14-15). We again reject the unsupported assertion that such evidence is required. See *supra* p. 30 note 13. The government produced more than sufficient evidence to support the jury's finding that Hazelton suffered serious bodily injury.[14]

b. Chain of Distribution

Coles also renews chain-of-distribution arguments he raised at trial. As to Count Eighteen, Coles notes Ita could not recall if it was Coles or Dickerson who handed her and Hazelton the heroin; she knew it was one of them, but did not know which. Coles asserts the government necessarily "relied on Pinkerton liability to

[14] Finally, Coles asserts the government did not establish heroin distributed by Dickerson and Coles caused Hazelton's overdose, because Ita did not actually watch Hazelton use the heroin and could not say with certainty whether the heroin that caused the overdose came from Coles and Dickerson. (See Doc. 1386 at 13). The circumstantial evidence at trial was adequate to support the inference reflected by the jury's verdict. Ita and Hazelton sought out heroin, purchased that heroin together from Coles and Dickerson, tested the strength of the heroin by giving it to an "old guy" Hazelton knew, preemptively bought Narcan after the "old guy" appeared to overdose, and then went together to a hotel room to use the heroin. (See 4/18/22 Tr. 123:2-132:7). Ita told the jury that she knew Hazelton was a former heroin user but did not think he was using at the time, that they were talking while she was in the shower but Hazelton stopped responding, and that she discovered Hazelton unconscious. (See id.) Most importantly, Ita told the jury she did not think Hazelton had any other heroin on him that day. (See id. at 192:6-8 (Q: "Was there any other heroin that you had that day other than what the defendant and Shy sold to Harrell Hazleton?" A: "No, we didn't have any. He didn't have any."); id. at 193:11-21 ("I can't say for sure, no, but I don't think he did have any.")). The jury could reasonably find from this evidence that, when Hazelton overdosed in the hotel room, the overdose was caused by the heroin he and Ita had just purchased from Coles and Dickerson.

connect Coles with Hazelton's overdose" on this count, and asks the court to adopt the Sixth Circuit Court of Appeal's conclusion in United States v. Hamm, 952 F.3d 728 (6th Cir. 2020), that the government cannot use the Pinkerton theory of criminal responsibility to prove a serious-bodily-injury allegation. (See Doc. 1386 at 13-14). Coles applies similar reasoning to the serious-bodily-injury findings as to both Hazelton and Rockwell for Count Fourteen. (See id. at 15).

We rejected Coles' reliance on Hamm at trial and do so again *infra*. But Coles encounters a threshold problem for Count Eighteen: he misapprehends the government's theory and the jury's verdict on that count. The government prosecuted Coles on Count Eighteen as a principal and an aider and abettor, *not* as a Pinkerton coconspirator. (See 4/27/22 Tr. 95:22-96:7). The government made this clear in proposed supplemental jury instructions filed before the second charge conference, (see Doc. 1332 at 3; 4/28/22 Tr. 61:1-16), and the verdict form provided only two options: "Principal" and "Aiding and Abetting," (see Doc. 1337 at 11). Coles' argument concerning Pinkerton attribution therefore does not apply to Count Eighteen.

At any rate, we again reject Hamm as inconsistent with the law of our circuit and incompatible with the facts of this case. In Hamm, the Sixth Circuit concluded the government cannot use a Pinkerton theory to apply the death or serious-bodily-injury enhancement to a drug charge; it must instead prove the defendant "[was] part of the chain of distribution" to the victim. See Hamm, 952 F.3d at 741. Coles contends that, because no witness could say with certainty whether it was Coles or Dickerson who supplied the overdose-inducing heroin—in other words, whether

Coles was within the "chain of distribution"—he is entitled to judgment of acquittal as to all serious-bodily-injury allegations. (See Doc. 1386 at 15-16).

Initially, Hamm is not binding on courts in this circuit. Coles cursorily invokes the decision but offers no discussion of whether it is consonant with Third Circuit precedent. Our research has not uncovered any decision of our court of appeals squarely on point. However, the court has held Pinkerton attribution applies to drug-weight sentence enhancements, subject to "the ordinary limitations on co-conspirator liability." See United States v. Williams, 974 F.3d 320, 364 (3d Cir. 2020). The court has also approved a Pinkerton theory and corresponding jury instruction for a death-results sentence enhancement for an interstate domestic violence conviction under 18 U.S.C. § 2261(b)(1). See United States v. Gonzalez, 905 F.3d 165, 190 (3d Cir. 2018). These decisions arose in slightly different contexts, but both signal our court of appeals would not subscribe to the Sixth Circuit's wholesale rejection of coconspirator liability for the serious-bodily-injury enhancement.

We also note, as we did at trial, that Hamm is factually distinguishable in significant ways. Hamm concerned multiple, separate chains of distribution comprising a broader conspiracy; the question was whether the government could use a Pinkerton theory to attribute a death and three nonfatal overdoses occurring within one chain to an uninvolved coconspirator in another chain. See Hamm, 952 F.3d at 733, 744. That is not what happened in the instant matter. Trial testimony established Coles and Dickerson effectively operated a joint venture; they "went half" on their drugs, were "always together," were "working together," and were "a unit when it comes to anything drugs." (See, e.g., 4/18/22 Tr. 141:2-4, 171:1-5; 4/19/22

Tr. 94:20-25; 4/25/22 Tr. 100:21-101:7). Under the specific and unique circumstances of this case, supply of heroin by Coles is virtually indistinguishable from supply of heroin by Dickerson.

Further distinguishing Hamm is the fact both Coles *and* Dickerson were involved in each of the incidents leading to the two charged overdoses. Ita and Hazelton bought the heroin that caused Hazelton's overdose directly from Coles and Dickerson; Ita could not recall specifically which of them handed it over, but she was certain both were present for and involved in the transaction. (See 4/18/22 Tr. 123:2-16, 173:11-177:8). Likewise for the heroin that caused Rockwell's overdose: both Coles and Dickerson were with Rockwell on the day of her overdose, and Rockwell told the jury the only heroin she used that day came from Coles and Dickerson's supply. (See 4/19/22 Tr. 215:25-216:10). Thus, even if we were to adopt

Hamm's chain-of-distribution requirement, the government's evidence would satisfy it. We will deny Coles' motion for judgment of acquittal on these grounds.[15]

3. *Count Seventeen: Possession with Intent to Distribute Heroin*

Count Seventeen charges Coles with possession with intent to distribute heroin and crack cocaine on or about July 22, 2016. The charge arises from law enforcement's search of Courtney Smith's apartment on July 22, 2016, and their seizure of cocaine base and heroin from that apartment. Coles asserts he was in jail for two weeks at the time of the search and there was no evidence that the seized drugs belonged to him or that he had the ability to exercise dominion or control over them. (See Doc. 1386 at 16).

Neither party provides much help in the way of case law or record evidence. The lone decision upon which Coles relies—United States v. Bates, 462 F. App'x 244 (3d Cir. 2012) (nonprecedential)—is distinguishable. The government in Bates

[15] Coles also argues he is entitled to judgment of acquittal on Count Eighteen because Ita disposed of the substance before emergency responders arrived, so it was never tested and the government cannot prove beyond a reasonable doubt it was in fact heroin. (See Doc. 1386 at 13). Such testing is not required: "It is well-established that 'lay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in an alleged narcotics transaction.'" See United States v. Stewart, 179 F. App'x 814, 818 (3d Cir. 2006) (nonprecedential) (quoting United States v. Dolan, 544 F.2d 1219, 1221 (4th Cir. 1976)) (rejecting defendant's claim he was entitled to judgment of acquittal because cocaine he allegedly possessed was not "seized from him or tested by experts"); see also Griffin v. Spratt, 969 F.2d 16, 22 n.2 (3d Cir. 1992) (noting government "may establish the identity of a drug through cumulative circumstantial evidence" (citations omitted)). Ita told the jury that she and Hazelton bought what they believed to be heroin from Coles and Dickerson, and that Coles and Dickerson held the substance out to be heroin. The jury also heard that Hazelton used the substance and suffered an overdose. From this circumstantial evidence, the jury could reasonably conclude the substance Coles possessed with intent to distribute was heroin.

sought to attribute heroin to the defendant based solely on evidence he previously lived in the residence where the heroin was found, still had his key, and was seen exiting the residence on one occasion before proceeding to conduct a cocaine sale on the same street. See Bates, 462 F. App'x at 245-46. The court held this evidence was insufficient to establish the defendant knew of and had control over the heroin found in the residence. See id. at 250-53.

Coles' motion raises a different issue entirely. Overwhelming record evidence establishes he and Dickerson stored their drugs at, and operated a drug-trafficking operation out of, Smith's apartment in the spring and early summer of 2016, through the day of Coles' arrest on July 6, 2016. The question is whether the government proved Coles *continued* to store drugs in Smith's apartment *after* his arrest, through the date of the July 22, 2016 search.

The government offers little assistance in answering this question. It cites only to "prison calls between Coles and Dickerson . . . in coded language about these activities," implying Coles and Dickerson discussed what to do with drugs remaining in the apartment after Coles' arrest. (See Doc. 1432 at 39-40). The cited calls, however, were about *guns*, not drugs. Pennsylvania State Police Sergeant Antwjuan Cox explained to the jury that he listened to the recordings and that Coles instructed Dickerson to "separate" himself from the "n*gga AR" and "n*gga RU," which Sergeant Cox interpreted to reference an AR-15 and a Ruger firearm. (See 4/21/22 Tr. 33:19-34:24).

The court has independently reviewed the record in search of evidence linking Coles to Smith's apartment, or to the drugs found in that apartment, after

his arrest. The only evidence we have found is Woodard's testimony that, when she visited Coles in jail, he gave her the keys to Smith's apartment and told her "to give the keys to Shy [Dickerson] and give the address to Shy so that he can give them to someone else." (See id. at 130:18-131:11). Woodard did as she was told. (See id. at 131:10-11). Yet there was no testimony about what Dickerson did after that. There was no proof he continued to operate the joint drug-trafficking enterprise from the apartment or that he or anyone else associated with the enterprise continued to use the apartment or to store drugs there. Nor was there testimony connecting Coles to the heroin and crack cocaine law enforcement eventually found in the apartment; no one testified, for example, that the drugs were packaged or stamped or stored in the same way Coles packaged or stamped or stored his supply.[16]

The government's citation to United States v. Introcaso, 506 F.3d 260 (3d Cir. 2007), for a general proposition about constructive possession illustrates more of what this case lacks. The defendant there was barred from entering the home he shared with his wife pursuant to a protection-from-abuse order. See Introcaso, 506 F.3d at 263-64. Roughly a week after entry of the order, during a search conducted with the consent of the defendant's wife, law enforcement found hand grenades in a

[16] Pennsylvania State Police Trooper Richard Kline did testify that the drugs were discovered in a "black pouch," and the jury was shown a photograph of the pouch. (See 4/20/22 Tr. 203:20-204:4; see also Gov't Ex. 36.54). Woodard testified that Coles carried his drugs and his firearm in a "fanny pack." (See, e.g., 4/21/22 Tr. 101:9-23; see also 4/19/22 Tr. 98:15-99:16 (Adams testifying Coles "regularly" had fanny pack on him but she did not know what it contained)). None of the witnesses who described the "fanny pack" were shown the photograph of the black pouch for comparison or identification, and the government does not suggest the "pouch" seized from Smith's apartment was the same bag in which Coles often stored his drugs and gun.

locked cabinet inside the home. See id. The court of appeals determined there was enough proof from which the jury could find the defendant constructively possessed the grenades, including, *inter alia*, that he resided in the home with his wife until a week before the search, he was seen in the vicinity of the home during the search, and his wife's keys did not work to unlock the cabinet. See id. at 270-71. That the grenades were stored in a secured location which only the defendant could access was central to the court's determination that the defendant possessed the grenades even after he no longer had access to the residence. See id.

The record *sub judice* is in stark contrast. Any number of people could have accessed Smith's apartment during the two weeks between Coles' arrest and law enforcement's search. It was a known trap house frequented by countless drug users. And the apartment was unsecured: one officer testified that the apartment door was hanging open when they arrived and he had "no idea" how long it had been open. (See 4/20/22 Tr. 187:8-11, 208:8-25). Given the number of drug users who frequented the apartment, the constant replenishment of the drug inventory, the transient nature of drugs, the length of time between Coles' arrest and the search, the fact the apartment door was open for an unknown amount of time, and the lack of any substantive evidence linking Coles to the particular drugs found, we conclude there is insufficient evidence to support the jury's finding that Coles possessed the drugs seized from Smith's apartment on July 22, 2016. Accordingly, we will grant his motion for judgment of acquittal as to Count Seventeen.

C. Motion for Judgment of Acquittal: Count Nineteen

Finally, Coles seeks judgment of acquittal on Count Nineteen, which charges possession of a firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c). The jury convicted Coles on this count as a principal, as an aider and abettor, and as a Pinkerton coconspirator. Coles contends lay witness testimony from individuals who personally observed him with a firearm is insufficient to support this Section 924(c) conviction. (See Doc. 1386 at 17). He suggests the government is required to seize the firearm and enter it into evidence to establish "exactly what kind of firearm" he possessed and whether it "was properly functioning and met the legal definition of a firearm." (See id.)

The law is to the contrary. Our court of appeals has long accepted lay witness testimony as adequate to support a firearm conviction. See, e.g., United States v. Beverly, 99 F.3d 570, 571-73 (3d Cir. 1996) (testimony of robbery victim that defendant wielded "a chrome-plated revolver" sufficient to support Section 924(c) conviction even when gun was not recovered); United States v. Trant, 924 F.3d 83, 93 (3d Cir. 2019) (citing Beverly, 99 F.3d at 571-73) (lay witness testimony that he saw "imprint of a gun" in defendant's waistband, that defendant revealed "gun in his waist," and that witness "knew what he saw was a gun, describing it as a Glock that looked like one that he owned" sufficient for Section 922(g) conviction). Such testimony is especially reliable if the witness observed the firearm more than once or was threatened with it, either of which decreases the likelihood the witness was mistaken about the weapon's authenticity. See Beverly, 99 F.3d at 573.

Witness after witness in this case testified to observing Coles with a gun while dealing drugs. They described the weapon (an automatic handgun), where he carried it ("in his waistband" or "fanny pack"), and how often he carried it ("[d]uring drug transactions mainly all the time" and "always"). (See, e.g., 4/18/22 Tr. 166:20-167:5; 4/19/22 Tr. 125:23-126:7, 155:14-156:18, 196:4-198:6, 208:1-8, 231:2-235:11; 4/20/22 Tr. 30:16-31:15; 4/21/22 Tr. 101:9-23). Several witnesses testified that Coles used his gun to threaten and to intimidate them. (See 4/19/22 Tr. 155:14-156:18, 199:22-203:24, 231:2-235:11). Witnesses also testified that Dickerson, Coles' partner in crime, regularly carried a firearm.[17] (See, e.g., 4/18/22 Tr. 166:20-167:5; 4/19/22 Tr. 95:1-96:16, 197:21-198:6). Given the vast corroborative testimony, the court concludes the record evidence is more than adequate to support Coles' conviction at Count Nineteen on all three theories of criminal responsibility.

D. Motion for New Trial

Coles alternatively contends that the interests of justice demand we grant him a new trial. Specifically, Coles claims the court's evidentiary rulings deprived him of his right to a fair trial. (See Doc. 1386 at 17-19). He targets three rulings: (1) our conclusion that testimony from Robin Gould about what he overheard Chaney say about an affair between Amber Jackson (victim Phillip Jackson's widow) and

[17] The jury found Coles to be equally responsible for Dickerson's firearm on aiding-and-abetting and Pinkerton theories. (See Doc. 1337 at 11).

Torey White was *likely* inadmissible hearsay;[18] (2) our conclusion that testimony from Pennsylvania State Police Trooper Hershey that Chaney's mother told him that Chaney told her that Chaney and White fought shortly before the murders over his affair with Amber Jackson was not admissible under the residual exception to the rule against hearsay; and (3) our conclusion that lengthy extraction reports for Amber Jackson's cell phone and iPad should not go to the jury room when only the title page of each document was shown and explained to the jury at trial. (See id.) Coles says these rulings in combination "neutralized important defense theories"—namely, Coles' desire to paint Amber Jackson as an alternate suspect.[19] (See Doc. 1446 at 12).

We note as a threshold matter that Coles does not identify any error in the court's rulings. He simply remonstrates that he does not like them. That is hardly a basis for the "exceptional" remedy of a new trial. See Silveus, 542 F.3d at 1005 (citation omitted). Moreover, any suggestion our evidentiary rulings tilted unfairly against Coles ignores that they went both ways. For example, the court prohibited

[18] We did not rule that Gould's testimony was inadmissible. Rather, we reminded counsel of our earlier ruling that Coles, as the alleged wrongdoer, could not use the forfeiture-by-wrongdoing exception to get out-of-court statements by the deceased victims into the record. (See 4/26/22 Tr. 184:15-23). The court then cautioned counsel to be careful with Gould's testimony and emphasized they must fit the testimony into a hearsay exception for it to be admissible. (See id. at 185:4-9). After brief discussion off the record, Coles' counsel reported "Mr. Gould's testimony would be strongly related to hearsay" and elected not to call him as a witness. (See id. at 185:13-16).

[19] We will not restate our rationale for each of the challenged rulings here; rather, we incorporate the reasoning articulated at length on the record as though fully set forth herein. (See 4/26/22 Tr. 166:4-170:2 (Trooper Hershey), 182:21-185:16 (Robin Gould); 4/28/22 Tr. 92:3-99:21 (extraction reports)).

Lorisha Adams from offering the only evidence the government had about what Dickerson said of Coles' role in the murders. Adams' testimony was technically admissible on the drug charges, but it was not on the murder charges, and to avoid prejudice to Coles, we did not let the testimony come in at all. (See 4/19/22 Tr. 4:5-16:25). The record reflects a careful and measured application of the Federal Rules of Evidence from start to finish. A new trial is not warranted.[20]

IV. Conclusion

The court will grant in part and deny in part Coles' motion for judgment of acquittal. The court will deny Coles' motion for a new trial. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: December 2, 2022

[20] The only evidentiary ruling which reflects a true exercise of discretion is the court's conclusion regarding Amber Jackson's phone and iPad records. But even if Coles had established an abuse of discretion, any error was harmless. See United States v. Casoni, 950 F.2d 893, 902 (3d Cir. 1991). The court and the parties were still attempting to work through this dispute when the jury reported it had reached a verdict. (See 4/28/22 Tr. 95:8-9). Thus, even though Coles' counsel encouraged the jury during closing argument to peruse the extraction reports in search of proof of his alternate theory, the jury was sufficiently persuaded by the government's case-in-chief and did not need to further scrutinize the reports.

KeyCite Yellow Flag
Unconstitutional or PreemptedPrior Version Held Unconstitutional by U.S. v. Grant, C.D.Cal., Nov. 30, 2007
KeyCite Yellow Flag
Proposed Legislation

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

21 U.S.C.A. § 841

§ 841. Prohibited acts A

Currentness

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits

such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not

more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath[1] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(g) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections[2] 823(g) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

CREDIT(S)

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 115-391, Title IV, § 401(a)(2), Dec. 21, 2018, 132 Stat. 5220; Pub.L. 117-215, Title I, § 103(b)(1)(G), Dec. 2, 2022, 136 Stat. 2263.)

Notes of Decisions (8667)

O'CONNOR'S COMMENTS

United States Sentencing Guidelines
§2D1.1 (offenses involving drugs & narco-terrorism)

§§2D1.9, 2D1.11, 2D1.13, 2D2.1 (offenses involving drugs & narco-terrorism)

Footnotes

1 So in original. Probably should be "health".

2 So in original. Probably should be "section".

21 U.S.C.A. § 841, 21 USCA § 841
Current through P.L. 119-18. Some statute sections may be more current, see credits for details.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

UNITED STATES OF AMERICA,	**CASE NO.**
Plaintiff	**1:16-CR-00212-CCC-01**
vs.	
KEVIN COLES,	
Defendant	

TRANSCRIPT OF TESTIMONY OF YOLANDA DIAZ
BEFORE THE HONORABLE CHRISTOPHER C. CONNER
UNITED STATES DISTRICT JUDGE
20 APRIL 2022 - 3:56 P.M.

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Proceedings recorded by machine shorthand; transcript produced by computer aided transcription.

P R O C E E D I N G S

(Witness testimony began at 3:56 p.m.)

THE COURT: Mr. Behe, do you have the next witness.

MR. BEHE: Yes, we do. Yolanda Diaz.

THE COURT: Yolanda Diaz? All right. Good afternoon, Ms. Diaz. If you would please remain standing, and the courtroom deputy will administer the oath.

(Yolanda Diaz was called to testify and was sworn by the courtroom deputy.)

COURTROOM DEPUTY: Please have a seat, state your name for the record, and please spell your last name.

THE WITNESS: My name is Yolanda Diaz, D-I-A-Z.

DIRECT EXAMINATION BY MR. BEHE:

Q. Good afternoon, ma'am.

A. Good afternoon.

Q. I'd ask you if in answering questions could you keep your voice up so the jury can hear everything you to say?

THE COURT: That chair swivels. It does not move up and down.

Q. All right, and if I ask a question and it requires a yes or no answer, you have to say yes or no. You can't shake your head or just say uh-huh, all right?

A. Yes.

Q. Ms. Diaz, how old are you?

A. Thirty.

Q. Date of birth?
A. 9-13-91.
Q. Where do you live?
A. Hagerstown, Maryland.
Q. By yourself?
A. Yes.
Q. Employed?
A. Yes.
Q. By whom?
A. Direct Mail Processors.
Q. Could you say that slower for the court reporter?
A. Direct Mail Processors.
Q. What do you do there?
A. Audits.
Q. How long have you worked there?
A. Three years.
Q. And what's the address where you live now?
A. 118 Broadway, Apartment 6.
Q. How long have you lived there?
A. Three years.
Q. Is your mother's name Llesenia Woodard?
A. Yes.
Q. That is your mother, correct?
A. Yes.
Q. Back in 2016, specifically April, May, June of that year,

where did you live?

A. North Potomac Street in Hagerstown, Maryland.

Q. Could you be more specific, please?

A. 441 North Potomac Street, Apartment 1.

Q. Can you describe the building there?

A. It was yellow.

Q. That's the color. Can you describe what type of building it is? Is it an apartment building, a single family home?

A. It's an apartment building.

Q. How many apartments are in it?

A. If I recall, four.

Q. Is there a parking area for it?

A. There were two parking areas.

Q. And at that time, again back in that time frame in 2016, did you live at that apartment by yourself?

A. Yes.

Q. At that time of 2016 you were in a relationship with Devin Dickerson, correct?

A. Correct.

Q. He goes by the name of Shy?

A. Correct.

Q. You knew him at that time for about seventeen, since you were about seventeen, is that right?

A. Yes.

Q. You had a relationship with him, correct?

A. Yes.
Q. Did he stay with you?
A. No.
Q. Where did he stay?
A. I can't recall. I don't know his actual address.
Q. Can you not recall, or you just don't know where he lived?
A. I didn't know, so I couldn't tell you.
Q. You never went to wherever he lived?
A. No. He had moved, so he didn't live at his previous address.
Q. What was his previous address?
A. North Prospect Street.
Q. Can you be more specific?
A. I can't. I don't know more than that.
Q. What was located at that address? Meaning was it a single family home, an apartment building?
A. An apartment I believe.
Q. And although I said, or although I asked you if you were in a relationship with Mr. Dickerson back in 2016, you still have a relationship with him today, don't you?
A. Correct.
Q. How frequently do you speak to him?
A. It fluctuates.
Q. Tell me how frequently that means.
A. Well, it depends on the circumstances. If he's on

lockdown or they're on regular, that's what it would depend on.

Q. So he's in prison?

A. Yes, he is.

Q. He's a codefendant of Mr. Coles here, correct?

A. Correct.

Q. Do you know the defendant here, don't you?

A. Correct.

Q. What name do you know him by?

A. Kevin.

Q. Do you know him by K?

A. Some people call him that, but I never called him that.

Q. But you've known him to be called K by some people?

A. Like the person you named, Devin.

Q. So Devin, who you know as Shy.

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Would call this defendant K?

A. Yes.

Q. Did you know back in 2016 where this defendant lived?

A. With my mom.

Q. Where did your mom live?

A. In North Prospect as well.

Q. Could you give me a precise address?

A. I can't. I don't know her exact number.

Q. So you and your mom lived on the same street?
A. No.
Q. Your street again was?
A. North Potomac. Hers was North Prospect.
Q. What type of building did she live in?
A. An apartment as well.
Q. Did you -- you said the defendant lived with her?
A. At the time, yes.
Q. For what period of time?
A. I don't recall.
Q. Well, you know he was arrested on July 7th of 2016. How many months prior to that did he live with your mother?
A. I don't recall. I couldn't tell you that. I didn't live there, so I don't know.
Q. But you saw your mom frequently, didn't you?
A. Not really.
Q. You didn't talk to her frequently?
A. Here and there. I still don't.
Q. You were seeing Shy at the time, your mom was living with his codefendant K, but you didn't talk to your mom about that?
A. Talked to my mom about what?
Q. Their relationship.
A. She already knew our relationship.
Q. Their relationship, meaning the defendant and Shy.
A. No.

Q. You didn't talk about at all about that relationship?
A. That wasn't -- no, that's not my place.
Q. Where were you working at that point in time back in 2016?
A. I actually wasn't working in 2016. I was going to school instead.
Q. Where was Shy working in 2016?
A. Last I knew of he was at Duncan Donuts.
Q. How about IHOP?
A. Yeah, I believe he did work at IHOP as well.
Q. And where did the defendant K work at?
A. I'm not sure.
Q. Do you know if he worked at all?
A. No.
Q. So you were interviewed by the Drug Enforcement Administration in connection with this case on January 24th of 2017. Do you remember that, being interviewed?
A. Kind of.
Q. Let's see if I can help you out remembering the setting. It was an interview on that day where Agent Kierzkowski, to my right, attended. 2018? I'm sorry. 2018. Do you want me to start over?
A. No, I hear you, but I don't recall. It's been so long.
Q. Well, look at the individual seated here to my right. He was part of that interview, wasn't he?
A. Yes. Yes, he was.

Q. And Corporal Decker from the Pennsylvania State Police was part of that interview? Yes?

A. Yes. Yes.

Q. And you had a lawyer?

A. Well -- I'm sorry.

Q. You had a lawyer at this interview as well, correct?

A. A public defender that they provided me with from the first subpoena I went to.

Q. Well, not to insult the public defenders, but they are very good lawyers. You had a lawyer available to you, correct?

A. Yes.

Q. So at this interview there were two law enforcement officers, and you had your own attorney, correct?

A. Yes.

MR. BEHE: I'd like to go over that interview with you at this time. And I'm looking at the report that the agents prepared of this interview of you --

MR. OPIEL: Judge?

THE COURT: Hold on one second.

MR. OPIEL: I object to this line of questioning. The witness is here. She can be questioned. We can't just go over her report that Agent Kierzkowski wrote word for word.

MR. BEHE: That's the way I want to ask her the questions. I want to read her what the report says and ask her if she said it and if it's true. That's a proper way to ask

the question -- may we approach side bar maybe?

THE COURT: Yeah, that's fine. I don't know that the witness has a direct recollection of the interview. It seems that it's rather vague. I think that would be the most direct way to get to the substance of what this witness can recall and what she cannot recall.

MR. BEHE: Thank you, Your Honor.

THE COURT: So why don't we avoid the side bar. We'll proceed in this fashion.

MR. BEHE: Yes, Your Honor.

BY MR. BEHE:

Q. So, Ms. Diaz, according to the report that I'm looking at that was prepared by the agents who interviewed you with your lawyer present, you said you knew Devin Dickerson since you were approximately seventeen years old. Did you tell them that?

A. Yes.

Q. And is that true?

A. Yes.

Q. In this interview it says, "Diaz admitted to being in a relationship with Dickerson during the spring and summer months of 2016." Did you tell them that?

A. Yes.

Q. And is that true?

A. Yes.

Q. You said -- or the report says, "Diaz stated that Dickerson was also in a relationship with Amanda Miller." Did you tell them that?

A. Yes, I did.

Q. Was that true?

A. Yes.

Q. Diaz, the next sentence, "Diaz admitted that she would allow Dickerson and Kevin Coles to store quantities of narcotics at her residence." Did you tell them that?

A. No.

Q. Is that true?

A. No.

Q. So if this report says that you told them you allowed this defendant and your boyfriend to store drugs there, your answer is you never said that?

A. No, I never said that.

Q. The next sentence, "Diaz stated that the drugs were kept high up in a kitchen cupboard so that kids couldn't get into it." Did you have skids?

A. I did.

Q. Do you have a kitchen cupboard?

A. Yes.

Q. Did you tell that to the agents that the drugs were kept high up in a kitchen cupboard so the kids couldn't get into it?

A. No.

Q. So the report is not true? You never said that?
A. No, it's not true.
Q. Well, did you -- did you say that?
A. No. I never said that.
Q. Well, even if you didn't say it, is it true?
A. No.
Q. Let's go on to the next sentence of the report. "Diaz stated that she was unsure if the drugs were heroin or cocaine or both." Did you tell that to the agents in this interview where you were with your attorney?
A. No.
Q. Is it true?
A. No.
Q. The report goes on, "Diaz stated that Dickerson and Coles also had a safe in her residence that she believed contained money and guns." Did you have a safe in your residence?
A. Yes.
Q. Did you tell the agents that they kept money and guns in the safe in your residence?
A. No.
Q. So this report with regards to that sentence is likewise something that you never said? Did you ever say that?
A. Can you repeat the question?
Q. Did you ever tell the agents that they kept guns and money in a safe in your --

A. No.

Q. Well, is it true, whether you said or not?

A. No, it's not true. Well, they actually had money in there come to find out, because I bailed Mr. Dickerson out with it.

Q. So you had a safe?

A. Yes.

Q. It had money in it?

A. Yes.

Q. In this report it says you said it also had guns, but now you say you never said that.

A. Never, no.

Q. It wasn't true even if you said it --

A. No.

Q. Let me finish my question. The report goes on to say that, "Dickerson and Coles had two different pistols which you described as being black in color." Did you say that?

A. No.

Q. Is it true?

A. No.

Q. Did you ever see this defendant or your boyfriend with guns?

A. No, never.

Q. Your lawyer was present for this interview, correct?

A. Yes.

Q. And two agents were there writing down everything you

said, correct?

A. Yes, they were writing down whatever they were asking.

Q. I'm sorry?

A. Yes, yes.

Q. "Diaz further stated that she believed that Coles and Dickerson shared the weapons between them." Did you say that to the agents?

A. No.

Q. Is it true?

A. No.

Q. So this statement in this report likewise is something that you never said? You never said that to the agents?

A. No.

Q. The report goes on, "Diaz further stated that Dickerson and Coles were in possession of a military style weapon that they kept in your closet," and you were shown a picture of an AR-15 assault rifle, which you indicated looked similar to the gun that you witnessed in your closet. Did you tell that to the agents?

A. No, that never happened.

Q. So it never happened and you never said it?

A. I never said they had a gun, let alone in my closet. I never seen them with guns.

Q. I'm trying to make sure, because we're at least seven sentences into the second paragraph of this report, and

apparently you didn't say any of this stuff.
A. No, I didn't.
Q. "Diaz stated that Coles and Dickerson sold drugs with Budda, Merk, and Ra." Do you know Budda?
A. I do.
Q. Do you know Merk?
A. I know of him. I don't know him.
Q. Do you know Ra?
A. No.
Q. What relationship is Budda to this defendant?
A. A brother.
Q. So did you say that then to the agents that this defendant and shy or Dickerson sold drugs with Budda, Merk, and Ra?
A. No.
Q. Another thing you didn't say in this interview, correct?
A. Correct.
Q. Is it true?
A. No.

MR. OPIEL: Judge, I would renew my objection at this point. I mean, none of these things are prior inconsistent statements as they're coming out. We're just walking through a report.

MR. BEHE: Well, I don't know if they're prior inconsistent statements or not, but under Rule 611(c) if I have a party who is tied to an adverse party, the Court can

authorize or permit me to ask leading questions. And I'm looking at a report and I'm expecting to get answers that match this report, and I'm trying to see when that's going to happen. So I think this is an appropriate line of questions for someone who's associated with a codefendant in this case.

THE COURT: Well, it almost sounds like everything that she's saying is inconsistent with the report. I think it's fair examination by the prosecution, and I don't think there's an objection to the fact that you're asking leading questions. Is there, Mr. Opiel? I think you would recognize the exception that Mr. Behe has identified in the rules, correct?

MR. OPIEL: Yes.

THE COURT: So your objection is overruled. You may proceed, Mr. Behe.

MR. BEHE: Thank you, Your Honor.

BY MR. BEHE:

Q. The report goes on, still in only the second paragraph. "Diaz stated that Dickerson and Coles dealt drugs in her residence from approximately May of 2016 until their arrest in July of 2016." You knew they were arrested in July of 2016, correct?

A. I knew one was, Mr. Kevin Coles.

Q. You didn't know that Shy was arrested and made bail?

A. Not until after I got a phone call.

Q. But you knew then, you knew he was arrested?
A. Yes.
Q. The statement says that they stored drugs in your residence from May of 2016 until their arrest. Did you say that to the agents during this interview --
A. No, I did not say that to either agent in the interview.
Q. Well, is it true that they stored drugs in your residence?
A. No. Completely far from the truth.
Q. I'm looking at --
A. Uh-uh.
Q. -- it looks like eight sentences into the second paragraph, and your testimony under oath is you didn't say any of that in this interview?
A. As I stated to you guys before, no.
Q. Well, your lawyer was there, correct?
A. Yes.
Q. If I called your lawyer your lawyer would be able to testify as to what you said, because this was a proffer setting, correct?
A. Correct. You told me my lawyer would be going against me.
Q. What about this agent? If I called this agent, he was there as well, correct?
A. You already stated that they will be testifying against me last we talked.
Q. Yet I'm trying to let you know so that you can decide how,

since you are under oath --
A. Uh-huh.
Q. -- what your testimony is going to be.
A. Uh-huh.
Q. We have people here who participated in that interview. You understand that?
A. Yes, I do understand that.
Q. The report goes on to say that, "Diaz said she met Kevin Coles through her mother Llesenia Woodard." Well, that's true, isn't it?
A. Yes.
Q. "Diaz explained that her mother was dating Coles." Well, that's true, isn't it?
A. Yes.
Q. So not only is it true, but you agree you said those two things, correct?
A. Yes, yes. That's what was apparent.
Q. You also said in this report, "Diaz said that prior to keeping drugs at her residence," meaning yours, "Coles kept drugs at Woodard's residence," meaning your mother's residence. Did you say that to the agent?
A. No, I didn't say that. I wouldn't know.
Q. You wouldn't -- so it's not true as far as you know?
A. Not true, no.
Q. Do you know your mother is going to testify tomorrow?

A. No.

Q. Have you spoken to your mother about this?

A. No.

Q. You've never spoken to your mother about this --

A. We don't talk about the case at all.

Q. One at a time. You've never spoken to your mother about this investigation into the triple murders?

A. No.

Q. Or the drug trafficking activities?

A. No.

Q. You have never spoken to her?

A. No.

Q. The report goes on to say, "Diaz stated she has seen Coles in possession of a handgun on several occasions and that Coles would keep the gun in front or back of his waistline." Did you say that?

A. No, I've never seen him with a gun.

Q. So you not only didn't say it, but it's not true.

A. No, it's not true.

Q. So we have three things you said and about ten things you say you never said. Fair to say?

A. Yes.

Q. That was Paragraph 3. We're moving on to Paragraph 4 of a seven paragraph interview. In Paragraph 4, "Diaz stated that she was familiar with Wendy Chaney, the victim that was killed

in the triple homicide." Did you say that?
A. No.
Q. Is it true?
A. No. I've never seen her, never met her.
Q. You never saw her?
A. Never met her. I don't know who she is.
Q. You don't even know who she is?
A. No.
Q. Never heard her name mentioned by Shy?
A. No.
Q. Never heard her name mentioned by your mother?
A. No.
Q. Or by this defendant?
A. No.
Q. So the bottom line is you just never said that in this interview and it's not true?
A. Yes.
Q. "Diaz stated that Coles used to drive Wendy's car and used her to sell drugs." Did you say that?
A. No.
Q. Is it true?
A. No.

THE COURT: Counsel, would you please approach?

(Side bar at 4:17 p.m.)

THE COURT: It seems to me as though this witness is

at least potentially in danger of future criminal charges for perjury or make false statements. I have not encountered this situation in twenty years on the bench, and I'm wondering if counsel have ever encountered this situation and whether we need to take a recess and whether I should advise the witness of her rights.

MR. BEHE: I've had instances where I've done this with witnesses where I've gone through the report and asked did you say it, and even if you didn't say it is it true. I know I've done it in a grand jury. I think I've done it at trial. I haven't tried as many cases in recent years, but this is what I do when a witness has given an interview, and I'm trying to determine what her true testimony is going to be. She's certainly not at risk for prosecution for any of the drug information that she's provided in the report because as --

THE COURT: Well, you're now getting into knowledge of the decedent Wendy Chaney, denials of any knowledge of who she is or what her interaction was with the defendant and her boyfriend Mr. Dickerson. It just seems to me that we're getting into some material information that ostensibly was given during the course of the proffer session, and what I'm asking counsel is, is there any obligation on the part of the Court at this juncture to stop if there is the potential for criminal charges against the witness, to notify the witness of that potential, and possibly to give her the opportunity to

secure counsel before she testifies further.

MR. BEHE: My view is that once the witness takes the stand and swears that they're going to tell the truth, that they are obligated to tell the truth. And if their testimony puts them at risk, that's their own, that's their own fault. And in this particular case she could have prior to trial said, "I'm not going to testify, I invoke my Fifth," but to take the stand and know fully well that she's going to be asked about the subject of this proffer, I don't see the need to advise her. I think she fully understands what she's saying. With Dickerson coming up for sentencing this is what I think she's, she's doing to help him out.

THE COURT: I don't disagree with you, Mr. Behe, but I'm erring on the side of caution. That's why I called counsel up here. It just strikes me that this is a very determined witness in terms of these denials, and it is at such great odds with what the report indicates there simply can't be a misunderstanding here.

Someone is not telling the truth, either the report writer or the witness, and -- but I don't disagree with you. I'm going to take a quick look at this before we proceed further, but I'm inclined to allow you to continue your examination just as you're doing it, all right? You may step back. I'm going to take a quick look with my law clerk on this issue.

(Side bar concluded at 4:22 p.m.)

THE COURT: Ladies and gentlemen, I just need one minute further. If you'll just give me a few minutes, I'll get right back to this line of questioning.

(Brief pause.)

THE COURT: All right. Counsel, Mr. Behe, you may proceed. Do you need the last question?

(The record was read back by the Court.)

MR. BEHE: Ms. Diaz, the report goes on to say in Paragraph 4, third sentence, "Diaz stated that her mother..." --

MR. OPIEL: Judge, I'm sorry, I object to this question. This calls for hearsay.

MR. BEHE: It's her own statement. I'm reading back to her what she said in the interview to ask her if she told it to the agent.

THE COURT: All right, it's a fair statement. But ladies and gentlemen, whatever the statement is attributable to, Ms. Diaz's mother is not being offered for the truth of the matter. The question is did she say this to the officer. Mr. Behe, you may proceed.

BY MR. BEHE:

Q. "Diaz stated that her mother told Diaz that Wendy had been in a relationship with Coles." Did you tell that to the agents?

A. No.

Q. Is it true?

A. I don't know.

Q. You don't know if your mother was in -- or you don't know whether Wendy was in a relationship with Coles?

A. Correct.

Q. The report goes on, "Diaz stated that Woodard," meaning your mom, "conducted a case search on Wendy," but you weren't sure why she did that. Did you tell that to the agents?

A. No. One of the agents told me that they searched her found and found Wendy's name in the search engine bar. That's how they obtained the information about her knowing about Wendy, not from me.

Q. So you didn't say that to the agents?

A. No, I did not.

Q. Do you know what a case search is?

A. Yes, I do.

Q. Tell the jury what a case search is.

A. Where you basically look up the person's name using their first and last name.

Q. The reason I'm asking you is they may never have done it and they want to hear from you what it is.

A. Uh-huh.

Q. So a case search is to see if somebody has charges pending on them, correct? You have to say yes or no.

A. Yes.

Q. And to see if maybe they're out on bail, correct?

A. I'm not sure. I don't know about that part.

Q. Or maybe to see if somebody has charges against them and you don't know they have charges against them because maybe they're cooperating with the police, correct?

A. I'm not sure.

Q. "Diaz," continuing with the interview, "Diaz stated that Coles and Dickerson were utilizing Wendy to distribute their drugs." Did you say that to the agents?

A. No.

Q. Even if you tell us you didn't say it, do you know that to be true?

A. No.

Q. The report goes on, "Diaz stated that she overheard conversations between Coles..." --

MR. OPIEL: Objection. Objection. Again I would have, I would ask the Court for a standing objection if we're going to continue through here. There would be a lot of hearsay arguments throughout this statement.

THE COURT: Well, I'm going to overrule your objection, but I'm going to ask you to please identify any additional objections. I'd like to have them placed on the record. I'm not sure a continuing objection applies here because the statements attributable to the witness are very

different from sentence to sentence in the report. So please reraise your objections and they'll be noted for the record.

MR. OPIEL: Thank you.

Q. The report says, "Diaz stated that she overheard conversations between Coles and Dickerson about her," meaning Wendy, "messing up the money and that they wanted to get rid of her..." --

A. No.

THE COURT: You have to let him finish the question, ma'am.

THE WITNESS: Well, he's already asked me these questions before, so --

THE COURT: Well, not in this proceeding. So you may proceed.

BY MR. BEHE:

Q. Did you tell that to the agent in this interview when your attorney was present and two agents were taking notes?

A. No.

Q. Well, is it true, did you hear conversations between your boyfriend Shy and this defendant about Wendy messing up money and then they had to get rid of her?

A. No, never.

Q. "Diaz explained," as the report goes on, "that she thought that Dickerson and Coles probably..." --

MR. OPIEL: Objection. Calls for speculation.

MR. BEHE: This is what she said in the interview. I'm just reviewing to see if she said it.

THE COURT: The objection is overruled.

BY MR. BEHE:

Q. "Diaz explained that she thought Dickerson and Coles probably played a role in the killing due to the fact she had just overheard them talking of 'getting rid' of Wendy." Did you say that?

A. No.

Q. Is it true that you heard that?

A. No.

Q. The report goes on to say, "Furthermore, Diaz admitted to lying to the police about an alibi for Dickerson and Coles on the night of the murders. Diaz admitted that she was going along with what her mother told the police, in essence creating an alibi for Coles and Dickerson. Diaz stated that neither Coles nor Dickerson were at her residence the night of the triple murders, as she had indicated to the police." Did you tell that to the agents during this interview?

A. No, I never told them that.

Q. Is it true though that you lied to the police about an alibi?

A. No.

Q. Do you remember being interviewed by police back in July of 2016 regarding who might have been at your house on the

night of the triple murders?
A. I remember them asking, basically restating a question they asked my mom that she already answered for me, and they were trying to find out if it was true or not and I told them I couldn't recall that specific night.
Q. Are you sure you didn't tell them --
A. I'm positive.
THE COURT: Let him finish his question, please.
Q. Are you sure you didn't tell them that Dickerson stayed at your house that night?
A. Yes. I'm positive I didn't tell them that.
Q. So in this interview where you said you lied to the police you never said that to the agents, correct?
A. Which part?
Q. The interview. The recent one with Agent Kierzkowski and your lawyer, you said you never said that to these agents and your lawyer that you lied to police. Is that correct? You never said that?
A. I don't get -- you're confusing me. I don't get what part --
Q. Let me ask you something that's probably a little bit more straightforward than that. "Diaz stated that she recalled the day that Coles and Dickerson had gotten arrested in Hagerstown, Maryland." Did you tell them that?
A. I told them that I had got a phone call for him to be

bailed out, but I don't know if it was specific day that he got locked up that he called me or if it was the day after to bail him out, I'm not sure.

Q. This jury has heard testimony from a police officer in Hagerstown that he chased Kevin Coles the night before he got arrested, or the early morning hours, over fences, through backyards in Hagerstown, but could never catch him. That's what this jury has heard. In this interview the report says, "Diaz stated that the night before they," meaning Coles and Dickerson, "got arrested, Coles shown up at her apartment banging on the door. Diaz stated Coles was covered in sweat and that his clothes were dirty and ripped up. Diaz stated that she allowed Coles into the kitchen, at which time after he showered and discarded his clothing," you didn't ask any questions, he didn't volunteer what happened. Did you tell that to the agents?

A. No.

Q. Is it true?

A. Not to my knowledge.

Q. Well, it would be your apartment.

A. Oh, no, I thought you was asking me something else.

Q. Well, what did you think I was asking you? Because I was asking you whether or not you told the agents --

A. You're combining a lot into --

Q. Let me --

A. You're combining like one or two things into one and requiring one answer from me for that. That's what's confusing me.

Q. I'll go line by line.

A. Yes.

Q. Because I don't want any --

A. Yeah, I don't either.

Q. -- mistake on your part as you answer these questions. "Diaz stated that the night before they got arrested Coles had shown up at her apartment banging on the door." Did you tell that to the agents?

A. No.

Q. Did it happen?

A. No.

Q. "Diaz stated that Coles was covered in sweat and that his clothes were dirty and ripped up." Did you tell that to the agents?

A. No.

Q. Is it true?

A. No.

Q. "Diaz stated that she allowed Coles into her residence, at which time he showered and discarded his clothing in the dumpster." Did you tell that to the agents?

A. No, I did not.

Q. Did it happen?

A. No, it did not.

Q. "Diaz stated that she didn't ask any questions, nor did Coles volunteer what had happened." Did you tell that to the agents?

A. No.

Q. Did that happen? Did that happen?

A. Did you ask me another question?

Q. Did that happen?

A. No.

Q. "Diaz stated that Coles then left her residence, claiming he was headed to her mother's house." Did you tell that to the agents?

A. No.

Q. Did that happen?

A. No.

Q. "Diaz stated that he," meaning Coles, "never made it to her mother's house, as verified by her mother." Did you tell that to the agents?

A. No.

Q. Do you know if that happened?

A. No.

Q. "Diaz stated she heard that Dickerson had gone to her..." --

MR. OPIEL: Objection. Hearsay.

MR. BEHE: May I continue with the question, Your

Honor?

THE COURT: Let me hear the question before the response. The objection was interposed before the completion of the question. So please give me the full question.

MR. BEHE: Yes, Your Honor. I was going to say that the report has down that, "Diaz heard that Dickerson had gone to a hotel to pick up Coles up, at which time they were arrested."

THE COURT: And she stated that to the investigators?

MR. BEHE: Yes.

THE COURT: All right. The objection is overruled.

BY MR. BEHE:

Q. Did you tell that to the investigators?

A. No, I did not.

Q. Do you know if that's what happened?

A. I didn't know until after I got the call to be bailed out.

Q. So that would have been the day of the arrest, correct?

A. No. I'm not sure if he called -- no, I'm not sure if he called me that day or the next day.

Q. So when he calls you does he tell you, "We went to a hotel to pick up some people and got arrested"?

A. No, I have no knowledge to that until after.

Q. The report goes on to say that, "Diaz stated that Coles and Dickerson were taken into custody in Washington County, Maryland." Did you tell that to the agents?

A. No. They already knew that.

Q. Well, that wasn't my question. Did you tell that to the agents?

A. No.

Q. Was it true though?

A. Yes.

Q. "Diaz stated," several sentences after that, "That Dickerson, once he got out on bail," immediately came to your residence, "to obtain the two handguns and the AR-15 style rifle from the closet." Did you tell that to the agents?

A. No.

Q. Did that happen?

A. No, it did not.

Q. "Diaz stated that she believed Dickerson also took the drugs, all of which were then taken to an unknown location." Did you tell the agents that Dickerson --

MR. OPIEL: I object to that. Speculation.

THE COURT: Hold on. I'm not sure we got the full question. And did we get the full question in?

MR. BEHE: I provided the statement, but I didn't get a chance to ask the question. The statement was, "Diaz stated, "to the agents, "that she believed Dickerson also took the drugs, all of which were then taken to an unknown location."

THE COURT: The objection is overruled.

BY MR. BEHE:

Q. Did you tell that to the agents?
A. No.
Q. Do you know if that's true?
A. It's not true. There were no drugs in my home.
Q. "Diaz said that Coles and Dickerson continued to speak," with your mother and where you're asking your mother to retrieve "things," which you believed to be money, drugs, or guns from an apartment in Chambersburg. Did you say that to the agents?
A. No.

MR. OPIEL: I object to that as well. It calls for hearsay.

A. Yeah, it was a --

THE COURT: Overruled.

Q. My question --
A. -- I made before that, no.
Q. You didn't say it to the agents. Was it true?
A. Was what true?
Q. That your mother was telling you that this defendant and your boyfriend Shy wanted her to go to an apartment in Chambersburg to retrieve things, which you thought to be money, drugs, or guns.
A. No.
Q. "Diaz," according to the report, you said you told your mother not to go to Pennsylvania for Coles or Dickerson. Did

you tell that to the agents?
A. No. I didn't. And it wasn't Dickerson. It was Coles that they asked, not Dickerson.
Q. Well, could you explain that to me? Because now I'm a little confused. What was said?
A. She had no conversations with Dickerson on the phone at all after he was arrested. She only had conversations with Mr. Coles.
Q. My, my. How would you know that?
A. What do you mean how would I know?
Q. How would know that your mother only had conversations with Coles --
A. They played a back recording.
Q. Did your mother tell you that?
A. No.
Q. And finally, Paragraph 7, "Diaz stated that she was very afraid of being harmed as a result of her testimony." Did you --
A. No.
Q. Did you tell that to the agents?
A. No.
Q. Are you afraid of being harmed?
A. No.
Q. When you were interviewed back in December of 2021 when this matter might have been scheduled previously you confirmed

for the agents that everything you said in this interview was true and correct, didn't you?

A. No. They had no statement then to go over.

Q. Well, they asked you if what you told them in the past was true and correct and you said yes, correct?

A. No.

Q. That didn't happen?

A. No, they didn't ask me about if I -- no.

Q. The person who was part of that is sitting right here.

A. I see him.

Q. The person who wrote this report is sitting right here.

A. I see him.

Q. And your testimony is that ninety-five percent of what is in this report attributed to you was never said?

A. Yes.

Q. It must have been a very short interview if it's three and a half, four pages long. And you didn't say anything?

A. I wasn't there very long.

Q. But your lawyer was there with you, correct?

A. Correct.

Q. Did your lawyer look at these notes?

MR. OPIEL: I object to this.

A. I don't know this.

Q. Well, if she saw it?

A. I just don't know --

THE COURT: I don't think that question was argumentative. The question was, "Did your lawyer look at these notes?" Which notes are you referring to, the report?

MR. BEHE: Yes, the notes that the agents were comprising at that interview to see if everything was correct before the interview ended.

THE WITNESS: I couldn't tell you that. I don't know. I can't recall.

THE COURT: All right. The answer is she does not know. The objection was overruled for the record.

BY MR. BEHE:

Q. In September of -- I'm sorry, on July 22nd of 2016, less than a month after the triple murders, you were interviewed by Trooper Baney of the Pennsylvania State Police. Do you remember that?

A. No, I don't recall.

Q. You don't recall being interviewed about Wendy Chaney and statements your mother made about Wendy Chaney when you were interviewed by Trooper Baney?

A. No, I don't.

Q. Were you interviewed by a Detective Duffy from Hagerstown Police Department?

A. I really, I don't recall.

Q. How many triple murders have you been interviewed about that you don't remember?

A. This is the first.

Q. But you don't remember it?

A. Yeah, I don't get in trouble. This is the first time.

Q. Your boyfriend is coming up for sentencing, correct?

A. Yes.

Q. If you said everything in this report was accurate about Shy's drug trafficking activities, his possession of these guns, that would not go well for him, would it?

A. I can't say. I don't know.

Q. You could say?

A. I can't say.

MR. BEHE: I don't have anything else to ask this witness.

THE COURT: Any examination, Mr. Opiel?

MR. OPIEL: No questions, Judge.

THE COURT: No questions? And I have no questions. Thank you very much. You may step down.

(Witness examination concluded at 4:42 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

USA vs. Kevin Coles

1:16-CR-00212-CCC-01

Trial Testimony of Yolanda Diaz

20 April 2022

I, Wesley J. Armstrong, Federal Official Court Reporter, in and for the United States District Court for the Middle District of Pennsylvania, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 12th day of May 2022

/s/ Wesley J. Armstrong

_____

Wesley J. Armstrong

Registered Merit Reporter