

APPENDIX

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APPENDIX A

23-7682

United States v. Lora

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of February, two thousand twenty-five.

Present:

**JOHN M. WALKER, JR.,
PIERRE N. LEVAL**

MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF
 AMERICA,

Appellee,

v.

23-7682

EFRAIN LORA,

*Defendant-
 Appellant.**

FOR DEFENDANT-
 APPELLANT:

DAVID J. WILLIAMS, Gravel
 & Shea PC, Burlington,
 VT.

FOR APPELLEE:

MEREDITH FOSTER (David
 J. Robles, Jacob R.
 Fiddelman, *on the brief*),
 for Damian Williams,
 United States Attorney for
 the Southern District of
 New York, New York, NY.

Appeal from a judgment of the United States
 District Court for the Southern District of New York
 (Gardephe, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY
 ORDERED, ADJUDGED, AND DECREED** that
 the judgment of the district court is **AFFIRMED**.

Appellant Efrain Lora received a thirty-year
 sentence for offenses related to the August 2002

* The Clerk of Court is respectfully directed to amend the
 caption accordingly.

murder of Andrew Balcarran, a rival drug dealer. On appeal, Lora now argues that the district court clearly erred when it found at sentencing that Lora served as the leader of a Bronx drug ring—whose ranks included Oscar Palmer, Luis Lopez, and Luis Trujillo—and ordered the hit on Balcarran. We assume the parties’ familiarity with the underlying facts, the procedural history, and the issues on appeal.

“A district court’s factual findings at sentencing need be supported only by a preponderance of the evidence, and such findings may be overturned only if they are clearly erroneous.” *United States v. Ryan*, 806 F.3d 691, 694 (2d Cir. 2015) (cleaned up). Factual findings are “clearly erroneous only if, after reviewing all of the evidence, this Court is left with a definite and firm conviction that a mistake has been committed.” *United States v. Cramer*, 777 F.3d 597, 601 (2d Cir. 2015) (cleaned up). If “there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *United States v. Norman*, 776 F.3d 67, 76 (2d Cir. 2015) (cleaned up).

Here, the district court presided over Lora’s trial and two related hearings pursuant to *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). Over the course of those proceedings, the district court heard evidence establishing that “Lora ordered his underlin[]gs to murder Balcarran.” Joint App’x at 47. For example, Dery Caban, one of Balcarran’s shooters, testified that Palmer—Lora’s “chief lieutenant”—received his drug supply from and paid Lora for the right to sell drugs in the area. *Id.* at 47, 109. Caban also noted that Lopez referred to Lora as the “boss” of the operation. *Id.* at 1042, 1374. After Palmer, Caban, and Trujillo retrieved guns, Lora called Palmer to report

Balcarran's location. Upon receiving that call, Palmer, Caban, and Trujillo went directly to the address and killed Balcarran. And according to Caban, Lopez explained that the murder arose from a "turf drug war problem," with Lora aiming to become "the owner" of Balcarran's territory. *Id.* at 1068, 1373.

Other witnesses supplied further support for the district court's findings. For instance, Terrelle Daniel testified that Lora would summon Palmer simply by whistling. And Dorothy Hendricks testified that Balcarran informed her, two weeks before his death, of an "incident" with Lora and Palmer. Joint App'x at 1372.

On appeal, Lora challenges the district court's view of the evidence. He points out that Palmer never alleged that Lora played a role in the decision to murder Balcarran. And he argues that the district court's view is "inconsistent with much of what we know about [Lora's] life before the shooting." Appellant's Reply Br. at 13. But those arguments show at best that there are "two permissible views of the evidence," and "we simply cannot say that the district court's choice between them amounted to clear error." *United States v. Chalarca*, 95 F.3d 239, 244 (2d Cir. 1996).

Lora's due-process claim fares no better. At sentencing, Lora objected to language in the Presentence Report that Lora "directed Trujillo and Lopez to take care of the problem." Joint App'x at 110. The government noted that it had "no objection to striking the specific language" on the condition that "the sentence should still reflect that Lora and his co-conspirators agreed to murder Balcarran as a result

of their dispute over drug territory.” *Id.* As Lora sees it, that response meant that the government “acknowledged that there was insufficient evidence to prove that [Lora] directed his co-defendants to eliminate Balcarran and admitted that it was a group decision in which the five co-defendants shared equal blame.” Appellant’s Reply Br. at 3. But the government made no such concession. To the contrary, it maintained that “Lora was a leader of the drug crew who stood to gain the most from Balcarran’s murder” and that a reasonable juror “could have found that Lora ordered members of his drug crew to commit the murder.” Joint App’x at 109, 110.

A “sentencing court, like a jury, may base its factfinding on circumstantial evidence and on reasonable inferences drawn therefrom.” *United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004). Here, the district court did just that, relying on testimony elicited during three separate proceedings. Because the district court’s factual finding does not leave us “with the definite and firm conviction that a mistake has been committed,” it must stand. *Cramer*, 777 F.3d at 601 (cleaned up).

* * *

We have considered all of Lora’s remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court




APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of May, two thousand twenty-five.

United States of America,

Appellee,

v.

Efrain Lora,

Defendant - Appellant.

ORDER

Docket No: 23-7682

Appellant, Efrain Lora, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The signature of Catherine O'Hagan Wolfe is written in blue ink over a circular official seal of the United States Court of Appeals for the Second Circuit.

APPENDIX C

* * *

drug distribution business.” Citing the September 19, 2022 transcript, docket No. 311 at page 28. Accordingly, to the extent that Lora objects to the presentence report statement that Luis Trujillo sold drugs for Lora, the objection is sustained. Lora objects to paragraph 16 of the presentence report which states Palmer, Trujillo, and Lopez were threatened by Balcarran. Lora argues that, “There is no evidence supporting the allegation that Andrew Balcarran ever threatened Luis Trujillo.” Citing the defendant’s objections docket No. 331 at page 2. The government states that it, “has no objection to striking Trujillo’s name from that sentence” because the evidence shows that, “there was a dispute between Balcarran and Palmer about drug dealing territory that resulted in Balcarran threatening Palmer who had who held a supervisory role in the drug conspiracy led by Lora.” Citing the government’s brief 337 at page 5. I am, therefore, sustaining Lora’s objection to paragraph 16.

Lora also objects to paragraph 17 which states that he directed Trujillo and Lopez to, “take care of the problem, and get rid of Balcarran.” As I have already discussed, a reasonable jury could have concluded that Lora ordered his underlinings to murder Balcarran. Lora led a drug crew selling drugs at 169 Street and Franklin Avenue, Balcarran had a competing drug operation a block away. There was evidence that

Balcarran had threatened the chief lieutenant, Oscar Palmer, also known as Tito, demanding that he either stop selling drugs at that location or that he sell drugs for Balcarran. Citing the trial transcript at pages 126-127, 203, 250-254, 262-263, 278, 289-290. On the day of the murder, Lora followed his co-conspirators by car as they obtained the firearms that were used to kill Balcarran. He drove around the neighborhood searching for Balcarran. And it was Lora who informed the shooters where Balcarran was standing immediately before the murder. And there was evidence that one of the conspirators, Luis Lopez, told one of the shooters that Balcarran was killed so that Lora and his chief lieutenant, Tito, could take over Balcarran's drug selling spot. See August 10, 2019 order docket No. 190 at pages 5 through 8. Lora argues, however, that at Palmer's sentencing, I struck a similar statement and Palmer's presentence report noting that I was, quote, unaware of evidence demonstrating that Lora told Palmer, to quote, take care of the problem, close quote. Citing defendant's objection docket No. 331 at page 2, which in turn is quoting the September 19, 2022 transcript, docket No. 311 at page 26. But paragraph 17 of Lora's presentence report addresses his interactions with Trujillo and Lopez, not his interactions with Palmer. In any event, while there was no testimony at trial that Lora told Trujillo and Lopez to, "take care of the problem," it is a fair inference from the evidence that Trujillo and Lopez were acting at Lora's behest and collecting the guns to used to kill Balcarran and in approaching Caban about committing the murder. Lora tailed his co-conspirators as they collected the guns. He searched for Balcarran in the neighborhood.

He informed the shooters where Balcarran was immediately before the murder and he was the primary beneficiary of Balcarran's murder. As I noted in sentencing Palmer, "it is a fair inference from the evidence that Lora, Palmer, and Lopez had concluded that if they wanted to continue selling drugs at that location, they would have to murder Balcarran." Citing the September 19, 2022 transcript, docket No. 3311 at page 17. In sum, to the extent that paragraph 17 suggests there was evidence at trial that Lora told Trujillo and Lopez to, "take care of the problem," Lora's objection is sustained. But that does not change the fact, that Palmer, Trujillo, and Lopez were acting at Lora's behest in connection with the murder of Balcarran.

Lora objects to paragraph 22 of the presentence report which states that he wanted to take control of over Balcarran's drug spot, and that after Balcarran's death, Lora did, in fact, gain control over that drug spot and maintained control over it for years. Lora argues that Caban's, "hearsay testimony he learned from Lopez that Balcarran was murdered, because Lora wanted to take over Balcarran's drug spot is directly contradicted by the hearsay declarant Luis Lopez." Citing statements Lopez made to federal investors between

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presentence report, paragraphs 48-55.

To summarize, the sentencing guidelines recommend a sentence of life imprisonment. The probation department, in the December 4, 2019 presentence report, recommends a sentence of 30 years imprisonment on Count Three to be followed

by a consecutive term of life imprisonment. On Count One the government asked me to reimpose an aggregate sentence of 30 years imprisonment. Mr. Lora requests a sentence of 188 months imprisonment. With all of this in mind, I will now describe the sentence I intend to impose. Then I will ask the parties if there is anything further they wish to say.

Mr. Lora spent most of his adult life committing crimes. He consistently sold drugs in his neighborhood over a period of more than 15 years. Although he was repeatedly arrested and convicted of drug trafficking crimes he never served any jail time. Ultimately, Mr. Lora's drug business put him in conflict with a competing drug dealer. And the evidence showed that Mr. Lora decided that that man had to be murdered. I conclude that a severe sentence must be imposed given the nature of Mr. Lora's crimes, the fact that they involve both murder and drug trafficking and the fact he has committed serious crimes for much of his adult life. I do believe that he presents a significant danger to the community having considered all of the circumstances. I intend to impose an aggregate sentence of 30 years imprisonment. I conclude that a life sentence is not necessary given that Mr. Lora is 53 years old.

As to supervised release, although I expect that Mr. Lora will be deported after serving his sentence, in the event that he is not, he will be subject to an aggregate sentence of five years supervised release. I intend to impose the following mandatory conditions of supervision, Mr. Lora will not commit another federal, state, or local crime. He will not unlawfully possess a controlled substance. He will cooperate in the collection of DNA as directed by the probation

officer. He must refrain from any unlawful use of a controlled substance. He will submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter. I intend to impose the standard conditions of supervised release set forth in the presentence report along with a following special conditions. The defendant will submit his person and any property residence, vehicle, papers, computer, other electronic communication or data storage device to a search on the grounds that there is a reasonable suspicion that a violation of the conditions of his supervised release may be found. Failure to submit to a search may be grounds for revocation. The defendant will warn any other occupants that the premises may be subject to search pursuant to this condition and any search must be conducted at a reasonable time in a manner reasonable manner. The defendant will obey the

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APPENDIX D

U.S. Const. Amend. V

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