NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 22-2512 & 23-1316

_____

UNITED STATES OF AMERICA

v.

JEREMY EDWARD JOHNSON,
Appellant in No. 22-2512

UNITED STATES OF AMERICA

v.

SUSAN MELISSA NICKAS,
Appellant in No. 23-1316

_____

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Nos. 3:21-cr-00143-001 and 3:21-cr-00143-002)
District Judge: Honorable Malachy E. Mannion

_____

Submitted Under Third Circuit L.A.R. 34.1(a)
on May 15, 2025

Before: SHWARTZ, MATEY, and FREEMAN, *Circuit Judges*

(Opinion filed: September 30, 2025)

OPINION*

FREEMAN, *Circuit Judge*.

A jury convicted Jeremy Johnson and Susan Nickas of drug offenses that resulted in the death of Joshua Kiernan. We will affirm both judgments of conviction.

I

On December 11, 2020, Joshua Kiernan died of an overdose on a combination of heroin and fentanyl. At the scene of the overdose, law enforcement recovered a syringe and two loose empty plastic bags that they suspected had contained drugs. One of the loose bags bore a "Rite-Aid" stamp, and the other was unstamped. Law enforcement also found Kiernan's drug kit, which contained banded bundles of small bags containing suspected drugs (some bearing the Rite-Aid stamp and others that were unstamped), and several empty bags (some stamped Rite-Aid and some unstamped).

A forensic scientist tested the substance in one of the full bags bearing the Rite-Aid stamp and the substance in one of the full unstamped bags. Both contained heroin and fentanyl. The scientist also tested the residue in one of the stamped empty bags and one of the unstamped empty bags. Both tested positive for heroin and fentanyl.

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

Law enforcement obtained evidence connecting both the stamped and unstamped bags of drugs to Johnson and Nickas.[1] Over the year immediately preceding Kiernan's death, Johnson and Nickas obtained drugs from New Jersey, and Johnson routinely distributed the drugs to people in Pennsylvania. Kiernan and Kiernan's fiancée, Kaleigh Watson, were two of Johnson's customers.

Hundreds of Nickas's and Johnson's text messages and Facebook messages documented their drug transactions. As particularly relevant here, messages showed that Johnson bought $300 worth of drugs from Nickas on December 6, 2020. Johnson contacted Nickas to obtain more drugs on December 7, 8, and 9, but Nickas had no drugs available. On December 9, Johnson and Nickas agreed that the two of them would get more drugs the following day.

On the morning of December 10, 2020, Watson sought drugs for herself and Kiernan. The couple had been unable to acquire drugs on December 9, and their supply was running low. Watson sent Johnson a message asking if he had obtained more drugs from Nickas, and Johnson responded that he and Nickas were planning to go to New Jersey at 1:00 p.m. that afternoon to buy drugs, Watson and Kiernan needed drugs sooner, though, so Watson asked Johnson if he had any drugs available "right now," and Johnson responded, "I might. Yea for now." Nickas App. 1103. Watson then asked Johnson to meet her that morning to supply her some drugs, and she offered to drive Johnson to Nickas's home afterward. Watson also suggested that Johnson could acquire

[1] All references to "drugs" refer to a mixture of heroin and fentanyl.

drugs from someone named Jeff "beforehand." Nickas App. 1104. That exchange of messages ended at 9:41 a.m.

Later that morning, Johnson made various phone calls to various other drug contacts, and cell site location data show that Johnson's cell phone travelled to locations outside of Johnson's residence.

Around 11:00 a.m. that day, Johnson met Watson and sold her two bundles of drugs in unstamped bags. Watson delivered some of those drugs to Kiernan at his work site later that day. Watson also gave Johnson additional money that he could use to buy drugs for her and Kiernan during his planned drug run to New Jersey with Nickas that afternoon.

On the evening of December 10, Kiernan used drugs in his home bathroom and passed out from the effects. Watson performed mouth-to-mouth resuscitation on him. Later that evening, Kiernan went out to meet Johnson to pick up the drugs Watson had prepaid for. Kiernan brought those drugs home, he and Watson divided them up, and the couple used some of them that night. Those drugs were in bags bearing a Rite-Aid stamp.

On the morning of December 11, 2020, Kiernan left for work, where he overdosed, leading to his death. Kiernan often used more than one bag of drugs at a time when Watson was not watching.

In February 2021, police arrested and interrogated Johnson. About twenty-five minutes into the interrogation, Johnson said, "I want a lawyer." Johnson App., Ex. A at

25:08. Although no lawyer was provided to him, discussions continued for a few more minutes, and Johnson then said he would continue the interrogation without an attorney.

In May 2021, a grand jury returned an indictment charging Johnson and Nickas with two counts: (1) conspiracy to distribute heroin and fentanyl, resulting in death of a user, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C); and (2) distributing heroin and fentanyl, resulting in death of user, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Before trial, Johnson moved to suppress all statements he made after requesting an attorney during his interrogation. The District Court denied the motion, concluding that Johnson voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

A jury convicted Johnson and Nickas of both counts. The District Court sentenced Johnson to 300 months' imprisonment and Nickas to 240 months' imprisonment. Each defendant timely appealed.

II[2]

On appeal, Johnson raises his *Miranda* claim, and Nickas raises five claims, two of which Johnson joins and adopts.[3] We address each claim in turn.

[2] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[3] Nickas stated her intent to join and adopt certain arguments in Johnson's brief, but none of those arguments appear in Johnson's brief.

A

Johnson argues that the statements he made to police after he requested an attorney were obtained in violation of *Miranda*. The District Court declined to suppress those statements, finding no *Miranda* violation.[4] We need not decide whether there was a *Miranda* violation because, even assuming there was, the violation was harmless.

When statements obtained in violation of *Miranda* are admitted at trial, we will reverse the judgment of conviction unless the government proves beyond a reasonable doubt that the statements were harmless—i.e., that the statements did not contribute to the conviction. *United States v. Brownlee*, 454 F.3d 131, 148 (3d Cir. 2006). Here, the government has met its burden of proving harmlessness.

Because the District Court denied Johnson's motion to suppress, we view the facts in the light most favorable to the government. *United States v. Kramer*, 75 F.4th 339, 342 (3d Cir. 2023). Apart from Johnson's challenged statements, the government's evidence tracked the drugs Kiernan obtained on the day before his death. Electronic messages and witness testimony detailed how some of those drugs went from Johnson to Watson to Kiernan on the morning of December 10, 2020, and others went directly from Johnson to Kiernan that night. In light of the record as a whole, we are convinced that any additional inculpatory evidence from Johnson's post-25-minute-mark statements did not contribute to the jury's verdict. *See United States v. Shabazz*, 564 F.3d 280, 286 (3d

[4] We review the District Court's factual findings for clear error, and we give its legal conclusions plenary review. *United States v. Jackson*, 120 F.4th 1210, 1217 (3d Cir. 2024).

Cir. 2009) (deeming any error from the denial of the suppression motion harmless because due to the other overwhelming evidence of guilt).

B

Nickas argues that there is insufficient evidence to sustain her convictions. Her argument stems from the two bags of drugs that were found at the scene of the overdose: the unstamped bag and the bag with the Rite-Aid stamp. Nickas concedes that the evidence supports that she was the source of the drugs in the bag with the Rite-Aid stamp, but she contends that no evidence connects her to the drugs in the unstamped bag. She also contends that the government did not prove the drugs in the bag bearing the Rite-Aid stamp caused Kiernan's death.

Nickas emphasizes that, after Johnson bought drugs from her on December 6, he did not buy additional drugs from her until December 10. She also points to the other drug contacts Johnson messaged and called before he delivered unstamped bags of drugs to Watson on the morning of December 10. Based on this evidence, Nickas reasons that Johnson had no remaining drugs from Nickas's supply on the morning of December 10, so Johnson must have sold Watson drugs from another supplier that morning.

Our review of this sufficiency claim is "highly deferential to the jury's verdict." *United States v. Jacobs*, 21 F.4th 106, 112 (3d Cir. 2021).[5] We review the record "in the light most favorable to the prosecution and ask only whether *any* 'reasonable juror could

[5] "We exercise plenary review over a district court's grant or denial of a motion for judgment of acquittal based on the sufficiency of the evidence." *United States v. Zayas*, 32 F.4th 211, 216 (3d Cir. 2022).

accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430–31 (3d Cir. 2013) (en banc)). We will "uphold the verdict as long as it does not 'fall below the threshold of bare rationality.'" *Id.* (quoting *Caraballo-Rodriguez*, 726 F.3d at 431).

Viewing the evidence in the light most favorable to the prosecution: Johnson obtained $300 worth of drugs from Nickas on December 6, 2020,[6] and he still had some of those drugs on the morning of December 10, 2020, when he told Watson that he had drugs available for her to purchase. Nickas App. 1103 (responding "Yea for now" to Watson's question about whether he had drugs "right now," and doing so before he communicated with other drug contacts that day). That morning, Johnson provided drugs from that supply to Watson in unstamped bags. Watson gave some of those unstamped bags of drugs to Kiernan later that day. The next day, Kiernan died of an overdose, and two empty bags of drugs were found at the scene—one stamped and one unstamped. Those empty bags are the ones that caused Kiernan's overdose death. The unstamped bag came from the supply Johnson obtained from Nickas on December 6, and the stamped bag came from Nickas on December 10.

Nickas argues that Johnson must have run out of the drugs she sold him on December 6 before December 10, as he was looking to buy more in the intervening days.

[6] Nickas argues that the deal was for $200 of drugs, but the text messages indicate that Johnson was buying drugs for "200 plus the 100 [he] owe[d Nickas]." Nickas App. 457.

But Johnson's desire to buy more drugs does not establish as a factual matter that he had run out of the drugs he bought from Nickas. A reasonable jury could find that he had not. And we cannot reverse this jury's verdict "simply because another inference is possible—or even equally plausible." *Jacobs*, 21 F.4th at 113 (quoting *Caraballo-Rodriguez*, 726 F.3d at 432). Sufficient evidence supports the jury's verdict against Nickas.[7]

C

Nickas and Johnson argue that the District Court was required to instruct the jury that the "death results" element of the charged offenses requires proximate causation and a knowing or intentional *mens rea*. We review this unpreserved argument for plain error, *Jacobs*, 21 F.4th at 114, and we discern none.

As Nickas and Johnson acknowledge, their proximate-causation argument is foreclosed by longstanding precedent. *Id.* at 113–15 (continuing to follow *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999)). And the lack of a *mens rea* instruction was not plain error.

We have previously declined to read a *mens rea* requirement into the "death results" element of 21 U.S.C. § 841 offenses. *Id.* at 114 (explaining that the "death results" element "puts drug dealers on clear notice that their sentences will be enhanced if people die from using the drugs they distribute[,] . . . regardless of whether th[e] defendant could have reasonably foreseen that death would result" (cleaned up)).

[7] Nickas also raises an unpreserved argument that she could not have distributed drugs to Johnson or conspired to do so—instead, Johnson engaged with Watson and Kiernan in joint possession of drugs for personal use. We review this claim for plain error, *Jacobs*, 21 F.4th at 112, though it warrants no discussion, as it is clearly belied by the record.

Moreover, contrary to Nickas's and Johnson's contention, it is far from plain that *Ruan v. United States*, 597 U.S. 450 (2022) disturbs that precedent. In *Ruan*, the Supreme Court held that a 21 U.S.C. § 841(a)(1) conviction requires the government to prove that the defendant knowingly or intentionally acted in an unauthorized manner. 597 U.S. at 457. The Court reasoned that "a lack of authorization is often what separates wrongfulness from innocence." *Id.* at 458, 461. But the *Ruan* opinion did not address the "death results" element, which enhances the sentence for certain § 841(a)(1) convictions but plays no role in separating wrongful from innocent conduct. *See Burrage v. United States*, 571 U.S. 204, 210 & n.3 (2014). Thus, the District Court did not plainly err in following our current precedent. *See Jacobs*, 21 F.4th at 115.

D

Nickas and Johnson argue that the prosecution improperly vouched for Watson's credibility at trial through the testimony of one of its witnesses: Detective Kimberly Lippincott. They take issue with Lippincott's testimony that Watson initially lied to investigators, denying that she helped obtain the drugs that killed Kiernan, but later told the investigators the truth in an April 2021 interview. Nickas and Johnson argue that Watson's April 2021 statement to investigators was consistent with her trial testimony, so Lippincott's testimony bolstered the latter.

The District Court overruled Nickas's objection to the purported vouching. That ruling was not an abuse of discretion.[8] *See United States v. Vitillo*, 490 F.3d 314, 325 (3d Cir. 2007).

Improper vouching occurs when the prosecutor (1) provides assurance of a witness's credibility (2) "based on either the prosecutor's personal knowledge, or other information not contained in the record." *United States v. Weatherly*, 525 F.3d 265, 271 (3d Cir. 2008) (cleaned up). "Although vouching most often occurs during summation, it may occur . . . during . . . witness examination, when the elicited testimony satisfies the two criteria for vouching." *United States v. Berrios*, 676 F.3d 118, 134 (3d Cir. 2012) (citation omitted), *abrogated on other grounds, Lora v. United States*, 599 U.S. 453 (2023); *see also Vitillo*, 490 F.3d at 327–28, *as amended* (Aug. 10, 2007).

The criteria for vouching are not satisfied here. Nickas and Johnson do not argue (and nothing in the record supports) that Lippincott testified based on *the prosecutor's* personal knowledge. And although Nickas and Johnson argue that Lippincott's opinions of Watson's veracity when speaking to investigators was based on extra-record information Lippincott gleaned during the investigation, it is far from clear that the basis of Lippincott's opinions was not contained in the record. After all, Lippincott gave lengthy testimony about the information she obtained during the investigation, beginning with the very first phone call she received about Kiernan's death. Moreover, Watson

[8] The government contends that Nickas did not object based on vouching. We need not decide whether Nickas preserved this issue because, assuming she did, the District Court's ruling withstands abuse-of-discretion review.

herself had already testified that she lied in initial interviews but later told the truth when the detectives showed her messages and she "realized [she] couldn't hide anything anymore." Nickas App. 273.

In any event, when we address a claim of improper vouching, "the statements must be considered in context." *Weatherly*, 525 F.3d at 272. Here, many of Lippincott's challenged answers were reasonable responses to questions from Nickas's defense counsel. For instance, Nickas and Johnson challenge Lippincott's testimony that "when someone is lying to me over and over and over again, sometimes when we lay all our cards out there, that gets them to tell the truth." Nickas App. 325. But that answer was a direct response to a question from Nickas's counsel: "What is your practice with respect to interviewing witnesses in terms of showing all your cards during an interview?" *Id.* Thus, context demonstrates that Lippincott reasonably responded to questions from defense counsel and did not improperly vouch for Watson.

E

Nickas asserts that she suffered prejudice due to prosecutorial misconduct. In support, she points to eight different remarks the prosecutor made during summation. Nickas did not object to any of these remarks at trial, so we review her claim for plain error. *United States v. Fulton*, 837 F.3d 281, 306–07 (3d Cir. 2016).

Nickas could not obtain relief on this claim even if it were preserved and even if we concluded that the prosecutor's remarks constituted misconduct. That is because the purported misconduct did not "so infect[] the trial with unfairness as to make the

resulting conviction a denial of due process." *United States v. Repak*, 852 F.3d 230, 259 (3d Cir. 2017) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

We address the challenged remarks individually before conducting our cumulative analysis of "the prosecutor's offensive actions in context and in light of the entire trial." *Id.* (citation omitted).

First, Nickas argues that the prosecutor began her summation by poisoning the proverbial well, remarking that Johnson and Nickas, like "all criminal defendants," urge jurors to be distracted by irrelevant issues rather than focusing on credible evidence of guilt. Nickas App. 492. Nickas contends that this remark attacked her right to present a defense. But we have held that "attacks on the opposing advocate's arguments and tactics are acceptable, and indeed that attacking and exposing flaws in one's opponent's arguments is a major purpose of closing argument." *United States v. Rivas*, 493 F.3d 131, 139 (3d Cir. 2007). In any event, the remark does not warrant reversal because the District Court instructed the jury that it was to rely on evidence, not counsel's statements, in reaching a verdict, and there was ample evidence to convict Nickas. *See Repak*, 852 F.3d at 258–60.

Second, Nickas asserts that the prosecutor attacked her character when she suggested, without record support, that Nickas referred to Kiernan and other individuals who purchased her drugs as "dumb ass junkies" and that Nickas might call one of the trial witnesses a "scum bag junkie." Nickas App. 493. The trial evidence did not show that Nickas used that language to describe Kiernan, but it did show that Nickas regularly called her customers (including one of the trial witnesses) "junkie[s]," "scum bag

junkies," and "junkie assholes." Nickas App. 341, 454, 455. Thus, in context, the prosecutor's remarks did not infect the trial with unfairness.

Third, Nickas claims the prosecutor misled the jury and misstated the law by saying that it was a "non-issue" that police tested some but not all of the bags of drugs found at the scene of Kiernan's overdose. Nickas App. 496. But Nickas mischaracterizes the prosecutor's remark. In response to defense counsel's suggestion that the random sampling performed on the bags was insufficient, the prosecutor argued to the jury that it could infer from the random sampling that all bags of drugs at the scene contained heroin and fentanyl. That argument neither misled the jury nor misstated the law.

Fourth, Nickas challenges the prosecutor's remark that the prosecution did not have to prove which bag of drugs caused Kiernan's death. But the prosecutor was simply repeating her argument that the evidence showed both the unstamped and the stamped bags came from Johnson and Nickas, so it did not matter which caused Kiernan's death.

Fifth, Nickas contends that the prosecutor misled the jury when she said the scene of Kiernan's death was not disturbed by Kiernan's coworkers. Nickas contends that a law enforcement witness testified otherwise. But the law enforcement witness merely confirmed that Kiernan's coworkers reported having moved Kiernan's body so they could render aid; the witness did not characterize that as disturbing the scene of Kiernan's death. Thus, there is no conflict between the prosecutor's remark and the witness's testimony, so the remark was not misconduct. *See United States v. Lee*, 612 F.3d 170, 194 (3d Cir. 2010) (holding that a "prosecutor is entitled to considerable latitude in

summation to argue the evidence and any reasonable inferences that can be drawn from that evidence" (citation omitted)).

Sixth, Nickas argues that the prosecutor overestimated how many bags of drugs Johnson purchased from Nickas on December 6, 2020, to make it sound like Johnson would have more drugs available to supply to Watson on December 10, 2020. Specifically, Nickas points to the prosecutor's remark that Johnson gave Nickas enough money to purchase "five bundles, 250 bags." Nickas App. 498. As the government concedes, that statement was incorrect. Indeed, the trial evidence made clear that a bundle of drugs contains 10 bags, so five bundles would contain 50 bags (not 250). But the prosecutor did not repeat her incorrect statement, and, where the jury was instructed that the prosecutor's arguments are not evidence, the misstatement did not infect the trial with unfairness. *See Repak*, 852 F.3d at 259.

Seventh, Nickas asserts that the prosecutor improperly shifted the burden of proof to the defense when she remarked that no evidence—only speculation—supported that Johnson purchased drugs from individuals other than Nickas in the days before Kiernan's death. But "[t]he prosecutor's comment attempted to focus the jury's attention on holes in the defense's theory," which does not support relief on plain error review. *United States v. Balter*, 91 F.3d 427, 441 (3d Cir. 1996).

Lastly, Nickas takes issue with a comment about the theory that Johnson had drug suppliers other than Nickas. The prosecutor stated, "I think it's a fair guess in light of the history of Jeremy Johnson and Susan Nickas working together for a year to get and sell drugs, they didn't have independent sources . . . . They were a team." Nickas App. 498.

Of course, a jury may not "guess" at whether the government proved a defendant's guilt beyond a reasonable doubt. And on rebuttal, co-counsel for the government clarified that the "fair guess" remark was "a misspeak," and told the jury that "nobody is asking [it] to guess at anything." Nickas App. 510–11. The government then reiterated that the jury had to find Nickas guilty beyond a reasonable doubt based on the evidence, and the District Court also provided that clear instruction. In light of the government's correction and the clear jury instruction, we are satisfied that the improper remark did not "so taint[] the trial as to violate [Nickas's] Fifth Amendment rights." *Repak*, 852 F.3d at 259.

Nickas takes issue with the prosecutor's remarks that either were not misconduct at all or did not infect her trial with unfairness. Considering these prosecutorial statements individually and cumulatively, we are assured that they did not infect the trial with unfairness.

E

In her final claim, Nickas seeks a new trial due to the cumulative prejudice from the errors in her trial. We review this unpreserved claim for plain error, *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019), but the result would be the same under any standard of review: Because any errors at Nickas's trial were harmless, there is no prejudice to cumulate. *See Balter*, 91 F.3d at 442–43.

* * *

For the foregoing reasons, we will affirm both judgments.

NO. 23-1316

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
Appellee

v.

SUSAN MELISSA NICKAS
Appellant

On Appeal from the judgment entered in the United States District Court for the Middle District of Pennsylvania, on February 6, 2023, at 3:21-CR-00143 (Mannion, J.)

APPELLANT NICKAS'S PETITION FOR REHEARING EN BANC AND BY PANEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION & REQUIRED STATEMENT

Is sufficiency-of-evidence review broken in this Circuit? Well… Does that review ignore evidence of innocence? Ignore whether fact/evidence *rationally* supports the Government's required chain-of-inferences? Force defendants to *disprove* the Government's fact-free theory? Or insulate the jury's decision from review *while simultaneously insulting* the Government from closing-argument mis-representations about the evidence? If any of that's true, then, yes, the doctrine is broken.

Consequently, I express belief, based on reasoned and studied professional judgment, that the panel decision is contrary to decisions of this Court, the Supreme Court, and sister circuits, or this appeal involves the question(s) of exceptional importance stated above.

A. After extensive winnowing, the Government's only remaining theory of guilt—its December 6 theory—is overwhelmingly contradicted by the trial record.

Joshua Kiernan tragically died of a heroin/fentanyl overdose on December 11, 2020, with two empty single-dose heroin/fentanyl bags in his vicinity—an unstamped-white bag, and a "Rite-Aid" stamped bag. Opinion, at 2.

The Government's trial evidence did not delineate which bag caused Kiernan's death: Dr. Coyer could not opine that any bag was a but-for or

independently-sufficient cause-in-fact. Nickas Br. 6-7, 28-32, 54; *see Burrage v. United States*, 571 U.S. 204, 218-19 (2014). So, to sustain the death-results sentencing enhancement[1] against Nickas, the Government had to prove beyond reasonable doubt that both bags came from Nickas.

In this appeal, the Government finally landed on its last viable theory.[2] Johnson sold 20 unstamped-white bags to Kiernan's fiancé Watson on the morning of December 10. The Government theorized: those unstamped-white bags came from Nickas because she sold Johnson *an unknown quantity of heroin/fentanyl in unknown bags* on December 6, and those are the same bags Johnson distributed to

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[1] "[I]f death…results from the use of such substance [defendant] shall be sentenced to a term of imprisonment of not less than twenty years or more than life." 21 U.S.C. §841(b)(1)(C).

[2] The Government's theory perpetually shifted.

The Indictment alleged distribution on December 10, not December 6. Appx21-23.

The Government asked for *Pinkerton* liability, but Judge Mannion correctly denied the Government's requested jury instruction. Appx481-483 (Tr.6-13). *Cf. United States v. Williams*, 974 F.3d 320, 366 (2020)(foreseeability is required for conspiracy-defendant's drug-quantity statutory range).

The Government failed to elicit from its expert any testimony that, if the bags had separate sources, then one or either bag was the but-for or independently-sufficient cause-in-fact. Nickas Br. 6-7, 28-32, 54.

The Government argued to the jury "it's a fair guess [that]…Johnson and Susan Nickas…didn't have independent [drug] sources…." Appx498.

Kiernan's fiancé Watson on the morning of December 10. This Court adopted that theory: Opinion, at 8-9.

This December 6 theory ignores all of the evidence—mostly Government evidence—that undermines it:

> Johnson tried to source drugs from Nickas on December 7, 8, and 9, too—but Nickas was out. Reply Br. 7-10. How did Johnson have 20 bags left from his December 6 deal with Nickas to give Watson on December 10, when he needed more drugs from Nickas on December 7, 8, and 9?
>
> Despite not having the burden of proof, *Nickas* introduced Johnson's cellphone call- and text-message logs—which the *Government* had obtained from AT&T but chose not to analyze or put into evidence—to show Johnson repeatedly communicated with other drug dealers on December 7, 8, 9, and the morning of December 10.[3] Nickas demonstrated these phone numbers were associated with heroin/fentanyl suppliers/dealers.[4] Government case-agent Tpr. De La Iglesia admitted those numbers belonged to other "source[s] of distributing narcotics,"[5] and we don't know the content of those communications "Because they were deleted on the device" (Johnson's cellphone).[6]
>
> Contextualizing Johnson's AT&T records, Robert Baker (Johnson's friend and fellow addict) testified about his and Johnson's process for sourcing heroin/fentanyl: "[T]here was drug dealers unfortunately. So you go down a list." Who to buy from and where "depend[ed] on who had [heroin] that day."

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[3] Appx361-365 (Tr.39-53) (voice-calls), Def.Exh. 408, pp.10-20 (voice-calls); Appx365-366 (Tr.53-57) (text-messages), Def.Exh. 408, pp.29-52, 218-248 (text-messages); Appx508 (Tr.113-115) (defense closing-argument discussing Johnson's AT&T logs, Def.Exh. 408).

[4] Appx352-359 (Tr.3-31), Nickas Br. 17-24 & footnotes.

[5] Appx471-472 (Tr.144-148).

[6] Appx468 (Tr.129-131).

> Baker went to "many public areas to meet many different people" to buy heroin/fentanyl, both with and without Johnson, in December 2020. Appx329-330, Appx334.
>
> "Johnson deleted most drug-related communications from his phone [that pre-dated] December 15, 2020." U.S. Br. 6 n.3; Appx494. Johnson deleted his drug-related communications with those other dealers on December 7-10.
>
> How much heroin/fentanyl was involved in that December 6 Nickas-Johnson deal? The Government made-up a number in trial closing-argument: "250 bags." Appx498. The Government conceded on appeal that number was wildly off-base: the prosecutor should have said 50 bags. U.S. Br. 47. A 500% error/over-estimation.

And the Government made concessions in district court that indicated it was speculating:

> The Government didn't charge any drug-dealing on December 6 nor mention it in opening-statement. This December 6 theory was a mid-trial variance or amendment,[7] when the Government's original theory and forensic evidence were falling apart.
>
> In its Fed.R.Crim.P. 29 argument, the Government indicated the December 6 theory was speculation: "he [Johnson] *could have had* plenty of bundles to distribute" from his December 6 purchase from Nickas. Appx478 (emphasis added).
>
> The Government asked Watson at trial, whom did the unstamped-white bags that Johnson handed her the morning of December 10 come from, "where do you think they came from?" District Court sustained objection to that speculation. Appx267 (Tr.55). The source remains speculative.

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[7] *United States v. Carey*, 72 F.4th 521, 529-30 & n.9 (3d Cir. 2023)(sufficiency-challenge simultaneously raises prejudicial/improper variance); *United States v. Washington*, 79 F.4th 320, 327-28 (3d Cir. 2023).

B. But the Court's sufficiency ruling says that doesn't matter.

With that context, the doctrine's or Opinion's flaws sharpen into focus. The Opinion's sufficiency analysis:

(1) ignores evidence of innocence,

(2) fails to ask whether the chain-of-inferences required for the Government's December 6 theory is rationally/reasonably supported by evidence/fact,

(3) contradicts this Court's prior sufficiency precedents,

(4) shifts to Nickas the burden of proving her innocence, and

(5) ignores the role prosecutorial mis-statements—which this Court agrees occurred, Opinion, at 13-16—played on the jury's review of the evidence.

That's inconsistent with Supreme Court, Third Circuit, and out-of-circuit precedent. But if the Opinion is correct, then it demonstrates this Circuit's sufficiency-review doctrine is broken.

1. The Sufficiency Ruling Does Not Consider All the Evidence

This Court "must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government." *Burks v. United States*, 437 U.S. 1, 16-17 (1978); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013)(en banc). Convictions must be premised on rational/reasonable inferences drawn from evidence: "*Jackson*…require[es] only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650,

655-56 (2012)(per curiam)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A "mere modicum" of evidence satisfies Fed.R.Evid. 401, "[b]ut it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, at 320.

"*[A]ll of the evidence*" must be considered. *Jackson*, at 318-19 (original emphasis). "[W]e review the evidence as a whole, not in isolation, and ask whether it is strong enough for a rational trier of fact to find guilt beyond a reasonable doubt." *Caraballo-Rodriguez*, at 430. Such review requires addressing evidence that undermines the Government's theory.

Judge Ikuta articulated this masterfully, in her two-step sufficiency test:

> Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, **including any evidence of innocence**, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. At this second step, **we must reverse the verdict if the evidence of innocence, or lack of evidence of guilt,** is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt.

United States v. Nevils, 598 F.3d 1158, 1164-65 (9th Cir. 2010)(en banc)(Ikuta, J., unanimous opinion)(emphasis added).

The *Nickas* opinion ignores the evidence—mostly Government evidence—that undermines the Government's December 6 theory.

2. The Sufficiency Ruling Does Not Consider Whether the Chain-of-Inferences Required for the Government's December 6 Theory is Rationally/Reasonably Based on Evidentiary Fact

"[W]here the government's evidence of defendant's guilt rests only upon a chain of inferences and the defendant contends that the evidence is insufficient to support the verdict, we must determine whether the 'proved facts logically support the inference' of guilt." *United States v. Casper*, 956 F.2d 416, 422 (3d Cir. 1992); *United States v. Bycer*, 593 F.2d 549, 550 (3d Cir. 1979).

Other circuits ask whether the chain-of-inferences required for conviction rests rationally/reasonably on evidentiary fact—including post-*Coleman* (2012):

> *United States v. Lopez-Diaz*, 794 F.3d 106, 111, 113-14 (1st Cir. 2015)(when "jury draws inferences from circumstantial evidence, a reviewing court should refrain from second-guessing the ensuing conclusions as long as (1) the inferences derive support from a plausible rendition of the record, and (2) the conclusions flow rationally from those inferences");
>
> *United States v. Guerrero-Narvaez*, 29 F.4th 1, 9 (1st Cir. 2022)("just as 'a judge may not pursue a 'divide and conquer' strategy in considering whether the circumstantial evidence adds up…, neither may a judge 'stack inference upon inference in order to uphold the jury's verdict'" (cleaned up));
>
> *United States v. Pauling*, 924 F.3d 649, 656-57 (2d Cir. 2019)(articulating difference between inference and speculation, which "occurs when the finder of fact concludes that a disputed fact exists that is within the realm of possibility, but the conclusion reached is nevertheless unreasonable because it is not logically based on another fact known to exist"; "we must defer to a jury's reasonable inferences, we give no deference to impermissible speculation");
>
> *United States v. Ouedraogo*, 531 Fed. Appx. 731, 739-40 (6th Cir. 2013)(non-precedential)("Substantial and competent circumstantial evidence may support a verdict. Although the evidence need not eliminate all reasonable

hypotheses except that of guilt, we must guard against 'piling inference upon inference.'");

Newman v. Metrish, 543 F.3d 793, 796-97 (6th Cir. 2008)("Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence.")[8];

United States v. Garcia, 919 F.3d 489, 503 (7th Cir. 2019)("Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation. In making this assessment, a judge must take special care to guard against the possibility that a defendant might be found guilty by either speculation or mere association.");

United States v. Jones, 713 F.3d 336, 352 (7th Cir. 2013)("If a necessary inference relies on speculation, it is not reasonable and not permitted.");

United States v. Katakis, 800 F.3d 1017, 1024-25, 1028 (9th Cir. 2015)("reasonable inference is one that is supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence"; Government "invited the jury to do what *Nevils* forbids: engage in mere speculation on critical elements of proof");

United States v. Goldesberry, 128 F.4th 1183, 1192-93 (10th Cir. 2025)("'[W]e do not give the government the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial.' An inference is unreasonable if it requires the jury 'to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.'");

United States v. Rodriguez, 93 F.4th 1162, 1165-66 (10th Cir. 2024)("We thus can't 'uphold a conviction obtained by piling inference upon inference.'");

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[8] The Sixth Circuit applies *Newman* post-*Coleman*. *See United States v. Reverand*, 2025 WL 637438 (6th Cir. 2/27/2025)("this is not a case where the prosecution asked the jury to speculate from an absence of proof. *Contra Newman*").

> *United States v. Lovern*, 590 F.3d 1095, 1104-05, 1107 (10th Cir. 2009)(Gorsuch, J.)(acquittal is required when "jury simply had no non-speculative reason to favor any one of these explanations over the others").[9]

The *Nickas* Opinion doesn't ask whether the chain-of-inferences required for the December 6 theory rationally/reasonably rests on evidentiary fact. The answer: it does not.

3. The Sufficiency Ruling Is Inconsistent with this Court's Prior Sufficiency Precedents, Demonstrating Incoherence in the Circuit's Sufficiency-of-Evidence Doctrine

In the past, this Court considered whether there was sufficient evidence to rationally rule-out an alternative source for the drugs. In *Jacobs*, this Court identified the key facts that rationally inculpated defendant-Jacobs, then assessed whether there was sufficient evidence to rationally rule-out the alternative ("Viking and Bulldog bags" not linked to defendant-Jacobs). *United States v. Jacobs*, 21 F.4th 106, 109-13 (3d Cir. 2021). Jacobs's accomplice Collins cooperated, testifying that: Jacobs was his only supplier, and Collins sold Jacobs's heroin to overdose-victim Ally the night of her death. *Id.* at 109-11. This Court then analyzed the evidence that rationally ruled-out the alternative suspects: "there was enough evidence for a

[9] Internal citations omitted.

jury to conclude that the Butter bags, and not the Viking and Bulldog bags, were the source of the lethal drugs Ally ingested before her death…." *Id.* at 113.

Fact-free inferences are speculation. In *Rowe*, expert DEA testimony about how much a dealer of defendant's magnitude could be expected to possess at one time "might be a basis for speculation, but it is not proof beyond a reasonable doubt." *United States v. Rowe*, 919 F.3d 752, 760-61 (3d Cir. 2019). And the Government's inability to pin-down a date was not inferred *against* defendant. Defendant's drug-ledger "lacked dates": "Without details about the timing of transactions, a rational juror would only have been able to speculate about whether Rowe possessed a quantity of at least 1000 grams at one time during the indictment period." *Id.*

Significant time-gaps require explanation. In *Casper*, "twelve hours after" the at-issue arson, defendant's presence as a passenger in the getaway vehicle was insufficient to connect him to the arson. *Casper*, at 420-22. The evidence did not prove defendant knew about the arson or arson-tools/supplies in the vehicle's trunk. *Id.* Similarly, in *Travillion*, the perpetrator/robber dropped objects at the crime scene. Defendant-petitioner's fingerprints were "found on [those] easily movable objects"—but there was no evidence about when those fingerprints were deposited, how long fingerprints could last, or even that the robber/perpetrator handled the objects bare-handed; nothing else connected defendant-petitioner to the robbery.

Travillion v. Superintendent, 982 F.3d 896, 903-06 (3d Cir. 2020). Jurors could not rationally infer defendant-petitioner was the robber/perpetrator. *Id.*

Here—unlike Collins in *Jacobs*—Johnson did not testify, say Nickas was his only supplier (she wasn't[10]), nor say the unstamped-white bags came from Nickas.

Like *Rowe*'s date-free drug-ledger, Johnson made the dates/times of his prior drug purchases unprovable by deleting that information off his cellphone. In *Rowe*, this Court did not permit speculation on the sentencing-enhancement (drug quantity) nor draw inferences against Rowe for his own obstructive conduct. Here, how can this Court speculate on this sentencing-enhancement (death results) and draw inferences *against Nickas* for *Johnson's obstructive conduct*? Johnson's cellphone would have benefitted Nickas.

Here, there is significant time-gap between Nickas's December 6 distribution to Johnson, and Johnson's December 10 distribution of unstamped-white bags to Watson.

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[10] Paradoxically, the Government conceded on appeal "Johnson could obtain heroin/fentanyl from sources other than Nickas," U.S. Br. 19—but argued the opposite to the jury: "I think it's a fair guess in light of the history of Jeremy Johnson and Susan Nickas working together for a year to get and sell drugs, they didn't have independent sources." Appx498.

4. The Sufficiency Ruling Puts the Burden on Nickas to Prove Her Innocence

No evidence suggests Johnson distributed on December 10 the same drugs he had acquired on December 6. Recognizing this shortcoming, the Government argued on appeal that it had "'presented evidence…that [Johnson] did not make another purchase between December 6 and December 10.'" Nickas Reply Br. 15-23 (quoting U.S. Br.). Rather than examine the Government's position and trial-record for that evidence, this Court shifted the burden *onto Nickas* to prove "as a factual matter that [Johnson] had run out of the drugs he bought from Nickas" on December 6. Opinion, at 8-9.

No one knows where the unstamped-white bags came from—except Johnson. Johnson deleted drug-communications off his cellphone.[11] Johnson's AT&T records show phone numbers, dates, and times—but not the content of conversations.

To fill the evidentiary gap between December 6 and December 10, the Government requires an inference that Johnson did not receive drugs from anyone else. But that inference is erected on—not evidence—but a faulty *modus tollens*:

a. Whenever Johnson buys drugs, he communicates with a drug-dealer. (If P, then Q.)

[11] Nickas didn't delete anything off hers.

b. Johnson did not communicate with another drug-dealer on December 6, 7, 8, 9, or the morning of the 10. (Not Q.)

c. Therefore, Johnson did not buy drugs from another drug-dealer on December 6, 7, 8, 9, or the morning of the 10. (So not P.) Thus, the morning-of-December 10 drugs must have come from Nickas on December 6.

This argument fails for three reasons.

First, on statement b., Johnson's AT&T records (collected *by the Government*) showed he communicated with numerous other drug-dealers numerous times on December 7-10—after Johnson learned Nickas was out of drugs. *See, supra*, pp.3-4 (discussing AT&T records and case-agent's testimony).

Second, the Government's *modus tollens* is actually an argument from ignorance. *Ad ignorantiam* "is the fallacy committed when it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true." Aldisert, LOGIC FOR LAWYERS 267 (3d ed. 1997).[12] "We cannot affirm knowledge from a state of ignorance (lack of proof)." *Id.*

In criminal trials, *ad ignorantiam* flips the burden of proof and eviscerates the presumption of innocence. This case is a perfect example. *Nickas cannot prove* from whom Johnson obtained the unstamped-white bags, because Johnson deleted

[12] *Available:* <www.jm919846758.wordpress.com/wpcontent/uploads/2022/04/lflgclt.pdf>.

that evidence off his cellphone and exercised his right to silence. But—nor can the Government.

Constitutional criminal trial rules contemplate this scenario[13]: the presumption of innocence and burden of proof require *the Government* prove the unstamped-white bags *did* come from Nickas. But *ad ignorantiam* allows the Government to escape that burden: Nickas did not sufficiently prove the drugs came from elsewhere, so they came from her. The Government made that burden-shifting argument explicitly—to this Court ***and the jury***.[14]

And this Court adopted that burden-shifting argument: Opinion, at 8-9.

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[13] Aldisert, at 269.

[14] *Inter alia*, here:

Appx494 (Tr.59)(Government closing-argument: "Susan Nickas for her part again is throwing Jeremy Johnson right under the bus by asking all of you to speculate about the possibilities of Jeremy Johnson having other sources of supply other than her which must be responsible for that first sale of the drugs to Kaleigh Watson on December 10th, 2020."),

Appx492 (Government closing-argument, arguing Nickas's defense is "speculation" and "If the walls of this courtroom could talk, they would tell you the same thing"),

Appx493 (Tr.53)(Government closing-argument, arguing Johnson's deleted cellphone data created "speculation" and "possibilities", not "evidence");

U.S. Br. 18-19 (arguing Nickas "did not demonstrate" Johnson's morning-of-December 10 calls/texts to drug-dealers "resulted in Johnson obtaining additional heroin/fentanyl before Watson picked him up," and such conclusion is "speculat[ive]").

Pointing to Nickas's alleged lack of proof doesn't affirmatively prove the Government's fact: "While the absence of evidence is not evidence of absence,…in our criminal justice system, evidence is required to convict. That simply means that in the absence of evidence, the State has not met its burden to prove guilt beyond a reasonable doubt."[15]

Third, the *modus tollens* is generous re-framing of the Government's argument (to avoid erecting a strawman). The Government's argument is actually weaker:

a. If there is evidence of another deal without Nickas, then the unstamped-white bags might have come from someone other than Nickas. (If P, then Q.)

b. There is not evidence of another deal without Nickas. (Not P.)

c. Thus, the unstamped-white bags came from Nickas. (So, not Q.)

That's a clear fallacy—"denying the antecedent." Aldisert, at 216.

The Government did not prove that Johnson had no contacts and no deals with other drug-dealers on December 7-10—it presented a lack of evidence in either direction for December 7-9, Nickas's text-messages indicated she was out of drugs

[15] *Long v. Hooks*, 972 F.3d 442, 480 (4th Cir. 2020)(en banc)(Wynn, J., concurring); *id.* at 491, 502 (Richardson, J., dissenting)(making similar point: negative result on forensic-lab tests does not necessarily exclude individual).

on December 7-9, and Johnson's AT&T records (put in evidence by Nickas) showed Johnson contacted numerous other drug-dealers on December 7-10.

It's difficult to prove a negative—to prove Johnson had no deals with other drug-dealers on December 7-10. The Government's brief misrepresented that it proved that negative at trial. Nickas Reply Br. 15-16.

Worse, this Court's Opinion rules that *Nickas* had to *disprove* the Government's fact-free inference at trial by *proving* Johnson ran-out of her drugs. Opinion, at 8-9. But, as demonstrated immediately above, Nickas "ha[d] no burden or obligation to present any evidence at all or to prove that [she] is not guilty." 3d Cir. Model Criminal Jury Instruction 3.06.

5. The Sufficiency Ruling Ignores the Role Prosecutorial Mis-Statements to the Jury Play in the Sufficiency-of-Evidence Analysis

This Court agrees with Nickas that the Government didn't play fair. In closing-argument to the jury:

> The prosecutor alleged Nickas called Kiernan—the decedent—a dumb-ass junkie. Nickas never did that. Opinion, at 13-14.
>
> The prosecutor told the jury that Nickas sold Johnson **250** bags of heroin/fentanyl on December 6, so Johnson would have plenty to re-sell on December 10. That's wild speculation. On appeal, the Government and Court agree the number should have been "50" bags. Opinion, at 15. **No prosecutor or judge ever said that to the jury.**

The prosecutor also said "Johnson and Nickas, like 'all criminal defendants,' urge jurors to be distracted by irrelevant issues…." Opinion, at 13. Prosecutor: "If the walls of this courtroom could talk, they would tell you the same thing." Appx492-493 (government closing-argument). This "invite[d] the jury to rely on the Government attorney's experience in prosecuting criminals generally" and expressed the prosecutor's personal belief in Nickas's guilt—but "[n]either the prosecutor's general experience nor [her] moral integrity has anything to do with the evidence in the case." *United States v. Schartner*, 426 F.2d 470, 478 (3d Cir. 1970).

The Opinion insulates the jury's decision from review *while simultaneously insulting* the Government from closing-argument mis-representations. But the doctrines inform each other—Due Process must exist somewhere.

Other circuits address this: prosecutors' mis-statements about the law or evidence "explain how a jury could mistakenly convict" with insufficient evidence. *Lopez-Diaz*, at 114.[16] Nickas did too: Reply Br. 4-6.

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[16] *Goldesberry*, at 1207-08 (Eid, J., dissenting) (Government conceded prosecutor mis-stated evidence in closing-argument, which defendant argued increased likelihood of conviction without evidence); *id.* at 1186 n.1 (panel-majority granted defendant's sufficiency claim, without ruling on prosecutorial misconduct);

Katakis, at 1030 (concluding evidence was insufficient, declining to rule on prosecutor's closing-argument misstatements/misconduct).

The Court's analysis ignores the role the prosecutor's mis-statements played in the jury's decision, then insulates the verdict from meaningful sufficiency review.

CONCLUSION

Nickas respectfully requests rehearing. Even if successful, she is still "liable for violating §841(a)(1) and subject to a substantial default sentence under §841(b)(1)." *Burrage*, at 217.

Respectfully submitted,

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Date: November 13, 2025

CERTIFICATE OF COMPLIANCE
WITH BAR MEMBERSHIP, IDENTICAL TEXT, VIRUS CHECK, AND WORD COUNT

I, Jason Ullman, of the Office of the Federal Public Defender for the Middle District of Pennsylvania, certify that:

1) I am a member in good standing of the bar of this Court.

2) The text of the electronic format of Appellant's Petition for Rehearing is identical to the hard copy format.

3) A virus check was performed on Appellant's Reply Brief, using Trend Micro Apex One, last update November 13, 2025, and no virus was detected.

4) Appellant's Petition for Rehearing En Banc and By Panel complies with the 3,900 word limit under FRAP 35(b)(2)(A) and 40(b)(1), as it contains 3,900 words.

Respectfully submitted,

/s/ Jason F. Ullman
JASON F. ULLMAN, ESQ.
Asst. Federal Public Defender

Date: November 13, 2025

CERTIFICATE OF SERVICE

I, Jason Ullman, of the Office of the Federal Public Defender for the Middle District of Pennsylvania, certify that I caused to be served on this date a copy of the attached Appellant's Petition for Rehearing En Banc and By Panel via Electronic Case Filing, and/or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, and/or by hand delivery, addressed to the following:

Patrick J. Bannon, Esq.
Office of United States Attorney
Patrick.bannon@usdoj.gov

Respectfully submitted,

/s/ Jason F. Ullman
JASON F. ULLMAN, ESQ.
Asst. Federal Public Defender

Date: November 13, 2025

EXHIBIT 1 – PANEL OPINION AND JUDGMENT

The Panel Opinion and Judgment are attached as an exhibit, per 3d Cir. L.A.R. 35.2(a) & 40.1(a).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1316

UNITED STATES OF AMERICA

v.

SUSAN MELISSA NICKAS,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 3:21-cr-00143-002)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE and MASCOTT, *Circuit Judges*

The petition for rehearing filed by Appellant Susan Melissa Nickas in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: November 26, 2025
Lmr/cc: All Counsel of Record