No. 16-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANIEL MONTEZ,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable Ronald A. Guzman
Case No. 1:12-cr-00755-8

BRIEF OF DEFENDANT-APPELLANT

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

Counsel for Defendant–Appellant
DANIEL MONTEZ

No. 16-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District Of Illinois, Eastern Division
v.	Case No. Case No. 1:12-cr-00755-8
DANIEL MONTEZ, Defendant-Appellant.	Hon. Ronald A. Guzman, Presiding Judge

DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Daniel Montez, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:

   Daniel Montez.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

   Sarah O'Rourke Schrup (attorney of record), Evan Bianchi (senior law student), Matt Monahan (senior law student), and Conor Tucker (senior law student), of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

   Daniel Montez, pro se.

   J. Clifford Greene, Jr.
   Law Office of J. Clifford Greene, Jr.

1 South Dearborn Street
Suite 2100
Chicago, IL 60603

Paul Camarena
North & Sedgwick L.L.C.
500 S. Clinton
No. 132
Chicago, IL 60607

Attorney's Signature: /s/ Sarah Schrup
Dated: November 22, 2016

Attorney's Printed Name: Sarah O'Rourke Schrup

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

375 East Chicago Avenue
Chicago, Illinois 60611
Phone:(312) 503-0063
Fax: (312) 503-8977
s-schrup@law.northwestern.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The government filed a three-count indictment against Daniel Montez on January 8, 2013, charging him with violations of 21 U.S.C. § 841(a)(1) (2012). (R.246 at 4, 8, 23.)[1] Thus, the district court had jurisdiction over Montez's case pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

Montez was tried before a jury in June 2014. On June 12, 2014, the jury acquitted Montez of two counts and returned a guilty verdict on the third. (Trial Tr. 599.) On January 5, 2016, the district court sentenced Montez and entered its judgment on February 9, 2016. (Sentencing Hr'g Tr. 42); (R.1232.) Montez filed his timely notice of appeal on February 1, 2016. (R.1226.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to their courts of appeal, and 18 U.S.C. § 3742, which provides for review of the sentence imposed.

[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. __), references to the sentencing hearing transcript as (Sentencing Hr'g Tr. __), and references to the pretrial status hearings, as ([Date] Hr'g Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the appendix shall be denoted as (A.__).

STATEMENT OF THE ISSUES

I. Whether the district court denied Montez a fair trial by erroneously admitting hearsay evidence as context while failing to issue limiting instructions as to the use of this evidence.

II. Whether, after the government expressly assured the district court and the defense that it would not present gang testimony at trial, the district court committed harmful error by failing to strike from the record the government's references to gangs.

III. Whether Illinois's 2006 aggravated battery statute qualifies as a crime of violence and, therefore, whether the district court erred in sentencing Montez as a career offender.

IV. Whether the government engaged in misconduct by presenting to the grand jury testimony that incorrectly represented what was contained in recorded calls, and in failing to timely correct the mistake prior to trial.

STATEMENT OF THE CASE

Jose de Jesus Ramirez-Padilla (also known as "Gallo") and his brother Helein ran a drug trafficking organization in Chicago from January 2009 until September 2012. (R.246 at 3.) In 2011 state and federal law enforcement agencies began investigating its activities. *Cf.* (R.1 at 9, 16–17.) Ultimately, the government targeted forty individuals allegedly involved in the operation and Appellant Daniel Montez was one of them. (R.1 at 6.)

Out of the group of forty, the government alleged nine individuals were involved in a conspiracy, including Montez. (R.1 at 1.) The grand jury, however, disagreed with the scope of the government's proposed conspiracy, and returned a true bill only as to six. (R.246 at 3.) The grand jury did not return a charge of conspiracy against Montez.

As Gallo later testified at trial, Montez was a mere customer "who wouldn't really buy much." *See* (Trial Tr. 402.) And the quantities alleged could be considered user—rather than distribution—amounts. *See* (Trial Tr. 496) (testimony from the government's expert witness that if Montez's "intent [was] to consume it, then it's a consumer amount"). In fact, he lived in an apartment with none of the trappings of a drug dealer. *Cf.* (Trial Tr. 502, 512.) When officers searched his apartment they did not find drugs or any drug-distribution paraphernalia such as scales, large quantities of money, or notebooks. (Trial Tr. 512–513.) In the end, the grand jury indicted Montez on three counts of possession with intent to distribute a detectable

amount of cocaine, based on transactions that occurred in October 2011, December 2011, and June 2012. (R.246 at 4, 8, 23.)

According to Montez, the government and its testifying agent before the grand jury relied on a recorded cell phone call (Call 6510) as support for its claim that Montez engaged in a drug transaction in December 2011. (R.805 at 4–5); (R.1151 at 3.) The government claimed that in the call, Helein asked Montez whether he was going to want "the tia." (R.805 at 4.) "Tia" is a code word for 14 grams of cocaine. *See* (Trial Tr. 398) ("mi tia" means a half ounce of cocaine, or 14 grams). Additionally, the government claimed that another recorded call (Call 6519)— presented in the criminal complaint—also referred to "the tia." *See* (R.1-6 at 140.) However, neither the translator's summaries of calls 6510 or 6519, nor the final transcripts of those calls presented at trial include the term "tia." (R.805 at 4–5); (R.1195 at 6); (A.72–74, 80–81) (final admitted transcripts of Calls 6510 and 6519); (A.69–71, 75–79, 82–84) (final admitted transcripts of other calls).

Before his trial Montez moved in limine to bar the government from eliciting testimony about or introducing evidence of gang affiliation. (R.632 at 3.) At a motion hearing, the district court asked the government whether it would present any such evidence. (A.55.) When the government responded that it would not, the district court replied "[t]hat was easy. That motion is denied as moot." (A.55.) In an order memorializing the hearing, the district court repeated the government's intention not to introduce any gang-related evidence as its reason for denying Montez's motion. (A.13.)

Around the same time, counsel for Benito Mojica, one of the other remaining defendants in the case, discovered that the wiretapped call transcripts disclosed by the government were inaccurate in various ways. (05/16/14 Hr'g Tr. 14.) Mojica filed an emergency motion and the district court held a hearing shortly afterwards. (05/16/14 Hr'g Tr. 2.) Although Montez himself was present, his lawyer was not, given the late notice. (05/16/14 Hr'g Tr. 2) (district court commenting, "I can't really say that I blame [Montez's counsel] since the notice was sent too late.").

During that hearing the government represented that it had been in the process of preparing transcripts and turning them over to the remaining defendants. (05/16/14 Hr'g Tr. 26.) The record is unclear, however, as to when and whether Montez received correct transcripts that did not include the erroneous reference to "tia." (05/16/14 Hr'g Tr. 26) (government stating that it produced transcripts specifically related to Mojica); *but compare* (05/16/14 Hr'g Tr. 26) (government stating that "calls with respect to all defendants" were produced in February) *with* (R.682 at 34–35) (government's April 30, 2014, *Santiago* proffer that still relied on the term "tia"). Regardless, as relevant to Montez, the government ultimately discovered that Calls 6510 and 6519, which related to the transaction underlying the December 2011 count on which Montez was ultimately convicted, contained inaccurate references to "the tia." *See* (A.72–74, 80–81) (transcripts of Calls 6510 and 6519 introduced at trial). The reference to "the tia" had been an essential part of the evidence presented to the grand jury. (R.1-6 at 139–40.)

Finally, roughly a month prior to trial, the government—after initially arguing against severance, *see* (04/16/2014 Hr'g Tr. 7–8)—requested that the district court sever Montez's case from the remaining defendants, (05/12/14 Hr'g Tr. 13–14). The government conceded multiple times that Montez was not a conspirator and characterized him as a "customer[]" who simply purchased from the drug trafficking organization. (05/12/14 Hr'g Tr. 16–17, 23.) During that same hearing, Montez's counsel moved to exclude hearsay contained in transcripts of wiretapped telephone calls between Montez and the Ramirez-Padilla brothers. (A.57–58) (Montez's oral motion in limine); (R.682 at 32–37) (government's *Santiago* proffer seeking to admit statements); *see also* (A.69–84) (call transcripts). Noting that the grand jury declined to indict Montez on conspiracy, defense counsel argued that the statements should not be admitted via the co-conspirator exception in Federal Rule of Evidence 801(d)(2)(E). (A.57–58.) In response, the government said that the issue could be "resolved in the interim with defense counsel." (A.58.) On that basis, the district court delayed ruling on the motion. (A.58.)

At a hearing the next day, however, Montez and the government informed the district court that they had not resolved the issue. Montez again objected to the admission of hearsay contained within the transcripts. (A.60.) The district court declined to rule on the motion, reasoning that "if [one of the other defendants is] found guilty, maybe we'll hold your client's trial off until after the sentencing," inferring that a guilty verdict might spur Montez to plead guilty. (A.60.) At the conclusion of the hearing, the district court advised Montez's counsel that it would

"try [Montez] on the date indicated, June 10th. And I'll hear your specific issue then. I think it will be much easier to rule on it then." (A.60.)

According to the district court's instructions, on the first day of jury selection, June 9, 2014, Montez again objected to the admission of hearsay in the call transcripts. (Trial Tr. 2.) Defense counsel indicated that although the government's position was that these statements were mere context, the defense "believe[d] that [they were] offered for the truth." (Trial Tr. 2.) The district court asked, "why this motion wasn't filed previously . . . so that [the court] could review [the statements] and rule on them before . . . the morning that we're supposed to begin jury selection?" (Trial Tr. 5.) Montez's counsel reminded the district court of his prior motions and the district court's mention of pushing the motion back to the trial date. (Trial Tr. 5.) But the district court again asked why Montez's counsel filed the motion when he did "because I'm here ready to select a jury and instead you're asking me to rule on multiple pages of transcripts on every single statement made by a co-conspirator, and I don't think that's reasonable . . . ." (Trial Tr. 6–7). In the end, the district court opted to "select the jury and then . . . stay late to rule on these at [defense counsel's] convenience." (Trial Tr. 8.) After jury selection wrapped up for the day, around 4:30 that afternoon, defense counsel asked the district court for a ruling. (Trial Tr. 189.) The district court stated that they would have to take it up the next day. (Trial Tr. 189.)

The next morning, Montez once more renewed his objection to the hearsay contained in the transcripts. (Trial Tr. 194.) This time, Montez specifically directed

the court to the transcript of Call 6510. (Trial Tr. 195.) The transcript included the following exchange:

DANIEL MONTEZ: And listen, is it hard or loose?

HELEIN RAMIREZ-PADILLA: It's real nice, dude.

DANIEL MONTEZ: Okay, that's what I need to know.

HELEIN RAMIREZ-PADILLA: It's more or less.

See (A.73.) Montez argued that the out-of-court statements were offered for their truth as evidence of a drug transaction. Implicitly denying the defense motion, the district court told the defense counsel that he could "refile" if he provided a detailed accounting of each statement in the thirteen transcripts that he believed amounted to hearsay. (Trial Tr. 200–01.) Then the district court admonished defense counsel, stating "that we're not stalling the trial for this." (Trial Tr. 201.)

Later that afternoon the district court handed defense counsel a printed order memorializing and expanding upon the oral discussion from that morning. (Trial Tr. 324–25.) In its order, the district court determined that seven lines out of the thirteen transcripts were admissible as context. (A.17.) It did not indicate whether any other lines were excludable as hearsay. The district court "order[ed] the defendant to file an amended motion to exclude that specifically identifies each of Ramirez-Padilla's statements that the defendant contends is inadmissible hearsay . . . , the basis for the defendant's belief [that they are hearsay], and his response to [the government's context argument]." (A.18.) Yet within minutes of

issuing this order, the trial resumed and the government published the first call transcript to the jury. (Trial Tr. 324–26.)

Ultimately, the district court admitted every transcript and nearly every statement within them into evidence during the trial. *See* (Trial Tr. 327 (Call 309), 328 (Call 314), 330 (Call 316), 331 (Call 322), 348 (Call 6510), 349 (Call 6513), 350 (Call 6516), 351 (Calls 6519 and 7052), 355 (Calls 2388 and 2406), 357 (Call 2453), 359 (Call 2460)); *see also* (Trial Tr. 300–01) (parties' stipulation to the admissibility of the transcripts, but preserving an objection to them on relevance grounds). The sole redaction in the thirteen published transcripts related to an uncharged drug deal mentioned in Call 7052. *See* (Trial Tr. 351–53) (indicating the government redacted parts of Call 7052). Additionally, although the government had previously suggested that a limiting instruction might be appropriate to inform the jury of how it could use the statements in the transcripts, (Trial Tr. 192), the district court gave no such instruction, either when the transcripts were admitted, *see* (Trial Tr. 327, 328, 330, 331, 348, 349, 350, 351, 353, 355, 357, 359), or during the final instructions, *see* (Trial Tr. 576–88).

During the trial, the government presented testimony from seven witnesses, mostly the law enforcement personnel who investigated the drug trafficking organization. *See* (Trial Tr. 271, 302, 332, 387, 450, 462, 477.) On the beginning of the third day of trial, the government called Gallo, who appeared pursuant to a plea deal that potentially halved his sentence. (Trial Tr. 446.) Gallo testified that he sold drugs to Montez on June 17, 2012. (Trial Tr. 409–10.)

On cross, however, Gallo stated that he had used marijuana and cocaine every day for 12 years, which he believed affected his memory. (Trial Tr. 418–19.) He also acknowledged that he was a drug dealer, and that about $1.75 million "ran through" his drug trafficking organization. (Trial Tr. 423.) Gallo additionally admitted to deceiving others. (Trial Tr. 427.) He testified that he had used aliases and illegally reentered the United States after being deported to Mexico. (Trial Tr. 419.) He confessed that he brokered a fraudulent deal with a cocaine supplier in order to cheat him of $10,000. (Trial Tr. 441.) He admitted to supplying a fake social security number in order to secure employment. (Trial Tr. 442.) And, finally, Gallo stated that he drove a scrap truck through Chicago alleys in order to throw law enforcement off his drug trafficking activity. (Trial Tr. 449.)

Immediately following Gallo's testimony, the government called Patrick Staehely, an FBI agent. (A.50.) The government initiated the following exchange:

MR. KNESS:	Are you a special agent with the FBI?
AGENT STAEHELY:	Yes, sir.
MR. KNESS:	Are you assigned to any particular group in the FBI?
AGENT STAEHELY:	Yes, sir.
MR. KNESS:	What are you assigned to?
AGENT STAEHELY:	A gang task force.
MR. KNESS:	What are the duties and responsibilities you have on the gang task force?

(A.51.)

Defense counsel allowed another question to pass before asking for a sidebar, (A.51), and then alerted the district court to the "patent[] unfair[ness]" and "improp[riety]" of the government's "imput[ing]" gang activity to Montez (A.52) ("It's just flat-out plain wrong, Judge."). In response, the district court brushed off the prejudicial effect of the statements, saying, "I frankly don't think it's of very great importance." (A.52.) The judge determined that Agent Staehely's gang reference was "not greatly prejudicial" because "the statement was so quick and it [had] no other bearing on what [Staehely was] going to testify to." (A.53.) Instead of striking the question and answer as irrelevant, the district court said that he could instruct the jury to disregard the gang reference, but defense counsel told the court that there was "nothing the Court [could] do now." (A.53.)

The trial lasted three days. Of the three possession-with-intent-to-distribute charges, the jury acquitted Montez of two counts—Counts Two and Twenty-One (the October and June counts)—and convicted him of Count Six (the December count). (R.788.)

For the acquitted counts, the government introduced calls between Montez and Helein or Gallo (Trial Tr. 546, 552); testimony from a lieutenant and FBI agent (Trial Tr. 546–48, 554); and Gallo's testimony (Trial Tr. 547, 554). The government even introduced a series of photographs it claimed memorialized one of the acquitted drug deals. (Trial Tr. 548.) Only two witnesses testified to direct knowledge of any facts underlying the charges: Agent Ostrow, *see* (Trial Tr. 332) (Ostrow testifying to surveillance of the October 27, 2011, alleged sale constituting

Count Two), and Gallo, *see* (Trial Tr. 435) (Gallo testifying to participation in the June 17, 2012, alleged sale constituting Count Twenty-One).

On the other hand, for the sole count of conviction (the December 2011 count), the government relied entirely on out-of-court statements—namely, the phone calls between Montez and Helein. (Trial Tr. 549–54.) And unlike the acquitted counts, which had the benefit of live testimony and cross-examination of Gallo, (Trial Tr. 411), the government never called Helein to the stand regarding the sale on which the jury convicted Montez.

After trial, Montez moved for a new trial or for a judgment of acquittal. (R.796.) In a pro se supplement to that motion, Montez argued that the government engaged in various forms of misconduct related to its handling of "the tia" evidence. *See* (R.805.) Meanwhile, the probation office prepared a Presentence Investigation Report (PSR) on August 25, 2014, which relied on the 2013 version of the Sentencing Guidelines. On January 5, 2016, the district court held Montez's sentencing. It first denied Montez's motion for a new trial or judgment of acquittal. (A.21.) The district court then turned to sentencing, adopting the PSR with just a few minor modifications that do not impact this appeal. (A.32.) Specifically, the district court adopted the PSR recommendation to apply the career-offender enhancement under Guideline § 4B1.1. (A.32.)

In finding that enhancement appropriate, the probation office had determined that two of Montez's prior convictions—a 1984 murder conviction and a 2006 aggravated battery conviction—served as the two predicate offenses. (R.888 at

9.) Both of these cases took place in Cook County. (R.888 at 12, 15.) The probation officer noted that she was "unable to obtain copies of criminal documents (such as copies of charging documents and disposition orders) from the Cook County clerk's office." (R.888 at 10.) Thus, the information about the murder and aggravated battery used in the report was obtained from "the clerk's office computer printout," corroborated by information on Montez's police rap sheets and reports (R.888 at 10, 15). Based on these materials, the probation officer determined that Montez's two convictions were crimes of violence, and made Montez a career offender under the Guidelines. (R.888 at 9.)

As a result, the probation officer calculated Montez's base offense level at 32. (R.888 at 9.) The district court did not rule on a specific drug quantity amount, believing that it did not "need to reach" the question, given its career-offender determination, (A.33), and therefore the district court did not independently calculate what Montez's Guidelines range would have been without the career-offender enhancement. The district court concluded that Montez's level 32 combined with the mandatory criminal history category of VI, yielded a Guidelines range of 210–262 months of imprisonment. (A32.) The district court ultimately settled on a 210-month sentence for Montez's sole count of conviction, his first federal offense. (A.35.)

SUMMARY OF THE ARGUMENT

Daniel Montez's case was plagued by inconsistent and even contradictory rulings. Those rulings led to the admission of inaccurate and inadmissible evidence and, at sentencing, an erroneous career-offender enhancement that resulted in a 210-month sentence for a solitary drug conviction.

The district court admitted thirteen call transcripts in their near entirety, sweeping aside Montez's concern that they contained within them inadmissible hearsay. Instead, the district court concluded that all of the statements could come in as context for Montez's statements. This was error. Even if a particular statement serves some purpose as context, it remains inadmissible hearsay if it is offered for its truth. And that is precisely what many of the statements were: Helein's and Gallo's assertions about quantities, qualities, and prices of the cocaine that had to be offered for their truth in order to establish the very transactions that formed the basis of the three charged counts. Even if some of the statements were admissible as context, the district court erred in admitting them whole cloth and, significantly, with no limiting instruction to the jury. Finally, for the December count—the sole count of conviction—the transcripts comprised the entirety of the evidence against Montez. Without any direct evidence—indeed without any other evidence at all—the admission of the hearsay-laden transcripts cannot be harmless.

The district court also erred by failing to strike gang references from the record. The government explicitly represented to the defense and the court that it would not reference gangs at trial, and yet it did so—twice. Gangs were not relevant

to Montez's charge of possession with intent to distribute. At the same time, this Court recognizes that gang evidence is extraordinarily prejudicial. Evidence must be both relevant and not substantially more prejudicial than probative. The gang references here met neither criterion, and so the district court erred in failing to strike that evidence from the record.

Montez's 210-month sentence resulted from a series of procedural errors that culminated in an erroneous career-offender enhancement. The district court relied on an outdated PSR, which itself was based on an outdated version of the Guidelines. The probation officer concluded that one of Montez's convictions served as a career-offender predicate by relying on second-hand printouts and police rap sheets in the absence of the appropriate *Shepard* documents. Had the district court relied on a properly prepared PSR or engaged in its own analysis of the facts and the law underlying Montez's sentence, it could only have concluded that Montez does not have the two predicate offenses required to impose a career-offender enhancement. Montez should be resentenced.

Last, Montez believes that the government engaged in misconduct by presenting evidence before the grand jury that did not exist—namely, that in two phone calls Montez used the word "tia" (code for a 14 grams of cocaine). However, the word "tia" does not appear in the finalized transcripts of those calls at trial. Montez asserts that he did not receive a fair trial while defending against such moving-target evidence. The government should have discovered the mistake sooner and it should have provided corrected, accurate transcripts in a timely manner.

ARGUMENT

I. The district court erroneously admitted hearsay evidence under the guise of context and therefore denied Montez a fair trial.

The district court erroneously admitted hearsay statements, and the fact that those statements might also serve as context does not neutralize the error. That is, if the out-of-court statement had to be true in order to serve as context, then it is hearsay first and foremost. Any ancillary contextual purpose does not minimize the damage of hearsay impermissibly sneaking into the trial. *United States v. Amaya*, 828 F.3d 518, 528 (7th Cir. 2016) ("Whether a statement is offered for 'context' is beyond the point—the relevant question is whether the statement is offered for its truth (and the answer to that question can be yes, even if the statement provides context for some other, admissible statement)."); *see also United States v. Smith*, 816 F.3d 479, 481–82 (7th Cir. 2016). Accordingly, a "district court should exercise great caution when admitting a non-conspirator's statements to provide context," *United States v. Gajo*, 290 F.3d 922, 930 (7th Cir. 2002), in order to ensure that it does not abuse its discretion in admitting inappropriate evidence, *Amaya*, 828 F.3d at 524 (noting that this Court reviews such errors for an abuse of discretion).

The district court failed to exercise this requisite caution when it admitted the transcripts. As a preliminary matter, the district court neglected to rule on defense counsel's repeated objections to these calls in the weeks leading up to trial, (A.57–58, 60), and instructed counsel to raise the issue on the morning of trial, (A.60). Montez did as requested, yet the district court characterized the defense

request as "not reasonable" and accused counsel of engaging in ambush tactics. (A.62–68.) The district court issued its order denying the motion to exclude (it also mentioned an opportunity to "refile") in the midst of the government's case-in-chief and only minutes later began admitting the objectionable transcripts. *See* (A.14–18) (order concerning transcripts); *see* also (A.46–48) (providing counsel copies of the order and then introducing the calls). Ultimately, after having the opportunity to review the thirteen call transcripts for at least a full day, the district court admitted Helein's and Gallo's statements—in their entirety—as non-hearsay context.

Thus, the district court's lack of care was reflected both by its inattentiveness to the defense's requests and by its actual ruling that admitted hearsay under the guise of context. As shown by the following representative example, which defense counsel placed squarely before the district court, *see* (Trial Tr. 194–97), Helein's statements could only serve as context if Helein was actually discussing cocaine and its quality:

DANIEL MONTEZ: And listen, is it hard or is it loose?

HELEIN RAMIREZ-PADILLA: It's real nice, dude.

DANIEL MONTEZ: Okay. That's what I need to know.

HELEIN RAMIREZ-PADILLA: It's more or less.

(A.73) (Call 6510, Dec. 12, 2011). Montez's question is not a statement; but Helein's answer—"It's real nice, dude."—is. The answer asserts a truth: that there is cocaine and that it is good quality. *See, e.g.*, *United States v. Love*, 706 F.3d 832, 840 (7th Cir. 2013) ("questions are not 'statements'"); *see also Smith*, 816 F.3d at 481.

Hearsay crops up constantly in other transcripts, too.[2] For example:

DANIEL MONTEZ: So, so what do you want?

HELEIN RAMIREZ-PADILLA: For you to arrive in about 20 minutes so I can measure all of the shit.

(A.76) (Call 6513, Dec. 12, 2011). Helein's assertion that he has cocaine and needs to measure it, must be offered for its truth to have any ancillary contextual meaning. Similarly on December 14, 2011, Helein asserts that he has cocaine and its quality is "nice"—another statement that must be true in order to be either relevant or contextual:

DANIEL MONTEZ: But, is it going to be uh, firmer, not like --

HELEIN RAMIREZ-PADILLA: No, it's nice, it's nicer dude.

(A.83) (Call 7052, Dec. 14, 2011). On June 17, 2012, Gallo asserts that he possesses a quantity of cocaine:

JESUS RAMIREZ-PADILLA [Gallo]: Hello.

DANIEL MONTEZ: Gallo.

JESUS RAMIREZ-PADILLA [Gallo]: Dude, dude, We [*sic*] already got the half around there, dude.

DANIEL MONTEZ: Okay. So—the number.

JESUS RAMIREZ-PADILLA [Gallo]: Dude, I'm just barely coming from the north side. Give me about a half hour, dude.

DANIEL MONTEZ: Okay. Fine. And, and, the, th, ah [pause]

[2] Included in the Appendix is a summary chart that identifies several additional examples of hearsay that the district court erroneously admitted as context. *See* (A.86.)

JESUS RAMIREZ-PADILLA [Gallo]: Five fifty for the half, dude.

(A.70) (Call 2406, June 17, 2012). In this call, Gallo also provides the cost of the very cocaine he claims to possess, which forms the core of the truth asserted in the conversation. When compared to Montez's stutters, Gallo's words are what establishes presence of drugs; they are not mere context.

Finally, even if this Court were to find that the district court did not err in labeling these many statements as non-hearsay context, it nonetheless abused its discretion in admitting them without giving a contemporaneous limiting instruction. *United States v. Burton*, 937 F.2d 324, 327–28 (7th Cir. 1991). Like here, the district court in *Burton* opted to admit statements as context rather than examining the government's *Santiago* proffer as a basis on which to admit the statements. *Id*. at 327. Like here, Burton's jury heard the conversations "without any admonishment to consider [the declarant's] statements only for context and not for truthfulness." *Id*. And, like here, the jury instructions contained no limiting instruction. *Id*. And although this Court ultimately affirmed Burton's convictions on other grounds, this Court found the district court's ruling—identical to the one issued by the district court here—"untenable." *Id*.; *see also United States v. Clark*, 535 F.3d 571, 578 (7th Cir. 2008) (citing *Burton* favorably post-*Crawford* for the proposition that limiting instructions should accompany contextual statements).

Reversal is warranted where the admission of hearsay causes "actual prejudice or had substantial and injurious effect or influence in determining the

jury's verdict." *United States v. Williams*, 133 F.3d 1048, 1053 (7th Cir. 1998); *see also Jones v. Basinger*, 635 F.3d 1030, 1054–55 (7th Cir. 2011). One way in which that prejudice can be shown is by balancing the impact of the hearsay against the strength of the remaining evidence. *Williams*, 133 F.3d at 1051–53 (reversing because it was "obvious that the minimal evidence the government did have was bolstered by inadmissible hearsay" in the form of an informant's out-of-court statement identifying the defendant).

Improper hearsay was the heart of the government's case on the sole count of conviction, dwarfing any other evidence of Montez's guilt. Of the seven witnesses called at trial, the majority laid foundation for other evidence. *See* (Trial Tr. 271–99, 302–20, 450–457, 462–509) (foundational witnesses relating to wiretaps and transcript translation, expert witness relating to drug terms, and two law enforcement witnesses who participated in Montez's arrest and interview). Only two witnesses testified to direct knowledge of the facts underlying the charges: Agent Ostrow (who surveilled the October 27, 2011, alleged sale constituting Count Two) and Gallo (who participated in the June 17, 2012, alleged sale constituting Count Twenty-One). The jury acquitted Montez of both of those counts. But only out-of-court statements established the factual basis for the December 2011 transaction in Count Six, the sole count of conviction. (A.72–84) (Calls 6510, 6513, 6516, 6519, and 7052). Helein—the other voice on those calls—did not testify.

The government's closing argument lays bare the importance of these hearsay-laden transcripts to the government's case. There, the government opened

by directing the jury to the recorded conversations: "The defendant didn't know that law enforcement was listening as he was talking . . . . And in taking those actions and in speaking those words" the defendant demonstrated his guilt. (Trial Tr. 544.) In summarizing its evidence, the government stated that "[t]he first category [of evidence is] the defendant's own recorded words and acts." (Trial Tr. 545.) And as its capstone during rebuttal, the government emphasized the solidity of the "wiretap calls" as evidence that should be taken as true whole-cloth: "the calls don't lie." (Trial Tr. 570.) Admitting the improper hearsay prejudiced Montez, and this Court should vacate his conviction on Count Six.

II. The district court erroneously failed to strike from the record gang references that the government introduced after explicitly representing that it would not.

Although the government expressly represented to the defense and the court before trial that it would not reference gangs at trial, it nonetheless did so, twice:

MR. KNESS:	Are you a special agent with the FBI?
AGENT STAEHELY:	Yes, sir.
MR. KNESS:	Are you assigned to any particular group in the FBI?
AGENT STAEHELY:	Yes, sir.
MR. KNESS:	What are you assigned to?
AGENT STAEHELY:	A *gang task force*.
MR. KNESS:	What are the duties and responsibilities you have on the *gang task force*?

(A.51) (emphasis added). The district court failed to strike from the record what was obviously irrelevant and unfairly prejudicial evidence. (A.51–53.) This Court reviews evidentiary decisions for an abuse of discretion. *United States v. Price*, 418 F.3d 771, 779 (7th Cir. 2005).

To be admissible, evidence must both be relevant and must not be substantially more prejudicial than probative. Fed. R. Evid. 402, 403. As this Court has noted, evidence of gang affiliation is exceptionally prejudicial. *See United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996) (gang evidence "generally arouse[s] negative connotations and often invoke[s] images of criminal activity and deviant behavior" in the jurors' minds, and can lead them to convict a defendant on an improper, propensity basis). And although in some cases gang testimony may be probative for certain discrete purposes, in Montez's case it was not. *Cf. United States v. Ozuna*, 674 F.3d 677, 682 (7th Cir. 2012) (gang evidence admissible to show witness's bias "in favor of his fellow gang member"); *United States v. Sargent*, 98 F.3d 325, 328 (7th Cir. 1996) (gang evidence admissible to undermine defendant's claim that he was coerced by a gang to illegally purchase guns and prove instead that they were bought *for* the gang); *United States v. Thomas*, 86 F.3d 647, 652 (7th Cir. 1996) (gang evidence may be probative in conspiracy or other types of cases where "the interrelationship between people is a central issue").

There was no need to introduce any gang evidence in Montez's trial. At the very most, Montez was a "customer" of the drug trafficking organization—one who "wouldn't really buy much," at that. *See* (Trial Tr. 402) (Gallo labeling Montez as a

customer); *see also* (05/12/14 Hr'g Tr. 17) (government labeling Montez as a customer). His case did not involve a conspiracy, nor did his conviction turn on establishing that he had purchased drugs from a gang. (R.246 at 3, 8.) Rather, Montez was the sole defendant in a simple prosecution for possession-with-intent charges. Put simply, the gang evidence did not belong here. The "lack of relationship between the gang and the drugs" both completely removes any probative value of the evidence (inadmissible under Rule 403) and makes the evidence irrelevant (inadmissible under 402). *Cf. Irvin*, 87 F.3d at 865 n.6.

The district court failed to evaluate the substance or nature of the evidence, as required under Federal Rules of Evidence 401, 402 and 403, and instead based its ruling on the amount of airtime the evidence had before the jury. (A.52–53) (opining during sidebar that it was a "single comment" that was "so quick," not of "great importance" and "certainly not greatly prejudicial"). Although airtime may be relevant to this Court's harmlessness assessment within the fabric of the whole trial, *see, e.g.*, *United States v. Hardin*, 209 F.3d 652, 664 (7th Cir. 2000) (finding no prejudice from nine gang references in 12-day trial with 42 witnesses, a "wealth of other evidence," and a cautionary jury instruction), *vacated on other grounds by Robinson v. United States*, 531 U.S. 1135 (2001) (*mem.*), it has no place in a district court's threshold determination of relevance and undue prejudice, *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (before admitting evidence, a district court must first determine whether it is probative and material).

If the district court had employed the proper evidentiary standard, it would have been clear that the reference was irrelevant and highly prejudicial. Moreover, the district court failed to consider the government's express representation that it would not delve into gang evidence at trial and should have immediately and forcefully struck the improper and prejudicial references from the record. *United States v. Harris*, 325 F.3d 865, 871 n.4 (7th Cir. 2003) (noting that if there was some indication that the lapse was deliberate on the part of the government, it would be incumbent on the trial court to take "appropriate disciplinary action" that might include declaring a mistrial sua sponte).

Finally, the admission of this evidence was harmful when considered in the context of the entire trial. On direct appeal, an error is harmful if the reviewing court declares that it would have "a substantial and injurious effect or influence on the jury's verdict." *See Irvin*, 87 F.3d at 866 (citing *United States v. Hanson*, 994 F.2d 403, 407 (7th Cir. 1993)). Here, the district court's failure to strike gang evidence was harmful because of the presumptively prejudicial nature of gang evidence, *see United States v. Santiago*, 643 F.3d 1007, 1011 (7th Cir. 2011), and because of the relative weakness of the other evidence against Montez. The jury acquitted Montez on the two counts on which it had the most evidence, and the count of conviction was infected by improper hearsay, as discussed above. *See supra* Section I. In this unique posture, it is not only plausible, but probable that even fleeting references to presumptively prejudicial gang evidence substantially nudged the jurors toward conviction on Count Six. This is particularly so when the jury did

not have the benefit of hearing Helein's live testimony or witnessing whether he withered—as did Gallo—on cross-examination. Because inclusion of the irrelevant and prejudicial gang references harmed Montez, this Court should vacate Montez's conviction.

III. The district court erred in sentencing Daniel Montez as a career offender.

The Guidelines range functions as the "lodestar" at sentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). Yet, in order for that lodestar to function properly, it must point in the right direction. For that reason, sentencing proceedings must remain free from significant procedural errors in order to reach a properly calculated Guidelines range. *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

Here, the district court committed several procedural errors. For one, the district court relied on an outdated presentence investigation report, *compare* (R.888 at 1) (report completed in August 2014) *with* (A.1) (judgment indicating sentencing on January 5, 2016), that in turn relied on the wrong version of the Guidelines, *see* 18 U.S.C. § 3553(a)(4)(A)(ii) (2012) (instructing district courts to apply the guideline "in effect on the date the defendant is sentenced."). And because the probation officer could not obtain any charging documents for Montez's relevant prior convictions, she instead relied on a printout of Montez's convictions along with details from the arrest report—a serious flaw. *See* (R.888 at 10, 15); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that courts may not use police reports

to determine offense of conviction). Finally, the district court did not make any findings regarding which clause within the career offender's crime-of-violence provision encompassed the crimes it found as predicates for its career-offender determination.

It may be that none of these procedural missteps alone warrant reversal. But they reflect a lack of attention that requires quite a bit of untangling on appeal. For example, in August 2015, the Sentencing Commission promulgated a proposed amendment deleting the residual clause in the crime-of-violence definition. *See* Proposed Amendment to the Sentencing Guidelines, 80 Fed. Reg. 79,294 (August 12, 2015). Had the probation office prepared an updated PSR reflecting the most current Guidelines, it and the district court would have had to account for the Supreme Court's recent decision in *Johnson* as well as the Sentencing Commission's imminent amendment.

Similarly, the district court failed to specify which clause of the career-offender guideline governed Montez's prior convictions. If it had made those findings and had used the residual clause, Montez would be entitled to an immediate resentencing. *United States v. Hurlburt*, 835 F.3d 715, 718 (7th Cir. 2016) (invalidating the career-offender guideline residual clause on due process vagueness grounds). What is more, had the district court executed these necessary procedural steps, it might not have committed the error—detailed below—of applying the career-offender enhancement when sentencing Montez to 210 months' imprisonment for his first federal offense.

This Court reviews procedural sentencing errors de novo, fact finding for clear error, and substantive reasonableness for an abuse of discretion. *United States v. Scott*, 555 F.3d 605, 608 (7th Cir. 2009). The most serious procedural misstep is the erroneous application of the career-offender guideline. The Guidelines' career-offender enhancement only applies to an adult defendant convicted of a controlled substance offense with "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. Sentencing Comm'n 2016). On first glance, Montez's criminal history appears lengthy, but the probation office identified only two of Montez's prior convictions as predicates for the career-offender enhancement: his 1984 murder conviction and his 2006 conviction for aggravated battery. (R.888 at 9.) Although the former is a career-offender predicate, *see* U.S.S.G. § 4B1.2, cmt n.1 (U.S. Sentencing Comm'n 2016) (listing murder as a crime of violence), the latter is not.

A. Montez is not a career offender because Illinois's 2006 version of aggravated battery is not a crime of violence.

As noted above, the district court did not articulate which clause of the career-offender provision governed its decision, but to the extent that *Hurlburt* eliminates the residual clause as a viable basis for the enhancement, Montez proceeds under an elements-clause analysis.[3] *Hurlburt*, 835 F.3d at 718. To fall under this clause, an element of the 2006 version of aggravated battery must

[3] Aggravated battery of a peace officer is not included in the enumerated-offenses clause nor is it listed in the application notes.

categorically require the use, attempted use, or threatened use of "violent physical force." U.S.S.G. § 4B1.2(a); *United States v. Hampton*, 675 F.3d 720, 730 n.2 (7th Cir. 2012).

As a threshold matter, the career-offender inquiry begins by discerning the offense of conviction. Here, the probation office concluded that Montez had a 2006 Illinois conviction for aggravated battery of a peace officer. (R.888 at 15); *see also* 720 Ill. Comp. Stat. 5/12-4(b)(6) (2006); (A.87) (reproducing the 2006 version of Illinois's aggravated battery statute). Yet the PSR resorts to police rap sheets and reports, (R.888 at 10, 15), a prohibited basis for identifying the offense at issue, *see Shepard*, 544 U.S. at 16. Rather, the probation office should have used approved *Shepard* documents, at a minimum a charging document, to start the inquiry. Its failure to do so is an independent basis for reversal. *Shepard*, 544 U.S. at 26.

Even putting aside the probation office's flawed methodology for concluding that Montez was convicted of aggravated battery of a peace officer, reversal is still warranted because that offense is not a crime of violence. This case hinges on the distinction between statutory divisibility and indivisibility. This Court interprets Illinois's battery statute as divisible, but the Supreme Court's 2016 decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016) calls that into question.

Elements make up the constituent parts of any substantive criminal offense. The Supreme Court recently clarified the distinction between a crime's elements and its means of commission, and explicitly pointed federal courts to state courts' interpretations in drawing that distinction. *Mathis*, 136 S. Ct. at 2249 (directing

federal courts to look to state court decisions on the elements of state criminal offenses); *Johnson v. United States*, 559 U.S. 133, 138 (2010) (reasoning that because the elements of a state criminal offense is not a question of federal law, federal courts are bound by state supreme court interpretation of state criminal statutes); *see also United States v. Edwards*, 836 F.3d 831, 836 (7th Cir. 2016) (quoting *Mathis* to hold that a "decision by the state supreme court authoritatively construing the relevant statute will both begin and end the inquiry").

The Supreme Court in *Mathis* then clarified that there is a difference between divisible statutes containing alternative elements and indivisible statutes listing multiple factual means. *See Mathis*, 136 S. Ct. at 2253–54. At bottom, a divisible statute contains alternative elements creating multiple crimes carrying different punishments. *See id.* at 2246. On the other hand, an indivisible statute provides multiple factual means and the prosecutor need not prove any one factual basis beyond a reasonable doubt, and the state courts' analysis of that question is dispositive. *Id.*; *see also Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination . . . .").

Turning to the crime of aggravated battery of a peace officer, the 2006 version of aggravated battery is divisible; it lists different punishments for different elements, thereby creating multiple crimes. *See* (A.89–90) (720 Ill. Comp. Stat. ILCS 5/12-4(e) (2006) providing that violations of 12-4(a) and 12-4(b) incurred

different punishments); *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."). In relevant part, the 2006 version of Illinois's aggravated battery statute provided that "[i]n committing a battery, a person commits aggravated battery if he or she . . . [k]nows the individual harmed to be a peace officer" engaged in their official duties. 720 Ill. Comp. Stat. 5/12-4(b)(6) (2006); (A.88.) Illinois state courts' interpretation of this statute confirms that aggravated battery of a peace officer in 2006 required that an individual: (1) commit a simple battery in violation of 720 Ill. Comp. Stat. 5/12-3; (2) of a peace officer performing his or her official duty. *Illinois v. Hale*, 395 N.E.2d 929, 931–32 (Ill. 1979).

Because one element of the crime of aggravated battery of a peace officer is the commission of an underlying simple battery under 720 Ill. Comp. Stat. 5/12-3, the pivotal question becomes what elements comprise simple battery and, then, whether that crime is divisible or indivisible. As noted above, this Court has previously held that simple battery is divisible into two separate crimes—a bodily harm version and an insulting-contact version. *See United States v. Rodriguez-Gomez*, 608 F.3d 969, 974 (7th Cir. 2010). But this Court did so without consulting Illinois courts' interpretations of that statute, as required by *Johnson* and *Mathis*.

Illinois courts have long interpreted simple battery as indivisible. The Illinois Supreme Court interprets the alternatives in the battery statute as alternative

means, and therefore the Illinois battery statute must be indivisible.[4] *See People v. Grieco*, 255 N.E.2d 897, 899 (Ill. 1970). In *Grieco*, the defendant challenged the battery indictment for failing to specify which type of contact he performed, thus omitting an essential element. *Id.* at 899. But the Illinois Supreme Court disagreed, reasoning that because the only element of a battery is a willful touching, a prosecutor need not include either alternative in an indictment for battery. *Id.* Therefore, the bodily harm and insulting-contact alternatives are mere evidentiary concerns—not elements of the offense. *Id.*; *see also People v. Bowman*, 270 N.E.2d 285, 287 (Ill. App. Ct. 1971) *aff'd People v. Graves*, 437 N.E.2d 866, 872 (Ill. App. Ct. 1982) (adopting the reasoning in *Grieco*).

And unlike this Court, which has on occasion[5] found aggravated battery of a peace officer linked only to the bodily harm version of battery, *United States v. Thigpen*, 456 F.3d 766, 770 (7th Cir. 2006), Illinois courts have not done so. *See*

[4] Reinforcing this conclusion is the fact that the battery statute does not include multiple punishments.

[5] This Court has previously questioned whether aggravated battery of a police officer qualified as a crime of violence. *See United States v. Humphreys*, 468 F.3d 1051, 1055 (7th Cir. 2006) (holding that "some doubt" existed about whether "aggravated battery under the Illinois statute may in some cases be nonviolent"); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 537 (7th Cir. 2008) (noting that even offensive conduct such as spitting directed toward a police officer may satisfy Illinois's aggravated battery statute). *Rodriguez-Gomez* itself concluded that the defendant's aggravated battery of a police officer was violent based on its fact-specific inquiry into the defendant's actual conduct. *Rodriguez-Gomez*, 608 F.3d at 974 (inferring from the factual statement in the PSR, apparently from a charging document, that Rodriguez-Gomez committed a bodily harm battery). And though at other times this Court has presumed that aggravated battery is always a crime of violence, *Stanley v. United States*, 827 F.3d 562, 566 (7th Cir. 2016); *Hill v. Werlinger*, 695 F.3d 644, 649–50 (7th Cir. 2012); *United States v. Thigpen*, 456 F.3d 766, 770 (7th Cir. 2006), it did so without resort to the Illinois courts' interpretation of its own statute.

Hale, 395 N.E.2d at 931–32 (holding that aggravated battery of a peace officer may be accomplished by mere insulting or provoking contact as well as bodily injury); *see also Illinois v. Peck*, 633 N.E.2d 222, 223 (Ill. App. Ct. 1994) (reasoning that Illinois's battery statute punishes offensive contact with an individual "by any means," including spitting). Given the Illinois state courts' clarity on the issue, federal courts need not independently interpret the elements of either battery or aggravated battery.

Thus, in the wake of *Mathis* and applying the Illinois courts' interpretations of its own statutes, simple battery is indivisible and aggravated battery is divisible. Importantly, because the underlying simple battery statute is indivisible the aggravated battery cannot qualify as a crime of violence. In *Johnson v. United States*, the Supreme Court specified that the type of physical force defined by the elements clause must be a "violent" force, "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. Even more specifically, the term "violent" connotes a "substantial degree of force."[6] *Id.*

Here, the lowest common denominator of conduct governs—in the case of the battery statute, something as offensive and non-violent as spitting in the direction of a peace officer. *See Garcia-Meza v. Mukasey*, 516 F.3d 535, 537 (7th Cir. 2008).

[6] The Guidelines definition of "crime of violence" is nearly identical to the Armed Career Criminal Act's definition of "violent felony," and this Court treats the two provisions "interchangeably." *See* 18 U.S.C. § 924(e); *Hampton*, 675 F.3d at 730 n.2 ("The definition of crime of violence in the career offender guideline is almost identical to the definition of violent felony in the ACCA; therefore our caselaw interpreting the two definitions is interchangeable.") (internal quotations and citations omitted).

Put another way, the battery element of the 2006 aggravated battery statute encompasses a broad range of non-violent force. Though bodily injury may lead to conviction, conviction may also result from the mere "dyne" it takes to spit. *See Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003). On that basis, Illinois's 2006 aggravated battery statute does not categorically require the use, attempted use or threatened use of violent physical force. Therefore, it cannot qualify as a predicate offense for the career offender enhancement.

B. Montez received a substantively unreasonable 210-month sentence for his first federal offense.

For Montez's conviction on a single count of possession-with-intent, the improper application of the career offender enhancement led to an extraordinarily high, and incorrect, Guidelines range of 210 to 262 months. (R.888 at 26); (Sentencing Tr. 40.) Crucially, "[w]hen a defendant is sentenced under an incorrect Guidelines range[,] . . . the error itself can, *and most often will*, be sufficient to show a reasonable probability of a different outcome but for the error." *Molina-Martinez*, 136 S. Ct. at 1346 (emphasis added). In Montez's case, the error produced just such an incongruous sentence for a first-time federal offender.

The district court did not calculate Montez's sentence absent the enhancement, but the advisory directive of the Guidelines range still has a potent anchoring effect. *See Hurlburt*, 835 F.3d at 723–24. Indeed, Sentencing Commission data "indicate that when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013). Thus, the

Guidelines are not "merely a volume that the district court reads with academic interest in the course of sentencing." *Id.* at 2287. Rather, the Guidelines range forms the "lodestar" for most sentencing proceedings. *Molina-Martinez*, 136 S. Ct. at 1346.

And the career offender guideline is a particularly bright lodestar. Among defendants sentenced for the same offense, less than 1% of drug offenders sentenced *without* the career offender enhancement receive sentences longer than the lowest end of the range for defendants sentenced with the career offender enhancement. *See* Brief of the Fed. Pub. & Cmty. Defs. & the Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae in Support of Petitioner at 14, *Jones v. United States*, No. 15-8629 (U.S. Apr. 21, 2016). And the average sentence for a career offender convicted of a drug offense is twice as long as the sentence for a drug offender not given the enhancement. *See* Sentencing Resource Counsel Project, Data Analyses 1 (2016). Thus, because the district court's erroneous application of the career offender enhancement produced a substantively unreasonable sentence for Montez, this Court should remand for resentencing.

IV. The government engaged in misconduct when it presented incorrect information to the grand jury and failed to timely correct that error before trial.

Montez believes that the government violated his due process rights when it presented evidence to the grand jury relating to what ultimately became Count Six of the indictment—the December 12, 2011, transaction between Helein and Montez. *See* (R.805 at 6.) According to Montez, the government relied on Call 6510 to

support its claim that Montez engaged in a drug transaction on December 12. (R.805 at 4); (R.1151 at 4–5.) Agent Roecker testified that during the call Helein asked Montez whether he was going to want "the tia." (R.805 at 4.) The government also represented in its criminal complaint that Call 6519 likewise contained "tia" references. (R.1-6 at 140.)

Montez believes that the government—which had the actual recordings of the calls—should have known that Roecker's testimony identifying the code-word "tia" in call 6510 was incorrect. When it discovered the discrepancy, the government should have affirmatively moved to remediate the error, either by dismissing the count, returning to the grand jury so that it could make a probable cause determination based on accurate evidence or, at a minimum, alerting the defendant in a timely manner. *See* Fed. R. Crim. P. 16(c) (prosecutor has continuing duty to disclose material discoverable under defendant's prior requests); (R.376) (defendant's discovery request covering transcripts); *United States v. Mackin*, 793 F.3d 703, 707 (7th Cir. 2015) (reversing for Rule 16 violation); *see also* (R.805 at 7) (citing *Napue v. Illinois*, 360 U.S. 264 (1959), for proposition that due process is violated when a prosecutor fails to correct a statement known to be false); (R.805 at 8) (citing Federal Rule of Criminal Procedure 6(f)); (R.1151 at 9) (citing *Griffin v. Pierce*, 622 F.3d 831, 841–42 (7th Cir. 2010), for the proposition that convictions based on false evidence violate due process).

This Court reviews for an abuse of discretion denials of motions for a new trial based on prosecutorial misconduct. *United States v. Palivos*, 486 F.3d 250, 256

(7th Cir. 2007). If this Court decides that the government's actions were improper, it weighs the misconduct in the context of the case as a whole, *id.*, and determines if the misconduct "so infect[ed] the proceedings" as to deny Montez due process, *United States v. Wilson*, 922 F.2d 1336, 1340 (7th Cir. 1991).

Montez submits that he suffered the kind of prejudice that warrants a reversal. (R.805 at 9.) Specifically, Montez claims unfair surprise at the variance between the facts presented to the grand jury and represented in the government's *Santiago* proffer (which also continued to use the incorrect "tia" term), and its proof at trial, which contained no reference to "the tia" for purposes of the transaction underlying Count Six. *See*, *e.g.*, (R.805 at 7–9.) Montez also asserts that the government's insistence on the term "tia" suggested authenticity problems with the evidence underlying Count Six. (R.805 at 6, 9.)

Furthermore, Montez notes that these issues arose so close to his trial that he was not able to fully present his defense. (R.805 at 7, 9); *see also* (R.1151 at 12) (citing *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969), for the proposition that prosecutors cannot change the essential facts proved at trial). Although some defendants received transcripts by the end of April 2014, the dates on which the government corrected their erroneous transcripts and turned them over to Montez are unclear from the record. *See* (05/16/2014 Hr'g Tr. 1–7, 19–21, 25–28) (indicating that certain transcripts were not provided to defendant Mojica until late April). Although there are several references to production dates in February, March and April 2014, many of those appeared to be limited to Mojica specifically. (05/16/2014

Hr'g Tr. 1–7, 19–21, 25–28.) There is nothing in the record confirming whether Montez or his lawyer received these same transcripts before trial and, if so, when they received them. What is clear, however, is that as late as April 30, 2014, the government had not corrected the transcripts relating to Montez, as it relied on the "tia" evidence in its *Santiago* proffer filed on that date. (R.682 at 34–35.) No other hearing occurred between May 16, 2014, and the trial date on June 10, 2014.

Because a defendant is entitled to a fair trial, which includes at a minimum a "meaningful opportunity to defend against the charge" through preparation, Montez believes that he should be granted a new trial. *Musacchio v. United States*, 136 S. Ct. 709, 715 (2015) (*quoting Jackson v. Virginia*, 443 U.S. 307 (1979)).

CONCLUSION

For the foregoing reasons, Appellant Daniel Montez respectfully requests that the Court vacate his conviction and remand for a new trial or, in the alternative, remand his case to the district court for resentencing.

Respectfully submitted,

Daniel Montez
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN

Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 9,534 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in in 11-point Century Schoolbook font.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: November 22, 2016

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Daniel Montez, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 22, 2016, which will send notice of the filing to counsel of record in the case.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: November 22, 2016

CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Daniel Montez, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: November 22, 2016

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

Record 1232, Judgment

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
Daniel Montez

JUDGMENT IN A CRIMINAL CASE

Case Number: 12 CR 755-8

USM Number: 45087-424

Paul Camarera
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 6 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. Section 841(a)(1)	Possession with Intent to Distribute Cocaine	June 25, 2012	6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2 and 21.

☒ Count(s) Any forfeiture allegation is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 5, 2016
Date of Imposition of Judgment

Signature of Judge

Ronald A. Guzman, U.S. District Court Judge
Name and Title of Judge

2/9/2016
Date

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Two Hundred Ten (210) Months.

☒ The court makes the following recommendations to the Bureau of Prisons: Defendant be placed at a Bureau of Prisons facility that offers a Residential Drug Abuse Program (RDAP).

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☐ before 2:00 pm on
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

MANDATORY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3583(d)

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
Three (3) Years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The court imposes those conditions identified by checkmarks below:

The defendant shall, during the period of supervised release:

- ☒ (1) not commit another Federal, State, or local crime.
- ☒ (2) not unlawfully possess a controlled substance.
- ☐ (3) attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. [Use for a first conviction of a domestic violence crime, as defined in **§ 3561(b)**.]
- ☐ (4) register and comply with all requirements of the Sex Offender Registration and Notification Act **(42 U.S.C. § 16913)**.
- ☒ (5) cooperate in the collection of a DNA sample if the collection of such a sample is required by law.
- ☒ (6) refrain from any unlawful use of a controlled substance AND submit to one drug test within 15 days of release on supervised release and at least two periodic tests thereafter, up to 104 periodic tests for use of a controlled substance during each year of supervised release. [This mandatory condition may be ameliorated or suspended by the court for any defendant if reliable sentencing information indicates a low risk of future substance abuse by the defendant.]

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3563(b) AND 18 U.S.C § 3583(d)

Discretionary Conditions — The court orders that the defendant abide by the following conditions during the term of supervised release because such conditions are reasonably related to the factors set forth in **§ 3553(a)(1)** and **(a)(2)(B), (C), and (D);** such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in **§ 3553 (a)(2) (B), (C), and (D);** and such conditions are consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to **28 U.S.C. 994a**. The court imposes those conditions identified by checkmarks below:

The defendant shall, during the period of supervised release:

- ☒ (1) provide financial support to dependents if financially able.
- ☐ (2) make restitution to a victim of the offense under **§ 3556** (but not subject to the limitation of **§ 3663(a)** or **§ 3663A(c)(1)(A)**).
- ☐ (3) give to the victims of the offense notice pursuant to the provisions of **§ 3555**, as follows: _____
- ☒ (4) seek, and work conscientiously, at lawful employment or pursue conscientiously a course of study or vocational training that will equip the defendant for employment.
- ☐ (5) refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances; (if checked yes, please indicate restriction(s) _____.
- ☒ (6) refrain from knowingly meeting or communicating with any person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity and from:
  - ☐ visiting the following type of places: _____.
  - ☒ knowingly meeting or communicating with the following persons: those the defendant knows as current or former gang members.
- ☒ (7) refrain from excessive use of alcohol (defined as having a blood alcohol concentration greater than 0.08%), or any use of a narcotic drug or other controlled substance, as defined in **§ 102** of the Controlled Substances Act (**21 U.S.C. § 802**), without a prescription by a licensed medical practitioner.
- ☐ (8) refrain from possessing a firearm, destructive device, or other dangerous weapon.
- ☒ (9)
  - ☒ participate, at the direction of a probation officer, in a substance abuse treatment program, which may include urine testing up to a maximum of 104 tests per year.
  - ☐ participate, at the direction of a probation officer, in a mental health treatment program, which may include the use of prescription medications.
  - ☐ participate, at the direction of a probation officer, in medical care; (if checked yes, please specify: _____.)
- ☐ (10) (intermittent confinement): remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling _____ [no more than the lesser of one year or the term of imprisonment authorized for the offense], during the first year of the term of supervised release (provided, however, that a condition set forth in **§ 3563(b)(10)** shall be

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

imposed only for a violation of a condition of supervised release in accordance with **§ 3583(e)(2)** and only when facilities are available) for the following period .

☐ (11) (community confinement): reside at, or participate in the program of a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of supervised release, for a period of months.

☐ (12) work in community service for hours as directed by a probation officer.

☐ (13) reside in the following place or area: , or refrain from residing in a specified place or area: .

☒ (14) remain within the jurisdiction where the defendant is being supervised, unless granted permission to leave by the court or a probation officer.

☒ (15) report to a probation officer as directed by the court or a probation officer.

☒ (16) ☒ permit a probation officer to visit the defendant at any reasonable time
☒ at home ☒ at work ☒ at school ☐ at a community service location
☐ other reasonable location specified by a probation officer
☒ permit confiscation of any contraband observed in plain view of the probation officer.

☒ (17) notify a probation officer promptly, within 72 hours, of any change in residence, employer, or workplace and, absent constitutional or other legal privilege, answer inquiries by a probation officer.

☒ (18) notify a probation officer promptly, within 72 hours, if arrested or questioned by a law enforcement officer.

☐ (19) (home confinement): remain at defendant's place of residence for a total of months during nonworking hours. [This condition may be imposed only as an alternative to incarceration.]
☐ Compliance with this condition shall be monitored by telephonic or electronic signaling devices (the selection of which shall be determined by a probation officer). Electronic monitoring shall ordinarily be used in connection with home detention as it provides continuous monitoring of the defendant's whereabouts. Voice identification may be used in lieu of electronic monitoring to monitor home confinement and provides for random monitoring of the defendant's whereabouts. If the defendant is unable to wear an electronic monitoring device due to health or medical reasons, it is recommended that home confinement with voice identification be ordered, which will provide for random checks on the defendant's whereabouts. Home detention with electronic monitoring or voice identification is not deemed appropriate and cannot be effectively administered in cases in which the offender has no bona fide residence, has a history of violent behavior, serious mental health problems, or substance abuse; has pending criminal charges elsewhere; requires frequent travel inside or outside the district; or is required to work more than 60 hours per week.
☐ The defendant shall pay the cost of electronic monitoring or voice identification at the daily contractual rate, if the defendant is financially able to do so.
☐ The Court waives the electronic/location monitoring component of this condition.

☐ (20) comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living.

☐ (21) be surrendered to a duly authorized official of the Homeland Security Department for a determination on the issue of deportability by the appropriate authority in accordance with the laws under the Immigration and Nationality Act and the established implementing regulations. If ordered deported, the defendant shall not reenter the United States without obtaining, in advance, the express written consent of the Attorney General or the Secretary of the Department of Homeland Security.

☒ (22) satisfy such other special conditions as ordered below.

☐ (23) (if required to register under the Sex Offender Registration and Notification Act) submit at any time, with or without a warrant, to a search of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, by any law enforcement or probation officer having reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, and by any probation officer in the lawful discharge of the officer's supervision functions (see special conditions section).

☐ (24) Other:

SPECIAL CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C. 3563(b)(22) and 3583(d)

The court imposes those conditions identified by checkmarks below:

The defendant shall, during the term of supervised release:

☐ (1) if the defendant has not obtained a high school diploma or equivalent, participate in a General Educational Development (GED) preparation course and seek to obtain a GED within the first year of supervision.

☒ (2) participate in an approved job skill-training program at the direction of a probation officer within the first 60 days of placement on supervision.

☐ (3) if unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

employment, perform at least 20 hours of community service per week at the direction of the U.S. Probation Office until gainfully employed.

☐ The amount of community service shall not exceed ____ hours.

☐ (4) not maintain employment where he/she has access to other individual's personal information, including, but not limited to, Social Security numbers and credit card numbers (or money) unless approved by a probation officer.

☐ (5) not incur new credit charges or open additional lines of credit without the approval of a probation officer unless the defendant is in compliance with the financial obligations imposed by this judgment.

☐ (6) provide a probation officer with access to any requested financial information necessary to monitor compliance with conditions of supervised release.

☐ (7) notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

☐ (8) provide documentation to the IRS and pay taxes as required by law.

☐ (9) participate in a sex offender treatment program. The specific program and provider will be determined by a probation officer. The defendant shall comply with all recommended treatment which may include psychological and physiological testing. The defendant shall maintain use of all prescribed medications.

- ☐ The defendant shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the United States Probation Office. The defendant shall consent to the installation of computer monitoring software on all identified computers to which the defendant has access. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent the software.
- ☐ The cost of the monitoring shall be paid by the defendant at the monthly contractual rate, if the defendant is financially able, subject to satisfaction of other financial obligations imposed by this judgment.
- ☐ The defendant shall not possess or use any device with access to any online computer service at any location (including place of employment) without the prior approval of a probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system.
- ☐ The defendant shall not possess any device that could be used for covert photography without the prior approval of a probation officer.
- ☐ The defendant shall not view or possess child pornography. If the treatment provider determines that exposure to other sexually stimulating material may be detrimental to the treatment process, or that additional conditions are likely to assist the treatment process, such proposed conditions shall be promptly presented to the court, for a determination, pursuant to **18 U.S.C. § 3583(e)(2),** regarding whether to enlarge or otherwise modify the conditions of supervision to include conditions consistent with the recommendations of the treatment provider.
- ☐ The defendant shall not, without the approval of a probation officer and treatment provider, engage in activities that will put him or her in unsupervised private contact with any person under the age of 18, or visit locations where children regularly congregate (*e.g.*, locations specified in the Sex Offender Registration and Notification Act.)
- ☐ This condition does not apply to the defendant's family members: ____ [Names]
- ☐ The defendant's employment shall be restricted to the district and division where he resides or is supervised, unless approval is granted by a probation officer. Prior to accepting any form of employment, the defendant shall seek the approval of a probation officer, in order to allow the probation officer the opportunity to assess the level of risk to the community the defendant will pose if employed in a particular capacity. The defendant shall not participate in any volunteer activity that may cause the defendant to come into direct contact with children except under circumstances approved in advance by a probation officer and treatment provider.
- ☐ The defendant shall provide the probation officer with copies of the defendant's telephone bills, all credit card statements/receipts, and any other financial information requested.
- ☐ The defendant shall comply with all state and local laws pertaining to convicted sex offenders, including such laws that impose restrictions beyond those set forth in this order.

☐ (10) pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release. The defendant's monthly payment schedule shall be an amount that is at least $____ or ____% of his net monthly income, defined as income net of reasonable expenses for basic necessities such as food, shelter, utilities, insurance, and employment-related expenses.

☒ (11) not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

☐ (12) repay the United States "buy money" in the amount of $ ____ which the defendant received during the commission of this offense.

☐ (13) Other: ____

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals	$100	$	$

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to **18 U.S.C. § 3664(i)**, all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant **to 18 U.S.C. § 3612(f)**. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g)**.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the .

☐ the interest requirement for the is modified as follows:

* Findings for the total amount of losses are required under **Chapters 109A, 110, 110A, and 113A of Title 18** for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DANIEL MONTEZ
CASE NUMBER: 12 CR 755-8

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $100 due immediately.

☐ balance due not later than , or

☐ balance due in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if Appropriate**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Record 669, Memorandum Opinion and Order on Motion to Sever and Motion to Preclude Gang Affiliation Evidence

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
	)	
	)	**No. 12 CR 755**
	)	
	)	**Hon. Ronald A. Guzmán**
v.	)	
	)	
Jose De Jesus Ramirez-Padilla, *et al.*	)	
	)	
	)	

Memorandum Opinion and Order

Defendant, Daniel Montez, has filed a motion to sever and, in the alternative, a motion to preclude the government from introducing evidence of gang affiliation. Mr. Montez is charged with possession with intent to distribute mixtures containing detectable amounts of cocaine. He is not charged with being a member of the conspiracy to distribute the same. He contends that Count I which charges some of his codefendants with conspiracy and Counts II, VI and XXI for which he is charged, were improperly joined under Rule 8(b). His concern is that the he will be prejudiced by the likelihood that jury may hold him responsible for the amounts of cocaine associated with those other defendants to him. In short, he argues that: "[I]f he is forced to proceed to trial with co-defendants charged with conspiring with each other to possess with intent to distribute cocaine and the amounts of cocaine alleged to have been possessed and distributed by those conspirators, that the jury will unfairly attribute those "conspired" amounts to the

amounts he is alleged to have possessed separate from the conspiracy: a conspiracy which he did not join, and for which he was not charged.

Rule 8(b) governs the joinder of multiple defendants in a single indictment. *United States v. Carter*, 695 F.3d 690, 700 (7th Cir. 2012). It provides, in part, that "[t]he indictment ... may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Rule 8(b) "is to be construed broadly to allow liberal joinder in order to enhance judicial efficiency." *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995). Joinder is appropriate when the defendants are charged with crimes that well up out of the same series of such acts, but they need not be the same crimes." *United States v. Williams*, 553 F.3d 1073, 1078 (7th Cir. 2009); *United States v. Cavale*, 688 F.2d 1098, 1106 (7th Cir. 1982). Thus, a defendant charged with a conspiracy to distribute heroin may properly be joined with others who conspired and others who were involved in the execution of the conspiracy. Proof of acts or transactions in furtherance of the conspiracy would be admissible and likely necessary to establish the conspiracy itself. The mere existence of evidentiary spill-over is not normally sufficient grounds for severing a properly joined defendant. *U.S. v. Abdelhaq*, 246 F.3d 990, 992 (7th Cir. 2001) (citing cases which have rejected severance on the basis of spillover evidence).

From the pleadings it would appear that a severance would cause the government to have to call many of the same witnesses to testify at both trials. Acts the

defendant was involved in which also furthered the conspiracy would be admissible and likely necessary evidence in separate trials against his co-defendants as well. Thus, separate trials would require the government to prove many of the same acts and occurrences twice, or possibly 3 or 4 times as there are several defendants not participants in the conspiracy still remaining in the case. Against this, we weigh the potential prejudice to the defendant.

We find that the likelihood of prejudice to the defendant is not significant in this case. The elements of the conspiracy are different and easily separated both conceptually and on the evidence from those of the actual possession or distribution of the cocaine. In addition, counts 2, 6 and 21 are not dependent upon, nor do they require, that the jury determine a specific amount of controlled substance, only that a detectable amount be shown. It is not likely, therefore, that a jury will become confused and attribute testimony as to the amounts of cocaine adduced is support of the allegations of the conspiracy described in Count One to the defendant. His alleged crimes are quite easily viewed and considered separately. Moreover, the jury will be instructed that each defendant and each count are to be judged separately on the evidence appropriate to that defendant and offense only. A finding of guilt or innocence as to one count or any single defendant is not to be considered as evidence of guilt as to any other count or defendant.

For the reasons given above, the defendant's, motion to sever is denied.

The Government has declared it does not intend to introduce evidence of Mr. Montez' gang affiliation, therefore, the motion to bar evidence of the same is denied as moot.

Dated: April 18, 2014

SO ORDERED **ENTER:**

Ronald A. Guzmán

RONALD A. GUZMÁN
District Judge

Record 778, Memorandum Opinion and Order on Motion to Exclude Hearsay Evidence

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
v.	)	**No. 12 cr 755-8**
	)	
Daniel Montez,	)	**Judge Ronald A. Guzmán**
	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Defendant Daniel Montez moves the Court for an order excluding as hearsay certain tape-recorded conversations between himself and Helein Ramirez-Padilla, a codefendant. The government intends to introduce a number of tape-recorded telephone conversations obtained during authorized wiretap surveillance as evidence of the defendant's purchase and possession with intent to deliver cocaine.[1] Out-of-court statements made by the defendant are of course, admissions, which are an exception to the hearsay rule. Statements made by Ramirez-Padilla, however, are not admissions and would constitute hearsay only if offered for the truth of the matters asserted. But it is well-established that "when statements are merely offered to show context, they are not being offered for the truth of the matter asserted, and therefore, [do] not require confrontation." *United States v. Nettles,* 476 F.3d 508, 517 (7th Cir. 2007). *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause also does not

[1] Specifically, the defendant objects to the introduction of telephone calls denominated as government exhibits TP3 Call 309, TP3 Call 314, TP3 Call 316, and TP3 Call 322.

bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.") ; *United States v. Tolliver,* 454 F.3d 660, 666 (7th Cir. 2006).

The defendant insists that every statement made by Ramirez-Padilla in the complained of recorded conversations is being offered for the truth of the matter asserted, and is therefore inadmissible hearsay. The government, on the other hand, asserts that the statements are not being offered to prove the truth of the matters asserted, but rather merely to give context to the statements made by the defendant during his conversations with Ramirez-Padilla. Indeed, it would be difficult if not impossible to understand what the defendant is saying in the recorded conversations and what he intends if only his half of the conversation were allowed into evidence. Ramirez-Padilla was not at any time a government informant or cooperating individual. He was one of the over 20 defendants named in the indictment along with the defendant. Therefore, he had no incentive to incriminate the defendant during the course of conversations that he did not know were being recorded by the government and would be used as evidence against him as well.

In his blanket objection to every statement in the recordings by Ramirez-Padilla, the defendant includes expressions that are neither statements nor hearsay. For example, the defendant objects to the statement by Ramirez-Padilla on line 11 of TP 3 Call 309: "No, dude, it's just that, I was sleeping dude. . . .You called me very late dude, no man, but if I didn't answer is because I was sleeping." But this comment is in response to and helps to put into context the defendant's preceding question to Ramirez Padilla: "F_ _ _, son of a bitch, are you on vacation?" Taking these statements together, the listener can infer that the defendant had previously attempted to call Ramirez-Padilla but was unable to contact him, hence the query as to whether

Ramirez-Padilla was on vacation. Without this response, it would be very difficult to understand why the defendant was asking Ramirez-Padilla if he was on vacation. Indeed, without this context, one might conclude that the entire conversation had to do with Ramirez-Padilla's vacation.

Later in the conversation, Ramirez-Padilla's contributions consist of "Uh-huh" (line 22), "Where . . ." (line 26), "Let me know where, somewhere around" (line 30), and "Yes" (line 35). It is doubtful that any of these quotes are even statements as defined in Federal Rule of Evidence ("Rule") 801. Line 22 is, at most, Ramirez-Padilla agreeing with the defendant's assertion of fact and intent. Line 26 is a question, while Line 30 is a directive or command, not an assertion of any fact or matter. All of these are direct responses to the defendant's statements and give context to the defendant's preceding or following statements. Line 35 does not appear to assert any fact or matter, and is, at most, a statement that the declarant will do as the defendant instructs. The entire conversation describes the defendant informing Ramirez-Padilla of his needs and inquiring of Ramirez-Padilla if, where and when he will be able to meet those needs. The conversation would make little sense without Ramirez-Padilla's responses to the defendant's questions and comments. As another example, at the end of the conversation the defendant says "okay" three separate times (Lines 53, 57, 61). Without Ramirez-Padilla's preceding questions or comments, the trier of fact would have no way of knowing with what the defendant was agreeing.

When asked by the Court to explain his specific arguments with respect to these particular entries, defense counsel, rather than answering directly, insisted on directing the Court's attention to a portion of TP 3 Call 6510 and arguing that a portion of that transcript was

contradicted by the government's description of the very same conversation in its *Santiago* proffer to a separate defendant. The Court finds this response inapposite.

Whether specific statements in the transcript of one recorded conversation are hearsay and whether the transcript of another recorded conversation is accurate are two entirely different issues. Defense counsel's conflation of these issues during oral argument hopelessly muddled his motion to exclude. Therefore, the Court orders the defendant to file an amended motion to exclude that specifically identifies each of Ramirez-Padilla's statements that the defendant contends is inadmissible hearsay as defined by Rule 801, the basis for the defendant's belief that each of the identified statements constitutes hearsay, and his response to the government's contention that each identified statement is not offered for the truth of the matter it asserts but as context for defendant's admissions.

Dated: June 10, 2014

SO ORDERED **ENTER:**

Ronald A. Guzmán

RONALD A. GUZMÁN
District Judge

January 5, 2016 Sentencing Hearing Transcript [pp. 23–32]

So it's time for you to sum up now.

DEFENDANT: I will, Your Honor. Thank you.

In summary, Your Honor, not the words "the tia" as allegedly spoken by Helene, however Montez was going to, quote, "want the tia," unquote, 14 grams of cocaine, not the mind-reading of Montez wanting to buy 28, but only had enough money to buy 14 grams, which is the third amount that the Government says -- first they say it's 14. They recently finally say it's 21 and originally they said it was 28.

Then not the submissions Your Honor, criminal complaint affidavit, it is false. It's perjurious and prejudicial to the defendant.

The Grand Jury testimony is false, perjurious and prejudicial to the defendant. The Santiago proffer is false, and it fails its obligations to correct the Santiago proffer given the knowledge of the transcripts even in its most recent filing, Your Honor -- --

THE COURT: Okay. I'm just going to have to ask you to stop at this point.

You are just repeating, and you keep going over the same information and making the same arguments.

DEFENDANT: Your Honor, an innocent man has been framed that there are numerous violations of the law, that the Government used perjurious testimony and people relied on those perjurious testimonies to influence -- substantially

influence their decisions. And without judicial intervention, an innocent man will be held on an illegal conviction and sent to jail for something that he never said.

THE COURT: Okay. Does the Government wish to respond?

MR. KNESS: Your Honor, we will rest on our submissions with one comment I'd like to make to the Court -- two comments.

One is, I would like to apologize to Your Honor and to the defendant for that typographical citation error in the complaint. That was an error. We're sorry that it caused this much trouble. We will attempt to be more careful in our citations in the future.

Second, however, to the extent that the defendant's allegations of governmental misconduct go beyond his written submissions, we categorically deny those allegations.

THE COURT: Okay. Nothing I've heard today changes the Court's mind.

The issues, the arguments that were brought up, were covered by the submissions. The motion for a new trial, the original motion was docket No. 1151, and the motion for acquittal, I think it was document No. 796. The motions are denied. We move on now to the sentencing stage of the proceedings.

There are some objections to the presentence

investigation report. Specifically, there's an objection to the listing of a conviction for battery at Paragraph 46 of the presentence investigation report, which the probation officer has conceded.

Therefore, that reference will be stricken, will not be considered by the Court. That results in a two-point reduction in the criminal history calculation from 17 to 15 criminal points and results in no change whatsoever in the actual criminal history category as calculated, which is based on a career offender finding.

Therefore, it has no effect on the guidelines sentencing range. Whether or not there's an active warrant in case No. 12 CR 97160, as represented in Paragraph 45, Page 16, or there was a finding of no probable cause, the Court will not consider the information with respect to that particular criminal -- prior criminal case.

I feel it has no impact on the Court's determination as to the appropriate guidelines or the appropriate sentence in this case.

Finally, with respect to the allegation asserting gang association, the Court finds the information presented in the presentence investigation report to be sufficient to convince the Court that the information in the report is accurate, and that is that the FBI -- that the defendant told the FBI, at the time of his arrest, that he was a member of

the 2-6 street gang --

DEFENDANT: Your Honor?

THE COURT: -- and holding a position of rank and had previously been a member of the Ridgeway Lords street gang, and the Court will consider those statements in its determination. Yes?

DEFENDANT: First I was going to ask for some water because my throat was dry.

THE COURT: Carol, do we have any water?

THE COURTROOM DEPUTY: Certainly.

DEFENDANT: But I do have some -- well, I'll just have a drink first. My throat is dry.

THE COURT: Okay.

DEFENDANT: Your Honor, I don't know the -- you know, as I was -- well, I guess, when will I have -- because I heard the Government say what they said, and I know that we're on this process right here. I know we've passed the other process.

What I wanted to know, basically why -- to give me peace of mind, so I'm being denied my -- both of my motions?

THE COURT: Yes.

DEFENDANT: And in the denial, even in -- with all the record in front of us of how the Government manufactured --

THE COURT: The Court disagrees with your conclusions

as to what the Government did.

I find no basis for concluding that the Government manufactured evidence or intentionally lied or intentionally deceived either the Grand Jury, the magistrate judge, the jury in your case or the Court.

We are satisfied that none of that occurred, that what did occur was a citation to one recording by a number that was inappropriate. It should have been another number for the recording, and that -- that citation was, if I recall correctly, as to line sheets, not the actual translation itself.

Furthermore, all of this evidence, which was available to and in possession of the defendant during the course of the trial, the defense counsel's representation of the defendant was not only appropriate; it was well within the standards of competence and effectiveness and indeed resulted in an acquittal on two of the three counts against the defendant in that case.

So to call the defense counsel's strategy and execution in the quest, it seems dubious to me, and I find, based upon what I saw and heard during the course of the trial that none of that is true.

In addition to that, simply throwing conclusive descriptions around, such as "perjurious," "planting," with respect to the evidence and the actions of the Government

doesn't prove anything. It just proves what you believe and nothing more. There's nothing in the record to substantiate any misconduct by the Government in this case.

In addition to that, any error with respect to information before the Grand Jury does not result in an improper indictment and a finding of guilty based upon that information, the information that was actually presented to the jury, is sufficient to absolve the Government of any error which may have occurred in the representation of the recording number for a particular recording.

Those are the reasons. I'm not going to let you argue because you've already argued. You've asked me for an explanation. So I've given you the explanation. We now move on to the sentencing, as I previously indicated.

Does either side wish to address either of the three points that are raised with respect to the presentence investigation report?

MR. KNESS: No. Thank you, Your Honor.

DEFENDANT: Yes. I have objections, Your Honor. I definitely have objections.

THE COURT: Go ahead.

DEFENDANT: Okay. Let me see if I got this right because I see Pages 14 -- okay. There's one on here that I'm not seeing right now that's also on Page 15.

This one right here [indicating]. Your Honor, this

is not even my case.

THE COURT: I'm sorry. What?

DEFENDANT: If Your Honor will take notice on -- from the PSI on Page 15 at the top, is this --

THE COURT: You're referencing Page 15 of the presentence investigation report, is that right?

DEFENDANT: Yes. Correct, Your Honor.

THE COURT: So, paragraph number?

DEFENDANT: It has a date of 11/25/2004, Your Honor, the first one up there.

MR. KNESS: Your Honor, I think if I may, I think it's Page 14, Paragraph 46. I think that's what he's talking about.

THE COURT: Thank you.

DEFENDANT: Okay. Because this says 15 on the bottom. That's why. This [indicating].

MR. KNESS: May I have a moment, please, Your Honor?

DEFENDANT: That's what I was trying to tell you.

MR. KNESS: May I have a moment, please?

THE COURT: Sure.

[Brief pause.]

DEFENDANT: Then there was another one, I believe, which was mentioned right now about the -- a warrant? If I recall, Your Honor, I was never visited by the sheriffs, or whenever I was stopped for driving, I was never told I had a

warrant or --

THE COURT: What part of the report are you referring to?

DEFENDANT: To the new one that the -- the PSI gave me.

THE COURT: Are you referring to the presentence investigation report?

DEFENDANT: Yes.

MR. KNESS: Your Honor, if I may, I think the defendant is referring to --

THE COURT: I would rather not have you intercede for the defendant because that may be part of an argument used later on.

This defendant appearing pro se, I'm going to allow him to make his argument without you interpreting it for him or helping him because that help may be actually viewed differently in a subsequent proceeding.

MR. KNESS: I understand. I just have a copy of a document that you may not have.

THE COURT: I think I have all the documents.

MR. KNESS: Okay.

THE COURT: Let's see. Let's see what the defendant says.

DEFENDANT: Okay. Oh. So it -- thank you.

It reflects that there is an active warrant, but

that's inaccurate, to my knowledge. So I --

THE COURT: Can you tell me what part of the report you're referring to? Is it the presentence investigation report?

DEFENDANT: Page 16, Paragraph 55.

THE COURT: Indeed. As I just said a few minutes ago, the Court will not consider that there was a warrant --

DEFENDANT: Okay.

THE COURT: -- out for your arrest with respect to that case.

DEFENDANT: Okay. Thank you, Your Honor.

THE COURT: Because there is some doubt as to the validity of it, and we feel it makes no difference with respect to the Court's determination as to the --

DEFENDANT: And lastly, Your Honor, I object to this Montez that -- that there's a statement that says that Montez is a member of the 2-6 street gang and currently holds the position of rank.

I definitely object to all of that right there, Your Honor.

THE COURT: I understand. I've noted your objection, and I'm overruling it. I find that the authorities cited by the presentence investigation report is sufficient to convince me that that actually happened.

Any other objections to the presentence investigation

report?

DEFENDANT: One last thing, Your Honor. The two predicates that the PSI has said that I was qualified me for career offender, one of them, I believe, was an aggravated battery.

Am I correct? Aggravated battery? And another one was a juvenile case that I had caught with a group of guys when we all got charged together. That was back in '84, 1984 when I was, like, 15.

And it is the defendant's position that when he got out, that he -- he later was released from this obligation of that conviction a few years later when he was given his parole papers telling him that he could vote, serve on a jury and -- I forgot what the other one was, and I was led to believe that that was restoring my rights and that that conviction wouldn't be used against me anymore.

THE COURT: Anything else?

DEFENDANT: Yes. That is my position, that the criminal career is -- enhancement should not apply to the defendant because his rights were restored.

And then the defendant only now coming to see it again -- because I haven't had until recently because at the MCC, it was taken from me, the --

THE COURT: I'm sorry. Wait. What happened at the --

January 5, 2016 Sentencing Hearing Transcript [pp. 45–49]

that's what I believe happened in this case.

They happened to sell the best story. I deny that I'm going to -- the things that Broker or David Astro said about me. I've heard enough of their lies and manipulation and things.

I'm just glad that I got an opportunity to come up here, and I hope, Your Honor, that I didn't mess it up for any other future defendant who might actually have, you know, just an ink of an idea about what he's doing when he comes up here because usually when guys come up here, they want to talk about this UCC stuff and, you know, these other things that they're not recognized by the Government, you know.

And they just do it to frustrate the system. I came up here to exercise my right because I'm a natural-born citizen of the state of Indiana, South Bend, Indiana.

And the things I've done in my life, whether it was paying taxes, voting, donating my body parts when I die from this world, I felt that I had a chance to go up there and tell my -- my peers the story, but it wasn't told. I was failed by my counsel, most of all, but I'll deal with those issues in the Appellate Court.

I just want Your Honor to know that this, what you heard, was me getting it out of my chest so that I could move forward. And I just pray that you don't hit me with a sentence that is, like, way out the heartland for a case like

this. That's all I'm asking.

I mean, I felt I had to exercise my right for trial, and like I said, I -- I know once in a while, I might sound repetitive, but it's because I guess I'm trying to nail it home, you know. That's it. I'm not trying to be an individual who came up here to antagonize or poke at the judge or, "Oh, yeah, he's going to give me 20. So I'm going to go up there and act a fool."

That's not me. Yeah, I'm categorized a certain way. That's fine, but that's not me. And I thank you.

THE COURT: Very well. The Court has reviewed the presentence investigation report, the submissions of the parties, the attorneys, the pro se submissions of the defendant, the presentence investigation report, the supplemental report, and I'm familiar with the facts of the case from having presided.

The Court adopts the presentence investigation report with the modifications previously indicated. The total offense level properly calculated is 32, and the criminal history is 6 with a resulting guideline range of 210 to 262 months. This is based upon the defendant's career offender status, which the Court finds is not only technically correct, but appropriate in this case.

The defendant was found guilty of one count. However, the evidence and the manner of the execution of the

one count for drug-dealing indicates to the Court that the defendant is familiar with dealing and drugs. This is not a one-time-only transaction, and we take that into account. Although, we do not feel the need to reach a finding of 364 grams of cocaine based upon the defendant's prior statements.

The defendant has been found, over the course of his life, guilty of some of the most serious offenses a person can commit, starting with murder, attempted murder, possession of controlled substances, battery, aggravated battery of a police officer and even with threatening a witness in a legal proceeding.

Sentences of substantial periods of incarceration have failed completely to deter him from future criminal conduct. It is, therefore, clear to the Court that deterrence is the most important factor in this case.

Despite all of the prior Court interventions, the defendant has continued to sell illegal drugs on the streets of the city of Chicago, demonstrating a lack of concern for the harm and violence associated with dealing cocaine and reflecting a very, very small likelihood of any future rehabilitation.

As we have observed in so many previous occasions, the widespread discrimination of addictive drugs can and does cause huge harm and damage, including the disintegration of families and sometimes entire neighborhoods.

In addition to the personal effects on the lives of the drug addicts themselves who purchase these drugs, drug trafficking also causes an increase in neighborhood crime and violence, as addicts look for money for which -- for money which they can use to buy their drugs.

Rival street gangs, drug-trafficking organizations often fight for control of drug points resulting in random violence, shootings, which result inevitably in just individuals who happen to be in the wrong place at the wrong time.

Drug dealers, for the most part, are known to carry illegal firearms to protect themselves from those who would steal their drugs or their money, since they do not have access to legitimate police enforcement without incriminating themselves.

The resulting degradation of quality of life and the residence of such neighborhoods is clearly documented on an almost daily basis on television, in the newspapers. We see almost every day some new act of violence in some part of the Northern District of Illinois. Large portions of those actions are attributable to the drug trafficking and the drug business.

The defendant, it is clear to the Court, totally refuses to accept any responsibility for the offense for which he has been convicted. He blames the Government, accuses them

of perjury, of concocting evidence, of planting evidence. He blames his own attorney, accuses his attorney of incompetence.

There comes a point where defendant's conduct has to be stopped. The people who live in the neighborhoods in the city of Chicago are entitled to relief from this kind of persistent criminal activity.

And for that reason, the Court will enter the following sentence in this case:

Pursuant to the Sentencing Reform Act in 1984, it is the judgment of the Court that the defendant, Daniel Montez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a total term of 210 months on Count 6. While incarcerated, the defendant shall participate in a comprehensive drug treatment program if eligible.

The Court finds the defendant lacks the ability to pay a fine and, therefore, waives imposition of a fine, waives imposition of the costs of incarceration and waives imposition of the costs of supervision.

The Court will assess, as is required by law, a $100 special assessment fee to be paid immediately. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years on Count 6.

I will now go over the terms of supervised release that I intend to impose to give either party a chance either to object to any proposed term or to suggest other terms of

June 10, 2014 Trial Transcript Vol. II, Defendant's Motion to Suppress [pp. 194–201]

explain what your client meant by that, why he's asking that question.

When Mr. Ramirez-Padilla says: Uh-huh, on line 22; on line 26 where he asks: Where? On line 28, when he says -- I'm sorry -- line 30, when he directs: Let me know where. Somewhere around. These aren't even statements, are they? They're not assertion of fact under the hearsay definition of what a statement is, are they? Are you really moving to suppress all of those?

09:45:36 09:45:55

MR. GREENE: Judge, I'd like to come back to that if I could.

We are moving to suppress all of the statements that Helein made to Mr. Montez in -- all of them -- in October and in December. And part of the analysis, Judge, if I could have brought this to your -- I did try to bring this to your attention before we got set for today's trial, for June 9th.

09:46:13

One of the things that I want to say, Judge, is that in addition to we think that it's hearsay is the fact that it's that -- some of these statements are flat out unreliable. And what I would ask the Court to look at is call No. 6510 because --

09:46:32

THE COURT: Well, wait. But --

MR. GREENE: But --

THE COURT: I mean, here's the problem --

MR. GREENE: It's unreliable, Judge. And I can show

09:46:44

where it's unreliable.

THE COURT: But that's not the motion before me. I'm not going to argue a motion you haven't placed before me. The motion you placed before me is to exclude them as hearsay.

09:46:56 MR. GREENE: It's unreliable hearsay. And I can show you in call 6510 where it's unreliable -- an example of where these calls, at least in some of them -- at least the one on 6510, it's unreliable hearsay.

THE COURT: Well --

09:47:09 MR. GREENE: If you'd let me -- let me just show you that, Judge.

THE COURT: I'd be happy to address your specific concerns. That actually is what I'm asking you is, can you direct the Court to what specific statements you feel ought to

09:47:27 be excluded as opposed to making a blanket assertion that all of the conversation, all of Mr. Ramirez-Padilla's part of any conversation, should be stricken --

MR. GREENE: I'm worried --

THE COURT: -- because --

09:47:40 MR. GREENE: I'm worried that the jury will listen to that tape, look at this transcript, and deduce without me having the opportunity to cross-examine Helein that there was a drug transaction about to occur. I'm concerned about that. If the government -- I think what the government is doing

09:47:57 here, Judge, is --

THE COURT: I understand your general concerns. But we have to do this on a specific basis.

What is it about the word f-u-c-k that leads you to believe that the jury is going to infer from that that there's a drug transaction going on and --

09:48:12

MR. GREENE: It's the entire conversation, Judge.

THE COURT: Well, but --

MR. GREENE: It's the entire conversation.

THE COURT: Clearly the conversation is put into the record to try to get the jury to believe that your client was involved in a drug transaction. There's no basis for excluding it because of that. That makes it relevant evidence.

09:48:22

MR. GREENE: It's --

THE COURT: The question is --

09:48:35

MR. GREENE: It may be relevant evidence. But if I don't get the chance to cross-examine the man, his constitutional rights are being trampled upon.

THE COURT: But you only are entitled to cross-examine him if his statements are hearsay statements. And that means that they are assertions of fact and they are being offered to prove the truth of what's asserted. So I'm asking you: The statement by Mr. Ramirez-Padilla on line 3, do you consider that to be an assertion of fact; an assertion of any kind with any content whatsoever that would make it a

09:48:43

09:49:09

statement under the hearsay definition --

MR. GREENE: Well, Judge --

THE COURT: -- and do you believe that whatever assertion it may be is being offered to prove the truth of that? If not, then the answer is it does not in any way confront or contradict your client's right to cross-examine witnesses.

09:49:20

MR. GREENE: It's -- it's -- that word, that four-letter word, has a connotation that after Mr. Montez allegedly says "hello" and Ramirez-Padilla says that word, that clearly says to me, and it would say to the jury, that he's upset about something. Why is he upset? Well, if you read on, you can see why he's upset.

09:49:41

THE COURT: But he doesn't say why he's upset.

MR. GREENE: His words indicate that he's upset.

09:50:03

THE COURT: Okay.

MR. GREENE: But, Judge, if I could just go back to my other point?

THE COURT: Yes.

MR. GREENE: Call No. 6510, the government in its Santiago proffer says that Montez -- Helein asked Montez if he was going to want the tia. And tia is in quotes. But in 6510, there's no word tia at all.

09:50:13

THE COURT: 65 --

MR. GREENE: 6510.

09:50:36

THE COURT: Okay. So --

MR. GREENE: In addition to that, Judge, in the Santiago proffer, it says that at 1:29 --

THE COURT: But wait. I'm still back here. I'm trying to figure out what point you're making here.

6510, the word tia does not appear.

MR. GREENE: But it does in their Santiago proffer.

THE COURT: Well, when you say it does in the Santiago proffer, what do you mean?

MR. GREENE: The government is saying that in their -- to me, in their Santiago proffer what they're saying is that this is what Montez -- Helein said to Montez in that telephone call. They told us that in their Santiago proffer.

THE COURT: But --

MR. GREENE: So something is wrong here, either the government --

THE COURT: I know. But, Mr. Greene, you're telling me that you're objecting because the statements are oranges and now you're arguing that you're objecting because they're apples.

MR. GREENE: No, no.

THE COURT: You're arguing two completely different things. You're telling me that you're moving to suppress these statements because they're hearsay. You're arguing that the government's own Santiago proffer with respect to another

case -- because this is not a conspiracy case; there is no basis or need for a Santiago proffer -- somehow contradicts the veracity of their transcript that they've given to you.

Now, if you're attacking the transcript because it's inaccurate, you have a right to do that. But don't file a motion in front of me telling me that it's hearsay --

MR. GREENE: No, no.

THE COURT: -- and then come here and argue inaccuracy.

MR. GREENE: Maybe I'm just not being clear.

THE COURT: You're not.

MR. GREENE: There's two different things here, Judge.

THE COURT: Okay.

MR. GREENE: And there's a part where they're intertwined. And one of them is, I think that the statements all -- all the ones on the 27th of October and the ones on the 12th of December are hearsay. They're unreliable hearsay in addition to them being hearsay.

THE COURT: It doesn't matter. If they're hearsay, they don't come in. Reliability doesn't really come into it. But I'm attempting to argue the hearsay with you to find out why you think each particular statement -- because you're objecting to all of them -- is hearsay. And instead of responding to that, you're arguing to me that the transcript

contradicts the Santiago proffer.

MR. GREENE: I know where --

THE COURT: That's a non sequitur.

MR. GREENE: I know where you're going with this, Judge. I think I know where you're going with this. Can I have just a minute, please? Just one minute.

THE COURT: I'm not going anywhere. I'm attempting to establish what the basis of your motion is.

MR. GREENE: Can I have one minute, Judge, please?

THE COURT: Sure.

(Brief pause.)

MR. GREENE: Just one more second, Judge. Thank you for your patience.

(Brief pause.)

MR. GREENE: Thank you, Judge.

Okay. What was your question, Judge?

THE COURT: I've attempted to indicate to you the problem with your motion, and we're not apparently communicating. So let me put it to you this way: If you want me to rule on each and every statement made by Mr. Padilla in his conversations with your client that the government is offering into evidence, you're going to have to put in your motion, in writing, address each and every statement and tell me why that statement is hearsay and why it should be excluded. And in your motion, I want you to address the

definition of a statement in Rule 801, the definition of hearsay in 801, and indicate to me why you believe that any one of these statements actually fits that definition. After you do that, you can then go on and argue why it is not being
09:58:43 used merely for the purpose of putting in context your client's incriminating statements when he calls for a meeting so that he can purchase a seven or he indicates he's going to need a seven or he may need three sevens; why these statements are not necessary to put your client's statements into
09:59:05 perspective for the jury.

You refile your motion. When it meets those qualifications, I will attempt to rule on it as best I can. But I am not going to review every single statement made based upon a general assertion that every such statement is a
09:59:21 hearsay statement when you have clearly not reviewed every such statement in the light of the hearsay definition and when called upon to argue the motion with me instead are arguing that the government's transcripts are not accurate rather than that each of these statements is hearsay.

09:59:39 Okay. Now, let's get on with the morning call and then the selection of the jury.

MR. GREENE: And, Judge, how much time are you going to give me to do this if I can do this?

THE COURT: You can do -- do it whenever you like,
09:59:51 but we're not stalling the trial for this. This trial has

No. 16-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANIEL MONTEZ,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable Ronald A. Guzman
Case No. 1:12-cr-00755-8

REQUIRED RULE 30(b) APPENDIX OF DEFENDANT-APPELLANT DANIEL MONTEZ

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

Counsel for Defendant-Appellant
DANIEL MONTEZ

RULE 30(b) APPENDIX TABLE OF CONTENTS

June 10, 2014 Trial Transcript Vol. II
[pp. 324–26]

THE COURT: Sir, you may step down.

THE WITNESS: Okay.

THE COURT: You're going to call another witness at this point?

02:37:16 MS. HUDSON: Your Honor, at this time the government would like to publish the wire calls from October 27th, 2011.

THE COURT: Approximately how long will that take?

MS. HUDSON: Probably ten minutes.

THE COURT: Let's take our afternoon break now. I

02:37:33 think we'll do that. We'll break for 15 or 20 minutes, ladies and gentlemen.

(Jury out.)

THE COURT: Anything we need to do before we break?

MR. KNESS: No, your Honor.

02:38:33 MR. GREENE: No, your Honor.

THE COURT: We're printing out a ruling on the motion to exclude the transcript of -- statements of Mr. Helein. It should be out in a few minutes.

We'll break for 20 minutes.

02:38:48 MR. KNESS: Very well, Judge.

MR. GREENE: 20 minutes, Judge?

THE COURT: Yes. Well, 15 now.

(Recess taken.)

THE COURT: Have you gotten copies of the Court's

03:00:50 order?

MS. HUDSON: Yes.

MR. GREENE: Yes, your Honor.

THE COURT: I just wanted to make sure everybody has that.

03:00:57 Does any part of the government's case that's going to go on today have anything to do with the post-arrest statement --

MS. HUDSON: No.

THE COURT: -- that you indicated was an issue?

03:01:14 MS. HUDSON: No.

THE COURT: So we don't have to deal with that until after we're done with the jury?

MS. HUDSON: Yes.

THE COURT: Okay. Let's bring the jury out then.

03:01:24 MS. HUDSON: Your Honor, what time are we going to end today?

THE COURT: 4:30.

MS. HUDSON: Okay.

THE COURT: Nothing has changed.

03:01:37 (Jury in.)

THE COURT: Be seated, please.

Welcome back, folks.

Government.

MS. HUDSON: Your Honor, at this time the government

03:03:15 would like to publish telephone call 309. But first we're

going to distribute the exhibit binders marked Government Exhibit Transcripts Montez to the jury through the CSO.

THE COURT: They may be published.

MR. KNESS: Thank you, Judge.

03:04:36 (Brief pause.)

MS. HUDSON: Your Honor, at this time we would ask that our student interns who are going to be reading the transcripts come up to the podium.

THE COURT: Very well.

03:04:46 Ladies and gentlemen, once a document, any kind of document, including a transcript, has been admitted into evidence, it may then be published to the jury in any one of many ways. One of the ways is to have people read the document to the jury. In a case where you have more than one

03:05:05 participant in the document, it's often done by having as many participants read as there are people in the transcript. And that's what's going to occur here today.

MS. HUDSON: Your Honor, at this time I'd ask the student interns to please state their names for the record and

03:05:19 who -- which role they will be playing.

MS. FEIKEMA: My name is Rita Feikema, F-e-i-k-e-m-a. And I will be reading Helein Ramirez-Padilla.

MR. SCHIED: My name is Paul Schied, S-c-h-i-e-d. And I will be reading Daniel Montez.

03:05:40 THE COURT: And you will both be reading very slowly,

June 11, 2014 Trial Transcript Vol. III,
Direct Examination of Agent Staehely
[pp. 450–53]

Q. So that you could get a benefit?
A. Well, yeah.
MR. GREENE: May I have a moment, Judge, please?
THE COURT: Sure.
02:10:08 (Brief pause.)
MR. GREENE: Nothing further, Judge. Thank you.
THE COURT: Redirect.
MS. HUDSON: Nothing for the government.
THE COURT: You may step down, sir.
(Witness excused.)
THE COURT: Call your next.
MR. KNESS: Thank you, your Honor. The United States calls Special Agent Patrick Staehely.
(Brief pause.)
02:12:46 THE COURT: Remain standing, sir. Raise your right hand.
(Witness sworn.)
MR. KNESS: May I begin, your Honor?
THE COURT: You may.
MR. KNESS: Thank you.
PATRICK STAEHELY, GOVERNMENT'S WITNESS, SWORN
DIRECT EXAMINATION
BY MR. KNESS:
Q. Good afternoon. Would you please state and spell your
02:13:08 name for the record.

A. Patrick Staehely, S-t-a-e-h-e-l-y.
Q. Are you employed?
A. Yes, sir.
Q. Where?
02:13:16 A. The FBI.
Q. How long have you been with the FBI?
A. Approximately eight and a half years.
Q. Are you a special agent with the FBI?
A. Yes, sir.
02:13:22 Q. Are you assigned to any particular group in the FBI?
A. Yes, sir.
Q. What are you assigned to?
A. A gang task force.
Q. What are the duties and responsibilities you have on the
02:13:33 gang task force?
A. Investigating numerous narcotics and firearms related
violations.
Q. Would you tell the jurors briefly, please, the training
you've received to become an FBI agent?
02:13:43 A. There was an 18-week course at Quantico, Virginia, that I
attended.
MR. GREENE: Judge, may we please have a sidebar?
THE COURT: Of course.
(Proceedings heard at sidebar:)
02:14:23 MR. GREENE: Judge, by them asking that question --

THE COURT: What question is that?

MR. GREENE: The gang -- that he works in the gang unit, why is a gang unit FBI agent involved in this case if it weren't for the fact that there's some gang activity here, which is now imputed to my client. That's patently unfair, improper. It's just flat-out plain wrong, Judge.

THE COURT: I don't --

MR. GREENE: We had --

THE COURT: I don't see the significance. If they ask him if there's gang involvement, that's a whole different thing.

Are you going to ask him about the investigation of the drug transactions? Anything else?

MR. KNESS: I'm going to ask him about his participation in the arrest and interview of the defendant and that's it. I was just trying to lay the background of where he works and where he's assigned to so the jury could have an understanding of his background and some basic understanding of the witness. I have absolutely no intention of going into anything about any gang nature of this.

THE COURT: Okay. If you want me to tell the jury to disregard it, I will. But I frankly don't think it's of very great importance. It's one single comment about what his assignment is. That's all.

MR. GREENE: But why is he in this case if he's

not --

THE COURT: I don't know why, but --

MR. GREENE: -- in a gang?

THE COURT: -- I'm --

02:15:47 MR. GREENE: That's the question that the jury is going to have.

THE COURT: Mr. Greene, I don't know why. Don't ask me questions. I'm not here to answer your questions.

Now, if you want me to instruct the jury to disregard

02:15:59 that, that he's assigned to the gang unit, that it has no significance here, I'll be happy to do that if that's what you think you want me to do. In my opinion, the statement was so quick and it has no other bearing on what he's going to testify to that I don't think it's of any great importance.

02:16:15 It's certainly not greatly prejudicial. But if you think there is some prejudice, I'll instruct the jury to disregard it.

MR. GREENE: I'm certainly not going to do that now.

THE COURT: Then what is it you wish the Court to do?

02:16:26 MR. GREENE: There's nothing the Court can do now, Judge.

THE COURT: Okay.

(Proceedings heard in open court:)

MR. KNESS: May I begin again, your Honor, please?

02:16:58 THE COURT: You may.

April 16, 2014 Transcript, Defendant's Motion to Preclude Gang Affiliation Evidence [p. 28]

already there if it's anything like the affidavits I've read in the past. So I don't think it's a great burden on the government. Okay.

MR. SASSAN: Thank you, Judge.

THE COURT: Mr. Greene, your client had a motion to bar evidence with respect to gang affiliation. First of all, is the government going to present evidence with respect to gang affiliation as to Mr. Greene's client?

MS. HUDSON: No.

THE COURT: That was easy. That motion is denied as moot based on the government's representation that it will not introduce any such evidence.

Mr. Galindo has filed a motion to require the government to reveal agreements entered into between the government and prosecution witnesses.

I assume that to the extent that there are any such agreements, the government has disclosed those pursuant to Brady and Giglio?

MS. HUDSON: Yes. The government is aware of its Brady and Giglio obligations and will comply with them.

THE COURT: Okay. Have you, in fact, complied with them? We're on the eve of trial. In other words --

MS. HUDSON: Yes. We have tendered the plea agreements, as well as the grand jury transcript and the grand jury statement of our cooperator.

May 12, 2014 Transcript, Defendant's Motion to Exclude Hearsay Evidence [pp. 47–48]

conspiracy.

MR. GREENE: Judge, there's one issue.

THE COURT: Wait. On that issue, what he said about the Santiago proffer, do you agree?

MR. GOLDBERG: Your Honor, I have to take another look at that because I have been spending most of my time trying to find my client. So I think when we come back in two days, maybe we could have a discussion between then and now and we can address it then if that's okay.

THE COURT: Sure. Because the government is going to find your client for you now so you don't have to concentrate on that anymore.

MR. THOMPSON: And, Judge, we'll speak -- I'll speak with Mr. Goldberg. If he had other concerns, we can point him in the right direction. We'll do that.

THE COURT: Okay. I think that pretty much covers it then. Those were all the motions, right? Was there something else?

MR. GREENE: There's one issue, Judge.

THE COURT: Go ahead.

MR. GREENE: And that is, in the government's Santiago proffer, it seems clear to me -- I hope it's clear to the Court as well; I didn't file anything on this; I'd be happy to file something if the Court would like to see my thinking on this -- they've alleged on October 27th, 2011, and

December 12th and 14th, 2011, that one Helein Ramirez-Padilla -- Padilla-Ramirez -- had a telephone conversation with my client, Mr. Montez. I would ask the Court to consider that a hearsay statement and rule it inadmissible.

THE COURT: Okay. And the basis would be?

MR. GREENE: The basis is that it's hearsay. It's an out-of-court statement offered for the truth of the matter asserted -- or offered therein. We would have a --

THE COURT: All the Santiago statements are.

MR. GREENE: -- hearsay objection because Mr. Montez was not in a conspiracy. It's not a -- the government has not established a conspiracy as to Mr. Montez; and it was not made by a co-conspirator in furtherance of the conspiracy. There is no conspiracy as to Mr. Montez. So that statement is classic hearsay.

MR. THOMPSON: Judge, I think, again, that's something we can address between now and Wednesday and we'll be prepared to resolve that in the interim with defense counsel.

THE COURT: Well, if you think you can resolve it, okay.

MR. GOLDBERG: And, your Honor, as far as Wednesday goes, may I suggest if there's any chance we can come back Thursday. I have a trial Wednesday and a detention hearing

May 13, 2014 Transcript, Defendant's Motion to Exclude Hearsay Evidence [p. 25]

arrested, that limited exposure, I think, is not unduly prejudicial.

I think even more so, the fact that the conversations themselves are not necessarily going to come into evidence -- 02:47:49 unless you introduce them; they're merely going to be used as known voice samples -- that the expert's testimony in this case, I think, would be admissible in spite of your objection.

MR. SASSAN: Okay.

THE COURT: Anything else?

02:48:06 MR. HUDSON: Not from --

MR. GREENE: There was one issue, Judge, I raised the other day about a conversation between Helein Ramirez-Padilla and my client, Mr. Montez.

THE COURT: Your client is not going to go to trial 02:48:17 for a while yet. We don't have to get to that. You may decide to plead guilty after this trial. Maybe we'll hold -- if he's found guilty, maybe we'll hold your client's trial off until after the sentencing.

MR. GREENE: Please don't do that, Judge.

02:48:35 MR. THOMPSON: Thank you, Judge.

THE COURT: No, we'll try your client on the date indicated, June 10th. And I'll hear your specific issue then. I think it will be much easier to rule on it then.

MR. GREENE: Very well.

02:48:48 MR. SASSAN: Judge, I have one scheduling question

June 9, 2014 Trial Transcript Vol. I,
Defendant's Motion to Exclude Hearsay Evidence
[pp. 2–8]

THE CLERK: 12 CR 755-8, United States of America v. Montez.

MS. HUDSON: Good morning, your Honor. Nathalina Hudson and John Kness on behalf of the United States.

09:20:24 MR. KNESS: Good morning, sir.

MR. GREENE: Good morning, Judge. J. Clifford Greene on behalf of Mr. Montez, who is present.

THE COURT: Good morning, everyone.

Are we prepared to proceed?

09:20:38 MS. HUDSON: We are, your Honor.

MR. GREENE: Judge, we filed a motion -- a second motion in limine, Judge, asking that the Court exclude conversations that the defendant allegedly had with Helein Ramirez-Padilla on October 27, 2011. We assert that it's

09:20:58 hearsay; it's out of court, offered for the truth of the matter asserted. We think that the government's position on this is that it provides context; but, Judge, we believe that it is offered for the truth. It talks about a perceived drug conversation, and it's not for context.

09:21:16 THE COURT: It's hard for me to tell because you didn't include the particular conversations you're referring to, so I really -- it's very difficult to rule on a motion that way. Do you want to supply me with a transcript of the conversation?

09:21:30 MR. GREENE: I can do that, Judge. We have the

transcripts.

THE COURT: That would be good because then I would probably be able to rule at that point.

MR. GREENE: We have the transcripts in the --

09:21:35 THE COURT: I don't have the transcripts.

MR. GREENE: -- government's exhibits, Judge.

THE COURT: Are you talking about the binders I received today?

MR. GREENE: Yes, sir.

09:21:47 THE COURT: This morning?

So which binder should I look at?

MS. HUDSON: Government Exhibit Transcript Montez.

THE COURT: Where should I be looking, Mr. Greene?

MR. GREENE: Call No. 309, Judge, which is the first

09:22:07 one, 3 --

THE COURT: So you're objecting to all the calls?

MR. GREENE: Just the ones on the 27th of October 2011, Judge.

THE COURT: Okay. What part of this transcript

09:22:19 reflects what you believe to be an inappropriate use of the -- your client's conversation?

MR. GREENE: Anything that Helein says is hearsay.

THE COURT: Well, show me -- for example, when Mr. Helein says f-u-c-k, is that hearsay?

09:22:38 MR. GREENE: Everything he says in there, Judge, is

hearsay because it's --

THE COURT: Well, he says f-u-c-k. Do you believe that that statement by him is hearsay?

MR. GREENE: No.

09:22:48 THE COURT: Okay. Then don't tell me everything. Point out to me which parts of this transcript you believe are hearsay so that I can rule on them.

MR. GREENE: Line 16, line 22.

THE COURT: So line 16 says: Didn't answer is

09:23:12 because I was sleeping.

That's hearsay?

MR. GREENE: Yes, Judge. It's offered for the truth.

THE COURT: You think it is being offered for the truth of the fact that Mr. Helein was sleeping?

09:23:28 MR. GREENE: Yes, yes.

THE COURT: Is that why you're offering it?

MS. HUDSON: No, your Honor, we are not.

THE COURT: What relevance would the fact that Mr. Helein is sleeping have with the case? How would it be

09:23:38 probative of anything in the case?

MR. GREENE: Because the implication is that Mr. Montez -- the implication -- the allegation is that Mr. Montez wanted something from him and called him at an hour when this man was asleep.

09:23:55 THE COURT: So you want us to go through each of

these conversations now?

May I ask why this motion wasn't filed previously --

MR. GREENE: Well, Judge --

THE COURT: -- with copies of the transcripts so that I could review them and rule on them before the eve of the -- well, before the morning that we're supposed to begin jury selection?

09:24:24

MR. GREENE: If the Court will recall, right before the defendant was severed out, I asked the Court to exclude these conversations.

09:24:37

THE COURT: And?

MR. GREENE: And you didn't rule on it.

THE COURT: You filed a motion too?

MR. GREENE: I said I would be glad to put something in writing if you want me to. And I believe the Court said, well, you're going to be severed out; your trial is not going to happen until June 10th --

09:24:47

THE COURT: Right.

MR. GREENE: -- which is originally what it was.

THE COURT: Okay. So why didn't you file it before the morning of the day we're supposed to be selecting the jury?

09:24:55

MR. GREENE: I have no explanation for that, Judge. I thought that the Court already -- in fact, it was -- I was of the opinion that the Court had already tentatively made a

09:25:06

ruling in this.

THE COURT: What ruling is that?

MR. GREENE: I thought that the Court said that there was a ruling pending -- that there was a status that the Court had that I was not present for. I didn't know about it until the day after. I don't know if you remember that.

09:25:16

THE COURT: No.

MR. GREENE: Okay. Well, there was a status hearing we had recently where I was not present. And Mr. Montez was here, and Mr. Montez indicated to me that the Court had a ruling that the Court thought would be beneficial to me. And the only ruling I was waiting on, Judge, was the ruling on that motion.

09:25:29

THE COURT: Let me see if I understand this correctly. You did not file this motion in writing with the transcripts I was supposed to rule on, did not call it up for a hearing, did not notice it until the morning before we're supposed to -- the morning of jury selection because your client told you that there was a favorable ruling pending of some sort?

09:25:42

09:26:02

MR. GREENE: No, absolutely that's not why I filed it, Judge. That's not why I filed it.

THE COURT: Well, what I want to know is why you filed it when you did because I'm here ready to select a jury and instead you're asking me to rule on multiple pages of

09:26:11

transcripts on every single statement made by a co-conspirator, and I don't think that's reasonable.

MR. GREENE: It's not a co-conspirator, Judge.

THE COURT: I just don't think it's reasonable.

09:26:25 MR. GREENE: It's not a co-conspirator, Judge.

THE COURT: Okay. Another defendant. Another person.

MR. GREENE: Judge, I apologize for --

THE COURT: I just don't think that's reasonable. If

09:26:35 I forced you to do that and make decisions about your client and your case on that kind of notice, would you think it was a reasonable thing for me to do to you?

MR. GREENE: Absolutely not, sir.

THE COURT: No, I think you would probably call it

09:26:51 reversible error and file a motion for appeal.

So what should I do now? Should I delay the jury selection process to rule on your motion? Should we wait until after you've selected the jury? Should we stay late? I mean, this case has only been scheduled for trial for months

09:27:07 and months and months.

MR. GREENE: Judge, we can --

THE COURT: It's just not fair. I don't know why you people do this.

MR. GREENE: I would suggest, Judge, that we do

09:27:16 whatever is convenient for the Court.

THE COURT: I just don't know why you do this.

Well, we'll select the jury and then I suppose we'll stay late to rule on these at Mr. Greene's convenience.

MR. GREENE: Judge, I'm truly sorry. Please accept my apologies.

09:27:38

THE COURT: Your apology is accepted. Thank you.

Anything else we need to do that actually impacts on jury selection?

MS. HUDSON: No, your Honor.

09:27:48

THE COURT: Okay. Let me know when the jury is up.

THE CLERK: Yes, your Honor.

(Recess taken.)

(Prospective jury in.)

THE COURT: Good morning, ladies and gentlemen.

09:58:39

Oh, that didn't sound good.

At any rate, we're happy to have you here this morning. Welcome to this courtroom. You're here today, as I'm sure you have surmised, so that we can select from your group a jury of persons to decide the case that's before us today. We shall be picking 12 jurors and two alternates today.

09:58:55

This process of jury selection and trial by jury is over 750 years old, going back to the time of England's King John. And in the opinion of many, it is one of the distinguishing elements that separates our democratic way of

09:59:22

Call Transcript No. 2406

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	18
CALL NUMBER:	2406
DATE:	06/17/2012
TIME:	3:00:03 p.m. CDT
SPEAKERS:	JESUS RAMIREZ-PADILLA, AKA "GALLO" DANIEL MONTEZ

[Ringing]

JESUS RAMIREZ-PADILLA: Hello.

DANIEL MONTEZ: Gallo.

JESUS RAMIREZ-PADILLA: Dude, dude, We already got the half around there, dude.

DANIEL MONTEZ: Okay. So—the number

JESUS RAMIREZ-PADILLA: Dude, I'm just barely coming from the north side. Give me about a half hour, dude.

DANIEL MONTEZ: Okay. Fine. And, and, and, the, th, ah [pause]

JESUS RAMIREZ-PADILLA: Five fifty for the half, dude

DANIEL MONTEZ: Okay.

JESUS RAMIREZ-PADILLA: And get something because there is not going to be any, dude. I only brought half and I have guys that want a lot.

DANIEL MONTEZ: Okay. Let me, let me, let me call then but for sure.

JESUS RAMIREZ-PADILLA: Well Alex is here with me, dude and I tell you that we're coming from there.

DANIEL MONTEZ:	Oh Okay. Come Okay uumh because I have several dudes that I can tell, you know, and grab everything together and…
JESUS RAMIREZ-PADILLA:	Oh dude come to an agreement, dude, of the most you want, dude, because honestly--
DANIEL MONTEZ:	[OV] –Okay let me, let me, let me that I'm going to give to these guys.
JESUS RAMIREZ-PADILLA:	Alright.
DANIEL MONTEZ:	Ok bye.

[End of call]

Call Transcript No. 6510

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	3
CALL NUMBER:	6510
DATE:	12/12/2011
TIME:	1:11 P.M. CST
SPEAKERS:	HELEIN RAMÍREZ-PADILLA DANIEL MONTEZ

HELEIN RAMÍREZ-PADILLA : Hello?

DANIEL MONTEZ : Hello dude?

HELEIN RAMÍREZ-PADILLA : There's some there already, dude.

DANIEL MONTEZ : Yeah?

HELEIN RAMÍREZ-PADILLA : Yeah, just now.

DANIEL MONTEZ : Okay, okay, well, I'm going to talk to this guy right now because me and him I want uh… he wanted a-a… I'll tell you what right now and uh one, two, three, I've got . . . Okay, give me a chance right now.

HELEIN RAMÍREZ-PADILLA : Anyway, just call me.

DANIEL MONTEZ : And listen, is it hard or is it loose?

HELEIN RAMÍREZ-PADILLA : It's real nice, dude.

DANIEL MONTEZ : Okay, that's what I need to know.

HELEIN RAMÍREZ-PADILLA : It's more or less.

DANIEL MONTEZ : Okay, no, no, so I know because these fucking dudes are picky.

HELEIN RAMÍREZ-PADILLA : Yeah, yeah, yeah.

DANIEL MONTEZ : Yeah, okay, well, you know what…. One, two, three, maybe three sevens.

HELEIN RAMÍREZ-PADILLA : All right dude, all right.

DANIEL MONTEZ : I'm going to call him right now-right now and ask him…

HELEIN RAMÍREZ-PADILLA : All right dude, it's set.

DANIEL MONTEZ : Okay.

Call Transcript No. 6513

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	3
CALL NUMBER:	6513
DATE:	12/12/2011
TIME:	1:29 P.M. CST
SPEAKERS:	HELEIN RAMÍREZ-PADILLA DANIEL MONTEZ

HELEIN RAMÍREZ-PADILLA: What's going on dude? Hey!

DANIEL MONTEZ: Listen?

HELEIN RAMÍREZ-PADILLA: [I'm] listening.

DANIEL MONTEZ: I'm passing uh, almost by 47th.

HELEIN RAMÍREZ-PADILLA: Look, dude, take about fucking 20 minutes around there, dude. Are you going to want the three?

DANIEL MONTEZ: I'm going to grab one first, uh, I'm,.. because the other dude is not going to give me the tickets yet; but I will need three, yes.

HELEIN RAMÍREZ-PADILLA: All right dude.

DANIEL MONTEZ: I'm going to get one for me in the meantime. You know?

HELEIN RAMÍREZ-PADILLA: All right.

DANIEL MONTEZ: So, so you want what?

HELEIN RAMÍREZ-PADILLA: For you to arrive in about 20 minutes so I can measure all of the shit.

DANIEL MONTEZ: Okay, that's fine then.

HELEIN RAMÍREZ-PADILLA: Or ten, 15, dude. It's done real fast. It's not a big deal.

DANIEL MONTEZ: Are you stopping by or are we going…

[noise]

HELEIN RAMÍREZ-PADILLA: [UI]

Call Transcript No. 6516

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	3
CALL NUMBER:	6516
DATE:	12/12/2011
TIME:	2:08 P.M. CST
SPEAKERS:	HELEIN RAMÍREZ-PADILLA DANIEL MONTEZ

1	DANIEL MONTEZ:	Hello?
2		
3	HELEIN RAMÍREZ-PADILLA:	Where are you dude?
4		
5	DANIEL MONTEZ:	Here on 59th.
6		
7	HELEIN RAMÍREZ-PADILLA:	Okay, I'll see you. Come here to where you know.
8		
9	DANIEL MONTEZ:	Okay, I'm on my way.
10		
11	HELEIN RAMÍREZ-PADILLA:	Alright.
12		
13	[end of call]	

Call Transcript No. 6519

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	3
CALL NUMBER:	6519
DATE:	12/12/2011
TIME:	2:18 P.M. CST
SPEAKERS:	HELEIN RAMÍREZ-PADILLA DANIEL MONTEZ

[radio in background]

DANIEL MONTEZ : Hello.

HELEIN RAMÍREZ-PADILLA : Hello?

DANIEL MONTEZ : [SV] Listen. Hey, I'm here.

HELEIN RAMÍREZ-PADILLA : In the garage. You know where my garage is dude.

DANIEL MONTEZ : Oh, okay.

HELEIN RAMÍREZ-PADILLA : [background: voices]

[end of call]

Call Transcript No. 7052

CASE NUMBER:	12 CR 755
CASE TITLE:	U.S. V. RAMIREZ-PADILLA, ET AL.
TP#:	3
CALL NUMBER:	7052
DATE:	12/14/2011
TIME:	5:52 P.M. CDT
SPEAKERS:	HELEIN RAMÍREZ-PADILLA DANIEL MONTEZ

1	HELEIN RAMÍREZ-PADILLA :	What's up?
2		
3	DANIEL MONTEZ:	Hello?
4		
5	HELEIN RAMÍREZ-PADILLA :	What's going on dude?
6		
7	DANIEL MONTEZ:	Listen, is my aunt with you?
8		
9	HELEIN RAMÍREZ-PADILLA :	Yes.
10		
11	DANIEL MONTEZ:	Oh, let's see if – may I speak to her?
12		
13	HELEIN RAMÍREZ-PADILLA :	Alright. Call me. I am here at Hamlin and, and 60th.
14		[UI]
15		
16	DANIEL MONTEZ:	But, is it going to be uh, firmer, not like --
17		
18	HELEIN RAMÍREZ-PADILLA :	No, it's nice, it's nicer dude.
19		
20	DANIEL MONTEZ:	Good, because this other one you gave me, man,
21		wasn't worth shit man. It was good, but it was all
22		loose, man, I had problems even giving it to that
23		son of a bitch, giving it --
24		
25	HELEIN RAMÍREZ-PADILLA :	Problems? Putting it into his head? Or what?
26		
27	DANIEL MONTEZ:	No, it's just that those mother fuckers, they don't
28		want them like that, man. They think it's bad --
29		
30	HELEIN RAMÍREZ-PADILLA :	No, well, look at it, look at it. Call me. I'm on 60th
31		and, and Hamlin.

DANIEL MONTEZ: Okay, I'm on my way.

HELEIN RAMÍREZ-PADILLA : Alright.

[call ends]

Additional Examples of Hearsay

Additional Examples of Hearsay Erroneously Admitted as Context

Record Citation	Call No. and Line(s)	Example	Explanation and Reference
R.1343 at 13	Call 316 at lines 15–18	DANIEL MONTEZ: Okay, because . . . uh, okay HELEIN RAMIREZ-PADILLA: I-I'll drop by there in a few minutes. I'm here-here on . . . I'm going to get the . . .	The assertion that Helein is present at the meeting place is only relevant if true, because Montez asserts his presence at the same location in Call 322
R.1343 at 25	Call 6519 at line 9	HELEIN RAMIREZ-PADILLA: In the garage. You know where my garage is dude.	The assertion that Helein is in the same meeting place is only relevant if it's true.
R.1343 at 27	Call 7052 at lines 7–13	DANIEL MONTEZ: Listen, is my aunt with you? HELEIN RAMIREZ-PADILLA: Yes. DANIEL MONTEZ: Oh, let's see if – may I speak to her? HELEIN RAMIREZ-PADILLA: Alright. Call me. I am her eat Hamlin and, and 60th [unintelligible]	Helein asserts possession of cocaine in response to Montez' question. *Compare Smith*, 816 F.3d at 482
R.1343 at 30	Call 2388 at lines 19–22	DANIEL MONTEZ: Fine because I was looking to see if I could talk with my aunt. JESUS RAMIREZ-PADILLA: Yes dude, Let [*sic*] me, I will tell you shortly.	Gallo asserts possession of cocaine, only relevant if it is true. *Compare Smith*, 816 F.3d at 482
R.1343 at 36	Call 2453 at lines 52–60	DANIEL MONTEZ: Do you need one? JESUS RAMIREZ-PADILLA: It's just that I brought some to a guy right now and it had-had and it had already finished dude. It's just that a guy wanted-wanted to get four and half, but he didn't have all the fucking money, dude. He wanted to me [*sic*] $1,000 for them, dude. I told him: "No dude, well I . . . I ain't going to make anything on them for what, dude."	Gallo asserts possession of cocaine and intent to sell to Montez
R.1343 at 39	Call 2460 at lines 8–9	JESUS RAMIREZ-PADILLA: No-no we measured it and everything already . . . We got . . .	Gallo asserts possession of measured quantities of cocaine

2006 720 ILCS 5/12-4 (Aggravated Battery)

ILCS 5/12-4. Aggravated Battery

Sec. 12-4. Aggravated Battery. (a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

(b) In committing a battery, a person commits aggravated battery if he or she:

(1) Uses a deadly weapon other than by the discharge of a firearm;

(2) Is hooded, robed or masked, in such manner as to conceal his identity;

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes;

(4) (Blank);

(5) (Blank);

(6) Knows the individual harmed to be a community policing volunteer while such volunteer is engaged in the execution of any official duties, or to prevent the volunteer from performing official duties, or in retaliation for the volunteer performing official duties, and the battery is committed other than by the discharge of a firearm;

(7) Knows the individual harmed to be an emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, other medical assistance, first aid personnel, or hospital personnel engaged in the performance of any of his or her official duties, or to prevent the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, other medical assistance, first aid personnel, or hospital personnel from performing official duties, or in retaliation for performing official duties;

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement;

(8.5) Is, or the person battered is, on a publicly or privately owned sports or entertainment arena, stadium, community or convention hall, special event center, amusement facility, or a special event center in a public park during any 24-hour period when a professional sporting event, National Collegiate Athletic Association (NCAA)-sanctioned sporting event, United States Olympic Committee-sanctioned sporting event, or International Olympic Committee-sanctioned sporting event is taking place in this venue;

(9) Knows the individual harmed to be the driver, operator, employee or passenger of any transportation facility or system engaged in the business of transportation of the public for hire and the individual assaulted is then performing in such capacity or then using such public transportation as a passenger or using any area of any description designated by the transportation facility or system as a vehicle boarding, departure, or transfer location;

(10) Knows the individual harmed to be an individual of 60 years of age or older;

(11) Knows the individual harmed is pregnant;

(12) Knows the individual harmed to be a judge whom the person intended to harm as a result of the judge's performance of his or her official duties as a judge;

(13) (Blank);

(14) Knows the individual harmed to be a person who is physically handicapped;

(15) Knowingly and without legal justification and by any means causes bodily harm to a merchant who detains the person for an alleged commission of retail theft under Section 16A-5 of this Code [720 ILCS 5/16A-5]. In this item (15), "merchant" has the meaning ascribed to it in Section 16A-2.4 of this Code [720 ILCS 5/16A-2.4];

(16) Is, or the person battered is, in any building or other structure used to provide shelter or other services to victims or to the dependent children of victims of domestic violence pursuant to the Illinois Domestic Violence Act of 1986 or the Domestic Violence Shelters Act [*750 ILCS 60/101* et seq. or *20 ILCS 1310/0.01* et seq.], or the person battered is within 500 feet of such a building or other structure while going to or from such a building or other structure. "Domestic violence" has the meaning ascribed to it in Section 103 of the Illinois Domestic Violence Act of 1986 [*750 ILCS 60/103*]. "Building or other structure used to provide shelter" has the meaning ascribed to "shelter" in Section 1 of the Domestic Violence Shelters Act [*20 ILCS 1310/1*];

(17) (Blank); or

(18) ***(As added by** P.A. 94-243)* Knows the individual harmed to be an emergency management worker engaged in the performance of any of his or her official duties, or to prevent the emergency management worker from performing official duties, or in retaliation for the emergency management worker performing official duties.

(18) ***(As added by** P.A. 94-333)* Knows the individual harmed to be an officer or employee of the State of Illinois, a unit of local government, or school district engaged in the performance of his or her authorized duties as such officer or employee.

For the purpose of paragraph (14) of subsection (b) of this Section, a physically handicapped person is a person who suffers from a permanent and disabling physical characteristic, resulting from disease, injury, functional disorder or congenital condition.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic, anesthetic, or controlled substance commits aggravated battery.

(d) A person who knowingly gives to another person any food that contains any substance or object that is intended to cause physical injury if eaten, commits aggravated battery.

(d-3) A person commits aggravated battery when he or she knowingly and without lawful justification shines or flashes a laser gunsight or other laser device that is attached or affixed to a firearm, or used in concert with a firearm, so that the laser beam strikes upon or against the person of another.

(d-5) An inmate of a penal institution or a sexually dangerous person or a sexually violent person in the custody of the Department of Human Services who causes or attempts to cause a correctional employee of the penal institution or an employee of the Department of Human Services to come into contact with blood, seminal fluid, urine, or feces, by throwing, tossing, or expelling that fluid or material commits aggravated battery. For purposes of this subsection (d-5), "correctional employee" means a person who is employed by a penal institution.

(e) Sentence.

(1) Except as otherwise provided in paragraphs (2) and (3), aggravated battery is a Class 3 felony.

(2) Aggravated battery that does not cause great bodily harm or permanent disability or disfigurement is a Class 2 felony when the person knows the individual harmed to be a peace officer, a community policing volunteer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman while such

officer, volunteer, employee, or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, volunteer, employee, or fireman from performing official duties, or in retaliation for the officer, volunteer, employee, or fireman performing official duties, and the battery is committed other than by the discharge of a firearm.

(3) Aggravated battery that causes great bodily harm or permanent disability or disfigurement in violation of subsection (a) is a Class 1 felony when the person knows the individual harmed to be a peace officer, a community policing volunteer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman while such officer, volunteer, employee, or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, volunteer, employee, or fireman from performing official duties, or in retaliation for the officer, volunteer, employee, or fireman performing official duties, and the battery is committed other than by the discharge of a firearm.

History

Source:

P.A. 86-979; *86-980*; *86-1028*; *87-921*, § 1; *87-1083*, § 1; *88-45*, § 2-57; *88-433*, § 5; 89-507, § 90L-93; *90-115*, § 5; *90-651*, § 5; *90-735*, § 5; *91-357*, § 237; *91-488*, § 5; *91-619*, § 5; *91-672*, § 5; *92-16*, § 88; *92-516*, § 5; *92-841*, § 5; *92-865*, § 5; *93-83*, § 5; *94-243*, § 5; *94-327*, § 5; *94-333*, § 5; *94-363*, § 5; *94-482*, § 5.

End of Document

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Daniel Montez, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 22, 2016, which will send notice of the filing to counsel of record in the case.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: November 22, 2016

CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Daniel Montez, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: November 22, 2016