In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 16-1188

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.
No. 12 CR 755-8 — Ronald A. Guzman, *Judge*.

BRIEF OF THE UNITED STATES

ZACHARY T. FARDON
United States Attorney
for the Northern District of Illinois
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 353-5300

DEBRA RIGGS BONAMICI
Assistant United States Attorney
Chief of Appeals, Criminal Division

HELENE B. GREENWALD
Assistant United States Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

SENTENCING GUIDELINES

JURISDICTIONAL STATEMENT

Defendant-appellant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed plain error, or abused its discretion, by admitting into evidence statements made by defendant's drug source and the source's worker during recorded conversations with defendant.

2. Whether defendant waived any challenge to the district court's failure to strike a law enforcement officer's testimony that he was assigned to a gang task force; and, if not waived, whether the court committed plain error by failing to strike such testimony.

3. Whether defendant's conviction should be overturned because the government introduced incorrect testimony before the grand jury.

4. Whether the district court plainly erred by finding defendant qualified as a career offender under U.S.S.G. § 4B1.1.

STATEMENT OF THE CASE

Overview

During 2011 and 2012, the Federal Bureau of Investigation ("FBI"), along with other federal agencies, conducted an investigation of a large-scale drug trafficking organization operated by Jose De Jesus Ramirez-Padilla (also

known as, and referred to herein as, "Gallo"). Tr. 279-81, 387; R. 1.[1] As a result of the investigation, defendant was indicted on three counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). R. 246. Each count charged a separate date of possession with intent to distribute; namely, October 27, 2011, December 12, 2011, and June 17, 2012. R. 246. Following a four-day trial, a jury convicted defendant of the count charging possession with intent to distribute on December 12, 2011, and acquitted defendant of the two remaining counts. R. 776, 779, 780, 782, 784, 788; Tr. 599. The court sentenced defendant to 210-months' imprisonment, which was at the very low end of the advisory guideline range. R. 1232; S. Tr. 46, 49. Defendant now appeals his conviction and sentence. For reasons discussed below, this Court should affirm.

Offense Conduct

On December 12, 2011, defendant obtained about 21 grams of cocaine from Gallo's drug trafficking organization with the intention of distributing

[1] This brief employs the following citation conventions: official record on appeal is cited as "R."; transcripts of pre- and post-trial proceedings as "[date of proceeding] Tr."; trial transcripts as "Tr."; Presentence Investigation Report as "PSR"; and defendant's brief as "D. Br." The transcript of the sentencing proceeding, which appears in the district court record at R. 1271, is cited as "S. Tr." followed by the page numbers included by the court reporter (which number appears in the right-side margin in the middle of pages). The transcripts of intercepted telephone calls were admitted at trial as Gov. Ex. Transcripts Montez, and appear in the district court record at R. 1343. These transcripts are cited by reference to this district court record number, R. 1343.

that cocaine to his (defendant's) own customers. Specifically, on December 12, 2011, defendant telephoned Gallo's brother Helein Ramirez-Padilla ("Helein"), who assisted Gallo in his drug-trafficking operation by delivering cocaine to customers, collecting money from the customers, and storing cocaine and money at his house. Tr. 282-83, 399, 465-73. Defendant told Helein that he wanted "[o]ne, two, three, maybe three sevens"—with "seven" being a reference to a 7-gram quantity of cocaine. Tr. 349, 489-93; R. 1343 at 18. Defendant also asked Helein whether the cocaine "is . . . hard or is it loose[,]" explaining that he "need[ed] to know" because "these fucking dudes [i.e., his customers] are picky." Tr. 349; R. 1343 at 17.

In another conversation a few minutes later, defendant confirmed that he "need[ed] three" (that is, 21 grams of cocaine for his customers), and was "going to get one for me [himself] in the meantime." Tr. 350; R. 1343 at 20. About forty-five minutes later, defendant told Helein that he (defendant) had arrived for the cocaine transaction. Tr. 351; R. 1343 at 25.

Two days later, on December 14, 2011, defendant complained to Helein about the quality of the cocaine that Helein had delivered to defendant on December 12th:

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

HELEI: No, it's nice, it's nicer dude.

DEFENDANT: Good, because this other one you gave me, man, wasn't worth shit man. It was good, but it was all loose, man, I had problems even giving it to that son of a bitch . . . .

HELEIN: Problems? Putting it into his head? Or what?

DEFENDANT: No, it's just that those mother fuckers, they don't want them like that, man. They think it's bad--

Tr. 351, 354; R. 1343 at 27.

Investigation

The investigation of Gallo's drug-trafficking organization included the placement of court-authorized wiretaps on telephones used by Gallo and others associated with his organization, including the telephone used by Gallo's brother Helein. Tr. 283-87; R. 1. These wiretaps intercepted numerous calls, including calls between defendant and Gallo, and between defendant and Helein. Tr. 283-88, 301; R. 1, 1343. These conversations were primarily in Spanish, and Spanish-speaking interpreters were involved in monitoring the conversations during the wiretaps, and summarizing the conversations in English. Tr. 288-91, 298-99, 301, 311, 316-17, 320; R. 1. Law enforcement officers also conducted surveillance of Gallo and others associated with his organization. Tr. 334-43; R. 1.

Intercepted calls involving the defendant included not only those on December 12 and 14, 2011, discussed above, but also calls on October 27, 2011 and June 17, 2012. During intercepted telephone conversations on October 27,

2011, defendant told Helein that he "need[ed] a seven" (code for seven grams of cocaine) and was going to "work" (code for drug dealing, buying or selling). Tr. 327-28, 330, 489-93; R. 1, 1343 at 8-11. Shortly after these conversations, law enforcement officers saw defendant meet with Helein in the location specified during the telephone calls, and an officer saw defendant, during the meeting, appear to put something in his pants pocket and then leave the area. Tr. 334-43.

During calls on June 17, 2012, defendant and Gallo discussed the price for "the half" (1/2 ounce of cocaine), and defendant told Gallo he "ha[d] several dudes that I can tell . . ." and that "I'm going to give to these guys." Tr. 355-57, 403-10, 477, 489-93; R. 1343 at 32-33. About one hour later, defendant told Gallo he was "going to need both my aunts" (code for 28 grams of cocaine). Tr. 396-98, 403-06; R. 1343 at 35.

As a result of this investigation, the government filed a complaint on September 26, 2012, charging 40 individuals, including defendant, Gallo and Helein, with various narcotics trafficking offenses. R. 1. Defendant was charged, along with Gallo, Helein and others, with narcotics conspiracy, in

violation of 21 U.S.C. § 846.[2] R. 1. When defendant was arrested on the complaint, he gave a statement to the FBI, admitting that he bought cocaine from Gallo in October 2011, December 2011 and June 2012. Tr. 455-57, 462-73. Defendant also identified Helein as a runner for Gallo, meaning Helein transported drugs and money back and forth between Gallo and those to whom Gallo sold drugs. Tr. 462-73.

Indictment

On January 8, 2013, a federal grand jury returned an indictment charging 23 individuals, including defendant, Gallo and Helein, with various narcotics-trafficking crimes.[3] R. 246. Defendant was charged in three substantive counts with possession of narcotics with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), on the following dates, respectively: October 27, 2011 (Count 2); December 12, 2011 (Count 6); and June 17, 2012 (Count 21).[4] R. 246

---

[2] The complaint affidavit reported that defendant was not only a regular customer of Gallo's drug organization but also conducted counter-surveillance for the organization and contacted a supplier for Gallo. R. 1 at ¶ 34. Evidence of defendant's involvement included not only the intercepted conversations described previously in the text, but also surveillance and additional recorded calls. R. 1 at ¶¶ 34, 324-346.

[3] Gallo and Helein, along with four others (not including defendant) were charged with narcotics conspiracy. R. 246.

[4] While Counts 2 and 6 correctly identified the controlled substance as cocaine, Count 21 mistakenly listed the controlled substance as marijuana, rather than cocaine. R. 246; 401 at 1-2. By agreement of the parties, this mistake was corrected and the indictment was amended to allege cocaine. R. 690, 690-1, 692, 692-1, 712.

Most of the co-defendants, including Gallo and Helein, pled guilty prior to defendant's trial. Tr. 389-92. By agreement of the parties, defendant's trial was severed from the trials of his three remaining co-defendants.[5] 5/13/14 Tr. 2-6; R. 720; *see also* 5/12/14 Tr. 11-23.

Trial

During defendant's four-day trial, the government introduced evidence that Gallo supplied cocaine to defendant on October 2011, December 2011, and June 2012, and that defendant possessed the cocaine with intent to distribute it. R. 776, 779, 780, 782, 784. That evidence included the wiretap calls described previously, and the transcripts of those calls.[6] Tr. 325-32, 348-60; R. 1343. The government also called an expert who testified about drug trafficking methods and the meaning of drug code words, such as "tickets" for money, "seven" for seven grams, and "half" for half an ounce. Tr. 477, 489-93. The expert further testified that seven grams of cocaine qualified as a

---

[5] While the government initially had opposed severance, the government ultimately agreed, after concluding that to try defendant with the remaining three codefendants risked a spillover effect that could be unduly prejudicial to defendant. 5/12/14 Tr. 11-23; 5/13/14 Tr. 2-6.

[6] The intercepted recorded calls, which were in Spanish, were translated into English by an expert in the Spanish language and the expert testified at trial to the accuracy of the English translation in the transcripts that were introduced into evidence at trial. Tr. 288-92, 301, 308-13.

distribution quantity, and 70 individual dosage units could be produced from that quantity, even without diluting it.[7] Tr. 493-95.

The government called the two FBI agents who interviewed defendant at the time of his arrest and they testified about defendant's confession. Tr. 451-472. An additional FBI agent testified about his surveillance of defendant on October 27, 2011, and observing defendant meet with Helein and appear to put something into his pants pocket during the meeting. Tr. 334-43.

Finally, the government offered the testimony of Gallo, who had pled guilty and agreed to cooperate. Tr. 389-92. Gallo testified about the operation of his drug trafficking organization, and that Helein delivered cocaine to Gallo's customers. Tr. 394-403. Gallo also testified that drug customers would reach him by telephone and that he and his customers would speak in code over the phone to prevent law enforcement from detecting their drug trafficking. Tr. 397. As part of that code, seven grams (the smallest quantity he would supply) was referred to as "seven up"; half ounce (or 14 grams) as "mi tia" which, in English, translated to "aunt"; and money as "the tickets." Tr. 396-98, 404, 410.

---

[7] While acknowledging that it was "possible" an individual drug user would buy a seven-gram quantity of cocaine, the expert testified that it was "more likely that a seven-gram purchase . . . is a distribution quantity." Tr. 496.

Gallo further testified that defendant was a customer of his drug organization in October and December 2011, and in June 2012. Tr. 402-03. Gallo testified that defendant bought cocaine in seven gram quantities, and that Helein delivered drugs to Gallo's customers during October and December 2011, and June 2012. Tr. 402-03.

Gallo also testified about his wiretapped conversations with defendant on June 17, 2012. Tr. 403-10. Gallo testified that he understood defendant to be ordering two half-ounces of cocaine (or 28 grams), and that he delivered the 28 grams of cocaine to defendant. Tr. 404-06, 409-10. Gallo also testified that he understood defendant to be purchasing the cocaine for redistribution to others and not for his personal use. Tr. 403-10.

At trial, the defense attacked the credibility of Gallo, and argued the remaining evidence was insufficient to prove guilt. Tr. 269-70, 417-32, 435-51, 559-67. The defense called one witness, FBI Agent David Ostrow, who testified that law enforcement found no cocaine on defendant during October 2011, December 2011, June 2012, or in September 2012 when defendant was arrested, and found no cocaine, fancy cars, scales, baggies or large amounts of money during the search of defendant's home. Tr. 511-13.

The jury convicted defendant of Count 6, which charged possession with intent to distribute on December 12, 2011. Tr. 599; R. 784. The jury found defendant not guilty on Counts 2 and 21, which charged possession with intent

to distribute on October 27, 2011, and June 17, 2012, respectively. Tr. 599; R. 784.

Defense counsel filed a motion for judgment of acquittal or new trial. R. 796. Defendant filed a *pro se* supplemental motion for judgement of acquittal and new trial. R. 805. The court denied the motions. R. 1220, 1224; S. Tr. 5, 24, 26-28.

PreSentence Investigation Report ("PSR")

The Probation Officer prepared defendant's PSR on August 25, 2014, just two months after defendant's conviction. PSR 1. That report set forth defendant's criminal history, which included: a 1985 conviction and 29-year prison sentence for murder and attempted murder; a 2001 conviction and 3-year prison sentence for possession of controlled substance; a 2005 conviction for possession of cocaine; a 2007 Illinois conviction and 3-year sentence for aggravated battery of an officer (which involved kicking the officer in the chest and face); a 2009 conviction and 3-year sentence for possession of cocaine; and a 2009 assault conviction for threatening a person that "[y]ou need to drop the charges . . . . If not, we are going to kill you or get someone to kill you and your family." PSR 12-15. Based on the 1984 murder conviction and 2007 aggravated battery conviction, the Probation officer determined, pursuant to U.S.S.G. § 4B1.1(b)(3), that defendant was a career offender, and his total offense level was increased from 26 to 32, and his criminal history category

remained VI. PSR 9-10, 16, 23. The offense level 32 and criminal history category VI yielded an advisory guideline range of 210 to 262 months, which was capped by the 20-year statutory maximum imposed by the single count of which he was convicted. PSR 10, 16, 23.

In September 2014, defense counsel filed objections to the PSR. R. 938. In that filing, defendant did not challenge the probation officer's finding that the career offender enhancement was applicable. R. 938 at 7. Rather, defendant argued only that the court was "empowered to deviate from the sentencing guidelines based on career offender enhancements." R. 938 at 7.

Sentencing

Prior to sentencing, defendant sought to dismiss his counsel and represent himself. R. 976, 986, 1014. The court granted defendant's motion to dismiss his counsel. R. 1014. At his insistence, and against the advice of the court and stand-by counsel appointed by the court, defendant represented himself at his sentencing. 9/16/15 Tr. 2-14; S. Tr. 2. Stand-by counsel was present. S. Tr. 2.

At sentencing, defendant objected to the career offender enhancement, claiming only that his rights had been restored with respect to one of the convictions, and thus that conviction could not be used to support the career offender enhancement. S. Tr. 32-33. The court agreed with the government that the enhancement was not precluded by any restoration of civil rights, and

overruled the objection. S. Tr. 33-34. The court further found "defendant's career offender status" to be "not only technically correct but appropriate in this case." S. Tr. 46.

Based upon the career offender enhancement, the court found the advisory guideline range to be 210-to-262 months, capped at 240 months' by the statutory maximum.[8] S. Tr. 46. After hearing from both sides and considering each of the § 3553 sentencing factors, the court imposed a sentence of 210-months' imprisonment. S. Tr. 49. The court noted that, while defendant was found guilty of one count, "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 need to take that into account." S. Tr. 46-47. The court further noted that defendant over his lifetime had been found guilty of "some of the most serious offenses a person can commit," and that "substantial periods of incarceration have completely failed to deter him from future criminal conduct . . . ." S. Tr. 47. The court also recognized the seriousness of drug trafficking and the harm it causes, and that defendant failed to accept

[8] Because the court found the career offender enhancement applicable, it did not resolve the issue regarding the amount of drugs for which defendant was accountable and thus did not determine defendant's offense level absent the career offender enhancement. *See* S. Tr. 47. Further, based on the career offender finding, the court continued to calculate defendant's criminal history as Level VI, even after striking a reference to a battery conviction which reduced his criminal history points. S. Tr. 24-25.

responsibility and blamed the government and his trial counsel, rather than himself. S. Tr. 47-49.

SUMMARY OF ARGUMENT

On appeal, defendant for the first time raises a hearsay objection to Gallo's intercepted June 17, 2012 statements. Defendant also for the first time identifies as hearsay, and offers argument as to the hearsay nature of, particular statements by Helein in the intercepted calls. The district court did not abuse its discretion, much less commit plain error, in admitting these statements by Helein and Gallo—which were not relevant for the truth of the matters stated but rather were offered to give context to defendant's statements and make defendant's admissions intelligible. Further, the court carefully considered the blanket, global hearsay objection made by defendant and gave defendant every reasonable opportunity to present his argument.

Even if error occurred with respect to the few statements now identified on appeal, reversal is not warranted. The evidence of defendant's possession with intent to distribute on December 12, 2011, which included defendant's own admissions on the recordings and his confession to law enforcement, was overwhelming. Nor did the court commit plain error by failing to give a limiting instruction that defendant never sought.

Defendant waived any argument challenging the district court's failure to strike the FBI agent's brief testimony that he was on the gang task force.

Defense counsel told the court that he did not want the jury instructed to disregard the statement, and that he did not want the court to take any action.

The court's denial of defendant's motion for new trial was not an abuse of discretion. The petit jury's conviction of defendant made any errors before the grand jury harmless beyond a reasonable doubt. The record does not support defendant's claims of undue surprise and inability to prepare his defense.

The district court did not commit plain error when it applied the career offender enhancement under U.S.S.G. § 4B1.1, based on defendant's Illinois conviction for aggravated battery of an officer. First, under well-established precedent of this Court the Illinois battery statute is divisible, and defendant has failed to show that the district court's application of the enhancement, which was consistent with that precedent, was error, much less obvious or clear error. Second, defendant has failed to show that any error arising from the court's reliance on information in the Presentence Report, rather than official court documents, resulted in substantial prejudice.

ARGUMENT

I. The District Court Neither Plainly Erred, Nor Abused Its Discretion, By Admitting Helein's and Gallo's Statements.

A. Standard of Review

This Court reviews evidentiary rulings for abuse of discretion when the party contesting the admissibility of the evidence objected at trial. *United States v. Cruse*, 805 F.3d 795, 810 (7th Cir. 2015); *United States v. Swan*, 486 F.3d 260, 263 (7th Cir. 2007). This Court will find abuse of discretion "only if no reasonable person could have adopted the [trial] court's view of the matter." *Cruse*, 805 F.3d at 810. Even if abuse of discretion is found, "reversal for such evidentiary error will be appropriate only if the error affected the defendant's substantial rights, meaning that an average juror would have found the prosecution's case significantly less persuasive without the proper evidence." *Id*.

This Court reviews for plain error the admission of evidence to which defendant did not object at trial. *Swan*, 486 F.3d at 263; *United States v. Williams*, 272 F.3d 845, 859 (7th Cir. 2001). Under this standard, defendant must show that the error was clear or obvious, and the error affected defendant's substantial rights, meaning the error affected the outcome of the district court proceedings. *Swan*, 486 F.3d at 264; *Williams*, 272 F.3d at 859. Further, this Court will not exercise its discretion to correct the error unless

the error "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings." *Swan*, 486 F.3d at 264 (citations and quotations omitted).

B. Background

By April 16, 2014, most of the codefendants in this case had pled guilty; only defendant and three co-defendants remained scheduled for a trial starting May 19, 2014. 4/16/14 Tr. 1-4. At the pretrial conference held on April 16, 2014, the government represented it would file the Santiago proffer on April 30, 2014, and the court ordered that defendants file any objections to the proffer by May 9. 4/16/14 Tr. 33. In particular, the court stated:

> The sooner the [Santiago proffer is filed the] better because not only does opposing counsel have to digest it, but then if they have objections -- . . . they need to have time to file those or motions with respect to the proffer. And as you know, any ruling with respect to the proffer is likely to greatly affect the course of the trial. And I don't think anyone wants that happening on the eve of trial. So the sooner you file the Santiago proffer the better. That should be your – for both sides, that should be your main concern at this point.

4/16/14 Tr. 33. The court continued the pretrial conference to April 30. 4/16/14 Tr. 61-62.

At the April 30th conference, the government confirmed that its Santiago proffer would be filed by the end of the day. 4/30/14 Tr. 15. Defense counsel were reminded that any objections to the proffer were due May 9. 4/30/14 Tr. 15. At the end of the conference, the court stated:

> [U]nless the filings that take place in next couple of days raise some issues that we have to address in open court, I will see you folks at 9:00 o'clock—9:00 a.m.—on the first day of trial. . . . . May 19th. If you have an issue that comes up before that, don't come in on May 19th and tell me you've got a 15-page motion you want me to rule on. File it immediately. Otherwise, I'll see you then.

4/30/14 Tr. 20.

The government filed its Santiago proffer on April 30, 2014.[9] R. 682. Defendant did not file any objection to the Santiago proffer on or before May 9. The parties appeared before the court on May 12, 2014 for a pretrial conference on various matters unrelated to the Santiago proffer. 5/12/14 Tr. 1-46. At the end of the proceeding—after the court had addressed all pending motions filed and issues raised by codefendants—defendant's counsel raised an objection to the Santiago proffer. 5/12/14 Tr. 47-48. Defendant acknowledged that he had not filed any written objection to the government's Santiago proffer, and engaged in the following discussion with the court:

> MR. GREENE: I'd be happy to file something if the Court would like to see my thinking on this—they've alleged on October 27, 2011 and December 12 and 14, 2011 that one Helein Ramirez-Padilla . . . had a telephone conversation with my client, Mr. Montez. I would ask the Court to consider that a hearsay statement and rule it inadmissible.

---

[9] In the proffer, the government referenced calls between Montez and Gallo on June 25, 2012, as evidence that defendant attempted to assist Gallo in purchasing cocaine from another source and provided counter surveillance for Gallo. R. 682 at 37-39. The government represented that the June 25, 2012 calls would not be played at trial but were included in the proffer to demonstrate defendant's involvement in the conspiracy. R. 682 at n. 8.

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 is 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.

5/12/14 Tr. 47-48.

At that point, the government interjected that it wanted the opportunity to address the matter with defense counsel and hopefully resolve the matter without court intervention. 5/12/14 Tr. 48. The court agreed to give the parties the opportunity to discuss and resolve prior to the next status scheduled for May 14, 2014. 5/12/14 Tr. 47-48. When a codefendant's counsel suggested moving the date of the next status to a later date, the court refused, stating:

> The problem is that we're starting trial on the 19th, Monday, so decisions that are made on these issues could impact the trial pretty drastically. And I think we really need to iron this out as quickly as possible. And I may, after hearing what you have to say on some of these issues, need some time to make a determination as well. And . . . I think if we make the rulings on the eve of trial, some of you may object to that.

5/12/14 Tr. 49.

The next day, May 13, 2014, the court held a status hearing, at which time the court granted a motion for severance that had been agreed to by all the parties, and ordered that defendant and his codefendant Mojica each would be tried individually. 5/13/14 Tr. 5-6; R. 720. The court ordered that codefendant Mojica's trial would start on May 19, and defendant's trial would begin June 10. 5/13/14 Tr. 6; R. 720. The court then inquired whether there were any remaining evidentiary issues that needed to be addressed. 5/13/14 Tr. 6. Counsel for co-defendant Mojica raised the issues he wanted the court to consider. 5/13/14 Tr. 7-25.

Following a lengthy discussion of codefendant Mojica's motions, defendant's counsel brought up the issue he had mentioned the day before "about a conversation between Helein Ramirez-Padilla and my client, Mr. Montez." 5/13/14 Tr. 25. The court noted that defendant was "not going to trial for a while yet[,]" and added:

> [W]e'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.

5/13/14 Tr. 25. Defense counsel responded, "Very well." 5/13/14 Tr. 25.

On May 20, 2014, the court entered a minute order resetting the start of defendant's trial to June 9, 2014. R. 737. On June 5, 2014—the Thursday prior to the start of trial on Monday, June 9—defendant filed a motion in limine to exclude as hearsay four recorded conversation between defendant and

Helein on October 27, 2011. R. 763. Defendant did not notice the motion for hearing by the court, or otherwise seek to have the motion heard prior to the start of trial. R. 763, 764; Tr. 6. In the motion, defendant did not identify any particular statements within these calls that constituted inadmissible hearsay but rather claimed "the calls" in general should be excluded as hearsay. R. 763. The motion did not include as a submission to the court of the transcripts or recordings of the calls defendant sought to exclude.[10] R. 763.

Right before jury selection was to begin on June 9th, defense counsel raised his motion in limine with the court. Tr. 2. The court requested that defendant present it with "a transcript of the conversation" at issue. Tr. 2-3. The defendant told the court to look at the transcripts for all the October 27, 2011 conversations contained in the transcript exhibit binder that the government had provided to the court just that morning. Tr. 2-3.

In response to the court's request that defendant identify the specific statements to which he objected, defense counsel maintained that "[a]nything that Helein says [in the October 27th conversations] is hearsay." Tr. 3. The court then inquired:

[10] Transcripts had been provided to the defendant at least one month before trial and defendant had the recordings, as well as summaries, of the wiretap conversations eighteen months prior to trial. R. 1195 at 1.

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

MR. GREENE: No.

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 because I was sleeping. That's hearsay?

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

Tr. 4. Defense counsel suggested that Helein's sleeping was relevant to show that Montez called him at an hour when he was asleep. Tr. 4-5. The government denied that it would offer this statement to prove that Helein was sleeping. Tr. 4.

The court inquired why the motion was not previously filed with copies of transcripts so that the court could review them and rule on them before the morning of jury selection. Tr. 5. Defense counsel said he had raised the issue at a prior status, though he had not filed a motion at that time. Tr. 5. Defense counsel had "no explanation" for why he had not filed the motion sooner except that he thought the court had made a tentative ruling on it a proceeding on May 16th proceeding that he had not attended. Tr. 5-6. Without objection by defendant, the court decided to proceed with jury selection and revisit the issue at the end of the day. Tr. 7-8.

Because the court had to address a pressing matter in another case at the end of the day on June 9, the court addressed the hearsay issue again first thing the following morning, June 10, before continuing with jury selection. Tr. 189; R. 776. The government maintained that it did not seek to offer any of Helein's statements for the truth but rather the statements were relevant to provide context for the defendant's admissions and make those admissions intelligible for jury. Tr. 192. The government further suggested that the court could instruct the jury that Helein's statements were not to be considered for the truth but rather to provide context. Tr. 192.

The court noted that defendant's motion was "hard to deal with because of the defendant's assertions that all of these statements by Mr. Ramirez-Padilla [Helein] should be excluded. He's made an awful lot of statements in these . . . half dozen conversations." Tr. 193. The court asked defendant if he could "narrow this down to some extent[,]" and elaborated:

> I mean, as we previously indicated, the first statement—the first oral expression by Mr. Ramirez-Padilla on line 3 of call 309 is clearly not an assertion of any fact. . . . [I]t's not hearsay at all. I mean, it's not a statement. It doesn't assert anything. It's just an exclamation of frustration apparently. You shouldn't be moving to suppress that, should you?
>
> On line 7, where Mr. Ramirez-Padilla says: What?
>
> And it's clearly established in the Seventh Circuit that a question is not a hearsay statement. It's not a statement. It's not an assertion at all. You shouldn't be moving to suppress that.

> On line 11 when Mr. Ramirez-Padilla says: No, dude. It's just that I was sleeping, dude.
>
> It's clearly not being offered to prove that Mr. Padilla was sleeping. Nobody cares. It's not part of the case. It's being offered to explain why your client said: F, son of a bitch, are you on vacation? That's just there to 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 30, when he directs: Let me know where. Somewhere around. These aren't even statements are they? They're not assertions of fact under the hearsay definition of what a statement is, are they? Are you really moving to suppress all of those?

Tr. 193-94. Defendant responded that he was seeking to suppress all those statements. Tr. 194. Defendant added that he sought to suppress not only all the statements Helein made in the October transcripts (as he indicated yesterday and in his written motion), he now also sought suppression of all of the statements Helein made in the December transcripts as well. Tr. 194.

The court again asked defendant to "direct the Court to what specific statements you feel ought to 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 . . . . " Tr. 195. Defendant responded, "I'm worried that the jury will . . . look at this transcript, and deduce without me having the opportunity to cross-examine Helein that there was a drug transaction about to occur." Tr. 195.

The court probed further:

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

Tr. 196. Upon further questioning by the court, defendant indicated that the word "f-u-c-k "was hearsay because it indicated that Helein was "upset about something." Tr. 197.

Defendant then argued that in the Santiago proffer the government represented that in call 6510 Helein asked defendant if he was going to want the "tia" but in the transcript of the call that was being offered at trial, the word "tia" did not appear. Tr. 197-98. The court pointed out that this did not address the hearsay motion currently before the court but raised an entirely different issue regarding the accuracy of the transcripts. Tr. 198-200. Defendant then asked for a couple moments, which the court allowed. Tr. 200. Upon return, defendant asked "What was your question, Judge?" Tr. 200.

The court then stated:

> 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 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 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 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.

Tr. 200-01.

The court told defense counsel he could file this motion at any time but trial would not be delayed for it. Tr. 201-02. The court added:

> This trial has been scheduled for a long time. If you wanted this Court to review every single statement proffered by the government as evidence against your client based upon this hearsay objection, you ought to have filed that motion and filed a proper motion with correct articulation of the issues and specific examples, at the very least. You didn't do that. So do it now whenever you can.

Tr. 201-02.

After a brief recess, the court continued with jury selection. Tr. 203; R. 780. Later that morning, once jury selection was completed but before the jury

was sworn, the court took an early lunch break and resumed at 12:43 p.m., with swearing-in the jury, preliminary instructions, and opening statements. Tr. 249-70. Later that afternoon, before the government published the first transcripts, the court took a 15-to-20 minute break, during which the court distributed to the parties its written order regarding defendant's motion to preclude the transcripts as hearsay. Tr. 324-25.

In the order, the court memorialized in writing its findings and directions announced orally that morning. R. 778. In particular, the court found that defendant's "blanket objection to every statement in the recordings by Ramirez-Padilla . . . include[d] expressions that [we]re neither statements nor hearsay" and were relevant for the purpose of providing context to the statements made by defendant during these conversations. R. 778 at 2. The court provided examples:

> [T]he 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 . . . 801. Line 22 is, at most, Ramirez-Padilla agreeing with 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 if 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.

R. 778 at 2-3.

In the order, the court repeated its directive that defendant "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," and the basis for the defendant's belief that each of the identified statements is offered for the truth of the matter it asserts rather than as context for defendant's admissions. R. 778 at 4.

Following this break, the government began publishing transcripts of the telephone conversations between Helein and defendant on October 27, 2011, and during the remainder of the afternoon published the transcripts of all the

conversations on October 27, 2011, December 12 and 14, 2011, and June 17, 2012. Tr. 325-32, 348-60. Defendant did not request that the court give a limiting instruction with respect to the transcripts nor did the defendant object to the failure of the court to give such an instruction.

Defendant did not file any additional motions with respect to the transcripts of the conversations between Helein and defendant. At no time did defendant object on hearsay grounds to the admission of the recordings and transcripts of intercepted conversations between defendant and Gallo.

C. Analysis

Defendant argues that the district court erroneously admitted hearsay statements made by Gallo during intercepted conversations with defendant on June 17, 2012, and by Helein during intercepted conversations with defendant on October 27, and December 12 and 14, 2011. These arguments lack merit for several reasons.

First, defendant never objected in the district court to the admission of any of the intercepted conversations between Gallo and defendant on June 17, 2012, and the transcripts of those conversations. Thus, this argument made for the first time on appeal is reviewable for plain error only. Even if any of

Gallo's statements identified in defendant's brief were hearsay,[11] defendant cannot establish the requisite prejudice. Defendant was acquitted of the count (Count 21) to which these conversations related. Moreover, not only did defendant confess to having purchased cocaine from Gallo during October and December 2011, and June 2012, but Gallo himself testified at trial regarding his narcotics dealing with defendant, including his sale to defendant on June 17, 2012. Thus, evidence of Gallo's possession of cocaine on that date and his measurement of quantities of that cocaine was presented through Gallo's testimony, as well as defendant's own statement to law enforcement, and defendant's own statements in the wiretap conversations, and the challenged recorded statements merely corroborated that evidence.

Second, defendant for the first time on appeal identifies as hearsay specific statements made by Helein during the October and December 2011 telephone calls.[12] Further, while in the district court defendant did make a

---

[11] They are not. For example, the only statements by Gallo that defendant identifies in the text of his brief are the statements, "We already got the half around there, dude" and "[f]ive fifty for the half, dude." D. Br. 18-19; R. 1343 at 32. These statements were not offered for the truth of the matter stated but rather to provide context for defendant's statements. Further, Gallo's statement about the price was the essence of the negotiation of the drug deal, and as such is a "verbal act" that is not hearsay. *See Carter v. Douma*, 796 F.3d 726, 735 (7th Cir. 2015).

[12] Had defendant proceeded on appeal as he did before the district court and failed to identify particular statements, this court would have considered his argument waived. *See United States v. McClellan*, 165 F.3d 535, 552 (7th Cir. 1999); *United States v. Williams*, 877 F.2d 516, 518-19 (7th Cir. 1989); *United States v. Shelton*, 669 F.2d 446, 465-66 (7th Cir. 1982).

blanket objection on hearsay grounds to all of Helein's statements during these calls, defendant failed to develop any argument orally or in writing as to why any one of those statements—much less all of them—constituted hearsay. In this respect defendant's challenge in the district court was akin to undeveloped appellate arguments, which this Court considers waived. *See*, *e.g.*, *United States v. Adams*, 625 F.3d 371, 378 (7th Cir. 2010); *see also McKissick v. Yuen*, 618 F.3d 1177, 1189-90 (10th Cir. 2010) (failure to develop arguments in district court results in forfeiture—if failure unintentional—or waiver—if failure intentional, on appeal).

Defendant's suggestion that he was not given the opportunity to identify specific statements or develop his argument, and his claim that the district court exercised a "lack of care" and was "inattentive" are unsupported by the record. The district court made clear throughout the proceedings in this case that it did not want to decide important, time-consuming evidentiary matters on the eve or morning of trial. While the court indicated to defendant at the May 13th status that the hearsay issue could be addressed nearer to or even at the start of defendant's trial, defendant had not described fully the number of statements he was challenging, and the court clearly had envisioned that defendant would identify the specific sentences or utterances at issue.

Even when defendant belatedly raised the issue at the start of trial, the court willingly addressed the issue. The court simply asked defendant to

identify the statements he alleged to be hearsay. When defendant responded that every single statement Helein made was hearsay, the court began to consider each statement, only to conclude quickly that the statements in the first transcript, which included an expletive and a statement that Helein had been sleeping, were not in fact hearsay. At that point, consideration of the motion was tabled until the next day in order to continue with jury selection.

That initial colloquy with the court on June 9th made clear that the court expected defendant to identify particular statements and present argument as to why each statement was hearsay. Defendant had overnight to prepare such argument. When trial resumed the next morning, the court delayed continuing with jury selection to continue consideration of defendant's motion. In response to the court's repeated requests on June 10th that defense counsel identify the alleged hearsay statements and explain the basis for the hearsay objection, defense counsel continued to insist that all statements were hearsay. Moreover, defendant added that he was challenging not only all the statements that Helein made in the October 27th conversations, but now also was challenging all of Helein's statements during the December 12th conversations. Even then, the court ended its inquiry only when defendant's answers became non-responsive to the questions regarding hearsay that the court posed.

Further, the court did not simply deny the motion. It ruled that it would consider the motion further if defendant filed an amended motion identifying specific statements and explaining why those statements were hearsay. The court made this ruling, orally, in the morning before jury selection was completed. The court took an early lunch break and did not swear in the jury and commence the trial until after the lunch break. The court took a second twenty-minute break much later in the day (at which time the court gave the parties its written order). The transcripts were not introduced until after both this lunch break and the afternoon break. Defendant had this additional opportunity to identify specific hearsay statements in the transcripts—particularly the three short statements by Helein that he has now identified as hearsay in the text of his brief.

In any event (and under any standard of review, including abuse of discretion), the district court properly admitted the statements by Helein that are now specifically identified for the first time on appeal.[13] This Court

[13] In the text of defendant's brief, he identifies and provides argument with respect to only three of Helein's statements. D. Br. 17-18. While he purports to provide "additional examples of hearsay" in a summary chart in the brief's appendix, it is the government's position that he has waived argument with respect to such statements by failing to include argument regarding them in the text of his brief, in compliance with Fed. R. App. P. 28(a)(8)(A). *See* D. Br. 18 n. 2, A. 86. In any event, any arguments lack merit because the listed statements are relevant not for the truth of matters asserted but rather to provide context and as verbal acts that form the negotiation of the drug deal. Further, any error was necessarily harmless because, as discussed later, the statements were insignificant in the context of other strong evidence of defendant's guilt on the count of which he was convicted.

recognizes that statements are not hearsay to the extent they are relevant not for the truth of the matter asserted, but rather for context or to make what the defendant said and did in reaction to the statements intelligible to the jury. *E.g.*, *United States v. Amaya*, 828 F.3d 518, 528 (7th Cir. 2016); *United States v. Smith*, 816 F.3d 479, 481-82 (7th Cir. 2016); *United States v. Gaytan*, 649 F.3d 573, 579-80 (7th Cir. 2011); *United States v. Bermea-Boone*, 563 F.3d 621, 626 (7th Cir. 2009). The challenged statements were relevant for these purposes, not for their truth.

Defendant challenges as hearsay Helein's statement "It's real nice, dude" in the following conversation on December 12, 2011:

> DEFENDANT: And listen, is it hard or is it loose?
>
> HELEIN: It's real nice, dude.
>
> DEFENDANT: Okay, that's what I need to know.
>
> HELEIN: It's more or less.
>
> DEFENDANT: Okay, no, no, so I know because these fucking dudes are picky.

R. 1343 at 17.

Helein's statement "[i]t's real nice" was not offered to prove that Helein was in possession of cocaine that was of good quality. In fact, as discussed in the Statement of the Case, defendant told Helein a couple days later, on December 14th, that the cocaine Helein provided on December 12th was not "nice" at all but rather of poor quality. In compliance with *Amaya*, 828 F.3d at

528, the relevance of Helein's statement was to put defendant's words in context, so that the jury could understand what it was that defendant "needed to know" and could understand, from defendant's own words, that defendant was seeking good quality cocaine to satisfy his (defendant's) "picky" customers.

Defendant also objects to Helein's statement in the following December 14th conversation that "it's nice, it's nicer dude":

> DEFENDANT: But, is it going to be uh, firmer, not like—
>
> HELEIN: No, it's nice, it's nicer dude.
>
> DEFENDANT: Good, because this other one you gave me, man, wasn't worth shit man. It was good, but it was all loose, man. I had problems even giving it to that son of a bitch….

R. 1343 at 27. Helein's statement "it's nicer dude" was not relevant to prove that Helein had cocaine of good quality on December 14. Defendant was not charged with any offense on December 14 and whether Helein was telling the truth when he claimed to have good quality cocaine (or any cocaine at all) on December 14 was irrelevant. The only relevance of this conversation was to show (by defendant's own words and admissions) that defendant had obtained cocaine from Helein on December 12th (the charged offense) that was not of good quality and he had difficulty selling it to his "picky" customer.

Similarly lacking merit is defendant's reliance on Helein's statement during a December 12, 2011 conversation that defendant should "arrive in

about 20 minutes so I can measure all of the shit." R. 1343 at 20. Defendant claims that the only relevance of the statement is to prove that Helein was measuring out drugs for defendant. However, that ignores the context of the entire conversation, which includes the following:

> DEFENDANT: I'm passing uh, almost by 47th.
>
> HELEIN: Look, dude, take about fucking 20 minutes around there, dude. Are you going to want the three?
>
> DEFENDANT: 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: All right dude.
>
> DEFENDANT: I'm going to get one for me in the meantime. You know?
>
> HELEIN: All right.
>
> DEFENDANT: So, so you want what?
>
> HELEIN: For you to arrive in about 20 minutes so I can measure all of the shit.
>
> DEFENDANT: Okay, that's fine then.

R. 1343 at 20.

In context, the deal is set and defendant's order for "three" placed well before the challenged sentence by Helein. The relevance of the statement is to inform defendant when to arrive to pick up the drugs he had ordered. It was irrelevant whether Helein would be spending the 20 minutes "measuring" or

playing the piano. The import was that he had told defendant to arrive in 20 minutes and offered this explanation to defendant for why he should come in 20 minutes; and this explanation provided context for defendant's response ("Okay, that's fine then") and thus agreement to come in 20 minutes, as opposed to coming immediately.

Even if admission of these statements were error, reversal would be appropriate (under abuse of discretion or plain error standards) only if the error affected the defendant's substantial rights. That is not the case here; defendant would have been convicted even without the purportedly hearsay statements. Defendant was convicted by his own words, using code-words like "seven" and "tickets" to order cocaine for his "picky" customers on December 12, 2011, and complaining two days later about the quality of the cocaine that Helein had provided and the dissatisfaction of his customers. R. 1343 at 17-27. In addition to the recordings, the government introduced evidence of defendant's confession that he purchased cocaine from Gallo and his organization during December 2011, and that Helein was a runner who delivered drugs for Gallo. Tr. 455-57, 462-73. Gallo also testified that he provided cocaine to defendant during December 2011, that defendant bought in seven gram quantities for distribution to his [defendant's] own customers, and Helein delivered cocaine to defendant for him. Tr. 402-10.

Finally, defendant's reliance on the failure of the court to give a "contemporaneous limiting instruction" lacks merit. D. Br. 19. Because defendant never sought such an instruction, the plain error standard of review applies. *See United States v. Resnick*, 823 F.3d 888, 895 (7th Cir. 2016); *United States v. Reese*, 666 F.3d 1007, 1016 (7th Cir. 2012); *see also United States v. Rodriguez*, 759 F.3d 113, 121 (1st Cir. 2014). No such error occurred.

Defendant's reliance on *United States v. Burton*, 937 F.2d 324, 327-28 (7th Cir. 1991) is misplaced. *Burton* involved out-of-court statements of a confidential informant that were offered for the truth and thus implicated the Confrontation Clause. Helein was not a confidential informant and his statements, which he did not know were being intercepted, were not made "in anticipation of or with an eye toward a criminal prosecution." *Gaytan*, 649 F.3d at 579 (citations and quotations omitted). Thus, even if his statements were offered for the truth, they were not testimonial, and thus did not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36 (2004); *Amaya*, 828 F.3d at 528-29. While this Court has approved the use of limiting instructions in potential Confrontation Clause cases to ensure that a non-testifying informant's statements were not considered for the truth of the matters asserted therein, this is not such a case. *See*, *e.g.*, *Gaytan*, 649 F.3d at 580; *United States v. Van Sach*, 458 F.3d 694, 701-02 (7th Cir. 2006). Nor does *Burton* stand for the proposition that a limiting instruction is required in a

non-Confrontation Clause case such as this, especially when one was not requested by defendant.

Examination of cases outside of the Confrontation Clause context makes clear no error occurred. As the First Circuit has explained, it is "particularly unreceptive" to plain error arguments based on the failure to give an unrequested limiting instruction because "[t]he district court is not required to act *sua sponte* to override seemingly plausible strategic choices on the part of counseled defendants." *Rodriguez*, 759 F.3d at 121 (citations and quotations omitted). Based on just this rationale, this Court, sitting *en banc*, has counseled trial courts against *sua sponte* giving unrequested limiting instructions in the context of the admission of evidence under Fed. R. Evid. 404(b). *See United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014).

Here, the government made the suggestion at the time of defendant's hearsay objection, before the completion of jury selection, that the court could give a limiting instruction. Defendant never followed up on this suggestion, and nothing in the record suggests that the court would have rejected such an instruction had defendant requested it. Nor did the government argue or otherwise seek to use Helein's statements for the truth of matters asserted therein. Given the strong evidence in the case, particularly defendant's own words during the intercepted conversations and his admissions to law

enforcement at the time of his arrest, no plain error, much less reversible plain error, can be shown.

II. Defendant Waived His Challenge To The District Court's Failure To Strike Agent's Testimony That He Was Assigned To A Gang Task Force.

A. Standard of Review

"Waiver occurs when a criminal defendant intentionally extinguishes a known right." *United States v. Clark*, 535 F.3d 571, 577 (7th Cir. 2008) (citations and quotations omitted). Forfeiture "occurs when a defendant negligently fails to assert a right in a timely fashion." *Id.* (citations and quotations omitted). "Waiver extinguishes any error and precludes appellate review, while forfeiture warrants review for plain error only." *Id.*

B. Background

Prior to trial, defendant filed a motion to preclude the government from mentioning any association with gang activity. R. 632 at 3; 4/16/14 Tr. 22, 28. The government represented that it would not be presenting evidence of defendant's gang affiliation. 4/16/14 Tr. 28. The court thus denied the motion as moot. 4/16/14 Tr. 28.

During trial, the government called FBI Agent Patrick Staehely, who interviewed defendant at the time of his arrest, to testify to defendant's statements. Tr. 451. As preliminary background information, the government asked the following questions and received the following answers:

[AUSA]: Are you assigned to any particular group in the FBI?

[WITNESS]: Yes, sir.

[AUSA]: What are you assigned to?

[WITNESS]: A gang task force.

[AUSA]: What are the duties and responsibilities you have on the gang task force?

[WITNESS]: Investigating numerous narcotics and firearms related violations.

[AUSA]: Would you tell the jurors briefly, please, the training you've received to become an FBI agent?

[WITNESS]: There was an 18-week course at Quantico, Virginia, that I attended.

Tr. 451. Following that answer, defense counsel asked for a sidebar. Tr. 451.

At sidebar, defense counsel objected to Agent Staehely's testimony that he was assigned to the gang task force, on the ground that it "imputed" that defendant had involvement in gang activity. Tr. 452. The government explained that it had elicited this testimony only to provide the agent's background, not to impute any gang activity by the defendant. Tr. 452. The court and defense counsel then had the following discussion:

THE COURT: [I]f you want me to instruct the jury to disregard 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. 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?

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

THE COURT: Okay.

Tr. 453.

Following the sidebar, the agent's testimony resumed, and the agent testified regarding his interview of the defendant. Tr. 454-58. In answer to questions on cross-examination, Agent Staehely testified that he was not one of the case agents in the case.[14] Tr. 457-58.

C. Analysis

Defendant waived the argument he now raises on appeal. Defendant never moved to strike Agent Staehely's brief testimony about the gang task force. To the contrary, defense counsel expressly declined the court's offer to instruct the jury to disregard that testimony. When the court asked defendant what he wanted the court to do, defense counsel responded that the court could do "nothing." Tr. 453. The record supports the conclusion that defense counsel made the tactical decision not to draw further attention to the testimony by

[14] The jury was told a that a "case agent" is the agent in charge of the investigation. Tr. 482-83.

having the district court highlight the testimony and then direct the jury to disregard it.

Even if not waived, the argument was forfeited. Defendant has failed to establish that the court erred at all (much less plainly erred) by proceeding just as defendant asked and not instructing the jury to disregard or "striking" the testimony. Further, defendant has not established prejudice, much less substantial prejudice, as required. The agent's testimony about his assignment to the gang task force was brief. Defense counsel brought out on cross-examination that Agent Staehely was not the case agent. None of the other law enforcement witnesses testified that they were assigned to a gang task force. In fact, Agent Burke, who interviewed defendant with Agent Staehely, testified that he was assigned to the Chicago field office. Tr. 462. Finally, the evidence in the case—which included defendant's own recorded statements and his confession—was so strong that defendant cannot possibly establish that any error here affected the outcome of the trial.

III. Any Error Before The Grand Jury Was Harmless Beyond A Reasonable Doubt.

A. Standard of Review

This Court reviews a district court's denial of a motion for new trial for abuse of discretion. *United States v. Flournoy*, 842 F.3d 524, 528 (7th Cir. 2016).

B. Background

On September 26, 2012, after the conclusion of the wiretaps in this case, the government filed a complaint for the arrest of defendant and 39 other individuals. R. 1. The affidavit supporting the complaint explained that the wiretap conversations discussed in the affidavit were in English and Spanish, and that the affiant "relied on draft summaries—not final—English translation of conversations in Spanish done by Spanish speaking FBI agents and/or interpreters contracted by the FBI." R. 1 at n. 43. In connection with the subsequent return of the indictment in this case, the testimony before the grand jury about the content of relevant Spanish-language conversations involving the defendant was based upon the complaint affidavit. R. 1195 at 5.

The complaint affidavit stated that in a conversation on December 12, 2011, "Heleins asked if MONTEZ is going to want the 'tia' (14 grams of cocaine)?" and that "MONTEZ said he was going to 'want the tia.'" R. 1 at ¶ 329. However, the translated summaries prepared in connection with the wiretap showed that "tia" was not said during the December 12, 2011 conversations, and that the quantity referenced in the complaint affidavit

should not have been "tia" (or 14 grams) but rather "3" (or 21 grams) as reflected in those summaries.[15] R. 1195 at 7, Exhs. B, C.

The government provided defendant the complaint affidavit (summarizing the evidence against defendant), as well as copies of all the wiretap recordings, on September 27, 2012, the day of his arrest on the original complaint in this case. R. 1195 at 1. On that same day, the government gave defendant all of the wiretap summaries that were relied upon by the affiant in the complaint affidavit. R. 1195 at 1, 5; R. 1 at n. 43. Further, on May 5 and 9, 2014, a month prior to trial, the government provided defendant with a list of calls that the government intended to play at trial, along with the transcripts of the calls. R. 1195 at 1. The list and transcripts included the calls on December 12, 2012 where defendant requested "three," and not "tia". R. 1195 at 1. Draft transcripts of the calls had been provided to defendant even earlier than that. 4/30/14 Tr. 15; 5/16/14 Tr. 26-27. The wiretap summaries for the December 12th calls that were provided to defendant back in September 2012 were consistent with the finalized transcripts introduced into evidence at trial, and reflected defendant's request for cocaine from Helein on December 12,

[15] While defendant did not use the words "mia tia" during conversations on December 12, 2011, the final trial transcripts regarding defendant's intercepted conversations with Helein on December 14, 2011, and with Gallo on June 17, 2012, correctly included defendant's express references to "tia" ("aunt") and "mis dos tias" ("both my aunts"). R. 1343 at 27, 30, 35.

2011, including the request for "three," and, in particular "three sevens," which trial testimony indicated was 21 grams of cocaine. R. 1195 at 7, Exhs. B, C, D; *see also* R. 1343 at 17-21. An expert in the Spanish language testified at trial to the accuracy of the English translation in the transcripts. Tr. 288-92, 301, 308-13.

Defendant raised the issue of the "tia" error in the affidavit in a post-trial motion which he filed *pro se*. R. 805. In his *pro se* "Supplemental Motion to Judgment of Acquittal and New Trial," defendant alleged that there was a "fatal variance" between the evidence supporting the indictment and the evidence produced at trial for Count 6, the count of conviction. R. 805; *see also* R. 1151; S. Tr. 6-28. Based on the reference to "tia" in the complaint affidavit but not in the final trial transcripts for calls on December 12, 2011, defendant alleged prosecutorial misconduct and contended the grand jury had not been given reliable material evidence when it returned the indictment. R. 805, 1151; S. Tr. 6-28. Defendant further contended that the government never corrected or changed this aspect of its evidence (so as to omit the reference to "Tia") until the actual day of trial before the jury and thus caused a surprise to the defense. R. 805, 1151; S. Tr. 6-28.

The district court denied defendant's motion. R. 1224; S. Tr. 5, 24, 26-28. Relying upon this Court's decision in *United States v. Philpot*, 733 F.3d 734, 741 (7th Cir. 2013), the district court explained that "any errors as

described by Defendant were harmless given that the [petit] jury was presented with finalized transcripts of the calls that were subject to adversarial testing during tria1." R. 1224 at 1. The court also found "nothing in the record to substantiate any misconduct by the Government in this case." S. Tr. 27-28.

C. Analysis

Defendant argues that the court's denial of his new trial motion was an abuse of discretion. Defendant contends that the government presented erroneous evidence in the complaint and before the grand jury that during an intercepted call on December 12, 2011, defendant used the code-word "tia." According to defendant, the government "should have affirmatively moved to remediate the error, either by dismissing the count (count 6), 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." D. Br. 35. Defendant maintains that, as a result of the government's misconduct, he was subject to "unfair surprise" at trial and "was not able to fully present his defense." D. Br. 36. Defendant's arguments lack merit.

First, the petit jury's conviction of defendant on Count 6 made any errors before the grand jury with respect to the "tia" reference "harmless beyond a reasonable doubt." *United States v. Philpot*, 733 F.3d 734, 741 (7th Cir. 2013) (citation and quotations omitted). As the Supreme Court has indicated, the

purpose of the grand jury is to "protect[] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty[,]" but a trial jury's subsequent guilty verdict "mean[s] not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *United States v. Mechanik*, 475 U.S. 66, 70 (1986); *see also Philpot*, 733 F.3d at 741; *United States v. Fountain*, 840 F.2d 509, 515 (7th Cir. 1988).

Second, defendant's claims of unfair surprise and inability to prepare his defense are unsupported by the record. Defendant had copies of all the wiretap recordings and summaries as of September 2012—eighteen months prior to his trial. Further, as the government represented to the court and defendant's counsel did not dispute, the government provided defense counsel with the list of calls the government intended to introduce at trial, along with final transcripts of the calls, on May 5 and 9, 2014—a month before trial. These transcripts were consistent with the summaries that had been provided to defendant 18 months before. Defense counsel did not complain, prior to or during trial, regarding the government's timely production of transcripts.

IV. The District Court Did Not Plainly Err In Applying The Career Offender Enhancement Under U.S.S.G. § 4B1.

A Standard of Review

In the district court, defendant never made the argument he now makes on appeal: that aggravated battery of an officer, under Illinois law, does not require the use of violent force and thus does not qualify as a crime of violence for purposes of the career offender enhancement under Guideline § 4B1.1. Accordingly, defendant forfeited his argument and this Court should review for plain error only. *See United States v. Hurlburt*, 835 F.3d 715, 719 (7th Cir. 2016); *United States v. Scanlan*, 667 F.3d 896, 899 (7th Cir. 2012).

Under plain error review, this Court will only reverse a determination of the district court if there was (1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Anderson*, 604 F.3d 997, 1002 (7th Cir. 2010).

B. The Law

Section 4B1.1(a) of the U.S. Sentencing Guidelines provides that a defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior

felony convictions of either a crime of violence or a controlled substance offense. At the time that defendant was sentenced in January 2016, U.S.S.G. § 4B1.2(a) continued to define a "crime of violence" to be any state or federal offense, punishable by more than one year of imprisonment, that either (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (§ 4B1.2(a)(1)); or (2) "is burglary of a dwelling, arson, or extortion, involved use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another" (§ 4B1.2(a)(2)). *See* U.S.S.G. § 4B1.2(a)(1), (2) (Nov. 1, 2015)[16].

In *Johnson v. United States,* 135 S. Ct. 2551 (2015), the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. In *United States v. Hurlburt*, 835 F.3d 715, 721-25 (7th Cir. 2016), this Court held that Guideline § 4B1.2(a)(2)'s definition of "violent felony" is also unconstitutionally vague. Neither *Johnson* nor *Hurlburt*, however, invalidated Guideline § 4B1.2(a)(1), which continues to define a crime of violence to include any offense that has as an element the use, attempted use, or threatened use of physical force. *Johnson*, 135 S. Ct. at 2563; *see also Stanley v. United States*, 827 F.3d 562, 564-565 (7th Cir. 2016).

[16] The amended version of the guidelines, to reflect *Johnson v. United States*, 135 S. Ct. 2551 (2015), became effective August 2016.

In evaluating whether a prior conviction has as an element the use, attempted use, or threatened use of force, a court may employ the categorical approach or the modified categorical approach. The court applies the categorical approach when the statute for the predicate crime in question "sets out a single (or 'indivisible') set of elements to define a single crime." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the categorical approach, courts identify the minimum criminal conduct necessary for conviction of the predicate offense, looking "only to the statutory definitions—*i.e.,* the elements—of [the] . . . offense[], and *not* to the particular [underlying] facts." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (internal quotations omitted). As long as the elements of the prior crime are the same as or narrower than the guideline definition of a crime of violence, then the prior crime counts as a predicate; "if the statute defines an offense more broadly than the Guidelines, the prior conviction doesn't count." *United States v. Edwards*, 836 F.3d 831, 835 (7th Cir. 2016).

When the statute lists multiple elements in the alternative and thus defines multiple crimes, the Court applies a modified categorical approach. *Mathis*, 136 S. Ct. at 2248. This approach "looks to a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of." *Id.* at 2249. Under *Mathis*, a statute is divisible only if it sets forth

alternative "elements" for the offense, rather than alternative "means" by which the offense may be committed. *Id*. at 2249.

C. Analysis

The district court did not commit plain error in applying the career offender guideline because defendant's aggravated battery conviction included as an element the use, attempted use, or threatened use of force, and thus qualified as a crime of violence.

In 2006, defendant was convicted in Cook County, Illinois, of aggravated battery of an officer/employee, in violation of 720 ILCS 5/12-4(b)(18). PSR 14; D. Br. 28, A. 88-89. At the time of the offense, the Illinois aggravated battery of an officer statute provided that "[i]n committing a battery, a person commits aggravated battery if he or she . . . knows the individual harmed to be an officer or employee of . . . a unit of local government . . . ." 720 ILCS 5/12-4(b)(18); D. Br. App. 88-89. The underlying Illinois battery statute, at that time, provided:

> A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

720 ILCS 5/12-3(a).

This Court has recognized that an Illinois conviction for aggravated battery of an officer criminalizes both battery by causing bodily harm (which would involve force and qualify as a crime of violence), and battery by making

physical contact that is insulting or provoking (which would not involve force and not qualify as a crime of violence). *See United States v. Rodriguez-Gomez*, 608 F.3d 969, 973 (7th Cir. 2010); *United States v. Aviles-Solarzano*, 623 F.3d 470, 472-73 (7th Cir. 2010). Further, this Court has held that the Illinois battery statute is divisible (thus permitting the modified categorical approach); and that a conviction for aggravated battery of an officer under the "bodily harm" prong of the battery statute is a crime of violence for purposes of the career offender guideline, and a violent felony under the Armed Career Criminal Act. *See*, *e.g.*, *Stanley*, 827 F.3d at 566; *Hill v. Werlinger*, 695 F.3d 644, 649 (7th Cir. 2012); *Rodriguez-Gomez*, 608 F.3d at 973-74.

Defendant challenges this precedent. Relying on *Mathis*, defendant argues that the "bodily harm" and "provocative or insulting contact" prongs are "means," not "elements," of the battery statute, and thus the statute is not divisible and the modified category approach may not be employed. Defendant's challenge fails because, as discussed below, defendant cannot establish error, much less the requisite plain error.

To find that an error was plain, "it must be of such an obvious nature that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. It cannot be subtle, arcane, debatable, or factually complicated." *See United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011) (citations omitted). No such obvious error can be

shown here.

Defendant attempts to show that the two prongs of the battery statute are "means" by relying on the Illinois Supreme Court's 1970 decision in *People v. Grieco*, 44 Ill.2d 407 (Ill. 1970). However, *Grieco* is inapposite.

In *Grieco*, defendant challenged the sufficiency of the indictment charging that he and his codefendant "committed the offense of battery, in that they, intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom . . . ." *Id.* at 408. The Illinois Supreme Court defined "the single, narrow issue presented" to be "whether the failure of the indictment to allege *the means* by which the battery was accomplished on the complaining witness caused it to offend the constitutional provisions and statute relied upon." *Id.* at 409 (emphasis added). The focus of the opinion was on whether sufficient information had been provided in the indictment to provide "certainty." *Id.* In particular, the court found that "the indictment here [met] . . . the test for certainty" because:

> [t]he term 'battery' is one of common usage and understanding, and the statute itself sets forth all *elements* necessary to constitute the offense intended to be punished, viz., causing harm to an individual, intentionally and knowingly without legal justification. Coupled with the allegations setting forth the name of the person upon whom the battery was committed, and the date it occurred, the indictment was sufficiently certain to enable defendant to prepare a defense and to permit any judgment entered to be pleaded in bar of a subsequent indictment for the same offense.

Id. at 410 (emphasis added). *See also id.* at 411.

While *Grieco* fails to address whether the prongs of the battery statute are separate elements, the Illinois Supreme Court one year later in *People v. Abrams*, 48 Ill.2d 446, 460-61 (1971), expressly referred to the two prongs of the battery statute as "alternative elements." Indeed, in *Jenkins v. Nelson*, this Court expressly relied on the *Adams* decision in recognizing that "[t]he two prongs of the battery statute 'are considered alternative elements of the offense" under Illinois law. 157 F.3d 485, 497 (7th Cir. 1998) (quoting *Abrams*, 48 Ill.2d at 460-61). *See also People v. Hale*, 77 Ill.2d 114, 116 (Ill. 1979) (statute defines battery "as consisting of either of two alternative types of misconduct"); *United States v. Richardson*, 2016 WL 6650833 (D. Minn. Nov. 9, 2016) (rulings of Illinois Supreme Court and Seventh Circuit indicate prongs of Illinois battery statute are separate elements); *Dawson v. United States*, 2016 WL 5369476 (S.D. Ill. September 26, 2016) ("Seventh Circuit has recognized that Illinois battery statute embraces two distinct crimes under the two different prongs"). *But see People v. Lutz*, 73 Ill.2d. 204, 212 (Ill. 1978) (references prongs as "alternative methods of committing the offense"); *People v. McBrien*, 144 Ill. App. 3d 489, 496 (Ill. App. 4th District 1986) (statute provides that "a battery may be committed in either of two manners . . .").

Where state law fails to resolve the issue, the Supreme Court in *Mathis* instructed courts to examine the language and structure of the statute. *See*

136 S. Ct. at 2256. Here, such an examination supports the well-established precedent of this Court that the Illinois battery statute is divisible. As noted previously, the Illinois statute provides that "[a] person commits battery if he or she knowingly without legal justification *by any means* (1) causes bodily harms to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (emphasis added). The use of the language "by any means" indicates that the two prongs of the statute are not themselves "means" of violating the statute but rather separate elements. *See also* Ill. Pattern Jury Instr. – Criminal § 11.05.

Defendant also argues that the district court committed plain error because, even if the statute is divisible and the modified categorical approach authorized, the record is devoid of the appropriate court documents, required under *Shepard v. United States*, 544 U.S. 13 (2003), to establish that his conviction rested on the bodily harm prong. However, here, too, defendant has failed to carry his burden under the plain error standard.

In the PSR, the probation officer reported defendant's conviction for aggravated battery of an officer, based on the Cook County clerk's office computer printout (which was corroborated by information on defendant's state and local police "rap sheets"), and reported the factual basis for the conviction by summarizing information from the arrest report. PSR 10, 14-15. That information, particularly the information in the police report, indicated

that the charge was based on defendant's kicking a police officer in the chest several times and once in the face causing bruising and swelling. PSR 14-15. Defendant did not dispute that this information formed the basis of this conviction.[17] PSR 15. Further, because defendant did not dispute that this conviction qualified as a crime of violence on the basis now raised on appeal, neither the probation officer nor the government obtained or submitted to the court the underlying court documents.

Even if failure to have requisite *Shepard* documents (or a summary of them) in the record were to constitute clear or obvious error,[18] defendant has not carried his burden of showing that this error caused him substantial prejudice. *See United States v. Serrano-Mercado*, 784 F.3d 838, 847-50 (1st Cir. 2015); *United States v. Zubia-Torres*, 550 F.3d 1202, 1208-10 (10th Cir. 2008); *United States v. Williams*, 358 F.3d 956, 966-67 (D.C. Cir. 2004). In other words, defendant has not carried his burden of showing that, in fact, he was not convicted based on the bodily harm prong of the statute—for it is only then that he has suffered any prejudice. *See ibid.* Every indication in the PSR

---

[17] The probation officer reported that, while defendant claimed that he (defendant) "suffered 'serious injuries'" from the encounter with the officer, defendant admitted that the arresting officer claimed the defendant had repeatedly kicked him, and that the presiding judge had offered him leniency if he entered a plea of guilty. PSR 15.

[18] In *Aviles-Solarzano*, 623 F.3d at 473-76, this Court held that the failure to have *Shepard* documents in the record is not always a clear or obvious error, such as when the PSR contains a summary of the indictment and defendant has not challenged the accuracy of the summary.

is that defendant was convicted under bodily harm prong, and defendant has not made any showing—or even asserted on appeal—that he, in fact, was not convicted under that prong. *See Rodriguez-Gomez*, 608 F.3d at 974 n. 1 (in plain error context, finding waiver of argument that defendant was not convicted under bodily harm prong of battery statute where defendant did not make that argument on appeal). As the First Circuit opined, "to reverse when there is no basis for finding an objection by MacArthur likely would have led to a different result would make little sense, and might encourage defendants to turn withheld objections into sentencing reset buttons to be employed if the sentence exceeds expectations."[19] *United States v. MacArthur*, 805 F.3d 385 389 (1st Cir. 2015).

[19] Defendant's claim regarding the unreasonableness of his 210-month prison sentence is premised on a ruling that application of the career offender guideline was erroneous. Because defendant has not shown that the application of the career offender enhancement was plainly erroneous, defendant's claim regarding the unreasonableness of his sentence (which was at the low-end of the advisory guideline range) necessarily lacks merit.

CONCLUSION

For these reasons, the government respectfully requests that this Court affirm defendant's conviction and sentence.

Respectfully submitted.

ZACHARY T. FARDON
United States Attorney

DEBRA RIGGS BONAMICI
Assistant United States Attorney
Chief of Appeals, Criminal Division

/s/ *Helene B. Greenwald*
HELENE B. GREENWALD
Assistant United States Attorney

RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 13,996 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the Microsoft Office Word proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

Respectfully submitted.

ZACHARY T. FARDON
United States Attorney

By: /s/ *Helene B. Greenwald*

HELENE B. GREENWALD
Assistant United States Attorney
219 South Dearborn Street, 5th Floor
Chicago, Illinois
(312) 353-5300

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, I electronically filed the foregoing Brief of the United States with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted.

By: /s/ *Helene B. Greenwald*

HELENE B. GREENWALD
Assistant United States Attorney
219 South Dearborn Street, 5th Floor
Chicago, Illinois
(312) 353-5300