

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

v.

ANTHONY VETRI,

*Defendant.*

CRIMINAL ACTION

NO. 15-157-2

**PAPPERT, J.**

**May 30, 2018**

**MEMORANDUM**

Anthony Vetri was charged in a May 31, 2017 Second Superseding Indictment with conspiracy to distribute oxycodone in violation of 21 U.S.C. § 846 and aiding and abetting the use, carrying and discharge of a firearm during and in relation to a drug trafficking crime, causing a willful and premeditated murder, in violation of 18 U.S.C. § 924(j)(1). (ECF No. 82.) Also charged were co-conspirators Mitesh Patel and Michael Vandergrift. Patel, a registered pharmacist, was accused of diverting oxycodone pills to Vetri and others for illegal resale.<sup>1</sup> (*Id.*) Vandergrift was alleged to have participated in the drug conspiracy and along with Michael Mangold killed Gbolahan Olabode, Patel's business partner, at Vetri's direction to increase Vetri's pill supply. (*Id.*)

Patel pled guilty before trial (ECF Nos. 164, 165, 166), which began on November 29, 2017 (ECF No. 178). On December 7, after seven days of trial, the jury found Vetri and Vandergrift guilty on both charges against them. (ECF Nos. 187, 190.) On December 20, Vetri, represented by new counsel, filed an omnibus post-trial motion pursuant to Federal Rules of Criminal Procedure 29, 33 and 34. (ECF No. 196.) After

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<sup>1</sup> Patel was charged in four additional counts with money laundering and filing false tax returns. (*See* Second Superseding Indictment, ECF No. 82.)

several extensions of time to supplement his motion (ECF Nos. 197, 201, 221, 228), Vetri's counsel withdrew from the case and current counsel, Vetri's third lawyer, supplemented the motion on April 23, 2018 (ECF No. 244). The Government responded on May 2, 2018. (ECF No. 247.)

In his papers, Vetri cursorily raises a number of alleged errors and grounds for acquittal or a new trial, addressing only a few in detail. He argues that the evidence was insufficient to support his convictions, that the charges were barred by the statute of limitations and that the jury was improperly instructed on *Pinkerton* liability. With respect to the conspiracy charge specifically, Vetri contends that the evidence failed to show that he sold or delivered drugs to anyone and that "it is clear that [he] withdrew from the conspiracy" prior to the limitations period. (Mot. at 15.) With respect to the murder, Vetri argues that the evidence was insufficient to show that he had advance knowledge that a firearm would be used, which is necessary to find him guilty under the aiding and abetting theory, and that it was error to instruct on the *Pinkerton* theory of liability, which has a less stringent knowledge requirement than aiding and abetting. His final argument is that the murder charge was filed outside the five year statute of limitations. Vetri raises a litany of other arguments with respect to the Court's rulings on pre-trial motions and alleged errors at trial, with little explanation of the bases for those arguments. He also claims that he was "denied a fair trial under the totality of the circumstances." (Supp. at 2.)

The evidence was more than sufficient to enable the jurors to find as they did and their verdict should not be disturbed. The Court accordingly denies Vetri's Motion in its entirety for the reasons that follow.

The evidence presented at trial established that from approximately 2008 through June 4, 2013, Patel conspired with several individuals in the greater Philadelphia area to divert thousands of oxycodone pills for illegal resale. (Trial Tr. at 105–06, 111, 116, 121, Dec. 04, 2017; Gov’t Ex. 908.) To facilitate this scheme, Patel partnered with Olabode, a personal trainer and body builder, in the ownership of three pharmacies. (Trial Tr. at 91–92, 97, 100, 122, 125–26, Dec. 04, 2017.) Patel placed orders for large quantities of oxycodone from various wholesalers (*see id.* at 114–15; Gov’t Exs. 306, 307), and then diverted the pills to various distributors, including Olabode, Vetri, Seth Rosen and Timothy Algeo (Trial Tr. at 104–06, 108–12, 118–19, 123, 128, Dec. 04, 2017; *see* Gov’t Exs. 306, 307). The evidence established that Vetri distributed his share of the pills to Vandergrift, Angelo Perone, Eric Maratea and others. (Trial Tr. at 226–29, Dec. 1, 2017; Trial Tr. at 227–28, Dec. 04, 2017; Trial Tr. at 210, 221, Dec. 5, 2017.)

Eventually, the excessive volume of oxycodone Patel continued to order caused the wholesalers to significantly limit his supply. (Trial Tr. at 114–15, 133, 153, Dec. 04, 2017; Gov’t Exs. 307.) This hindered Patel’s ability to provide the pills to Vetri and his other distributors. (*Id.* at 115, 153–54, 161–62.) In the fall of 2011, after Patel chose Olabode over Vetri as his primary distributor, Vetri decided to eliminate Olabode as a competitor and discussed with Vandergrift that Olabode should be murdered. (*Id.* at 162–64; Trial Tr. at 65–67, Dec. 5, 2017.) Vandergrift recruited Mangold and Allen Carter to help carry out the murder plan. (Trial Tr. at 240–44, Dec. 04, 2017; Trial Tr. at 66, 74, Dec. 5, 2017.) Mangold testified that in exchange for murdering Olabode,

Vetri promised to get Vandergrift “more [oxycodone] from the pharmacy owner[.]” (Trial Tr. at 67, Dec. 5, 2017; Trial Tr. at 240–41, Dec. 04, 2017.)

The evidence showed that to facilitate the murder, Vetri provided Vandergrift with information on Olabode, including, among other things, Olabode’s address and the type of cars he drove. (Trial Tr. at 60, 62, Dec. 5, 2017; Gov’t Ex. 601-C.) He also told Vandergrift that Olabode routinely carried a gun. (Trial Tr. at 69, Dec. 5, 2017.) Vandergrift shared this information with Mangold. (*Id.* at 69–70.) The Government introduced text messages and cell cite location data showing that in the fall and winter of 2011, Vetri and Vandergrift tracked Olabode’s movements. (Trial Tr. at 65, 84, 105, 1007, 113–14, Dec. 6, 2017; *see also* Gov’t Exs. 601B, 601C, 601D, 601E.) The evidence also showed that Vandergrift surveilled Olabode’s residence. (Trial Tr. at 60–65, Dec. 5, 2017.)

On the evening of January 4, 2012, Vandergrift, Mangold and Carter went to Olabode’s residence to kill him. (*Id.* at 78, 80.) The three waited together in a yard adjoining the parking lot behind the apartment house where Olabode lived. Carter, who did not have a gun, eventually returned to the car while Vandergrift and Mangold continued to lie in wait. (*Id.* at 80, 83.) Olabode eventually arrived home and Vandergrift and Mangold ambushed him as he walked from his car to the house. (*Id.* at 85, 86.) They fired 31 shots at Olabode, hitting him numerous times and killing him. (*Id.*; Gov’t Ex. 805.) The next day, Vetri went to the house where Vandergrift was staying, where he spoke with Vandergrift and Mangold about the murder.<sup>2</sup> (Trial Tr. at 94–97, Dec. 5, 2017.) They discussed, among other things, the number of shots fired.

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<sup>2</sup> Vetri owned the house. Mangold and Carter were also staying there at the time of the murder. (Trial Tr. at 237, Dec. 4, 2017; Trial Tr. at 65, Dec. 5, 2017.)

(*Id.*) Vetri offered to get rid of the guns for Vandergrift and Mangold but Mangold decided to trade the guns on the street in South Philadelphia. (*Id.* at 97–103.)

## II

### A

Rule 29 of the Federal Rules of Criminal Procedure provides that the court, “on the defendant’s motion[,] must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). In considering the motion, the court must “review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.” *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 261 (3d Cir. 2001)). The court must “presume that the jury properly evaluated credibility of the witnesses, found the facts, and drew reasonable inferences.” *United States v. Iafelice*, 978 F.2d 92, 94 (3d Cir. 1992) (citing *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987)); *see also United States v. Norris*, 753 F. Supp. 2d 492, 501 (E.D. Pa. 2010) (“The court may not ‘usurp the role of the jury’ by weighing the evidence or assessing the credibility of witnesses.” (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005))). The burden on the defendant is “extremely high” when challenging the sufficiency of the evidence, *Norris*, 753 F. Supp. 2d at 501 (quoting *United States v. Iglesias*, 535 F.3d 150, 155 (3d Cir. 2008)), and the jury verdict must be sustained “as long as it does not ‘fall below the threshold of bare rationality,’” *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431 (3d Cir. 2013) (quoting *Coleman v. Johnson*, 566 U.S. 650, 656 (2012)). *See also Brodie*, 403 F.3d at 134 (“A finding of

insufficiency should be ‘confined to cases where the prosecution’s failure is clear.’” (quoting *Smith*, 294 F.3d at 477)).

## B

A more deferential standard of review applies under Rule 33, which permits the Court to grant a motion for a new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a); *see also United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (“Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case.”). Courts may grant a new trial if “the verdict is against the weight of the evidence[,]” *United States v. Fattah*, 223 F. Supp. 3d 336, 342 (E.D. Pa. 2016) (citing *Johnson*, 302 F.3d at 150), and “must consider whether there is ‘a serious danger that a miscarriage of justice has occurred[,]” *id.* (quoting *United States v. Silveus*, 542 F.3d 993, 1004–05 (3d Cir. 2008)). Rule 33 motions are not favored and should be “granted sparingly and only in exceptional cases.” *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) (internal quotation and citation omitted); *see also United States v. Ponton*, 337 F. App’x 179, 181 (3d Cir. 2009) (providing that granting Rule 33 motions is “proper only when . . . the jury’s verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience”).

## C

21 U.S.C. § 846 prohibits attempting or conspiring to distribute or possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 841. To convict a defendant of conspiracy, the jury must find beyond a reasonable doubt “a unity of

purpose between the alleged conspirators, [] intent to achieve a common goal, and an agreement to work together toward that goal.” *Smith*, 294 F.3d at 477 (quoting *United States v. Gibbs*, 190 F.3d 188, 197 (3d Cir. 1999)). The elements “can be proven entirely by circumstantial evidence.” *Brodie*, 403 F.3d at 134 (citing *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986)). In fact, “it is not unusual that the government will not have direct evidence” as “[k]nowledge is often proven by circumstances.” *Caraballo-Rodriguez*, 726 F.3d at 431 (quoting *Iafelice*, 978 F.2d at 98); see also *Brodie*, 403 F.3d at 134 (“Indeed, the very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence.”).

Further, “a conspirator does not have to be aware of all aspects or details of the conspiracy[,]” *Fattah*, 223 F. Supp. 3d at 352 (citing *United States v. Bailey*, 840 F.3d 99, 108 (3d Cir. 2016)), and can be found guilty of an offense committed by a co-conspirator if the offense was “reasonably foreseeable” or reasonably anticipated by the defendant and furthered the objectives of the conspiracy, *United States v. Ramos*, 147 F.3d 281, 286 (3d Cir. 1998) (“A defendant convicted of conspiracy is liable for the reasonably foreseeable acts of his coconspirators committed in furtherance of the conspiracy.” (citing *Pinkerton v. United States*, 328 U.S. 640 (1946))).

18 U.S.C. § 924(j)(1) states that a defendant may be found guilty of murder if he “causes the death of a person through the use of a firearm” in the course of a violation of § 924(c), which prohibits the use or carrying of a firearm in furtherance of a drug trafficking crime. Section 924(j)(1) further specifies that the defendant shall be punished by death or by imprisonment for any term of years or for life “if the killing is a murder (as defined in section 1111).”

### III

#### A

The jury's verdict was amply supported by the overwhelming amount of evidence presented by the Government. (Mot. at 14–15.) First, the trial included extensive evidence of Vetri's criminal partnership with Patel and his distribution of oxycodone, including testimony about specific transactions. Patel, Mangold, Carter, Angelo Perone, Louis Santoleri, Eric Maratea, Brian White, Joseph Billingsly and Eric Hastings all testified about Vetri's participation in the drug conspiracy.<sup>3</sup>

Specifically, Patel testified to the entirety of his oxycodone distribution relationship with Vetri. He explained that the two entered into their illicit partnership in the winter of 2008. (Trial Tr. at 129, Dec. 4, 2017.) Patel explained that he would go to Vetri's house and provide Vetri with oxycodone bottles that he had ordered from pharmaceutical wholesalers. (*Id.* at 130, 137, 146.) In the beginning, Patel supplied Vetri with anywhere from seven to ten 100 count bottles of 30 milligram oxycodone pills on a weekly basis. (*Id.* at 131.) His supply later increased to 50 bottles per month. (*Id.* at 132, 149–150.) Vetri either paid Patel in cash or deposited money into Patel's account to pay for the pills. (*Id.* at 133–34.)

Vetri contends that the witnesses provided self-serving testimony and should not have been believed. (Mot. at 25.) First of all, the Court must presume that the jury properly assessed the witnesses' credibility. Moreover, the witnesses corroborated each

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<sup>3</sup> Not only is Vetri's argument that the evidence failed to prove that he "sold or delivered drugs to anyone" controverted by the evidence; it is irrelevant as a matter of law. (*See* Mot. at 14–15.) Vetri was charged and convicted of conspiracy to distribute oxycodone, which required proof of only an agreement, of which Vetri was a party, to distribute oxycodone and that Vetri joined the agreement knowing of its objectives. *See Smith*, 294 F.3d at 477.

other and their testimony was supported by other evidence presented at trial, including phone records, text messages and other documentary evidence.

Second, Vetri claims that there was insufficient evidence that he aided and abetted Olabode's murder. (Mot. at 15.) Specifically, he argues that the Government failed to prove he had advance knowledge that a firearm would be used to kill Olabode. (Supp. at 6.) Vetri is incorrect. Carter testified that the murder was committed for Vetri. (See Trial Tr. at 245–46, Dec 4, 2017.) Mangold also explained that Vandergrift gave him information on Olabode, who had received the information from Vetri, including that Olabode typically carried a gun. (Trial Tr. at 69, Dec. 5, 2017.) Further, Mangold and Carter stated that, following a meeting between Vandergrift and Vetri, the original plan to rob Olabode became instead a plan to kill him. (*Id.*; Trial Tr. at 239–40, 242, Dec. 04, 2017.) Mangold also testified that Vetri asked him during a pre-murder planning meeting if he had ever killed someone, to which Mangold said that he would do anything for money. (See Trial Tr. at 71–72, Dec. 5, 2017.) Vetri then asked to see Mangold's gun, which Mangold showed him. (*Id.* at 72.) Mangold testified that the gun he showed Vetri was the gun he used to shoot Olabode. (*Id.*)

To convict a defendant of aiding and abetting a § 924(j) murder, the Government must prove that the defendant “actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission.” *Rosemond v. United States*, 134 S.Ct. 1240 (2014). “[A]dvance knowledge” means “knowledge at a time the accomplice can do something with it—most notably, opt to walk away.” *Id.* at 1249–50. “[I]f a defendant continues to participate in a crime *after a gun was displayed* or used by a confederate, the jury can

permissibly infer from his failure to object or withdraw that he had [advance] knowledge.”<sup>4</sup> *Id.* at 1250 n.9 (emphasis added).

Vetri’s actions after the murder further enabled the jury to conclude that he knew all along a gun would be used to kill Olabode. Vetri met with Vandergrift and Mangold the morning after Olabode was killed. Mangold testified that Vetri appeared excited that the plan had finally been carried out. (*Id.* at 96.) Vandergrift thought Vetri might be mad at the number of shots fired, 31 in total, but Vetri responded “no, as long as it got done”; he expressed no surprise Mangold and Vandergrift killed Olabode by shooting him. (*Id.*) Moreover, the three men also specifically discussed the guns used to commit the murder, which Vetri said he could get rid of. (*Id.* at 97.) Vetri’s lack of surprise or disappointment that Olabode was shot to death stands in contrast with his disdain upon learning during this same conversation that Carter had been included in the hit squad. Carter testified that Vandergrift told him Vetri was upset that Carter was involved in the killing because Vetri “didn’t know that [Carter] was supposed to be there.” (*Id.* at 266.)

Whether viewing the record in the light most favorable to the prosecution or assessing the weight of the evidence, the jurors properly concluded that Vetri was a distributor in Patel’s oxycodone diversion scheme and an active participant in the plot to kill Olabode. The evidence showed that Vetri was involved in planning the murder, knew Olabode carried a gun, asked to see Mangold’s gun when discussing the plan, and

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<sup>4</sup> Although *Rosemond* dealt only with the use of a firearm in connection with a drug trafficking crime in violation of 18 U.S.C. § 924(c), it applies to violations of §924(j) by extension, as § 924(j) prohibits murder in the course of a § 924(c) violation.

Even if the evidence was insufficient to show advance knowledge under *Rosemond*, it was more than sufficient to convict Vetri under the *Pinkerton* theory of liability, which requires only that acts of co-conspirators be reasonably foreseeable and further the conspiracy. (*See infra* Section III.C.)

celebrated the killing the following morning with the shooters, with neither surprise at, nor disapproval of, the method of execution.

## B

Vetri's argument that the charges were barred by the statute of limitations is equally unavailing. Under 18 U.S.C. § 3282, non-capital offenses are subject to a five-year statute of limitations. The statute of limitations for a drug conspiracy, which does not require proof of an overt act, *see United States v. Shabani*, 513 U.S. 10, 11 (1994), is satisfied if the Government proves that the conspiracy continued into the limitations period. *Smith v. United States*, 568 U.S. 106, 113 (2013); *see also United States v. Seher*, 562 F.3d 1344, 1364 (11th Cir. 2009) ("The government satisfies the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the conspiracy continued into the limitations period."). Non-overt act conspiracies continue "until termination of the conspiracy or, as to a particular defendant, until that defendant's withdrawal." *Smith*, 568 U.S. at 113.

The drug conspiracy charge against Vetri was not barred by the statute of limitations and the evidence presented was sufficient for the jury to find his willing and continuous participation in the scheme. The operative date for determining whether the drug charges were timely is May 31, 2012, five years before the Second Superseding Indictment<sup>5</sup> was filed (ECF No. 82). The evidence established that the drug conspiracy continued well into the limitations period. Patel testified that he distributed oxycodone from 2008 until his pharmacy was raided by law enforcement on June 4, 2013. (Trial Tr. at 121, Dec. 4, 2017.) "[C]onspiracy is a continuing offense, [and] a defendant who

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<sup>5</sup> Although the Second Superseding Indictment is the operative indictment, there is no relation back issue because Vetri was not charged as a co-conspirator in the preceding indictments.

has joined a conspiracy continues to violate the law ‘through every moment of [the conspiracy’s] existence,’ and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot.” *Smith*, 568 U.S. at 111 (quoting *Hyde v. United States*, 225 U.S. 247, 269 (1912)). Vetri joined the conspiracy in the winter of 2008 and was responsible for its acts until the end. (Trial Tr. at 129, Dec. 4, 2017)

Vetri argues, as he did during the trial, that he withdrew from the conspiracy in early 2012, citing an April 15, 2013 email to Vandergrift in which Vetri claims not to have worked for Patel for a year. (Trial Tr. at 51, Dec. 4, 2017.) Patel, however, testified that Vetri distributed oxycodone for him until July 31, 2012. (*Id.* at 172–74.) The Government also introduced July 29, 2012 text messages between Patel and Vetri in which Patel asks Vetri to deposit money into Patel’s bank account as payment for oxycodone supplied to Vetri days before. (*Id.* at 176; Gov’t. Ex. 612-V.) To show that he withdrew from the conspiracy, Vetri must have “taken some clear, definite and affirmative action to terminate his participation, to abandon the illegal objective, and to disassociate himself from the agreement.” (Trial Tr. at 106, Dec. 4, 2017.) The defendant has the burden of establishing withdrawal by a preponderance of the evidence. Vetri failed to present any evidence that he withdrew; in fact the jurors saw and heard evidence to the contrary.

Vetri further argues that the § 924(j) charge for Olabode’s murder was barred by the five year statute of limitations because “[he] was not death penalty qualified.” (Mot. at 16.) Section 924(j)(1), however, provides that a person who, in the course of a § 924(c) violation, causes the murder (as defined in § 1111) of a person through the use of a firearm, shall be “*punishable by death* or by imprisonment for any term of years or

for life[.]” 18 U.S.C. § 924(j) (emphasis added). Section 3281, in turn, states that “[a]n indictment for any offense *punishable by death* may be found at any time without limitation.” 18 U.S.C. § 3281 (emphasis added); *see also United States v. Ealy*, 363 F.3d 292, 296–97 (4th Cir. 2004) (holding that whether a crime is punishable by death under § 3281 depends on the penalty that may be imposed under the statute, not whether the death penalty is available for a particular defendant).

As the plain language of the statute makes clear, § 924(j) is a crime punishable by death. Accordingly, the Government could have indicted Vetri for violating that statute “at any time without limitation.” 18 U.S.C. § 3281; *see also United States v. Jake*, 281 F.3d 123, 127 n.4 (3d Cir. 2002) (explaining that there is no statute of limitations for murder under 18 U.S.C. § 1111); *United States v. Korey*, 614 F. Supp. 2d 573, 581 (W.D. Pa. 2009) (holding that no statute of limitations for an offense of § 924(j)).<sup>6</sup>

## C

Vetri further argues that the Court improperly instructed the jury with respect to the murder charge. (Mot. at 17; Supp. at 12–13.) Specifically, he contends that § 1111(b) provides a jurisdictional element for murder under § 924(j), that the jury should therefore have been told that Olabode must have been killed “within the special

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<sup>6</sup> Vetri also moves to arrest judgment under Federal Rule of Criminal Procedure 34 based on the same statute of limitations arguments. (Mot. at 27.) As already explained, the indictment was filed within the applicable statute of limitations, and the Rule 34 motion is also denied.

maritime and territorial jurisdiction of the United States,” (Mot. at 17) and that the Court improperly instructed the jury on *Pinkerton* liability (Supp. at 4).<sup>7</sup>

Section 924(j) incorporates the definition of murder contained in § 1111(a)—not § 1111(b). *United States v. Tatum*, 31 F. App’x 156, at \*2-3 (5th Cir. 2001); *United States v. Young*, 248 F.3d 260, 275 (4th Cir. 2001); see also *United States v. Solomon*, No. 05-0385, 2013 WL 869648, at \*19 (W.D. Pa. Mar. 7, 2013). The Fourth and Fifth Circuit Courts of Appeals have explained that § 1111(b) “merely provides minimum sentences for murders that occur within the special maritime and territorial jurisdiction of the United States.” *Tatum*, 31 F. App’x 156, at \*2–3; see also *Young*, 248 F.3d at 275. Further, as the court explained in *Young*, § 924(j) already contains a jurisdictional requirement from § 924(c) and therefore the jurisdictional “element” from § 1111(b) is not necessary.

With respect to the *Pinkerton* instruction, Vetri believes that a defendant cannot be found guilty under *Pinkerton* for a violation of 18 U.S.C. § 924(j) because *Pinkerton* liability requires a “lax reasonable foreseeability standard of proof” compared to the “advanced [sic] knowledge standard of proof” required by the Supreme Court in *Rosemond v. United States*, 134 S. Ct. 1240 (2014) for aiding and abetting 924(c) crimes. (*Id.*) As previously explained, a defendant may be convicted of a § 924(c) offense if he has “advance knowledge that a confederate would use or carry a firearm during the crime’s commission.” *Rosemond*, 134 S. Ct. at 1243. Under the *Pinkerton* theory, a

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<sup>7</sup> Vetri also argues that the Court erred when it instructed the jury that “the Government is not required to prove that any overt acts were performed. Under the law, the agreement to commit the offense is alone sufficient to prove a charge of conspiracy against a Defendant.” (Trial Tr. at 104, Dec. 7, 2017; Mot. at 15, 27–28.) The Court also instructed the jury on withdrawal. (*Id.* at 106.) These instructions were taken from the Third Circuit’s Model Jury Instructions or based on United States Supreme Court precedent, and were not erroneous.

defendant may be convicted for acts of a co-conspirator that were done in furtherance of the conspiracy and that could have been “reasonably foreseen as a necessary or natural consequence” of the conspiracy. *Pinkerton*, 328 U.S. at 647–48. In the context of § 924(c) crimes, a conspirator may be liable for his co-conspirator’s use of a firearm if the use was reasonably foreseeable. *United States v. Casiano*, 113 F. 3d 420, 427 (3d Cir. 1997); *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990).

*Rosemond*’s aiding and abetting knowledge requirement does not vitiate *Pinkerton* liability for § 924(c) offenses. *Rosemond* did not address *Pinkerton* liability at all. The Third Circuit Court of Appeals and other Circuits have rejected the argument that *Rosemond*’s advance knowledge requirement for aiding and abetting precludes the use of *Pinkerton* liability for § 924(c) offenses. See *United States v. Whitted*, No. 15-3752, 2018 WL 2277869, at \*2 (3d Cir. May 18, 2018) (“The government may seek a conviction for a substantive criminal offense by introducing evidence that a defendant directly committed the offense or by proceeding on a theory of vicarious liability under *Pinkerton* or aiding and abetting.”); *United States v. Stubbs*, 578 F. App’x 114, 118 n.6 (3d Cir. 2014) (“Since we find the evidence sufficient to convict [the defendant] under a *Pinkerton* theory of vicarious liability, we need not decide whether there was sufficient evidence of [the defendant’s] advance knowledge under *Rosemond*.”); see also *United States v. Hare*, 820 F.3d 93, 105 (4th Cir. 2016); *United States v. Saunders*, 605 F. App’x 285, 288–89 (5th Cir. 2015); *United States v. Rodriguez*, 591 F. App’x 897, 904 (11th Cir. 2015); *United States v. Young*, 561 F. App’x 85, 92 (2d Cir. 2014).

## IV

### A

Vetri argues that the Court wrongly decided various pretrial motions, rendering his trial unfair. Specifically, he believes that the Court was incorrect in its decisions on his motions to sever and to suppress evidence recovered from his cell phone, as well as the Government's motion to introduce prior bad acts evidence. (Mot. at 26.) He further argues that the Court erred in refusing his request for a continuance of the trial. (Mot. at 17.) He is wrong on all counts.

Each pretrial motion was fully litigated. The Government and Vetri submitted briefs regarding severance (ECF Nos. 107, 117, 125), suppression (ECF Nos. 109, 143, 147), and prior bad acts (ECF Nos. 111, 127, 154) and the Court heard oral argument on each issue (ECF Nos. 131, 161). The Court issued its decision on each motion before trial in three Memorandum Opinions (ECF Nos. 140, 171, 175). Vetri simply asserts that the Court erred in its decisions; he fails to explain why. To the extent Vetri seeks to re-litigate these issues under Rule 33 and have the Court reconsider its decisions, the Court declines to do so and Vetri is free to raise these issues on appeal.

Lastly, during the final pretrial conference, Vetri's lawyer told the Court that his client had asked him "to make a request for an adjournment" because Vetri was unable to review all of the Jencks Act material while at the FDC. (Pretrial Tr. at 25, Nov. 21, 2017.) Counsel at the same time however stated that he had reviewed the Jencks Act material and was ready for trial. (*Id.*) Counsel reiterated in a November 28, 2017 letter to the Court that he was prepared for trial. (Resp., Ex. 1, ECF No. 247.) Given that Vetri was represented by counsel who assured the Court he was ready to try the

case, Vetri never formally sought a continuance of the trial. To the extent he made such a request, the Court denied it because Vetri (and more importantly his lawyer) had an adequate opportunity to prepare for trial and the denial of his request was not arbitrary. “In determining if a continuance should be granted, a court should consider: the efficient administration of criminal justice; the accused’s rights, including an adequate opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance.” *United States v. Kikumura*, 947 F.2d 72, 78 (3d Cir. 1991) (citing *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984)). “[D]enying a request for a continuance constitutes an abuse of discretion only when it is ‘so arbitrary as to violate due process.’” *Id.* (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

## B

Vetri contends that he is entitled to a new trial because the Government failed to turn over all *Brady* material. (Mot. at 34; Supp. at 4.) Specifically, he accuses the Government of failing to disclose records showing that Patel was involved in “longstanding and ongoing insurance fraud.” (*Id.*) Vetri fails to articulate any explanation as to why this amounts to a *Brady* violation. To establish one, Vetri must show that: “(1) evidence was suppressed, (2) the suppressed evidence was favorable to the defense, and (3) the suppressed evidence was material either to guilt or to punishment.” *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005).

Vetri cannot point to any evidence suppressed by the Government. “Evidence is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.”

*United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991). Further, “*Brady* does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence.” *Id.* Vetri was aware that Patel was committing insurance fraud. In fact, Vetri confronted Patel about it. The Government introduced into evidence text messages between Vetri and Patel showing that Vetri knew about the fraud. (See Gov’t Ex. 612-V.) In these communications, Vetri called Patel a “liar and a cheat” and was upset that Patel never told him that he was going to “scam” his ex-girlfriend’s or grandfather’s insurers. (*Id.*)

Even if the Government suppressed “records” of the insurance fraud, such evidence is not material. Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). Reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* There is no reasonable probability that “records” pertaining to Patel’s insurance fraud scheme would have led to a different outcome. Although such records (that the Government represents it did not have) could possibly in certain contexts constitute *Brady* material, *United States v. Isaac*, 22 F. Supp. 3d. 427, 433 (E.D. Pa. 2014) (citing *Giglio v. United States*, 405 U.S. 15, 154 (1972)), Vetri’s lawyer cross-examined Patel about committing insurance fraud. Indeed, Patel admitted that he defrauded insurance companies and the jurors considered this information, along with all of Patel’s other failings and transgressions, in assessing his credibility. (Trial Tr. 185:14–186:1, Dec. 4, 2017).

Further, even if Patel could somehow have been made to look worse by “records” of his fraud, the absence of those records did not “undermine[ ] [the] confidence in the outcome of the trial.” *Bagley*, 437 U.S. at 678. Patel was an important witness, but not the only person tying Vetri to the drug conspiracy: (1) Santoleri testified that he received from Vetri Percocet in a bottle with a label from Patel’s pharmacy (Trial Tr. 100:21–102:24, 103:2–9, Dec. 1, 2017), (2) White testified that he received pills from Perone which he would pick up from Vetri’s house (*id.* at 129:13-24), (3) Gordon testified that Perone told him he received his oxycodone from Vetri (*id.* at 176:13-17), (4) Perone testified that received oxycodone from Vetri, who got the pills from Patel (*id.* at 238:14-20), and (5) Mangold testified that Vandergrift obtained oxycodone from Vetri (Trial Tr. 68:16-20, Dec. 5, 2017).

### C

Vetri claims that the verdict sheet was improper because it did not contain a special interrogatory concerning his statute of limitations argument. (Mot. at 5.) First of all, counsel never requested a special interrogatory on the issue. (Pretrial Conf. Tr. 18:4-6, Nov. 21, 2017.) Moreover, special verdict sheets are “generally disfavored in criminal cases.” *United States v. Russo*, 166 F. App’x 654, 660 (3d Cir. 2006) (citing *United States v. Desmond*, 670 F.2d 414, 416 (3d Cir. 1982)). Aside from “rare cases” that are “exceptionally complex,” general verdict sheets suffice. *Id.* At Vetri’s request, the Court added a jury instruction pertaining to the statute of limitations and withdrawal defense to the conspiracy charge. (Trial Tr. 106:3–108:15, Dec. 7, 2017.) Vetri provides no argument that this case warranted a special interrogatory, and the issues were not “exceptionally complex.”

## D

Vetri argues also that he should receive a new trial because he was shackled throughout the trial and it “inflamed the jury.” (Mot. at 29–31.) This argument is, as Vetri knows, particularly frivolous because the jurors never saw Vetri in any form of restraints. Based on the nature of the case and safety concerns (including the potential for trouble between Vetri and Vandergrift) brought to the Court before trial by the United States Marshals Service, the Court agreed with the Marshals’ recommendation that Vetri (and Vandergrift) be escorted to and from the courtroom in handcuffs and leg irons. (Hr’g Tr. 2:19-22, Mar. 12, 2018, ECF No. 243.) Vetri’s counsel did not object to this decision.

While requiring a defendant to wear “visible shackles” may amount to a due process violation, *see Deck v. Missouri*, 544 U.S. 622, 623 (2005), that was not the case here. Vetri’s handcuffs were removed before the jurors entered the courtroom and were never put back on until after the jurors were excused. The leg irons remained on but were hidden at all times by a dark, floor length bunting that surrounded both counsel tables. The jurors never saw Vetri, who was behind counsel table with his legs obscured by the bunting whenever the jury was present, with his legs restrained.<sup>8</sup>

## E

Vetri alleges that the prosecutors engaged in misconduct by mentioning his brother Michael Vetri during their opening statement, inducing perjured testimony

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<sup>8</sup> Even if they had, Vetri was not prejudiced. As explained *supra* Section III.A, based on the overwhelming evidence, the Government proved beyond a reasonable doubt that the verdict would have been the same even if there was some evidence that the shackles were visible, and Vetri would not be entitled to a new trial. *See United States v. Brantley*, 342 F. App’x 762, 770 (3d Cir. 2009) (holding that a defendant was not entitled to a new trial despite the possibility that the jury may have seen the defendant’s shackles through the spindles on the witness stand because the defendant did not suffer “unfair prejudice”).

from Eric Hastings and directing Hastings to speak with Vandergrift in a United States Marshals' holding cell. (Mot. at 25.) During its opening, the government said that "Mitesh Patel starting selling drugs to Michael Vetri until Michael Vetri got in trouble with the law." (Trial Tr. at 19, Nov. 30, 2017.) First of all, the Court instructed the jury that opening statements were not evidence. In any event, this statement was not improper because it provided the jury with context about the case and how Anthony Vetri became one of Patel's distributors. *See United States v. DeRose*, 548 F.2d 464, 470 (3d Cir. 1977); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Moore v. Morton*, 255 F.3d 95, 105 (3d Cir. 2001). It was also consistent with testimony the jurors would hear. Specifically, Patel testified that Michael Vetri distributed oxycodone for him until being pulled over by police, after which Anthony Vetri approached Patel about becoming a distributor. (Trial Tr. at 127–130, Dec. 4, 2017.) Finally, Vetri provides no support for his wild and inflammatory allegations that the government induced perjured testimony from Hastings or directed him to speak with Vandergrift in violation of *Missiah v. United States*, 377 U.S. 201 (1964). In fact, Hasting testified that he was never instructed to seek out information from Vandergrift. *See* (Trial Tr. at 274, Dec. 5, 2017.)

## F

Finally, Vetri joins his co-defendant Vandergrift's post trial argument that he should be acquitted because there is a variance between the conduct charged in the indictment and the evidence presented at trial. The only "variance" Vetri points to is Perone's testimony regarding a trip to Florida to purchase oxycodone. (Supp. at 4.) Perone testified that he, Vandergrift and Carter traveled to Florida in February 2011

with a large sum of cash to purchase oxycodone for distribution in Pennsylvania. The three went to Florida because oxycodone was cheaper there and Perone need more oxycodone than Vetri could sell him. (Trial Tr. at 234–240, Dec. 1, 2017.) Perone also testified that all three were detained by law enforcement in Florida and that their money was seized. (*Id.* at 238.) Neither defendant objected to this testimony.

A variance can result in a reversible error “only if it is likely to have surprised or otherwise [] prejudiced the defense.” *United States v. Daraio*, 445 F.3d 253, 262 (3d Cir. 2006) (citing *United States v. Schurr*, 775 F.2d 549, 553–54 (3d Cir. 1985)). To prevail, a defendant must show “(1) there was at trial a variance between the indictment and the proof and (2) the variance prejudices a substantial right of the defendant.” *United States v. Miller*, 527 F.3d 54, 69–70 (3d Cir. 2008) (quoting *Schurr*, 775 F.2d at 553). The record is reviewed in the light most favorable to the Government. *United States v. Kemp*, 500 F.3d 257, 287 (3d Cir. 2007).

Where a single conspiracy has been alleged, a variance occurs only if the evidence shows multiple distinct conspiracies. *United States v. Lee*, 359 F.3d 194, 207 (3d Cir. 2004) (“Where a single conspiracy is alleged in an indictment, and the evidence at trial merely proves the existence of several distinct conspiracies, there is an impermissible variance. On the other hand, a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance.”) To distinguish a single conspiracy from multiple, distinct ones, the Court must examine three factors: (1) “whether there was a common goal among conspirators;” (2) whether the agreement “contemplated bringing to pass a continuous result that will not continue without the continuous operation of

the conspirators;” and (3) “the extent to which the participants overlap in the various dealings.” *United States v. Kelley*, 892 F.2d 255, 259 (3d Cir. 1989). “[T]he absence of one factor does not necessarily defeat an inference of the existence of a single conspiracy.” *United States v. Padilla*, 982 F.2d 110, 115 (3d Cir. 1992).

Here, the Government proved the existence of a single conspiracy. Vetri, Perone and their co-conspirators shared the common goal of making money by illegally selling oxycodone. *See Kelly*, 892 F.2d at 259 (finding common goal “simply to make money selling ‘speed.’”). This was the goal that Vetri pursued throughout the duration of the conspiracy. (Trial Tr. at 121, 129–134, 173–76, Dec. 4, 2017.) Next, the success of the scheme depended on a steady stream of oxycodone and the trip to Florida to purchase the drug was advantageous to the overall success of the conspiracy. *United States v. Salmon*, 944 F.2d 1106, 1117 (3d Cir. 1991) (noting that the second prong is met by evidence “that the activities of others were necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture”). The trial included substantial evidence of activities by members of the conspiracy that were necessary to further its overall purpose of making money through the illegal sale of oxycodone. (Trial Tr. at 226–27; 230, 233, Dec. 1, 2017.)

Finally, there was significant overlap between the participants involved in the various dealings. Patel supplied Vetri with oxycodone, who in turn sold pills to Perone for distribution. (Trial Tr. at 226–27; 230, Dec. 1, 2017.) Perone then sold his share of pills to Vandergrift and Allen Carter. (*Id.* at 232.) Perone received oxycodone from Vetri and a source in Florida contemporaneously until Vetri could no longer supply the quantity Perone required. (*Id.*) Perone continued buying oxycodone from his

connection in Florida until he was arrested there. (*Id.* at 237.) While in custody, Perone called Vetri, who traveled to Florida hours later. (Trial Tr. at 232, Dec. 4, 2017.)

An appropriate Order follows.

BY THE COURT:

*/s/ Gerald J. Pappert*  
GERALD J. PAPPERT, J.