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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 02-198-02
	:	
EULISES RODRIGUEZ	:	

MEMORANDUM AND ORDER

McLaughlin, J. October _____, 2003

Eulises Rodriguez was convicted by a jury of conspiracy to distribute heroin and cocaine base and possession with the intent to distribute heroin. The jury acquitted the defendant of a second distribution of heroin count.

The defendant moved for judgement of acquittal after the close of the government's case, and the Court reserved on the motion. The defendant renewed his motion for a judgment of acquittal after the verdict and, in the alternative, moved for a new trial. The Court will grant the motion for a judgment of acquittal and will conditionally grant the motion for a new trial.

The indictment was the result of an eleven month investigation of the co-defendant, Julian Rodriguez, by the

Pennsylvania Office of Attorney General.[1] Most of the evidence at trial described the co-defendant's sixteen transactions in which he sold heroin, or in one instance, cocaine base, to an undercover agent. The government relied on the following evidence to establish the guilt of the defendant: a series of phone calls between the defendant's and the co-defendant's cell phones during the period when the undercover agent was negotiating the last transaction with the co-defendant; the defendant's presence at three transactions; the presence of a packet of heroin in the defendant's car ("cobra" heroin, as opposed to the "ghetto" heroin that the co-defendant was selling to the undercover agent); and references by the co-defendant to his "brother's" working with him in selling drugs.

The Court finds the evidence insufficient to establish the defendant's membership in the conspiracy or his aiding and abetting the one substantive charge of which he was convicted. Without knowing the substance of any calls between the defendant and the co-defendant, the jury could not infer that the defendant was arranging the drug transaction during the calls. Merely driving a drug seller to the scene of a drug transaction is not enough. Nor is the fact that there was a packet of another type

[1] The Court refers to Eulises Rodriguez as the defendant or as Mr. Rodriguez throughout this memorandum. When the Court is referring to co-defendant Julian Rodriguez, it identifies him as either the co-defendant or by his full name.

of heroin in the car sufficient. The references to the co-defendant's "brother's" involvement is not sufficient because there was no evidence that the defendant is the co-defendant's brother.

The defendant argues that he is entitled to a new trial because (1) the government did not disclose to him the full content of proffer sessions with the co-defendant, and (2) the government destroyed the notes of those proffer sessions. The Court held a post-trial evidentiary hearing on the motion for a new trial.

There were two proffer sessions with the co-defendant during which the co-defendant told the government, among other things, when he started dealing drugs, from whom he obtained the drugs, for whom he worked, and who else was involved in his drug dealing. The co-defendant said that the defendant, who was his uncle, was not involved in the drug dealing and only drove him to the site of the last transaction. At least one government agent took notes during each of the proffer sessions.

The government did not disclose the content of the proffer sessions to the defendant before the return of the verdict. Prior to that time, the government disclosed to the defendant only what the co-defendant had said about the defendant at the proffer sessions. By the time of trial, the government had destroyed the notes that were taken during the proffer

sessions. During the trial, the government made many misrepresentations about the number and content of the proffer sessions as well as whether anyone had taken notes during the sessions.

The Court holds that the government's failure to disclose to the defendant what was said by the co-defendant during the proffer sessions was a violation of Brady v. Maryland, 373 U.S. 83 (1963).

I. The Indictment

The indictment contains nineteen counts. The defendant is charged in counts one, six, and seventeen. Julian Rodriguez, the co-defendant, is charged in all nineteen counts.

Count one charges the defendant with conspiring with the co-defendant and others to distribute over 100 grams of heroin and five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846 and 18 U.S.C. § 2.
Counts six and seventeen charge both defendants with violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count six charges both defendants with distributing 3.4 grams of heroin on August 18, 2000. Count seventeen charges both defendants with possessing 89.42 grams of heroin with intent to distribute on May 2, 2001.

II. Rule 29 Motion

A. The Proof at Trial

Most of the evidence presented at trial related to the drug dealing of the co-defendant, Julian Rodriguez. There was no direct evidence connecting the defendant to the co-defendant's drug dealing. Following is a description of the evidence presented by the government in its case-in-chief.

1. Overview of the Alleged Conspiracy

Agent Timothy Deery of the Pennsylvania Office of Attorney General presented an overview of the government's investigation. Agent Deery purchased heroin from the co-defendant in a series of transactions between June 16, 2000, and May 2, 2001. Agent Deery purchased heroin and cocaine base from the co-defendant on September 27, 2000. Tr. 1/22/2003, at 44-48, 53, 65-66, 72-73, 75, 84, 86, 111, 124-25, 130-31, 135, 137-38, 140-42, 146, 148, 150-54, 157-58.

To set up a transaction, Agent Deery typically called the most recent number that the co-defendant had given him and asked whether the co-defendant had drugs to sell. Because the co-defendant did not speak much English and Agent Deery did not speak much Spanish, the two often had their conversations translated by other people who spoke English and Spanish. Aileen Salgado, a woman identified by the co-defendant as his wife,

translated many of the conversations. A Hispanic male, identified by the co-defendant as his brother, translated other conversations. To the best of Agent Deery's knowledge, the defendant speaks no English. Agent Deery never spoke to the defendant. Tr. 1/22/2003, at 31, 46-47, 49, 52-53, 65, 72-73, 75, 79, 88, 124-25, 133-35, 137, 140-41, 146-49, 153-55; Tr. 1/23/2003, at 89-92; 94-98, 115-17.

The co-defendant generally met Agent Deery on a street corner in Northeast Philadelphia. Over the series of transactions, the co-defendant arrived for the transactions in at least eight different vehicles. The co-defendant came alone to some transactions and was accompanied to other transactions. Tr. 1/22/2003, at 44-48, 53, 65-66, 72-73, 75, 84, 86, 111, 124-25, 130-31, 135, 137-38, 140-42, 146, 148, 150-54, 157-58.

Throughout the investigation, the co-defendant sold Agent Deery heroin stamped "ghetto." On one occasion, July 20, 2000, Ms. Salgado told Agent Deery that the co-defendant only had heroin stamped "cobra." Ms. Salgado made her statement while she was translating a conversation between Agent Deery and the co-defendant. Agent Deery told the co-defendant that he only wanted heroin stamped "ghetto." Later on July 20, 2000, the co-defendant sold Agent Deery heroin stamped "ghetto." Tr. 1/22/2003, at 72-75.

During the investigation, the government conducted

surveillance at different properties associated with the co-defendant. The addresses of the properties were 114 West Wishart Street, 3318 Kip Street, 2932 Reese Street, 3000 Hutchinson Street, 522 West Venango Street, and 4743 Whitaker Avenue. The co-defendant lived at 114 West Wishart Street. The defendant lived at 4743 Whitaker Avenue. Tr. 1/22/2003, at 85-86, 115-16, 124, 150; Tr. 1/23/2003, at 20-21, 72, 78-79, 203; Gov't Ex. 26, 29a.

2. June 16, 2000 to August 17, 2000

The co-defendant sold heroin to Agent Deery on four occasions before August 18, 2000. On June 23, 2000, after arranging a deal with the co-defendant, Agent Deery talked to Ms. Salgado over the phone. The first time he talked to her, she said the co-defendant was "doing the candy now and to call back in fifteen minutes." The second time Agent Deery talked to Ms. Salgado, she told Agent Deery that the co-defendant was at his brother's house. Later that day, the co-defendant met Agent Deery. The co-defendant was accompanied to this transaction by a heavyset Hispanic male. The heavyset male had been seen with the co-defendant earlier that day. They were followed by surveillance from 114 West Wishart Street to 3318 Kip Street to 4743 Whitaker Avenue to 114 West Wishart Street. At 4743 Whitaker Avenue, the co-defendant went into the residence. He

let himself in using a key. During the July 20, 2000 transaction, Agent Deery asked the co-defendant about getting crack cocaine. Tr. 1/22/2003, at 46-47, 65-66, 71-73, 75, 115-16; Tr. 1/23/2003, at 78-79.

Before August 18, 2000, the defendant was seen a few times at 3318 Kip Street and 4743 Whitaker Avenue. The defendant drove a red Toyota Camry to these residences. The defendant was not seen at any of the co-defendant's transactions with Agent Deery before August 18, 2000. Tr. 1/22/2003, at 46-47, 65-66, 71-73, 75, 115-16; Tr. 1/23/2003, at 78-79.

3. August 18, 2000

On August 18, 2000, the co-defendant drove to 4743 Whitaker Avenue. He went inside the residence and came out with an envelope. Then, he drove to the 3000 block of Hutchinson Street where he picked up an unidentified Hispanic male. They drove to Center City Philadelphia. Tr. 1/22/2003, at 86-88; Tr. 1/23/2003, at 101-02. At 2:29 p.m., Agent Deery called the co-defendant. They arranged to meet for a heroin transaction. Tr. 1/22/2003, at 88.

At 4:05 p.m., Agent Deery called the co-defendant's cell phone to ask where he was. The co-defendant put the unidentified Hispanic male on the phone who said, "We are bringing it now." Agent Deery told this person that he wanted

the co-defendant to come alone. The Hispanic male told Agent Deery that, "He [the co-defendant] said his brother is bringing you your stuff, he is going to meet you." Agent Deery asked for the co-defendant to be put on the phone. He told the co-defendant to come alone. Then, the Hispanic male got on the phone and told Agent Deery that the co-defendant would come by himself. Tr. 1/22/2003, at 88-89.

At 4:08 p.m., Agent Deery approached the meeting spot and saw the co-defendant talking on a pay phone. At 4:16 p.m., the defendant arrived at the meeting spot in a red Toyota Camry. The co-defendant approached the passenger side window of the defendant's vehicle. He leaned in the window for less than a minute. Then, he walked to Agent Deery's vehicle that was parked around the corner. Tr. 1/22/2003, at 88-89, 111, 119; Tr. 1/23/2003, at 104, 108-09, 113-14.

Agent Deery told the co-defendant that he was unhappy the co-defendant brought people with him. The co-defendant told Agent Deery that his brother was good and he worked the dope with his brother. The co-defendant intended to send his brother to meet Agent Deery because the co-defendant was at his lawyer's office. The co-defendant sold heroin to Agent Deery. Tr. 1/22/2003, at 111-12, 119; Tr. 1/23/2003, at 98, 115-17.

After the co-defendant left Agent Deery's car, he walked to the defendant's vehicle. He did not get into the

defendant's vehicle. The unidentified Hispanic male who came with the co-defendant and the defendant were inside the defendant's vehicle. The three individuals spoke briefly. Tr. 1/22/2003, at 114-15.

The unidentified Hispanic male and the co-defendant left the scene in the co-defendant's vehicle. The defendant left the scene in his vehicle. The defendant's and the co-defendant's vehicles stopped a couple of blocks later. The defendant exited his vehicle, walked over to the driver's side window of the co-defendant's car, and talked with the co-defendant. After this conversation, Mr. Rodriguez went to a gas station and then to 4743 Whitaker Avenue. The government agent who observed the defendant on August 18, 2000 described him as a "Hispanic male, late thirties, medium-complected, mustache, resides at 4743 Whitaker Avenue." Tr. 1/22/2003, at 114-15; Tr. 1/23/2003, at 72-78, 175-77, 202-03.

4. <u>August 19, 2000 to December 19, 2000</u>

On August 21, 2000, Mr. Rodriguez was seen at 522 West Venango Street. At 1:49 p.m., five minutes after he went inside the residence, the defendant spoke with the co-defendant outside of the residence. The defendant and the co-defendant left in their own vehicles. Government surveillance agents described the defendant as a "Hispanic male, late thirties, medium-complected,

mustache, resides at 4743 Whitaker Avenue." Tr. 1/22/2003, at 124; Tr. 1/23/2003, at 72-78.

At 3:00 p.m. on August 21, 2000, Agent Deery called the co-defendant to arrange a drug deal. At 3:50 p.m., Agent Deery bought heroin from the co-defendant. Tr. 1/22/2003, at 124-25.

On August 25, 2000, Ms. Salgado, the co-defendant, and Agent Deery spoke on the phone. Near the end of the phone call, Ms. Salgado told Agent Deery that the co-defendant needed to go to his brother. Tr. 1/22/2003, at 129-30.

Later in the day on August 25, 2000, Agent Chris Losino, a government surveillance agent, observed two Hispanic males and two Hispanic females come out of a bar called "Limit 21." The males were the defendant and the co-defendant. One of the females was Ms. Salgado. The other female was not identified. Tr. 1/23/2003, at 178-79.

The unidentified female knocked on the window of Agent Losino's vehicle. She asked who he was, what he was doing there, and why he was following her brother. Agent Losino responded by asking who they were, stating that he did not know anything about anyone being followed, and inquiring as to why they took down his license plate number. The unidentified female asked why other vehicles followed her brother throughout that day. Tr. 1/23/2003, at 178-79, 185, 193.

On September 13, 2000, Agent Deery asked the co-

defendant if he could get heroin in bulk form. Later that day, Ms. Salgado called and told Agent Deery that the co-defendant got the heroin in bulk form from his brother. Tr. 1/22/2003, at 132.

On September 15, 2000, Agent Deery spoke with the co-defendant and Ms. Salgado about the progress on getting bulk heroin. Ms. Salgado told Agent Deery that the co-defendant was talking to his brother at the co-defendant's house. Ms. Salgado told Agent Deery that the co-defendant obtained heroin from his brother for $100 a gram, and the co-defendant would charge Agent Deery $120 a gram. Agent Deery asked about the availability of crack cocaine. Tr. 1/22/2003, at 132-33.

On September 25, 2000, Agent Deery called the co-defendant to inquire about bulk heroin and crack cocaine. The co-defendant put a Hispanic male on the phone who the co-defendant said was his brother. The conversation between Agent Deery and the unidentified Hispanic male was in English. The unidentified Hispanic male was not the defendant. Agent Deery asked this person to ask the co-defendant if he had the heroin and the crack cocaine. This person told Agent Deery that everything was cool. Tr. 1/22/2003, at 134; Tr. 1/23/2003, at 94-98, 115-17.

On September 27, 2000, Agent Deery called the co-defendant and spoke with the same Hispanic male he spoke to on September 25, 2000. Agent Deery told this person he needed ten

bundles of crack cocaine and ten bundles of heroin. Later on September 27, 2000, the co-defendant sold Agent Deery nine bundles of crack and 10.5 grams of loose heroin. Tr. 1/22/2003, 134-35.

On October 25, 2000, Agent Deery called the co-defendant and had a conversation in English with the same Hispanic male he spoke to on September 25 and 27, 2000. Agent Deery made arrangements to meet the co-defendant. The co-defendant sold Agent Deery approximately fourteen grams of heroin. Tr. 1/22/2003, at 137.

On November 27, 2000, the co-defendant and an unidentified male were seen by surveillance driving the red Toyota Camry that the defendant was previously seen driving. The defendant was not in the vehicle. The co-defendant sold heroin to Agent Deery on November 27, 2000. The co-defendant was driven to the transaction in a blue Toyota by a person who was not the defendant. The defendant was not seen by surveillance agents at all on November 27, 2000. Tr. 1/22/2003, at 140-41, 145; Tr. 1/23/2003, at 63-68.

5. December 20, 2000

On December 20, 2000, the co-defendant met Agent Deery. The co-defendant was driven to the transaction in the defendant's red Toyota Camry. Agent Deery described the driver of the defendant's vehicle as a Hispanic male, mid to late twenties, with a moustache, and dark, full hair. In his report of the transaction, Agent Deery listed the driver as a "John Doe" who lived at 3318 Kip Street, possibly Jose Antonio Rodriguez. Agent Deery testified that the driver looked like the defendant, but he was not sure that it was the defendant. Tr. 1/22/2003, at 146-48; Tr. 1/23/2003, at 75-77.

Later that day, Agent Deery called the co-defendant. Agent Deery had a conversation in English with the same Hispanic male to whom Agent Deery spoke previously. This was the male to whom the co-defendant referred as his brother. Agent Deery complained that the substance he received was not heroin. He inquired about doing an exchange. This person told him that the substance was good and that it could not be "grinded" for too long. Tr. 1/22/2003, at 148; Tr. 1/23/2003, at 94-98, 115-17.

6. December 21, 2000 to May 1, 2001

On January 10, 2001, Agent Deery called the co-defendant to set up another transaction. Agent Deery had a conversation in English with the same Hispanic male with whom he

previously spoke and whom the co-defendant had identified as his brother. Agent Deery told the Hispanic male that he wanted to return the substance he received at the December 20, 2000 transaction. He also wanted an additional half ounce of heroin. There was no transaction on January 10, 2001. Tr. 1/22/2003, at 149-50; Tr. 1/23/2003, at 94-98, 115-17.

On January 16, 2001, at 11:37 a.m., Agent Deery called the co-defendant. At 12:10 p.m., the red Toyota Camry parked in front of 114 Wishart Street, the co-defendant's residence. A Hispanic male with a moustache and a thin build got out of the car, went into the residence, and returned to the vehicle. The Hispanic male left within one to two minutes of when he arrived. The Hispanic male was not identified. At 12:40 p.m., the co-defendant left 114 Wishart Street. At 12:45 p.m., the co-defendant met Agent Deery and sold him heroin. Tr. 1/22/2003, at 150-52; Tr. 1/23/2003, at 197.

7. May 2, 2001

On May 2, 2001, Agent Deery arranged a transaction with the co-defendant for bulk heroin. The government introduced toll records from the co-defendant's cell phone showing the incoming and outgoing calls for May 2, 2001. Agent Deery also described the substance of his phone conversations with the co-defendant on May 2, 2001. No evidence was offered about the substance of the

other phone calls.

Beginning with the first call between Agent Deery and the co-defendant, the series of calls to and from the co-defendant's phone was as follows:

- 12:17:02 p.m. - incoming call from Agent Deery that lasted one minute and eighteen seconds. Agent Deery told the co-defendant that he had $12,000. He wanted to know what the co-defendant could get him. The co-defendant said he could get anything that Agent Deery wanted. Agent Deery said he would call back in thirty minutes.

- 12:27:44 p.m. - incoming call from 610-804-0278 that lasted nine seconds.

- 12:41:09 p.m. - incoming call from 610-804-0278 that lasted eight seconds.

- 1:03:28 p.m. - incoming call from 215-221-5530 that lasted thirty-two seconds.

- 1:21:04 p.m. - incoming call from Agent Deery that lasted one minute and fifty-six seconds. Agent Deery ordered 123 grams of heroin for $11,000. The co-defendant said he would call back in ten minutes because he needed to make a call.

- 1:23:57 p.m. - outgoing call to 267-205-5246 that lasted twenty-eight seconds.

- 1:38:43 p.m. - outgoing call to 215-739-9808 that lasted one minute and twenty seconds.

- 1:48:51 p.m. - outgoing call to 267-205-5246 that lasted nine seconds.

- 1:50:06 p.m. - incoming call from Agent Deery that lasted fifteen seconds. The co-defendant told Agent Deery that he needed ten minutes.

- 1:51:04 p.m. - incoming call from 267-205-5246 that lasted thirty-nine seconds.

- 1:52:43 p.m. - outgoing call to Agent Deery that lasted one minute and forty-two seconds. The co-defendant told Agent Deery that he had ninety-two grams of heroin for $11,000.

Agent Deery said he would only pay $10,000 for that amount of heroin. The co-defendant said that he would call right back.

- 1:55:07 p.m. - outgoing call to 267-205-5246 that lasted forty-four seconds.
- 1:56:33 p.m. - outgoing call to Agent Deery that lasted one minute and twenty-five seconds. The co-defendant told Agent Deery that he could sell ninety-two grams of heroin for $10,000.
- 2:41:33 p.m. - incoming call from Agent Deery that lasted ten seconds. Agent Deery told the co-defendant to "hurry up."
- 3:01:29 p.m. - incoming call from 215-634-4007 that lasted one minute and twelve seconds.
- 3:08:40 p.m. - outgoing call to 215-569-3909 that lasted one minute and thirty-five seconds.
- 3:14:24 p.m. - incoming call from Agent Deery that lasted thirty seconds.
- 3:20:20 p.m. - incoming call from 215-569-3825 that lasted six minutes and twenty-seven seconds.

Tr. 1/22/2003, at 155-56; Tr. 1/23/2003, at 38-41; Gov't Ex. 29; Gov't Ex. 30, at 1-2.

At 3:45 p.m., the defendant drove the co-defendant to the scheduled transaction. The co-defendant was in the back seat of the defendant's vehicle, and a female passenger was in the front seat. The defendant dropped off the co-defendant down the street from Agent Deery's vehicle. As the co-defendant walked towards Agent Deery's vehicle, he was arrested. Eighty-nine grams of heroin were confiscated from inside the co-defendant's pants. Tr. 1/22/2003, at 157-58.

The defendant parked his vehicle on a corner near where the transaction was to take place. Law enforcement arrived and arrested Mr. Rodriguez and the female in the car. Tr. 1/22/2003, at 157-58; Tr. 1/22/2003, at 205.

Two cell phones were taken from the red Toyota Camry - one from the center console and one from the back seat. The number of the cell phone in the back seat was the number on which Agent Deery had been calling the co-defendant. The number of the other cell phone was 267-205-5246. Tr. 1/22/2003, at 159; Tr. 1/23/2003, at 35, 206.

A single bag of heroin stamped “cobra” was found under the center console of the defendant's vehicle. Tr. 1/23/2003, at 25-27.

Agent Deery also confiscated Mr. Rodriguez's wallet. Agent Deery found various identification documents in the wallet including: (1) a driver's license for Mr. Rodriguez listing his residence as 4743 Whitaker Avenue; (2) a social security card for Mr. Rodriguez; and (3) a resident alien card for Mr. Rodriguez. Both the resident alien card and the driver's license listed 1965 as the defendant's year of birth. Tr. 1/22/2003, at 159-61; Tr. 1/23/2003, at 20-22, 25; Gov't Ex. 26.

Two documents in the defendant's wallet related to cell phone service. There were two receipts dated May 2, 2001, from the Sprint PCS store at 4640 Roosevelt Boulevard in Philadelphia.

One receipt was in the amount of $100 and had a time stamp of 11:11:52 a.m. The other receipt was in the amount of $20 and had a time stamp of 11:26:45 a.m. Neither receipt states what was bought or the phone number associated with the transaction. Tr. 1/22/2003, at 159-61; Tr. 1/23/2003, at 20-22, 25; Gov't Ex. 26.

Other documents in the defendant's wallet related to his automobile. These documents include: (1) a voided title in the name of Mr. Rodriguez for a 1990 Toyota; (2) an insurance card and registration for the 1990 Toyota showing that the car was registered to Mr. Rodriguez at 4743 Whitaker Avenue; (3) an automobile insurance bill and receipt in the amount of $401.65 listing the defendant's address as 4743 Whitaker Avenue; and (4) a receipt dated April 31, 2001 in the amount of $550 in Spanish for "repairs of a Buick" that also contained "1989," "Eulise," and "267-205-5246." Tr. 1/22/2003, at 159-61; Tr. 1/23/2003, at 20-22, 25; Gov't Ex. 26.

There were documents in the defendant's wallet relating to a house at 3232 North Sixth Street. These documents include: (1) an agreement for the sale of a house at 3232 North Sixth Street to Mr. Rodriguez dated April 6 and 7, 2001; (2) a title deed transfer receipt in the amount of $500; and (3) a receipt in the amount of $350 for insurance at 3232 North Sixth Street. Tr. 1/22/2003, at 159-61; Tr. 1/23/2003, at 20-22, 25; Gov't Ex. 26.

There was an assortment of other documents found in the

defendant's wallet. These documents include: (1) a mail label with the name crossed out and an address of 2932 Reese Street; (2) some business cards; and (3) a card for an appointment on May 10, 2001 at 9:15 a.m. for oral and maxillofacial surgery at 3401 North Broad Street in Philadelphia. Tr. 1/22/2003, at 159-61; Tr. 1/23/2003, at 20-22, 25; Gov't Ex. 26.

A personal history and arrest report were taken from the defendant. Mr. Rodriguez gave his address as 4743 Whitaker Avenue and his phone number as 267-205-5246. He listed a second address of 3334 North Sixth Street. Mr. Rodriguez was listed as five feet, ten inches tall, 155 pounds with a thin build and brown eyes and black hair. Gov't Ex. 29a.

From the time the investigation began in June 2000 until Mr. Rodriguez and his co-defendant were arrested on May 2, 2001, the co-defendant never referred to Mr. Rodriguez by name. Drugs were never seen in the defendant's hand or found on his person. No one ever saw the defendant deliver drugs to anyone. Tr. 1/23/03, at 44-45.

B. Analysis

The defendant was convicted of two of the three charged crimes. He was found guilty on count one, conspiracy to distribute heroin and cocaine base, and count seventeen, possession of heroin with intent to distribute on May 2, 2001.

The jury acquitted the defendant on count six, distribution of heroin on August 18, 2000.

Pursuant to Fed. R. Crim. P. 29(a), the defendant moved for a judgment of acquittal at the close of the government's case. He argued that the evidence was insufficient to sustain a conviction on any of the charged counts. The Court reserved decision on the motion pursuant to Rule 29(b). The Court must, therefore, "decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). The defendant renewed his motion for a judgment of acquittal in a post-trial motion.

A claim of insufficiency of the evidence places a heavy burden on the defendant. If any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," then the jury's verdict must be sustained. United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998); see Jackson v. Virginia, 443 U.S. 307, 319 (1979). A Rule 29 motion will be granted only in those cases "where the prosecution's failure is clear." United States v. Smith, 294 F.3d 473, 477 (3d Cir. 2002).

1. Count One - Conspiracy to Distribute Heroin and Cocaine Base

The crime of conspiracy requires the government to prove beyond a reasonable doubt: (1) a unity of purpose between

the alleged conspirators; (2) the intent to achieve a common goal; and (3) an agreement to work together toward that goal. This proof incorporates a demonstration that the defendant entered into an agreement and knew that the agreement had the specific unlawful purpose charged in the indictment. United States v. Mastrangelo, 172 F.3d 288, 291 (3d Cir. 1999); see United States v. Perez, 280 F.3d 318, 342 (3d Cir. 2002); Dent, 149 F.3d at 188. In the absence of proof of an agreement or the requisite knowledge, a conspiracy charge cannot be sustained. United States v. Idowu, 157 F.3d 265, 267 (3d Cir. 1998).

There is no direct evidence that the defendant entered into an agreement or that he knew of an agreement that had the unlawful purpose of distributing heroin and cocaine base. In the absence of direct evidence, the agreement and requisite knowledge to establish a conspiracy can be inferred from circumstantial evidence. See Dent, 149 F.3d at 188. Drawing inferences from established facts is an acceptable method of proof if there is a logical and convincing connection between the facts established and the conclusion inferred. See United States v. Casper, 956 F.2d 416, 422 (3d Cir. 1992); United States v. McNeill, 877 F.2d 448, 450 (3d Cir. 1989). When evidence of a defendant's guilt is based only on a chain of inferences, as it is in the present case, a court must determine if the "proved facts logically support the inference of guilt." Casper, 956 F.2d at 422.

The sufficiency of circumstantial evidence in a conspiracy prosecution requires "close scrutiny." United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987). Although inferences may establish the essential elements of a conspiracy, a conspiracy "cannot be proven . . . by piling inference upon inference." Id. at 808.

To establish the defendant's entry into an agreement and knowledge of the agreement's purpose to distribute heroin, the government relies on the following evidence: (1) the series of phone calls on May 2, 2001 between the co-defendant's cell phone and the phone number 267-205-5246 that occurred during the same period the co-defendant was negotiating a deal with Agent Deery; (2) the defendant's presence at the transactions on August 18, 2000, December 20, 2000, and May 2, 2001; (3) the references to the co-defendant's brother at various points during the investigation; (4) the "cobra" heroin found in the defendant's vehicle when he was arrested and Agent Deery being told on July 20, 2000 that the co-defendant could only get "cobra" heroin; and (5) other sightings of the defendant during the government's investigation. The Court will first discuss the permissible inferences from each piece of evidence separately and then the permissible inferences from the evidence as a whole.

a. The May 2, 2001 Phone Calls

The government argues that it is permissible to infer from the timing and context of the phone calls between the defendant's and the co-defendant's telephone numbers that the defendant and the co-defendant spoke and arranged the May 2, 2001 transaction. The Court concludes that although the jury could infer that the defendant and co-defendant spoke during at least some of these calls, it would be speculation to infer the substance of these conversations. Without any evidence as to the substance of the conversations, they are not sufficient to uphold a conspiracy conviction. See, e.g., United States v. Thomas, 114 F.3d 403, 406 (3d Cir. 1997); United States v. Cooper, 567 F.2d 252, 254-55 (3d Cir. 1977).

The phone call evidence in the present case is similar to the phone call evidence in Thomas and Cooper that was insufficient to sustain a conspiracy conviction. Phone calls from a co-defendant to the defendant's home, cell phone, and pager on the day of the Thomas defendant's arrest were suspicious because of the temporal proximity of the calls to other illegal conduct. Three phone calls from a co-conspirator to the defendant's home near the beginning of the alleged conspiracy in Cooper and two phone calls from the motel room that the defendant shared with a co-conspirator during the conspiracy were also suspicious. The phone calls in Cooper and Thomas, however, could

not support a conspiracy conviction because there was no evidence of the substance of the conversations. See Thomas, 114 F.3d at 406; Cooper, 567 F.2d at 254-55.

The phone call evidence presented in this case is not like the phone call evidence presented in United States v. McGlory, 968 F.2d 309, 322-24 (3d Cir. 1992). In McGlory, evidence was offered that the defendant used coded words in a series of phone calls. There was also evidence that connected the coded words to other illegal behavior. The evidence connecting the coded words and illegal behavior permitted an inference that the defendant entered into an agreement and had the requisite knowledge of the agreement's purpose. McGlory, 968 F.2d at 322-24. In the present case, there is no evidence about the substance of the phone calls or any connection between the substance of the phone calls and illegal behavior. The phone calls, therefore, are insufficient to establish the elements of a conspiracy in this case.

b. The Defendant's Presence at the August 18, 2000, December 20, 2000, and May 2, 2001 Transactions

The government argues that the presence of the defendant at the August 18, 2000, December 20, 2000, and May 2, 2001 transactions is sufficient evidence to allow the jury to conclude that the defendant agreed with the co-defendant to sell

heroin to Agent Deery.

A threshold problem with the government's argument as to the August 18 transaction is that the jury acquitted the defendant of distribution and aiding and abetting the distribution of heroin on August 18. The jury rejected the government's argument that the defendant participated in the co-defendant's sale of heroin on that date. Even if the Court were to ignore the jury's verdict, however, the August 18 evidence does not allow the inferences urged by the government.

The government wants the jury to infer that: (1) the co-defendant was referring to the defendant when he told Agent Deery that his brother was going to bring Agent Deery the heroin; (2) after the co-defendant agreed to come alone, he still met his brother at the transaction to get the heroin; (3) the defendant brought the heroin to the co-defendant; (4) the co-defendant went to the defendant's vehicle to get the heroin; and (5) the co-defendant was referring to the defendant when he told Agent Deery that his brother was good and that he worked the dope with his brother. Under the government's theory, if all of these inferences are permitted, then the essential elements of a conspiracy are established. The argument fails, however, because when the government asks for a piling of inference upon inference to establish the elements of conspiracy, a conspiracy conviction cannot be sustained. See Coleman, 811 F.2d at 807.

Aside from whether the government's piling of inference upon inference is a permissible way to prove a conspiracy, the evidence from August 18, 2000 does not establish a conspiracy. There is no evidence that the defendant was the person the co-defendant and the Hispanic male meant when they made the comments regarding the co-defendant's brother. Nor is there any evidence in the entire case linking the defendant and the co-defendant together as brothers. The English speaking, Hispanic male that Agent Deery spoke to on September 25 and 27, 2000, October 25, 2000, December 20, 2000, and January 10, 2001, is the only person who was identified as the co-defendant's brother. There was no evidence that this person was the defendant.

The events of December 20, 2000 present even less evidence from which the elements of a conspiracy could be inferred. On this date, the co-defendant was driven to the transaction with Agent Deery in the defendant's vehicle. The co-defendant sold Agent Deery a substance that turned out not to be heroin. After the transaction, Agent Deery observed the driver of the defendant's vehicle. Agent Deery described the driver as a Hispanic male, mid to late twenties, with a moustache, and dark, full hair, possibly Jose Antonio Rodriguez, who is not the defendant. Agent Deery testified that he was not sure whether it was the defendant.

When the defendant was observed by government

surveillance on August 18 and 21, 2000, he was described as a Hispanic male, late thirties, medium complected with a moustache. The personal history taken from the defendant after he was arrested listed him as five feet, ten inches tall, 155 pounds with a thin build and brown eyes and black hair.

In view of Agent Deery's uncertainty that the defendant was the driver on December 20, and the discrepancy between surveillance's description of the defendant on other occasions and Agent Deery's description of the driver, it would appear to be speculation for the jury to conclude that the driver was the defendant. Even if the defendant were the driver, his presence and the co-defendant's illegal behavior do not permit an inference of the defendant's entry into an agreement or knowledge of an agreement's illicit purpose. See United States v. Wexler, 838 F.2d 88, 91 (3d Cir. 1988); Cooper, 567 F.2d at 255.

The third time that the defendant was seen at a transaction was on May 2, 2001. The government argues that the defendant must have known the purpose of the meeting between Agent Deery and the co-defendant because a person who drives someone to a $10,000 transaction must know the purpose of the transaction. This argument is in essence an argument that because the defendant was near illegal activity and the person in his car was involved in illegal activity, the defendant must be guilty of a conspiracy. Proximity to illegal behavior and

associating with people involved in illegal behavior does not establish the defendant's entry into an agreement or knowledge of an agreement's unlawful purpose. See Wexler, 838 F.2d at 91; Cooper, 567 F.2d at 255.

c. The References to the Co-Defendant's Brother Other Than the August 18, 2000 References

There were references to people who were the co-defendant's brother throughout the case. In arranging heroin transactions on September 25 and 27, 2000, October 25, 2000, and January 10, 2001, Agent Deery had telephone conversations with an English speaking, Hispanic male who the co-defendant identified as his brother. During the September 27, 2000, transaction, this male and Agent Deery also spoke about getting crack cocaine. Agent Deery spoke with this same Hispanic male who had been identified as the co-defendant's brother on December 20, 2000, when he called to complain about the substance he received that day.

The evidence presented at trial was that the defendant did not speak English and that Agent Deery had never spoken with the defendant. Agent Deery's conversations with the English speaking, Hispanic male, therefore, are not evidence that the defendant entered into an agreement or had the requisite knowledge of the agreement's purpose.

Ms. Salgado also mentioned a brother of the co-

defendant during conversations with Agent Deery on June 23, 2000, August 25, 2000, September 13, 2000, and September 15, 2000. Ms. Salgado's references to the co-defendant's brother were not connected to the defendant through any evidence. There is no evidence that the co-defendant ever referred to the defendant as his brother. There is no evidence that the co-defendant and the defendant are brothers. The defendant was not seen at the transactions between the co-defendant and Agent Deery on June 23, 2000, September 13, 2000, or September 15, 2000 even though other people were observed at these transactions.

The only other references to the co-defendant's brother in the entire case besides Ms. Salgado's references were: (1) to the English speaking, Hispanic male who Agent Deery spoke to several times and who the co-defendant did identify as his brother, and (2) the references on August 18, 2000, by the co-defendant and an unidentified Hispanic male driving with the defendant. A jury could not conclude that the English speaking, Hispanic male was the defendant because the evidence showed that the defendant did not speak English. The August 18, 2000 references could have been to any one of a number of people: the defendant; the person who accompanied the co-defendant on August 18, 2000; the English speaking, Hispanic male who Agent Deery spoke with on several occasions; or any of the other males seen with the co-defendant throughout the transaction.

d. The "Cobra" Heroin Found in the Defendant's Vehicle

Throughout the investigation, the co-defendant always supplied Agent Deery with heroin stamped "ghetto." On July 20, 2000, however, the co-defendant initially told Agent Deery that he did not have "ghetto" heroin available that day, but he could get heroin stamped "cobra." Agent Deery did not want the "cobra" heroin, and the co-defendant eventually delivered "ghetto" heroin on that day. On May 2, 2001, a packet of "cobra" heroin was found under the center console of the defendant's vehicle.

The government argues that this evidence supports an inference that the defendant was the person able to get the "cobra" heroin that the co-defendant was willing to supply on July 20, 2000. That may be a proper inference from the evidence but it does not help the government here. That the defendant may have been engaged in other illegal activity is not sufficient to allow the defendant to be convicted of the conspiracy that was actually charged. See United States v. Samuels, 741 F.2d 570, 574-75 (3d Cir. 1984).

e. Other Sightings of the Defendant

The government's attempt to link Eulises Rodriguez with a conspiracy by relying on the defendant being sighted with Julian Rodriguez at other times during the investigation is nothing more than an attempt to hold the defendant liable for

keeping the company of individuals who are engaged in illegal activity. This evidence will not support an inference that the defendant entered into an agreement or that he knew about the heroin distribution. See Wexler, 838 F.2d at 91; Cooper, 567 F.2d at 255; United States v. Salmon, 944 F.2d 1106, 1113-15 (3d Cir. 1991).

f. Cumulative Effect of Permissible Inferences

Several inferences are permissible from the government's evidence. From the series of phone calls on May 2, 2001 between the defendant's and the co-defendant's cell phones, it is permissible to infer that the defendant and the co-defendant spoke on that date. Because the co-defendant was negotiating a transaction in the same time frame, it is also permissible to conclude that the calls were suspicious. The defendant's presence at some of the transactions allows for an inference that the defendant drove the co-defendant to some of the drug transactions in the defendant's vehicle. On one occasion, the defendant and the co-defendant spoke before the co-defendant sold drugs to Agent Deery. The references to the co-defendant's brother allow for an inference that the co-defendant had a brother and that the brother was involved in the drug transactions. It is permissible to infer from the "ghetto" heroin that the defendant may have been involved in some type of

illegal behavior. Finally, the other sightings of the defendant permit an inference that the defendant associated with the co-defendant.

When the Court puts together the evidence against the defendant with its permissible inferences, it finds that there is insufficient evidence to allow a rational juror to find guilt beyond a reasonable doubt. Although the jury could infer that the defendant was engaged in some suspicious activity, the inferences do not establish that the defendant had any knowledge of a conspiracy to distribute heroin and cocaine base or ever entered into an agreement to distribute heroin and cocaine base.

2. Count Seventeen - Possession of Heroin with Intent to Distribute

To prove possession of heroin with the intent to distribute, the government must prove that the defendant "knowingly and intentionally possessed the drugs with the intent to distribute them." United States v. Iafelice, 978 F.2d 92, 95 (3d Cir. 1992). An individual may be convicted of aiding and abetting if: (1) another person committed the substantive offense; (2) the person charged with aiding and abetting knew that the substantive offense would be committed; and (3) acted with the intent to facilitate it. To satisfy the intent to facilitate the substantive offense requirement, an individual must act with the "intent to help those involved with a certain

crime." Salmon, 944 F.2d at 1113.

Both possession with intent to distribute and aiding and abetting the possession with intent to distribute have a knowledge requirement. The defendant's conviction on count seventeen must be set aside for the same reasons the May 2, 2001 evidence did not permit an inference of knowledge sufficient to sustain the conspiracy conviction. See Salmon, 944 F.2d at 1114-15; Wexler, 838 F.2d at 92.

III. Rule 33 Motion

A motion for a new trial may be granted if "the interests of justice so require." Fed. R. Crim. P. 33. The decision is left to the discretion of the district court. United States v. Skelton, 893 F.2d 40, 44 (3d Cir. 1990). If the Court grants a judgment of acquittal after a guilty verdict, then the Court must also conditionally determine whether to grant a new trial should the judgment of acquittal later be vacated or reversed. Fed. R. Crim. P. 29(d)(1).

The primary argument made by the defendant for a new trial involves the proffer sessions held by the government with the co-defendant. This issue came up for the first time during the trial when the defendant asked the Court for permission to admit the co-defendant's statement into evidence as a statement against penal interest. The government made different and at

times conflicting representations during the trial about the content of the sessions and the existence of notes from the sessions. After the verdict, the Court held an evidentiary hearing in order to determine what happened at the proffer sessions. What follows is a description of the Court's findings of fact as to the proffer sessions and the government's shifting representations concerning those sessions.

A. Findings of Fact

1. The Proffer Sessions with Julian Rodriguez

There were two proffer sessions with Julian Rodriguez: June 5 and 10, 2002. Present at the June 5, 2002 session were the co-defendant, Raul Rivera, Patrick Leonard, Christina Staunton, and Ricardo Rodriguez. Mr. Rivera is the co-defendant's attorney. Mr. Leonard is an attorney in the Pennsylvania Office of Attorney General. He prosecuted the co-defendant and the defendant as a Special Assistant United States Attorney. Ms. Staunton and Mr. Rodriguez are agents for the Pennsylvania Office of Attorney General.

Agent Staunton and Mr. Leonard took notes during the June 5, 2002 session. Agent Rodriguez interpreted for the co-defendant. The session took one to two hours. During this session, Agent Staunton and Mr. Leonard asked questions. The co-defendant was questioned about his personal background and how he

got involved in the business of selling drugs. He told the government when he started dealing drugs, from whom he obtained the drugs, for whom he worked, and who else was involved. The co-defendant also discussed an apartment in the area of D Street and Wyoming Avenue. Agent Staunton drew a diagram of the area where the apartment was located.

Present during the June 10, 2002 session were the co-defendant, Mr. Rivera, Mr. Leonard, Agents Staunton and Deery, and Victor Benites. Mr. Benites is an agent for the Pennsylvania Office of Attorney General. He translated for the co-defendant at the proffer session. Mr. Leonard took notes during the session and Agent Deery may also have taken notes. Agent Deery asked questions during this session. The proffer session lasted approximately one hour.

During the June 10, 2002 session, the co-defendant told Agent Deery that Francisco Rodriguez drove him to a drug transaction with Agent Deery in a parking lot. The co-defendant gave Francisco Rodriguez $150 to $200 for driving him there. Agent Deery showed the co-defendant two videos and asked him questions about the videos. The co-defendant answered Agent Deery's questions. He identified an individual on one of the videos. The co-defendant also talked about his involvement in selling hurricane heroin for an individual who lived on Hutchinson Street. The co-defendant also confirmed that Ms.

Salgado knew about his drug dealings, answered the phone, and translated for him during conversations with Agent Deery.

At the June 10, 2002 session, Agent Deery asked Julian Rodriguez about the defendant. The co-defendant said that the defendant was not involved in the drug dealing and only drove him to the site of the transaction on May 2, 2001. The co-defendant also told Agent Deery that the defendant was his uncle. During the session, Agent Deery told the co-defendant through the interpreter that he, Agent Deery, thought that the co-defendant was lying. The basis for this conclusion is not clear. Mr. Rivera stated that it related to the statement by the co-defendant that the defendant was not involved. Agent Deery said that he thought that the co-defendant was lying about other things as well. Agent Deery, however, was not able to explain to the Court what other lies the co-defendant told.

Neither Mr. Leonard nor any of the government agents recalled what happened to the notes that were taken by Mr. Leonard or the agents at either proffer session.

My findings of fact regarding the proffer sessions with the co-defendant are based mainly on the testimony of Mr. Rivera.[2] He appeared to have the best memory of all the

[2] Mr. Rivera spoke in court on January 24, 27, and 30, 2003. Mr. Rivera was sworn in as a witness only for the January 30, 2003 testimony. At the January 30, 2003 hearing, Mr. Rivera adopted his prior statements with the changes he made at that day's hearing. In relying on Mr. Rivera's testimony for my

witnesses concerning the proffer sessions. I also found him credible. The only failure of recollection he had was that Agent Staunton, and not Agent Deery, attended the June 5, 2002 proffer session and took notes. Otherwise, almost all of his testimony was supported by the testimony of one or more of the agents.

Agent Deery's and Mr. Leonard's statements regarding the proffer sessions are suspect because of the different statements each gave to the Court on different occasions, as detailed below. Of course, had the agents and Mr. Leonard kept their notes, as they should have, the Court would not be in the position of trying to figure out what happened at the co-defendant's proffer sessions.

2. The Government's Disclosures to the Defendant

On June 12, 2002, Mr. Leonard sent defense counsel a letter, stating that the government interviewed the co-defendant on June 5 and 10, 2002. According to the letter, the co-defendant told the government that: (1) the defendant was the co-defendant's uncle; (2) the defendant gave the co-defendant rides in the defendant's vehicle; (3) the rides that the defendant gave to the co-defendant included times when the co-defendant delivered heroin; and (4) the defendant did not know that the co-

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findings of fact, I am relying on his statements to the Court on January 24 and 27, 2003 as well as January 30, 2003 because Mr. Rivera adopted the earlier statements while he was under oath.

defendant was involved in the distribution of heroin. The June 12, 2002 letter was the only information that the defendant received about the government's proffer sessions with the co-defendant.

3. The Government's Representations About the Proffer Sessions During the Trial

On four separate occasions during the trial, the Special Assistant United States Attorney and the case agent made representations to the Court about the proffer sessions.[3] In certain critical respects, these representations were false. The government told the Court repeatedly that there was only one proffer session and that the first proffer session was cancelled because Mr. Rivera could not make it. The government told the Court that no one took notes during the one proffer session. The government told the Court that the co-defendant refused to implicate any family members during the proffer sessions. Specifically, Mr. Leonard told the Court that the co-defendant did not identify the woman who had been on the telephone conversations with Agent Deery, and that the co-defendant said that she did not know about the drug transactions.

The Court assumes that the government agents did not intend to mislead the Court; but, they did mislead the Court and

[3] Tr. 1/23/03, at 6-12; Tr. 1/24/03, at 5-23; Tr. 1/27/03, at 3-21; Tr. 1/28/03, at 17-30.

defense counsel. A lawyer is an officer of the Court and should not make representations without checking his facts for accuracy. If Mr. Leonard had checked his file, he would have seen his letter to the co-defendant's counsel that referred to two meetings and not one, and to the presence of several agents at the proffer sessions. Mr. Leonard should then have asked the agents on the case what happened at the proffer sessions.

It is especially troublesome that Mr. Leonard told the Court during the trial that Mr. Rivera was not telling the truth when it turned out that the other agents present at the sessions corroborated most of what Mr. Rivera said. It also appears that Mr. Leonard did not follow the instruction of the United States Attorney's Office that he was to tell counsel for the defendant what the co-defendant said at the proffer sessions. This instruction did not appear to be limited to the specific statements in which the co-defendant mentioned the defendant.

B. Analysis

The defendant argues that the Court should grant a new trial because the government violated his due process rights by failing to provide him with the exculpatory information provided by the co-defendant at the proffer sessions, and by failing to preserve the notes from the proffer sessions. The Court will discuss each of the government's alleged failures in turn.

1. Failure to Disclose Information from the Proffer Sessions

A criminal defendant's due process rights are violated when the prosecution suppresses favorable evidence that is material to the guilt of the accused regardless of whether the defendant requests the material. Strickler v. Greene, 527 U.S. 263, 280 (1999); United States v. Bagley, 473 U.S. 667, 682 (1985); Brady, 373 U.S. at 87. A Brady violation occurs when: (1) the prosecution suppresses evidence; (2) the suppressed evidence is favorable to the accused either because of its impeachment or exculpatory value; and (3) the non-disclosure prejudiced the defendant. Strickler, 527 U.S. at 281-82. The Court will analyze each element in turn.

The government suppressed the following categories of information from the proffer sessions: (1) the nature of the co-defendant's drug dealing, including when he started selling drugs, for whom he worked, who supplied him with drugs, and who else was involved; (2) the co-defendant's statements implicating other family members such as his statements that Francisco Rodriguez drove him to a drug transaction in exchange for $150 to $200 and Ms. Salgado translated the conversations between Agent Deery and the co-defendant and knew that the co-defendant was selling heroin; and (3) the co-defendant's identification of various individuals, including people involved in the drug

transactions and an individual on a videotape from June 23, 2000.

There are three ways in which the suppressed information was favorable to the defense. First, it could have been used to impeach Agent Deery. Second, it strengthens the argument that the co-defendant's statement was admissible as a statement against interest and makes it more likely that the defendant would have chosen to use the statement. Third, it could have led to additional investigation by defense counsel and potentially other exculpatory evidence.

(1) Impeachment of Agent Deery. The government relied almost exclusively on Agent Deery's testimony in attempting to prove the defendant's guilt. The government's theory, put in primarily through Agent Deery, was that the defendant and the co-defendant were involved in a conspiracy in which the defendant was the source of the heroin and brought the co-defendant and the drugs to some of the transactions.

The information from the proffer sessions called that theory into question. The co-defendant provided detailed information about a drug distribution network that did not involve the defendant. If the defendant had been given the suppressed information, Agent Deery could have been cross-examined more effectively. Agent Deery's credibility was crucial to the success of the government's case. Evidence that could have cast Agent Deery's testimony in a less favorable light was

favorable to the defendant.

(2) Admissibility of the Co-defendant's Statement. The defendant sought the Court's permission during the trial to admit the portion of the co-defendant's statement that had been disclosed to him: the defendant was his uncle and gave him rides to some of the drug transactions but was not involved in his drug dealing. It was during the argument over the admissibility of the statement that the government made the inaccurate representations about the proffer sessions.

The Court ruled that the statements could come into evidence but only with the parts that the government wanted to admit, that is, that the co-defendant refused to implicate family members. Neither the Court nor defense counsel had any reason to know that the government's representations about the statements were wrong. The defendant decided not to introduce the statements under those circumstances because their exculpatory value would be so undermined by the government's additional evidence.

The Court learned later that the co-defendant did implicate family members: Ms. Salgado, who was his wife; and Francisco Rodriguez, who was another relative. Under these circumstances, it is likely that the defendant would have introduced the statement, and the defendant has so stated.

The government argues that the impact of the proffer

sessions on the admission of the statements cannot be a Brady violation because the co-defendant's statements are inadmissible hearsay. The statements are hearsay. The question is are they admissible as a statement against interest under Fed. R. Evid. 804 (b)(3), that provides an exception to the hearsay rule if the declarant is unavailable as a witness for:

> [a] statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The parties agreed that the co-defendant was unavailable because he would invoke his Fifth Amendment privilege against self-incrimination if he was called to testify. Tr. 1/23/2003, at 127-29; see Fed. R. Evid. 804(a)(1).

A statement is against interest within the meaning of Rule 804(b)(3) if it is truly self-inculpatory. Portions of larger narratives that are not truly inculpatory are inadmissible. Determining whether a statement is truly against interest requires the statement to be viewed in context. The circumstances in which the statements are made are to be examined to determine whether the statements are self-inculpatory or self-serving. Williamson v. United States, 512 U.S. 594, 600-02

(1994); United States v. Moses, 148 F.3d 277, 281 (3d Cir. 1998).

Most portions of the co-defendant's statement are obviously self-inculpatory. His description of his drug suppliers and confederates in drug dealing was self-inculpatory. His admission that he used his wife to communicate with the undercover officer was also self-inculpatory. Someone who leads others into wrongdoing may receive a sentence enhancement. U.S.S.G. 3B1.1(c). Even if the part of the statement in which the co-defendant said that the defendant was not involved was inadmissible, the defendant may still have chosen to use the statement because, by naming others as the supplier of the drugs, it exonerated the defendant as the supplier of the co-defendant's drugs.

The statement about the defendant's non-involvement, however, was inculpatory as well. See United States v. Paguio, 114 F.3d 928, 933-34 (9th Cir. 1997). The statement was given in the context of a proffer session that the co-defendant hoped would lead to a cooperation plea agreement that included the possibility of the government filing a motion for downward departure under Sentencing Guideline § 5K1.1. This was the co-defendant's best chance to decrease the very large criminal penalty he was facing. Not obtaining a plea agreement had the possibility of subjecting the defendant to increased criminal penalties. The government appeared not to be interested in

entering into a plea agreement with the co-defendant unless he would implicate the defendant. In this situation, the co-defendant had a significant incentive to implicate the defendant. Not only did the co-defendant refuse to implicate the defendant, he exculpated the defendant.

After the proffer sessions, the government sent the co-defendant's counsel a letter stating that the government believed that the co-defendant was not forthright and instructing counsel to let the government know if the co-defendant changed his mind. Even after the government's letter, the co-defendant did not withdraw his statements about the defendant.

Another requirement for the admissibility of a statement against interest in this context is that "corroborating circumstances clearly indicate the trustworthiness of the statement." That factor is met here. The co-defendant's statement about the defendant was consistent with the government's trial evidence. There was no direct evidence of the defendant's joinder in the drug conspiracy and the co-defendant's explanation of the defendant's involvement was just as consistent with the evidence as the government's theory. There was also internal corroboration in that the co-defendant explained from whom he did get the drugs and who were his accomplices. Finally, it was consistent with the defendant's trial evidence.

The Court concludes that the statement would have been

admissible as a statement against interest.

(3) Additional Investigation by Defense Counsel. Had defense counsel been given the complete information from the proffer sessions, he would have been able to conduct a further investigation about the sources of the co-defendant's drugs that may have resulted in additional exculpatory evidence.

The third requirement of a Brady violation is that the defendant was prejudiced by the non-disclosure. This inquiry focuses on whether the suppressed evidence is material to the defendant's guilt. See Strickler, 527 U.S. at 282, 289-91, 296. 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." Bagley, 473 U.S. at 682. A reasonable probability exists when the government's suppression of evidence undermines confidence in the outcome of the trial. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The government's case against the defendant was not strong. The government asked the jury to draw a series of inferences from a case built entirely on circumstantial evidence that was presented through Agent Deery's testimony. Against this backdrop, there is a reasonable probability that the result of the proceeding would have been different if the suppressed evidence had been disclosed.

The Court concludes that there was a Brady violation. The

Court, therefore, conditionally grants the motion for a new trial. The Court notes also that destroying the proffer session notes was a violation of the government's duty to preserve interview notes. See United States v. Ammar, 714 F.2d 238, 258-59 (3d Cir. 1983); United States v. Vella, 562 F.2d 275, 276 (3d Cir. 1977) (per curiam).

An appropriate order follows.

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 02-198-02
	:	
EULISES RODRIGUEZ	:	

ORDER

AND NOW, this day of October, 2003, upon consideration of the defendant's oral motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(a), the defendant's Motions for a Judgment of Acquittal and/or New Trial (Docket No. 68), and the government's opposition thereto, IT IS HEREBY ORDERED that:

1. The defendant's motion for a judgment of acquittal is GRANTED for the reasons stated in a memorandum of today's date.

2. The defendant's motion for a new trial is conditionally GRANTED for the reasons stated in a memorandum of today's date.

BY THE COURT:

_____
MARY A. McLAUGHLIN, J.