No. 13-40998

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERTH WILLIAM VILLEGAS ROJAS, ALSO KNOWN AS ROBERTO VILLEGAS; JAIME GONZALO CASTIBL CABALCANTE; OSCAR ORLANDO BARRERA PIÑEDA, ALSO KNOWN AS OSCAR, ALSO KNOWN AS CAPI; JULIO HERNANDO MOYA BUITRAGO, ALSO KNOWN AS PRIMITO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division
No. 4:09-CR-194; Hon. Marcia Crone, Judge Presiding

BRIEF OF APPELLANTS CABALCANTE AND PIÑEDA

Carlo D'Angelo
ATTORNEY AT LAW
100 E. Ferguson St.; Suite 1210
Tyler, TX 75702

[Tel.] (903) 595-6776
[Fax] (903) 407-4119

COURT-APPOINTED ATTORNEY FOR APPELLANT CABALCANTE

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 200
Houston, TX 77002

[Tel.] (713) 775-3050
[Fax] (713) 224-2815

COURT-APPOINTED ATTORNEY FOR APPELLANT PIÑEDA

CERTIFICATE OF INTERESTED PARTIES

No. 13-40998

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERTH WILLIAM VILLEGAS ROJAS, ALSO KNOWN AS ROBERTO VILLEGAS; JAIME GONZALO CASTIBL CABALCANTE; OSCAR ORLANDO BARRERA PIÑEDA, ALSO KNOWN AS OSCAR, ALSO KNOWN AS CAPI; JULIO HERNANDO MOYA BUITRAGO, ALSO KNOWN AS PRIMITO,

Defendants-Appellants.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

1. United States of America—Appellee. It is represented in the Fifth Circuit by:

Traci Kenner
U.S. Attorney's Office
110 N. College Street; Suite 700
Tyler, TX 75702

The United States was represented in the district court proceedings by:

AUSAs Heather Rattan, Camelia Lopez, and Jay Combs
101 E. Park Boulevard; Suite 500
Plano, TX 75074

2. Oscar Orlando Barrera Piñeda, Appellant. Piñeda is represented in the Fifth Circuit by:

Mr. Seth H. Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 200
Houston, TX 77002

Additional counsel who represented Piñeda in the district court proceedings were:

Bryan Mac Morris
LAW OFFICE OF MAC MORRIS
5000 Legacy Drive; Suite 395
Plano, TX 75024-0000

3. Jaime Gonzalo Castibl Cabalcante – Cabalcante is represented in the Fifth Circuit by:

Carlo D'Angelo
ATTORNEY AT LAW
100 E. Ferguson St.; Suite 1210
Tyler, TX 75702

Mr. D'Angelo also represented Appellant Cabalcante at the trial.

/s/ Seth Kretzer

Seth Kretzer

STATEMENT REGARDING ORAL ARGUMENT

Appellants Piñeda and Cabalcante request oral argument. This case trains on attempted cocaine smuggling in South America. The key disputed issue at trial trained on intent to import into the United States.

But it was undisputed at trial that not a single particle of cocaine from this conspiracy ever came close to (much less actually ever touched) American soil. Indeed, in the court of thousands of intercepted phone calls no one ever mentioned the United States, much less the Eastern District of Texas.

In every other §§963 and 959 prosecution in which cocaine did not enter American soil, the Government has adduced evidence such as maps of the United States or flight plans into this country. Because the Government had no such evidence in this case, it argued that 1) cocaine intended to be smuggled into Mexico must necessarily be intended to be further smuggled into the United States and 2) the fact that narcotics were transacted in dollars substitutes for a minimally sufficient evidence.

It appears that an issue of first impression presents itself to this Circuit in the appeal *sub judice*: are dollars and exports to Mexico sufficient evidence of intent to import into the United States when 1) the American dollar is the world's reserve currency, and 2) cocaine is exported from Mexico to many countries other than the United States?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Secondary Sources

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court entered Piñeda's final judgment on February 24, 2014. ROA.6558. Piñeda timely filed his notice of appeal on February 28, 2014. ROA.6574; FED. R. APP. P. 4(b)(1)(A).

The district court entered Cabalcante's final judgment on February 24, 2014. ROA.5078. Cabalcante timely filed his Notice of Appeal the same day. ROA.5085.

This Court has jurisdiction over both appeals under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court had jurisdiction.

2. Whether venue was improper in the Eastern District of Texas when Cabalcante was first brought into the United States at Guantanamo Bay.

3. Whether any rational jury could find that either Cabalcane or Piñeda had the intent to import cocaine into the United States.

4. Whether the evidence at trial established multiple conspiracies when the Indictment alleged a single conspiracy and Cabalcante's substantial rights were affected thereby establishing a fatal variance.

5. Whether the District Court reversibly erred in denying the motion to suppress evidence gathered by foreign law enforcement.

6. Whether the District Court erred in ruling that the cocaine seized from the Avante ship was intrinsic evidence.

7. Whether the District Court erred in its alternative holding that if the cocaine seized from the Avante was extrinsic evidence, it should not have been excluded under other rules of evidence.

8. Whether the District Court reversibly erred in not giving requested jury instructions for withdrawal, specific intent, and venue.

9. Whether the Prosecutor engaged in summation misconduct when she used her rebuttal to detail evidence neither the Government [in its opening] or any defendant referred to in their respective argument.

10. Whether the District Court erred in assessing the 2-level Specific Offense Characteristic of USSG §2D1.1(b)(3), which applies only when and "If the defendant unlawfully imported or exported a controlled substance"; by contrast, it was uncontroverted that no cocaine from the alleged conspiracy every entered the United States. ROA.4037 (Prosecutor says during closing: "The cocaine never even left Columbia.").

STATEMENT OF THE CASE AND FACTS

A. Narcotics Trafficking Infrastructure From Columbia Into Central America

Guillermo Amaya-Ñungo ("Don Juan") and Julio Cesar Ramos-Martinez ("Primo") were drug trafficking partners in Colombia who represented that they could fly loads of cocaine on clandestine flights from Colombia to Guatemala and Central America. ROA.1865; 2354. Carlos Gaitan-Uribe ("Gaitan") was a pilot who provided logistics support to drug traffickers in Colombia. Gaitan made arrangements for the departure of these flights that included hiring pilots, providing clandestine landing strips and fixing corrupt air-traffic controllers. ROA.1350 and 1853.

Fernando Moreno-Rodriguez ("Moreno") was Don Juan's stepson and associate in the drug trafficking business. ROA.2352. Byron de Jesus Gonzalez-Vasquez ("Byron") also worked for Don Juan and Primo. ROA.2374. Oscar Orlando Barrera-Piñeda ("Barrera") is a pilot who was alleged to have worked with Gaitan. ROA.1652. Julio Hernando Moya-Buitrago ("Moya") was an air-traffic controller who also allegedly worked with Gaitan. ROA.1653.

B. The Zetas Drug Cartel in Mexico Capitalized An Attempted Importation of Cocaine From Columbia Into Mexico

The central figure in this case is a man named Hector Manuel Sauceda-Gamboa, AKA ("Karis"), ("Ocaris") and ("Ocadiz"). Ocaris was a leader of the Gulf Cartel and had ties to the Zeta drug trafficking organization in Mexico.

In July 2007, Karis fronted Jaime Sanchez ("Jimmy"), a Colombian drug trafficker living in Mexico, with $7.9 million dollars for the purchase and delivery of cocaine into Central America. ROA.2355; 2421-22. Karis had two Mexican associates who worked with him on this deal, Lupito, and a female known as La Guera. ROA.2421. La Guera represented Karis' interests in Colombia. ROA.2363.

Subsequently, Jimmy sent $5 million of Karis' money to Primo and Don Juan in Colombia to secure the purchase and shipment of cocaine. ROA.2356; 2373. Shortly after Jimmy collected the money from Karis he was arrested in Mexico. *Id.* Karis thereafter summoned Cabalcante to Matamoros, Mexico to assure him that Don Juan and Primo would follow through with their commitment. ROA 2636-37 and 2371.[1]

[1] The government stressed at trial that Matamoros, Mexico is near the U.S./Mexican border, ROA.2367, and that this fact somehow suggested that the cocaine in the Jimmy/Karis deal was intended for import in the United States. No recorded calls, however, confirm this was indeed the intended destination for the cocaine in this case.

C. Bayron Travels to Mexico To Supervise Cocaine Supplied By A Man Named Mao

In October 2007, Byron was sent to Mexico by Don Juan to supervise the reception of a load of cocaine owned by an un-indicted individual known only as Mao. As Bayron explained in his direct examination:

> Q: Mr. Gonzalez Vasquez, do you know someone by the name of Guillermo Amaya Nungo?
> A: Yes.
>
> Q: How long have you known Guillermo Amaya Nungo?
> A: I met him in 2006.
>
> Q: Let me ask you about -- around October of 2007, were you in contact with Guillermo Amaya Nungo?
> A: Yes.
>
> Q: Why? What happened?
> A: Mr. Guillermo Amaya Nungo sent me to Mexico.
>
> Q: For what?
> A: For me to wait for a plane that he was going to be sending into Mexico.

ROA.2415.

> Q: Where they were talking about a deal with Mao, or a deal involving Jimmy?
> A: That's correct.
>
> Q: Are Julio Cesar Ramos and Guillermo Amaya Nungo involved in both?
> A: That's correct.

ROA.2403 (re-direct examination of case agent Furgason).

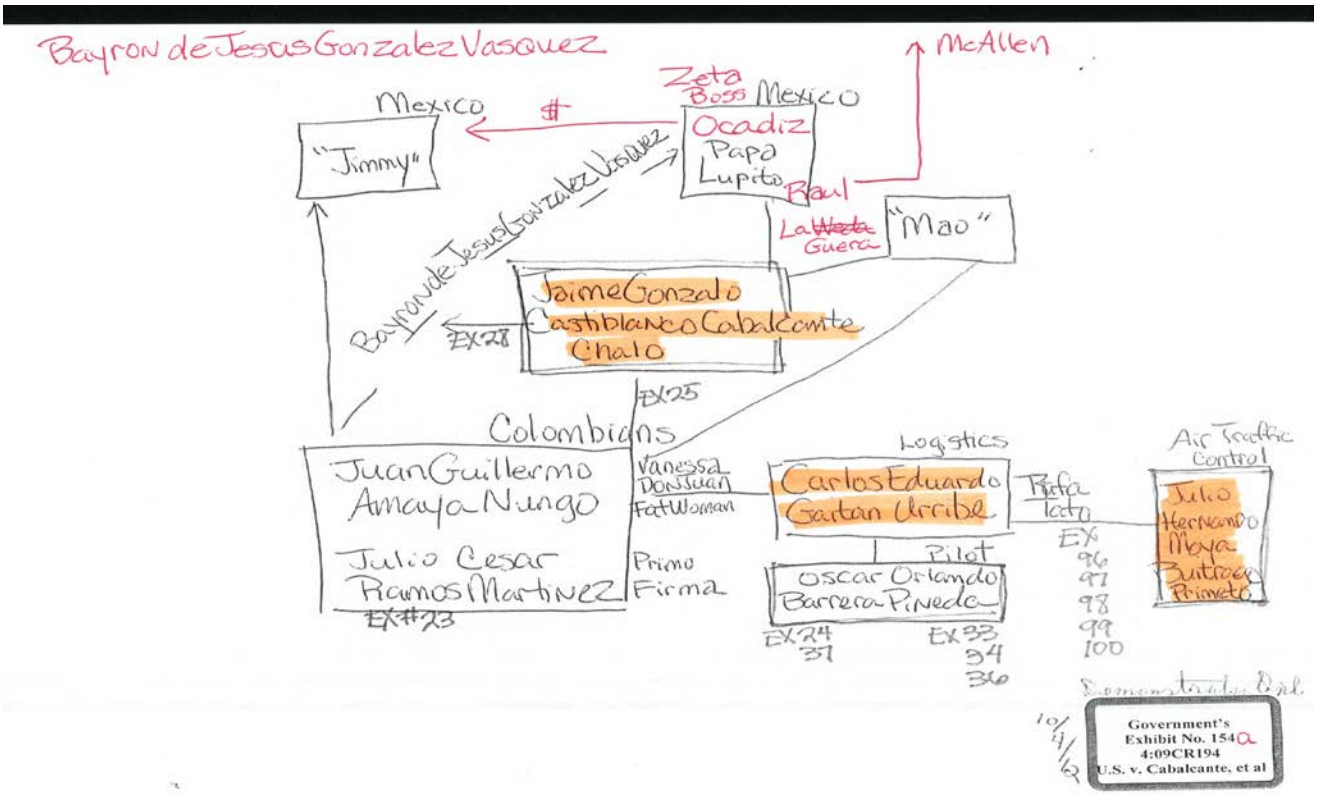
A: Mao was a friend of Julio Ramos, but what his name is I don't know.
Q: And you know that this December flight that was forced down, the load on that flight was intended for Mao, was it not?
A: At that time there were two deals going on, the Julio Ramos identified as a deal with Jimmy or Bayron, and another deal as Mao.

Q: Now you've already testified that the person who put up the money for this cocaine is Jimmy, correct?
A: I know that through Jimmy they turned over the money to Julio Ramos in Colombia.

ROA.2373 (testimony of Fernando Alexander Moreno Rodriguez).

Mao was in fact the owner of that first attempted load of cocaine from Don Juan and Primo. ROA.1865 and 1926; *see also* ROA.2373. ("At the time there were two deals going on, the Julio Ramos [Primo] identified as a deal with Jimmy or Byron, and another deal as Mao").

Government Exhibit 154a provides a diagrammatic representation:



D. Bayron Travels to Guatemala

In early December 2007, Byron travelled from Mexico to Guatemala to check on a possible clandestine landing strip to receive the Mao load of cocaine Primo and Don Juan planned to dispatch.[2] *Id.* The government's own calls clearly established that Primo and Don Juan had two flights planned in late 2007, one for Mao and a later second flight from Jimmy. According to a December 15, 2007 recorded

[2] Bayron claims that while he was in Reynosa, Mexico he observed individuals who worked for Lupito loading cocaine into a van. Gonzalez conveniently also claims that he overheard one of these unidentified individuals say "you got to go faster, because they are waiting for this [cocaine] in McAllen [Texas]. ROA.2427. This cocaine had nothing to do with the conspiracy in this case, but was offered by the government in an effort to suggest some otherwise non-existent nexus between the United States and Mexico. ROA.2462.

conversation between Byron and Cabalcante, the first flight [the Mao flight] was to arrive in Guatemala on Tuesday, December 18, 2007. The Mao flight was ultimately cancelled by Karis on December 18, 2007 and he instructed his people that no further flights would be attempted until after the Christmas holiday. ROA.2456. As a result, the second flight [Jimmy's flight] never happened. That meant that no flight, no landing strip and no cocaine were ever arranged for Jimmy's flight.

E. On December 18, 2007, Piñeda Flew 1607 From Columbia to Panama

There was nothing extraordinary about this plane, and its flight was without incident.

> Q: (By Ms. Rattan) So Oscar Orlando Barrera Piñeda flew the plane from Bogota to Panama.
> A: Yes.
>
> Q: And then what happened?
> A: Then the plane was staged in Panama. The plane sat for one day. The pilots that he coordinated were then ferried from their hotel to the airport.

ROA.2067.

> A: They are discussing the movement of the aircraft. They are talking about the quality of it, that the pressurization was fine, it didn't depressurize, some instruments were very good to them, and the temperatures are not -- are coming out -- are not coming out the same. And then they go on to discuss that everything flows.
>
> Q: And that's December 19th of 2007?
> A: Yes.

ROA.1656; ROA.1589 ("It was flying back and forth in December between Panama and Colombia,…").

F. The December 20, 2007 Shootdown Of HP-1607

Despite this glaring problem with their case, the government continued to suggest to the jury that Jimmy, Cabalcante, Don Juan and Primo intended to import nonexistent cocaine into the United States. To accomplish this, the government continued to insist that it was not the Mao flight, but instead Jimmy's flight, that was scheduled to leave Colombia for Guatemala in December of 2007. On December 20, 2007, Colombian Police tipped off the Colombian Air Force that a clandestine flight was leaving Panama and headed for Colombia. Colombian jets then forced down this plane [HP 1607] and fired on it and destroyed it.

Government Exhibit 35 contains hundreds of pictures of the interception and destruction of HP1607. Simply put, the pictures below show what the air force did to this unarmed civilian aircraft which contained no drugs:

Byron confirmed that as of December 20, 2007, there was no plan to fly cocaine from Colombia on the HP-1607 aircraft. ROA.2457. As a consequence, the Colombian government downed the HP-1607 on failed intel that it was about to pick up a load of cocaine. ("So that in addition to the fact that you were in Reynosa, Mexico, on December 20, confirms that there would be no flight that you were expecting to receive in Guatemala from Colombia, correct? Correct"). Since all plans to fly cocaine out of Colombia were canceled by Karis, Primo and Don Juan flew Byron back to Colombia in time for him to spend Christmas with his family.

Government Exhibit 153, ROA.1474 (received as a demonstrative) provides a summary of the events which occurred in December 2007:

December 2007

12/4	12/10	12/14	12/15	12/18	12/19	12/20	12/21
10:11 a.m. Julio Ramos Martinez tells Nungo the pilots were afraid to fly to MX due to limitations of aircraft. Julio Ramos Martinez tells Nungo to find clandestine airstrip	*11:03 a.m.* Defendant Pineda gets coordinates of clandestine airstrip	*12:47 p.m.* Defendant Cabalcante tells Julio Ramos Martinez he has airstrip *2:39 p.m.* Gaitan gives Julio Ramos Martinez coded coordinates of clandestine airstrip *9:41 p.m.* Vasquez tells Julio Ramos Martinez don't use cell phones on take off	*7:55 p.m.* Vasquez tells defendant Cabalcante they are ready for the "dance" and confirms airstrip ready for Tuesday	*10:54 a.m.* Julio Ramos Martinez tells Nungo Vasquez has everything "the party begins around 6 and will finish around 3-4 in morning then they'll come by Lucy's place to pick up the other money	*12:17 p.m.* Gaitan meets a Panamanian flagged aircraft-plane takes off and Gaitan leaves *5:34 p.m.* Defendant Pineda tells Gaitan the trip was excellent, everything is fine	*11:30 a.m.* Gaitan tells defendant Pineda programming is more or less, be there by 3p.m. Defendant Pineda references starting at 3-3:15 stay alert Colombian Air Force picks up plane with Panamanian tail number Plane crashes *8:30 a.m.* Defendant Pineda tells Gaitan folder with data in plane	*4:16 p.m.* Flaquito tells Defendant Pineda he's left without Christmas Defendant Pineda says he has a meeting to go to up North

G. The Efforts to Smuggle Cocaine From Columbia Are Abandoned And the Effort Transforms Into A Collection Matter

In the end, no cocaine ever actually left Colombia for Central America in connection with this deal. As a consequence, the Mexican's held Jaime Gonzalo Castiblanco-Cabalcante ("Chalo") responsible for the failure of Don Juan and Primo to deliver any cocaine. The Mexicans blamed Cabalcante because he recommended Primo to Jimmy as someone who could get Karis' his cocaine. ROA.2358 and 2419.

In sum, no evidence was offered of any flight leaving Colombia in 2007, 2008 or 2009 in fulfillment of this deal between Jimmy and Karis. The evidence was uncontested at trial that Primo and Don Juan failed to move any cocaine from Colombia to Central America. ROA.2457. Gonzalez testified at trial:

> Q. And although [in 2008] Don Juan and El Primo continued to promise they would do a flight, they never did a flight, did they.
>
> A. It is my understanding that they never—that delivery of that never—they never completed their side of that.
>
> …
>
> Q. And you do know that at this meeting [in Ibague, Colombia in the spring of 2008] the entire deal [between the Mexicans and Don Juan and Primo] was cancelled.
>
> A. Yeah, I was told something about the fact that it had been canceled, that the monies were being returned.

ROA.2458.

Don Juan and El Primo were subsequently murdered and this conspiracy unraveled into a collection matter between the Colombians and the Mexicans.

Since the government had no cocaine to show the jury in connection with this deal ("Conspiracy 1")[3], they showed the jury cocaine from another separate and unrelated conspiracy ("Conspiracy 2") that was lumped into the Indictment. This second conspiracy began in 2008. Government witness Hugo Ancir Megudan Mendez ("Megudan") testified that German Giraldo-Garcia ("El Tio") gave money to an unindicted co-conspirator named David Quiñonez ("Quiñonez") to purchase an aircraft and load it with cocaine that would be transported from Colombia to Belize. ROA.3327. Quiñonez used that money to purchase an aircraft, N-258-AG, to accomplish this goal. Quiñonez, however, ultimately failed to acquire or transport any cocaine on behalf of El Tio.

After this deal collapsed, El Tio was referred to a Mexican drug trafficker known as "Chepa". ROA.3328. Chepa put El Tio in contact with Jamed Colmenares-Fierro, ("Turko"). Turko had access to a load of cocaine in Colombia, but needed an aircraft to transport it. Turko and his brother Virgilio Colmenares-Fierro thereafter struck a deal with Chepa to fly a load of cocaine from Colombia to Belize. El Tio was brought into the deal because he could provide an aircraft to fly

[3] The District Court did permit the government to offer 340 kilograms of cocaine at trial against Cabalcante that were seized on December 9, 2009 in a vessel off the coast of Panama. Appellant objected at trial that this evidence as extrinsic to the conspiracy and hugely prejudicial.

the cocaine. Accordingly, Turko fronted El Tio money to arrange transportation of cocaine on the N-258-AG aircraft. ROA.3343.

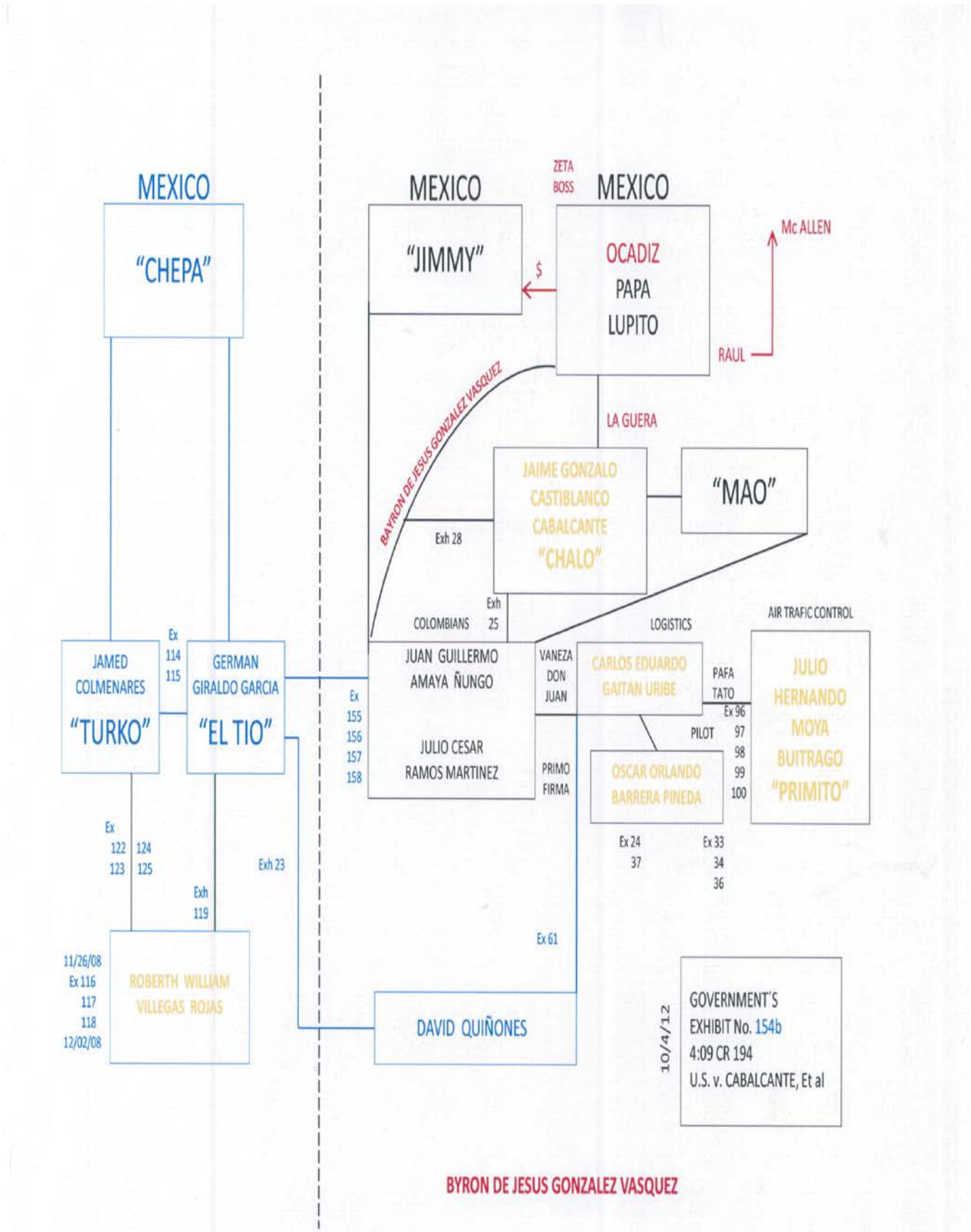
H. Evidence The Government Contends Expand This Limited Conspiracy

In an effort to link these conspiracies, the government offered 4 telephone conversations between Don Juan and El Tio recorded in August of 2009 (ROA.3585); more than 2 years after Conspiracy 1 was put on the shelf. ROA.3628-29. Just like Conspiracy 1, no cocaine ever left Colombia in connection with Conspiracy 2. ROA. 3344. The Colombian National Police seized a freight truck that contained 1080 kilos of Turko's cocaine. ROA.3333. Thereafter, a second load of Turko's cocaine, 250 kilograms, was seized in Medellin. ROA.3335. No further attempts were made by Conspiracy 2 to export cocaine from Colombia to Belize and again there were no calls suggesting an intent to import any cocaine into the United States.

The government also offered Conspiracy 2 at trial in order to try and connect Roberth William Villegas-Rojas ("Rojas") to Conspiracy 1. Rojas worked for Turko and assisted him with the storage and transport of the above cocaine kilos that were seized in Medellin. ROA.3590. It was obvious, however, that Rojas had no connection whatsoever to Conspiracy 1.

On December 8, 2008, Colombian authorities detained an aircraft at an airport in Barranquilla, Colombia as it was about to takeoff. ROA.3699. Inside the aircraft authorities found 670 kilos of cocaine and three fuel tanks. *Id.* The aircraft was allegedly travelling to Honduras. Gov. Exhibit 110. One of the pilots arrested on this flight was codefendant Barrera. Barrera pled guilty to this offense in Colombia and was sentenced to serve 256 months in prison. ROA.3797.

The Government's own Exhibit 154(b) shows that Rojas was literally tangential. For ease of viewing in this appeal, we have created a computer generated diagram identical to that which the Prosecutor created by hand and pasted in on the following page. But we would urge the Court to look at the original 154(b), which has a scratch-out of "154a" on the bottom and has written the Chepa, Turko, and Rojas dimension to the side and in blue ink, whereas the original 154a was in black ink.


MEXICO
"CHEPA"
MEXICO
"JIMMY"
ZETA
BOSS
MEXICO
OCADIZ
PAPA
LUPITO
$
Mc ALLEN
RAUL
LA GUERA
BAYRON DE JESUS GONZALEZ VASQUEZ
JAIME GONZALO
CASTIBLANCO
CABALCANTE
"CHALO"
"MAO"
Exh 28
Exh
25
COLOMBIANS
LOGISTICS
AIR TRAFIC CONTROL
JAMED
COLMENARES
"TURKO"
Ex
114
115
GERMAN
GIRALDO GARCIA
"EL TIO"
Ex
155
156
157
158
JUAN GUILLERMO
AMAYA ÑUNGO
JULIO CESAR
RAMOS MARTINEZ
VANEZA
DON
JUAN
PRIMO
FIRMA
CARLOS EDUARDO
GAITAN URIBE
PAFA
TATO
PILOT
Ex 96
97
98
99
100
JULIO
HERNANDO
MOYA
BUITRAGO
"PRIMITO"
OSCAR ORLANDO
BARRERA PINEDA
Ex 24
37
Ex 33
34
36
Ex
122
123
124
125
Exh 23
Exh
119
Ex 61
11/26/08
Ex 116
117
118
12/02/08
ROBERTH WILLIAM
VILLEGAS ROJAS
DAVID QUIÑONES
10/4/12
GOVERNMENT'S
EXHIBIT No. 154b
4:09 CR 194
U.S. v. CABALCANTE, Et al
BYRON DE JESUS GONZALEZ VASQUEZ

I. Piñeda Is Caught With 670 Kilograms of Cocaine in December 2008, Almost One Year After the Shootdown of Flight 1607

Almost one year after the shootdown of flight 1607, Piñeda was arrested on an aircraft runway in Baranquilla, Columbia in a plane with 670 kilograms of cocaine. Government Exhibit 110 contains an album of 24 pictures of the interdiction on December 8, 2008:

Piñeda was convicted of this offense in Columbia; incidental to a treaty between our two nations, Piñeda was only tried in this case under Count 2 of the

Indictment. The government introduced evidence concerning the above seizure as extrinsic evidence at trial.

In an attempt to convict Piñeda on Count 2 at trial, the government contended that the December 18 flight from Columbia to Panama was intended to make sure there was fuel and pilots for the return trip. For example, Milton Freddie Pacheco Paipa of the Columbian National Police testified about Exhibit 102 (transcript of intercepted call with Piñeda):

> A: Oscar Barrera is giving information to Carlos -- Mr. Carlos Gaitan. He is talking about the way that he was able to get into -- or the flight itself, how he was – how the flight was, the one going into Venezuela. And he's confirming how this particular trip went.

ROA.2846.

In addition, the Government called Lieutenant Correa-Mendoza of the Honduran National Police. Correa-Mendoza testified that a burned aircraft was found alongside a road in Honduras in August 2008. Photographs were offered at trial of the tail and one side of the rear part of the body of this wrecked aircraft.

ROA.3063, 3064, and Gov. Exhibit 112:

The photos depicted a Venezuelan flag and a blue stripe painted along the body of the aircraft. ROA.3065. No trace of illegal drugs were found on this aircraft. Correa also testified that the previous night, Honduran radar picked up a trace of an aircraft coming on a route typically used by clandestine flights transporting drugs from Colombia or Venezuela. ROA.3066-67.

The government tried to tie Barrera to this aircraft because six months prior to the crash, he had inspected an aircraft registered in Venezuela under tail number YV-2442. ROA.2848. The government suggested the aircraft in Colombia matched the wreckage later recovered in Honduras.

J. The Infirmity Motif Throughout Government's Trial Evidence

As to both of the above conspiracies, not a gram of cocaine ever left Colombia. Thousands of wiretap conversations were captured in this case investigation. Not a single call mentioned that any of the cocaine deals discussed in this case were destined for importation into the United States.

K. Indictment

An Indictment filed October 15, 2009 charged twenty-seven (27) people with narcotics trafficking. Count One charged Cabalcante and Piñeda with Conspiracy to Import Five Kilograms or More of Cocaine Intending and Knowing That the Cocaine Will Be Unlawfully Imported Into The United States, in violation of 21 U.S.C. § 963 "from in or about 2002…in the Republic of Columbia, the Republic of Mexico, the Eastern District of Texas, and elsewhere." ROA.37.[4]

Count Two charged Manufacturing and Distributing Five Kilograms or More of Cocaine Intending and Knowing That the Cocaine Will Be Unlawfully Imported into the United States, in violation of 21 U.S.C.§ 959. ROA.39.

L. Jury Trial

Jury selection began on October 1, 2012. ROA.835. The defendants gave opening statements on the Second Day of Trial, October 2, 2012. ROA.1086. The

[4] Barerra was subsequently dismissed from Count One.

Government rested on October 18, 2012. ROA.3801. One defendant, Butraigo, presented evidence in his defense. ROA.3824-3921. Closing arguments were delivered on October 19, 2012. ROA.3958.

M. Jury Verdict

The jury returned its verdict on October 19, 20912. ROA.761-762. Cabalcante was convicted of both Counts One and Two. Piñeda was convicted of Count Two. In addition, the jury affirmed a "Special Finding as to Orlando Barrera Piñeda Only" that "You must affirm that you guilty verdict was based on an act or acts committed on a date or dates after December 8, 2008." ROA.

N. Sentencing: Oscar Orlando Barrera-Piñeda

1. First PSR Does Not Know That Piñeda Was Not Convicted of Count One

Piñeda's PSR issued on April 25, 2012. Doc. No 1015. Throughout, Probation stated that Piñeda was convicted of Counts One and Two; this is of course incorrect because he was not tried on Count Two. In any event, Paragraphs 36 and 37 grouped both counts. Paragraph 31concluded about quantity, "Barrera Piñeda is responsible for coordinating and collaborating with Gaitan-Uribe and Rodriguez Beltran in the exportation of at least 150 kilograms of cocaine." ROA.6618.

A Base Offense Level of 38 (Paragraph 28) was augmented by a 2-level Specific Offense Characteristic under §2D1.1(c)(1). Zero criminal history points

(Paragraphs 48-50) yielded a Category I. The guideline range was therefore 292-395 months. Paragraph 66; ROA.6622.

2. Second PSR

A revised PSR issued May 23, 2012 correctly reflecting the fact that Piñeda was only convicted of Count Two. Doc. No. 1036; ROA.6627. The offense computations (less the multiple count/grouping rubric) remained the same, with an Offense Level of 40 and a Guidelines range of 292-365 months. ROA.6639.

3. Objections

On August 16, 2013, Piñeda filed objections to the PSR. Doc. No. 1117; ROA.6644. Piñeda listed a passel of factual disagreements with Probation's description of offense conduct, but Piñeda repeatedly stated, "Please not there are no drug quantities proven or associated with Piñeda." The crux of the objections is found on page 5, where it is written, "Since no drug quantity was proven, you can assume that the lesser included amount of 25 grams of cocaine was encompassed by the finding of guilt by the jury as well. Therefore, the base offense level should be 12." ROA.6648.

On page 5, Piñeda challenges the two-level specific offense characteristic as follows:

> There was no evidence offered at trial of a flight plan. If Mr. Piñeda was a pilot, then the government could have had evidence for the jury that he was

> licensed by the agency in Columbia. There is no such evidence. A two point increase should be denied.

ROA.6648.

In conclusion, "based upon an offense level of 12 and criminal history category I, the guideline range is 10-16 months." ROA.6649.

4. Third PSR

A revised PSR issued October 4, 2013. Doc. No. 1136; ROA.6652. The guidelines range remained the same as the two successor versions, save for four non-material revisions listed on ROA.6672 under the heading "revisions" in the Addendum. The Addendum proper begins at ROA.6666, with point-counterpoint responses to each objection. The only Guidelines-specific issue trained on safety-valve relief, which Probation maintained was impossible because Piñeda had made no effort to satisfy the fifth prong of §5C1.2(a)(5). ROA.6672.

5. Judgment

Sentencing was held on February 18, 2014. ROA.6585. The District Court overruled all of Piñeda's objections, specifically finding that he was a pilot (justifying the specific offense characteristic) and that his insistence that he was not showed the lack of truthfulness which would entitle him to safety valve relief. The District Court adopted the PSR, found a Guidelines range of 292-365 months, and sentenced to the low point on that range, 292 months, a $100 special assessment, and a five year term of Supervised Release. ROA.6602-6604. *See also* ROA.6558-6563

(judgment) and ROA.6677 (detailed page in the Statement of Reasons explaining sentence imposed).

Sentencing: Jaime Gonzalo Castiblanco Cabalcante

1. PSR

The PSR calculates Mr. Cabalcante's Base Offense Level at 38 because this offense allegedly involved 150 or more kilograms cocaine. ROA.5230. A 3-point increase was assessed based upon the claim that Mr. Cabalcante was a manager or supervisor of 5 or more persons in the alleged conspiracy. *Id.* Because Mr. Cabalcante elected to proceed to trial, the PSR states that no acceptance of responsibility reduction is warranted. *Id.* As a consequence, Cabalacante's Total Offense Level was assessed at a 41. *Id.* The PSR further states that based upon his priors, Cabalcante was assessed 6 criminal history points. ROA.5234. The PSR also claims that because Cabalcante committed the instant offense while under supervised release in another case, he is deserving of a 2-point criminal history increase. *Id.* Accordingly, the PSR set Cabalacante's criminal history category at IV. *Id.* Based upon a total offense level of 41 and a criminal history category of IV, the guideline imprisonment range in this case is 360 months to life imprisonment. ROA.5237.

2. Objections

Cabalcante filed objections to the PSR. ROA.5246. Objections 1 through 11 were fact-specific to the offense conduct. ROA.5246-53. Objection 12 addressed the 3-level role increase. ROA.5253. Objection 13 attacked whether the instant offense was committed while Cabalcante was on term of supervised release. ROA.5255. In Objection 14, Appellant opposes the final guideline imprisonment range of 360 to life. ROA.5256. Objection 15 argues that PSR recommendation of 396 months imprisonment amounts to a life sentence and therefore violated the terms of the extradition treaty between the United States and Colombia. ROA.5256.

A revised PSR was issued on October 2, 2013. ROA.5273. The PRS conceded Objection 13 noting that there was no information to confirm that Appellant committed the instant offense while under supervision. ROA.5286.

3. Sentencing

At the sentencing hearing held on February 18, 2014, the District Court overruled all of Appellant's remaining objections, ROA.5203, and imposed a sentence of 360 months as to counts 1 and 2, to be served concurrently. ROA.5214. The District Court waived imposition of a fine and ordered payment of a $200 special assessment. ROA. *Id.* The Court ordered that at the conclusion of his term of imprisonment, Mr. Cabalcante was to serve a term of five years supervised release. *Id.*

SUMMARY OF THE ARGUMENT

First, there is no sufficient subject matter jurisdiction over Appellants because no acts charged in the Indictment touched upon the United States.

Second, venue was improper in the Eastern District of Texas under the specific venue statutes governing Counts One and Two, respectively.

Third, the evidence presented by the Government at trial was not sufficient for the jury to conclude that either appellant had the intent to import cocaine into the United States via clandestine flights from Colombia to Central America. It was undisputed at trial that not a single particle of cocaine from this conspiracy ever came close to (much less actually ever touched) American soil. Indeed, in the court of thousands of intercepted phone calls no one ever mentioned the United States, much less the Eastern District of Texas. The use of dollars overseas is not probative of anything; in addition to being the world's reserve currency, the nations of Panama, Ecuador, and El Salvador are completely dollarized. Columbia is not dollarized, but it is one of the largest purchasers of dollars in the currency exchange markets of any country in South America.

Fourth, the trial evidence established two separate conspiracies. Conspiracy 1 tried to traffic cocaine from Colombia through Guatemala on a plane. Conspiracy 2 used trucks to carry cocaine in Colombia for a flight to Belize. Cabalcante captures the prejudice prong of the "fatal variance" analysis because the government

transferred guilt to him by introducing cocaine seized in Conspiracy 2. This cocaine seizure had no bearing whatsoever upon Conspiracy 1 and without its introduction the Government would have not have been able to survive the Rule 29 motion

Fifth, the District Court erred in making a finding that no joint venture existed between the United States and Colombia, thereby denying Appellants' motion to suppress the wiretap recordings in this case under the Fifth Amendment.

Sixth, the cocaine seizure from the ship named Avante was not admissible as intrinsic evidence because it was not inextricably intertwined with the crimes charged, a part of a single criminal episode, and was not a necessary preliminary to the crimes charged.

Seventh, even if the cocaine seized from the Avante were found to be proper intrinsic or extrinsic evidence, the evidence should have been excluded as prejudicial under the Rule 403 balancing inquiry. Because the unfairly prejudicial effect this evidence substantially outweighed its probative value, this Court should reverse both defendants' convictions and remand for a new trial.

In claims eight through ten, Appellants submit that the District Court erred in failing to give several requested jury instructions: 1) Pattern Jury Instruction 2.23 as to "Withdrawal" by Cabalcante because he adduced evidence that in May 2008, his role had shifted from trying to facilitate cocaine smuggling to instead trying to recover the money fronted by the Zeta drug cartel in Mexico. Furthermore, a meeting

in Ibague meeting clearly communicated this fact to Cabalcante's coconspirators; 2) defendants' joint request for a jury instruction on specific intent because the crimes alleged in Counts 1 and 2 required a specific intent to import cocaine into the United States. *See United States v. Conroy*, 589 F.2d 1258, 1270-71 (5th Cir.1979) *cert. denied*, 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979) (nothing the law in this circuit, to support his contention that a conspiracy to import a controlled substance into the United States requires proof that the defendant knew the controlled substance "was destined for the United States"); *see also United States v. Ojebode*, 957 F.2d 1218, 1224 (5th Cir. 1992); and 3) the requested jury instruction on venue because whether venue has been properly proven is an issue of fact for the jury. Therefore, the jury must be properly instructed in order to make this finding. A general jury verdict of guilty does not incorporate a finding as to proper venue.

Eleventh, even if this Court finds the evidence minimally sufficient to sustain Cabalcante's convictions on both Counts, and/or Piñeda's convictions on Count Two, this Court should, pursuant to the broad remedial powers vested in it by 28 U.S.C. § 2106, grant both a new trial on the grounds of newly discovered evidence and prosecutorial misconduct in the form of perjured testimony. *Accord* FED. R. CRIM. P. 33.

Twelfth, because the prosecutor's improper argument during rebuttal (detailing evidence neither the Government [in its opening] or any defendant

referred to in their respective argument) deprived both defendants of a fair trial, this Court should reverse all three convictions and remand for a new trial.

Finally, the District Court erred in assessing the two-level Specific Offense Characteristic of U.S.S.G. § 2D1.1(b)(3), which applies only when and "If the defendant unlawfully imported or exported a controlled substance"; by contrast, it was uncontroverted that no cocaine from the alleged conspiracy every entered the United States. ROA.4037 (Prosecutor says during closing: "The cocaine never even left Columbia."). Piñeda was harmed because at Level 40, his Guideline range was 292-365. But at Level 38, the range is only 235-293 months. Since the District Court rejected Probation's recommendation for a sentence in the middle of the (incorrect) range at Level 40, and instead chose the bottom of that improperly computed range, there is every reason to think that the court would have chosen a point below 292 months had the low end of the range been properly computed at 235 months.

STANDARDS OF REVIEW

1. Subject Matter Jurisdiction

Constitutional challenges that question a district court's jurisdiction may be raised at any time. *See United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003). This Court's review of a district court's determination of subject matter jurisdiction is *de novo*. *United States v. Urabazo*, 234 F.3d 904 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

2. Venue in the Specific Context of Conspiracy and Venue Enfolded Withinthe General Concept of Locus Delicti

"Venue in conspiracy cases is proper in any district where the agreement was formed or where an overt act in furtherance of the conspiracy was performed." *United States v. Pomranz*, 43 F.3d 156, 158, 159 (5th Cir. 1995).

The Supreme Court has long held that "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United State v. Anderson*, 328 U.S. 699, 703 (1946)).

"The relevant question for this court is whether the Government presented the jury with sufficient evidence to support a finding that…offense[s] were begun, continued or completed in the [respective] District of Texas." *United States v. Perez*, 223 Fed. Appx. 336, 340 (5th Cir. 2007).

"Venue is a fact that must be proved in a criminal case though it need not be

proved beyond a reasonable doubt, and the absence of direct proof of venue does not defeat conviction if the fact of venue is properly inferable from all the evidence." Charles Alan Wright and Mary Kane, 20 Fed. Prac. & Proc. Deskbook § 45 (2013).

3. Insufficient Evidence of Criminal Intent

The standard of review for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

4. Multiple Conspiracy

"Whether the evidence shows one or multiple conspiracies is a question of fact for the jury." *United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999). Thus, it "will affirm the jury's finding that the Government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the Government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." *Id*. (internal quotation marks omitted).

5. Motion to Suppress

To assess a district court's ruling on a motion to suppress evidence under the Fourth Amendment, the Court reviews the district court's factual findings for clear error and the ultimate Fourth Amendment conclusions de novo. *United States v. Menchaca-Castruita*, 587 F.3d 283, 289 (5th Cir. 2009). The Court views the facts

in the light most favorable to the government as the prevailing party. *See United States v. Raney*, 633 F.3d 385, 389 (5th Cir. 2011).

6. Intrinsic Evidence

The evidentiary rulings of a district court with respect to intrinsic evidence is reviewed under an abuse of discretion standard. *United States v. Dillman,* 15 F.3d 384, 391 (5th Cir.), *cert. denied,* 513 U.S. 866, 115 S.Ct. 183, 130 L.Ed.2d 118 (1994). "Even if we find that the district court abused its discretion, the error is not reversible unless the defendant was prejudiced." *Id.*

7. Admission of Extrinsic Evidence

"[This Court] review[s] the district court's admission of extrinsic [] evidence over a 404(b) objection under a 'heightened' abuse of discretion standard." *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (citation omitted). "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence." *United States v. Insaulgarat* 378 F.3d 456, 464 (5th Cir. 2004).

8 - 10. Jury Instructions

"We review a district court's denial of a proffered jury instruction for abuse of discretion." *United States v. Porter*, 542 F.3d 1088, 1093 (2008).

A district court abuses its discretion in denying a requested instruction only if such instruction (1) is a substantively correct statement of the law, (2) is not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense. *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996).

11. Motion for New Trial

FED. R. CRIM. P. 33 provides that a district court may vacate a judgment and grant a new trial "if the interest of justice so requires."

"We review an order granting new trial under an abuse of discretion standard." *United States v. Pankhurst*, 118 F.3d 345, 353 (5th Cir.1997).

12. Summation Misconduct

The trial court's admission of objected-to comments are reviewed for abuse of discretion, which involves two steps: (1) whether the prosecutor made an improper remark and (2) if an improper remark was made, whether the remark affected the substantial rights of the defendant. *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007).

13. Sentencing

"We review a district court's interpretation or application of the Guidelines de novo and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008).

ARGUMENT

I. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION

Due Process, U.S. Const. Amend. 5, implores that neither a foreign citizen nor a United States citizen should be prosecuted extraterritorially for a controlled substance crime committed in a foreign land unless the government can establish some nexus between the crime and the United States. The relevant statutes, 21 U.S.C. §§ 959 and 963, are under the "Import/Export" section, and § 963, the conspiracy statute, has no listed, explicit extraterritorial provision. Thus, the notice required by Due Process is lacking.

Appellants Cabalcante and Barerra contend that their due process rights were violated because the Government failed to comply with the statutory jurisdictional requirements of the crime charged. Specifically, Appellants contend that the Government failed to establish any nexus whatsoever to the United States. As noted in *United States v. Scruggs*, 714 F.3d 258, 262 (5th Cir.) *cert. denied*, 134 S. Ct. 336, 187 L. Ed. 2d 158 (2013): "[A] federal criminal case is within the subject matter

jurisdiction of the district court if the indictment charges ... that the defendant committed a crime described in Title 18 or in one of the other statutes defining federal crimes." *United States v. Scruggs*, 714 F.3d 258, 262 (5th Cir.) *cert. denied*, 134 S. Ct. 336, 187 L. Ed. 2d 158 (2013). The *Scruggs* opinion, however, carves out an exception to this general principle of subject matter. *Id.* (noting that "An indictment or information could fail to invoke criminal subject matter jurisdiction by alleging violation of a state criminal statute, *see United States v. Titterington*, 374 F.3d 453, 459 (6th Cir.2004), **or by failing to comply with another statutory jurisdictional requirement**, *see United States v. Sealed Juvenile 1*, 225 F.3d 507, 508–09 (5th Cir.2000) (emphasis added).[5]

Count 1 of the Indictment charges Cabalcante with a conspiracy to violate Title 21 U.S.C. § 963. Section 963 does not, however, provide a specific venue provision. The District Court made a finding that jurisdiction was proper under 18 U.S.C. § 3238 "because Defendant's were first brought to a district of the United States when they arrived in McKinney, Texas, in the Eastern District of Texas." ROA.683. Proper venue § 3238, however, does not equate to proper subject matter jurisdiction in this case. Section 3238 as Congress intended it, deals solely with

[5] A similar jurisdictional claim was raised in *United States v. Malago*, No. 12-20031-CR, 2012 WL 3962901, at *2 (S.D. Fla. Sept. 11, 2012) (wherein Defendant argued that courts have inferred Congressional intent to provide for extraterritorial jurisdiction only where the acts created, or were intended to create, a harmful effect in the United States").

venue. *See United States v. Williams*, 589 F.2d 210, 212 (5th Cir. 1979) (holding that § 3238 is not an independent source of extraterritorial jurisdiction). "The legislative history of § 3238 describes that section as being "designated to cure two important defects in the present venue statutes." *See id. quoting* S. Rep. No. 146, 88th Cong., 1st Sess. *reprinted in* 1963 U.S. Code Cong. & Admin. News 660. "The necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." *United States v. Bowman*, 260 U.S. 94, 97-98 (1922).

Despite the fact that the trial evidence lacked any nexus whatsoever to the Untied States, the Government nevertheless attempted to fabricate jurisdiction therein. The government charged Cabalcante and Barerra in Count 2 with a violation of 21 U.S.C. § 959; the manufacture or distribution of cocaine with the knowledge and intent that it would be imported into the United States. Title 21 U.S.C. § 959 therefore hinges jurisdiction to the commission of a crime what impacts the United States.

The United States Supreme Court has recognized that common law traditions have substantial relevance in determining the scope of the Due Process Clause. One looks to some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Patterson v. New York*, 432 U.S. 197, 202(1977) (relating that as to the 14th Amendment Due Process Clause that in

dealing with crime it is much more the business of the States than the Federal government) (as here it is much more the business of the involved foreign countries to deal with crime in their own country than that of the United States). It is fundamental in our common law and history that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. *Smith v. United States*, 507 U.S. 197(1993). Although as far back as the seminal case of *Church v. Hubbart*, 6 U.S. (2 Cranch) 87 (1804), the United States has been allowed extraterritorial jurisdiction to protect itself, that is not the present case. In the present case there is no effect in the United States by the conduct of the Appellants. Appellants therefore urge that their prosecution for acts in foreign countries, which countries enforce their own laws, and which acts have no impact or effect on the United States, violate constitutional Due Process Rights.

A. Article I, Section 8, Clause 10, the Offence Clause does not, does not support the prosecution of the this case in the United States

The United States Supreme Court has interpreted the Offense Clause as granting three distinct powers to Congress: 1) the power to define and punish piracies; 2) the power to define and punish felonies committed on the high seas; and 3) the power to define and punish offenses against the law of nations. *See, United States v. Smith*, 18 U.S. 153, 158-59(1820). The first two grants of power are not implicated in the present case. Appellant urges that the power of Congress to define

and punish conduct under the "Offenses Clause" is limited by customary international law, that drug trafficking is not a violation of customary international law, and, as a result, falls outside of the power of Congress under the Offenses Clause, especially as applied presently to Appellant.

The United States Supreme Court has further held that the power to "define" in Article I, Section 8, Clause 10 is limited by the three specific subjects of the clause. *United States v. Furlong*, 18 U.S. 184, 198(1820), one of which is the Law of Nations. Then, whether the offense is defined as an offense against the Law of Nations depends on the thing done, not on any declaration to that effect by Congress. *United States v. Arizona*, 120 U.S. 479, 478(1887).

So what does the phrase "Offenses Against the Law of Nations" mean? The term is synonymous with violation of customary International Law. *Sinaltainal v. Coca-Cola Co.*, 578 F.3d 1252(11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, ___ U.S. ___ 132 5.Ct. 702, 1706 n.2(2012). *See also, Sosa v. Alvarez-Machain*, 542 U.S. 692(2004) (interpreting Alien Tort Statute). *C.f., United States v. Postal*, 589 F.2d 862, 869(5th Cir. 1979).

In the present case, Appellant urges that regardless of Congress' intent the involved statute cannot rest on the Law of Nations under the Offense Clause, because drug trafficking is not an international law crime. The Law of Nations is dependent upon "the general assent of civilized nations." *Flores v. Southern Peru Copper*

Corp., 414 F.2d 233(2nd Cir. 2003). Drug trafficking within another nation's territorial jurisdiction has never been treated as an international law crime. The fact that nations almost universally prosecute drug trafficking is not sufficient to render the offense one against the Law of Nations. *See generally, United States v. Bellaizac-Hurtado*, 700 F.3d 1245(11th Cir. 2012) (in which the 11th Circuit held that Congress' authority to define "Offenses against the Law of Nations" was limited by customary international law, and thus, as an issue of first impression in the 11th Circuit, the 11tch Circuit ruled that the MDLEA exceeded Congress' authority and was unconstitutional).

Moreover, drug trafficking is neither subject to "universal jurisdiction." Universal jurisdiction allows a state to "define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, even where none of the bases of jurisdiction indicated in §402 is present." *See*, Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement") §404. Again, acceptance of an offense as a "universal jurisdiction" crime is dependent upon the consensus of the international community. The Restatement identifies only "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" as universal jurisdiction crimes. Restatement §404. Drug trafficking is not on the list.

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988 (the "Convention"), 28 I.L.M. 493, 497-98 (1989) retains traditional notions of jurisdiction, directing Parties to "carry out their obligations under this Convention in a manner consistent with," principles of "sovereign equality," "territorial integrity," and "non-intervention in the domestic affairs of other States." Convention, Article 2 ¶ 2. Even a scholar who advocates the advancement of universal jurisdiction agrees that "there is certainly no general consensus that drug trafficking should be afforded universal jurisdiction." Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems*, 16 Fla. J. Int'l L. 371, 372 (2004).

Accordingly, because drug trafficking is not a violation of customary International Law, Congress lacks the power to proscribe drug trafficking between foreign nations extraterritorially under the Offenses Clause; the Natural Law Clause. *See, Bellaizac-Hurtado*. Even as to its own citizens, there is no United States Constitutional provision that authorizes Congress to penalize the possession of a controlled substance by its citizens extraterritorially, unless there is an intent to export or import same.

In *Bellaizac-Hurtado*, the 11th Circuit held that the Maritime Drug Law Enforcement Act, "MDLEA", 46 U.S.C. §§ 70503(a), 70506, was unconstitutionally applied as Congress' authority to extraterritorially define "offenses against the Law

of Nations" was limited by customary international law. The 11th Circuit therefore held that the Congress had exceeded its authority and that the MDLEA was therefore unconstitutional.

As the Courts have stated:

> The federal courts are in consensus on two basic restrictions to giving a law extraterritorial effect. First, Congress must state that it intends the law to have extraterritorial effect. Second, application of the law must comport with due process, meaning that application of the law 'must not be arbitrary or fundamentally unfair.' In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles such as the objective principle, the protective principle, or the territorial principle.

United States v. Ibarguen--Mosquera, 634 F.3d 1370, 1378--79 (11th Cir. 2011). "Whether Congress has intended extraterritorial application is a question of statutory interpretation." *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998). "Absent an express intention on the face of the statues to [apply extraterritorially], the exercise of that power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved." *United States v. Baker*, 609 F.2d 134, 136 (11th Cir.1980). (An import case).

Title 21 United States Code Section 963, the actual provision under which Appellant was convicted, is a conspiracy statute and does not specifically provide for extraterritorial jurisdiction. The government's evidence at trial shows no criminal acts occurred in the United States. The government's evidence also failed to prove

that a gram of cocaine intended to be manufactured, distributed or imported into the United States. Finally, aside from U.S. currency allegedly changing hands overseas, none of the established that any of the proceeds from the alleged transactions were to be returned to the United States.

According to the Government. Count 1 of the Indictment rests its venue upon the extraterritorial reach of Title 21 United States Code, Section 959 at (c). §959(c) states:

> (c) Acts committed outside territorial jurisdiction of United States; venue … is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violated this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

Appellants argue that this section should not be applied to alleged offenses that do not entail the importation or exportation of drugs either into the United States or out of the United States. Further, if Congress is attempting to do so, Congress has exceeded the legislative power vested in it by the United States Constitution.

Appellants further contend that even if §959(c) were not otherwise constitutionally impaired, the extraterritorial provision is designed to be used in conjunction with offenses that allege the importation and exportation of illegal substances with a specific intent that those substances be imported into the United

States. Facts to support this statutory factor are clearly lacking in this case. Accordingly, the District Court lacked subject matter jurisdiction over this case.

B. The Commerce Clause fails to support subject matter jurisdiction in the present case

Article I, Subsection 8, Clause 3 of the United States Constitution authorizes the United States "To regulate commerce with foreign Nations, and among the several states and with the Indian Tribes."

All conduct in the present case occurred outside the United States and had no nexus whatsoever to this country. It would be anomalous to construe the term "foreign commerce" as including all forms of commerce occurring outside the United States and without a nexus whatsoever to this country. *United States v. Weingarten*, 632 F.3d 60(2d Cir. 2011). The Commerce Clause also may not apply to commerce *among* foreign countries; as opposed to commerce *with* foreign countries. Further, the same type issues arise as to Congress' ability to use the Commerce Clause as to Congress' possible use of the Offense Clause as authority for a grant of extraterritorial jurisdiction in regard to drug transactions under 21 U.S.C. Sections 959 and 963 when there is no nexus with the United States.

In *Weingarten*, the defendant, a United States Citizen, urged that the Court had no jurisdiction over his air travel between Belgium and Israel. *Weingarten* urged

that while 18 U.S.C. § 2423(b), travel with intent to engage in illicit sexual conduct, had an extraterritorial provision, that travel without a territorial nexus to the United States is not travel [] in foreign commerce within the meaning of §2423(b). *Weingarten* also urged that if §2423(b) does include such travel, it exceeds Congress' authority under the Foreign Commerce Clause. The Second Circuit in *Weingarten* held that while §2423(b) can apply to conduct occurring outside the United States, absent any territorial nexus to the United States, the air travel between Belgium and Israel did *not* constitute travel [] in foreign commerce for the purpose of §2423(b).

The same type reasoning is true in the present case. The United States Supreme Court recently reiterated that the presumption against extraterritorial application "represents a canon of construction, or a presumption about a statute's meaning rather than a limit upon Congress' power to legislate." *Morrison v. Nat'l Austl. Bank*, ___ U.S. ___, 130 S.Ct. 2869, 2877, 177 L.Ed.2d 535 (2010). The Supreme Court has repeatedly held, however, that even a statute that contains broad language in their definition of "commerce" that expressly refer to "foreign commerce" do not apply abroad. *Morrison*, 130 S.Ct. 2882. In the present statute, 21 U.S.C. § 959, the term foreign commerce does not occur at all. Appellants maintain therefore the Commerce Clause is not the basis of authority for any extraterritorial effect of § 959(c), and further does not give Congress such authority to enact such non-territorially connected extraterritorial jurisdiction.

C. The Nationality Principle does not authorize Congress to criminalize the conduct alleged in this case when there is no nexus to the United States

As previously discussed supra, "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *Smith v. United States*, 507 U.S. 197, 204 (1993) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). A limited exception to this presumption has been recognized with respect to criminal statutes that penalize actions that are not dependent on the locality for the government's jurisdiction, but rather protect "the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents." *United States v. Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 41 (1922). In such cases, intent of Congress to apply the law extraterritorially may be inferred from the nature of the offense. *Id.*

The Fifth Circuit has applied the *Bowman* exception in numerous cases. The exception has been applied to uphold jurisdiction in cases concerning smuggling of controlled substances for importation to the United States. *See e.g.*, *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980) (statutes against possession with intent to distribute and conspiracy to import into the United States may be applied extraterritorially); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (extraterritorial application to attempt to import marijuana into the United States

where all acts committed outside United States but the purpose was for importation into the United States). In these cases, this Court has held that jurisdiction may be maintained where no act, whether by a co-conspirator or principal accused of attempt, occurs within the United States. *United States v. Baker*, 609 F.2d at 139 (intent to cause effect within the United States is sufficient); *United States v. Perez-Herrera*, 610 F.2d at 292 (attempt to cause effects within the United States).

This Court has similarly held that the court has jurisdiction over a crime committed by a foreign national in foreign territory when the crime was intended to produce and did produce effects within the United States. *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974) (citing *Strassheim v. Dailey*, 211 U.S. 280, 285, 31 S.Ct. 558, 560 (1911) to uphold jurisdiction over forgery of U.S. Social Security checks by Mexican national in Mexico on grounds that forgery had effects in United States by impeding the normal disbursement of the U.S. government funds). The Fifth Circuit has also held that a court has subject matter jurisdiction over extraterritorial acts when the acts are intended to have effects within the United States if the statute under which charges are brought does not require proof of an overt act. *United States v. Loalza-Vasquez*, 735 F.2d 153, 156 (5th Cir. 1984). It is important to note that in each case, jurisdiction was upheld based on the government's right to defend itself against obstruction, or fraud, or criminal acts that were intended to have, or cause effects within the United States. But for the need to

protect its citizens, territory, or regulate activities within its boundaries, the United States would not have obtained jurisdiction.

Before giving extraterritorial effect to congressionally mandated penal statutes, courts have considered whether international law permits the exercise of jurisdiction. *E.g., United States v. Schmucker-Bula*, 609 F.2d 399, 402-403 (7th Cir. 1980); *King*, 552 F.2d at 851; *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967).

International law recognizes five general principles whereby a sovereign may exercise this prescriptive jurisdiction: (1) territorial, wherein jurisdiction is based on the place where the offense is committed; (2) national, wherein jurisdiction is based on the nationality or national character of the offender; (3) protective, wherein jurisdiction is based on whether the national interest is injured; (4) universal, which amounts to jurisdiction is based on the nationality or national character of the victim. *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982). While there are cases involving the prosecution of United States citizens for acts committed abroad, extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority. *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976). *See also, United State v. Donieszewski*, 390 F.Supp. 113 (E.D.N.Y. 1974).

In *King*, this Court upheld the authority of the United States to prosecute United States citizens for distribution of heroin intended for importation into the United States in violation of Section 959. The distribution occurred in Japan, but the heroin was intended for importation into the United States. This Court noted that the nationality principle applied because the appellants were United States citizens. However, this Court stated that "appellants' prosecution for violating section 959 could also be justified under the territorial principle, since American courts have treated that as an 'objective' territorial principle." *Id. at 851*. Under the "objective" territorial principle, acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. *Strassheim v. Daily*, 221 U.S. 280, 285(1911). This rule applies to nations as well as states. *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961). The critical distinction between these case and Cabalcante's cases is that all of these assertions of extraterritorial jurisdiction have involved the import or export of drugs into or out of the United States. In the present case, there is no evidence that the alleged acts as charged in the indictment created, or were intended to create any effect in the United States. There was no actual import or export of drugs.

The United States has long adhered to the objective principle of territorial jurisdiction, which holds that it has jurisdiction to attach criminal consequences to extraterritorial acts that are intended to have effect in the United States. *Ford v. United States*, 273 U.S. 593, 620, 47 S. Ct. 531, 540, 71 L. Ed. 793 (1927); *United States v. Cadena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978); *United States v. Winter*, 509 F.2d 975, 981 (5th Cir.), *cert. denied sub nom. Parks v. United States*, 423 U.S. 825, 96 S. Ct. 39, 46 L. Ed. 2d 41 (1975); *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir.), *cert. denied sub nom.*; *Groleau v. United States*, 389 U.S. 884, 88 S. Ct. 151, 19 L. Ed. 2d 181 (1967); Cf. *Strassheim v. Daily*, 221 U.S. 280, 284-85, 31 S. Ct. 558, 560, 55 L. Ed. 735 (1911) (interstate extradition).

"The nation has long asserted the objective view, under which its jurisdiction extends to **persons whose acts have an effect within the sovereign territory even though the acts themselves occur outside it**." *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (emphasis added). When a conspiracy statute does not require proof of overt acts, the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders. *See United States v. Postal*, 589 F.2d 862, 886 n. 39 (5th Cir. 1979). This requirement is lacking in the present case because not a gram of cocaine ever left Colombia; or entered the United States for that matter.

The Second and Ninth Circuits have held that, while Congress may clearly express its intent to reach extraterritorial conduct, a Due Process analysis must also be undertaken to ensure the reach of Congress does not exceed its constitutional grasp. *See, United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990). To apply a federal criminal statute to a defendant extraterritorially without violating Due Process, " 'there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' " *Yousef*, 327 F.3d at 111 (quoting *Davis*, 905 F.2d at 248-49); *see United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 727-28 (E.D. Va. 2003) (involving extraterritorial application of International Parental Kidnapping Crime Act). Regarding the nexus requirement, the Ninth Circuit has also noted that the nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being hauled into court in this country. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998).

In *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1306(11th Cir. 2007), two American citizens conspired to transport a large quantity of cocaine by airplae from Caracas, Venezuela, to Paris, France for distribution in Paris. The deal was negotiated, at least in part, in the United States; Miami, Florida. The defendants were

charged with conspiracy under 21 U.S.C. § 846 to possess cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). None of the cocaine was to be imported to the United States. The Eleventh Circuit rejected the application of U.S. law and reasoned that the conspiracy involved "no import or export;" and no intent to cause any effect within the United States. This holding was reached despite the fact that the conspiracy was formed, at least in part, in Miami, Florida *Id.* (holding that there can be no violation of §846 if the object of the conspiracy is not a violation of the substance offense; *see also, United States v. McInnis*, 601 F.2d 1319, 1324-1325(5th Cir. 1979) (holding that a conspiracy entered into in the United States to kidnap a victim in Mexico is not a United States federal crime).

In the case *sub judice*, there is not a sufficient nexus between the alleged acts of Appellant and the United States. None of the alleged criminal acts charged in the indictment occurred in the United States. None of the alleged acts caused an effect in the United States. And, none of the alleged acts were intended to cause any effect in the United States. Based on these facts, there cannot be a sufficient nexus to apply extraterritorial conduct without violating the Due Process Clause of the United States Constitution. There are absolutely no facts to support that any of the alleged activities were aimed at causing criminal acts or detrimental effects within the United States. Therefore, there is no sufficient basis for the United States to exercise its jurisdiction over Appellants.

II. VENUE WAS IMPROPER IN THE EASTERN DISTRICT AS TO EITHER COUNT OF CONVICTION [GERMANE ONLY TO CABALCANTE]

A. Baseline Legal Principles

"Venue is a fact that must be proved in a criminal case though it need not be proved beyond a reasonable doubt, and the absence of direct proof of venue does not defeat conviction if the fact of venue is properly inferable from all the evidence." Charles Alan Wright and Mary Kane, 20 FED. PRAC. & PROC. DESKBOOK § 45 (2013).

The standard of review for whether venue lies in a particular district is whether, viewing the evidence in the light most favorable to the government and making all reasonable inferences and credibility choices in favor of the finder of fact, the government proved by a preponderance of direct or circumstantial evidence that the crimes charged occurred within the district." *United States v. Carreon-Palacio,* 267 F.2d 381, 390 (5th Cir. 2001).

B. Argument

The Constitution of the United States contains two specific provisions that detail venue and jurisdiction for criminal courts. First, Article III § 2 provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the

Congress may by lay have directed." Secondly, two years later, the Sixth Amendment provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law…"

FED. R. CRIM. P. 18 mandates that except as otherwise permitted by statute or these rules, the prosecution shall be had in the district in which the offense was committed. It is the government's burden of establishing by a preponderance of the evidence that venue is appropriate. *United States v. Lam Kwong-Wah*, 924 F.3d 298, 301 (D.C. Cir. 1991).

C. Venue Was Improper For Count One

As part of the "war on drugs" Congress in 1970 enacted 21 U.S.C. § 959 to reach drug distributors who resided outside the United States but "knowing that such substance or chemical" would be imported into the United States. *See Public Law* 91-513. Specifically, § 959(c) provides that "this section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court of Columbia."

Count 1 of the Indictment charges Cabalcante with a conspiracy to violate Title 21 U.S.C. § 963. Section 963 does not, however, provide a specific venue provision. Courts are required to conduct a separate venue analysis for charges of conspiracy and the underlying substantive offense. *See United States v. Bernard*, 490 F.2d 907, 910-12 (9th Cir. 1973); *United States v. Walden*, 464 F.2d 1015 (4th Cir. 1972). As the Supreme Court noted, a criminal conspiracy trial is proper in any district in which the conspiracy was formed or **"in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense."** *Whitfield v. United States*, 543 U.S. 209, 218 (2005) (emphasis added).

The government failed to prove the essential element of venue as to Count 1 at trial.[6] Count 1 alleges that "in the Eastern District of Texas and elsewhere" Cabalcante and others conspired to possess cocaine with the intent that it would be imported into the United States. None of the evidence offered by the government at

[6] Defendant's filed a Joint Defense Motion to Dismiss arguing for dismissal of the Indictment due to: 1) improper venue and lack of extra-territorial jurisdiction by the Court as to Count 1; and improper venue and jurisdiction for Count 2, asserting proper venue is in the District of Columbia based upon the initial entry into the United States being via Guantanamo Bay, Cuba, a special territory of the United States. ROA.5504, 5546 and 5562. The government answered Defendant's joint motion with a claim that venue was proper in the Eastern District of Texas because when Defendants were extradited, their plane landed in the Eastern District of Texas. ROA.5532 and 5554. The government further argued that because 21 U.S.C. § 963 charged a conspiracy to violate 21 U.S.C. § 959, it follows that the special venue provision of § 959 would apply to a § 963 charge. The government also claimed that in the alternative, venue for the § 963 charge was also proper under 18 U.S.C. § 3238. The District Court adopted the Magistrate Court's findings that no analysis was necessary as to whether proper venue for a § 963 conspiracy could be found under § 959(c). ROA.567-571. The Court in the alternative Ordered that venue was proper for the § 963 conspiracy count under 21 U.S.C. § 3238. ROA.682-84.

trial established the commission of a single overt act in the Eastern District of Texas. Accordingly, the government failed to carry its burden of proof with respect to venue as to Count 1 of the indictment. The District Court made a finding that venue was proper as to Count 1 under 18 U.S.C. § 3238 "because Defendant's were first brought to a district of the United States when they arrived in McKinney, Texas, in the Eastern District of Texas." ROA.683. Section 3238 provides that venue is proper in the district "in which the offender, or any one of the two or more joint offenders, is arrested or is first brought". The District Court's reading of § 3238, however, is in incomplete. Congress's purpose in enacting § 3238 is unclear from its legislative history. *See* Megan O'Neill, *Extra Venues for Extraterritorial Crimes? 18 U.S.C. § 3238 and Cross-Border Criminal Activity*, 80 U. CHI. L. REV. 14,25, 1447 (Summer 2013) (noting that the general constitutional and statutory framework for venue in federal criminal trials implies that the underlying purpose of the statue is to provide a venue where there otherwise would not be one).

For cases such as this where all the criminal activity took place entirely abroad, the Constitution's directions for setting venue are incomplete as there is no United States district in which the crime was committed.[7] The District Court's

[7] "In the context of non-U.S. citizens, 'due process requires the Government to demonstrate that there exists 'a sufficient nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant."' *United States v. Lawrence*, 727 F.3d 368, 396 (5th Cir. 2013)(quoting *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006)).

reading of § 3238 is simply an effort to fill in this constitutional gap by providing a specific venue in these situations.

D. Venue Was Improper As to Count Two[8]

Despite the fact that the trial evidence lacked any nexus whatsoever to the Eastern District of Texas, the government nevertheless attempted to fabricate venue therein. The government charged Cabalcante in Count 2 with a violation of 21 U.S.C. § 959; the manufacture or distribution of cocaine with the knowledge and intent that it would be imported into the United States. Title 21 U.S.C. § 959 provides that "any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia."

Accordingly, the government incorrectly argued at trial that venue was proper in the Eastern District of Texas. Because Cabalcante's plane first touched down in Guantanamo Bay, however, venue was instead proper in the United States District Court for the District of Columbia. The District Court ruled that as to Count 2, "each defendant first entered a judicial district in the United States when he arrived in McKinney, Texas. Thus venue is proper under § 959(c)." ROA.683.

[8] Pineda does not join in this argument only because his plane did not refuel at Guantanamo Bay.

Mr. Cabalcante was arrested and detained in Colombia pending extradition into the United States. ROA.37. On December 1, 2010, DEA agents flew Cabalcante to the United States. At trial DEA Special Agent Beloney testified that Cabalcante's plane left Bogota, Colombia and touched down at the United States Naval Base at Guantanamo Bay, Cuba (ROA 3391). The plane remained on the ground in Guantanamo for 30 to 45 minutes. ROA.3392. Thereafter, the plane took off and headed to its final destination, McKinney, Texas in the Eastern District of Texas. *Id.*

As noted in Defendants' joint motion to dismiss, pursuant to *Rasul v. Bush*, 542 U.S. 466 (2004), Guantanamo Bay is the exclusive territory of the United States (ROA 5504-11). In accordance with 28 U.S.C. § 2241 and the Detainee Treatment Act and Military Commissions Act, this action should have been brought in the District of Columbia, because that is the district court wherein jurisdiction over persons who land at Guantanamo Bay rests pursuant to *Rasul.*

Title 18 U.S.C. § 7 outlines the special maritime and territorial jurisdiction of the United States to include the high seas, vessels or aircraft flagged by the United States, lands reserved or acquired by the United States areas of the earth where other countries do not exercise jurisdiction and vessels destined or departing the United States. Within this special maritime and territorial jurisdiction of the United States is Guantanamo Bay, Cuba. The criminal venue and jurisdiction provision applicable to Guantanamo Bay, Cuba are 18 U.S.C. § 7 and 3238. *See United States v. Lee,* 906

F.2d 117 n.1 (4th Cir. 1990). As previously stated, 3238 holds that the proper court of venue is the District of Columbia. The evidence presented at trial established that Cabalcante first touched down in Guantanamo Bay, Cuba prior to entering the Eastern District of Texas. As a consequence, venue for this case does not lie in the Eastern District of Texas. Proper venue for this trial should have been in the District of Columbia pursuant to § 3238. As a consequence, the government failed to satisfy its burden at trial with respect to Count 2 of the Indictment.

III. THE EVIDENCE WAS NOT SUFFICIENT FOR THE JURY TO CONCLUDE THAT CABALCANTE OR PIÑEDA HAD CONSPIRATORIAL INTENT TO IMPORT COCAINE INTO THE UNITED STATES (GERMANE TO COUNTS ONE AND TWO FOR CABALCANTE AND COUNT TWO FOR PIÑEDA)

As an initial matter, both Cabalcante and Piñeda are very aware that Fed R. App. P. 28(i) only permits appellants to incorporate challenges that are not fact-specific as to a particular defendant. See *United States v. Baptiste*, 264 F.3d 578, 586 n. 6 (5th Cir. 2001).

Although the sufficiency arguments about the absence of evidence that either evinced an intent to import cocaine into the United States are largely co-extensive because the macro-level objective of the conspiracy indicated nothing more than an intent to import into Mexico, each respective appellant presents arguments below tailored to the specific evidence entered against him at the trial.

A. Timely Rule 29 Motions

The Government rested early on the 15th day of trial, October 18, 2012. ROA.3801; ("MS. RATTAN: Your Honor, members of the jury, the United States rests its case in chief.").

1. Cabalcante's Rule 29 Motion

Immediately thereafter, Both Cabalcante and Piñeda made Rule 29 motions thereby preserving their sufficiency challenges for appeal. Id. ("MR. D'ANGELO: Your Honor, the government having rested, on behalf of defendant Jaime Cabalcante, I would respectfully request the Court grant the motion for 19 judgment of acquittal pursuant to Rule 29." See also ROA.3802-3805 (Cabalcante's counsel speaks at length uninterrupted presenting argument in support of this motion).

2. Piñeda's Rule 29 Motion

Piñeda made his Rule 29 motion at ROA.3807. "MR. MORRIS: For Mr. Barrera, Your Honor, I'll also adopt any arguments made by my co-counsel. I do also move for a motion for judgment of acquittal under Rule 29." See also ROA.3808-3810 (Piñeda's counsel speaks at length uninterrupted presenting argument in support of this motion).

3. District Court's Unified Ruling Regarding All Defendants

The District Court overruled:

THE COURT: I know what the evidence is. I think there's sufficient evidence for this to go to the jury. I'm going to deny all motions. The venue and the amendment issues have already been addressed in the written rules, and they will stay as they are. It's denied and we will continue with the trial.

ROA.3824.

B. The Trial Evidence Was Devoid of Anything Suggesting (Much Less Establishing Beyond A Reasonable Doubt) That Anyone Intended Domestic Importation

1. Introduction

Even if the evidence presented at trial is considered in the light most favorable to the verdict, *Glasser v. United States*, 315 U. S. 60, 80 (1942), no reasonable trier of fact could have found that the evidence established beyond a reasonable doubt that Cabalcante was guilty of Counts One or Two. *United States v. Bell*, 678 F. 2d 547 (5th Cir. 1981) (en banc), aff'd on other grounds. 462 U. S. 356 (1983).

Nor could any rational jury have found Piñeda guilty of Count Two. Id.

2. Controlling Legal Principles

The Government was required to prove that every defendant intended to bring cocaine into the United States and distribute it therein. *See United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980); *United States v. Palella*, 846 F.2d 977 (5th Cir.), cert denied, 488 U.S. 863, 109 S.Ct. 162, 102 L.Ed.2d 133 (1988); *United States v. Vazquez-Velasco*, 15 F.3d

833 (9th Cir. 1994); and *Chua Han Now v. United States*, 730 F.2d 1308 (9th Cir. 1984), cert. denied, 470 U.S. 1031, 105 S.Ct. 1403, 84 L.Ed.2d 790 (1985).

"The United States has a valid 'federal interest' in prohibiting importation of drugs into our country where a drug carrier actually enters [the United States] with drugs …." *United States v. Ojebode,* 957 F.2d 1918, 1225 (5th Cir. 1972). In *United States v. Conroy,* 589 F.2d 1258 (5th Cir.), *cert. denied*, 444 U.S. 831, 100 S.Ct. 60, 62 L. Ed.2d 40 (1979) the court "found there [was] 'no federal interest' in prohibiting importation into another country by a drug carrier who is discovered with dugs outside the United States territory." *Id.* Consequently, extraterritorial jurisdiction should not apply absent evidence of some impact or effect upon the United States. *Perez-Herrera*, 610 F.2d at 290-91.

A conspiracy to import a controlled substance into the United States count requires proof of (1) an agreement (2) to import (3) a controlled substance (4) into the United States and (5) the defendant's knowing and voluntary participation in the agreement. *Conroy,* 589 F. 2d at 1270. "Just as a defendant cannot be convicted of such a conspiracy without knowledge that the substance he was carrying was controlled... or without knowledge that he was transporting some substance... so the government must meet the burden of showing that the conspiracy to import was directed at the United States." *Id.* (emphasis added); *see United States v Leavit*, 878 F. 2d 1329, 1337 (llth Cir. 1989) *cert, denied, sub. nom, Garces v. United States,*

107 L. Ed 2d 280 (1989); *United States v. Bollinaer*, 796 F. 2d 1394 (llth Cir. 1986), modified on other grounds, 837 F. 2d 436, *cert, denied, sub. Nom*, *De la Fuente v. United States*, 486 U. S. 1009 (1988). Thus, a defendant so charged must be shown to possess the specific intent to bring the contraband into the United States before such convictions may stand.

3. The Evidence In This Case Is Far Removed From That Required Under Doctrinal Standards for Sufficient Evidence of "Intent to Import"

a. *United States v. Reyes*

In *United States v. Reyes*, this Court reversed for insufficient evidence convictions for conspiracy for intent to import marijuana against four illegal aliens from Columbia who were found on a plane intercepted in South Florida. 595 F.2d 275 (5th Cir. 1979). The evidence included the following: "A thorough search of the plane revealed aviation charts, a Colombian newspaper, survival equipment and pieces of rope; when the plane's floor was vacuumed, minute amounts of marijuana debris were found." *Id*. at 277-78. The Government's trial theory posited that bales

of marijuana had been pushed out of the plane before it was intercepted, and [l]ater that same day, Coast Guard officials recovered bales of marijuana floating in the Gulf of Mexico in locations under the recorded flight path of the aircraft, and wrapped in burlap bags with rope similar to that found in the plane." *Id*. at 278. This Court reversed because, "The defendants may have assisted in the flight, but they may as plausibly have been mere passengers during the short trip from Colombia to Florida." *Id*. at 281.

b. *United States v. Carrion*

Similarly, in *United States v. Carrion*, the Ninth Circuit reversed convictions for convictions for smuggling marihuana by airplane from Mexico into the United States in violation of 21 U.S.C. § 176a for insufficient evidence of intent to import. 457 F.2d 200, 201 (9th Cir. 1972) ("Guttersrud's possession of a map of Mexico, along with other maps, and his having a worn match book bearing an advertisement for a Mexican motel, and Carrion's having a slip of paper in his wallet with a few innocuous words in Spanish on it added nothing of significance.")

c. *United States v. Pruett*

Even in cases where the appellate court found evidence of intent to import sufficient, the defendants have always been found in possession a navigational tools

such as maps or charts of the United States. *See e.g.*, *United States v. Quemener*, 789 F.2d 145, 156 (2d Cir. 1986) ("MARGIE carried a large number of detailed coastal maps for the east coast of the United States and the Caribbean Islands, but no detailed charts for any area north of Cape Cod; although the MARGIE carried a tide table for the east coast of the United States, she had no similar table of Canadian tides; as discussed above, contrary to the MARGIE's announced St. John's, Newfoundland, course, she appeared to be heading for some spot along the United States coast."); *United States v. Pruett*, 540 F.2d 995, 1006 (9th Cir. 1976) ("The maps, writing on the maps, course lines drawn on the maps, the printing on the sack, and the appearance of the packaging of the marijuana, sufficiently prove by reasonable inferences that there was an overflight over the Southern District…").

d. Prosecutor Brags During Closing Argument, "The cocaine never even left Columbia"

By contrast, in the case *sub judice*, there was no evidence of navigational tools programmed with geographical data about the United States or its borders because, as the Prosecutor stated during closing argument, "The cocaine never even left Columbia." ROA.4037.

4. Precise Denotation of "Import"

The statutory language contained in 21 U.S.C. § 963, supports the interpretation given this statute by this Court in *Conroy*; that specific intent to bring

narcotics into the United States is required. *United States v. Londono-Villa*, 930 F. 2d 994, 997-99 (2d Cir. 1991). "Import" is defined as any bringing in or introduction of an article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States). 21 U.S.C. § 951(a)(l). In both "common parlance and in the statutory definition, the term "import" carries a connotation not just of movement of goods but of their entry into a given area." *Londono-Villa*. 930 F. 2d at 998. The court explained that the "knowingly or intentionally imports" language chosen by Congress implies that, to be guilty of a criminal offense under § 960, the defendant must have known or intended the area into which the goods were to enter. The choice of this formulation suggests that Congress did not intend us to interpret these sections in a way that divorces the knowledge/intent element from the connotation of the word "import."

5. At the Conspiracy's Macro-Level, There Was No Intent to Import or Distribute Cocaine Outside of Latin America (Germane to Both Piñeda and Cabalcante)

In the present case the government failed to carry its burden, because no credible evidence was adduced at trial to suggest that the object of this conspiracy was to import cocaine into the United States. This case involved a plan to send an aircraft loaded with cocaine from Colombia to Guatemala. After a series of failed attempts to do so, the object of this conspiracy was abandoned. The goal of the conspiracy thereafter devolved into an effort by members of a Mexican drug cartel

to collect money they paid to two Colombian drug distributors, Don Juan and El Primo.

The government's case hinges upon a pile of flawed inferences. *See United States v. Knowles*, 66 F.3d 1146, 1155 (11th Cir. 1995) ("Where the government's case is predicated largely, if not solely, on circumstantial evidence, 'reasonable inferences, and not mere speculation, must support the jury's verdict.'" While it is true the government need not offer direct evidence of an agreement, its circumstantial evidence must nonetheless be competent. *United States v. Morado,* 454 F.2d 167, 174 (5th Cir.), cert. denied, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972)(citations omitted) (noting "proof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence, ordinarily the acts and conduct of the alleged conspirators themselves").

In the present case, no direct evidence was offered at trial that the defendants entered into an agreement to import drugs into the United States. Whatever circumstantial evidence the government offered to prove intent was vague and speculative at best. *See United States v. William-Hendricks*, 805 F.2d 496, 502 (5th Cir. 1986) (citation omitted) (holding that "the government need not prove the existence of a formal agreement to establish a conspiracy, but it must do more than 'pile inference upon inference upon which to base a conspiracy charge"'); *see also United States v. Ross,* 58 F.3d 154, 160 (5th Cir. 1995)(quoting *United States v.*

Galvan, 693 F.2d 417, 419 (5th Cir. 1982) (observing that "when the government attempts to prove the existence of a conspiracy by circumstantial evidence, each link in the inferential chain must be clearly proven").

In circumstantial evidence cases such as this the links in the government's chain must be clearly proven, and taken together must point not to the *possibility or probability*, but to the *moral certainty* of guilt. *United States v. Schorr*, 462 F.2d 953, 959 (5th Cir. 1972) (emphasis supplied by the Court) (quoting *United States v. Kassim*, 87 F.2d 183, 184 (5th Cir. 1937)). "In a circumstantial evidence case, one inference cannot be founded upon another to sustain a conviction." *Id.* (citations omitted).

In this case, no drugs were ever exported from Colombia. No drugs ever reached Guatemala. And no drugs ever made it into Mexico. It is therefore impossible for the trier of fact to reach any reasonable inference that the cocaine in this case was intended for the United States. In response, the government leans on the notion that no cocaine made it into the United States because of good police work. ROA.4119. Although this may well explain why no cocaine left Colombia, it does little to bridge the gapping lack of intent necessary to prove importation into the United States. *See United States v. Ross*, 92 U.S. 281, 282-84, 23 L.Ed. 707

(1889) (holding that "[n]o inference of facts or of law is reliable, drawn from premises that are uncertain")[9].

When a case depends exclusively upon circumstantial evidence to prove intent, the facts used to get there cannot be based upon staking inferences or presumptions. An inference must be based upon a fact established by direct evidence and such a fact, as the predicate for an inference, cannot be either inferred or presumed. *See Vernon v. United States*, 146 F. 121, 125 (8th Cir. 1906) ("It is equally well settled, not only in criminal cases, but also in civil cases, that whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed"). Accordingly, the only presumption of facts which the law recognizes are immediate inferences from facts proved." *Manning v. Insurance Company.*, 100 U.S. 693, 697-98, 25 L.Ed. 761 (1880). "A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection

[9] It is well settled that: "[i]n the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue." *Ross*, 92 U.S at 284. "Rather is this a case for the application of the rule, recognized by this court, that multiple inferences may be drawn from one set of facts, as may separate inferences as there are facts to support them, although an inferred fact may not be used as basis for a further inference, thereby extending a chain of inferences into the realm of pure conjecture." *Hunter v. Shell Oil Co.*, 198 F.2d 485, 490 (5th Cir. 1952)(citations omitted). "It is untenable because it is unreasonable to infer one or more facts from the inference of another fact." *Pereira v. United States*, 347 U.S. 1, 16, 74 S.Ct. 358, 98 L.Ed. 435 (1954)(Mr. Justice Minton, with Mr. Justice Black and Mr. Justice Douglas join, concurring in part and dissenting in part).

between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." *Id.* at 698 (citation omitted).

a. No Phone Calls Mention The United States

This case involved foreign players who attempted, but ultimately failed, to distribute cocaine onto foreign soil. Of the thousands of phone calls recorded in this case by the Colombian National Police, not a single call was made to the United States. Not a single recorded conversation even mentions the United States.

6. The Use of American Dollars Overseas Does Not Indicate An Intent to Import Anything Into the United States

a. Government Asks: "What is the Answer? It's the U.S. dollar"

The cynosure of the Government's trial theory was that the initial capitalization of the smuggling operation by Ocaris and Jimmy in American dollars was *ipso facto* proof of an intent to import into the United States. This theory is somewhat self-contradictory since Ocaris already had dollars in Mexico and that lucre only flowed south (not north) during the course of events described at trial.

Nevertheless, during summation the Prosecutor made clear that the dollar was the key to unlocking her entire case:

> What is the answer? It's the U.S. dollar. For two hours we never heard one mention of the U.S. dollar. The U.S. dollar is an important factor in this case. Intent to import into the United States, why would they do it? It's because they want our money. It's because they want the U.S. dollar. It's all

> about money. It's all about being paid for the cocaine. It's all about getting the U.S. dollar from the United States through Mexico, Central America, and back into Colombia. That is the motive, and that's why they are doing it.

ROA.4106.

> There was so much testimony about the U.S. dollars.

ROA.4107.

> That's how you know what they are doing, because it's all about getting the U.S. dollar back over there.

ROA.4108.

> Why? For the U.S. dollars, the many, many U.S. dollars that they are going to take back into Mexico and then ship back to Columbia.

ROA.4109

b. Argument

At its core, this was a conspiracy to import cocaine from Colombia by aircraft into Guatemala.

To elide past this unfortunate reality for its case, the cynosure of the government's theory was that coconspirators conducted their transactions in U.S. currency. For example, their very first witness was a Denton County Sheriff's Department Officer, William Scott, who was totally unconnected to the investigation or arrest of the Columbians on trial (and who had in fact never left the United States in his life) but nevertheless testified:

Q: Would the fact that U.S. currency, U.S. dollars are involved be an indication to you that the cocaine was distributed in the United States?
A: Yes, ma'am.

ROA.1303.

But this extremely leading question (on direct examination, no less) sheds more heat than it does light. The Prosecutor asked about "the cocaine was distributed" in this country. But it was uncontroverted that no cocaine from the alleged conspiracy ever entered the United States. ROA.4037 (Prosecutor says during closing: "The cocaine never even left Columbia."). So nothing about the answer to this hypothetical impinges about intent to import cocaine in the case *sub judice.*

Of course, the mere exchange of dollars, rather than pesos, in a foreign in a foreign transaction is of course not an illegal act. The case agent, William Furgason, conceded the following on cross-examination:

Q: You of course will acknowledge that the Unites States currency is still internationally recognized as the most frequently used currency worldwide?
A: Yes, if you say so.

Q: And in and of itself -- well, I don't say so, the United States monetary fund says so. And in and of itself it is the most commonly exchanged form of currency in the world?

A: Yes.

Q: And just because you're working in another country and exchanging dollars doesn't mean you're committing a crime does it?

A: Correct.

Q: So if I go buy a loaf of bread in Mexico and pay for it with dollars, I haven't committed a crime, have I?

A: A loaf of bread, no, sir.

Q: Okay. And if I buy a loaf of bread in Colombia with dollars, that's not indicative of committing a crime.

A: No, sir.

ROA.1351.

Cabalcante and Piñeda warrant to the Court that their own research does not find any reported cases suggesting that the mere use of United States currency by drug traffickers acting overseas suggests an intent to import drugs into the United States.

On this first impression, Cabalcante and Piñeda contend that the Government's theory is orthogonal to realities of modern global commerce. It is an unalloyed fact that the United States dollar is the world's most dominant reserve currency. At the Fall 2014 joint meeting the International Monetary Fund and the World Bank, Federal Reserve Vice Chairman Stanley Fischer explained:

> Financial stability responsibilities do not stop at our borders, given the size and openness of our capital markets and ***the unique position of the U.S. dollar as the world's leading currency for financial transactions.*** For example, the global financial crisis highlighted the extent of borrowing and lending in U.S. dollars by foreign financial institutions.
>
> Vice Chairman Stanley Fischer, "The Federal Reserve and the Global Economy" (speech given October 11, 2014) (available at

http://www.federalreserve.gov/newsevents/speech/fischer20141011a.htm) (emphasis added); *see also* Barry Eichengreen, *Exorbitant Privilege: The Rise and Fall of the Dollar and the Future of the International Monetary System* (Oxford Press 2012).

Beyond these normative statements about the role of the dollar and American monetary policies, it is a positive statement that Columbia is the largest purchaser of dollars in Latin America.

"Columbia is sticking with its two-year-old policy of buying dollars to beef up its international reserves, which are low compared with those of some of its neighbors." Andrea Jaramillo, BloombergBusinessweek, *Colombia Keeps Its Peso Weak*, (February 13, 2014) (available at: http://www.businessweek.com/articles/2014-02-13/colombia-keeps-its-peso-weak) (last visited November 22, 2014).

Jaramillo also notes that "Colombia's international reserves ended last year at $43.6 billion, compared with $65.7 billion for Peru and $176.6 billion for Mexico." *Id*. Cabalcante and Piñeda would suggest that the fact that the United States' southernmost neighbor has over 176.6 billion in dollar reserves gives succor to their argument that the use of dollars in the alleged conspiracy established nothing more than an intent to import into Mexico.

c. Dollars Are The Official Currency of Many Latin American Countries

i. Panama Has Been Dollarized For 100 Years

Even further vitiating the Government's contention that use of dollars outside the borders of the United States shows an intent to import into this country is the fact that the dollar is an official currency of Panama. "The balboa has been tied to the United States dollar (which is legal tender in Panama) at an exchange rate of 1:1 since its introduction ***and has always circulated alongside dollars*.**" Chester L. Krause and Clifford Mishler, *Standard Catalog of World Coins: 1801–1991* (18th ed.) (1991) (emphasis added).

ii. Ecuador Has Been Dollarized Since 2000

Nor is the phenomenon of dollarization limited to former protectorates like Panama. For example, Ecuador has been dollarized since 2000. "The US dollar became legal tender in Ecuador March 13, 2000, and sucre notes ceased being legal tender on September 11." Julián P. Díaz, *Dollarization in Ecuador: A Process in Progres*s (available at:

http://www.econ.umn.edu/~dmiller/Ecuador%20Dollarization.pdf).

iii. El Salvador Has Been Dollarized Since 2001

El Salvador has also been dollarized since 2001. The Economist Magazine observes, "Today, **85% of transactions in the country are in greenbacks**, and the dollar is the only unit of account in the financial system." The Economist, "El Salvador learns to love the greenback" (September 26, 2002) (available at: http://www.economist.com/node/1357779) (emphasis added).

In other words, under the Government's theory of this case, "85% of the transactions' in El Salvador' must be regarded as being intended for eventual import into the United States.

7. The Evidence Was Specifically Insufficient As to Cabalcante As To Either Counts One or Two

Cabalcante's only role in this conspiracy was that he referred the Mexicans to El Primo and Don Juan. As a consequence, the Mexicans held Cabalcante to some extent responsible for the failed deal and tasked him with assisting in the return of the money.

At trial, the government simply failed to prove through direct evidence that Appellant agreed with one or more persons to either manufacture, distribute or import cocaine into the United State. Instead the government offered the testimony of convicted drug traffickers who they deemed "experts" as circumstantial evidence to bridge the gap between Colombia and the United States in this case. One of the government's star witnesses on this subject was a former Mexican Gulf Cartel member, Mario Cuellar. Cuellar testified that in his experience, cocaine that came from Colombia through Guatemala and into Mexico was intended for importation into the United States. ROA.3141-95. Cuellar, however, conceded on cross-examination that he had no knowledge of or affiliation with any of the defendants

associated with this conspiracy. ROA.3195. Despite his contention that he worked for the Zetas on the Mexican/United States border from 2007 through 2008, he had did not know, and never dealt with La Guera, Cabalcante, Byron, or Gaitan. *Id.*

> Q. Do you know anything about this case you are testifying in here?
>
> A. Are you asking me do I know anything about as to the people that are present here today?
>
> Q. Right.
>
> A. No, sir, I don't. But it is my opinion that the cocaine had the same source, which was Colombian.

Id.

It was therefore impossible for Cuellar to offer any opinion with respect to the ultimate destination for the cocaine in this case. All he could opine was that the cocaine in this case had the same Colombia sources. This was the sort of evidence the government offered to support its misplaced belief that the cocaine in this case was intended for importation into the United States.

Another of the government's star "expert" witnesses was convicted felon and former Sinaloa cartel member, Otto Herrera Garcia. Garcia testified that he worked for the Sinaloa cartel in Guatemala. He described the Sinaloa cartel as "a big organization that operates out of Mexico, buys cocaine in Colombia and transports it from Colombia into Central America, then into Mexico, and finally the United

States." ROA.3153. His testimony with respect to this conspiracy was also completely speculative. Garcia acknowledged on cross-examination that he didn't know Cabalcante and that he never did business with any of the defendants in this trial. ROA.3162. Since he had no familiarity with the players in this case, it was impossible for Garcia to say with any degree of certainty that the cocaine in this conspiracy was in fact destined for the United States.

The government also called another convicted drug trafficker, Mario Fernando Gomez-Gonzalez. ROA.2646. He testified that he too shipped cocaine from Colombia cocaine from Panama to Mexico. ROA.2518. He of course added that this cocaine was ultimately imported into the United States. *Id.* Despite the fact that Gomez-Gonzalez had just met Cabalcante for the first time in the courtroom, he too predicted that the cocaine in this conspiracy was destined for the Untied States. ROA.2667.

The government called yet another career drug trafficker and convicted felon, Christian Vasquez Angel. ROA.2987. He too opined that the cocaine in this case was intended for importation into the United States. ROA.3004. According to Vasquez Angel, "all the drug that goes out of Colombia to Central America or Mexico ends up in the United States. ROA.3005. This witness also never dealt with Cabalcante and met him for the first time in prison after the indictment was returned

this case. ROA.3008. He also conceded that he had never trafficked cocaine with any of the defendants that were on trial in this case. ROA.3016.C

Another government witness, drug trafficker, Victor Hugo Ramirez Estupinan, also opined that the cocaine he transported out of Panama on vessels into Mexico was destined for import into the United States. His opinion also failed the laugh test. Estupinan conceded on cross-examination, that he had no affiliation with the Mexican cartels he delivered cocaine to. ROA.2559. He therefore had no ultimate say or control over what these Mexican cartels ultimately did with the cocaine he shipped them.

At best again, the government's witnesses offered nothing more than speculation and conjecture. The piling of such unsubstantiated inferences, however, does nothing to bridge the gap between an intent to import cocaine into Mexico and an the necessary intent required for a conviction in this case; that the cocaine was ultimately intended for the United States. *See United States v. Moreno,* 185 F.3d 465, 471 (5th Cir.1999) (holding the government "must do more than pile inference upon inference upon which to base a conspiracy charge"); *see also United States v. Mackay,* 33 F.3d 489, 493 (5th Cir.1994) (internal quotation marks omitted); *United States v. Grant*, 683 F.3d 639, 642 (5th Cir. 2012). The government attempted, but ultimately failed, to prove Appellant intended to import cocaine into the United States through the testimony of the above "expert" witnesses and the fact that

cocaine was purchased with U.S. currency. Knowledge and intent that the cocaine in this case was destined for the United States was a key ingredient of Counts 1 and 2. The inferences offered by the government to suggest a Appellant had the required knowledge and intent to import cocaine into the United States was totally speculative. *See United States v. Milkovich*, 161 F.3d 15 (9th Cir. 1998) *quoting Mikes v. Borg*, 947 F.2d 353, 357 (9th Cir.1991) (record must contain sufficient probative facts from which the fact finder can reasonably infer guilt and cannot be based on mere speculation); *United States v. Gardner*, 475 F.2d 1273, 1278 (9th Cir.1973) (inference "too speculative" and "remote" to allow a conspiracy conviction beyond a reasonable doubt) (internal quotations and citations omitted). Accordingly, the evidence was insufficient to sustain Appellant's conviction under Counts 1 and 2 of the Indictment.

8. The Evidence Was Specifically Insufficient As to Piñeda As To Count Two

In response to Piñeda's Rule 29 motion, the Court asked the Prosecutor:

THE COURT: Okay. I mean do you have evidence other than that flight?

ROA.3817.

The Prosecutor responded:

Government's Exhibit Number 102 is a transcript of a conversation between Carlos Gaitan, Tato, and Oscar Orlando Barrera Piñeda. As the evidence has established, Carlos Gaitan, Tato, was about one thing during this conspiracy. He was a cocaine transporter. And you can see through the phone call, Oscar Orlando Barrera Piñeda

confirms to Carlos Gaitan in this phone call that there was a flight, there weren't any problems, the flight was very pleasant, and that there's going to be a second flight after that. They are going to be taking off. And Oscar Orlando Barrera Piñeda clearly confirms that he's doing that. Carlos Gaitan tells him to be sure that he has his cell phone in hand, he says no problem, that he does have a cell phone. The interpretation of this call and the reasonable inference based on this call where they are talking about equipment, vehicles -- we know vehicles is a code word for airplanes. The reasonable inference based on this call is that Oscar Orlando Barrera Piñeda and Carlos Gaitan were involved in distribution of cocaine, and it involves the plane. And you know that Carlos Gaitan is in charge of logistics, getting cocaine out of Colombia into Central America into the United States. I think we have had numerous witnesses testify about what Carlos Gaitan's operations are.

Also, you look to the phone calls and events of December of 2007. I think Government's Exhibit 33 and 34 are the phone calls that take place between Carlos Gaitan and Oscar Orlando Barrera Piñeda before the plane goes down on December 20th of 2007, and then after the plane goes down. There are two phone calls between Carlos Gaitan and Oscar Orlando Barrera Piñeda. The two phone calls after, Oscar Orlando Barrera Piñeda is panicked because he thinks that he left some paper work on the plane that went down, and he's very concerned that that plane can be linked to him. And he shares his panic and concern with Carlos Gaitan.

In the second phone call after the plane goes down, Oscar is talking to a person named Flacito. The reasonable inference based on the series of calls is that Flacito was actually the pilot on the plane when it went down. And he and Flacito are lamenting that there won't be any pay off. The specific quote is, "there won't be any Christmas this year." There won't be a pay off because the plane was taken down.

So as to the events of December 20, 2007, you have the phone calls before the plane goes down with Oscar Orlando Barrera Piñeda, and you have the phone calls after the plane goes down when he's panicked about what happened. Because that's the plane they were going to use to transport the drugs through Central America into the United States.

ROA.3817-3819.

The problem with the Government's analysis is that none of these flights (or the phone calls about the flights) have anything to do with the United States or

importation into that country. At most, the Government proved the unremarkable proposition that Piñeda flew a small plane from one country to an adjacent country knowing that it would be used to move drugs entirely within South America.

IV. MULTIPLE CONSPIRACY AND VARIANCE (GERMANE TO CABALCANTE ONLY)

A. Jury Instruction Given

The Jury Instructions provided Pattern Jury Instruction 2.21. ROA.745.

B. The Evidence was Insufficient to Establish Cabalcante's Participation in The Single Conspiracy Alleged in the Indictment

In the present case, the government joined in a single conspiracy a combination of defendants and charges that it could not encompass within a single conspiratorial agreement. It is apparent from the face of the Indictment as well as the evidence offered at trial that there is no single conspiracy involving all defendants. To the contrary, the trial showed two separate conspiracies:

Conspiracy 1:

As summarized supra in the Statement of the Case and Facts, Conspiracy 1 was the Amaya-Nungo (Don Juan) (6) Drug Trafficking Organization and it allegedly included Ramos-Martinez (Primo), Gallon Henao, Rodriquez Monsalve, Moya-Buitrago (Moya), Moreno-Rodriguez (Moreno), Castiblanco-Cabalcante (Chalo), Barrera Piñeda (Barrera), and Gonzalez-Vasquez (Byron). Don Juan and Primo were drug trafficking partners based in Colombia. ROA.1865. These two

represented to the Mexicans that they could send cocaine from Colombia into Central America on clandestine flights. Carlos Gaitan-Uribe ("Tato") had access to pilots and corrupt air traffic controllers and provided these services for a fee to drug traffickers in Colombia. *Id.* Tato made flight departure arrangements, hired pilots, provided clandestine landing strips and bribed corrupt air-traffic controllers. ROA.1853. Fernando Moreno worked for Don Juan in Colombia. ROA.2352. Byron was dispatched by Don Juan to Mexico to receive the never-to-be-accomplished cocaine flight on the HP-1607. ROA.2374. The government claimed that Barrera-Piñeda was a pilot and Moya-Buitrago was a corrupt air-traffic controller that worked for Gaitan.

Conspiracy 2:

As also referenced supra in the Statement of the Facts and Case, Conspriacy 2 involved the Giraldo-Garcia (El Tio)/Freddy Correa Drug Trafficking Organization which allegedly included Vasquez-Angel, Murcia Rodriquez, Villegas-Rojas (Rojas), Rodriguez-Melo, Marin-Arboleda, Megudan-Mendez, Umbreit-Urrutia, Costano-Mendez, and Valencia-Bedoya. Megudan testified that in 2008 El Tio gave money to an unindicted co-conspirator named David Quiñonez ("Quiñonez") to purchase an aircraft and a load of cocaine to be shipped on such aircraft from Colombia to Belize. ROA.3327. Quiñonez thereafter bought an aircraft, but failed deliver a gram of cocaine for El Tio. *Id.* After this deal stalled, El Tio

met a cocaine trafficker named Chepa in Mexico who put him in contact Turko. ROA.3328. Turko had a load in Colombia but was missing an aircraft to transport the drugs. Roberth William Villegas Rojas was a driver who worked for Turko.

Although each defendant is alleged to have engaged in the same type of criminal activity, such allegations alone are insufficient to allege a joint conspiracy. Nothing offered by the government at trial supports the existence of a single conspiracy encompassing the defendants. At best the government alleged superficial similarities among the alleged activities of these defendants. Each defendant is essentially charged with the same kind of basic criminal activity, trafficking in cocaine. These similarities make it appear that defendants are part of a single conspiracy, despite the absence of any connection among them.

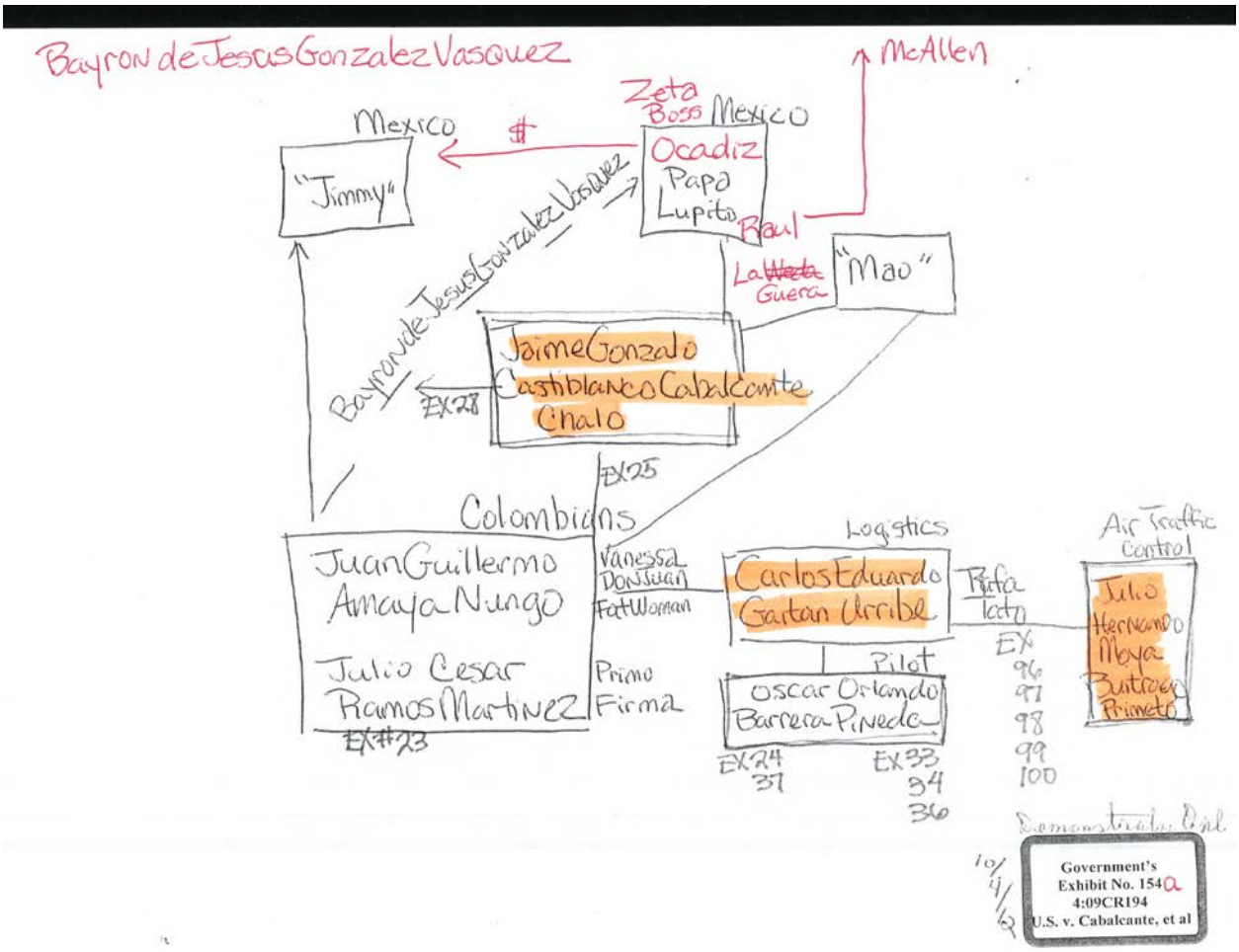
ISSUE RESTATED: Conspiracy 1 tried to traffic cocaine from Colombia through Guatemala on a plane. Conspiracy 2 used trucks to carry cocaine in Colombia for a flight to Belize.

In *Kotteakos'* terms, these similarities make it appear that there is "some interaction [among] those conspirators who form the spokes of the wheel," even though the conspiracy actually lacks the "rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 775 (1946). These superficial similarities are an insufficient basis to force the defendant to defend against a host of possible conspiracy theories, without knowing on which of them the government or the jury

might rely. In *United States v. Sutherland*, 656 F.2d 1181, 1194 (5th Cir. 1981), the Fifth Circuit noted that a variance among conspiracies will exist if a single conspiracy is charged in the indictment and multiple conspiracies are ultimately proven at trial. In addition to having different members, the conspiracies alleged in the indictment in the present case had separate and distinct goals and contained no overlap whatsoever between conspirators.

The evolution from government exhibit 154a to 154b clearly demarks the existence of at least two separate and distinct conspiracies. Despite the best efforts of the government to merge these two conspiracies into one, there was no common goal, nature of the scheme or overlapping participants. During the trial, the government offered Exhibit 154a as a demonstrative exhibit and summary of witness testimony.

Later in the trial, the government made additional changes in blue ink to this exhibit and offered it as substantive Exhibit 154b; over defendant's objection (ROA 3619-20). As can be seen below, there is a clear division between the two conspiracies listed in Exhibit 154b:


Bayron de Jesus Gonzalez Vasquez
McAllen
Zeta Boss Mexico
Mexico
$
"Jimmy"
Ocadiz
Papa Lupito
Raul
La Guera
"Mao"
Bayron de Jesus Gonzalez Vasquez
Jaime Gonzalo Castiblanco Cabalcante
Chalo
EX28
EX25
Colombians
Juan Guillermo Amaya Nungo
Julio Cesar Ramos Martinez
EX#23
Vanessa
Don Juan
Fat Woman
Primo
Firma
Logistics
Carlos Eduardo Gaitan Urribe
Pilot
Oscar Orlando Barrera Pinedo
EX24
37
EX33
34
36
Air Traffic Control
Julio Hernando Moya Buitrago
Primero
EX
96
97
98
99
100
Government's Exhibit No. 154a
4:09CR194
U.S. v. Cabalcante, et al

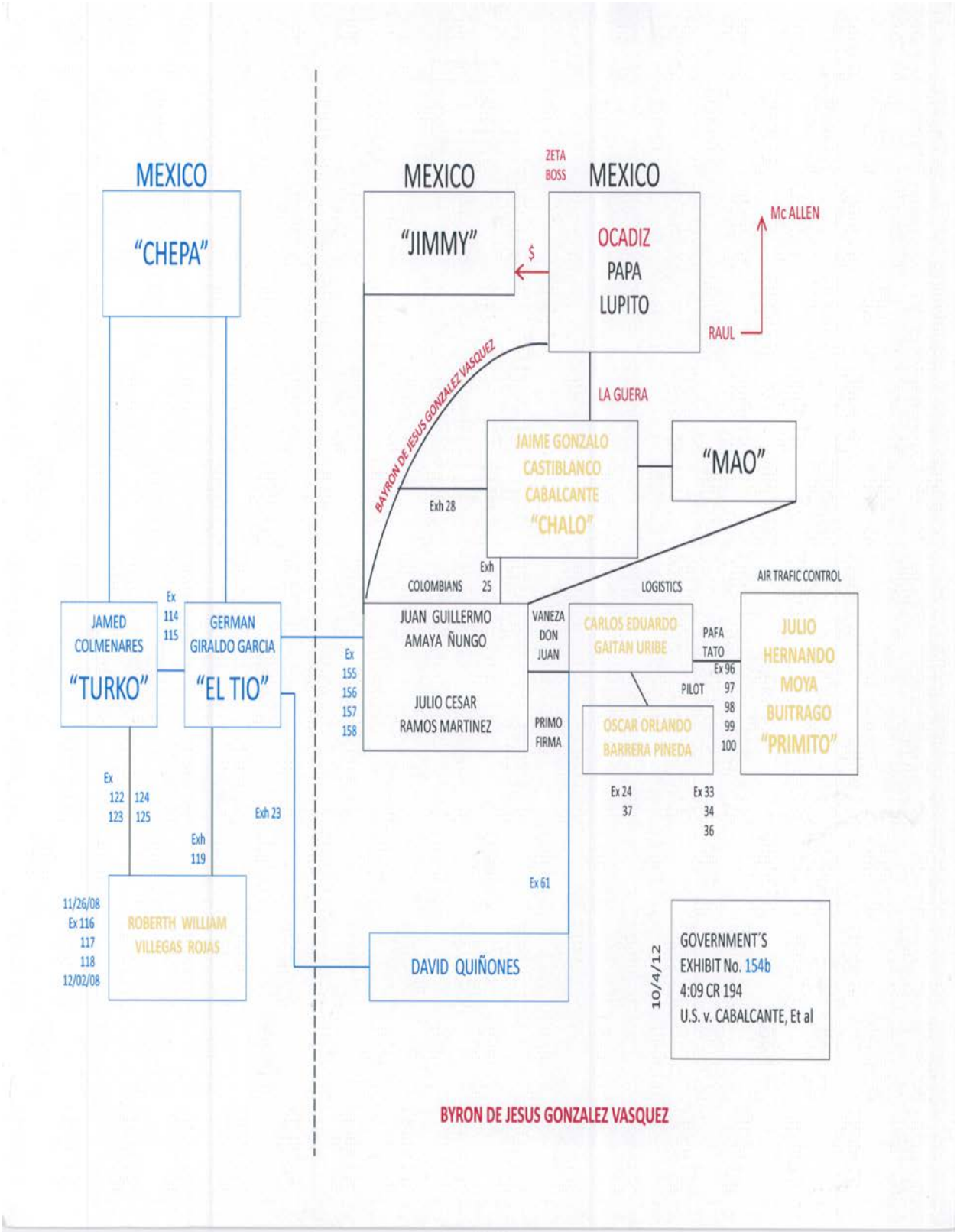

MEXICO
"CHEPA"
MEXICO
"JIMMY"
ZETA
BOSS
MEXICO
OCADIZ
PAPA
LUPITO
$
Mc ALLEN
RAUL
LA GUERA
BAYRON DE JESUS GONZALEZ VASQUEZ
JAIME GONZALO
CASTIBLANCO
CABALCANTE
"CHALO"
"MAO"
Exh 28
Exh
25
COLOMBIANS
LOGISTICS
AIR TRAFIC CONTROL
JAMED
COLMENARES
"TURKO"
Ex
114
115
GERMAN
GIRALDO GARCIA
"EL TIO"
JUAN GUILLERMO
AMAYA ÑUNGO
JULIO CESAR
RAMOS MARTINEZ
Ex
155
156
157
158
VANEZA
DON
JUAN
PRIMO
FIRMA
CARLOS EDUARDO
GAITAN URIBE
PAFA
TATO
PILOT
OSCAR ORLANDO
BARRERA PINEDA
JULIO
HERNANDO
MOYA
BUITRAGO
"PRIMITO"
Ex 96
97
98
99
100
Ex 24
37
Ex 33
34
36
Ex
122
123
124
125
Exh 23
Exh
119
Ex 61
11/26/08
Ex 116
117
118
12/02/08
ROBERTH WILLIAM
VILLEGAS ROJAS
DAVID QUIÑONES
GOVERNMENT'S
EXHIBIT No. 154b
4:09 CR 194
U.S. v. CABALCANTE, Et al
10/4/12
BYRON DE JESUS GONZALEZ VASQUEZ

Exhibit 154b and the testimony summarized therein in blue ink was an attempt by the government to merge defendant Rojas with the remaining defendants at trial. This was necessary because up until that point in trial, there was no link whatsoever between Rojas, his boss Jamed El Turko (ROA 3601) and the other defendants (ROA. 3627-28) (quoting cross-examination of SA Ferguson: "Q. And you haven't offered this jury any evidence whatsoever to suggest in any way, shape or form that El Turco was a source of supply for the 1607 flight, have you? A. That's correct").

To accomplish this, the government attempted to merge two completely separate and distinct drug trafficking conspiracies into one; Conspiracy 1 that occurred in late 2007 and was terminated in early 2008 and Conspiracy 2 that occurred in 2009 (ROA 3626). The trial testimony elicited on cross-examination, however, demonstrates that these two conspiracies had no relationship whatsoever to each other beside the fact that two of the players Quinones and Gaitan knew each other and that Quinones utilized Gaitan for clandestine flight logistics services[10] (ROA 3628) (quoting cross-examination of SA Ferguson: Q. Okay. So again, you're suggesting to the jury that these events that happened in 2009 somehow relate back to and create a connection between the 1607 flight [the failed 2007 flight of cocaine

[10] In an effort to link these conspiracies, the government also offered 4 telephone conversations between Don Juan and El Tio recorded in August of 2009 (ROA.3585); more than 2 years after Conspiracy 1 was put on the shelf. ROA.3628-29.

from Colombia to Guatemala involving Cabalcante], when there is no evidence to support that. Correct? A. Co-conspirators were involved with each other").

The government maintained that because there were conversations in 2009 between the failed source of supply in the 1607 flight back in 2007 [Don Juan] and a Colombian source of cocaine [El Tio], that this amounted to a single conspiracy (ROA 3628). The government tried to connect the two separate conspiracies simply because some of the players knew each other: "Carlos Gaitan "made contact between numerous of these events. They all know him, they all know Mr. Quinones and Mr. German Giraldo Garcia, alias El Tio. Which in August of 2009, Juan Guillermo Amaya Nungo and El Tio met with each other." (ROA 3629-30). This evidence, however, fell well short of creating a single unified conspiracy.[11]

Although it can be argued that all the participants in the Indictment shared a common goal, trafficking in cocaine outside the United States, the conspiracy lacked a cohesive scheme to functionally unify these efforts. *See United States v. Rodriguez,* 509 F.2d 1342, 1348 (5th Cir. 1975) (observing that a plan, over three years in

[11] "Although mere association with conspirators and mere presence at the scene of a crime do not in themselves establish participation in a criminal conspiracy, a jury may properly consider both in conjunction with one another and with other facts to infer knowing and intentional participation." *United States v. Brantley,* 68 F.3d 1283, 1288 n. 4 (11th Cir.1995).

process, with varying participants, to buy cocaine, was a sufficient common goal to establish a single conspiracy).

The nature of the scheme in this case between Conspiracy 1 and 2 was wholly lacking. In determining the inherent nature of the criminal scheme the *Perez* court said "If [an] agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy." *United States v. Perez,* 489 F.2d 51, 62 (5th Cir. 1973).

In *United States v. Elam,* 678 F.2d 1234, 1246 (5th Cir. 1982) this Court said "Where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture, where there are several parts inherent in a larger common plan, ... the existence of a single conspiracy will be inferred.

Finally, the government failed to demonstrate any real overlap between the participants in the above multiple conspiracies. This is a critical factor when determining whether a single conspiracy exists. *United States v. Elam,* 678 F.2d 1234, 1246 (5th Cir. 1982) (holding that "Where the memberships of two criminal endeavors overlap, a single conspiracy may be found"). There is no requirement that every member must participate in every transaction to find a single conspiracy. The law in this Circuit requires that parties **knowingly participate with core**

conspirators to achieve a common goal in order to be considered members of an overall conspiracy. *United States v. Perez,* 489 F.2d 51, 62 (5th Cir. 1973) (emphasis added). There was no common goal[12] between Conspiracies 1 and 2. All that existed was a familiarity and alleged utilization of Gaitan for logistics and 4 telephone calls between El Tio and Don Juan that occurred 2 years after Conspiracy 1 was scrapped.[13]

A single conspiracy exists where a "key man" is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal. *Elam,* 678 F.2d at 1246. There was no "key man" proven at

---

[12] Here the pattern of operations is in some way similar to the facts of *United States v. Nichols*, 741 F.2d 767 (5th Cir. 1984), cert denied, 469 U.S. 1214, 105 S.Ct. 1186-87, 84 L.Ed.2d 333 (1985); and *United States v. Michel*, 588 F.2d 986 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979), where the Circuit court concluded that there was but a single underlying conspiracy. In *Nichols*, the accused carried out three of four planned cocaine smuggling importations from Colombia to the United States during a six months period. The importation episodes had *common planners*, but the cocaine suppliers in Colombia were different, one of the pilots was different, different aircraft were used, and the intermediaries dropped out after the first two trips. In *Michel* there was a loosely organized conspiracy, there were over a dozen separate episodes in which marihuana was flown from at least two different locations in Mexico to more than six different sites in Texas and at least three separate aircraft were flown from different pilots. The Circuit court found "[t]he group *made efforts to maintain protected landing sites and there was a continuous planning and cooperation among the people involved* which convinced [the court] that [that] was one scheme to import marihuana which envisioned as many flights as could safely be made." (emphasis added). *Michel*, 588 F.2d at 995. None of those common factors found in the aforementioned cases is present in the instant case, here, the place of dispatch and reception, financer planning, aircraft, timing and locus of each conspiracy which points to separate conspiracies.

[13] In *United States v. Futch*, 637 F.2d 386 (1981), the Fifth Circuit found that only two of the twenty-one persons named in the two indictments were common to both importation episodes. It found that the "cast of characters in the two operations were predominantly different and affirmed the finding of the two separate conspiracies." *Id*. at 390-91.

trial who directed the activities in Conspiracy 1 and 2. Although the members of a conspiracy which functions through a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy, there nevertheless must be a meeting of minds toward a common goal. *Elam,* 678 F.2d at 1246.

In the present case, the government failed to show a sufficient overlapping relationship between the participants in Conspiracies 1 and 2. The government offered 2 multi-kilo seizures associated with Conspiracy 2 at trial in an effort to fabricate a nonexistent business relationship between the players in Conspiracies 1 and 2. No such relationship existed, however. The mere bulk seizure or sale of large quantities of narcotics alone is insufficient to establish the existence of a unified conspiracy.[14] In the end, that's all the government could prove at trial; that large

[14] The Second, Seventh, and Tenth Circuits have all held that the purchase or sale of a bulk quantity of illegal drugs is insufficient to support a conspiracy conviction. *United States v. Parker*, 554 F.3d 230, 235-236 (2d. Cir. 2009) (holding that, when wholesale quantities of drugs are involved, "the liability of buyer and seller for having conspired together to transfer drugs would depend not on the seller's mere knowledge of the buyer's intent to retransfer, but on a further showing of the seller's interest, shared with the buyer, in the success of the *29 buyer's resale"); *United States v. Rivera*, 273 F.3d 751, 755 (7th Cir. 2001) ("Showing that the buyer purchased a quantity larger than could be used for personal consumption ... is not enough to show conspiracy on behalf of the seller."); *United States v. Contreras*, 249 F.3d 595, 600 (7th Cir. 2001) (holding that evidence that the defendant bought "ten one-kilogram quantities of cocaine ... over a period of six to ten months" from the same supplier was only evidence of a buyer-seller relationship and not a conspiracy); *United States v. Howard*, 966 F.2d 1362, 1364 (10th Cir. 1992) ("The huge quantity of crack cocaine involved in this case permits an inference of conspiracy, but by itself this is not enough to convict defendant."); *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) ("A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also warrant the inference that a

quantities of cocaine were seized in Colombia in connection with Conspiracy 2. What they failed to prove, however, is that those kilos of cocaine were in any way connected to Conspiracy 1.

C. Fatal Variance

Cabalcante recognizes that acknowledges that this drastic variance does not necessarily end the inquiry. In the event the Government proved multiple

---

supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.").

The reason that evidence of the quantity of drugs - and of a buyer's intent to resell the drugs - cannot prove a conspiracy is because the Government must establish not only that the seller knew the buyer intended to engage in further *30 distribution, but that the seller intended and *agreed to the shared intent* of the buyer to further distribute. "There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken.... [N]ot every instance of sale of restricted goods ... in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1943). Accordingly, the First, Second, Third, Seventh, and Ninth Circuits have all stated that even where the evidence shows that the seller knew that the buyer was purchasing a quantity of drugs in order to resell them, without additional evidence of a distribution agreement, the evidence only shows a buyer-seller relationship. *See United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009) ("Evidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy. This is so even if the seller is aware of the buyer's intent to resell."); *Parker*, 554 F.3d at 235--36 ("[I]t is often said that mere awareness on the part of the seller that the buyer intends to resell the drugs is not sufficient to show that the seller and the buyer share a conspiratorial intent to further the buyer's resale. This is because the seller cannot be considered to have joined a conspiracy with the buyer to advance the buyer's resale unless the seller has somehow encouraged the venture or has a stake in it--an interest in bringing about its success. The transferor's mere *31 knowledge of the transferee's intent to retransfer to others, without anything more, would not show that the transferor had a stake or interest in the further transfer of the drugs." (citations omitted)); *United States v. Thomas*, 150 F.3d 743, 745 (7th Cir. 1998) (It was plain error not to instruct the jury on the buyer-seller rule in a case where the defendant bought cocaine for resale from the same supplier on three occasions, because "[n]one of the evidence suggests that [the seller] had any stake in [the buyer's] profits from [the resale]; all deals were cash on the barrelhead.").

conspiracies at trial, rather than the single conspiracy alleged, and the evidence established that Cabalcante was involved in at least one of the proved conspiracies, he must show prejudice to his "substantial rights" to establish reversible error. *See United States v. Richerson*, 833 F.2d 1147, 1154--1155 (5th Cir. 1987) (to establish a fatal variance between the indictment and proof, defendant must establish that the variance affected his substantial rights); *see also United States v. L'Hoste*, 609 F.2d 796, 801 (5th Cir. 1980) (If the government proves multiple conspiracies and a defendant's involvement in at least one of them, then there is no variance affecting that defendant's substantial rights).

Cabalcante can establish prejudice because the government transferred guilt to him by introducing cocaine seized in Conspiracy 2. This cocaine seizure had no bearing whatsoever upon Conspiracy 1 and without its introduction the Government would have not have been able to survive the Rule 29 motion.[15]

V. SUPPRESSION

[15] The concern here "centers around the keystone of [the American] criminal justice system that guilt with [in our courts] remains individual and personal, even as respect conspiracies, it is not a matter of a mass application." *United States v. Petersen*, 611 F.2d 1313, 1325 (10th Cir. 1979), cert. denied, 447 U.S. 905, 100 S.Ct. 2985, 64 L.Ed.2d 854 (1980) (quoting *Kotteakos*, 328 U.S. at 772). "[R]airness demands that alleged co-conspirators not be trailed alongside the perpetrators of a wholly separate criminal scheme." *United States v. Brito*, 721 F.2d 743, 746 (5th Cir. 1983). "The possible transference of guilt of other accused in the eyes and minds of a jury which so often is claimed to be encounter where en masse prosecution are undertaken for a conglomeration of separate offenses." *Id.* At 746-47.

A. Introduction

A motion to suppress the wiretaps, on which this case is based, was filed by co-defendant Freddy Correa based upon this case involving a joint venture between the DEA and CNP, which did not comport with Constitutional Protections of the Fourth Amendment, and lead to the current indictment.[16]

The denial of the motion to suppress put in motion a series of events which give rise to the Motion for New Trial, which is addressed elsewhere in this brief.

B. Magistrate's Report and Recommendation

As noted in the Magistrate Judge's, July 10, 2012, Report and Recommendation on the original motion to suppress the wiretaps, Piñeda joined in this motion.

An evidentiary hearing was held July 5, 2012. ROA.5105. Officer Milton Pachecho testified on behalf of the Government that he receives information from several agencies, including the DEA, and if the information has merit they will work on it. ROA.4719. Officer Pacheco stated that if they did not want to investigate the information that was provided by the DEA they would not investigate it. ROA. 4720. The DEA never supervised his unit according to Officer Pachecho. ROA.4726. When asked directly if the SIU, which was an American term, was managed by the

[16] The original motion is not part of the record provided by the Clerk's Office. It is DKT # 576 and is submitted as an excerpt to this brief.

DEA, Officer Pachecho stated "no." ROA. 4728. Officer Pachecho also stated that the vehicles and equipment that they used for surveillance and wiretapping were provided by the Colombian National Police. ROA.4742. Any money received from the United States would go to police operations and he was unaware of where the money comes from. ROA. 4744. In United States Government correspondence from 2010, the operation which lead to the arrests of the defendants was labeled a "joint investigation" between the DEA and CNP. ROA.4748. Due to subsequent events and subsequent testimony, it is certain that Officer Pachecho was at best being misleading and at worst lying.

Agent Ferguson, testified that the entire investigation was run by the CNP and they were under no obligation to follow up on the "tip" that he had provided and often would not. ROA.4753-56. Agent Ferguson stated that equipment used to intercept phone calls was provided by the Colombian Government and the CNP paid the officers to do the intercepts and the surveillance. ROA.4760.

The Magistrate Judge's report noted that he had heard from Officer Melton Pacheco, who later testified a trial. Officer Pacheco stated that the investigation began when his SIU received two telephone numbers from the DEA and the only thing the DEA was provide some additional numbers that were investigated in their unit. He specified that the DEA was never in charge and did not supervise the SIU. ROA. 4570-71. Agent Ferguson testified at the hearing in lock step with Officer

Pachecho. Agent Ferguson said the equipment that was used was paid for by the Colombian National Police and the Colombian National Police paid its officers. ROA. 4573. Based upon these representations, the Magistrate Judge concluded that "American authorities did not participate in the wiretaps nor were Colombian officials acting as agents of the United States to the extent necessary to implicate the Fourth Amendment." ROA. 4575. On August 10, 2012, the District Court adopted the original Report and Recommendation. ROA.4589.

Shortly before trial, the Government turned over the Grand Jury testimony of Agent Ferguson which was given on October 14, 2009. In contrast to his testimony at the first suppression hearing, Agent Ferguson told the Grand Jury what he did as a DEA agent in Colombia. That is our job is to interact with investigative authority we're assigned to manage. We're assigned what we refer to as SIU, a Sensitive Investigative Unit. Those Units are managed by the DEA and hand selected by the DEA." He further states that they trained "our" individuals both in the uses of investigative techniques in Colombia in the practice utilized for the benefit of the DEA investigative cases. He worked "hand-in-hand" with the Colombian police on a "daily basis." ROA. 4779-80.

On October 8, 2012, Mr. Cabalcante filed a joint motion for the Court to reconsider the motion to suppress the wiretaps asserting newly discovered evidence

regarding what Agent Ferguson testified too to the Grand Jury and the testimony at trial. ROA. 4691-4698.

On October 9, 2012, the Government submitted a response to the motion to reconsider the Court's order on the motion to suppress the wiretaps. The Government again argued that the involvement of the DEA was minimal and it was a Colombian National Police Operation with no oversight or joint venture. ROA. 662-672. As previously noted, Agent Ferguson testified at trial that the CNP officers that he supervised were trained by the DEA, polygraphed by the DEA or FBI, had all their equipment provided by the United States Government and were given money for their apartments by the U.S. Government and had their cars provided by the U.S. Government. ROA. 1369-1371. Agent Ferguson testified at the Grand Jury that the DEA managed and hand selected the members of the SIU for which he was assigned. However, at trial he said they were not managed by DEA until confronted with his prior Grand Jury testimony. ROA. 1594-1595.

On December 10, 2012, Mr. Moya submitted a joint reply to the Government's response. ROA.5608-5610. During trial, the Court made it clear that the motion to suppress would not be re-considered and it could be taken up on appeal despite what the testimony at trial was because it had been asserted pretrial and had "lost." ROA.2168-2170.

On October 15, 2012, the Court entered an order denying the Joint Motion to Reconsider the motion to suppress the wiretaps. ROA. 685-688. During the trial, the Court stated that suppression of the wiretaps would not be considered during trial but the defense nevertheless noted that they objected to the introduction of the wiretapped conversations. ROA.1736.

C. Motion to Suppress Wiretaps as a Joint Venture

The Government, in this case, went to great lengths to try to withhold the joint venture of the parties that lead to the wiretaps. Agent Ferguson would provide numbers to the SIU which he managed and they would work those numbers for the money that they were provided by the DEA as well as the equipment, apartment and cars that the DEA provided to them. It is certain that is was unlawful under the laws of Colombia for them to be on the DEA payroll but it was meant to be kept as a secret from the Court and defense counsel. However, the evidence that came out during and after trial tells some of the real story.

Traditionally, there have been two exceptions to a blanket prohibition of reviewing searches on foreign soil in which United States Government Agents participated in. The second of these applies in this case and is referred to as the joint venture doctrine. The exclusionary rule applies if it is a joint venture, that is the foreign authorities were acting as agents for their American counterparts. *United States v. Morrow*, 537 F. 2d 120, 129 (5th Cir. 1979).

The Trial Court's reliance on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), may be misplaced because the Supreme Court did not specifically review the joint venture exception in relation to persons from other countries. Counsel is aware that in *United States v. Emanual*, 565 F.1324 (11th Cir. 2009), the 11th Circuit held that the joint venture doctrine would not apply to citizens of other countries. However, in *United States v. Lee*, 723 F.3d 134 (2nd Cir. 2013) the Second Circuit suggests that a version of the joint venture doctrine survives the holding of *Verdugo-Urquidez* even though in *Lee* they found that the conduct of the officers did not rise to the level of a joint venture. This issue is being presented for the first time to the Fifth Circuit for a decision in interpretation of the joint venture doctrine in light of the holding of *Verdugo-Urquidez* and the contrary holdings of the 11th and 2nd Court of Appeals.

VI. THE COCAINE SEIZED FROM THE AVANTE WAS NOT INTRINSIC EVIDENCE [GERMANE TO BOTH CABALCANTE AND PIÑEDA]

A. Baseline Legal Principles

In determining whether "other acts" evidence was admitted erroneously, this Court first decides whether the evidence was intrinsic or extrinsic. *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010). " 'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were

'necessary preliminaries' to the crime charged." Id. (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). Intrinsic evidence is "admissible to complete the story of the crime by proving the immediate context of events in time and place." *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996) (emphasis added) (citing *United States v. Kloock*, 652 F.2d 492, 494-95 (5th Cir. 1981)); See also *United States v. Taylor*, 210 F.3d 311, 317 (5th Cir. 2000) (district erred in admitting evidence of coconspirators prior convictions as intrinsic evidence because the prior acts were not in furtherance of the conspiracy charged).

B. Factual Background

1. Government Exhibit 50

Over Cabalcante's repeated objections, the District Court erroneously admitted into evidence 340 kilograms of cocaine seized in 2009 aboard a vessel, "The Avante", as it was traveling from Ecuador to Panama. ROA.1063, 1203, 2471-79, 2576 and 3962 and Government's Exhibit 50. Cabalcante argued at trial that this evidence was not relevant, was unduly prejudicial and it was extrinsic to the conspiracy and that the seizure occurred after the conspiracy alleged in the Indictment ended.

2. Initial Trial Testimony of Victor Hugo Ramirez Estupinan

At trial the government called a cooperating witness, Victor Hugo Ramirez Estupinan ("Estupinan") to testify regarding the Avante load. Estupinan testified that he was a career drug trafficker who used vessels to transport cocaine out of Panama. ROA.2519. Estupinan claimed that he was introduced to Cabalcante by and associate of his, Pipino. ROA.2522. He claims that the first time he sold cocaine to Cabalcante was in March 2009. Estupinan conveniently added that Pipino told him that the cocaine he sold Cabalcante was destined for the Zeta drug caretl in Mexico. ROA.2524. He added that Cabalcante had a problem with alleged member of this conspiracy by the name of La Guera.[17]

Estupinan added that in October of 2009 he had his first face-to-face meeting with Cabalcante at a hotel in Bogota, Colombia. ROA.2525-26. According to Estupinan, Cabalcante gave him $600,000[18] in American dollars to secure the purchase of 200 kilos of cocaine. ROA.2526. Thereafter, Estupinan claims he sent the cocaine from Ecuador to Panama to be dispatched on the Avante. *Id.* The government offered the 340 kilos seized on Avante as evidence intrinsic to the present conspiracy case. Cabalcante argued that the kilos were extrinsic to the conspiracy because the meeting Estupinan testified to occurred outside of the timeframe of the Indictment.

[17] According to the government's evidence, La Guera was a Mexican woman who represented Zeta boss Ocaris' interests in Colombia.

[18] Estupinan acknowledged that the currency of Panama is in fact U.S. dollars.

3. District Court Recalls Estupinan For Voir Dire Examination

The District Court called Estupinan back after his testimony for *voir dire* to determine the exact time frame of the meeting between him and Cabalcante in Bogota. ROA.2614. Estupinan testified that he met up with Cabalcante in October, but he could not remember if it was towards the beginning or towards the end. He claimed "the Avante negotiations began about 20 days before we met personally." ROA.2516. The District Court concluded that "even if the meeting was on October 31, that if the negotiations began 20 days before, that's going to put it before October 15th the day the Indictment was returned, which will make it intrinsic in my opinion." *Id.* Cabalcante argued that Estupinan's recollection was very vague with respect to the time of the initial meeting (Estupinan acknowledges on cross-examination that he "don't remember dates"). *Id.* The District Court thereafter continued to probe Estupinan about when the meeting occurred in relation to Halloween in an effort to substantiate his recollection of the date of the meeting. *Id.* Estupinan could not recall whether it was several days or several weeks before Halloween. *Id.*

> THE COURT: Okay. Do you know how—a few days before you celebrated Halloween, or several days, or several weeks or –.
>
> THE WITNESS: I don't remember".

ROA.2619.

The District Court continued to probe.

THE COURT: Do you celebrate Columbus Day in Colombia?

THE WITNESS: October 12.

THE COURT: Did you celebrate that day?

THE WITNESS: Yes.

THE COURT: Was this meeting before or after Columbus Day.

THE WITNESS: Honestly, I don't remember.

Id.

The District Court ultimately concluded that the evidence was intrinsic because Estupinan alleged he met Cabalcante before Halloween. ("it's going to be—and it's 20 days, I think it fits within the indictment period"). ROA.2620.

C. Argument and Analysis

Based solely upon the timeframe of the deal, the District Court admitted the cocaine as intrinsic rather than extrinsic evidence. Intrinsic evidence, however, is limited to conduct that occurs *before* the return of the indictment. *United States v. Cochran,* 697 F.2d 600, 604 (5th Cir. 1983). In the instant case, the original indictment was returned on October 14, 2009. The Avante seizure occurred on December 9, 2009, approximately 6 weeks after the Indictment was returned in this

case. ROA 2474. The government claimed at trial that this seizure was intrinsic because the cocaine deal was consummated in "early October of 2009." *Id.*

The Indictment alleged that the offenses occurred from on or about 2002 through October 14, 2009. The Avante incident occurred in December 2009 and was not "inextricably intertwined" or a part of a "single criminal episode" of the conspiracy with which Cabalcante was charged; that being, conspiracy to import cocaine into the United States. *Cf. Taylor*, 210 F.3d at 317 (district erred in admitting evidence of coconspirators prior convictions as intrinsic evidence because the prior acts were not in furtherance of the conspiracy charged); *see also Rice*, 607 F.3d at 141. Given that the Avante seizure occurred well after the failed December 20, 2007 cocaine flight, and after the all efforts ceased to deliver cocaine to the Mexicans, this evidence cannot be characterized as "necessary preliminary" to the crime charged, *Williams*, 900 F.2d at 825, and therefore could not "be construed as inextricably intertwined with, related to as part of a single criminal episode, or necessary preliminaries to conspiracy of which [Cabalcante] was charged." *Taylor*, 210 F.3d at 317. Consequently, the District Court erred in admitting the evidence as intrinsic. *Id.*

VII. THE COCAINE SEIZED FROM THE AVANTE WOULD HAVE FAILED THE *BEECHUM* TEST

A. District Court's Alternative 403/404(b) Finding

Although intrinsic evidence does not implicate Rule 404(b), in this case, the district court alternatively found that the Avante seizure was admissible as extrinsic evidence. ROA.2874 ("I mean I think it clearly would come under 404(b) and it would be admissible.").

Even if the intrinsic evidence is determined to be proper, this Court reviews the evidence to determine if it should be excluded as unduly prejudicial under FED. R. EVID. 403. *United States v. Taylor*, 210 F.3d 311, 317 (5th Cir. 2000). This Court's "settled approach" to Rule 404(b) questions is the two-step test set forth in *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (*en banc*). *United States v. Grimes*, 244 F.3d 375, 384 (5th Cir. 2001). Under the *Beechum* test, "[f]irst, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [Federal] [R]ule [of Evidence] 403." *Beechum*. 582 F.2d at 911 (footnote and citation omitted).

B. The Cocaine Seized From the Avante Fails *Beechum*'s First Prong

Under the first step of the *Beechum* test (relevance), the relevance of an extrinsic offense or act is a function of its similarity to the offense charged. In this regard, however, similarity means more than that the extrinsic and the charged offense have a common characteristic. For the purposes of determining relevancy,

"a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand." Therefore, similarity, and hence relevancy, is determined by the inquiry or issue to which the extrinsic offense is addressed.

Id. (citation omitted). What this means is that

> [w]here the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and the charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.

Id. (footnote and citation omitted).

Likewise, where extrinsic act evidence is tendered for the purpose of proving knowledge, the extrinsic act must "be of such a nature that its commission involved the same knowledge required for the offense charged." *Id.* at 912 n.15.

The cocaine seized from the Avante does not make it past the first step of the Beechum test because it lacks the "crucial element of similarity," *United States v. Guerrero*, 650 F.2d 728, 734 (5th Cir. Unit A July 1981). The conspiracy alleged in the present case involved the use of airplanes to transport cocaine from Colombia to Guatemala for ultimate distribution in Mexico. The Avante involved the use of a sea vessel to transport cocaine off the cost of Panama.

C. Avante Seizure Was Outside the Scope of the Indictment

Moreover, the Avante seizure occurred after the conduct alleged in the indictment. *See United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978) ("the government may introduce evidence of other acts committed by conspirator during the life of the conspiracy). Under *Beechum* and its progeny, these evidentiary deficits deprive the extrinsic evidence of relevance with respect to the charged offense. The District Court therefore erred, and abused its discretion, in admitting that evidence against Cabalcante.

D. Evidence Should Have Been Excluded Under 403

Even if the Avante evidence were found to be proper intrinsic or extrinsic evidence, the evidence should have been excluded as prejudicial under the Rule 403 balancing inquiry. First, District Court performed no on-the-record balancing of the probative value versus unfairly prejudicial effect of the Avante evidence. This failure alone requires remand because, as this Court has held, **"[w]hen the admissibility of external offense evidence is a close question**, the court should say more, even without a request; it should pinpoint the element or elements listed in Rule 404(b) that the evidence will prove and explain why the evidence's probative value is not substantially outweighed by its undue prejudice." *United States v. Anderson,* 933 F.2d 1261, 1270 (5th Cir. 1991) (emphasis added) (quoting *United States v. Fortenberry*, 860 F.2d 628, 634 n.11 (5th Cir. 1988); internal quotation marks

omitted); *see also, e.g.. United States v. Elwood*, 993 F.2d 1146, 1153-54 (5th Cir. 1993) (remanding for district court to perform on-the-record Rule 403 balancing). The District Court never explained why the Avante evidence was not overly prejudicial. The District Court therefore reversibly erred in failing to perform an on-the-record Rule 403 balancing analysis.

But, irrespective of this failure, the admission of this evidence still fails. Any probative value of the evidence was substantially outweighed by the risk of unfair prejudice, confusion of the issues, and misleading the jury . . . ." *United States v. Guerrero*, 650 F.2d at 735. Cabalcante and Piñeda have argued that the evidence of guilt on the charged offenses was insufficient. *cf. United States v. Ridlehuber*, 11 F.3d 516, 523 (5th Cir. 1993) (fact that evidence of charged offense "was not particularly strong" was a factor weighing in favor of exclusion under Rule 403).

E. Government Emphasized the Avante Evidence In Both Its Opening and Closing Arguments

"Furthermore, the prejudicial impact of the [Avante] evidence was magnified by the prosecution's focus on that evidence." *Ridlehuber*, 11 F.3d at 523-24. Moreover, and the prosecutors pointedly relied upon the evidence in their opening and closing arguments. During the opening argument, the government told the jury how crucial the evidence was to its decision:

> Now also as to Jaime Gonzalo Castiblanco Cabalcante, you'll hear that in 2009 he buys cocaine from a co-conspirator. It begins in early 2009.

That co-conspirator's name -- and he's going to testify in this trial -- is Victor Ramirez Estupinan. He's going to tell you that he was a cocaine dealer broker himself. That this defendant needed another source of supply. His supplier couldn't keep up with Chalo's demands, so he went to Victor Estupinan Ramirez -- Ramirez Estupinan, and asked him if he could supply him with cocaine, these are the two organizations talking. And you'll hear that Victor Ramirez Estupinan started -- and his people, started supplying this defendant, Chalo, with cocaine in the spring of 2009. Ultimately, Chalo and Victor Ramirez Estupinan met at a hotel. And at that hotel there was approximately $690,000. Not pesos, United States currency. Because these drugs are intended for the United States. Everybody wants to be paid in United States currency. You'll hear that at this hotel meeting this defendant, Chalo, showed up with his bodyguards and he turned over 590 -- approximately $600,000 in United States currency to Victor Ramirez Estupinan. And that was payment for cocaine that was going to be transported on a boat called the Avante out of Colombia into the Ecuadorian waters, and it was for -- scheduled for delivery in Panama. However, the evidence will show that in December 9 of 2009, after the defendant had made these specific arrangements in October of 2009, that boat, the Avante, that had the cocaine that this defendant had paid for, had paid Victor Estupinan Ramirez for, was seized. You'll hear from Daniel Derr, he's the eye witness officer who boarded the vessel and seized the drugs. You'll hear about that. That is another event that relates to Jaime Gonzalo Cabalcante, also known as Chalo.

ROA.1256-57.

In closing, the government told the jury:

And then in 2009, he's got another deal with who? Mr. Victor Ramirez Estupinan. And what does that have to do with? You remember that Victor Ramirez Estupinan told you that that was also dealing with the Zetas. In fact Mr. Chalo said that he dealt cocaine to the Zetas, and they have this $600,000 transfer of cash at the hotel. But law enforcement did their job, United States Navy Coast Guard did their job and they seized that 385 kilos of cocaine from the Avante. That was his role, ladies and gentlemen.

ROA.4042.

> You heard from Victor Hugo Estupinan Ramirez. He told you he made five to 10 million-dollars in a very short time period. It's about the money. He told you that he met with Chalo at a hotel in South America. And what did Chalo bring him? Euros? Pesos? No, it was U.S. dollars that Chalo brought him from the United States to reinvest with Victor Hugo in a load of cocaine. Now that was ultimately the load of cocaine that was seized from the Avante.

ROA.4109.

F. Conclusion

As its closing argument demonstrates, the government shifted the focus from showing intent, motive, or purpose, to establishing alleged propensity to import cocaine into the United States. "This, however, is precisely the sort of evidentiary reasoning prohibited by Rule 404(b); it impermissibly allows use of a defendant's extrinsic actions to establish a certain character type in order to prove that the defendant committed the action in question." *United States v. Rodriguez*, 45 F.3d 302, 307 (9th Cir. 1995).

Here, when the government's evidence and closing arguments about the Avante are considered in conjunction with Cabalcante and Piñeda's sufficiency arguments, the prejudicial nature of the error is twofold. "First, the jury may infer that [Cabalcante] must be guilty of the charged offense because he associated with

[the co-conspirators and others]." *Taylor*, 210 F.3d at 318. This Court has "repeatedly held that such 'guilt by association' should be excluded." Id (footnote omitted).

Under these circumstances, the government cannot meet its burden of proving this error to be harmless. Because the unfairly prejudicial effect of the Avante evidence substantially outweighed its probative value this Court should reverse Cabaclante and Piñeda's convictions and remand for a new trial.

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CABALCANTE'S REQUEST FOR PATTERN JURY INSTRUCTION 2.23 AS TO WITHDRAWAL

A. Objection At the Charge Conference

At the charge conference, Cabalcante objected as follows:

> And number two, Your Honor, I would reurge my request for the withdrawal of the conspiracy instruction.
>
> I would simply remind the Court that there was a summary of calls that I provided, numbers and dates of calls that I provided to Special Agent Furgason. And the calls that we discussed during his cross-examination made it abundantly clear that Mr. Cabalcante had abandoned this objective of trying to secure this cocaine because there was absolutely no way that Don Juan and El Primo were ever going to be able to provide it. It was obvious from the conversations that I cross-examined about that they had abandoned this endeavor. Mr. Cabalcante made it very clear that he was done with this endeavor, and that his objective was because he was getting pressure from Lupito and Ocaris about this money -- about this money that Jimmy took on the recommendation of Mr. Cabalcante, his role from that point was trying to avoid this problem with these people and get them their money back. He had made

> it clear to all the players in this case -- it is obvious from the calls that El Primo and Don Juan were ducking Mr. Cabalcante and were ducking Lupito. They were not taking calls because they could not deliver.
>
> Based upon the evidence that the Court heard, I would reurge my request for the instruction with respect to abandonment of the conspiracy and exiting the conspiracy.

ROA.3964-3965 (emphasis added).

Appellant also filed Proposed Jury Instruction No. 6:

> The burden of establishing an abandonment of or a withdrawal from a conspiracy lies upon the defendant. It is clear that, once an individual has joined in an unlawful scheme, which is meant to continue until full fruition, in order to be found to have withdrawn from such conspiracy, that individual must show that he acted affirmatively to defeat or disavow the purpose of the conspiracy; in this case, knowingly and intentionally importing cocaine into the United States from Colombia and Mexico. An example of such an affirmative action is demonstrated when the defendant makes a clean breast [Sic] to the authorities or notifies the other members of the conspiracy of a termination of his participation.

ROA.4631.

The District Court did not explicitly overrule this objection or deny the proposed charge, but no jury instruction was given as to withdrawal.

B. Baseline Legal Principles Governing Withdrawal From A Conspiracy

A conspiracy participant is legally liable for all reasonably foreseeable acts of his or her coconspirators in furtherance of the conspiracy. Pinkerton v United States, 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). However, a conspiracy

participant is only obligated for the acts of his or her co-conspirators until the conspiracy accomplishes its goals or until the conspirator withdraws. See *Hyde v. United States*, 225 U.S. 347, 369, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). The defense of termination by withdrawal requires that the defendant show that he or she has done "some act to disavow or defeat the purpose" of the conspiracy. *United States v. Cherry*, 217 F.3d 811, 817-18 (10th Cir. 2000) (citing *Hyde*, 225 U.S. at 369).

While withdrawing from a conspiracy may not exonerate past conduct, it can limit liability as to future conduct by co-conspirators. *United States v. Williams*, 374 F.3d 941, 949-550 (10th Cir. 2004). Furthermore, it may limit liability in that withdrawal from the conspiracy starts the running of the statute of limitations. See Williams, 374 F.3d at 950 (citing with approval *United States v. Grimmett*, 150 F.3d 958, 961 (8th Cir. 1998)).

C. Points of Evidence From The Trial That Entitled Cabalcante to Pattern Jury Instruction 2.23

The evidence offered at trial established that in May of 2008, Cabalcante was no longer a part of the conspiracy to import cocaine from Colombia into the United States. The Government refused to concede this fact, but the evidence at trial made it abundantly clear that Cabalcante withdrew from the conspiracy to import cocaine and instead was tasked with securing the return of the money fronted by the Mexicans to the Colombians.

Q: And you do know that at this meeting [in May of 2008 in Ibague, Colombia] this entire deal was cancelled, correct?

A: Yeah, I was told something about the fact that it had been cancelled, that the monies were being returned.

ROA.2458 (cross-examination of Byron).

Q: And Ocaris wanted his money back.

A: Yes.

Q: And in fact, on the wire El Primo is lamenting that he's been visited by a collector. Correct?

A: Yes. And Gonzalo [Cabalcante] indicates that they need to return the money. They need to do whatever is necessary to get it back.

ROA.1978 (cross-examination of SA Furgason).

The above testimony confirms that as of May 2008, Cabalcante was no longer a part of a conspiracy to import cocaine into Guatemala, Mexico or the United States. Conspiracy 1 thereafter ceased to exist. As noted supra in the sufficiency issue, Cabalcante had nothing whatsoever to do with Conspiracy 2.

Under the law of conspiracy, Cabalcante is only responsible for the reasonably foreseeable acts of his or her coconspirators in furtherance of the conspiracy. Pinkerton, 328 U.S. at 646-47. Since Conspiracy 1 (the El Primo/Don Juan conspiracy to import cocaine to Mexico via Guatemala) ceased in May of 2008, Cabalcante should have been entitled to a withdrawal instruction. . See Hyde, 225 U.S. at 369. (noting that a conspiracy participant is only obligated for the acts of his

or her co-conspirators until the conspiracy accomplishes its goals or until the conspirator withdraws). The testimony referenced supra established that the conspiracy was incapable of meeting its goal. The above testimony concerning the May 2008 Ibague meeting also established that Cabalcante took "some act to disavow or defeat the purpose" of the conspiracy. *See Cherry*, 217 F.3d and 817-18.

> Q: **You know from your investigation of this case that on May 28 there was a meeting held in Ibague, Colombia where an emissary from the Mexicans, a lady named La Guera, met with El Primo and they agreed to call off this whole endeavor and cancel this whole project. Correct?**
>
> A" Are you talking about one of the conversations here, or a conversation between Gonzalo, Primo and La Guera?
>
> Q: Are you aware of that May 28 meeting?
>
> A: I believe there was some surveillance, I'm not sure. I would have to see the photos.
>
> Q: And you are aware that they changed this from a deal for cocaine, to a return of the money. Right?
>
> A: **Yes, there was between Lupito, Gonzalo – numerous individuals, they were demanding the money back.**

ROA.1976 (emphasis added).

The above testimony supports Appellant's defense theory that in May 2008 his role had shifted from trying to facilitate this deal to instead trying to recover the Karis' money. The Ibague meeting clearly communicated this fact to his coconspirators. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464 (1978)

(requiring that to withdraw from a conspiracy, defendant must take affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonable calculated to reach coconspirators). Accordingly, Appellant presented sufficient evidence to justify the granting of the withdrawal instruction. The District Court's denial of this instruction was therefore an abuse of discretion.

IX. THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON SPECIFIC INTENT

All defendants requested that the trial court give an instruction defining specific intent. ROA.3973 ("I have submitted to the Court a request for an instruction which is a definition of willful, which would include the word specific intent.").

More specifically, Proposed Jury Instruction No. 3 read as follows:

> The evidence in the case *must* show beyond a reasonable doubt that two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment. The unlawful plan alleged in the indictment was to import cocaine into the United States from Colombia and Mexico. In order to find Cabalcante Castiblanco guilty, **you must therefore find beyond a reasonable doubt that he knew and specifically intended that the cocaine alleged in the Indictment was destined for the United States.**

ROA.4627.

Cabalcante also filed a pretrial objection to the Government's proposed charge with respect to its lack of a specific intent element. Cabalcante argued that:

> The government, however, fails to acknowledge in its proposed instruction that this offense requires a find[ing] of specific intent to import the cocaine at issue into the United States. I would submit that you need to add a forth element that defendants had to know and specifically intend that the cocaine alleged in the indictment was destined for importation into the United States.

ROA.4638.

Throughout the trial, defense counsel repeatedly urged the District Court to consider giving a specific intent instruction. ROA.1223, 3810, 3950 and 3973. The District Court refused to do so.

There is no doubt that the instruction requested by Appellants in this case was a "substantially correct" statement of the law. The crimes alleged in Counts 1 and 2 required a specific intent to import cocaine into the United States. *See United States v. Conroy,* 589 F.2d 1258, 1270-71 (5th Cir.1979) *cert. denied,* 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979) (nothing the law in this circuit, to support his contention that a conspiracy to import a controlled substance into the United States requires proof that the defendant knew the controlled substance "was destined for the United States"); *see also United States v. Ojebode*, 957 F.2d 1218, 1224 (5th Cir. 1992) *disapproved of by United States v. Oreira*, 29 F.3d 185 (5th Cir. 1994).

Thus, the first of the three conditions for reversal was met in this case. The second condition was also met, since the Court's charge to the jury did not substantially cover the content of the instruction requested by Cabalcante and

Piñeda. The failure of the trial court to properly instruct the jury regarding the terms, "specific intent" and "willfully," prejudiced both Cabalcante and Piñeda because nowhere in the trial court's charge did the court tell the jury that the Government had to prove that each of the defendants specifically intended the cocaine to be imported into the United States. The District Court's jury instruction simply asked to jury to find a general intent among the conspirators, and not a specific intent, to import cocaine into the United States. ROA.4026.

As a correlate to the situation described in the section of this brief addressing insufficient evidence, there was a surfeit of evidence established offered at trial to disprove the Government's theory that the cocaine in this case was destined for the United States. This case is therefore one of those rare cases that still falls within the scope of *United States v. Goss,* 650 F.2d 1336 (5th Cir. 1981), which held that if there is any evidentiary support whatsoever for a legal defense, and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing thus to charge the jury. *Id.*, 650 F.2d at 1344. This Court has also stated that "to determine whether the trial court's failure to give a requested jury instruction violates a defendant's right to the fair trial guaranteed him by the Due Process Clauses of the Fifth and Fourteenth Amendments, the charge must be examined in the full context of trial") *See United States v. Fooladi,* 746 F.2d 1027, 1030 (5th Cir. 1984), *cert. denied,* 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 382

(1985). A review of the specific intent arguments raised supra in the sufficiency section makes it abundantly clear that Appellants' rights were violated as consequence of the trial court's failure to instruct on this issue.

Moreover, the District Court's failure to grant a specific intent instruction seriously impaired the ability of Cabalcante and Piñeda to effectively argue their defense theory to the jury. This error became painfully evident when the jury returned a note during its deliberations.

> We the jury request the following, and it goes Re: Count 1: If we agree that there was a conspiracy, **must we believe that each – each is underlined -- defendant knew or intended importation to the U.S.,** question mark? **Or, if we believe there was a conspiracy and only one or two defendants had knowledge of importation to U.S. can we find all four guilty of Count 1.**

ROA.3949 (emphasis added).

This note by the jury reinforces that they were of the belief that a general intent among "one or two defendants" that the cocaine was intended for importation into the United States was sufficient to find all defendants guilty. This note, and the trial court's response[19], only compounds the error in this case by making it abundantly clear that the jury failed to consider the intent of each defendant before returning a guilty verdict. Herein lies the harm which redounds the district court's error.

[19] "No. Please note that only three of the defendants are charged in Count 1 of the indictment. Please read carefully the instructions regarding Count 1 found on pages 13 through 15 of the Court's Instructions to the Jury, as well as the remainder of the instructions." ROA.3956.

X. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANTS' JOINT REQUEST FOR A JURY INSTRUCTION AS TO VENUE

A. Timely Objection

At the charge conference, Cabalcante and Piñeda requested the Court to charge the jury on the necessity of finding, as a matter of fact, that venue was properly laid in the Eastern District of Texas.

For record purposes, Your Honor, I just want to formally make my objection to the Court's denial of that venue instruction.

ROA.3967.

Appellants' Proposed Jury Instruction No. 5 read as follows:

> The Government has alleged that Defendant, Jaime Gonzalo Costilblanco Cabalcante committed the alleged crimes in the Eastern District of Texas. Our Constitution provides that a trial must be conducted in the State and District in which the crime occurred. With regard to location of the offense, you are instructed that, except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. If the government fails to prove to you beyond a reasonable doubt that Castilblanco Cabalcante did commit a crime, you must find him Not Guilty. **Additionally, if you find that Mr. Castilblanco Cabalcante did commit the crime, but it did not occur in the Eastern District of Texas, you shall find him Not Guilty of the charged crime.**

ROA.4625 (emphasis added).

At the close of the government's case, Cabalcante and Piñeda also requested the following additional proposed venue instruction:

> You are hereby instructed that the government has alleged that Defendants that on or about 2002 the exact date unknown to the Grand Jury and continuing thereafter up to and including October 15, 2009, in the Republic of Colombia, the Republic of Mexico, the Eastern District of Texas and elsewhere, Defendants did knowingly and intentionally import at least five kilograms of cocaine into the United States. **If the government has not proven that conduct occurred in the Republic of Colombia, the Republic of Mexico, the Eastern District of Texas and elsewhere, by a preponderance of the evidence, you are instructed to find the Defendants not guilty.**

ROA.4783 (emphasis added).

B. The District Court Adopted the Government's Urged Venue Paradigm

The government's position at trial was that "venue was established by the long-arm statute as a matter of law … [and since the issue is] not raised by the evidence, it's not an appropriate jury instruction." ROA.3968. It is the core contention of Cabalcante and Piñeda that venue is an essential element of the crime that must be proven to the jury. The court denied the District Court denied Appellants' requested special instruction, ruling that "other venue statutes [presumably] govern in this situation because it something arising outside the United States." ROA.3971.

The District Court erred in refusing to give a venue charge to the jury where the defense made a request for the court to do so. *See United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); *United States v. Miller*, 111 F.3d 747 (10th Cir. 1997) (venue issue of fact for jury) (citing *United States v. Record*, 873 F.2d 1363, 1370 (10th Cir. 1989); *United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979); *Green v. United States*, 309 F.2d 852, 856 (5th Cir. 1962); *United States v. Gillette*, 189 F.2d 449, 452 (2d Cir.1951)). *See also United States v. Gillette*, 189 F.2d 449, 452 (2d Cir. 1951) (L. Hand, C.J., Swan, Frank, J.J.)(denial of request to give venue charge error, since venue an indispensable part of Government's proof); Scott A. Liljegren, Comment, *Criminal Procedure: Failure to Instruct the Jury on Venue, When Requested, Constitutes Reversible Error, Notwithstanding Venue Subsumed by a Guilty Verdict*, 37 WASHBURN L.J. 439 (1998); and 2 Charles Allen Wright, *Federal Practice & Procedure* § 307, at 225 (2d ed. 1982 & Supp. 1999) (whether venue has been properly proved is an issue of fact for jury, but jury must have been properly instructed to make this finding).

Contrary to the government's position in this case, venue is not a mere legal technicality, but is a right safeguarded in the United States Constitution. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI. *See also* FED. R. CRIM. PROC. 18 (adopting constitutional venue standard in Federal criminal prosecutions). The Supreme Court

has held that failure to safeguard an accused's rights as to venue may not only impose hardship and unfairness to the accused, but might also encourage forum shopping by federal prosecutors. *United States v. Johnson*, 323 U.S. 273, 275 (1944). Accordingly, issues of venue are not merely issues of formal legal procedure, but raise deep issues of public policy. *Id.* at 276.

Whether venue has been properly proven is an issue of fact for the jury. Therefore, the jury must be properly instructed in order to make this finding. *See Winship*, 724 F.2d at 1124. A general jury verdict of guilty does not incorporate a finding as to proper venue. *Miller*, 111 F.3d at 753. No matter how overwhelming the evidence of venue, the court's speculation as to the verdict the jury might have reached if properly charged on venue is no substitute for an actual jury verdict. Indeed, in a multi-national case such as this where the District Court refuses to charge on the issue of venue despite a defense request to do so, the government cannot, as a matter of law, show beyond a reasonable doubt, or even a preponderance of the evidence, that the jury's verdict necessarily incorporates a finding of proper venue. *Miller*, 111 F.3d at 751.

C. Because the Verdict Here Included no Finding on Venue, the Error was Both "Plain" and "Structural"

In the case sub judice, the jury made no finding as to venue. Since such a finding is one of the core components of the jury verdict guaranteed by the Sixth Amendment, the court's omission requires that both appellants' conviction(s) be reversed. *Gillette*, 189 F.2d at 452; *Sullivan v. Louisiana*, 508 U.S. 275 (1993). No showing of prejudice is required; in other words, the error that occurred here is both "plain" and "structural." *United States v. Birbal*, 62 F.3d 456, 461 (2d Cir. 1995) (defective reasonable doubt instruction both plain and structural error. Cf. Gillette, 189 F.2d at 454 (no error where, based on other portions of the court's charge, the jury must necessarily have found proper venue before convicting).

XI. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING A NEW TRIAL

A. Introduction: Defendants File Various Motions for New Trial

On February 7, 2014, Defendant Butraigo filed a Motion for New Trial. ROA.5636.

On February 11, 2014, Cabalcante filed a Motion for New Trial based upon newly discovered evidence and prosecutorial misconduct. ROA.4821.

On February 13, 2014, Piñeda filed a "Motion to Join Codefendants Motions for New Trial". Doc. No. 1197. While the District Court never explicitly ruled on

Piñeda's motion to join, the order denying relief was clear that "Defendant Julio Hernando Moya Buitrago ("Moya"), Jaime Gonzalo Castiblanco Cabalcante ("Castiblanco"), and Oscar Orlando Barrera Piñeda ("Barrera") (collectively, "Defendants") filed Motions for New Trial (#s 1189, 1191, and 1197, respectively) based on allegations of newly discovered evidence and prosecutorial misconduct." ROA.6537. Thus, it is clear that the District Court regarded Piñeda as properly joining these objections and preserving the issue for appeal.

B. New Evidence

The new evidence came from a Southern District of Florida drug conspiracy case involving substantially the same DEA and Colombian National Police officers who testified in the present case. *See United States v. Jose Salazar Buitrago*, Case No. 10-20798-CR-Cooke.[20]

After jury selection in the Miami case began, defendant Salazar-Buitrago filed a Motion to Dismiss Based Upon Outrageous Government Conduct. *See United States v. Jose Salazar Buitrago*, Case No. 10-20798-CR-Cooke at Doc. No. 474.

> At that time, the Court inquired of AUSA Andrea Hoffman whether any monies were paid by the United States government to members of Colombian law enforcement in connection with the investigation of this case. Ms. Hoffman responded that she was unaware of any such

[20] The United States Attorney's Office for Eastern District of Texas worked closely with the Untied States Attorney's Office for the Southern District of Florida in developing the investigation that ultimately lead to the indictment in this case.

> payments. Jury selection in this case was completed the morning of May 21, 2013, after which time opening statements were made.
>
> The government then called its first witness, Colombian National Police Officer Pacheco. During the cross-examination of Mr. Pacheco, it was revealed that he and other officers in his unit receive $200.00 per month from the United States Embassy in Colombia. Following the cross-examination of Officer Pacheco, the Court, *sua sponte*, excused the jury and conducted its own inquiry regarding such payments. During this inquiry, **Officer Pacheco testified under oath that he does not have to give the United States an accounting of how he spends the $200 per month that he is paid by the United States, but he is encouraged to use that money to assist him in undercover investigations.** The Court then excused the jury for the remainder of the afternoon and made further inquiry about this issue. The Court's inquiry ultimately revealed that when Ms. Hoffman represented to the Court on May 20, 2013 that she was unaware of any payments flowing from the United States to individual Colombian law enforcement officers and groups, she was less than truthful (see transcript of court's questioning of S/A Turke regarding 'bonuses') [p. 16, lines 12-22].

Id. at 3 (emphasis added).

The District Judge in the Miami case thereafter questioned DEA Special Agent Guillermo Turke concerning the concealment of payment by the United States to the Colombian National Police.

> THE COURT: Can you tell me, are you aware of this 200-dollar per month payment that was paid to Colombian police officers and how that works?
>
> SPECIAL AGENT TURKE: Yes, ma'am.
>
> THE COURT: How does it work?
>
> SPECIAL AGENT TURKE: **It is a bonus that the police officers receive for their undercover operations that they do and their**

> **expenses for them to operate on a daily basis on the streets**. When they conduct surveillances, they have to buy undercover clothes because they are not uniform cops. They use the money to buy lunches, when they are doing surveillances and covering meets, things like that, operational.
>
> THE COURT: **And this is something that is known for the individuals that work in this unit, this is not a secret?**
>
> SPECIAL AGENT TURKE: **No, ma'am.**

ROA.4484-85.

Both CNP Officer Pacheco and Special Agent Guillermo Turke testified at trial in the present case. ROA.2837 and ROA.3205. CNP Officer Pacheco also testified at Appellants' joint suppression hearing. ROA.5121. He denied that he personally received money from the United States in connection with his investigative work on the Special Investigations Unit.

> Q: (BY MR. D'ANGELO) Are you aware whether this investigation unit is funded by the United States?
>
> A: (OFFICER PACHECO) We receive support for operations.
>
> Q: And in the support that you receive for observation (sic), you receive money?
>
> A: The director of criminal investigation.
>
> Q: And when the director of criminal investigation receives this support, it's financial support for these investigations, correct?
>
> A: For operations.
>
> Q: And this case that we're here for today for is an operation?

A: At the moment of capture, not during the development of the investigation.

Q. So you're saying that you're only aware of funding from the United States at the point that you capture suspects?

A: Police operations.

Q: Would you agree with me that police operations include the monitoring of the telephone calls in this case?

A: No.

Q: So that was all paid for by the Colombian government is your testimony?

A: The -- the -- I don't -- **I don't know where the money comes from.**

Q: Correct. **You don't know where the funding comes from for these operations.**

A: **No.**

Q: **At best, all you can say is that your office receives organizational funding from the United States.**

A: **Yes.**

ROA.5147-48 (emphasis added).

Pacheco's testimony at the suppression hearing directly contradicts the testimony in the Miami case. As noted supra in the Miami hearing transcript, all the CNP officers did in fact did receive $200.00 per month directly from the United

States government.

DEA Special Agent William Michael Ferguson also testified at the suppression hearing and denied any direct knowledge of payments made from the United States to the CNP. ROA.5156. SA Ferguson was the lead case agent in this case.

> Q. Who pays for the officers to do the surveillance and monitoring?
>
> A. The Colombian National Police.
>
> Q. And there's no money that leads back to the United States for any of those investigative efforts by this Special Investigative Unit?
>
> A. There is funding supplied by DEA, but not through Plan Colombia.
>
> Q. Where is it supplied from?
>
> A. From DEA.
>
> Q. And where does it go in Colombia?
>
> A. It goes to the DIJIN [Direccion de Policia Judical e Investigacion], and the DIJIN then parses out the money through each individual unit.
>
> Q. And how much money goes from DEA to the DIJIN?
>
> A. I couldn't account for that. I wasn't the accountant that managed that program.

ROA.5164-65.

SA Ferguson’s testimony at the suppression hearing also contradicts that of SA Turke in the Miami case. SA Turke worked with SA Ferguson in the

investigation of this case. Turke testified that it was common knowledge that DEA directly funded CNP officers for expenses related to surveillance of targets in Colombia. ROA.4484. The lead investigator in this case, Ferguson, claims he "wasn't the accountant that managed that program" and therefore had no idea whether DEA directly funded CNP officers. ROA.5165.

Ferguson's testimony was an obvious attempt to avoid conceding that the DEA directly supervised and funded the CNP. Such a concession would have triggered Defendant's Fourth Amendment protections as to the Colombian wiretap recordings.[21] At the Grand Jury proceedings in this case, however, Ferguson testified that the Colombian National Police Officers working on the Special Investigations Unit in this case are "managed by DEA and **hand-selected by DEA**." ROA.4946. Ferguson went on to testify that DEA "trained … [SIU officers] both in the uses of investigative techniques … [and] in the practice utilized for the benefit of DEA investigative cases." *Id.* Moreover, Ferguson testified that he worked **hand-in-hand with Colombian law enforcement on a "daily basis"**. *Id.* (emphasis added). Special Agent Ferguson's grand jury testimony concerning the degree of oversight and involvement he had with the Colombian SIU is consistent with the testimony

[21] *See United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) (noting that the Fourth Amendment applies to overseas wiretap recordings in two instances: 1) if the actions by foreign officials "shock the conscience" of the court; and 2) if American officials participated in the search or foreign officials acted as agents for the United States.

noted supra in the Miami case and totally at odds with his testimony at the suppression hearing in this case.

This Court denied Defendant's suppression motion finding that CNP Officer Pacheco's and DEA Agent Ferguson's testimony supported a finding that "American authorities did not participate in the wiretaps nor were Columbian officials acting as agents of the United States to the extent necessary to implicate the Fourth Amendment." ROA.4575. Because the Court declined to apply the Fourth Amendment to the wiretap recordings in this case, no determination was made whether the Columbian wiretaps were reasonable under Columbian law. In reaching this conclusion, the District Court relied upon the false and misleading testimony of Pacheco and Ferguson. There can be no doubt that if the wiretap recordings were excluded from evidence under the Fourth Amendment, the jury's verdict in this case would have been different.

The general rule is that newly discovered evidence will not entitle a defendant to a new trial under Rule 33 unless the evidence *probably* would produce a different result. *United States v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985). When basing a motion for new trial on newly discovered evidence, a defendant must ordinarily show that: I) the evidence is, in fact, newly discovered and was unknown at the time of trial; 2) the failure to discover the evidence was not due to lack of diligence by the defendant;

3) the evidence is material, not merely cumulative or impeaching; and, 4) the evidence will probably produce acquittal. *United States v. Loney*, 959 F.2d 1332, 1334, n.28 (5th Cir. 1992); *United States v. Munoz,* 957 F.2d 171, 173 (5th Cir. 1992); *United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991). Given that the Miami hearing occurred after the verdict in this case, there is no chance that Appellant could have otherwise discovered this evidence. Because establishment of a joint venture between the DEA and CNP was critical to the suppression issue, the evidence was material. As noted supra, because the government's case relied heavily upon the wiretap recordings, evidence supporting the suppression of these recordings due to a joint venture would have likely produced an acquittal in this case.

C. Perjured Testimony

A somewhat different test is employed where, as here, the newly discovered evidence involves an allegation of perjury. Where, as here, it is alleged that the government used false testimony, and knew or should have known of its falsity, a new trial must be held if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. MMR Corporation,* 954 F.2d 1040, 1047 (5th Cir. 1992), *citing, United States v. Antone,* 603 F.2d 566, 569 (5th Cir. 1979); *United State v. Lopez-Escobar,* 920 F.2d 1241, 1246 (5th Cir. 1991).

The Constitution forbids the government from seeking a conviction in a criminal trial by the use of perjured testimony. *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). In *Agurs v. United States,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976), the Supreme Court concluded that a conviction obtained through a prosecutor's knowing use of perjured testimony is fundamentally unfair and must be set aside if there is "any reasonable likelihood that the false testimony could have affected" the judgment of the jury.

When a defendant seeks a new trial on the ground that the government used perjured testimony, he "must establish (1) that the prosecution indeed presented perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is some likelihood that the false testimony impacted the jury's verdict." *Id.* The perjured testimony must bear a direct relationship to the defendant's guilt or innocence." *United States v. Magana,* 118 F.3d 1173, 1191 (7th Cir.1997), *cert. denied,* 522 U.S. 1139, 118 S.Ct. 1104, 140 L.Ed.2d 158 (1998). Evidence is false if it is specific misleading evidence important to the prosecution's case in chief. False evidence is material only if there is any reasonable likelihood that [it] could have affected the jury's verdict. *Nobles v. Johnson,* 127 F.3d 409, 415 (5th Cir. 1997).

CNP Officer Pacheco's false testimony is imputed upon the prosecutor. *See Wedra v. Thomas,* 671 F.2d 713, 717 n. 1 (2d Cir.) *cert denied,* 458 U.S. 1109 (1982) (noting that "the knowledge of a police officer may be attributable to the prosecutor if the officer acted as an arm of the prosecution"); *see also Vail v. Walker*, 1999 WL 34818638 (N.D.N.Y. Aug. 24, 1999) (observing that when attributing police conduct on the prosecutor, courts should focus on the degree to which the officer giving the perjurious testimony was involved in the prosecution's case). As discussed supra, this false evidence was material to the State's case and had a substantial influence on the jury's verdict. *See Barrientes* 221 F.3d at 752-53.

D. Materiality

In determining whether perjured testimony is "material" in a given case, the Supreme Court requires that a strict standard of materiality apply, not only because the knowing use of perjured testimony involves prosecutorial misconduct, but because it involves a corruption of the truth-seeking function of the trial process. *United States v. Agurs, supra*, 96 S.Ct. at 2397. Pacheco and Ferguson's false testimony satisfied the test set forth supra in *Agurs*. A comparison of the testimony offered in the Miami case to that offered in the present case confirms that the prosecution indeed presented false testimony. The witnesses in this case acted as an arm of the government. As a consequence, the prosecution knew or should have known of the perjured testimony.

In sum, there is a strong likelihood that the false testimony in this case impacted the jury's verdict on the basis that it opened the door to the wiretap conversations coming into evidence. There is no doubt that without those wiretap conversations, the prosecution would have been disemboweled and the jury's verdict could only have been to acquit. Accordingly, the District Court erred in denying Cabalcante's and Piñeda's Motions for New Trial.

XII. SUMMATION MISCONDUCT

In its opening summation, the first Prosecutor did not mention "dollars" a single time as an indicator of intent to import. Nor did the defendants hinge on this during their summations. Nevertheless, the second Prosecutor transformed her rebuttal into a brand new closing argument with a primary focus on American dollars as evidence of guilt, unhinged from the limited function of respond to statements made during the defenses' summation.

Counsel vigorously objected:

> I would draw the Court's attention to Rule 29.1, it requires in closing arguments that the government argues, that the defense then argues, then the government rebuts. Now what we just saw was the government put on a facade of an opening. I think they took 20, 25 minutes. Then defense had their closing arguments, and then the government had their closing arguments. They didn't rebut ours, they just had their brand new arguments and we never got to rebut.

ROA.4149.

Especially because I didn't hear one peep about the dollars, dollars, dollars, and that was their closing argument for an hour. It started with dollars and ended with dollars. We didn't get a chance to rebut that, Your Honor…

ROA.4150.

"Sandbagging occurs when a prosecutor argues new theories of makes new arguments not made previously." Bennett L. Gershman, Prosecutorial Misconduct §11:20, p. 524 (2d ed.) (West 2014).

The Prosecutor's summation misconduct in the case sub judice is similar to that which caused the District of Columbia Court of Appeals to find plain error in *Coreas v. United States*, 565 A.2d 594 (D.C. 1989). The prosecutor in his initial closing summation argued that the defendant's story was inconsistent with the medical evidence and pointed to defendant's guilt. The defense then made its closing argument centered on the theory of self-defense. The prosecutor, for the first time in his rebuttal argument, raised an entirely new theory, i.e., that the defendant was lying in wait for the victim. Another court characterized as "outrageously unfair conduct" a prosecutor's waiting until the rebuttal summation to play damaging portions of tape recordings for the first time. *United States v. Giovanelli*, 945 F.2d 479 (2d Cir. 1991).

XIII. SENTENCING

A. Guidelines Requires Actual Importation

Piñeda objected to the 2-level Specific Offense Characteristic of U.S.S.G. § 2D1.1(b)(3), which reads:

> If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance,… (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels.
>
> As an initial matter, it must be noted that this enhancement speaks of 'importation or exportation' not any attempt at either of these conditions. Since it was undisputed that no cocaine ever left Columbia, this Specific Offense Characteristic is facially inapplicable to Piñeda.

B. Eleventh Circuit Reversed On This Point of Law in *United States v. Chastain*

The Eleventh Circuit rejected application of this Guideline for that exact reasons in *United States v. Chastain*, 198 F.3d 1338, 1353 (11th Cir. 1999):

> In Appellants' case, there was clearly an attempt and a conspiracy, on which the district court relied in applying this enhancement. However, the plain language of the guideline that uses the past tense, viz "used to import," cannot be ignored. When the language of the guideline is clear, it is not necessary to look elsewhere for interpretation. Here, the language of the guideline clearly contemplates a completed event, an actual importation. That did not occur in this case.
>
> The two-level increase as applied to these three Appellants, therefore, was an error of law. Because it was incorrect for the district court to apply the enhancement, the sentences of Appellants Chastain, Hopkins, and Rucks are remanded for re-sentencing.

C. The Rule of Lenity Gives Succor to A Reading Requiring Actual Importation

Insofar as this Guideline is ambiguous on the point, this Court should apply the Rule of Lenity to restrict its reach to instances of actual importation or exportation. "When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. For Women*, 537 U.S. 393, 409 (2003). "When they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting- namely the Department of Justice or its state equivalent." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 299 (1st ed. 2012). Furthermore, the Rule of Lenity applies to sentencing statutes. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *United States v. Simpson*, 319 F.3d 81, 87 (2d Cir. 2002) ("[W]e are satisfied that the rule of lenity is generally applicable to the Sentencing Guidelines as well as criminal statutes, in order for the rule of lenity to apply to a criminal law—or in this case, to a Guideline—the provision of law at issue must be ambiguous.").

D. Harm Analysis

At Level 40, Piñeda's Guideline range was 292-365. But at Level 38, the range is only 235-293 months. Since the District Court rejected Probation's recommendation for a sentence in the middle of the (incorrect) range at Level 40 and

instead chose the bottom of that improperly computed range, there is every reason to think that the court would have chosen a point below 292 months had the low end of the range been properly computed at 235 months.

CONCLUSION

The convictions of Piñeda and Cabalcante must be reversed and rendered if this Court finds the evidence insufficient as to any count of conviction.

In the first alternative, both Piñeda and Cabalcante should be afforded a new trial on the basis of newly discovered evidence and perjured testimony.

In the second alternative, both Piñeda and Cabalcante should be afforded a new trial on the basis of the evidentiary errors surrounding the cocaine seized from the Avante and the failure to give the jury Pattern Instruction 1.30 on similar acts.

In the third alternative, both Piñeda and Cabalcante should be afforded a new trial on the basis of the summation misconduct.

In the fourth alternative, Cabalcante should be afforded a new trial on the failure of the district court to instruct the jury as to withdrawal (Pattern Jury Charge 2.23).

Respectfully submitted,

Carlo D'Angelo
ATTORNEY AT LAW
100 E. Ferguson St.; Suite 1210
Tyler, TX 75702

[Tel.] (903) 595-6776
[Fax] (903) 407-4119

COURT-APPOINTED ATTORNEY FOR APPELLANT CABALCANTE

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 200
Houston, TX 77002

[Tel.] (713) 775-3050
[Fax] (713) 224-2815

COURT-APPOINTED ATTORNEY FOR APPELLANT PIÑEDA

CERTIFICATE OF COMPLIANCE

1. This brief exceeds the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 31,686 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Appellants have therefore filed an agreed Motion to Exceed the Type-Volume Limitations.

Prior to the filing of this brief, this Court granted a joint motion to reallocate words and permit the filing of a joint brief with a word-count limit of 28,000 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-Point Times New Roman font.

/s/ Seth Kretzer

Date: December 4, 2014 Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that seven (7) copies of the Brief of Appellant were filed with the Court by U.S. Mail, and in electronic format via the ECF system, on the 4th day of December, 2014. I further certify that an electronic copy of the brief was served on all counsel of record by filing on the ECF System on the same date.

/s/ Seth Kretzer

Seth Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Oscar Orlando Barrera Piñeda, Register Number 18940-078, on the 4th day of December, 2014, at the address below:

Beaumont Low FCI
P.O. Box 26020
Beaumont, TX 77720

/s/ Seth Kretzer

Seth Kretzer

I certify that one copy of the Brief of Appellant was served on Jaime Cabalcante, Register Number 44925-198, on the 4th day of December 2014, at the address below:

FCI Bennettsville
P.O. Box 52020

Bennettsville, South Carolina 29512

/s/ Seth Kretzer

Seth Kretzer