No. 12-40056

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ISRAEL PEREZ-SOLIS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division
No. 5:11-cr-799(2); Hon. Diana Saldana, Judge Presiding (trial)
Hon. Ivan Lemelle, Judge Presiding (sentencing)

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No. 12-40056

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ISRAEL PEREZ-SOLIS,

Defendant-Appellant.

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United States District Judge for the Southern District of Texas, Laredo Division

Hon. Ivan Lemelle, Judge Presiding (sentencing)
United States District Court for the Eastern District of Louisiana

STATEMENT REGARDING ORAL ARGUMENT

Appellant Perez-Solis requests oral argument; this case rests on the case agent, Jose Lopez's, solipsistic interpretation of the word "it" when translating the Spanish terms "aqui la traigo", which means 'I bring it here' and "estan adentro" which means, 'they are inside.'

The case agent was clear that during both the drug buy and his courtroom testimony, he never actually defined the word "it" in Spanish for his listeners. To the contrary, the case agent testified that because ***he*** knew what he meant by "it" ***everyone else*** must have necessarily been endowed with his same subjective interpretation. R.293 ("We communicated effectively."). However, and rather ironically, it was the Prosecutor on re-direct examination who most conclusively established that Lopez never actually talked about drugs with Perez-Solis:

> Q: And at all relevant times, you talked about the subject matter of the transaction as "it"?
>
> A: Yes.
>
> Q: Nobody used the word drugs, methamphetamine, Ice, eyes (phonetic)-
>
> A: No.
>
> Q: -- none of those words?
>
> A: No.

R.333.

Oral argument could assist the Court in determining whether the Government adduced legally sufficient evidence of scienter against this self-recognized backdrop of ambiguity resembling the venerable Abbott and Costello routine, "Who's on First."

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The district court announced sentence on December 28, 2011, and entered its final judgment the following day. RE.5.[1] Perez-Solis filed his notice of appeal on January 6, 2012. RE.2; FED. R. APP. P. 4(b)(1)(A). The Court has jurisdiction over Perez-Solis' appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

[1] Docket entries 1-129 comprise the "Record on Appeal." The pagination of the Record begins at page USCA5 1. Documents from the Record are referred to herein as R. [bates number]. Cites to the record excerpts are in the form RE.[tab number].[bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether the Government adduced legally sufficient evidence to sustain Perez-Solis' conviction for conspiracy to possess and distribute narcotics.

2. Whether the Government adduced legally sufficient evidence to sustain Perez-Solis' conviction for possession with intent to distribute narcotics.

3. Whether the evidence adduced for either count of conviction was in equipoise when the Undercover Agent who arranged the drug sale, Jose Lopez, testified that Perez-Solis never told him what was in the cooler. R.337 ("Q: But he never told you what ***it*** was hidden, correct? A: That is correct.") (emphasis added).

4. Whether the District Court abused its discretion under FED. R. EVID. 401, 403, 608, and 61, in allowing the Prosecutor to cross-examine Perez-Solis about unsigned tax returns, deposit slips, bank statements found during an inventory search of his van when no direct examination questions concerned his finances in anyway.

5. Whether the Prosecutor's use of the financial documents during his cross-examination of Perez-Solis worked a material variance of proof at trial from the Indictment which did not concern financial conduct (nefarious or otherwise) in any way.

6. Whether the Prosecutor engaged in Prosecutorial Misconduct during closing argument.

7. Whether the District Court erred in overruling Perez-Solis' objections to USSG §§ §3B1.2 and 3C1.1.

INTRODUCTION

Perez-Solis was on trial for violations of 21 USC §§846 and 841. There was no §1956 count charged, nor was there any mention of monetary instruments in the Indictment. However, during the Government's cross-examination of Perez-Solis, the Prosecutor went into extraordinary detail about unsigned tax returns, bank accounts, and deposit slips found in Perez-Solis' car after his arrest. Overruling Perez-Solis' contemporaneous objection that this line of questioning was both irrelevant and impermissibly outside the scope of cross-examination, because no such testimony had been developed on direct examination, the District Court explained, "Well, you went over his entire life story…so I think it's relevant now." RE.6.439.

Perez-Solis respectfully submits that no reported case in American history has ever held that a judge's discretion under FED. R. EVID. 611 (b), to allow inquiry on cross-examination into matters not addressed on direction examination, extends to the point of allowing inquiry to anything about the defendant's "life story" *writ large*.

But even the District Court's decision to allow cross-examination of Perez-Solis about his tax returns and bank accounts merely establishes the outer limit of a judge's discretion under FED. R. EVID. 611(b). That methodological approach

nevertheless violated FED. R. EVID. 404(a) and 608 because: 1) Perez-Solis did not offer any character evidence during his direct examination; 2) nothing about these eclectic financial documents were at all probative of "truthfulness or untruthfulness;" 3) inquiry about these documents predicated an impermissible "specific instance" outside the limitations of Rule 608(b); and 4) the only character witness testified after Perez-Solis did so the door could not have been opened *a priori*.

STATEMENT OF THE CASE

I. Indictment

On June 7, 2011, Israel Perez-Solis and another man named Rene Martinez were named in a two-count narcotics indictment. Count One charged conspiracy to possess with intent to distribute 50 grams or more of methamphetamine in violation of 21 USC §846. RE.3.31. Count Two charged possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 USC §§841(a)(1) and 841(b)(1)(A).

II. Pretrial Dispute About Evidence

The Government submitted its proposed exhibit list on July 20. R.79-80. Perez-Solis vociferously objected to two classes of exhibits on this list.

A. Prosecutor Reluctantly Withdrew Exhibits Concerning Jailhouse Phone Calls Not Properly Disclosed

Exhibits 30-31 consisted of jailhouse phone calls, which were not disclosed by the Prosecutor until that very same day. Even more alarming, the Prosecutor claimed to be generally unfamiliar with that which had just been produced. R.220. ("MR. YOUNG: I don't know -- it was in Spanish, so I don't personally listen to them.").

At the July 21 Pretrial Conference held just before the start of trial, the District Court expressed extreme dismay with the Government's conduct with regards to these exhibits:

> THE COURT: You know, Mr. Young, you keep saying that, and that's really annoying because it's your responsibility to know what's in the calls.
>
> So, that's not helping you and you keep saying --
>
> MR. YOUNG: Well, I don't -- I --
>
> THE COURT: -- that and that's not – that's not helping you at all.
>
> MR. YOUNG: Okay, but the Government doesn't --
>
> THE COURT: In fact – don't interrupt me.

R.223.

After seeing where he was apparently heading, the Prosecutor chose to withdraw these exhibits:

> MR. YOUNG: Well, all right, your Honor, in the interest of justice we'll withdraw it entirely. And we will not play it at all.
>
> THE COURT: Okay. So that's 30 and 31.

R.225.

B. Financial Documents Seized During A Post-Arrest Inventory Search of Perez-Solis' Vehicle

Unfortunately, the Prosecutor did not extend his belatedly discovered "interest of justice" to Exhibits 14-29, which were comprised of various bank statements, tax returns, checks, and deposit slips found in Perez-Solis' vehicle after the arrest. Fumbling around for an evidentiary theory, the Prosecutor explained:

> In this case, we're not offering them – that's a hearsay exception rule, and we're not offering them to prove the truth of the matter asserted in those documents, which, you know, it's questionable what matter, if any, is asserted at all in those documents anyway. But we're not offering them to prove that, for example, it in fact happened the way it said. We're simply offering them as circumstantial evidence of the crime going on, and then for the jury to consider for whatever weight they want to place on them. But we're not trying to prove, for example, that the Defendant actually earned such and such amount of dollars in 2010.

R.217-218.

The District Court did not resolve the issue at the Pretrial Conference.

C. At A Bench Conference Immediately After Opening Arguments, the District Judge Resolved the Issue By Relegating the Financial Data to Cross-Examination Material Against Perez-Solis

Immediately after opening statements, R.247-255, but before the presentation of any evidence, the District Court held a sidebar conference on the issue of the financial document seized from Perez-Solis' van. The Prosecutor began by reiterating his evidentiary theory:

> I think the bigger question here is, the purpose I would like to show is that he is making bank transactions and he has five banks that he deals with. This isn't consistent with the poor merchant, and that's part of the theory here is that we have just essentially a man who's an electronics dealer in Mexico and he just got snaked into this kind of thing. And the fact that he does business with five different banks, especially over about a five-day period of time right around this transaction, I think is problematic and very suspicious.

R.257.

The District Court found this theory unavailing:

> THE COURT: I don't think that there's any rule that just because you found them in his possession that they just come in --

R.255-256.

At this point, the Prosecutor retreated to a backup position that he would only seek to use these financial documents as cross-examination material in the event Perez-Solis testified:

MR. YOUNG: Let me ask a question. If we want – my main purpose is I would like to cross-examine him about it. So the only reason I was going to --

THE COURT: Well, if that's –

MR. YOUNG: But if –

THE COURT: -- completely different.

MR. YOUNG: I agree.

R.258.

III. Trial

Martinez pled guilty; Perez-Solis alone began jury trial on July 21, 2011.[2] R.234.

A. The Government Presented Four Witnesses

The Government presented four witnesses. First, Webb County Investigator Jose Lopez who posed as the undercover buyer for Martinez's drug deal. R.263-338. Second, DEA Agent Patrick Curran who was on the arrest team and listened in real time to the wire worn by Lopez. R.353 (Curran testifies that he did not know if there were drugs in the cooler but only responded to Lopez's signal).

Third, DEA Group Supervisor Gilberto Hinojosa testified that he Mirandized Perez-Solis and that the defendant's story was as consistent immediately after arrest as it was to be at trial: a neighbor had promised him $300

[2] Jury selection was held July 20 before Magistrate Judge Garcia. R.565. *See also* R.72 (consent to proceed before Magistrate).

to retrieve a cooler but never detailed its contents. R.363-364. Lastly, DEA Agent Nicholas Rich testified as to the prevailing sales price for methamphetamine. R.385.

B. Perez-Solis Made Rule 29 Motion

The Government rested late on the first day of trial. R.396 ("MR. WHITE: Judge, the Government rests."). Immediately thereafter, Perez-Solis made a Rule 29 motion. RE.7.[3] The District Court denied Perez-Solis' motion, and he began the defense by testifying in his own behalf. *Id.* R.405.

C. Perez-Solis Testified in His Own Defense

1. Government Excused of Burden to Authenticate Financial Documents Seized During Inventory Search

Before the defense began its case, the District Court reversed the order of operations decided upon at the Pretrial Conference whereby the Government would present a case agent to authenticate the financial documents seized during an inventory search of his vehicle:

> THE COURT: [W]ith regard to cross-examination, Mr. Young, I don't think that you need to bring in an agent to lay the foundation for those documents.
>
> MR. YOUNG: Okay, your Honor. I will not do it.

[3] Perez-Solis described his motion as a motion for directed verdict. This Court has long held that such nomenclature serves as the functional equivalent of a Rule 29 motion. *See United States v. Higdon*, 832 F.2d 312, 314 n.1 (5th Cir. 1987) ("We treat defense counsel's motion for an instructed verdict as a motion for acquittal under Rule 29(a), FED. R. CRIM. P.").

THE COURT: So, you'll just, you know, use whatever you have that would make sense to use during the cross-examination.

MR. YOUNG: Yes, your Honor. I mean, I think it's obvious, there is no dispute that they were found in the man's van, so --

THE COURT: Yeah. Okay.

R.404.

2. Direct Examination

Counsel for Perez-Solis, Mr. Falcon, sedulously avoided any questions about deposits, bank accounts, or any other financial subjects whatsoever. To the contrary, Perez-Solis' only mention of money concerned the payments for legitimate delivery services he had received in the past, and expected to receive in the future, from Alaniz:

Q: And how much would you think was fair on this occasion?

A: For gas I used $70, and then whatever we used eating there, and, you know, about time, it was 90 miles going and 90 miles coming back. I thought that maybe he would give me around $200.

R.415.

Q: So, what you were doing on that day, you were trying to get the $250 that were owed to you.

A: Yes, plus the 50 other that I had already spent by giving them to the man who had that ice chest.

Q: So, it was $300.

A: It was about $300.

R.431.

3. Cross-Examination

The Government's cross-examination began on the First Day of Trial, and continued into the second day. R.462 (trial testimony re-commences on July 22). The cynosure of the Government's questioning consisted of the financial documents. R.438 (when showing Perez-Solis his 2010 tax return, Prosecutor states, "this is marked as Government Exhibit 14" even though the District Court had previously ruled that this could not be admitted as substantive evidence); R.440 (same with regards to Exhibit 15).

D. Two Additional Defense Witnesses

Perez-Solis called two other witnesses: his wife, Brenda Reyes-Quevedo, R.502-508, who testified as to her husband's good works in the community, "Q: Does he help in the community, Mr. Perez, in any way? A: Well, at church. Sometimes he shepherds at church." R.507, and DEA Agent Andrew Sammaciccia, who testified that there were no latent prints found on the narcotics. R.510-512.

E. Verdict

Perez-Solis did not renew his Rule 29 motion after he rested and was subsequently convicted on both counts. RE.4 (verdict form).

IV. Sentencing

A. Case Reassigned

On December 1, a Notice of Setting was issued changing the date of sentencing and noting that the hearing would be held before Judge Ivan Lemelle. R.107. On December 28, a docket entry was entered indicating that this case had been reassigned to Judge Lemelle and that "Judge Diana Saldana no longer assigned to the case." No order in the record corresponds to this docket entry.

B. PSR

The PSR issued on August 12, 2011. The narcotics quantity assessed as relevant conduct was 1.804 kilograms, corresponding to a Base Offense Level of 38 under USSG §2D1.1(c)(1). Doc. No. 81; §48. In addition, a 2-level adjustment for Obstruction of Justice under USSG §3C1.1 was urged because "the defendant was found guilty of both Counts One and Two of the Indictment." *Id*. at §52. At a Total Offense Level of 40, and zero criminal history points, Perez-Solis' Guidelines range was 292 to 365 months.

C. Objections to PSR

Perez-Solis filed objections on September 9, 2011. (Doc. No. 78). First, the Base Offense Level under Paragraph 48 should be 34, under 2D1.1(c)(3) rather than Level 38 under (c)(1), because 1.804 kilograms of methamphetamine falls in between 1.5 and 5 KG. *Id*. at p.1. Second, Perez-Solis argued that he should have

been afforded a minor role under §3B1.2. *Id*. at p. 1-2. Third, Perez-Solis challenged the Obstruction of Justice Enhancement in PSR §52 on the grounds that he did not exhibit a "willful attempt to obstruct justice." *Id*. at 3.

Perez-Solis' final objection was enfolded within his Motion for Downward Departure. *Id*. at p. 2-3. Objecting to Paragraph 110 ("Part E: Factors That May Warrant Departure"), Perez-Solis presented an argument under 5K2.20. *Id*. at 2-3.

D. Addendum to PSR

Probation's Addendum issued September 15, 2011. Doc. No. 83. Probation stood behind each of its original contentions.

E. Judgment

Sentencing was held December 28 before Judge Lemelle. The District Judge overruled all of Perez-Solis' objections, R.177, and denied his motion for downward departure. *Id*. at 178; Statement of Reasons, Doc. No. 99, at 1 (adopting PSR without change).

The District Court imposed the lowest point on the Guidelines range, 292 months, to be served concurrently on each count. RE.5. (judgment). In addition, a five-year term of Supervised Release was imposed. *Id*. at 433. Lastly, a $200 Special Assessment and a total fine of $5,000 were assessed.

STATEMENT OF FACTS

A. Law Enforcement Testified About Events Preceding Arrest

Each law enforcement officer who testified, was clear that no one had any idea who Perez-Solis was until he showed up toward the end of their point-of-sale transaction with Martinez. On direct examination, Agent Lopez explained:

> Q: Was this part of the deal that you understood was going to happen, that some other was going to become involved, or not?
>
> A: I did not know that, no.
>
> **Q: Martinez did not tell you that –**
>
> **A: He didn't say that.**

R.274 (emphasis added).

For methodological convenience, the section immediately below overviews events leading up to the May 23 arrest from the testimonial perspective of law enforcement. However, since no law enforcement officer testified about Perez-Solis' involvement other than simply driving up to the parking lot where Agent Lopez and Martinez had already started their meeting, the immediately following section limns Perez-Solis' uncontroverted testimony about the preceding events.

1. Surveillance of Martinez Began May 10

Beginning in early May 2011, DEA Agent Jose Lopez acted as a Dallas-based visitor to the Laredo area. As part of his undercover role, he held himself

out as an aspiring purchaser of four pounds of methamphetamine in the Laredo market for transportation back to his home based in North Texas. R.263-265. Through an informant, Lopez began to negotiate with a supplier named Rene Martinez. R.266 (Lopez estimates he had ten phone calls with Martinez between May 10-20).

2. May 20 Meeting at Golden Corral

Ostensibly staying as a guest at the Spring Hill Hotel, Lopez arranged to meet Martinez at an adjacent Golden Corral restaurant on May 10. (See Gov't Ex. 2; hotel portico visible from front door of restaurant). Martinez agreed to provide Lopez with a one-ounce sample of his methamphetamine. R.268. Around 9:00 that evening, Martinez tendered four small samples of methamphetamine: one sample for each type of drug he had available. R.270. Lopez requested four pounds of the type with the most identifiable crystals. *Id*. ("[T]he crystals were a little bigger. The color was a lot brighter. I led him to believe that the clearer the color, the higher the quality.").

3. All Subsequent Phone Calls Were With Martinez

Additional phone calls ensued over the following days; each and every one was with Martinez alone. R.269-270 ("Q: Were all -- and all of these phone calls that you're talking about, were they always with the same person? A: With

Martinez, yes, sir.”). The delivery date was set for May 23 at the adjacent hotel. R.272.

4. Perez-Solis Appears In His Own Car After Police Contact With Martinez Had Been Initiated

When Perez-Solis arrived in his white van, Agent Lopez told him where to park. R.274. (Lopez: “I directed the van to a parking spot or a parking space directly across from where Rene Martinez was.”). In the interactions immediately thereafter, Lopez spoke in the patois of his own subjective use of the word “it”:

> A: I asked him if he had ***it***, referring to the four pounds of methamphetamine.

R.275 (emphasis added).

> A: I asked him where exactly is ***it.***

R.276 (emphasis added).

In other words, Lopez assumed a man who he had never spoken to, met before, or even knew existed shared his nefarious connotation of the word “it.”

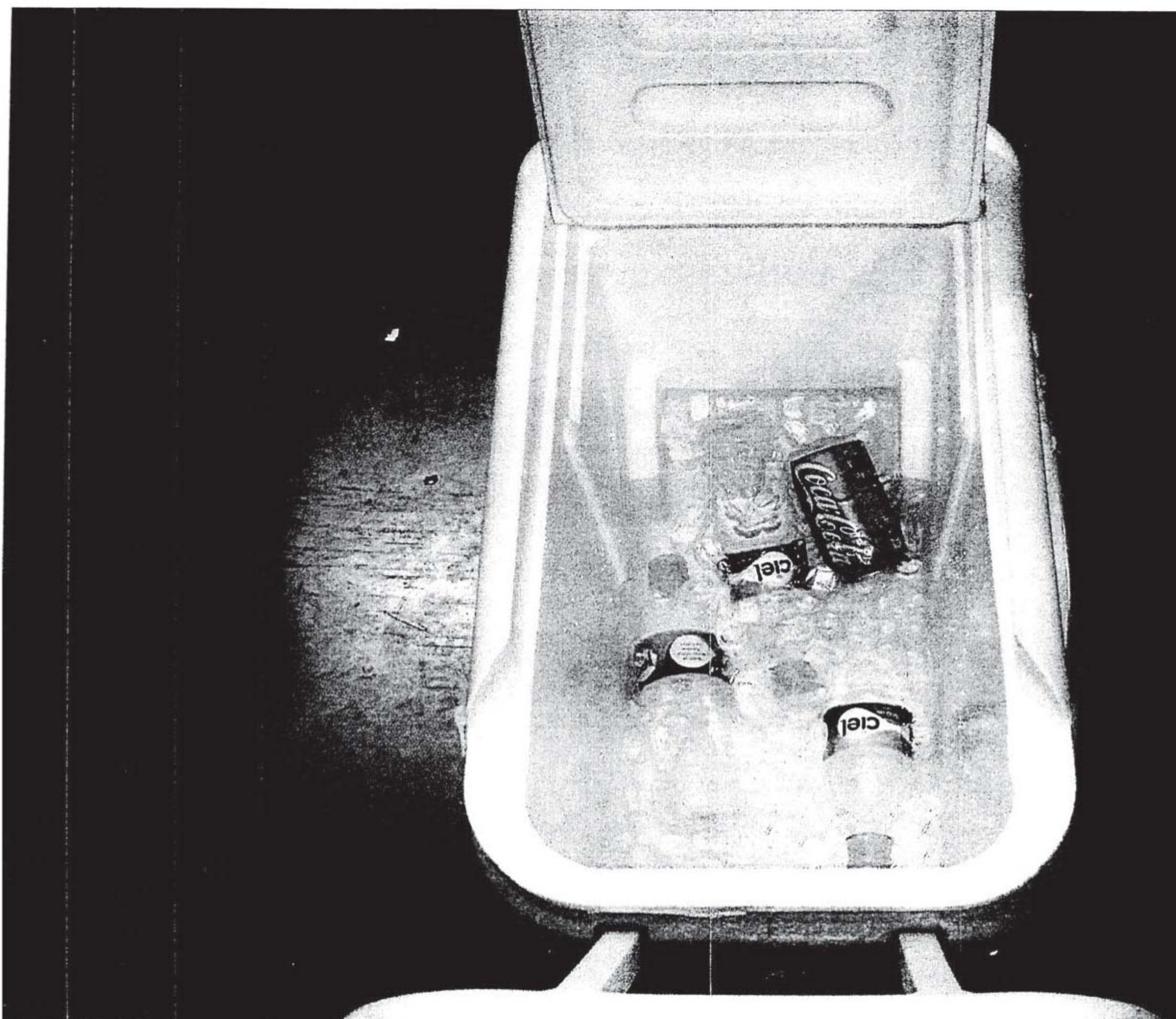
5. Pivotal Trial Exhibit: Gov’t Ex. # 7

When the cooler in the back of the van was opened, Lopez saw ice and water.

> A: I think there was water –
>
> Q: Okay.
>
> A: A -- bottled water.

R.277.

Government Exhibit 7 shows the cooler as it looked when first opened. This image is reproduced immediately below. It is fairly obvious that in the ice are three bottles of water and a can of Coca-Cola. R.280 (Exhibit 7 admitted into evidence).



Moreover, it was Agent Lopez (NOT Perez-Solis) who opened the cooler:

Q: All right. Who opened it up? This is Government Exhibit 7.

A: I want to say that –

Q: If you know.

A: I want to say that maybe I did when I looked at it when I first saw it.

R.285.

In the moments immediately thereafter, Lopez was speaking of four (4) items he was referring to as "it" whereas Perez-Solis was looking at four (4) items containing water and soda packed in ice on a hot day in Laredo.

6. Pivotal Trial Exhibit: Gov't Ex. # 13

Gov't Ex. 13 is a translated transcript of the wiretap of the interactions between Martinez, Perez-Solis, and Lopez. This transcript perfectly demonstrates Lopez's continued use of the word "it" to describe four (4) items he never elaborated upon and Perez-Solis' consistent description of four (4) drinks in a cooler:

Lopez: It's the [stutters]… will you take out… can I see all four (4)?

Perez-Solis: They're there… they're there.

The remaineder of the transcript is also consistent with Perez-Solis' allusion to three bottles of water and one can of soda:

Martinez: Oh, I thought you had it over here.

Perez-Solis: No, it's ready. It's just that we have to open it.

Lopez: What is it that you need?

Perez-Solis: What?

Lopez: Where is it?

Perez-Solis: I have it right here.

Most striking is that once Lopez and Martinez removed the cooler's interior lining and discovered four bags of methamphetamine, *see* Gov't Ex. 8, Perez-Solis played no further role in Martinez's drug deal.

B. Perez-Solis' Role as a Legitimate Delivery Man and Errand Runner

Perez-Solis ran a small business on both sides of the border installing stereos and doing other menial labor on cars. A neighbor named Hector Alaniz brought tractor-trailers and other trucks to Perez-Solis for equipment installation, R.408-409, and over time began to hire Perez-Solis to run errands. For example, Alaniz had Perez-Solis bring him a computer from the Laredo Best-Buy store, R.410, and on another occasion he brought a piece of automotive equipment from the Laredo Pep-Boys store. R.411; *see also* R.412 (detailing similar process for gathering of toolboxes, lights, stereos, etc…). With regards to all of these transactions, Alaniz paid Perez-Solis on a cost-plus basis tendered only after completion of the task assigned:

> He usually wouldn't tell me how much he was going to give me. He would just give me my expenses and whatever he thought was fair.

R.414.

On May 23, a friend of Alaniz's told Perez-Solis that Perez-Solis could receive payment on delinquent arrears owed for prior deliveries if he made an additional delivery on the American side of the border. R.420. Later that day, a man named Demetrio called him with delivery instructions. R.421. Perez-Solis was told to give $50 to a security guard at a warehouse on Mines Road and effect a delivery at the Golden Corral. R.423-424. Perez-Solis duly received the ice chest. After a delay during which Perez-Solis was ready to leave, Agent Lopez waived for him to park. R.426.

SUMMARY OF THE ARGUMENT

Sufficiency of the Evidence-Conspiracy

Despite the undeniable "flurry of activity" presented by the facts of this case, *United States v. Galvan*, 693 F.2d 417, 420 (5th Cir. 1982), and the certainty that a conspiracy existed, no jury could have reasonably found Perez-Solis guilty beyond a reasonable doubt. To the contrary, even though this evidence raises suspicions of guilt, a reasonable trier of fact would see virtually equal circumstantial evidence of incrimination and exoneration, and consequently would entertain a reasonable doubt whether Perez-Solis knew of Martinez's agreement with others to possess and/or distribute methamphetamine and/or voluntarily participated in that

agreement. *United States v. Reyna*, 148 F.3d 540, 547 (5th Cir. 1998). "When," as here, "that is the case, [this Court] has no choice but to reverse the conviction." *Id.*

Sufficiency of the Evidence-Possession with Intent to Distribute

There is no legally sufficient evidence that Perez-Solis shared co-defendant Martinez's intent to possess and distribute methamphetamine.

Cross-Examination Outside the Scope of Direct Examination

The District Court abused its discretion under FED. R. EVID. 611 when it overruled Perez-Solis' objection to the Prosecutor's cross-examination of the accused with wholly irrelevant financial documents.

Cross-Examination About the Accused's Character When No Such Evidence Was Adduced During Direct Examination

Even if Perez-Solis adduced some modicum of character evidence during his direct examination, the District Court abused its discretion under FED. R. EVID. 404 and 608 by allowing cross-examination of Perez-Solis, with the financial documents.

> The defense can choose to open only limited aspects of character, stopping short of opening everything or even every trait that may be germane to the charged crime or defenses.

1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:23 (West 2007).

Perez-Solis specifically chose to open only certain very "limited aspects;" cross-examination with the financial documents was unhinged from any anchoring concept of relevance to those traits testified about in direct.

Material Variance

A material variance of proof at trial is demonstrated because the Indictment alleged conspiracy/possession with intent to distribute methamphetamine. There was not a word about financial misfeasance. However, the cynosure of the Government's case was trained on a set of financial documents found in Perez-Solis' van. Although no witness testified that there was anything criminal (or even so much as out of the ordinary) about these garden-variety tax returns and deposit slips, the Prosecutor seized on them to present an alternative theory of conviction. Perez-Solis' substantial rights were affected because but-for this litigation ambush tactic, he would have been prepared to counter the Prosecutor's closing argument to the jury that it could infer guilt because only people involved with the drug trade would make bank deposits in round numbers.

Prosecutorial Misconduct During Closing Argument

Because the prosecutor's numerous improper arguments during closing statements deprived Perez-Solis of a fair trial, this Court should reverse his

convictions and remand for a new trial. Whether singly or cumulatively considered, these instances were not only improper, but reversible plain error.

Sentencing

The District Court reversibly erred in overruling Perez-Solis' objection to enhancement for Obstruction of Justice under USSG §3C1.1 and in failing to credit him with an obvious and condign role reduction under USSG §3B1.2.

STANDARDS OF REVIEW

Sufficiency of the Evidence

Perez-Solis made a Rule 29 motion after the government rested, but did not renew the motion after the conclusion of his defense. As such, this Court reviews for plain error. *United States v. Lee*, 2012 U.S. App. LEXIS 5709, *7 (5th Cir. 2012) ("Although Michelle Lee moved for a judgment of acquittal after the Government rested its case, she failed to renew the motion at the close of all evidence. Accordingly, her sufficiency claim is reviewed for 'a manifest miscarriage of justice, which is found if the record is devoid of evidence pointing to guilt.'" (citation omitted)).

Evidentiary Challenges

"This court reviews evidentiary decisions by the trial court for abuse of discretion." *United States v. Hicks*, 389 F.3d 514, 522 (5th Cir. 2004). "Even

where the district court erroneously admitted prejudicial evidence, the defendant's conviction will not be reversed if the error was harmless." *Id.*

Material Variance of Proof at Trial

"A variance is material if it prejudices the defendant's substantial rights, either by surprising the defendant at trial or by placing the defendant at risk of double jeopardy." *United States v. Valencia*, 600 F.3d 389, 433 (5th Cir. 2010).

Prosecutorial Misconduct

Perez-Solis' trial counsel did not object to the prosecutor's comments, so this Court reviews for plain error. *United States v. Gracia*, 522 F.3d 597, 599-600 (5th Cir. 2008). Perez-Solis must therefore show that (1) there was error, i.e., the prosecutor's remarks were improper; (2) the error was plain and obvious; and (3) the error affected his substantial rights. *Id*. at 600. Even if Perez-Solis "meet[s] that burden, we still would have [the] discretion to decide whether to reverse, which we generally will not do unless the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *Id*. at 600.

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).

Procedural Reasonableness

"If a procedural error is significant, *i.e*., not harmless, it usually requires reversal." *United States v. Delgado-Martinez*, 564 F.3d 17 750, 753 (5th Cir. 2009). A procedural error is harmless only if it did not affect the district court's choice of sentence. *Id*.

ARGUMENT

I. EVIDENCE WAS INSUFFICIENT AS TO THE CONSPIRACY COUNT

A. Baseline Legal Principles

This Court has long held that the Government may not attempt to prove a defendant's guilt by establishing "guilt-by-association" with "unsavory characters." *United States v. McCall*, 553 F.3d 821,826 (5th Cir. 2010) (quoting *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981)). These principles apply straightforwardly to the case at bar, where the prosecutor could not identify anything that Perez-Solis actually *knew*, but rather only that he responded to the nebulous word "it."

B. Elements of the Offense

To establish a conspiracy to distribute a controlled substance, the Government must prove beyond a reasonable doubt: "(1) the existence of an agreement between two or more persons to violate narcotics laws; (2) the defendant's knowledge of the agreement; and (3) his voluntary participation in the

conspiracy." *United States v. Valdez*, 453 F.3d 252, 256-57 (5th Cir. 2006). No overt acts in furtherance of the conspiracy need be alleged or proved. *United States v. Shabani*, 115 S. Ct. 382, 385 (1994). However, "mere presence and association with wrongdoers is insufficient to support a conspiracy conviction." *United States v. Wilson*, 116 F.3d 1066, 1075 (5th Cir. 1997).

C. The Government Failed to Prove that Perez-Solis Had Knowledge of Martinez's Agreement With Others

1. This Court Rejected As Insufficient, Evidence Far More Attenuated Than Offered Against Perez-Solis in *United States v. Carrasco*

In *United States v. Carrasco*, this Court reversed a conviction for drug conspiracy when "[n]o evidence, circumstantial or otherwise, establishes [Defendant Valdez's] knowledge of the conversations that took place out of his hearing." 830 F.2d 41, 45 (5th Cir. 1987). Each and every law enforcement agent presented by the Government was clear that no interception from early May 2011 onward revealed a single thing about Perez-Solis; simply put, no one had any idea who he was.

2. *United States v. Maltos* Perfectly Encapsulates The Mere Presence Which Describes Perez-Solis' Role

In *United States v. Maltos*, this Court reversed when, "[o]ther than evidence of Maltos's association with the conspirators, and his presence at the time of the

transactions, the government presented no proof establishing his knowledge of, or participation in, the conspiracy." 985 F.2d 743, 747 (5th Cir. 1992).

Agent Lopez was clear that Perez-Solis unexpectedly arrived at the end of the prearranged May 23 meeting. After Lopez opened the cooler, Perez-Solis pointed to the four drinks in the cooler and stated "aqui la traigo", which means 'I bring it here' and "estan adentro" which means, 'they are inside.' Nothing about this testimony establishes that Perez-Solis knew that Martinez had agreed with others to violate narcotics laws, much less so that he shared that agreement.

3. This Court's Holding in *United States v. Rosas-Fuentes* Found Insufficient For More Inculpatory Utterances Than Perez-Solis' Use of the Phrases "Aqui La Traigo" and "Estan Adentro"

United States v. Rosas-Fuentes presented the situation of a Mexican national, Rosas, who was stopped at the border checkpoint in a truck found to contain marijuana secreted in a gas tank. 970 F.2d 1379 (5th Cir. 1992). The arresting agent, Marcell, testified that on the way to the Border Patrol station, "Rosas asked him in Spanish if they found anything in the tank. Marcell responded in Spanish, 'Well, you tell me. Rosas's response was, 'Well, yes.'" *Id.* at 1381. This Court reversed Rosas's conviction for conspiracy to possess with intent to distribute, explaining, "It could have been just as reasonable to infer from this

statement that Rosas was admitting the obvious, that the agents must have found something or else they would not have arrested them." *Id*. at 1382.

Similarly, it was quite logical for Perez-Solis to tell Lopez that he brought drinks and placed them in the cooler when Lopez asked him what was in the cooler.

4. Perez-Solis' Situation is Qualitatively Different From A Defendant Who is Paid A Sum of Money Disproportionate to the Value of the Task At Issue

This Court has rejected sufficiency challenges when a defendant has protested lack of knowledge of his shipment's contents despite having been paid a substantial sum of money to accomplish a relatively routine task. *See, e.g., United States v. Luna*, 815 F.2d 301, 302 (5th Cir. 1987) (defendant offered $10,000 to deliver a load of cabbage into the United States even though the job usually paid only $1,000). By contrast, the Government offered no evidence as to what Perez Solis was to be paid and made no effort to countermand his testimony that he was to be paid a small sum commensurate with delivering a cooler against a backdrop of being owed money for making a series of such deliveries along with border.

5. In the Alternative, the Evidence Was Merely in Equipoise

The bottom line is that there is no more reason to think that Anderson was talking about four pounds of methamphetamine than he was talking about the four liquids seen in Exhibit #7. "When the evidence is in equipoise, as a matter of law

it cannot serve as the basis of a funding of knowledge." *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999) (reversing conviction for narcotics conspiracy).

II. EVIDENCE WAS INSUFFICIENT AS TO THE POSSESSION WITH INTENT TO DISTRIBUTE COUNT

Perez-Solis' sufficiency challenge on Count Two is largely co-extensive with that for Count One. There is no evidence that Perez-Solis knowingly possessed the methamphetamine found in the cooler, which had been placed into his van, much less so that he intended to distribute it in any way. Perez-Solis recognizes that the Government presented evidence that he was present while Lopez and Martinez disassembled the cooler. It is Perez-Solis' contention that even when viewed in the light most favorable to the theory of his conviction, this evidence merely establishes that he was curious about the machinations between Martinez and Lopez.

In *United States v. Harbin*, this Court reversed a conviction for a marijuana conspiracy against a man named O'Quinn, when statements made by O'Quinn proved no more than that he was merely "curious" about the drug activities of others:

> In these conversations, O'Quinn asked Hyde about the local drug scene, expressing interest in Hyde's drug-related activities and in those of other conspirators. However, the content and context of the conversations are consistent with O'Quinn's claim that he was unfamiliar with the conspiracy's drug transactions and thus strongly support the hypothesis that

> at the time of the phone calls O'Quinn was not a conspirator. These conversations also cannot support a conclusion that O'Quinn made the inquiries in the process of joining the conspiracy, since they can be understood as revealing no more than that he was curious about the illegal drug activities.

601 F.2d 773, 783 (5th Cir. 1979).

Perez-Solis necessarily prevails under the logic of *Harbin*. O'Quinn asked known drug dealers about their business because he was "curious." This suggests far more active involvement (or, at least, desire to join) the drug trade than was established by any utterance from Perez-Solis.

III. THE DISTRICT COURT REVERSIBLY ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE PEREZ-SOLIS WITH FINANCIAL DATA WHEN NO SUCH TESTIMONY WAS DEVELOPED ON DIRECT EXAMINATION AND THE PROSECUTOR VOLUNTEERED THAT HIS THEORY TRAINED ON PEREZ-SOLIS' UNTRUTHFULNESS

A. Perez-Solis' Objection

When the Prosecutor began to cross-examine Perez-Solis with the financial documents, Perez-Solis objected on both relevance and 'Scope of Cross' grounds:

> MR. FALCON: Your Honor, I'm going to object as to relevance, your Honor, and also that it doesn't address any issues that I raised during my direct examination.
>
> THE COURT: Well, you went over his entire life story and all of his business in Mexico and in the United States, so I think it's relevant now.
>
> MR. FALCON: Okay.
>
> THE COURT: Overruled.

RE.6.439.

B. The Financial Documents Were Wholly Irrelevant

1. The Documents Fail the Baseline Rules 401/402 Test

Relevance under FED. R. EVID. 401 must be "determined in the context of the facts and arguments in a particular case." *Sprint/United Management v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008). The financial documents found in Perez-Solis' van fail this baseline level of inquiry, because Perez-Solis was not charged with conspiracy to launder monetary instruments, any other crime under §1956, or any sort of financial misfeasance whatsoever. Nor did the government give notice under FED. R. EVID. 404(b) that it regarded Perez-Soilis' financial documents as evidence of prior bad acts.

"Implicit in this definition are two distinct requirement: 1) the evidence must be probative of the proposition it is offered to prove; and 2) the proposition to be proved must be one that is of consequence to the determination of the action." *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981).

Amazingly, the Prosecutor himself explained why the documents failed this test. At the Bench Conference immediately before commencement of the case-in-chief, the Prosecutor explained, "The bank statements actually don't really state much of anything." R.298. Perez-Solis submits that this is the paradigmatic

description of irrelevance. *See United States v. Johnson*, 558 F.2d 744 (5th Cir. 1977) (in a prosecution for making false statements on a tax return, evidence offered by taxpayer that he actually overpaid his taxes by failure to take permissible deductions was properly excluded on relevance grounds).

C. The Documents Should Have Been Excluded Under Rule 403

1. The Only Possible "Prosecutorial Need" Is the Government's Desire to Introduce A Theory of Financially-Oriented Narcotics Evidence Which Was Not Charged Nor in Any Way Even Suggested By Any Evidence Adduced

"[W]hat counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997). Perez-Solis recognizes that under Rule 403, an important consideration relating to probative value is prosecutorial need for the evidence. *See, e.g., United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir.1976). However, "prosecutorial need alone does not mean probative value outweighs prejudice." *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983).

In Perez-Solis' case, the only prosecutorial need for the financial documents was its desire to present an alternative theory of financially-oriented narcotics activity unhinged from any allegation in the Indictment or any other evidence introduced in the case-in-chief.

2. Even If the Financial Documents Were Impacted With Some Modicum of Probity, the Awesome Undue Prejudice Weighs Far More Heavily In *Beechum* Balancing Test

This Court has long instructed that "[i]t is the ***incremental probity*** of the evidence that is to be balanced against its potential for undue prejudice." *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978) (emphasis added). Notwithstanding Perez-Solis' argument in the immediately preceding section that the financial documents have zero probity, the potential for undue prejudice was both palpable and in fact demonstrated by the Prosecutor's heavy emphasis on these documents during closing argument. *See* Part VI, *infra*.

In *BE&K Construction Co. v. United Brotherhood of Carpenters & Joiners*, the Eighth Circuit found error under Rule 403 when "[t]he videotape improperly focused attention on what took place in International Falls on September 9, 1989 instead of what was actually said at the October 24, 1991 meeting in McGehee, Arkansas." 90 F.3d 1318, 1331 (8th Cir. 1996). Similarly, the use of Perez-Solis' financial documents on cross allowed the Prosecutor to focus the jury's attention (during examination and again in closing) on his own unsworn testimonial opinion that round numbers indicate narcotics proceeds rather than Agent Lopez's otherwise ambiguous use of the word "it" in Spanish.

3. The Prosecutor's Theory Is Inverted to the Point of Absurdity

In any event, the Prosecutor's theory of inculpation regarding the financial documents is entirely inverted: few (if any) narcotics dealers who take money in cash choose to deposit these sums in a bank account bearing their own name. If they did so, there would undoubtedly be far fewer §1956 prosecutions in America. But even fewer still (if any) report these sums on their tax returns! *Accord United States v. Mendoza*, 351 Fed. Appx. 921, 924 (5th Cir. 2009) (This Court "will not 'declare testimony incredible as a matter of law unless it is so unbelievable on its face that it defies physical laws.'") (citation omitted).

4. The Doctrinal Principles from *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.* Apply Straightforwardly

A cogent case from the Eleventh Circuit synthesizes the conceptual weaknesses inherent in the cross-examination of a witness with financial conduct that had not been shown to be illegal or even morally/ethically questionable. *Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp.*, 37 F.3d 1460 (11th Cir. 1994). Ad-Vantage sued GTE for antitrust violations and business torts. At trial, Ad-Vantage called Leonard Anton, a CPA and lawyer, for expert testimony about lost profits. Rather than focusing on his methods, the defendant delved into the witnesses financial and professional past:

> GTEDC first sought to inquire into Anton's bankruptcy several years before trial. The magistrate judge sustained Ad-Vantage's objection to explicit mention of the bankruptcy. GTEDC's counsel nonetheless delved into loans Anton had taken from his accounting clients that he did not repay in full because of his bankruptcy. GTEDC's counsel went down Anton's bankruptcy schedule, asking Anton about each client--by name--from whom Anton had borrowed money. The mention of each client was followed by the question whether Anton had repaid the debt. Ad-Vantage's repeated objections were overruled.

Id. at 1462-1463.

Reversing, the Eleventh Circuit explained:

> Acts probative of untruthfulness under Rule 608(b) include such acts as forgery, perjury, and fraud. 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* P 608[5] at 608-45 to 608-46 (1994). **Unlike these acts, seeking discharge in bankruptcy does not show a disregard for truth that would cast doubt on a witness's veracity.**
>
> Anton's borrowing from his clients, while ethically questionable, is likewise irrelevant to his truthfulness as an expert. To infer untruthfulness from any unethical act 'paves the way to the exception which will swallow the Rule.' 3 Weinstein & Berger, *supra,* P 608[05] at 608-49.

Id. at 1464 (emphasis added and citations omitted).

These same principles apply straightforwardly to Perez-Solis' case. Filing tax returns in round numbers "does not cast doubt on a witness's veracity." Even if Perez-Solis was lying on his tax returns (and not a single witness was brought to testify about this one way or the other), that "is likewise irrelevant to his truthfulness as" a witness about a drug delivery.

D. FED. R. EVID. 611(b)

1. District Court's Latitude is Limited When the Cross-Examiner Poses Questions Outside the Scope of Direct

The first sentence in FED. R. EVID. 611(b) says that cross-examination should be limited to the scope of the direct examination and matters affecting credibility. The second says that the court may allow the cross-examiner to inquire into additional matters, in which case the questioning should proceed in the manner of direct examination. Professors Mueller and Kirkpatrick explain:

> In short, FED. R. EVID. 611 is not an invitation to adopt a blanket rule authorizing unrestricted cross-examination on all relevant issues in particular courtrooms, or before particular judges, or in particular classes of cases. Instead, the idea is that judges may authorize broader cross-examination on a case-by-case basis when a particular reason for doing so appears.

3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:70 (West 2007).

Even when the witness is one other than the accused, courts of appeals have long found reversible error when District Courts permitted a cross-examiner too much latitude resulting in serious disruption for no good reason. *See, e.g.*, *Lewis v. Rego Co.*, 757 F.2d 66 (3d Cir. 1985) (reversing where, in product suit, it was error to let defense cross-examine fact witness on his opinion on cause of rupture in propane cylinder; cross-examiner used occasion to put substance of repudiated report in front of jury); *Reagan v. Brock*, 628 F.2d 721 (1st Cir. 1980) (in a

contaminated food suit, defendant testified on direct examination that the kitchen was clean and proper in the summer of 1976; cross-examination about health code violations in the summer of 1977 went beyond the scope of direct).

2. Cross-Examination of the Accused: Impact of Privilege Against Self-Incrimination

A separate doctrine has developed about the scope of Fifth Amendment waiver when the accused testifies. WEINSTEIN'S FEDERAL EVIDENCE, §611.04 (2d ed. 2011). *Brown v. United States*, 356 U.S. 148, 154-156 (1958); *United States v. Fernandez*, 559 F.3d 303, 331 (5th Cir. 2009) ("A criminal defendant who testifies waives the privilege against self-incrimination to the extent of ***relevant*** cross-examination.") (quoting "dated but still authoritative opinion" from Supreme Court in *Johnson v. United States*, 318 U.S. 189, 195 (1943)) (emphasis added). Even before enactment of the Federal Rules of Evidence, a defendant could limit the extent of his waiver of Fifth Amendment rights by circumscribing his own direct examination. *Fitzpatrick v. United States*, 178 U.S. 304 (1900) (accused may stop at any point during direct examination and constitutional privilege protects him from cross-examination on any point not touched on by direct examination).

However, relevance is only the first step of inquiry as to the permissible scope of cross-examination. Professor McCormick explains, "In all events, the extent of the waiver of the privilege against self-incrimination ought not to be

determined as a by-product of a rule on scope of cross-examination." McCormick on Evidence 6th Ed. 648 (West Publishing Co., 2006). In the Fifth Circuit, the rule at least since *Beechum* has been:

> All evidence relevant to the subject of direct examination is within the scope of cross-examination…. Of course, this is not to say that all such relevant evidence is admissible, for the rules themselves embody policies that exclude evidence even though relevant.

582 F.2d 898, 907-909 (5th Cir. 1978) (en banc) (when defendant raised issue of not having requisite intent, other crimes evidence was relevant and defendant could be questioned about other crime even though he had not referred to it on his direct examination).

Beechum distinctly proves Perez-Solis' point, as the documents with which he was questioned are not the fruits or instrumentalities of any other crime, but rather ordinary financial forms about which the Prosecutor assigned a subjectively determined nefarious character.

In *United States v. Brannon*, this Court explained that once the defendant testified "the only real issue is whether the questions propounded to him were within the scope of permissible cross-examination." 546 F.2d 1242, 1246 (5th Cir. 1977). Numerous courts have reversed in situations where cross-examination was even "less permissible" than that demonstrated in the cross-examination of Perez-Solis.

a. Perez-Solis Did Not Testify About His Financial Situation

Perez-Solis did not open the door with direct examination testimony about his finances. As such, cross-examination on this point was error. *United States v. Hernandez*, 646 F.2d 970, 978 (5th Cir. 1981) (cross must be "reasonably related" to subjects covered in direct); *U.S. ex rel Irwin v. Pate*, 357 F.2d 911, 915 (7th Cir. 1966) (extent of waiver is determined by "what the defendant's testimony makes relevant for cross-examination"); *State v. O'Dell*, 576 A.2d 425 (R.I. 1990) (prosecution cannot use inadmissible hearsay for impeachment on cross-examination when the defendant does not give contradicting testimony on direct examination).

b. No Opinion Has Ever Countenanced Direct Examination About One's "Life Story" For Opening the Floodgates on Cross

Overruling Perez-Solis' objection, the District Court stated, "you went over his entire life story." RE.6.439. In measuring the scope of permissible cross against the direct examination subjects propounded, no reported opinion in American history has ever defined an accused's testimony in terms as general as one's "life story." Furthermore, the District Court's logic is orthogonal to hornbook law on the defendant's ability to circumscribe the scope of cross-examination:

> The defendant can control the breadth and nature of cross and rebuttal evidence simply by confining his own proof, and offering only focused evidence on particular traits or aspects of his character does not open up his whole character.
>
> The defense can choose to open only limited aspects of character, stopping short of opening everything or even every trait that may be germane to the charged crime or defenses.

1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:23 (West 2007).

Substantial case law accords with this view. *State v. Avendano-Lopez*, 79 Wash. App. 706 (Div. 2 1995) (defendant's testimony on direct examination that he had recently been released from jail did not open the door for cross-examination on whether defendant had ever sold heroin); *State v. Stockton*, 91 Wash. App. 35 (Div. 1 1998) (a passing reference to any knowledge defendant had about drugs did not open the door to cross-examination on prior drug use by the defendant); *State v. Quattrocchi*, 681 A.2d 879 (R.I. 1996) (evidence of other crimes was erroneously admitted on cross-examination where defendant's testimony had not placed his character at issue, and the evidence had no independent relevance reasonably necessary to prove elements of sexual assault).

IV. Even If Perez-Solis Transformed Himself Into A Character Witness, Under Fed. R. Evid. 404(a), the District Court Reversibly Erred In Allowing the Prosecutor to Cross-Examine About Specific Instances Of Character Under Fed. R. Evid. 608 (b)

A. Perez-Solis Did Not Offer Character Evidence Through His Own Testimony

WEINSTEIN'S EVIDENCE MANUAL is clear that "[t]aking the stand, alone, does not expose the defendant's character to attack." Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual*, §7.01[3][b] (Joseph M. McLaughlin, ed., Matthew Bender 2011) (citing *United States v. Wilson*, 244 F.3d 1208, 1217-1218 (10th Cir. 2001) (trial court erroneously permitted prosecution to cross-examine defendant concerning his prior drug arrests; defendant's testimony that he never used, sold, or bought crack cocaine did not concern a trait of character and prior acts were inadmissible under Rule 404(b))).

A simple review of the transcripts makes clear that Perez-Solis did not offer any character evidence. As such, cross-examination of Perez-Solis about his character was error.

B. Even if Perez-Solis Did Offer Character Evidence, The Acts Averred to in the Financial Documents Were Wholly Irrelevant

Professor Mueller and Kirkpatrick explain:

> The most important point relating to cross-examination is that the acts inquired about must be relevant to the qualities or traits to which the character witness has testified.

2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:43 (West 2007).

Judge Weinstein elaborates on the prudential reason for this rule:

> The purpose of this rule is to encourage witnesses to testify by protecting them against disclosure of past misconduct that is not relevant to the material, consequential facts of the case.

WEINSTEIN'S FEDERAL EVIDENCE, §608.30[1] (2d ed. 2011).

Operationalizing these principles, this Court has long held that relevancy in the Rule 404/608 context must be properly tailored. *Aaron v. United States*, 397 F.2d 584, 585 (5th Cir. 1969) (in a trial for embezzlement and misapplication of bank funds, "[r]umors of an illicit affair with a woman, even if these rumors were true, were wholly immaterial to the character traits involved in this case. The question was therefore improper, and the defense objection was properly sustained."); *United States v. Park*, 525 F.2d 1279, 1284-85 (5th Cir. 1976) (criticizing insinuating questions that imply wrongdoing); *United States v. Tomblin*, 46 F.3d 1369, 1387-1388 (5th Cir. 1995) ("A review of the record reveals nothing in Tomblin's direct examination of Chall that provided grounds for the prosecutor to cross-examine Chall on Tomblin's character. Further, the prosecutor's questions to Chall did not relate to Tomblin's business dealings, but to Tomblin's alleged bragging about profiting from his businesses' bankruptcies.").

See also United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) (in a prosecution for robbery and firearms offenses, it was error for the government to cross-examine the defendant's brother and alibi witness by repeatedly asking him to admit he had a bad reputation for violence in his community.).

The financial documents about which Perez-Solis was cross-examined are ordinary tax returns, deposit slips, and bank statements. In the Prosecutor's own unsworn testimony, it was somehow vaguely nefarious that the sums stated thereon are in round and even numbers. But not only was there no witness (such as a forensic accountant, or an FBI money laundering expert) to testify about this, there is no logical link between income earned in previous years and/or sums deposited in days before Perez-Solis' arrest and the specific date listed for both counts in the Indictment. This point is accentuated by the fact that each and every law enforcement officer testified that Perez-Solis did not appear on any of their previous weeks-long surveillance of Martinez.

C. The Only Character Witness Was Brenda Reyes-Quevedo

1. As Given, Pattern Jury Instruction 1.09 Did Not Specify Which Witness Presented Character Evidence

The District Court gave Fifth Circuit Pattern Jury Instruction 1.09 on character evidence. R.543 (court reads charge to jury). As given, the instructions did not identify which defense witnesses testified as to character. However, a

simple review of the trial transcripts reveals that this testimony was adduced through Perez-Solis' wife, Brenda Reyes-Quevedo, rather than through Perez-Solis himself:

> A: On Sundays what we would do is, you know, like spend time in the family, go to church.
>
> A: No, he doesn't drink.
>
> Q: Okay. What about drugs? Have you ever seen him using drugs?
>
> A: No, never.

R.505.

> Q: Has Mr. Perez ever been in trouble with the law?
>
> A: No, never.
>
> Q Okay. Have you ever found out whether or not Mr. Perez's van was used for an illegal purpose or anything like that?
> A: No, the only thing that he would use it for is that sometimes he would drive back and forth people from church.

R.506.

> Q: Okay. Does he help in the community, Mr. Perez, in any way?
>
> A: Well, at church. Sometimes he shepherds at church.

R.507.

2. The Testimony of Reyes-Quevedo Does Not Impact the Earlier Cross-Examination of Perez-Solis

Perez-Solis recognizes that under FED. R. EVID. 405, prosecutors can cross-examine defense character witnesses, whether they testify to opinion or reputation, about specific instances of the conduct of the defendant that are relevant to the trait of character to which the witness has testified. But this fact is rather tangential as concerns Perez-Solis' defense, as the presentation of Mrs. Reyes-Quevedo as a character witness could not have enabled the cross-examination of Perez-Solis himself about his own character, for the simple reason that Reyes-Quevedo testified ***after*** her husband.

V. MATERIAL VARIANCE

A. Prosecutor Shifted Focus from Drugs to Money

Perez-Solis was charged with conspiracy and possession with intent to distribute; there was no mention of any form of financial misfeasance. However, the Government seized on the financial documents found in Perez-Solis' vehicle to present an alternative theory of conviction whereby the jury could convict him if it believed he was involved in the North Mexico/South Texas drug trade generally:

> [I]t's all ***circumstantial evidence***. But take a look at his tax returns. He's self employed, ladies and gentlemen, and his tax return in 2010 shows $25,000 even, with no business expenses, 2-5-0-0-0.

RE.8.534 (emphasis added).

He's well aware that this is a big deal in Laredo, Texas and Nuevo Laredo, Tamaulipas.

RE.8.531.

The Prosecutor's decision to atomize his focus on the deposit slips, bank statements, and tax returns constitutes a material and multifaceted variance which rose to the level of plain error.[4]

B. The Paradigm Shift Effected An Impermissible Broadening Of Proof Viz. The Indictment Rather than A Permissible Narrowing

The hallmark Supreme Court case on the subject of variance is *Stirone v. United States*, 361 U.S. 212 (1960) (where indictment charged defendant with violation of Hobbs Act with respect to importation of sand, it was error to admit evidence that steel was being exported). But even before *Stirone*, the law permitted narrowing of allegations from Indictment to trial. *Dealy v. United* States, 152 U.S. 539, 542 (1894) (one count of a multi-count indictment is withdrawn from the jury's consideration); *United States v. Miller*, 471 U.S. 130, 140-145 (1985) (permissible to narrow an indictment alleging fraud against "the Comptroller of the Currency and the agent…[of a federally organized] bank" by removing the term "Comptroller of the Currency").

[4] Perez-Solis did not raise this objection at trial; plain error review governs. *United States v. Valencia*, 600 F.3d 389, 433 (5th Cir. 2010).

By contrast, broadening is prohibited. The hallmark Fifth Circuit case demonstrating this point arose in the parallel context of constructive amendment. *United States v. Adams*, 778 F.2d 1117 (5th Cir. 1985). A defendant was charged with use of a false name. Additional evidence about falsification of address was introduced. *Id*. at 1120. Although the address was intertwined with the false name:

> [T]he court's admission of evidence concerning residence and under its charge, false statements or identification concerning residence might have been the basis of Adams' conviction. The manner in which the driver's license was false bears on an essential element of the crime charged. The grand jury chose to indict Adams for use of a driver's license that was false as to name. Had it desired to indict Adams for use of a driver's license that was false as to residence, it could have drawn up an indictment…

Id. at 1124.

The applicability of *Adams* to Perez-Solis' situation is obvious: the grand jury chose to indict Perez-Solis for narcotics possession. Had it desired to prosecute him for penumbral financial activity, it could have appended such a charge or issued a separate indictment.

C. The Showing of Variance Is Not Obscured By the Fact That The Financial Documents Were Adduced During Perez-Solis' Cross-Examination

Perez-Solis recognizes that in the typical variance situations, the impermissible additional evidence was introduced in the Government's case-in-

chief. In Perez-Solis' case, however, the Government gave up on trying to introduce evidence of the financial documents when it realized, at the Pretrial Conference, that no custodian of records had been made ready. Nevertheless, the second clause of Rule 611(b) gives succor to the Perez-Solis' showing of variance even though the evidence was adduced during cross. "The court may allow the cross-examiner to inquire into additional matters, in which case the questioning should proceed **in the manner of direct examination**." (emphasis added). Because the financial documents were presented "in the manner of direct examination" this Court should review the variance challenge in the same analytical framework as that which governs conventional variance challenges.

VI. PROSECUTORIAL MISCONDUCT

In the seminal case of *Berger v. United States*, Justice Sutherland explained:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

295 U.S. 78, 88 (1935); *accord United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (improper for prosecutor to tell jury it had any obligation other than weighing evidence).

Unfortunately, the Prosecutor's closing statements went far beyond reminding the jury that they were "the representative not of an ordinary party to a controversy" but were contaminated with prosecutorial misconduct.

A. Commenting on Matters Outside the Record

The ABA Standards specifically prohibits a prosecutor from referencing facts outside the record. ABA Standards for Criminal Justice Prosecution Function §3-5.9 (3d ed. 1993). This Court has long recognized that an attorney may state to the jury inferences and conclusions he wishes them to draw from the evidence, but these inferences must be based on the evidence. *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979); *accord United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999) ([While] "a prosecutor can argue that the fair inference from the facts presented is that a witness has no reason to lie… a prosecutor's closing argument cannot roam beyond the evidence presented during trial.").

1. Prosecutor Argued that the Financial Documents About Which He Cross-Examined Perez-Solis Were in Fact Substantive Evidence of Guilt

During closing argument, the Prosecutor abandoned all but the pretense that the financial documents, about which he cross-examined Perez-Solis, were being used only for impeachment purposes and were in fact substantive evidence of guilt:

> First of all, there's – ***it's all circumstantial evidence***. But take a look at his tax returns. He's self employed, ladies and gentlemen, and his tax return in 2010 shows $25,000 even, with no business expenses, 2-5-0-0-0.

RE.8.534 (emphasis added).

"A misstatement of law that affirmatively negated a constitutional right or

principle is often, in our view, a more serious infringement than the mere omission of a requested instruction." *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (holding, on pre-AEDPA habeas review, that prosecutorial misstatement about jury's fact-finding role was harmful error requiring reversal).

2. Prosecutor Made Himself An Unsworn Witness About "Incredible Coincidences"

The Prosecutor expounded at great length about the meaning he wish for the jury to assign to Perez-Solis' financial data:

> Now if you're salaried and you work for somebody else you might reasonably have a salary of $25,000 but it would be an incredible coincidence if you have 15 to 20 customers a day and on typical transactions your profit is 15 to $20 or your labor costs is 15 to $20, plus the cost of the stereo equipment, that it would just all add up at the end of 2010 exactly 25,000. But that's what he told you.
>
> And if you'll down on the Schedule C in the 2009 one, it turns out to be exactly 14,000, 14,000 even. It's unbelievable two years that that happened for a self-employed man.

RE.8.534-535.

Unfortunately for the Prosecutor, no witness testified that there was any reason to think (empirical or otherwise) that tax returns in round numbers demonstrate any manner of criminality. For this reason, in order to complete the circular reasoning of his story, the Prosecutor exclaimed, "***I*** submit to you that if you believe his story then let him go. If you really believe that, if you really believe this story, then let him go." *Id.* at 534 (emphasis added). *See People v.*

Shief, 312 Ill. App. 3d 673 (1st Dist. 2000) (reversing when prosecutor impermissibly draws on personal experience to bolster credibility).

3. Attempted Burden Shifting When Prosecutor Stated that Perez-Solis "Has No MRI" of his Brain to Show A Lack of Knowledge

The Prosecutor stated:

> It doesn't really make any sense if you look at it from any other angle either because the other view would be -- because how would it that all those people accept our defendant know that? So that's what you have to think about. So when we're talking about what did the defendant know, you know, the government doesn't have a ***brain scan of the defendant***. That's impossible. That doesn't -- that wouldn't tell us and ***he has no MRI***.

RE.8.517-518 (emphasis added).

There was no evidence of brain scans. Nor has any court ever required evidence of a histological nature to establish the element of scienter. More alarmingly, the Prosecutor clearly intended to burden shift by stating that "he", i.e. Perez-Solis, "has no MRI" rather than stating that the Government failed to produce such evidence. *Accord Comonweath v. Gaudette*, 441 Mass. 762 (2004) (impermissible for prosecutor to argue that jury should draw negative inference from defendant's opportunity to shape testimony); *State v. Bradshaw*, 195 N.J. 493, 510 (N.J. 2008) (reversing where prosecutor commented about the witness "[h]er whole world is about her ability to recognize things,").

B. Prosecutors May Not Ask Juries to Send Larger Social Messages At the Expense of a Dispassionate Analysis of the Facts Adduced at Trial

Prosecutors have a duty not to express personal opinions and beliefs. ABA Code of Professional Conduct DR7-106(4) (1976) (duty of attorney not to "assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused."); *United States v. Young*, 470 U.S. 1 (1985) (expressing personal opinions concerning defendant's guilt pose twin dangers that jury will impact special trust in the prosecutor's judgment).

1. Law and Order Appeal To Stop "The Drug Trade" in "Laredo, Texas and Nuevo Laredo, Tamaupilas"

In direct contravention of these legal maxims, the Prosecutor stated:

> By the way, this person is also sophisticated about what in the world is going on in ***our community***. He indicated yes, he knows there's a ***drug trade***. He has read the news. He sees it on TV. He crosses the bridge all the time. The dogs have actually been in his vehicle before searching his car. ***He's well aware that this is a big deal in Laredo, Texas and Nuevo Laredo, Tamaulipas.***

RE.8.531 (emphasis added).

Perez-Solis recognizes that "prosecutorial appeals for the jury to act as 'the conscience of the community' are not impermissible when they are not intended to inflame. *United States v. Smith*, 918 F.2d 1551, 1563 (11th Cir. 1990) (quoting *United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982). However, these statements by the Prosecutor were clearly 'intended to inflame' since the jury

was asked not to serve as a mere ‘community conscience’ but rather to end “the drug trade” in “our community” as defined by the shared social links between “Laredo, Texas and Nuevo Laredo, Tamaulipas.”

a. The Prosecutor’s Improper Argument Is Strongly Correlative to the D.C. Circuit’s Hallmark Opinion in *United States v. Brown*

Brown v. United States involved a criminal prosecution of an African-American youth for assault based on a confrontation between the defendant and two police officers. 370 F.2d 242 (D.C. Cir. 1966). The court found the prosecutor’s community appeal improper. During closing argument, the prosecutor warned the jury that to acquit the defendant would leave the police powerless to protect themselves and citizens against assault short of resort to martial law. In condemning these remarks, and in reversing the defendant’s conviction, the D.C. Circuit found that such an argument was an appeal wholly irrelevant to any facts or issues in the case. *Id*. at 246 (relying on *Viereck v. United States*, 318 U.S. at 247, and *Berger*, 295 U.S. at 88). Further, the court stated that the prosecutor’s argument raised the spectra of martial law and therefore constituted an especially flagrant and reprehensible appeal to passion and prejudice in the context of current events (i.e., the social unrest of the late 1960s).

The Prosecutor's law-and-order argument in Perez-Solis' case is strongly correlative to *Brown.* The only distinction is the involvement of racial tension versus involvement of the War on Drugs.

b. More Recent Case law is Also in Accord

Numerous courts have reversed when prosecutors have engaged in these sorts of exhortations to the jury to act as a community conscious to protect law and order. *Brown v. State*, 986 So 2d. 270 (Miss 2008) (prosecutor's remarks that "we have got to do something now" to "rid crime from our streets" constituted reversible error); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) (reversing when prosecutor stated during closing argument "we don't want drugs in Northern Kentucky"); *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) (prosecutor may not urge jurors to convict in order to protect community values, preserve civil order, or deter future crimes); *United States v. Mooney*, 315 F.3d 54, 60 (1st Cir. 2002) (improper for prosecutor to contrast juror's sense of community safety with defendant's armed robbery of hotel).

VII. SENTENCING

A. Obstruction of Justice

1. The Sentencing Judge Was Not Present for Trial

In every other reported opinion in which an adjustment under §3C1.1 was challenged, the sentencing judge was also the judge who presided at trial. In Perez-Solis' case, Judge Lemelle was assigned the case for sentencing long after Judge Saldana presided over the jury trial. Nor could Judge Lemelle have reviewed the trial transcripts, because these were not transcribed until Perez-Solis' counsel submitted the DKT13 and CJA24 forms after his appointment subsequent to the entry of judgment. R.155 (DKT13 form dated January 17 requesting transcripts of both trial days).

2. Sentencing Judge Stated It Was An "Anamoly" and "Strange Consequence" That He Had to Apply the Enhancement Simply Because Perez-Solis Testified But Was Nevertheless Convicted

In the hallmark case of *United States v. Dunnigan*, the Supreme Court held that before imposing the adjustment, the district court must make independent findings that defendant willfully attempted to obstruct justice. 507 U.S. 87, 95 (1993) ("the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury."). The logical correlate is that a District Court may not rely on the mere fact of a jury's

guilty verdict to justify the enhancement. *United States v. Bustos-Flores*, 362 F.3d 1030 (8th Cir. 2004) (reversing where the district court failed to make independent judicial findings, but simply relied on the jury verdict); *United States v. Scotti*, 47 F.3d 1237, 1251-52 (2d Cir. 1995) (reversing enhancement when district court based enhancement in part on guilty verdict); *United States v. Benson*, 961 F.2d 707, 709-10 (8th Cir. 1992) (reversing enhancement when district court relied solely on jury verdict).

A review of the sentencing transcript makes clear that the District Court believed the enhancement to be all but automatic when a defendant testifies but is nevertheless convicted:

> It is one of the, perhaps, ***anomalies or strange consequences for a person who maintains their innocence***, proceeds to trial, exercises their right to take the stand and to defend themselves of the accusation against them that once they're convicted, after the trier of fact, in this case the jury, rejects their defense and finds the government proved beyond a reasonable doubt the elements of the crime that they stood accused of and went to trial on that you are then faced with the guideline enhancement for obstruction of justice on the basis that when you take the stand and simply deny your –

R.173-174 (emphasis added).

Perez-Solis respectfully submits that what the sentencing judge regarded to be an "anamoly" and a "strange consequence" is exactly the sort of sophistry the *Dunnigan* disallows through its requirement of a n essential "factual predicate for a finding of perjury."

B. The District Court Erred in Overruling Perez-Solis' Objection To Role Reduction Under §3B1.2(b)

1. Perez-Solis Embraces His Burden

Perez-Solis recognizes that it is his burden to show that the District Court erred in denying the relief sought. *Cf. United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998) (defendant failed to meet his buden). To meet this burden, Perez-Solis argues that the text and structure of § 3B1.2 apply straightforwardly to his situation.

2. Application Note 5 Illustrates How Perez-Solis Fits Comfortably Within The Contours of A Minor Role

One indication of a minimal role, according to Application Note 4 is the defendant's "lack of knowledge or understanding of the scope and structure of the enterprise and of others." By contrast, a minor participant is one "less culpable than most other participants, but whose role could not be described as minimal." Application Note 5. Perez-Solis' fleeting conduct in picking up a cooler and driving it to the location directed was so attenuated compared to the weeks-long surveillance Martinez that the District Court clearly erred in not affording role reduction relief.

3. Substantial Caselaw Requires Reversal Based on Perez-Solis' Attenuated Links to Martinez's Drug Activities

Numerous cases have upheld the minimal-or-minor role adjustment for peripheral participants in a drug conspiracy. *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998) (4-level minimal role reduction upheld in a marijuana growing case where only two defendants were involved even though defendant admitted that he hoped to receive 50% of the profits.); *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998) (affirming three level mitigating role reduction where defendant's role was limited to facilitating sales).

Perez-Solis recognizes that a relatively fewer number of cases present Courts of Appeal reversing a District Court for failing to afford relief under §3B1.2. *United States v. Hunte*, 196 F.3d 687 (7th Cir. 1999) (district court erred in denying a role reduction because defendant was less culpable than most other participants and may have been a minimal participant); *United States v. Neils*, 156 F.3d 382 (2d Cir. 1998) (district court erred in refusing to make a minor role reduction).

This Court should align with the holding of *Green* and *Hunte* because Sanchez only went where Martinez instructed and played no part in the actual production or importation of any methamphetamine. Nor did Perez-Solis share

any part of the profits from the eventual sale. Perez-Solis low flat fee was fixed independent from any lucre Martinez stood to receive.

C. The Impact of These Dual Errors Was Far From Edentulous

Perez-Solis recognizes that when the sentence imposed "falls inside both the correct and incorrect guidelines ranges" this Court has "shown considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence." *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010) (citation omitted). However, a polar opposite situation is presented in this case, as a 4-level decrease from Level 40 to Level 36 corresponds to a Guideline range of only 188-235 months. Even the highest point on this range is 57 months shorter than the sentence imposed on Perez-Solis.

CONCLUSION

Perez-Solis' conviction(s) must be reversed and rendered if this Court finds that the evidence was insufficient as to any respective count.

In the first alternative that this Court finds the evidence minimally sufficient, this Court must reverse and remand for a new trial because of the Prosecutor's summation misconduct.

In the second alternative that this Court finds the evidence sufficient, and does not view the prosecutorial misconduct as requiring reversal, Perez-Solis'

concurrent sentences must be reversed and remanded with a properly calculated Guidelines range of 188-235 months.

Respectfully submitted,

/s/ Seth Kretzer

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,932 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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: June 18, 2012

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 18th day of June, 2012. 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 Israel Perez-Solis, Register Number 43984-279, on the 18th day of June, 2012, at the address below:

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