No. 10-10886

# In the United States Court of Appeals for the Fifth Circuit

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

CRISTOBAL MEZA, III,
*Defendant-Appellant.*

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On Appeal from the United States District Court
for the Northern District of Texas, Wichita Falls Division
No. 7:09-cr-30, Hon. Reed O'Connor, Judge Presiding

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## BRIEF OF APPELLANT CRISTOBAL MEZA, III

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## CERTIFICATE OF INTERESTED PARTIES

No. 10-10886

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

CRISTOBAL MEZA, III.

*Defendant-Appellant.*

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.

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## STATEMENT REGARDING ORAL ARGUMENT

Appellant Meza requests oral argument. Meza believes that oral argument would be of material assistance to the Court in evaluating whether there was legally sufficient evidence to support the jury's guilty verdicts for two counts of 18 U.S.C. §§922(g)(1) and 924(a)(2) when the Government's star witness, Christopher Sanchez, recanted his earlier statements to the police and testified:

> I never sold [guns] to this man. [Meza] didn't have nothing to do with it.

R.186.

Sanchez also testified that Meza's property was frequently occupied by others. *Id*. ("That's where everybody goes and chills.").

Since its seminal opinion in *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993), this Court has required the government to prove more than "mere control or dominion over a place in which contraband is found" in the context of joint occupancy cases. For these reasons, oral argument could assist the Court in evaluating whether the government adduced any legally sufficient evidentiary indicium of possession attributable to Meza when its star witness said the opposite and no other witness testified on the subject of Meza's knowledge or awareness.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court announced sentence on August 4, 2011, and entered its amended judgment August 10.[1] RE.5. Meza earlier filed his notice of appeal on August 5, 2011. RE.2; FED. R. APP. P. 4(b)(1)(A). This Court has jurisdiction over Meza's appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] Docket entries 1-103 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 there was legally sufficient evidence to support Meza's convictions for two counts of 18 U.S.C. §§922(g)(1) and 924(a)(2) when the Government's star witness, Chris Sanchez, testified, "I never sold them to this man. [Meza] didn't have nothing to do with it." R.277.

2. Whether there was legally sufficient evidence to support Meza's conviction for Count One, Felon in Possession of A Firearm, when the Mossberg shotgun was found in a shed separated from Meza's home and the only witness who testified about its placement, Sanchez, was clear that Meza did not set it there.

3. Whether there was legally sufficient evidence to support Meza's conviction for Count Two, Felon in Possession of Ammunition, when a box of Winchester shotgun shells was found in Meza's residence, but other individuals regularly passed through the home and the arresting officer testified, "I honestly don't know", if Meza was the sole occupant of the home. R.269.

4. Whether a material variance of proof at trial is demonstrated when Count 2 of the Indictment charged possession of "a box" of shells but the evidence adduced was that there were in fact two (2) boxes of shells, and furthermore witnesses testified that 8 shells from one box had been loaded into the gun.

5. Whether the District Court erred under FED. R. EVID. 613(b) in allowing the government to impeach its own witness, Chris Sanchez, with a purportedly prior inconsistent statement when Sanchez had not denied making the statement sought to be impeached.

6. Whether the District Court erred under FED. R. EVID. 403 when the probative value of Sanchez's statement was substantially outweighed by the danger that the jury would be confused between use of this statement for impeachment purposes rather than substantive evidence of Meza's guilt or innocence.

7. Whether the District Court's error in overruling Meza's objections under FED. R. EVID. 613(b) and 403 affected his substantial rights under Fed. R. Evid. 103(a).

8. Whether the two Prosecutors committed prosecutorial misconduct during closing argument when both averred to Sanchez's prior statement as substantive evidence of guilt, rather than for the limited purpose of impeachment for which it had been admitted under FED. R. EVID. 613(b).

9. Whether AUSA Foos-Pierce committed prosecutorial misconduct during closing argument when she stated, "It's great that this trial was so brief because you -- all the testimony will be very fresh in your mind" when the obvious implication was that there existed other unusued evidence and this statement averred to Meza's decision not to testify.

10. Whether both prosecutors committed prosecutorial misconduct during their respective portions of the closing argument when they derogated their own witness, Sanchez, because the testimony was contrary to that which the Prosecutor expected.

11. Whether the doctrinal prohibitions on a Prosecutor's bolstering of its own witnesses apply with equal strength to a Prosecutor's derogation of its own witness.

12. Whether the District Court erred in imposing two consecutive 120 month sentences, rather than 120 months on Count One and 68 months on Count Two to reach the "minimum total punishment" required by U.S.S.G. §5G1.2(d) and this Court's controlling precedent interpreting this statute.

## INTRODUCTION

Cristobal Meza was indicted for being a felon in possession of a firearm and a felon in possession of ammunition. The weapon was found in a shed behind Meza's house; the ammunition was found in a back bedroom closet in the house proper. The defining characteristic of Meza's house and its shed was its social function within the neighborhood such that virtually anyone could traipse through at their own will. R.277 (government's lead witness testifies on direct examination, "[t]hat's where everybody goes and chills.").

Plea negotiations quickly commenced, and an agreement was reached whereby Meza would plea guilty to the firearms offense in exchange for dismissal of the ammunition offense. The Magistrate Judge recommended acceptance of the plea agreement to the District Judge, a PSR was prepared, and matters proceeded towards sentencing. Unfortunately, the Probation Department made an awesomely grave mistake in the calculation of Meza's criminal history score: 24 criminal history points were assessed when, in fact, only 8 such points should have been assessed. Correspondingly, Meza's Criminal History Category was artificially elevated from IV to VI.

Based on this erroneous calculation, Meza's Guidelines score was computed at 235-293 months. Even the lowest point on this range was nearly twice as high as the 120 month statutory maximum Meza faced under his plea agreement.

Because of this wrongfully inflated Guidelines score, the District Court rejected the plea agreement and set Meza's case for trial. RE.6.

The Government's star witness, Christopher Sanchez, had robbed the pawn shop from which the gun found in Meza's shed was taken. Unfortunately for the government, Sanchez's trial testimony was 180-degrees opposite of what he had been expected to say about Meza. "I never sold them to this man. This man didn't have nothing to do with it." R.277. Despite the fact that Sanchez had not denied making an earlier inconsistent statement inculpating Meza, the Government was allowed to introduce this statement under FED. R. EVID. 613(b). During closing argument, the Prosecutor ignored all but the pretense of using Sanchez's statement only for impeachment purpose and averred to it repeatedly as substantive evidence of Meza's guilt. As a result, Meza was convicted on both counts after his Rule 29 motion was erroneously overruled.

Meza timely appealed, but the Court Reporter lost or inadvertently destroyed the transcript of Meza's sentencing. For that reason, this Court remanded for a properly recorded re-sentencing. Before re-sentencing, Probation confessed error and acknowledged that Meza's criminal history points had been overstated by a factor of 300%; the actual Guidelines range was 188-235 months. Over Meza's fierce written and oral objections that the term "total punishment" under §5G1.2

directed a sentence of 188 months, the District Court re-imposed a sentence of 240 months via an unrequested upward variance.

## STATEMENT OF THE CASE

### I. Indictment

On August 18, 2009, Cristobal Meza III was charged in an Indictment with two counts related to his being a felon in possession of impermissible destructive devices. RE.3. Count 1 charged Felon in Possession of a Firearm, in violation of 18 U.S.C. §§922(g) and 924(a)(2). *Id*. at 15. Count 2 charged Felon in Possession of Ammunition, in violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). *Id*. at 16. After arraignment, Meza was released on bond. R.28.

### II. Plea Agreement is Recommended by Magistrate Judge

On November 3, 2009, Meza and the government reached a Plea Agreement whereby Meza would plea guilty to Count One in exchange for dismissal of Count Two. R.45-50. The benefit of this deal to Meza was obvious; his sentencing exposure would be capped at the ten-year statutory maximum specific to Count One and avoid additional (consecutive) time germane to Count Two.

Meza consented to the Rule 11 colloquy before a Magistrate Judge, R.52, and the Rearraignment was held on November 12. R.416. Magistrate Judge Roach entered a Finding and Recommendation urging that Meza's plea agreement

be accepted that same day. R.53. Meza's conditions of release were continued and matters proceeded in the normal course towards sentencing. On December 30, a first PSR issued which calculated a Criminal History Score of 24 and a Criminal History Category of 6. (First PSR ¶51). With a Total Offense Level of 30, *id*. at 31, Meza's Guidelines range was 168-210 months.

### III. Meza Violates Conditions of Release and His Bond is Revoked

Unfortunately, Meza thereafter violated the conditions of his release by using cocaine and his bond was revoked. R.350 (revocation hearing); R.63 (order of detention pending sentencing). For purposes of sentencing, this revocation cost Meza the loss of his acceptance of responsibility points under U.S.S.G. §3E1.1 (a) and (b), which raised his Total Offense Level to 33. *See, e.g.*, First PSR; ¶¶30-31; *United States v. Dugger*, 485 F.3d 236 (4th Cir. 2007) (drug activities undermine contention of acceptance of responsibility).

Meza's Guidelines Range therefore rose to 235-293 months.

### IV. District Judge Rejects Plea

Since Meza's plea deal capped his sentencing exposure at the statutory maximum of 120 months, the difference between a range of 168-210 months and 235-293 months would have otherwise been rather edentulous. Unfortunately, on March 1 the District Judge entered an advisory order explaining that the plea was likely to be rejected because "[i]t appears that the plea agreement undermines the

sentencing guidelines and the statutory purposes of sentencing" because the 120 month global maximum was less than half of the 235-293 month range. RE.6.64. The District Court officially rejected the plea agreement the following day. (Doc. No. 29).

### V. Motion to Suppress Recorded Statement

On March 17, Meza moved to suppress the video recorded statement taken by the Wichita Falls Police Department on the grounds that this utterance was made only after Meza requested his lawyer be present. R.65. A Suppression hearing was held March 23. R.214-239.

The District Court granted in part and denied in part Meza's motion. In a lengthy ruling from the bench, the Court found that Meza did not initially clearly invoke his right to counsel and additionally made various spontaneous statements that were not in response to questioning on the record. Those statements were not suppressed. *Id*. at 233-236. However, a portion of the recorded statement following Meza's clear invocation of his right to counsel was ordered suppressed. *Id*. at 235.

### VI. The Government Discloses Newly Discovered Evidence and the District Court Suppresses Recorded Statement in its Entirety

On March 31, the Government filed a Motion Regarding Newly Discovered Evidence, volunteering an "Incident/Investigation Report" revealing that Meza had

unequivocally invoked his right to counsel before the recorded statement at the Wichita Falls Police Department. R.90-93. As a result, the District Court reconsidered the partial suppression it is March 17 oral order and suppressed Meza's statement in its totality. RE.154-160 ("the recorded statement is suppressed.").

### VII. Trial and Sentencing

The entire trial was conducted and concluded on April 12. R.247-335. The government called four law enforcement officers. First, Wichita Falls Police Officer Schulte, who investigated the pawn shop break-in. R.257. Second, FBI Agent Fernando Benavides, who interviewed Christopher Sanchez and recorded his statement. R.285. Third, Wichita Falls police officer Karl King, who executed the search warrant of Meza's house and explained that the Winchester shells were found concealed in "a back bedroom closet." R.303. Fourth, ATF Agent Brandon Chenault, who testified about the gun having travelled in interstate commerce. R.308.

The only witness called who ever observed in Meza in his house, and the only witness who could have even possibly testified to Meza's awareness of the contraband found on his property, was a 19 year old man named Christopher Sanchez. Sanchez originally confessed to stealing the guns from the pawn shop

and originally implicated Meza. However, Sanchez's testimony turned out to be far different from what the Prosecutors expected.

### A. Sanchez Recanted His Earlier Statement to Police Inculpating Meza

One week before trial, Sanchez gave a recorded statement to the investigating agents claiming that he sold one of the guns to Meza. R.275. Sanchez was the government's star witness at trial, and began his testimony with an admission that he stole three shotguns and a rifle from the pawn shop. R.276.

Thereafter, Sanchez hid one of the weapons "at a trap house." *Id*. However, Sanchez proceeded to explain that everything he had told the agents about Meza's involvement was a lie:

A: Yes, ma'am. I lied and said I sold them to this man.
Q: So you lied?

A: Yes, ma'am.
Q: And what about when you talked to Agent Benavides last week? What about that?

A: I lied again.
Q: Why did you lie?

A: Because I was scared. I already told them I sold them to this man, and I never sold them to this man. This man didn't have nothing to do with it.

Q: Why did you say you sold them to him?
A: Because I was scared. I didn't know. I didn't know what to do.

RE.7.277.

Q: And then what about when you spoke to Agent Benavides this past week and you told him that you sold the gun to him?
A: I lied. I know I made a mistake. It's just I didn't want to dig myself into a deeper hole than what I'm already in. I thought because of putting it off on somebody else, I would get away with it, but I didn't.

**Q: So you're saying that if we found that gun in the back bedroom, you put it there?**
**A: Yes, ma'am.**

RE.7.279 (emphasis added).

### B. Sanchez's Prior Statement Was Introduced Under FED. R. EVID. 613(b)

For its final witness, the Government called Agent Benavides to testify about the recorded (and now recanted) statement by Sanchez. R.285. When the Government moved to introduce this recorded statement as its Exhibit 13, Meza objected that this was improper under FED. R. EVID. 613(b):

> If [Sanchez] denied that he had made an inconsistent statement, then I think you're able to offer extrinsic evidence to prove that he has, in the past, made a prior inconsistent statement. Here, I don't think it applies to the extent that he admitted he made a prior inconsistent statement.

R.292.

Meza also objected under FED. R. EVID. 403:

> I would basically also object under Rule 403 that by allowing the tape in, you -- that there is a danger of the prejudicial matter that they will -- although it's being offered with the limited instructions, there is a danger that they will consider it for substantial evidence of the offense itself…

RE.8.293.

### C. Rule 29 Motion

After the government rested, Meza made a Rule 29 motion. RE.312-313. The District Court denied Meza's motion, explaining:

> Well, I don't know why they would put on that witness [Chris Sanchez], but they did, but I do think that witness notwithstanding, his credibility is in issue, ***and the jury otherwise would be allowed to infer possession***, so I'll overrule your objection.

R. 313 (emphasis added).

Meza was found guilty on both counts. RE.4 (jury verdict). On August 30, Meza was sentenced to consecutive 120 month sentences on each of Counts One and Two, for an aggregate sentence of 240 months. R.200 (original Judgment). The court further ordered a 3-year term of supervised release and mandatory special assessments totaling $200. *Id*.

## VIII. The Court-Appointed Lawyer Failed to Prosecute Meza's Appeal and Was Sanctioned By this Court

The court-appointed trial lawyer continued his representation on appeal. However, that lawyer did not order any transcripts and ignored repeated correspondence from the Clerk's Office in New Orleans. On January 28, 2011, Chief Judge Jones removed Mr. Cannedy and instructed the Clerk of Court to locate replacement counsel. R.206-207. On March 15, this Court imposed

monetary sanctions against Mr. Cannedy for failing to reply to the earlier order of removal. R.211. In the meantime, new Counsel was appointed. R.208.

### IX. District Court Requests Remand Because Transcript of Sentencing Hearing is Lost or Destroyed

On May 17, the District Court *sua sponte* sent a "Request for Remand" to this Court explaining that "the electronic stenographic notes of the sentencing hearing are corrupted and inaccessible from her machine, the disk and her computer." R.464. In a per curium opinion, this Court granted the remand with the instruction that the District Court "conduct those proceedings as may be necessary." R.468. On June 9, the District Court appointed the same lawyer who had been selected as replacement appellate counsel to represent Meza at the resentencing. R.466.

### X. Before Resentencing, Probation Acknowledged that It Had Overstated Meza's Criminal History Points by 300%

Before resentencing, the Probation Department submitted a Second Addendum confessing a grave error in its earlier Guidelines computations. The computation of Meza's criminal history score included convictions that were impermissibly remote. (Doc. No. 87-1). As a result, Meza's criminal history points were inflated to 24 from 8. Correlatively, Meza should have been assessed "a Criminal History Category of IV instead of VI." *Id*. In sum, Meza's Guideline range was actually 188-235 months rather than 235-293 months. *Id*. at p. 2.

## XI. Meza Objects to the Second Addendum

On July 26, Meza filed a four-pronged Objections and a Sentencing Memorandum trained on PSR ¶103 and the Probation Department's only partial recognition of its error in the calculation of Meza's Guidelines range. First, the PSR incorrectly relied on §5G1.1 (which governs "sentencing on a single count of conviction") when the correct Guidelines was necessarily §5G1.2 ("Sentencing on Multiple Counts of Conviction"). Second, ¶103 "should be amended so as to indicate that the highest point in this range is 5 months lower than the 240 month sentence to which he was originally sentenced." *Id*. at p. 2.

Meza's third and fourth objections were far more impactful with regards to the sentence ultimately meted out. Section 5G1.2(b) only references 5G1.1(a) and (b), whereas the PSR sought to "import a legal principle from '5G1.1(c)(1).'" *Id*. Furthermore, §5G1.2(d) establishes a "total punishment" equal to the minimum point on the correct Guidelines range, 188 months. "It necessarily follows that Meza should be sentenced to 120 months on Count One, and 68 months on Count Two, to be served consecutively." *Id*. at p. 4. In support of this contention, Meza argued that since the term "total punishment" is not defined in §1B1.1, the District Court should apply the Rule of Lenity to infer this point at the minimum, rather than the maximum, possible punishment. *Id*., n. 2.

## XII. Probation Responds with A Third Addendum

In response to Meza's Objections, Probation issued a terse Third Addendum on July 29:

> The Total Offense Level is 33; this is based on the Armed Career Criminal guideline calculations found in paragraphs 31 and 33 of the Presentence Report. The Criminal History Category is IV; this category was revised in the second Addendum to the Presentence Report. The revised guideline imprisonment range is 188 to 235 months. The statutory maximum prison exposure is 120 months for each of Counts 1 and 2. The total maximum prison exposure for both counts is 240 months. Since there are two counts for the court to impose sentence on U.S.S.G. §5G1.2(d) applies.

## XIII. Meza Replies to the Third Addendum

Since the Third Addendum acknowledged mistakes in the earlier versions of the PSR as to the wrongful application of §5G1.1, but did address Meza's objections as to the meaning of the term "total punishment" and/or the Rule of Lenity, Meza replied to the Third Addendum on August 3 so as to make clear that he was not waiving either of these objections.

## XIV. The District Court Re-imposed An Aggregate 240-Month Sentence Via Unrequested Upward Variance

Resentencing was held on August 4. Overruling all of Meza's objections, the District Court sentenced Meza to consecutive 120 month sentences on each of Counts One and Two, for an aggregate sentence of 240 months. RE.5 (amended

judgment). The incremental 5 months above the Guidelines range pinnacle of 235 months was imposed pursuant to upward variance. R.502.

## STATEMENT OF FACTS

### I. The Burglar of a Pawn Shop Placed A Stolen Gun in A Shed Behind Meza's Home

On July 14, 2009, three shotguns and a rifle were stolen from the Quick & Easy Pawn Shop in Wichita Falls. R.258. On July 21, the police received a lead that a 19-year old man, Chris Sanchez, had committed the robbery. R.259. Three of the four stolen guns were found at Sanchez's house on Buchanan Street. R.260. However, after his arrest, Sanchez divulged that he had placed the shotgun in a shed behind Cristobal Meza's home on Fillmore Street:

A: Yeah, I put it there.

Q: Oh, you put it there?
A: Yes, ma'am.

Q: Where did you put it in the house?
A: In the back room.

RE.7.278.

### II. Police Search Reveals Shotgun in The Shed

A search warrant was obtained for Meza's residence, R.261-262. The shotgun was located in a shed "20 to 30 feet from the back door." R.264 (arresting officer explaining search for, and location of, weapon in shed). However, this shed

was always unlocked, R.269, and was accessible to any number of people. R.277. ("That's the trap house. Everyone goes in there."). Nor had the shotgun had not been moved since it was originally placed in the shed. R.265 (Officer Schulte testifies, "[n]obody had touched the firearm.").

### III. Police Search Also Reveals Two Boxes of Shells in Meza's House

Inside of a "back bedroom closet" of Meza's house were two boxes of ammunition shells. R.303. Each box could hold fifteen shells. One box was full; the other box contained seven shells. The gun in the shed contained the other eight shells removed from the partially filled box. R.266; 267.

### IV. Joint Occupancy

Meza was not the only regular occupant of the house. R.269; 270. A man named Salvador Aleman was staying at Meza's house at the time. RE.7.280. In addition, Meza's girlfriend was also found at the house. R.373-374. Explaining the social and widely accessible nature of Meza's property, Sanchez explained:

***Everybody*** goes in there. That's where ***everyone*** goes and chills.

RE.7.277 (emphasis added).

Similarly, on cross-examination, Sanchez explained:

Q: And you knew, besides Mr. Meza, other people had access to that house?
A: **A lot.**

RE.7.280 (emphasis added).

## SUMMARY OF THE ARGUMENT

***Insufficient Evidence That Meza Knowingly Possessed A Firearm***

The Government's trial evidence elided past any effort to confront its heightened burden in a joint occupancy case. To the contrary, the evidence showed no more than a Mossberg shotgun was found in a shed 30 feet removed from Meza's house. In addition to being unlocked, this shed was regarded in the neighborhood as a place "where everybody goes and chills." R.277. The Government failed to present legally sufficiency evidence that Meza knew the shotgun was in the open shed. To the contrary, the government's star witness testified that:

I never sold them to this man. [Meza] didn't have nothing to do with it.

RE.7.277.

Q: So you're saying if we found that gun in the back bedroom, you put it there?

A: Yes, ma'am.

RE.7.279.

***Insufficient Evidence That Meza Knowingly Possessed Ammunition***

The government presented no evidence, much less legally sufficient evidence, that Meza knew Winchester shotgun shells were in his home. Two

factual parameters make this conclusion ineluctable as a matter of logic and as a matter of law.

First, neither prosecutor asked a single question of Sanchez establishing Meza's scienter with regards to the shells in his house. Sanchez was the only witness brought to testify who ever saw Meza occupy his home; all of the other witnesses were law enforcement officers who either investigated the pawn shop burglary or affected the search warrant. Nor did any of these law enforcement officers testify (or even aver) that Meza had ever bought Winchester shells. Second, Officer Schulte testified that "nobody had touched the firearm" since its original placement in the shed. R.265.

The closest evidence the government the government came to establishing scienter was Sanchez's testimony that the gun was unloaded when he placed it in the shed, RE.7.281, yet the gun was loaded with 8 shells from the unfilled box at the time of Meza's arrest. R.266. Unfortunately for the government, it offered no evidence to fill this gap. Since 1) the only evidence offered established that Sanchez put the gun in the shed and 2) the government itself contended that "nobody had touched the firearm" in the meantime, there is no legally sufficient evidence to connect Meza to the 8 shells taken from the unfilled box and loaded into the gun.

***Material Variance***

A material variance of proof at trial is demonstrated because Count 2 of the Indictment charged possession of "a box" of shells but the government presented evidence that there were in fact two (2) boxes of shells. Furthermore, the government elicited witness testimony that 8 shells from one box had been loaded into the gun, even though Count 1 of the Indictment contained no qualification that the gun was loaded. Meza's substantial rights were prejudiced by this surprise at trial, because absent these litigation-ambush tactics Meza would have been prepared to counter the prosecutor's closing argument to the jury that it could infer possession of the shells from their location in the gun. RE.10.319.

***The District Court Erred in Admitting Sanchez's Recorded Statement Through Agent Benavides***

The government's star witness, Christopher Sanchez, changed his story at trial. Despite the fact that Sanchez had earlier given the investigating agents a statement attesting that he had sold the Mossberg shotgun to Meza, Sanchez recanted and testified, "I lied and said I sold them to this man." R.277.

For its next witness, the Government called the Special Agent, Fernando Benavides, to whom Sanchez had given his earlier statement inculpating Meza. Meza objected to admission of an audio-tape of Sanchez's statement under FED. R. EVID. 613(b) and 403.

The District Court erred in admitting this audio recording through Agent Benavides, because "[p]roof of such a statement may be elicited by extrinsic evidence **only if** the witness on cross-examination denies having made the statement." *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991) (emphasis added). However, Sanchez did not deny (or claim to have forgotten) having made the earlier statement. To the contrary, Sanchez simply disclaimed the truth of that statement.

***Prosecutorial Misconduct Was Demonstrated During Closing Argument When the Prosecutor Averred to Sanchez's Prior Statement As Substantive Evidence of Guilty Even though Such Was Admitted For the Limited Purpose of Impeachment***

The Prosecutor began his closing argument with a detailed focus on Sanchez's prior recorded statement as substantive evidence of Meza's guilt. Meza immediately objected; the District Court overruled. The preponderance of the Prosecutor's closing argument was devoted to further analysis of the prior statement. This emphasis was clearly intended to go beyond the function of impeaching Sanchez. Prosecutorial misconduct is established by these instances of the Prosecutor going outside the four corners of the record evidence.

***Sentencing***

Based on §5G1.2(d), the District Court should have imposed 120 months on Count One, but only a consecutive 68 months on Count Two to arrive at a minimum Guidelines sentence of 188 months.

## STANDARDS OF REVIEW

***Sufficiency of the Evidence***

Challenges to the sufficiency of the evidence are reviewed de novo. *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000). In reviewing the sufficiency of the evidence, this Court examines whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Klein*, 543 F.3d 206, 212 (5th Cir. 2008). In undertaking this review, "all reasonable inferences are drawn in the light most favorable to the prosecution." *Id*.

***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*.

To determine whether an error in a criminal case is harmless, this Court examines "whether there is a reasonable probability that the (error) might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); "Even if an error in an evidentiary ruling is shown, reversal is warranted only if harm occurred to a substantial right of the aggrieved party." *Great West Cas. Co. v. Rodriguez-Salas*, 436 Fed. Appx. 321, 323-324 (5th Cir. 2011).

***Rule 403 Violation***

The standard for reviewing an alleged Rule 403 violation is "especially high" and requires a showing of a "clear abuse of discretion." *United States v. Setser*, 568 F.3d 482, 495 (5th Cir. 2009).

***Material Variance***

"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***

Meza objected to the Prosecutor's comments during closing argument about Sanchez's recanted testimony. 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).

Contrariwise, Meza did not object to certain other improper comments made by the Prosecutor during closing arguments. Plain error review governs statements to which no objection was made. To demonstrate reversible plain error, Meza must show that (1) there is error; (2) it is plain; and (3) it affected his substantial rights. *United States v. Gracia*, 522 F.3d 597, 600 (5th Cir. 2008).

***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).

In reviewing a sentence, this Court utilizes a two-step approach, first asking "whether the district court committed a procedural error." *United States v. Valencia*, 600 F.3d 389, 433 (5th Cir. 2010). Such errors include "miscalculating or failing to calculate the sentencing range under the Guidelines, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009).

## ARGUMENT

## I. EVIDENCE WAS INSUFFICIENT AS TO THE FELON IN POSSESSION OF A FIREARM COUNT

### A. Elements of the Offense

#### 1. Statutory Elements

To establish a violation of 18 U.S.C. § 922(g)(1), the government must prove that (1) the defendant was a convicted felon; (2) he knowingly possessed a firearm; and (3) the firearm was in or affected interstate commerce. 18 U.S.C. § 922(g)(1); *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005). Meza stipulated to his felony convictions. *See* Gov't Exs. 1 and 2; R.254-255 (stipulation read to jury).

#### 2. Possession May Be Actual or Constructive

Possession of a firearm under section 922(g)(1) may be actual or constructive. *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999). Actual possession requires direct physical control over the gun. *See United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998). "Intent is not an element of actual possession under §922." *United States v. Jones*, 484 F.3d 783, 788 (5th Cir. 2007). However, the government did not advance a theory of actual possession against Meza.

### a. Government Argued That Meza Had Constructive Possession

Constructive possession can be established by showing (1) ownership, dominion, or control over an item; or (2) dominion or control over the place where the item is found. *Id*.

### b. Government Argued That Meza's Constructive Possession Took the Form of Control Over the Place Where Illicit Items Were Found, Rather than the Items Themselves

In its prosecution of Meza, the government trained its attack on the latter rather than the former. The government had no demonstrative evidence (such as a photograph) showing Meza with the gun or ammunition in his hands. *Cf. United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (affirming §922(g) conviction when defendant had shown others "pictures of guns he had bought").

### c. "Place" Refers to A Specific Location Rather Than An Elastic Concept of Space

Meza did not contest that the shotgun and ammunition were found on his property. *See, e.g.*, Gov't Ex. 10 (utility bills addressed to Meza); R.261 (Officer Schulte testifies that he verified Meza's ownership of the property). However, "place" refers to a more precise location on a piece of property than its global expanse or outer reaches. *See, e.g.*, *United States v. Mergerson*, 4 F.3d 337, 348

(5th Cir. 1993) (defendant and the person who had purchased the firearm in question "shared the ***bedroom*** in which the gun was found.") (emphasis added).

### 3. In Joint Occupancy Cases, The Government Must Also Prove "Knowledge Of And Access To" the Weaponry

#### a. Heightened Burden

The government's burden is heightened in joint occupancy cases. "Proving constructive possession is more difficult when a residence is occupied by multiple people." *United States v. Tate*, 104 Fed. Appx. 411, 413 (5th Cir. 2004).

Where two or more persons jointly occupy the premises where a firearm is found, mere control or dominion over the premises is insufficient to establish constructive possession; the evidence must support at least a "plausible inference that the defendant had knowledge of and access to the weapon or contraband." *Mergerson*, at 349.

#### b. Meza's Case Demonstrates the Concept of Joint-Occupancy Because His House Was Cohabitated By A Man Named Slavador Aleman Property During the Time Period in Question

In most joint occupancy cases, the situation involves a couple "cohabitating in the [relevant abode]." *Id*. at 348. Meza's case shares this dimension. R.280 (Sanchez testifies on cross-examination that a friend of his, Salvador Aleman, was staying at Meza's house at the same time); R.373-374 (Agent Benavides testifies that Meza's girlfriend cohabitated).

### c. The Concept of Joint-Occupancy Is Demonstrated *In Extremis* Because Meza's Property Was Generally Accessible to the Entire Neighborhood Community

Furthermore, the concept of joint occupancy is demonstrated *in extremis* because of Sanchez's repeated testimony that Meza's property was open to a large cross-section of their community. On direct examination, Sanchez explained,

> Everybody goes in there. That's where everyone goes and chills.

RE.7.277.

Similarly, on cross-examination, Sanchez explained:

> Q: And you knew, besides Mr. Meza, other people had access to that house?
> A: **A lot.**

RE.7.280 (emphasis added).

> ***Everybody*** has access to the house.

RE.7.281 (emphasis added).

## B. The District Judge Averred to the Government's Striking Dearth of Evidence Once Sanchez Recanted From the Witness Stand

Overruling Meza's Rule 29 motion, the District Court commented on the obvious tactical mistake the Government made in basing its case almost entirely on Sanchez's expected testimony:

> Well, I don't know why they would put on that witness, but they did, but I do think that witness notwithstanding, his credibility is in issue, **and the jury otherwise would be allowed to infer possession**, so I'll overrule your objection.

R.313 (emphasis added).

It is particularly salient that the District Court did not identify what other points of evidence would permit a ***reasonable*** "jury [to] otherwise…be allowed to infer possession."

In the sections immediately below, Meza will demonstrate that the government failed to adduce legally sufficient evidence that he had either 1) knowledge of the weapon and/or ammunition placed on his property by another or 2) access to this weaponry when its placement had been concealed from him by the transients who often passed through his home and the shed appurtenant thereto.

### C. Insufficient Evidence of Meza's Knowledge

In determining what constitutes dominion and control over an illegal item, this Court considers not only the defendant's access to the dwelling where the item is found, but also whether the defendant had knowledge that the illegal item was present. *Guzman v. Lensing*, 934 F.2d 80, 84 (5th Cir. 1991). For example, the mere fact that the defendant had a key to an apartment where cocaine was found is insufficient to establish that he exercised dominion or control over the cocaine. *Id*.

Unfortunately for the government, Meza's trial was devoid of any evidence that Meza had knowledge a shotgun was placed in the shed on his property.

### 1. No Evidence That Meza Entered The Shed

Perhaps because it intended to rely on Sachez's presumed favorable testimony, the government did not introduce any evidence that Meza ever entered or otherwise utilized the shed. This critical omission distinguishes Meza's situation from cases in which some active use and enjoyment over property established predicated "knowledge of and access to" weaponry found thereupon. *Cf. United States v. Patt*, 305 Fed. Appx. 218, 220 (5th Cir. 2008) ("It was undisputed that Patt was the owner of the vehicle on the date of the traffic stop **and that he had been using the vehicle for one to two months before that date**.") (emphasis added)

### 2. Shotgun Had Not Been Handled Since Its Placement in the Shed By Sanchez

#### a. Sanchez Was Clear That He Placed Gun in Shed

The government offered no evidence that Meza had placed the shotgun in his shed; to the contrary, Sanchez testified that he was solely responsible for its placement:

Q: What did you do with the guns after you stole them?
A: I kept them.

Q: All four of them?
A. Yes, ma'am.

Q: And did you do anything with any of them after that?

A: No, ma'am. I hid them.

Q: Where did you hide them?
A: At a trap house.

Q: The trap house?
A: Yes, ma'am.

R.276.

**b. Officer Schulte Was Clear That "Nobody Had Touched The Firearm" Since Sanchez Placed It in the Shed**

Against this backdrop, Officer Schulte was clear that the shotgun he found in the remote shed 'had not been touched' since its original placement:

A: Nobody had touched the firearm.

Q: I'm sorry, say it again?
A: Nobody had touched the firearm.

R.265.

This testimony aligns Meza's situation with *United States v. Ridlehuber*, 11 F.3d 516, 520 (5th Cir. 1993) ("Although there is evidence that defendant was in relatively close proximity to the short-barreled shotgun, there is no evidence that defendant ever handled or closely examined the gun." ) (reversing and remanding conviction for possession of unregistered shotgun).

### c. A Virtually Identical Fact Pattern Predicated Reversal in *United States v. Mills*

The factual situation arched by the dual testimonies of Sanchez and Officer Schulte are very similar to those which compelled reversal in *United States v. Mills*, a doctrinal case in which the Tenth Circuit expressly adopted this Court's holding in *Mergerson*, 29 F.3d 545, 549 (10th Cir. 1994):

> Based on our review of the record, we hold that there was insufficient evidence for a jury to find beyond a reasonable doubt that Mills constructively possessed the two firearms on June 30.
>
> The only direct evidence of what happened next is the testimony of Hall that she placed the guns in her dining room table compartment without Mills' knowledge and contrary to his instructions. Even if the jury disbelieved the entire defense testimony, that disbelief cannot constitute evidence of the crimes charged and somehow substitute for knowing constructive possession in this joint occupancy situation. We are unwilling to infer knowledge of 'dominion and control' over Hall's guns contained in the compartment (and out of view), *see Mergerson*, 4 F.3d at 349, on June 30 solely because Mills handled them and placed them in the garage six days before…

## D. Insufficient Evidence of Meza's Control

### 1. The Shed Behind Meza's House Was Permanently Unlocked

By all accounts, the shed behind Meza's home was a permeable place which was always unlocked. For example, Officer Schulte explained:

> Q: But in your observation of it, it didn't appear that it had been locked or was kept on a locked basis?
>
> A. No, sir.

R.269.

This testimony distinguishes Meza's situation from cases in which the defendant's excusive possession of the key to a locked place has been held to establish control. *See, e.g.*, *United States v. McDaniel*, 293 Fed. Appx. 265, 269 (5th Cir. 2008) (defendant "McDaniel supplied keys to the truck" where revolver was found); *United States v. Piwowar*, 492 F.3d 953, 955 (8th Cir. 2007) (defendant "possessed the sole key to the refrigerator" where guns were found); *cf. United States v. Wright*, 24 F.3d 732, 735 (5th Cir. 1994) (reversing conviction for constructive possession when "the facts establish, if anything, that the passenger -- and *not* Wright -- exercised complete dominion and control over the gun: (1) the key which unlocked the glove box was found in the cruiser where the passenger had been detained…") (emphasis in original).

**2. Social Gathering Place Frequented By Many Other People**

Sanchez's testimony was clarion that Meza's shed served as a social gathering place in their neighborhood and that many different people entered and exited:

> A: That's the trap house. Everybody goes in there. That's where I had my guns hidden. I don't even know if they know that they were there or not. **That's where everybody goes and chills.**

RE.7.277 (emphasis added).

Moreover, Sanchez was also clear that Meza's home was open and accessible to the community *writ large*:

> Q: So you're saying he doesn't live there?
> A: I don't- everybody lives there. **If you need a place to go, that's where you go.**

*Id*. (emphasis added).

## II. EVIDENCE WAS INSUFFICIENT AS TO THE FELON IN POSSESSION OF AMMUNITION FOUND IN MEZA'S HOUSE

Officer King was clear that he found the two boxes of Winchester shells in "the back bedroom closet." R.303. While Meza might have constructively possessed shells set in his house by another were the contraband left open for anyone to see, the Government did advance such a theory or adduce any evidence that Meza had seen these shells in the closet.

### A. Meza's Home Was Jointly Occupied

#### 1. The Government's Own Witness Could Not Speak to Joint versus Sole Occupancy

On cross-examination, Officer Schulte testified that he was unsure if Meza was the sole occupant of the house in question:

> Q: And now, from your observations there in the house, did it appear that more than one person resided in that house?
> A: I honestly don't know.

R.269.

### 2. At Least Two Other People Cohabitated with Meza

However, Sanchez was clear on cross-examination that a friend of his, Salvador Aleman, stayed with Meza at his home during the relevant time period. RE.7.280. In addition, Meza cohabitated with his girlfriend. R.373-374 (Agent Benavides testifies that Meza's girlfriend was found at the home at the time warrant was effected).

### 3. Joint Occupancy *In Extremis* Demonstrated By Social Permeability of Meza's Home

More significant is Sanchez's testimony on direct examination that Meza's home was as socially permeable as the shed:

> Q: So you're saying he doesn't live there?
> A: I don't—**everyone lives there**. If you need a place to go, that's where you go.

RE.7.277.

> Q: So you're saying he does live there?
> A: Where **everybody goes and stays.**

RE.7.278 (emphasis added).

***Everybody*** has access to the house.

RE.7.281 (emphasis added).

### B. No Evidence Whatsoever About Meza's Knowledge or Awareness of the Shells

Sufficient evidence usually assumes some evidence germane to an element of the offense was offered at trial. To the contrary, no evidence was adduced concerning Meza's scienter on Count 2. This dearth defeats a finding of sufficient evidence *vel non*.

With regards to each and every law enforcement witness, there were far more questions asked about the gun in the shed than the shells in the house. However, it is fatal to the government's case that neither of the two prosecutors who questioned Sanchez on direct or re-direct examinations asked him a single question about "shells" or ammunition in Meza's house. RE.7. In other words, the lone witness who could testify as to Meza's knowledge or awareness of the shells (as contra-distinguished from the officers who testified only about the location of the shells) was not asked a single such question.

### C. The Government's Evidence Completely Fails to Establish Meza's Control Over the Shells

Meza recognizes that Sanchez testified that the gun was unloaded when he placed it in the shed, RE.7.281, yet the gun was loaded with 8 shells from the unfilled box at the time of Meza's arrest. R.266. However, the government did

not seize this opportunity to offer any evidence whatsoever that it was Meza who moved the shells from the container into the gun.

The only demonstrative evidence adduced by the government was two photographs of the shells after they had been discovered and arranged for photographing. *See* Gov't Exs. 5 and 6. This evidence established no more than Meza's mere proximity to the shells in his home; these pictures do not establish a "plausible inference" that Meza possessed these shells. *United States v. De Leon*, 170 F.3d 494, 497 (5th Cir. 1999); *see also United States v. Beverly*, 750 F.2d 34, 36-37 (6th Cir. 1984) (constructive possession not proven by evidence that defendant was standing close to a waste basket which contained two guns, one of which contained defendant's fingerprint).

However, even if there were some evidence connecting Meza to the movement of the shells from the box to the gun, it is just as likely that 1) co-occupant Salvador Aleman brought the shells into the house and loaded the gun and/or 2) that Meza's girlfriend brought the shells into the house and loaded the gun, and/or 3) one of the neighborhood residents who traipsed through the socially permeable house and its permanently unlocked shed did so.

More likely, since 1) the only evidence offered established that Sanchez put the gun in the shed and 2) the government itself contended that "nobody had touched the firearm" in the meantime, R.265, the 8 shells taken from the unfilled

box and placed into the gun could only have been so moved by the person who put the gun in the shed originally.

In any event, "[w]hen 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). While Meza's primary argument is that the government failed to offer any evidence impinging on the scienter element of possession regarding the ammunition, his alternative argument is that the evidence offered at most rose to the level of equipoise. Either conclusion compels reversal and acquittal.

### D. The Check-stubs in the Tin Do Not Pertain to the Shells

Meza recognizes that Officer King testified that he found pay-stubs in a tin in the closet where the shells were found. R.303-304; 307. These pay-stubs are not probative of anything. In his gasp for a theory of conviction, the Prosecutor argued at closing argument:

> He was putting his pay stubs in the tin. Pretty sure he saw the shotgun shells over there. Pretty sure he knew they were there.

RE.10.328.

Unfortunately, the Prosecutor's reach for this necessary fact exceeded his grasp, because no witness testified that Meza "was putting pay stubs in the tin."

Meza's girlfriend (or anyone else) could have just as easily gathered the stubs and put them in the tin.

But even if there had been testimony that Meza put the stubs in the tin, there was no testimony that the shells were visible (as arranged for display in Gov't Exhibit 5) from the vantage point of the tin. To the contrary, even in Gov't Exhibit 6, the boxes of shells are closed shut. Moreover, there was no testimony that these two closed boxes were themselves visible from the opening of the closet. Indeed, these boxes might have been buried underneath cluttered papers (such as pay-stubs and receipts).

### E. Conclusion: *Mergerson* Applies Straightforwardly And Compels Reversal As To Both Counts 1 and 2

The holding of *Mergerson* applies with equal valence to the lack sufficient evidence undergirding both Counts 1 and 2. "In *Mergerson*, the room was unoccupied; someone else owned the gun; and the gun was out of the defendant's reach." *United States v. Hordge*, 350 Fed. Appx. 970, 973 (5th Cir. 2009) (describing *Mergerson*).

With regards to Count 1, the shed was unoccupied, Sanchez "owned" the gun insofar as he had unilaterally stolen it from the pawn shop, and the shotgun was out of Meza's reach. The issue of "reach" is particularly salient. No witness testified that they ever saw Meza in the shed. However, ample testimony

established that any number of people traipsed through the permanently unlocked shed at will.

With regards to Count 2, no witness testified Meza actually owned the shells or had palpable access to them. Meza's house was at least as socially permeable as was his shed. Moreover, because the only evidence offered established that Sanchez put the shotgun in the shed, it is more logical to assume that Sanchez (rather than Meza) hid the shells in the house to keep anyone else from using the shotgun before Sanchez could return and retrieve it.

## III. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A NEW TRIAL

Even if the Court finds the evidence barely sufficient to sustain the two convictions, this Court should, pursuant to the broad remedial powers vested in it by 28 U.S.C. 2106, grant Meza a new trial on the ground that the verdict is against the weight of the evidence. Under FED. R. CRIM. P. 33, a district court is authorized to grant a new trial on this ground even where the evidence is sufficient. *See, e.g., United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) (upholding a district court's grant of a new trial on this ground). Moreover, "[i]f the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong as to require a judgment of acquittal, the district judge may be obliged to grant a new trial." *United States v. Morales*, 910 F.2d 467, 468

(7th Cir. 1990), amending opinion originally reported at 902 F.2d 604 (7th Cir. 1990).

## IV. MATERIAL VARIANCE: THE INDICTMENT'S CHARGED POSSESSION OF "A BOX" OF SHOTGUN SHELLS YET THE TRIAL EVIDENCE FOCUSED ON TWO BOXES, ONE OF WHICH WAS PARTIALLY EMPTY BECAUSE EIGHT SHELLS HAD BEEN LOADED INTO THE GUN

### A. The Government Adduced Proof at Trial To Predicate Theories of Conviction Not Alleged in the Indictment

Count 2 charged Meza with possession of "a box" of Winchester 12 gauge shotgun shells. RE.3.16; Count 1 charged Meza with possession of "a firearm." RE.3.15. There was no qualification that Meza allegedly possessed a loaded firearm, much less than the firearm in Count 1 was loaded with the shells at issue in Count 2. However, at trial, the Government adduced evidence of two boxes of shells and that 8 of the shells from one of these boxes had been loaded into the gun. This multifaceted variance was material and rose to the level of plain error.[2]

### B. The Government Adduced Two Boxes of Shells to Expand the Possible Ambit of Meza's Possession of Both the Ammunition and the Gun

The difference between one and two boxes of shells in qualitative rather than quantitative. Harmless variance might have been demonstrated had the government merely offered evidence of two (or even more) identical boxes of

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

shells. For example, in Gov't Exhibit 6, the two boxes of shells are closed shut. Presumably, the two boxes looked equally fungible when introduced as Exhibit 9. *See United States v. Arlt*, 567 F.2d 1295, 1298 (5th Cir. 1978) (no prejudice, and thus no material variance, when an indictment alleged that defendant made false statements on a W-4 form, but defendant actually used a different form).

To the contrary, the additional evidence adduced at Meza's trial was far more nefarious in its purpose and deleterious in its effect. The Government offered repeated testimony that the second box contained only 7 of the 15 shells which it could hold in full; the other 8 shells had been loaded into the shotgun:

> There were seven in the box, and the -- I believe the other eight from that box were in that shotgun. The box of slugs was completely full with 10 rounds.

R.267 (introducing the 8 shells removed from the gun as Exhibit 8).

### C. During Closing Argument, the Prosecutor Seized on the Superfluous Evidence To Expand the Potential Grounds of Conviction to the Jury

Not only did the Government shift its trial theory, during closing argument the Prosecutor took full advantage of the opportunity this variance of proof afforded to argue expanded theories of conviction to the jury:

> And what is really, really interesting about that box of shotgun shells -- well, there are two boxes. Well, they hold 15 shells each. One of them had seven, right? Where were those other eight? The same Winchester brand shotgun shells found in the firearm, in that pistol grip shotgun, just behind the house. Again, common sense and reasoning.

RE.10.321.

The issue of missing bullets taken from the second box also allowed the Prosecutor to further impeach his own witness, Christopher Sanchez, during closing:

> What else did [Chris Sachez] say? Well, he said it wasn't loaded. You all also know that that wasn't the case. It had eight live rounds in it.

RE.10.319. *See* Parts V-VIII, *infra*.

## V. THE AUDIO RECORDING OF SANCHEZ'S STATEMENT TO THE INVESTIGATING OFFICERS DID NOT QUALIFY AS A PRIOR INCONSISTENT STATEMENT UNDER FED. R. EVID. 613(B)

### A. Sanchez Did Not Deny Or Forget Making the Previous Statement

Sanchez did not deny (or forget) making his recorded statement to Officer Benavides the week before:

> Q: And what about when you talked to Agent Benavides last week? What about that?
> A: I lied again.

RE.7.277.

### B. Meza Objected Under FED. R. EVID. 613 and 403

Meza objected to the introduction of Sanchez's recorded statement (Gov't Ex. 13) on the grounds that his testimony elicited no inconsistency under FED. R. EVID. 613(b):

> [I]f he denied that he had made an inconsistent statement, then I think you're able to offer extrinsic evidence to prove that he has, in the past, made a prior inconsistent statement. Here, **I don't think it applies to the extent that he admitted he made a prior inconsistent statement.**

R.292 (emphasis added).

Meza also objected to potential jury confusion under FED. R. EVID. 403. R.293; *see also* Part IV, *supra*.

### C. Extrinsic Evidence May Be Introduced Only if A Witness First Denies or Claims to Have Forgotten Making A Statement

#### 1. A Party May Impeach Its Own Witness

Meza recognizes that under FED. R. EVID. 607, the prosecution may impeach its own witness. *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985). Meza also recognizes that under FED. R. EVID. 613(b), "[i]f the witness denies or cannot recall making the prior statement, it may be authenticated through another witness." *Great West Cas. Co. v. Rodriguez-Salas*, 436 Fed. Appx. 321, 327 (5th Cir. 2011).

#### 2. Requirement That A Witness First Deny the Statement

> The witness's presence is advantageous only if the witness admits to having made the statement. ***If the witness denies it, or answers that he or she does not remember making the statement***, counsel may resort to extrinsic proof as the next step.
>
> WEINSTEIN'S FEDERAL EVIDENCE, §613.05[3][a] (2d ed. 2011) (emphasis added).

Sanchez did not deny having made his earlier statement to the police. Nor did Sanchez claim to have forgotten making this statement.

This Court has long held that "[p]roof of such a statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement." *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991); *see also United States v. Sisto*, 534 F.2d 616, 622 (5th Cir. 1976) ("If on cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness.") (quoting McCormick on Evidence § 34 (1972)); *see also United States v. Gholston*, 10 F.3d 384, 388 (6th Cir. 1993) (witness was impeached by his prior inconsistent statement that he sold drugs for, and received drugs from, defendant, only after denying at trial that he had made that statement).

### 3. Error to Label A Prior Statement "Inconsistent" Simply Because its Substance Diverges From Current Trial Testimony

#### a. Tape-Recorded Statements Were Addressed by this Court in *United States v. Greer*

In *United States v. Greer*, this Court held that a taped statement in direct conflict with trial testimony was excludable where on cross-examination the witness admitted making the statement:

> Laird and his attorney taped this statement in preparation for plea bargaining. In the statement, Laird denied meeting with Greer, Byrd, and

> Courville in Basile to prepare Byrd and Courville to lie before the Lafayette grand jury, stating that to the extent Byrd said otherwise, Byrd was lying. The taped statement was in direct conflict with his trial testimony that the four men met in Basile to rehearse false testimony to be given before that grand jury. **Laird, however, later admitted on cross-examination that he made the previous inconsistent statement.**
>
> …[T]he tape was properly excludable for this reason…
>
> 806 F.2d 556, 558-559 (5th Cir. 1986) (emphasis added).

#### b. The Sixth Circuit Reached the Same Conclusion in *Rush v. Illinois Cent. R.R.*

*Rush v. Illinois Cent. R.R.* centered on a child plaintiff who was injured in a fall from a railcar on which he and other children were playing. 399 F.3d 705 (6th Cir. 2005). Within several hours of the accident, a risk manager/railroad police officer interviewed three of the children. At trial, the plaintiff called two of the interviewed children as witnesses. The Sixth Circuit found that it was error to admit an audio recording to impeach one of the children after he admitted making inconsistent statements. *Id*. at 723 (citing the Fifth Circuit's holdings in *Greer* and *Sisto*).

#### c. Logic Applies With Equal Strength to Statements Which Were Not Tape-Recorded

*United States v. Arena* involved a Hobbs Act prosecution arising from butyric acid attacks on abortion providers. 180 F.3d 380 (2d Cir. 1999). The defendant was prohibited from impeaching the principal prosecution witness with

statements to a probation officer indicating that the defendant was not involved with the incidents because the witness herself testified to making these statements:

> Under FED. R. EVID. 613(b), extrinsic evidence of a witness's prior statement may be offered to impeach that witness's credibility only if, inter alia, the statement is inconsistent with her trial testimony. In the present case, Campbell herself testified at trial that she told Baumes her mother had had nothing to do with the incidents and was being unjustly prosecuted. Thus, the proffered Baumes testimony would have been **consistent with and duplicative of** that portion of Campbell's testimony.

*Id*. at 400 (emphasis added and citation omitted).

## VI. DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO EXCLUDE SANCHEZ'S STATEMENT UNDER FED. R. EVID. 403

### A. Meza Objected Under FED. R. EVID. 403

Meza recognizes that "Rule 613(b) addresses only when extrinsic proof of a prior inconsistent statement is inadmissible; it says nothing about the admissibility of such evidence." *Rush v. Illinois Cent. R.R.*, 399 F.3d 705, 723 (6th Cir. 2005). For that reason, Meza objected to Sanchez's recorded statement under Rule 403 immediately after his objection under Rule 613(b) was overruled:

> I would basically also object under Rule 403 that by allowing the tape in, you -- that there is a danger of the prejudicial matter that they will -- although it's being offered with the limited instructions, there is a danger that they will consider it for substantial evidence of the offense itself and would – we would point out that even though the party rule doesn't apply, you know, it's their witness who backed up on them, and so we would also object for its admissibility under 403.

RE.8.293.

### B. The "Prosecutorial Need" for Sanchez's Statement Was A Function of the Government's Own Decision Concerning the Marshaling of Witnesses

"[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). Meza 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 Meza's prosecution, any "prosecutorial need" for additional evidence was entirely of a function of the government's decisions at trial. Sanchez's testimony was obviously a colossal tactical failure. Indeed, the District Court itself commented, "I don't know why they would put on that witness [Chris Sanchez], but they did…". R.313. However, the government's trial posture was also a function of its decision to present its case with only three witnesses. Two of these three witnesses were law enforcement officers; Sanchez was the only witness who ever observed Meza on his property and who could speak about his dominion thereof. Surely, the government could have located and/or subpoenaed other

witnesses who had observed Meza on the property at different points in time. Unfortunately for the government, they did not choose to bring such witnesses to trial.

### C. The Incremental Probity of Sanchez's Prior Statement Was Dramatically Outweighed By The Prejudice to Meza

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). Sanchez's recorded statement could only be probative of his own truthfulness or un-truthfulness. Having acknowledged his complete and total recantation from the witness stand, the introduction of the audio recording as Exhibit 13, any additional probative effect at the margin was slim to none.

However, the potential for undue prejudice to Meza was awesome and great as it allowed the prosecution to improperly focus the jury on an inculpatory (but unsworn) prior version of Sanchez's statement rather than the exculpatory trial testimony made under oath. *Accord BE&K Construction Co. v. United Brotherhood of Carpenters & Joiners*, 90 F.3d 1318, 1331 (8th Cir. 1996) (finding reversible 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."

## VII. MEZA'S "SUBSTANTIAL RIGHTS" WERE AFFECTED BY THE COURT'S DECISION TO OVERRULE HIS OBJECTIONS UNDER RULES 613(B) AND 403

Meza recognizes that FED. R. EVID. 103(a) provides that an erroneous ruling does not constitute reversible error unless the ruling affected "a substantial right of the party."

### A. Harmful Error Redounds to the Prosecution's Aversion to Sanchez's Tape-Recorded Statement as Substantive Evidence of Guilt

Any contention by the Government that it regarded Sanchez's tape-recorded statement as mere impeachment evidence is vitiated by the Prosecutor's decision in closing argument to "start off from the very beginning with Chris Sanchez." R.318.

> Let's start off from the very beginning with Chris Sanchez, okay. Chris Sanchez is a young man who talked to police officers and agents two different times before appearing here today, nine months apart, not looking at any statements or reports, and what did he say to the police officers? The same basic facts, that he stole those firearms from the pawn shop, that he broke into --

*Id.*

After Meza's contemporaneous objection was overruled, *id*, the Prosecutor continued:

> Obviously, this is an individual who got up here and said something very different from what he said on a prior occasion.
>
> What else did he say? Well, he said it wasn't loaded. You also know that wasn't the case.

R.319.

> I would submit to you that he came in here and he lied. [B]ut one thing—there are a couple of things he definitely—**if the story he was telling today was true, he got it wrong.**

R.329 (emphasis added).

### B. Harmful Error is Accentuated By the Dearth of Other Evidence Impinging on Meza's Knowledge and/or Constructive Possession

It is striking that even during closing argument, the Prosecutor had difficulty enunciating any evidence implicating Meza other than the trial testimony he had anticipated and hoped to elicit from Sanchez. Indeed, the Prosecutor apparently could not discern if its theory trained on actual or constructive possession:

> So with or without the testimony of Chris Sanchez, we proved beyond a reasonable doubt that he constructively possessed that shotgun, and that he actually possessed, ***well, or constructively possessed***, those shells.

R.330.

### C. Conclusion

Even when viewed in the light most favorable to the government's theory, the case against Meza was close. This reality is made plain by the fact that the Prosecutor could not find much else to talk about during closing argument other than Sanchez's earlier tape-recorded statement. The Prosecutor abandoned all but the pretense of limiting use of this prior statement for impeachment purposes. Meza was clearly harmed by the District Court's error under Rules 613(b) and 403

because absent the introduction of Sanchez's tape-recorded statement, the Prosecutor would not have had the opportunity to cloak this impeachment evidence in the guise of substantive evidence of guilt.

## VIII. PROSECUTORIAL MISCONDUCT

### A. Prosecutor Suggested Extra-Record Verification to Derogate Sanchez's Credibility

#### 1. Invitation to the jury to Speculate

The Prosecutor repeatedly offered open-ended speculation as to the reason(s) why Sanchez recanted his earlier statement:

> Now, ***why*** [Sanchez] came up here today and said what he said, that's for y'all to decide. ***Why***, when talking to police officers, he iterated certain facts not once but twice over, the very same set of facts; and then today, when facing all of us, he changes his story. Well, that's for y'all to decide. You need to take that and consider what you will with it.
>
> But I will point this out, specifically, regarding his credibility at this point, what did he say?

R.319 (emphasis added).

#### 2. Meza Objected to Preserve His Objection

Meza objected to the Prosecutor's line of argument concerning Sanchez's prior statement. R.318. Accordingly, this Court reviews for abuse of discretion. *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007).

### 3. Substantial Caselaw Supports Reversal

Numerous courts have reversed when prosecutors have suggested an esoteric ability to assess witness credibility. *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999) (reversal for prosecutor's insinuation that he possessed special ability to assess credibility of his witnesses); *United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997) (plain error for prosecutor to imply that he possesses extra-record knowledge and capacity to monitor truthfulness of witness).

## B. Prosecutor's Statement, "It's Great That This Trial Was So Brief" Was an Obvious Aversion to the Availability of Unused Evidence

In *United States v. Young*, the Supreme Court warned of the twin dangers inherent in a prosecutor's decision to vouch for the credibility of witnesses and expressing personal opinions concerning a defendant's guilt because the jury will think there is additional nonrecord evidence to support charges and the jury's special trust in prosecutor's judgment. 470 U.S. 1 (1985).

In direct contravention of these principles, the Prosecutor began the rebuttal portion of closing argument by commenting on the relative shortness of Meza's trial vis-à-vis other (theoretically longer) trials[3]:

[3] Meza did not object to this statement by the Prosecutor. As such, this Court reviews for plain error. *United States v. Gracia*, 522 F.3d 597, 600 (5th Cir. 2008).

> Ladies and gentlemen, I would like to thank you again for your attention. **It's great that this trial was so brief** because you -- all the testimony will be very fresh in your mind.

R.327 (emphasis added).

Courts have repeatedly reversed when prosecutors have informed the jury that a case would have taken more time if the government had chosen to call additional witnesses. *United States v. Maddox*, 156 F.3d 1280 (D.C. Cir. 1998) ("When a prosecutor starts telling the jury what other potential witnesses would have said if the government had only called them, it is time not merely to sustain an objection but to issue a stern rebuke and a curative instruction, or if there can be no cure, to entertain a motion for a mistrial."); *see also People v. Webb*, 68 AD2d 331, 417 N.Y.S.2d 92 (2d Dep't 1979) (prosecutor averred that certain witnesses were not called because their testimony would have been repetitive).

The logic of *Maddox* and *Webb* apply even more straightforwardly to the statement by Meza's prosecutor that the brevity of his trial was "great" because it suggested the availability of other unused evidence. Moreover, the Prosecutor's comment on the trial's brevity drew an obvious reference to Meza's decision not to testify, since doing so would have lengthened the time of trial and lessened the "greatness" of its short duration. *United States v. Johnston*, 127 F.3d 380 (5th Cir. 1997) (reversible error by prosecutor suggesting that defendants could corroborate witness' account if they chose to testify).

### C. Prosecutor Expressed Personal Opinions and Beliefs

The Fifth Circuit has repeatedly instructed prosecutors not to attempt to bolster witness credibility through personal vouching. *United States v. McCann*, 613 F.3d 486 (5th Cir. 2010) (prosecutor improperly vouches for credibility of police officers); *United States v. Gallardo-Trapero*, 185 F.3d 307 (5th Cir. 1999) (same); *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979). The principles prohibiting vouching apply with equal strength when the prosecutor is seeking to derogate, rather than bolster, his own witness's testimony. R.290 (Prosecutor explains, "[e]ssentially, [Sanchez] became a hostile witness by not being truthful with the Court.").

Unfortunately, closing argument was contaminated with instances of the prosecutor's personal expressions:

> And the reason ***I*** bring Mr. Sanchez and the testimony up and the conflicting statements is because ***I*** want you to use your common sense…
>
> But ***I*** will point out, specifically, regarding his credibility on this point…

R.319 (emphasis added).

> And ***I*** **can't urge you enough** that these are two separate counts in the indictment…

R.320 (emphasis added).

> Again and again, ***I*** don't think there is any issue at all…

R.320-321 (emphasis added).

## IX. SENTENCING

### A. Procedural Background: Probation Department's Successive Mistakes

#### 1. Meza's Original Plea Agreement Was Rejected Based on Probation's Wrongfully Inflated Computation of the Criminal History Score

PSR ¶6 explains:

> On March 2, 2010, the defendant appeared before the U.S. District Judge Reed O'Connor for sentencing. Judge O'Connor rejected the plea agreement in the case and ruled that it undermined the guidelines, and the statutory purposes of sentencing, as the defendant's guideline range is between 235 and 293 months custody, yet pursuant to the plea agreement, the defendant only faced a 120-month maximum sentence.

According to the original Statement of Reasons, this PSR was adopted without change for the first sentencing. (Doc. No. 62, I.A.). It necessarily follows that the District Court rejected Meza's plea deal based on the inflated Guidelines range presented in the February 2010 PSR.

#### 2. The PSR Used at Meza's First Sentencing Was Not Properly Revised to Reflect the Applicability of §5G1.2 Rather Than §5G1.1

PSR ¶ 103 cites §5G1.1(c)(1) for the proposition that "since the maximum of the guidelines range is greater than the statutorily authorized maximum sentence of 240 months, the Guidelines Imprisonment Range becomes 235-240 months."

However, in its Third Addendum, Probation conceded that §5G1.1 was not the proper section because that provision governs "Sentencing on a Single Count

of Conviction" whereas Meza was convicted of two different 922(g)(1) counts. The likely source of this mistake arises from the fact that the First Addendum was prepared on February 2, 2010, when Meza had pled guilty to one count of conviction. At that point, §5G1.1 was the applicable Guideline. Pursuant to that First Addendum, Paragraph 101 read, "the Guidelines Imprisonment Range becomes 120 months." However, the Second PSR was prepared on June 7, 2010, after Meza's plea deal had been rejected and Meza had been convicted on both counts at trial. The PSR utilized at sentencing erroneously extrapolated §5G1.1 into a multiple-conviction context.

### 3. Probation Confessed Error With Regards to Meza's Criminal History, but Failed To Respond to Meza's Arguments Concerning the Second Addendum's Guideline Implications

The Third Addendum issued two days before re-sentencing. Beyond stating the obvious point that §5G1.1 does not govern sentencing on two counts of conviction, Probation did not respond to any of the arguments Meza advanced in his July 26 Objections. For this reason, Meza renewed these objections at the re-sentencing hearing. Moreover, Meza specifically objected on procedural reasonableness grounds after sentence was announced from the bench so as to preserve these issues for appellate review:

> To preserve our objections for appeal, I have to very respectfully make our objections to both procedural and substantive reasonableness.
>
> And, Your Honor, of course, our Circuit requires more than just saying that. It requires some specificity.

R.502-503.

Those objections are overruled and I order the sentence as imposed as stated.

R.503.

*Cf. United States v. Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir. 2008) ("[w]hen a defendant fails to raise a procedural objection below, appellate review is for plain error only."); *see also United States v. Peltier*, 505 F.3d 389, 391-94 (5th Cir. 2007) (applying plain error standard to claims of substantive and procedural unreasonableness when defendant failed to object to his sentence).

### B. Armed Career Criminal Act is Tangential to Meza's Punishment Because the Lowest Point on His Guidelines Range is Above this Statutory Minimum

Meza recognizes that 18 U.S.C. 924(e)(1) establishes a minimum aggregate sentence of 180 months. However, this parameter is rather tangential since the lowest point on Meza's Guidelines range was 188 months, and he did not move for downward departure or variance.

### C. §§5G1.1 and 5G1.2 Are Not Coextensive

The most salient problem with the PSR's erroneous reliance on §5G1.1(c) is that the "applicable guideline range" concept addressed in that Guideline does not come within the ambit of §5G1.2. Specifically, §5G1.2(b) only cross-references §5G1.1(a) and (b). This issue stands apart from Probation's concession in the Third Addendum that §5G1.2, rather than §5G1.1, is the controlling Guideline.

To make clear that he was not waiving this argument through lack of an additional set of written objections to the Third Addendum, Meza explained at re-sentencing:

> This case law, there's this structure of the guidelines, they – there's two guidelines there for a reason. They're not meant to be redundant. The Sentencing Commission knows how to make cross references. That even in addition to this case law that is a second alternative argument at the structure of the guidelines compels the result that we are urging and that objection was not addressed in the Third Addendum and that's – I'm not sure I can say that's been accepted.

R.492.

### D. The Fifth Circuit Has Defined the Term "Total Punishment" in §5G1.2(d) to Mean "Minimum Total Punishment"

Three cases limn this Court's jurisprudence on the meaning of the term "total punishment" in the context of §5G1.2(d).

### 1. *United States v. Garcia*

In *United States v. Garcia*, this Court held that "the district court shall impose consecutive sentences to the extent necessary to meet the **minimum** total punishment." 322 F.3d 842, 846 (5th Cir. 2003) (emphasis added). Arguably, *Garcia* is distinguishable on the grounds that this condition applied because "the statutory maximum is less than the minimum total punishment required by the Guidelines." *Id*. However, this distinction would only serve to buttress Meza's argument, since his statutory maximum (two consecutive 120 month sentences) were well above the minimum total punishment required by the Guidelines (188 months).

### 2. *United States v. Hicks*

*United States v. Hicks* is a doctrinal case built upon *Garcia*:

> [S]ince the resultant minimum total punishment required by the Sentencing Guidelines, 188 months, exceeded the statutory maximum for each count in the indictment (ten years per count), the district court was required to 'impose consecutive sentences to the extent necessary to meet the **minimum total punishment** [under the Guidelines].' *United States v. Garcia*, 322 F.3d at 845. The only exception to this rule, which the district court employed to Hicks's benefit, derives from the court's authority to depart downwardly. *See United States v. Martinez*, 950 F.2d 222, 226 (5th Cir. 1991) (stating that 'sentencing courts retain at least some discretion under [18 U.S.C.] § 3584 [regarding the imposition of] concurrent sentences, but that discretion is limited to the district court's power to depart from the Guidelines').

389 F.3d 514, 532 (5th Cir. 2004) (emphasis added).

By contrast, in re-sentencing Meza, the District Court did not employ the "exception" to downwardly depart but rather upwardly varied to the same sentence it had imposed in the previous sentencing.

### 3. *United States v. Saleh* Is Perfectly Correlative to Meza's Situation

Aziz Saleh pleaded guilty to two counts of aiding and abetting real estate fraud in violation of 18 U.S.C. §1010. *United States v. Saleh*, 257 Fed. Appx. 740, 741 (5th Cir. 2007). Like Meza's PSR, the Probation Department applied §5G1.1 rather than §5G1.2, notwithstanding the fact that two counts of conviction were at issue. *Id*. at 743. Saleh's PSR computed an Offense Level of 23, corresponding to a range of 46-57 months, but circumscribed the maximum at the 24 month statutory maximum for a violation §1010. *Id*. In any event, the District Court sentenced Saleh to probation, notwithstanding the fact that he was ineligible because he fell into Zone D, rather than Zone A or B. *Id*. at 744. The government did not object at sentencing, but apparently took umbrage after the fact and cross-appealed the departure from 46 months to probation.

This Court held the government to plain error review, *id*. at 742, and explained the plain error committed by the District Court in its §5G1.2 calculation:

> In this case, the maximum possible sentence under § 1010 for either of Saleh's two counts is 24 months, less than the 46-month total minimum punishment under the Guidelines. **Accordingly, based on U.S.S.G. § 5G1.2(d), the district court should have calculated a maximum of 24**

> **months for one count, and a consecutive sentence of 22 months on the second count to arrive at a minimum Guidelines sentence of 46 months.**

*Id*. at 744 (emphasis added).

Saleh's sentence was affirmed because "[t]he Government made no showing of how its substantial rights were affected." *Id*.

Nevertheless, the highlighted language immediately above perfectly demonstrates how the District Court plainly erred in re-sentencing Meza. Based on §5G1.2(d), the District Court should have imposed 120 months on Count One, but only a consecutive 68 months on Count Two "to arrive at a minimum Guidelines sentence" of 188 months.

The only distinctions between *Saleh* and Meza are 1) the numbers involved and 2) the fact that Meza objected to preserve this issue for appeal.

### E. The District Court Predicted Subsequent Review By this Court

After Meza discussed these three cases in detail, R.488-492, the District Court overruled his objection, explaining:

> I think that the 5G1.2(d) requires this structure of imposing the sentences to receive the total punishment and I don't think that it requires a determination that the minimum sentence is what is required -- the minimum guideline determination, I don't think it requires that to be what is required here be -- I think what is required is to follow, in making this determination, is to follow what the guidelines call for, which is total punishment, and in some of these cases it appears that the district court had sentenced to a particular time and that time, at least in one of the cases, that time equaled the minimum under the guidelines, and so when determining this interplay, as you've described,

> which is very interesting -- but determining that interplay, I think the Fifth Circuit was saying that that's the minimum under the guidelines and that seems to be what the district court required, and so to reach that total minimum punishment or minimum total punishment, whatever they say, you have to combine the convictions in this fashion under the guidelines to get there. So, I think that is where the minimum total punishment comes in and **I'm not sure that the Fifth Circuit intended to insert the word 'minimum' in 5G1.2(d), but we will see. Some day, right?**

R.494 (emphasis added).

### F. This Court Should Apply the Rule of Lenity if it Finds the Term "Total Punishment" Ambiguous

#### 1. The Term "Total Punishment" Is Undefined

The term "total punishment" does not appear in the Guidelines' definitions section, 1B1.1 Application Notes.

#### 2. The Term "Total Punishment" Is Ambiguous

"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); *United States v. Williams*, 610 F.3d 271, 289 n.21 (5th Cir. 2010) ("The doctrine of lenity requires courts to resolve ambiguous statutes in favor of criminal

defendants.") (reversing on the basis of instructional error in a Federal Death Penalty Act prosecution).

Moreover, the Rule of Lenity applies with equal strength to sentencing statutes. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *United States v. Fuentes-Barahona*, 111 F.3d 651, 653 (9th Cir. 1997) (court should apply the "rule of lenity" to "infer the rationale most favorable to the [defendant] and construe the Guidelines accordingly."); *United States v. Flemming*, 617 F.3d 252 (3d Cir. 2010) (same).

Meza's primary argument that it is ***more*** logical to construe the term "total punishment" to mean the minimum, as opposed to the maximum, possible punishment. However, in the alternative, it is still ***equally*** logical to construe the term "total punishment" to mean minimum punishment as maximum punishment. In this equal magnitude situation, this Court should apply the Rule of Lenity and pick the construction more favorable to Meza. *United States v. Santos*, 553 U.S. 507, 514 (2008) ("Under a long line of our decisions, the tie must go to the defendant.") (Scalia, J.);

### G. Conclusion

Meza's primary argument is that §5G1.2(d) requires the imposition of a sentence of 188 months.

In the first alternative, Meza's suggested Guidelines range was not 188-235 months, but rather the discreet minimum point of 188 months. "To satisfy procedural reasonableness, the district court is required first to correctly calculate the guidelines range." *United States v. Solis-Herrera*, 293 Fed. Appx. 341, 342 (5th Cir. 2008).

Even if this Court rejects Meza's primary sentencing argument that the 188 month sentence is ineluctable, it should still remand for resentencing with a properly circumscribed "range" of 188 months. Meza recognizes that the District Court varied upwards from 235 months to 240 months. However, there is no indication that the Court would have varied from 188 months (properly calculated point) to 240 months rather than from 235 (top of improperly calculated range) to 240 months.

## CONCLUSION

This Court should reverse both of Meza's convictions, vacate his sentences, and remand to the district court for entry of a judgment of acquittal.

In the first alternative that this Court finds the evidence insufficient as to only one of the two counts of conviction, Meza's case should be remanded to the district court for entry of a judgment of acquittal and vacatur of the consecutive 120-month sentence appurtenant thereto.

In the second alternative that this Court finds the evidence sufficient as to both counts of conviction, this Court should reverse for imposition of an aggregate sentence of 188 months. In the third alternative, this Court should remand for resentencing with a Guidelines range computed at precisely 188 months.

Respectfully submitted,

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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 13,972 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: February 24, 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 24 day of February, 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 Cristobal Meza, Register Number 39114-177, on the 24th day of February, 2012.

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