No. 10-10496

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

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

HERBERT PHILIP ANDERSON,
*Defendant-Appellant.*

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On Appeal from the United States District Court
for the Northern District of Texas, Ft. Worth Division
No. 4:09-cr-115(8), Hon. John McBryde, Judge Presiding

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## BRIEF OF APPELLANT HERBERT PHILIP ANDERSON

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## CERTIFICATE OF INTERESTED PARTIES

No. 10-10496

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

HERBERT PHILIP ANDERSON

*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 Anderson requests oral argument. Anderson believes that oral argument would be of material assistance to the Court in evaluating, *inter alia*, the district court's denial of Anderson's oral and written Rule 29 motions when the evidence was insufficient to sustain his convictions for conspiracy to possess with intent to distribute narcotics and for money laundering. In support of this request, Anderson would urge this Court to note that even during closing argument the prosecutor had difficulty enunciating a theory of Anderson's guilt:

> Andy Anderson did not distribute drugs. Andy Anderson did not hold the drugs.

R.1861.

Considering the government's conceded paucity of evidence, oral argument could assist this court in evaluating whether the small number of attenuated facts adduced at trial meet the "scintilla" standard.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court announced sentence on May 13, 2010, and entered its final judgment the following day.[1] RE.5. Anderson filed his notice of appeal on May 18, 2010. RE.2; FED. R. APP. P. 4(b)(1)(A). The Court has jurisdiction over Anderson's appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] Docket entries 1-897 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 Anderson's conviction for conspiracy to distribute and possession with intent to distribute more than 500 grams of methamphetamine, 21 U.S.C. §§ 846, 841(a)(1), and 841 (b)(1)(A).

2. Whether there was legally sufficient evidence to support Anderson's conviction for money laundering, 18 U.S.C. § 1956(a)(1)(A)(i).

3. Whether Anderson's act of returning $60,000 to Gerry upon his explicit request qualifies as a "financial transaction" as that term is defined in 18 U.S.C. 1956(c)(4).

4. Whether there was legally sufficient evidence that Anderson's return of Gerry's $60,000 demonstrated "specific intent" by the former to promote drug trafficking by the latter.

5. Whether the District Court engaged in a clear abuse of discretion by limiting closing argument to four (4) minutes per defendant.

6. Whether the District Court abused its discretion by giving a "deliberate indifference" instruction, the "deliberate indifference" instruction unjustly lessened the government's burden of proof by imputing knowledge to Anderson despite any evidence that he had deliberately "blinded" himself, and the error implicit in the "deliberate indifference" instruction was not harmless.

7. Whether the District Court erred in the determination of drug quantity under U.S.S.G. § 2D1.1.

8. Whether the District Court erroneously Applied a 'strict-liability' *mens rea* standard in its Application of § 2D1.1(b)(4).

9. Whether the District Court misapplied U.S.S.G. § 2S1.1(a)(1) by violating Application Note 2(C).

10. Whether the District Court misapplied § 3C1.1 by applying an enhancement for Obstruction Of Justice based on a reading of testimony which was contrary to what the witness actually said.

## INTRODUCTION

On June 5, 2009, a Fort Worth nightclub entrepreneur named Herbert "Andy" Anderson discovered that the landlord from whom he rented space for his club owed unpaid taxes and that the IRS intended to immediately seize and auction the building. Fearing that a new landlord might abrogate his profitable rental arrangement, Anderson endeavored to buy the building himself. After engaging local real estate transaction attorneys, Anderson discovered that he would likely need $300,000 to prevail at the auction. Anderson did not have that much cash, so he asked an acquaintance, ex-convict, (and subsequently lead co-defendant) named Thomas Gerry if he would like to invest in the deal with him. Gerry loaned Anderson $160,000. Ultimately, Anderson was unsuccessful in purchasing the building. On June 11, Gerry asked Anderson to return $60,000 to him. Anderson did so, and for this innocuous act was convicted of money laundering and was sentenced to 240 months in prison.

The jury correctly acquitted Anderson of the alleged § 1956(a)(1)(B) money laundering violation for receiving Gerry's $160,000 on June 5, 2009. Unfortunately, the district court rejected Anderson's timely oral Rule 29 motions, as well as the written post-trial motion concerning the alleged § 1956(a)(1)(A)(i) violation for returning to Gerry one-third of his funds when requested to do so 6 days later, on June 11, 2009.

In addition, from 2007—09 Gerry often stayed in a guesthouse on top of the garage at Anderson's home. On some of these occasions, Gerry had drugs in his room. However, there was no evidence that Anderson ever saw drugs in Gerry's room: notably, the prosecutor himself described the garage as a "free-standing building", R.1526, and the witnesses who had been to the guesthouse were unambiguous that Anderson was always in the main-house or in the process of leaving that structure during their visits. No witness testified that he ever saw Anderson in the guestroom when drugs were visible. It was also undisputed that Anderson did not receive any interest, payment or other remuneration for holding Gerry's funds.

For these reasons, it is perhaps unsurprising that the prosecutor conceded in closing argument:

> Andy Anderson did not distribute drugs. Andy Anderson did not hold the drugs.

R.1861.

Notwithstanding this concession, and the remarkable dearth of evidence tying Anderson to Gerry's narcotic activities, the government obtained a conviction for Conspiracy to Distribute and Possession With Intent to Distribute More Than 500 Kilograms of Methamphetamine under 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). The district court rejected Anderson's timely oral

Rule 29 motions as well as the written post-trial motion despite the fact that there was no legally sufficient evidence to sustain Anderson's conspiracy conviction. At most, the government presented evidence that Anderson knew some of the conspirators and that these conspirators sometimes met at a separate guesthouse on his property. But the government presented no proof establishing Anderson's knowledge of, much less his participation in, a conspiracy.

Compounding both of these errors, Anderson's sentencing was contaminated with procedural errors in both the calculation of the total quantity of drugs ascribed and in erroneous application of several enhancements. As a result, Anderson was sentenced to a substantively unreasonable 30 years (360 months).

## STATEMENT OF THE CASE

### I. Indictment

On October 14, 2009, Anderson and sixteen co-defendants were charged under Count 1 in a Superseding Indictment with Conspiracy to Distribute and Possess With Intent to Distribute More Than 500 Grams of Methamphetamine in violation of 21 U.S.C. § 846, as defined in 21 U.S.C. § 841(a)(l) & (b)(l)(A). Count 4 charged Anderson and a co-defendant named Thomas Gerry with Laundering of Monetary Instruments, in violation of 18 U.S.C. § 1956(a)(l)(B)(i). Count 5 charged Anderson and Gerry with Laundering of Monetary Instruments, in violation of 18 U.S.C. § 1956(a)(l)(A)(i). Count 4 focused on Anderson's alleged

receipt of $160,000 from Gerry on June 5, 2009; Count 5 focused on Anderson's alleged return of Gerry's $60,000 to him upon request on June 11, 2009.

## II. Trial

Anderson and two co-defendants (John Holt and Kelly Murphy) began jury trial on January 11, 2010. R.1237. The government rested on January 12, 2010. R.1735. Anderson began his defense immediately thereafter, R. 1736, and rested on the third day of trial, January 13. The jury began deliberations the same day. R.1839. After one day of deliberation, the jury returned a mixed verdict: Murphy was acquitted on Count 1 (Conspiracy) while Anderson and Holt were both convicted. Additionally, Anderson was acquitted on Count 4 (§ 1956(a)(l)(B)(i)) (receipt of $160,000) but convicted on Count 5 (§ 1956(a)(l)(A)(i)) (return of $60,000). RE.4.

## III. Sentencing

The original PSR urged a Base Offense Level of 38, and a Total Offense Level of 42, which corresponded to a range of 360-LIFE. In two separate addendums, Probation discovered two successive 'oversights' which raised Anderson's Total Offense Level to 44 and then to 46, well above Guidelines' global maximum of 43. Interspersed between these addendums were a litany of burgeoning objections from both Anderson and the government.

### A. Probation Largely Disavowed First Version of the PSR In Response to Objections from the Prosecutor

#### 1. No Offense Level Computation for the Money Laundering Count

The PSR was first disclosed on March 18, 2010. Anderson's two convictions (Count One-narcotics conspiracy and Count Five-money laundering) were grouped under USSD § 3D1.2(b). PSR; ¶119. Probation concluded that the offense level for Count One was "the most serious" and proceeded directly to an offense level computation under the rubric of U.S.S.G. § 2D1.1. *Id*. at ¶120. In apparent disregard of U.S.S.G. § 1.1(a)(4), no offense level computations were performed with respect to Count 5 under U.S.S.G. § 2S. However, Probation subsequently recanted when it realized that § 2D1.1 was not the applicable Guideline. *See* Part III.C., *infra*.

#### 2. The PSR Attributed Conspiracy-Wide Quantities of Methamphetamine Starting From A Time Period Before Anderson Was Involved

The PSR ascribed to Anderson the "conservative" conspiracy-wide quantity of 173.8 kilograms of methamphetamine, corresponding to a Base Offense Level of 38 under U.S.S.G. § 2D1.1(c)(1). (PSR; ¶120). No elaboration was offered as to what greater quantities would have qualified as less "conservative" estimates. This "conservative" quantity is shockingly disproportionate to any amount attributable as relevant conduct: after Anderson returned Gerry's $60,000 to him

on June 11, Gerry bought 2 kilograms (4.4 pounds) of methamphetamine from the Cruz brothers. The PSR did not explain what methodology was utilized to expand relevant conduct by a factor of 87 times (from 2 kilograms to 173.8 kilograms).

#### 3. Specific Offense Characteristic: U.S.S.G. § 2D1.1(b)(1)

A 2-level Specific Offense Characteristic was added under U.S.S.G. § 2D1.1(b)(1) because some of the co-conspirators carried firearms. *Id*. at ¶121.

#### 4. Adjustments

A 2-level adjustment was added under U.S.S.G. § 3C1.1 because Anderson allegedly testified falsely in his own defense at trial. *Id*. at ¶124.

#### 5. Zero Criminal History Points

The total absence of any criminal convictions elicited a Criminal History Category of I. *Id*. at ¶131. In the first PSR's paradigm, Anderson's Total Offense Level of 42 (38+2+2) corresponded to a Guidelines Range of 360-LIFE.

### B. First Addendum Introduced The Applicability of U.S.S.G. § 2D1.1(b)(4)

The First Addendum added as an oversight the applicability of U.S.S.G. § 2D1.1(b)(4) because Anderson "knew the methamphetamine was unlawfully

reported."[2] (First Addendum; p. 5). In the paradigm of the First Addendum, the application Total Offense Level therefore rose to 44.

### C. Second Addendum Recognizes That the PSR Urged Application of the Wrong Guideline

On April 19, the prosecutor objected that the PSR failed to properly apply the interplay of § 2D1.1 and § 2S1.1(a)(1) and (2)(B). Acknowledging this (second) methodological mistake, a Second Addendum issued in which the paradigm had shifted from § 2D1.1 to § 2S1.1 because this Guideline provides increased penalties for defendants who launder funds derived from more serious criminal conduct, such as drug trafficking. Section § 2S1.1(a)(1) imports the Base Offense Level germane to § 2D1.1; subsection (b)(2)(B) requires a 2-leve increase because Count 5 was prosecuted under 18 U.S.C. § 1956. (Second Addendum, p. 1).[3]

As a result of the operation of subsection (b)(2)(B), Anderson's Total Offense Level rose (further) from 44 to 46.

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[2] N.B.: In the November 1, 2011 version of the Guidelines, the Specific Offense Characteristic for unlawfully imported methamphetamine was renumbered §2D1.1(b)(5) rather than §2D1.1(b)(4). Anderson refers to this subsection as it was numbered in the 2009 version of the Manual under which he was sentenced.

[3] The Second Addendum reads, "because the defendant was convicted under 18 U.S.C. §1856." This is clearly a typographical error; the money laundering statute is 18 U.S.C. §1956. Section 1856 concerns fires left unattended on public lands. Neither party brought this (third) mistake to the attention of the District Court.

### D. Objections to the First Two Addenda Elicit A Third Addendum

Anderson filed objections to the PSR and each Addendum. With regards to relevant conduct, Anderson's core argument maintained that "it is not foreseeable to hold Anderson accountable for any more methamphetamine other than the two kilos directly attributable to the 'rainy day' monies returned to Gerry." (Objections to PSR, p. 2-3). Anderson also disputed the Specific Offense Characteristic regarding firearms, the Obstruction of Justice Adjustment, and the latent additions of §§ 2D1.1(b)(4) and § 2S1.1.

A Third Addendum issued late on the afternoon of May 6, even though Sentencing was set for the morning of May 7. The Third Addendum summarized the sentencing landscape as it had developed through successive rounds of objections and changes and reiterated the "conservative" conspiracy-wide estimate of 173.83 kilograms of methamphetamine "reasonably foreseeable to the defendant". (Third Addendum, p. 3). Nevertheless, the Third Addendum made a faint attempt to identify the 8.9 kilogram subset actually traceable to Anderson from the 173 kilogram global quantity:

> [I]nvestigators determined (via 'wiretaps' as well as from codefendants statements) that the defendant was actively engaged in the Gerry DTO. During this time frame, the defendant participated in the following: the defendant stored the $50,000 'rainy day fund;' $160,000 borrowed from Gerry for the purchase of the Hardbody's property; on June 5, 2009, the defendant was present for the 1 kilogram purchase of methamphetamine

from Medina; and on June 10, 2009, the defendant provided the $60,000 used to purchase 2 kilograms of methamphetamine from the Cruz brothers on June 10 and 11, 2009. Thus, within 60 days, the defendant aided and abetted Gerry's distribution of approximately 8.9 kilograms of methamphetamine. This amount of methamphetamine is calculated by dividing the $270,000 by the methamphetamine kilogram purchase price (provided by investigators) of $39,000, which is 6.9 kilograms of methamphetamine; plus the 1 kilogram purchased by Gerry (on each date), in the defendant's presence, in or about April or May 2009 (from Perez-Leon) and on June 5, 2009 (from Medina).

*Id*.

### E. Motion for Downward Departure and Preliminary Ruling from the Court

On April 26, Anderson filed a motion for downward departure under U.S.S.G. 5K2.0 noting Anderson's many good works in the community. R.887. The prosecutor was opposed to this relief. (Doc. No. 575).[4] Soon thereafter, the District Judge entered a written order advising the parties that he had "tentatively concluded that all objections made by Anderson to the Presentence Report and addenda are without merit." R.894.

### F. First Sentencing Hearing

Sentencing began on May 7, 2010. R.1071. Because the Third Addendum was only disclosed the night before this hearing began, the district court decided at

[4] The government's response to Anderson's Motion for Downward Departure is dated March 22, 2010. It is unclear how this document could have been filed in March when the Motion was not filed until April. Nor does this document appear in the Record on Appeal. The Docket Number is 575, which does not appear on the docket sheet, either.

the outset to defer resolution of the disputed quantity determination until a future date:

> THE COURT: [L]et's go on with the issues that are not involved in that third addendum and then make a decision as to what we'll do with that.

R.1077.

> THE COURT: The first objection has to do with quantity. So that is related to the third addendum. We'll skip over that for the time being.

R.1079; 1084; 1091.

With regards to other issues, the district court overruled Anderson's objections as to firearms under U.S.S.G. § 2D1.1(a)(1), R.1080; 1084-85, the temporal expanse of Anderson's involvement with the conspiracy, R.1082-1083, concluded that Anderson did provide translation services, R.1084; 1086, obstructed justice by testifying falsely at trial under U.S.S.G. § 3C1.1, R.1085-87, and deserved the enhancement under U.S.S.G. § 2D1.1(b)(4) because the drugs emanated from Mexico. R.1095.

### G. Second Sentencing Hearing

Sentencing reconvened on May 13, 2010. R.1107. Appreciating the grave conceptual flaw in the approach urged by Probation, the Court asked the prosecutor:

> How can the defendant be held accountable for the balance of that $210,000 for drug calculation purposes when, apparently, that money was given to the defendant ***after*** those drug transactions had occurred?

R.1117 (emphasis added).

The Court further inquired:

> If you assume that he is to be held accountable for that $210,000, converting it into drugs, then you would have to take out of that the money that was used to buy the two kilograms. **Would that be double counting if you didn't, or is that a separate transaction all together?**

R.1119 (emphasis added).

Disregarding these concerns, the Court employed a methodology by which the $210,000 was assessed a quantity on a profit-per-unit basis. As a result, the Base Offense Level rose from 34 to 36. U.S.S.G. § 2D1.1(c)(2); (c)(1). R.1126. In the aggregate, the enhancements added 8 points for a Total Offense Level of 44. R.1127. The Motion for Downward Departure was granted; a sentence of 360 months was imposed on Count One and the statutory maximum of 240 months was imposed on Count Five to run concurrently. R.1148; Statement of Reasons (Doc. No. 677, p. 1). Synthesizing the multiple versions of the PSR, the District Court explained:

> The court adopts as the fact findings of the court the facts set forth in the Presentence Report, as modified or supplemented by the Addenda and any facts found from the bench during the sentencing hearing and the court adopts as the conclusions of the court the conclusions expressed in the Presentence Report as modified or supplemented by any of the Addenda and any conclusions expressed from the bench during the sentencing hearing.

Statement of Reasons (Doc. No. 677) p. 1; ¶I.B.5.

### IV. Forfeiture

The superseding Indictment also contained Forfeiture Allegations. Forfeiture Allegation 1 was general and pertained to all defendants. Forfeiture Allegation 4 alleged that upon conviction, Anderson shall forfeit to the United States any property, real or personal, involved in Count 4 of the superseding Indictment and any property traceable to such property. Forfeiture Allegation 5 alleged that upon conviction, Anderson shall forfeit to the United States any property, real or personal, involved in Count 5 of the superseding Indictment and any property traceable to such property.

On January 15, 2010, the court issued a preliminary order of forfeiture, noting that pursuant to 21 U.S.C. § 853, the defendant shall forfeit to the United States a sum of money equal to $5,000,000 in U.S. currency, representing the amount of proceeds obtained as a result of the Count 1 conspiracy offense, for which the defendant is jointly and severally liable with Holt and Smith. R.670.

## STATEMENT OF FACTS

### A. Anderson and Gerry Have A Long-Lasting Social Relationship

Anderson owned and operated nightclubs in Fort Worth. R.74. As an active member of the community, Anderson donated to a host of civic events. R.1431.

This generosity extended to helping an ex-con, Thomas Gerry, while he was in Texas state prison from 1990—2005 and after his release. R.292. Anderson sent small amounts of money to Gerry while he was incarcerated without knowing when (or if) Gerry would be paroled and with no expectation of receiving back these sums. R.291. After Gerry was released, Anderson allowed him to stay in the small apartment atop his three-car garage. R.795-96;1525.

Gerry started working for Anderson as an employee of his club. R. 1802—03. In addition, Anderson gave Gerry a job doing gardening and maintenance work, useful labor which dovetailed with "horticultural" skills Gerry developed while in state prison. R.1748—49, 1753, 1757, 1802—03, 1806. Anderson testified Gerry was a 'project' of his to help keep him 'straight.' R.1753. It outwardly appeared that Gerry was on the mend, having become a part-owner of a wrecking service in addition to his horticulture work. R.1770. The unfortunate reality was that Gerry had recurred to drug dealing. R.1754, 1806—07.

### B. Gerry Furtively Stores Drugs At Anderson's House

#### 1. Farrell Coleman and Roger Flittie Testify That Anderson is Nowhere Near Drug Transactions

Like Gerry, Farrell Coleman also did maintenance work for Anderson. R.1506—1507. Coleman testified that in early 2007, Gerry asked him if he wanted to "work", which he interpreted to mean distribute drugs. R.1511;1524. Coleman

went to meet Gerry to discuss the matter. At the time, Gerry was living in a room above Anderson's garage. *Id*.

As Coleman "went through the little crash gate and into the garage area" he saw Anderson leaving his home and exchanged greetings in the egress. *Id*. Anderson was not present when Coleman walked into Gerry's room. The pool table was filled with pre-packaged ounce quantities of methamphetamine. Gerry wanted Coleman to distribute large quantities but Coleman told him he could only distribute 1/4 ounce quantities at a time. Gerry fronted Coleman 1/2 ounce and Coleman sold the methamphetamine and returned the money to Gerry. R.1527—1529. Coleman also testified that his interactions were always with Gerry or Holt. R.1530—1531. At no point did Coleman conduct any narcotics activities with Anderson or in Anderson's presence. R.1541—1542.

Roger George Flittie testified that on June 11, 2009, he, Gerry, and Gerry's daughter, Brittany Krambeck, drove to Anderson's house. Upon arrival, Gerry and Anderson chatted on the front steps "for a few minutes." R.1653. Gerry borrowed Anderson's Excursion. *Id.* Thereafter, Flittie and Gerry left for the Smith/Krambeck house where two Mexican nationals (Juan and Rene Cruz) offered for sale 1,000 grams of methamphetamine. *Id*. Anderson however did not follow Gerry, Flittie or Krambeck to Krambeck's house, the drug situs. *Id.* Flittie testified that not only was Anderson nowhere near this drug transaction, he

subsequently wrote and signed a statement that Anderson had no involvement with drugs. R.1656; 1660 (Flittie reads aloud the exculpatory statement about Anderson introduced as Exhibit 10).

### 2. Steven Adams Testifies That Anderson Translated An Indecipherable Statement

Steven Adams became acquainted with Gerry during a period of overlapping incarceration; in June 2009, Adams began to pick up and deliver methamphetamine for Gerry. R.1615. On June 5 evening, Adams went to Gerry's (San Fernando) residence with the money Gerry instructed him to bring where they met a Mexican national named "Tio" or "Medina." R.1617; 1530—1531. Adams recounted:

> A: Mr. Anderson was interpreting English to Spanish for Mr. Medina. And there was something about being $4,000 short for the price of what was asked for the kilo, and Hammer said, 'We are $4,000 short.' And Mr. Anderson tells Medina something in Spanish that I can't tell. But then Medina said, 'No problema,' which means no problem.
>
> Q: All right. What happens next?
>
> A. After all that is said and done, Medina leaves and we sat down and had a shot of vodka or drank a Corona.
>
> Q. And when you say 'we,' who is 'we'?
> A. Mr. Anderson and Mr. Gerry and myself and Ms. Nance.

R.1618—1619.

The prosecutor did not develop what information might have been conveyed in the statement Adams "couldn't tell." Nor did any other witness testify that Anderson speaks Spanish, much less has fluency in that language. The text exchanges between Gerry and Medina were carried on and continued in English. R.1586; 1634—1636. Another transaction solely between Medina and Gerry occurred on July 22, 2009; Anderson was not present to translate English for Medina. R.1678—1679.

### C. Anderson Raises Cash to Buy A Building

Anderson owned his nightclub outright, but leased the building which it occupied. R.1740; 1759—1761. The landlord experienced tax trouble, and in June 2009 the IRS decided to foreclose and sell the building at auction. R. 1759—1762, 1765—1766. Fearing that a new landlord might abrogate his profitable rental arrangement, Anderson resolved to purchase the building himself. R. 1766—67. After engaging local real estate transaction attorneys, Anderson discovered that he would likely need $300,000 to prevail at the auction. R. 1746; 1759—68 (Anderson testifying as to nature of IRS proceedings); see also Defendant's Exhibits 1 and 2 (correspondence with, and invoices, from real estate lawyers).

### 1. An Eight-Day Window of Events

The key events of money exchange occurred over a period of 8 days. However, Gerry was 'suspected' or 'known' to have been dealing drugs since at least February 2006. R. 1754, 1756, 1806—1807. On June 3 or June 4, Gerry asked Anderson to temporarily hold $50,000 of Gerry's money for safekeeping. R. 1804—1805. On June 6, Anderson asked for Gerry to lend him up to $200,000 in desperation to save his club, and to use the $50,000 Anderson was holding. *See* R. 1805, Gov. Ex. 39. On June 11, Gerry asked Anderson for return of $60,000 of his $210,000 he had lent and/or left with Anderson for safekeeping. *See* R. 1804; Gov. Exs. 58, 60, 70.

### 2. Anderson Received Financial Assistance on June 5

On the afternoon of June 5, Anderson told Gerry to "[c]all me now". Gov. Ex. 38. Anderson asked Gerry to lend him money and/or to become an investor in the building. R. 811, 1803—04; *see also* Gov. Ex. 39, p.3—5. Gerry agreed to give Anderson $160,000. Gov. Ex. 43. Gerry sent a text to Anderson about 50 minutes later stating he was on the way soon. Gov. Ex. 44. Gerry brought the money that afternoon. R. 1776, 1804.

Anderson had no reason to think it unusual for Gerry to have this much money available in case, as Gerry had asked Anderson a few days before to hold $50,000 for him. R. 1769. Gerry told Anderson he could not keep the money at his

own home because he did not trust anybody. R.1769. Anderson did not consider Gerry to be a business partner because of the $160,000, but merely an investor of real estate. R. 1773—75; *see also* R. 1803. Anderson told Gerry he would not only return the loan, but double it. Gov. Ex. 39; *see also* R. 1773—74. This second cluster of cash of $160,000 formed the basis of Count 4 on which Anderson was acquitted. In the end, Anderson did not succeed in buying the building. R. 1775, 1783—84, 1787.

### D. Gerry Requests Return of His Cash For Private Purposes

Later on this same day, Anderson dropped Gerry home because Gerry did not have his car, and because Gerry had been drinking. R. 1777—79, 1781—82. Anderson left about 8:30 pm after taking a phone call at Gerry's home from a manager of one of his clubs regarding an employee. R. 1780; Gov. Ex. 51. Meanwhile, Gerry was communicating with Medina, notably in English, via text message, *see* Gov. Ex. 46, regarding 'drinking beer.' Gerry told Medina to come over to his place. Gov. Ex. 46.

#### 1. Time and Purpose of Anderson's Presence at Gerry's Home is Disputed

Anderson testified he left Gerry's house about 8:30 p.m. Medina allegedly arrived about 9 p.m. according to surveillance testimony. No testimony was given by agents as to the time Anderson was seen leaving Gerry's residence that evening.

Anderson testified he never met Medina or translated Spanish to help effect the alleged June 5 drug transaction. R. 1807. Adams testified to the contrary, stating Anderson was present during the June 5 drug exchange, and further alleged that Anderson translated for Medina. R.1618. Adams specifically testified:

> There was -- Hammer said, 'Okay. It is good.' And Mr. Anderson was interpreting English to Spanish for Mr. Medina. And there was *something* about being $4,000 short for the price of what was asked for the kilo, and Hammer said 'We are $4,000 short.' And Mr. Anderson tells Medina *something* in Spanish that *I can't tell*. But then Medina said, 'No problema,' which means no problem.
>
> *Id.*

However, Adams could not elaborate on what exactly Anderson had translated; Adams only knew 'something' in Spanish was said. Testimony of a separate drug transaction on July 22, 2009 between Gerry and Medina was alleged. Importantly, it was neither alleged that Anderson was present or that he translated to effectuate this transaction on Gerry's behalf. R. 1678—79. The court, however, assigned points for obstruction of justice against Anderson, finding Anderson was present at the transaction, did speak Spanish, and did translate for Gerry with Medina. R. 1084, 1086—1087.

### 2. Gerry Asked For, and Received, A Condign Refund of A Portion of the $210,000 Left With Anderson Six Days Earlier

On June 10 through June 11, 2009, Gerry sent Anderson a series of text messages in which he asked Anderson to return $40,000 of his funds being held for safekeeping. *See* Government Exhibits 58, 60, 70; R. 1626 *et seq*. Initially, at 11:55 p.m., Gerry asked for his 'box at [Anderson's] place', i.e., the $50,000 he asked Anderson to keep safe for him. *See* Gov. Ex. 58; R. 1626. Anderson immediately responded at 11:55 p.m. to 'Come by', followed at 11:56 p.m. with a text asking if Gerry needed all of the money. Gov. Ex. 58; R. 1626. Gerry said he only needed $20,000. *Id.* Gerry follows up with texts on June 11 at 12:34 a.m., stating he would actually need $30,000, later revised to $40,000 at 12:46 a.m. Gov. Ex. 58; R. 1632—33. Anderson immediately responds asking when, and states he would have the money ready once Gerry responds he is close. *Id.* Gerry texts Anderson at 12:48 a.m. of his arrival at Anderson's home. *Id.* Anderson gives Gerry his $40,000.

### 3. Gerry Asked For, and Received, The Remaining $170,000 of From Anderson Six Days Later

On June 11, 2009, at 2:59 p.m., Gerry wrote Anderson, "Yes, got Tango Blast either to be here- or I will go to them... Will be decided PDQ." Gov. Ex. 70; R. 1637—38. Anderson did not respond to this text message. *Id.* At 5:39 p.m.,

Gerry sent another message which read, "A., i'm gonna need my $.. Dealing on some stocks spose to double 2 wks. Hope ur home." Gov. ex. 70; R. 1638. At 5:44 p.m., Anderson simply replied, "I'm home." Gov. Ex.70; R. 1639. Anderson sent no further texts until 7:39, when he asked Gerry, "Gonna need how much frm me... when?" Gov. Ex. 70; R. 1641. Gerry asked for 'all the box', i.e., the $160,000 Anderson borrowed, plus ten thousand more. R. 1639. Anderson returned the remainder, $170,000 of Gerry's money. R. 1639; 1785.

The most salient aspect of this text-message exchange is that Anderson never responded to the missive about "Tango Blast" or comment on the "stocks spose to double 2 wks." To the contrary, Anderson simply replied that he was home and inquired as to how much of Gerry's funds he was requesting back.

#### 4. Anderson Had No Knowledge of the Use Gerry Put to His $60,000

Unfortunately, but unbeknownst to Anderson, Gerry took $60,000 of the $170,000 and bought 2 kilograms of methamphetamine from two brothers named Cruz. RE.3.255; R.1644—46. The $60,000 used to buy meth from the Cruzes formed the basis of the second laundering count. It is critical to note that Anderson was not physically present during the exchange of Gerry's $60,000 by Krambeck with the Cruzes. R. 1637—46. Government's surveillance testimony placed Krambeck at Anderson's residence about 6:38 p.m. before departing for Gerry's

home in Bedford. R. 1640—41. The drug transaction situs actually occurred at a Days Inn by Krambeck nearly two hours apart and after Gerry's text to Anderson. R.1644—46. The initial exchange actually began on the evening of June 10, per Krambeck's testimony. R. 1661—64. Again, Anderson was not present at the situs. R. 1663. Nor was Anderson privy to Gerry's contacts or inside circle. R. 1785.

## SUMMARY OF THE ARGUMENT

***Conspiracy to Possess with Intent to Distribute***

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 Anderson 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 Anderson knew of Gerry's agreement with others to violate narcotics laws 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*.

***Money Laundering***

No rational jury could have found that Anderson had the "specific intent to promote" Gerry's illegal conduct, which is the gravamen of § 1956(a)(l)(A)(i). To the contrary, Anderson could have been sued by Gerry for conversion had he **NOT** returned these funds upon request.

***Deliberate Ignorance Instruction***

The evidence did not support either of the two elements of the required factual predicate for the deliberate ignorance instruction. This erroneous instruction created a risk of jury confusion on a crucial matter and made it possible for the government to obtain a conviction without having to convince the jury beyond a reasonable doubt that Anderson had actual knowledge of Gerry's narcotics activities.

***Time Limitation on Closing Argument***

The District Court abused its discretion by limiting each defendant to only four (4) minutes of closing argument.

***Sentencing: Drug Quantity***

The District Court's errors in the determination of drug quantity were three-fold. Part of the total quantity ascribed to Anderson comprised the drugs bought by Gerry from a Mr. Medina on June 5. The district court determined this amount was 2 kilograms when, in fact, trial testimony and the PSR were clear that this transaction involved only 1 kilogram.

The other part of the total quantity ascribed was derived by converting $210,000 of cash given to Anderson by Gerry into an equivalent amount of weight. This approach is countenanced by U.S.S.G. § 2D1.1 Application Note 12; unfortunately, the District Court ignored the procedural prerequisites required for

this Application Note by failing to make a finding that "the amount seized does not reflect the scale of the offense. Such a finding is expressly required by this Court's precedent in *United States v. Henderson*, 254 F.3d 543 (5th Cir. 2001).

Furthermore, the purchase price/conversion ratio urged by Probation is materially untrue. No witness testified that methamphetamine was retailed in kilogram increments; to the contrary, at least one witness testified that he could not sell as much methamphetamine as Gerry asked him to.

***Sentencing: Other Specific Offense Characteristics and Enhancements***

The District Court erroneously applied a strict-liability *mens rea* standard in its application of § 2D1.1(b)(4).

The District Court misapplied § 2S1.1(a)(1) by shifting the focus of its analysis from the drug conspiracy to money laundering but denying a reduction under § 3B1.2(a) from the perspective of conduct germane to the drug conspiracy rather than conduct germane to money laundering.

The District Court misapplied § 3C1.1 by concluding that Anderson falsely testified that he did not speak Spanish with Medina on June 5 to facilitate a drug deal, when in fact, the witness who testified about the alleged translation did not actually testify as this statement was attributed.

***Sentencing: Anderson's Sentence Was Substantively Unreasonable***

A sentence of 360 months is substantively unreasonable for a first-time offender with a long history of good works in his community.

## 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, the 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*.

***Limiting Scope or Time for Closing Arguments***

"We review a district court's determination of how much time to provide to defense counsel for closing argument for an abuse of discretion." *United States v. Leal*, 30 F.3d 577, 586 (5th Cir. 1994).

***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).

***Substantive Reasonableness***

Substantive reasonableness review entails consideration of the totality of the circumstances surrounding the offense. *Gall v. United States*, 552 U.S. 38 (2007).

***Relevant Conduct***

Factual findings regarding relevant conduct are reviewed for clear error. *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). These findings are not clearly erroneous as long as they are "plausible in light of the record as a whole." *Id*. The essential components of the U.S.S.G.§ 1B1.3(a)(2) analysis are "similarity, regularity, and temporal proximity." *United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992).

***Uncharged Narcotics Quantities Utilized in the Sentence Determination***

"The district court's determination that unadjudicated conduct is 'part of the same course of conduct or common scheme or plan' is a factual finding subject to review under the clearly erroneous standard." *United States v. Jimenez*, 509 F.3d 682, 693 (5th Cir. 2007) (holding that in a marijuana smuggling conspiracy, "the district court could have found the ***uncharged cocaine*** to be relevant conduct" which had the effect of raising the Base Offense Level from 32 to 38) (emphasis added).

***Deliberate Ignorance Instruction***

"We review the district court's decision to use the deliberate ignorance instruction under an abuse of discretion standard." *United States v. Nguyen*, 493 F.3d 613, 618 (5th Cir. 2007). "[T]he deliberate ignorance instruction 'should rarely be given,' and 'is appropriate only when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference.'" *United States v. McElwee*, 646 F.3d 328, 341 (5th Cir. 2011) (quoting *United States v. Peterson*, 244 F.3d 385, 395 (5th Cir. 2001)). Even if the district court errs in its decision to give the deliberate ignorance instruction, any such error is harmless "where substantial evidence of actual knowledge was presented [at trial]." *United States v. Ricardo*, 472 F.3d 277, 286 (5th Cir. 2006).

## ARGUMENT

### I. EVIDENCE WAS INSUFFICIENT AS TO THE CONSPIRACY COUNT

#### A. The Prosecutor Conceded That Anderson Did Not Hold or Distribute Any Drugs

In his closing argument, the prosecutor conceded:

> Andy Anderson did not distribute drugs. Andy Anderson did not hold the drugs.

R.1861.

Nor was there any evidence that Anderson profited from Gerry's drug dealing, much less interacted with Gerry's inner circle. R.1785. For this reason, it is perhaps unsurprising that the prosecutor struggled to enunciate a theory by which Anderson knowingly participated in any conspiracy:

> How is it that Thomas Gerry gathered up, made this organization, and distributed all of this dope that you have seen, the hundreds and hundreds of grams of methamphetamine? He did it with Andy Anderson's phone, he did it with Andy Anderson's car, he did it using Andy Anderson's house, he did it using Andy Anderson's gun safe to store his money, he did it using Andy Anderson's name,…

*Id*.

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 Anderson actually *did*, but rather only things which Gerry did with Anderson's property.

### B. Legal Standards

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 Anderson Had Knowledge of Gerry's Agreement With Others

#### 1. The Testimonies of Coleman and Flittie Were Unambiguous That Anderson Was Not Present When Gerry Showed His Methamphetamine

##### a. Coleman Simply Saw Anderson Leaving His Own Home

It is undisputed that Gerry stayed in Anderson's guesthouse and that this room was above the garage and separate from the home. On three separate points during his testimony, Farrell Coleman explained that Gerry asked him to come to the guesthouse above the garage; when he arrived Anderson was leaving the main house through this garage:

> And so I went through the little crash gate and into the garage area. And when I turned to go up, Andy was coming out, and then I went up the stairs and Gerry said, 'Boomer, come on up.'

R.1511.

Coleman elaborated:

> I pulled up, I went through the crash gate, the pool gate, and then there is a side door to the living quarters, and I opened the door, going through, Mr. Anderson is coming down, I went inside, went upstairs, and met with Mr. Gerry.

R.1525.

> Q. So you turned right?
> A. Turned right.

Q. And started up the stairs?
A. I started up the stairs.

Q. What happened?
A. Mr. Anderson was coming down. When I opened the door I told him, 'Hello.' He nodded hello. And then Hammer heard me. He said, 'Boomer?' I said, 'Yeah.' He said, 'Come on up.' So I just went straight on up.

R.1527.

At most this testimony establishes that Coleman saw Anderson leaving his own house through his garage and that Anderson nodded hello to Coleman in the process. Coleman did not testify that Anderson saw the drugs in the secluded guesthouse or had any involvement with them.

**b. Flittie Simply Saw Anderson In His Own Doorway**

Flittie testified that on June 11, 2009, he travelled with Gerry and Gerry's daughter, Brittany Krambeck, briefly to Anderson's home, and that Gerry purchased 1,000 grams of methamphetamine from "two Mexican individuals" at Krambeck's and Smith's home. R.1653. Anderson played no role in this transaction:

Q. And what happens when you arrive at Anderson's house?

A. Me and Ms. Krambeck stayed in her vehicle. Mr. Gerry got out, went up to the Anderson residence, was in there for 15 minutes maybe, came out, got in Mr. Anderson's Excursion, backed it out on the street, went back up to the house, **met Mr. Anderson on the front steps of the house outside the front door, talked for a few minutes, came back out and got back**

> **in Mr. Anderson's Excursion**. Me and Ms. Krambeck followed Mr. Gerry over to the Smith/Krambeck home.

R.1652 (emphasis added).

Flittie did not testify as to what Gerry and Anderson "talked [about] for a few minutes." Nor could Flittie have so testified, since he "and Ms. Krambeck stayed in her vehicle" and was therefore not within hearing distance of the conversation.

### c. This Court Has Rejected As Insufficient Evidence Far More Attenuated Than That Offered Against Anderson

The fact that Coleman conducted drug deals in the secluded guesthouse of around the time Anderson was at his home is not sufficient evidence to establish knowledge. The fact that Flittie briefly stopped with Gerry at Anderson's home, prior to engaging in a drug transaction not conducted at Anderson's home but elsewhere, is not sufficient evidence to establish knowledge. 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). Similarly, 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).

### D. The Government Failed to Prove That Anderson Voluntarily Participated

#### 1. Adams Testified That He Heard Anderson Translate Something He Could Not Understand Into A Language He Did Not Speak

Steven Adams was the only witness who testified that he saw Anderson anywhere near drugs. Gerry asked Adams to come to his house on June 5, 2009. R.1616. Anderson greeted him upon arrival: "Mr. Anderson come over and shook my hand, or we pounded fists 'Hey, how you doing?'" R.1617. Thereafter, Adams threw a sack of money on the table; reciprocally, Gerry handed a sack of methamphetamine to Adams for him to test. R.1618. Upon his return, Adams found Anderson communicating with the other guests:

> A: There was -- Hammer said, 'Okay. It is good.' And Mr. Anderson was interpreting English to Spanish for Mr. Medina. And there was something about being $4,000 short for the price of what was asked for the kilo, and Hammer said, 'We are $4,000 short.' **And Mr. Anderson tells Medina something in Spanish that I can't tell.** But then Medina said, 'No problema,' which means no problem.

R.1618 (emphasis added).

> Q. All right. What happens next?
>
> A. After all that is said and done, Medina leaves and we sat down and had a shot of vodka or drank a Corona.

*Id*.

The only Spanish term that Adams understood was the phrase, "no problema." "No problema" is a very simple cognate which any English speaker could have comprehended. However, Adams had no idea (and certainly did not testify) as to what Anderson was told by Medina and what, in turn, he translated for Medina. Adams' testimony is not legally sufficient evidence.

*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, 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).

Anderson necessarily prevails under the logic of *Rosas-Fuentes*. Agent Marcell was fluent in Spanish, or at least spoke enough Spanish to relate that Rosas asked him if they found anything in the tank and assented to Marcell's response. By contrast, Adams spoke no Spanish and was unable to convey anything other than the simple term "no problema." But even if the language barrier is not an insuperable obstacle, Anderson also 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 Anderson.

Further, the need for Anderson to translate for Gerry or Medina is questionable. Gerry's text conversations with Medina were all in English and Gerry and Medina conducted another transaction July 22, 2009, without Anderson present. *See* Gov. Ex. 46; R. 1586—1587; 1634—1636; 1678—1679. The text

message sent by Gerry on June 5, 2009, asking if Medina had the beer "[you] and I usually drink" necessarily implies prior similar exchanges. R. 1586. Medina responds, in *English*, stating the beer is "much better because it [is] cold." *Id.* Anderson was not a part of any of these text conversations.

The bottom line is that there is no more reason to think that Anderson was talking about drugs than he was talking about the Corona beers consumed after Medina departed, or any other subject under the sun. "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).

### 2. The Holding and Return of Gerry's Money Is Insufficient to Establish Criminal Intent or Active Participation

The government's own evidence buttressed Anderson's contention that he borrowed $160,000 from Gerry to explore the legitimate purchase of a building. *See* Gov't Ex. 39, p. 3-5. The jury found Anderson not guilty on the alleged § 1956(a)(l)(B)(i) violation, Count 4. But even without the parameter of this acquittal, Gerry's conduct in lending Anderson money is consistent with that of one friend helping another in financial or economic need. *United States v. Sacerio*, 952 F.2d 860, 864 (5th Cir. 1992) ("Sacerio's actions are consistent with those of a

friend, albeit a good friend, helping another friend out of a jam.") (reversing conviction for narcotics conspiracy).

Anderson's return of $60,000 to Gerry (which Gerry subsequently used to purchase drugs from the Cruz brothers) formed the basis of Count 5. See Part II, *infra*. However, a bailee's simple act of returning property to its bailor is not legally sufficient evidence to establish voluntary participation in criminal conduct subsequently (and independently) engaged in by the bailor. The hallmark Fifth Circuit in this area of conspiracy doctrine is *United States v. Ross*, 58 F.3d 154 (5th Cir. 1995). As part of a sting operation an undercover police officer, Ramsey, made purchases from various drug dealers in Abilene. *Id*. at 156-157. Two rival sellers were Lee and Ross. Lee arranged to sell .62 grams of cocaine base to Ramsey for $80. Problematically, Ramsey did not have correct change:

> Ramsey did not have proper change to pay both men and according to her, Lee and Ross said they would make change among themselves. She then gave Lee three $20 [bills] and Ross a $100 bill and Lee gave her back $20.

*Id*. at 159-160.

Ross challenged his conviction on the grounds that simply making change was insufficient evidence to predicate a conviction for narcotics conspiracy. This Court agreed, holding:

> We think that the mere act of making change, albeit for an illegal transaction, does not provide proof beyond a reasonable doubt that Ross was

> a member of a greater conspiracy dealing with fifty grams or more of cocaine base.

Id. at 160.

The holding of *Ross* applies even more strongly in Anderson's situation, because Anderson did not "make change" for Gerry, but rather returned the exact same money Gerry had given to him days earlier.

### E. No Evidence That Anderson Was Paid Any Money

#### 1. Anderson's Situation Is Qualitatively Different Than 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).

#### 2. Anderson Was A Very Wealthy Man

By contrast, no evidence was presented that Anderson profited in any way from Gerry's drug activities. Nor did Anderson have any reason do so: he was an extremely wealthy man by way of his nightclubs who enjoyed a luxurious standard of living from honest wages. R.783 (Anderson testifies that his nightclubs are

"very lucrative"); R.792-793 (Anderson testifies that he has "Couple thousand Coca-Cola bottles, about 3,000 Barbies, some Lladro" as well as cars and a Bible collection).

Even more specifically, the PSR determined that Anderson enjoyed over $8.5 million in assets with only $60,000 in unsecured debt. (PSR, p. 38-39). Most of Anderson's wealth took the form of equity in his clubs. However, the forfeiture order shows the scope and expanse of Anderson's personal possessions. ***Substitute*** assets were comprised of 11 automobiles (including a Corvette and a BMW), 42 pieces of fine jewelry (such as Rolex and Raymond Weil wristwatches), and 7 antique firearms. RE.5.906-910

### F. In the Alternative, This Court Should Grant A New Trial

Even if the Court finds the evidence barely sufficient to sustain the convictions, this Court should, pursuant to the broad remedial powers vested in it by 28 U.S.C. 2106, grant Anderson 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).

## II. EVIDENCE WAS INSUFFICIENT AS TO THE 1956(A)(1) MONEY LAUNDERING COUNT

### A. The Simple Act of Returning Cash to Its Owner Is Not A "Financial Transaction"

#### 1. Anderson's Conduct Falls Outside the Ambit of 18 U.S.C. 1956(c)(3)(i) or (ii)

"To sustain a conviction under 1956(a)(1), the government must prove beyond a reasonable doubt that (1) the financial transaction in question involves the proceeds of unlawful activity, (2) the defendant had knowledge that the property involved in the financial transaction represented proceeds of an unlawful activity, and (3) the financial transaction was conducted with the intent to promote the carrying on of a specified unlawful activity." *United States v. Valuck*, 286 F.3d 221, 225 (5th Cir. 2002) (quoting *United States v. Wilson*, 249 F.3d 366, 377 (5th Cir. 2001)). The Indictment defined the financial transaction as "the delivery of approximately $60,000 in United States currency to Thomas Gerry" and the unlawful conduct was defined as "the felonious sale and distribution of the controlled substance, methamphetamine." RE.3.260.

The Money Laundering Crimes Act defines "financial transaction" as:

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

18 U.S.C. 1956(c)(3).

Since there was no transfer of title or involvement with a financial institution whatsoever, Anderson's conviction could only be predicated on (c)(3)(A)(i) or (ii). However, no case has ever held that "movement of funds by wire or other means" can be established in a bailment situation through a simple physical transfer from a transferee back to the transferor.

### 2. Fifth Circuit Caselaw Has Found Asportation More Extensive Than Anderson's Return of Gerry's Money Insufficient to Support a Conviction under § 1956

#### a. *United States v. Puig-Infante*

The hallmark Fifth Circuit case demonstrating the distinction between a transaction of funds from mere transportation of funds in the context of 1956(c)(3) is *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994). Abigail Puig drove from Laredo to San Antonio where she picked up a load of marijuana. *Id*. at 937. From San Antonio, Puig drove to Florida where she exchanged her marijuana for

$47,000 cash. *Id*. at 938. Next, Puig drove from Florida back to Laredo with these funds. This Court reversed Puig's conviction under 1956(a)(1), explaining:

> The government contends that 'the delivery and transfer of cash from [the Willises] to Abigail in Florida, and her subsequent movement of these cash proceeds interstate, constitutes a financial transaction.' However, because the money did not become *proceeds* of unlawful activity until the sale of the marihuana was *completed*, what the government describes as one transaction is actually two separate actions: the first, the sale by the Puigs of the marihuana to the Willises and their payment to Abigail Puig for same, is a transaction (and an unlawful one) but is not shown to have been one which involved the *proceeds* of unlawful activity; the second, Abigail Puig's transportation of the money from Florida to Laredo, involves the proceeds of unlawful activity but is not a *transaction.*

*Id*. at 939 (emphasis in original).

> [A]lthough the money Abigail Puig received in exchange for the marijuana was the proceeds of unlawful activity, here mere subsequent transportation of those proceeds by car does not constitute a 'financial transaction' within the meaning of the statute.

*Id*. at 938.

### b. *United States v. Garza*

The holding in *Puig-Infante* is good law and its logic has vitiated convictions in § 1956 prosecutions where no financial transaction is demonstrated by evidence adduced at trial. In *United States v. Garza*, two men named Garza and Garcia were observed conducting counter-surveillance at a Days Inn and then met with a man named Inocencio at a Texaco where he gave them a green jacket with a firearm. 118 F.3d 278, 283 (5th Cir. 1997). Later on, the police searched

Inocencio's home and found $5 million in cash and drug ledgers. *Id.* at 281. Garza and Garcia were convicted of both conspiracy to possess with intent to distribute narcotics and money laundering related to the cash found in the house. On appeal, this Court reversed the § 1956 convictions, explaining:

> currency found by officers in connection with a drug trafficking offense, by itself, is insufficient to support a money laundering conviction.

*Id.* at 284.

#### c. Anderson's Conduct Fits Within the Legal Framework Arched by *Puig-Infante* and *Garza*

Anderson's conduct (acquiring funds from Gerry for the legitimate attempted acquisition of a building and then returning part of these funds upon his request) fits comfortably within the holdings of *Puig-Infante* and *Garza.* Unlike Abigail Puig, Anderson never moved these funds: Gerry brought the money to Anderson at his house and then later retrieved a subset of these funds at the house. R.1777 (Anderson explaining that he "never opened the box of 160"); R.1782 ("It stayed in my safe the whole time."). Like Messrs. Garza and Garcia, the government presented no evidence that Anderson engaged in a financial transaction with the $60,000: these funds were only located when the Cruz brothers' car was searched hours later. R.1644—1646.. Anderson was not physically present at the time the money exchanged hands between Krambeck and the Cruzes the first or the second time. *Id*; R. 1633, 1635, 1662—63. Anderson was

at home on both occasions when the money was exchanged with the Cruzes on June 10 through June 11, 2009. *Id.*

Anderson recognizes that the Sixth Circuit relied on *Puig-Infante* in its seminal opinion, *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (en banc). In *Reed*, the Sixth Circuit reversed precedent and concluded that a lawyer who instructed his client to bring his marijuana proceeds to her office and arranged for the transfer of the money to a courier, who took the money back to California for that very client had effected a financial transaction:

> in this case, defendant is alleged to have arranged for the exchange of the proceeds, accepted them into her possession, exercised control over the proceeds for a period of time, and authorized the release of the proceeds to *another individual*. Under these facts, the defendant here would clearly have effected a disposition of the proceeds.

*Id*. (emphasis added) (citation to *Puig-Infante* omitted).

However, even the logic of *Reed* does not reach Anderson's conduct. Reed gave the proceeds to "another individual." Anderson promptly gave the money to Gerry, not to another individual. Anderson replied immediately to Gerry's texts within minutes (June 10, 11:55 pm reply to 11:55 text from Gerry; June 11, 5:44 pm reply to 5:39 pm text from Gerry). Gov. Ex. 58, 70. Anderson provided the money both times within about an hour. Gov. Ex. 60, 70; R. 1626; 1632—33; 1638—40; 1663.

No case has ever concluded that a "financial transaction" is demonstrated by the receipt of money in a bailment situation from a transferor followed by a nearly instantaneous refund of those exact funds to the very same transferor upon their request.

### B. The Funds Anderson Returned to Gerry Did Not Qualify As "Proceeds" As That Undefined Term in the Money Laundering Act Has Been Construed

#### 1. Funds Do Not Become "Proceeds" Until After A Narcotics Transaction Has Been Finalized

Section 1956(a)(1) "uses the term 'proceeds' in describing two elements of the offense: The Government must prove that a charged transaction 'in fact involve[d] the proceeds of specified unlawful activity' (the proceeds element), and it also must prove that a defendant knew 'that the property involved in' the charged transaction 'represent[ed] the proceeds of some form of unlawful activity' (the knowledge element)." *United States v. Santos*, 553 U.S. 507, 511 (2008). The term "proceeds" is undefined, *id*., but every court to consider the issue has held that funds intended as currency for a drug transaction do not become "proceeds" when a narcotics transaction is envisaged, but rather, only after the sale has been completed. *United States v. Gaytan*, 74 F.3d 545, 555-556 (5th Cir. 1996) ("a transaction to pay for illegal drugs is not money laundering, because the funds involved are not proceeds of an unlawful activity when the transaction occurs, but

become so only after the transaction is completed"); *United States v. Garza*, 118 F.3d 278, 284 (5th Cir. 1997) ("currency does not become proceeds of drug trafficking until a drug sale has been completed") (quoting *Gaytan*); *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (en banc) ("We do not hold that the mere transportation of cash meets the definition of a financial transaction.").

Even when viewed in the light most favorable to the prosecution, the evidence at trial established that funds given by Gerry to Anderson were intended for the legitimate purchase of a building and returned by Anderson to Gerry for a narcotics transaction. But these funds did not become *proceeds* until Gerry and Krambeck handed them over to the Cruz brothers hours later. It is uncontroverted that Anderson was nowhere near this drug sale, but rather was at home. The entirety of Anderson's involvement with these funds well predated the completion of both transfers. R. 1633—1635; 1640—1646; 1662—1664.

### 2. The Absence of Any Profits to Anderson Precludes Liability Under Section 1956(a)(1)

In the recent opinion of *United States v. Santos*, the Supreme Court held that "proceeds" means the "profits," rather than merely the "receipts," of the activity. 553 U.S. 507, 514 (2008). Santos, who operated an illegal lottery, was convicted of illegal gambling and money laundering promotion. The latter crime

carries a much steeper penalty than the gambling. The transactions that formed the proceeds element of the money laundering charge were payments made by Santos to lottery winners and to his "runners." Santos challenged the money laundering conviction on the theory that these were not proceeds (in the sense of profits) but rather were simply receipts or revenue used to cover his operating expenses, and therefore they were not sufficient to support a money laundering conviction. The question before the Court amounted to whether "proceeds" under the statute means only profits of the specified criminal activities, or whether it includes all receipts.

The logic animating the Court's reasoning was very specific:

> [A] criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.

*Id*. at 517.

There was no evidence that Anderson charged Gerry any interest rate or fee for holding the funds; Anderson did not serve as a straw man or pass-through entity. This parameter brings Anderson's conduct within the protection of *Santos*, *id*. at 514 ("[u]nder a long line of our decisions, the tie must go to the defendant"). Anderson's outflows (return of $60,000) are tantamount to *Santos*' "costs"; the identical cash given to Anderson days earlier is tantamount to *Santos*' "receipts." The former perfectly offsets the latter, because the cash was exactly the same.

### C. A *Mens Rea* of "Specific Intent to Promote" Requires More than "Mere Promotion" or "Knowing Promotion"

#### 1. Legislative History Cleaves A Distinction Between "Specific Intent" Required for § 1956(a)(1)(A) and "Knowledge" Under § 1956 (a)(1)(B)

Anderson was acquitted of the 1956(a)(1)(B) count involving the $160,000 of Gerry's money held by Anderson but convicted of the (a)(1)(A) count involving the $60,000 returned to Gerry upon his request. The distinction between the specific intent requirement of subsection (a)(1)(A) for which Anderson was convicted, and the lesser knowledge requirement of subsection (a)(1)(B), was not inadvertent. Congress, in an attempt to pass compromise legislation, declared:

> 18 U.S.C.A. § 1956(a)(1)… has two "knowing" requirements. In order to prove a violation of the offense, the Government must show not only that the defendant knew the property involved in a transaction was the proceeds of a crime, but also that the defendant either *intended* to facilitate a crime or *knew* that the transaction was designed to conceal proceeds of a crime.

S. Rep. No. 433, at 9 (1986) (emphasis added).

#### 2. To Establish A *Mens Rea* of "Specific Intent to Promote" The Government Must Show More than "Mere Promotion" or "Knowing Promotion"

"The 'specific intent to promote requirement" has been called the 'gravamen' of a § 1956(a)(1)(A)(i) violation." *United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010); *see also United States v. Valuck*, 286 F.3d 221, 227 (5th Cir. 2002) ("To satisfy the 'promotion' element of a money laundering conviction,

we require the government to show that a defendant conducted the financial transaction in question with the specific intent of promoting the specified unlawful activity."). "To prove it, the Government must satisfy a stringent *mens rea* requirement, establishing that the transaction at issue was conducted with the intent to promote the carrying on of a specified unlawful activity." *Trejo*, at 314.

By contrast, "[p]roof that financial transactions involving the proceeds of unlawful activity merely promoted other criminal activity is insufficient to support a conviction under section 1956(a)(1)(A)(i)." *United States v. Dovalina*, 262 F.3d 472, 475 (5th Cir. 2001). Stated another way, "[t]his element is not satisfied by mere evidence of promotion, or even *knowing* promotion, but requires evidence of *intentional* promotion.". *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999) (emphasis in original).

### 3. The Government Offered No Evidence That Anderson Intentionally Promoted Gerry's Subsequent Crime

These legal principles apply straightforwardly to Anderson's situation, as there was no evidence that he intended to promote Gerry's subsequent purchase of methamphetamine from the Cruz brothers. Viewed in the light most favorable to the prosecution, the Government established that Gerry retrieved his $60,000 from Anderson and then went to see the Cruz brothers from whom he purchased 2 kilograms of methamphetamine. Anderson played no role in this drug transaction:

He was not physically present; he did not communicate with the Cruzes or translate for Gerry; he did not physically hand the Cruzes the $60,000 nor physically receive the methamphetamine for which it was exchanged. R. 1632—1633; R. 1643—1646; 1652—1653.

At trial, the Government introduced as Exhibit 70 a series of text messages between Anderson and Gerry on June 11 in which Gerry evinced his desire to retrieve the $60,000. At 2:59 p.m., Gerry wrote Anderson, "Yes, got Tango Blast either to be here- or I go to them... Will be decided PDQ." Anderson did not respond to this text message; at 5:39 p.m., Gerry sent another message which read, "A., i'm gonna need my $.. Dealing on some stocks spose to double 2 wks. Hope ur home." At 5:44 p.m., Anderson simply replied, "I'm home." R. 1639. Anderson sent no further texts until 7:39, when he asked Gerry, "Gonna need how much frm me… when? R. 1641.

When asked to interpret the message about "Tango Blast", Special Agent Robinson explained:

> I know that that is a predominantly Hispanic street gang, and I think Mr. Gerry is telling Mr. Anderson there that he has got a meeting with some of those people, and he is going to decide where the meeting is going to take place, and he is going to make that decision.

R.1638.

As concerned the message about "doubling on some stocks", Special Agent Robinson explained:

> [Gerry] says he is dealing on some stock and that they are supposed to double in two weeks. In other words, 'This is a good deal. I can't pass it up.' He is telling Mr. Anderson that he needs his money and he hopes he is home so he can retrieve some of that money.

*Id*.

At most, this testimony established that Tango Blast is a "predominantly Hispanic street gang." There was no evidence that Anderson shared Agent Robinson's specialized knowledge. Nor did Agent Robinson even go so far as to testify that "stocks" is any sort of colloquialism for narcotics.

Even more significant is that Anderson did not reply to either the text messages about "Tango Blast" or "stocks." Two and one-half hours after Gerry sent the text message about Tango Blast, Anderson responded simply, "I'm home."

## III. THE DISTRICT COURT CLEARLY ERRED BY LIMITING EACH DEFENDANT TO FOUR (4) MINUTES OF CLOSING ARGUMENT WHEN THE FACTS OF THIS CASE WERE EXTREMELY COMPLEX

### A. The Court Reluctantly Raised Its Time Limit on Closing Argument from 2.5 to 4 Minutes Per Defendant

After the close of all evidence, the District Court stated that it would hold each side to seven minutes. After an objection, the District Court reluctantly

agreed to allow the prosecution ten (10) minutes and four (4) minutes to each of the three defendants:

> THE COURT: Can you do it in the customary seven minutes?
>
> MR. SCHATTMAN: Judge, I would really like to have ten, if it's all right.
>
> THE COURT: You want me to be generous. The others get ten if you get ten. Okay. I'm going to give you ten. I'm going to give them 12, four each.

R.1840-1841.

Immediately before closing arguments began, the District Court stated:

> For the information of the jury, I have given the parties a total of 22 minutes to make their final statements. It will be divided up amongst the parties, but that will give you a feel for how long you will be listening to the lawyers talk.

R.1846.

### B. Anderson's Trial Was Extremely Complex

Each of the three days of Anderson's trial was long and complicated. The first day of trial ran 8 hours and 32 minutes, R.17, the second day ran 8 hours and 13 minutes, R.18, and the third day ran 10 hours and 24 minutes. *Id*. Beyond sheer hours in the courtroom, this case involved almost 200 total exhibits, including approximately 25 total testifying witnesses, and 164 wiretap sessions of audio and text message conversations admitted (of 355 actually recorded). Of the 164 wiretap sessions recorded, 143 of these sessions of this form of evidence were

text messages written in vernacular requiring decoding and interpretation by witnesses.

### C. A District Court Abuses Its Discretion By Limiting Closing Argument to Four Minutes

Anderson recognizes that district courts are afforded substantial discretion in placing time limits on closing argument. *See, e.g.*, *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997) (no error in 25 minutes of closing argument of which 5 was an extension); *United States v. Moncrieffe*, 319 Fed. Appx. 249 (4th Cir. 2009) (district court could limit defendant's closing argument to 20 minutes); *United States v. Alaniz*, 148 F.3d 929 (8th Cir. 1998) (no error in 12 minutes per defendant up to 36 minutes total). However, no case has ever held that 4 minutes is a sufficient amount of time for closing argument.

The two hallmark Fifth Circuit cases on time limitations in closing argument are *United States v. Leal*, 30 F.3d 577 (5th Cir. 1994) and *United States v. Moye*, 951 F.2d 59 (5th Cir. 1992). In *Leal*, no error was established when a district court limited each of two defendants to twenty-two (22) minutes, and this time was determined only after, "[t]he district judge listened to both sides before deciding how much time to allot." 30 F.3d at 586. Unlike the situation in *Leal*, Judge McBryde did not listen to either side before deciding how much time to allot, but rather picked seven minutes because this is "customary" in his court. Even after

Judge McBryde assented to the prosecutor's request for more time, none of the defendants was asked how much time would be needed. R.1841.

In *Moye*, this Court concluded that there was no error in limiting a defendant to ten (10) minutes, but observed that this time was "probably a shorter limit than we would have established." *Id*. at 63. It is striking that Anderson and his two co-defendants were limited to a length of time 60% shorter than that found dubious in *Moye*.

### D. The District Court's Discretion to Truncate Closing Argument Winnows With the Complexity of the Case

"[I]n a case such as this involving multiple defendants charged on multiple counts in a complicated conspiracy, we must carefully examine whether the time allotted was adequate in light of the complexity of the case **and not rely upon a cursory comparison of time limitations that we have upheld in other cases**." *United States v. Okoronkwo*, 46 F.3d 426, 437 (5th Cir. 1995) (emphasis added). Anderson's situation is more akin to the complexity of *Okoronkwo* than the relatively more straightforward prosecutions in *Leal* and *Moye*. In *Leal*, "the defense was basically that there was a lack of intent, which did not require an elaborate presentation." 30 F.3d at 596. Similarly, *Moye* "was a single-issue case that was tried in two days." 951 F.2d at 63.

By contrast, Anderson's case was a multi-defendant case tried over three days. Moreover, Anderson was situated differently than his two co-defendants insofar as he was indicted on two § 1956 money-laundering counts in addition to the Conspiracy count. Even on the Conspiracy count which all three defendants shared in common, there was no contention that Anderson used, sold, or transported drugs. The jury was presented with a litany of text messages, of the 143 sessions admitted, written in a very abbreviated form of slang the substance of which could not possibly be addressed in a grand total of 240 seconds. Some of these were admitted generally into the record. R. 1676 (27 sessions involving various actors). Of the 143 admitted, only 33%, or 47 text messaging sessions, admitted involved Anderson. R. 541; *see also* R. 1573—1637.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GIVING A DELIBERATE IGNORANCE INSTRUCTION WHEN THERE WAS NO EVIDENCE ANDERSON PURPOSELY CONTRIVED TO AVOID LEARNING OF GERRY'S ILLEGAL CONDUCT

### A. This Court Reaches Challenges to Instructional Error Only If the Evidence Is Found to Be Sufficient to Sustain Anderson's Convictions on Counts One and Five

This Court addresses challenges to the sufficiency of the evidence before reaching issues of trial or instructional error because if the Court finds the evidence insufficient, then the Double Jeopardy Clause would bar the government from seeking to retry the issue in a new proceeding. *United States v. Miller*, 952 F.2d

866, 871 (5th Cir. 1992) (stating rule and explaining that in *Burks v. United States*, 437 U.S. 1 (1978), "the Supreme Court, overruling prior precedent, held that appellate court reversal of a conviction for insufficient evidence is the functional equivalent of a verdict of acquittal and thus bars reprosecution for the same offense"). As the Court stated in *United States v. Moses*, "[i]n cases where the reversal permits the Government to retry the defendant, we *must* reach a sufficiency of the evidence argument because the Government may not retry the defendant if the evidence at trial was insufficient." 94 F.3d 182, 188 (5th Cir. 1996) (emphasis added); see also *Miller*, 952 F.2d at 874 ("Although not mandated by the double jeopardy clause, it is accordingly clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction.").

### B. Instruction Given Over Anderson's Objection

In the general charge to the jury, delivered before closing arguments, the district court included the optional clause in Pattern Jury Instruction 1.37:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

R.590 (written jury instructions); R.1884-1885 (court reads jury instructions aloud).

Anderson contemporaneously objected. RE.X.1845.

### C. The Evidentiary Prerequisite Justifying The Deliberate Ignorance Instruction is High Because of Its Implicit Risk

"The circumstances which will support the deliberate ignorance instruction are rare." *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Because "[t]he instruction is nothing more than a refined circumstantial evidence instruction properly tailored to the facts of a case. . . ." *United States v. Manriquez Arbizo*, 833 F.2d 244, 248 (10th Cir. 1987), this Court has explained the contexts in which it is applicable and those in which it is not.

Stated in the affirmative, "[t]he district court is permitted to instruct the jury on deliberate indifference when there is a proper factual basis such as where the record supports inferences that '(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant *purposely contrived* to avoid learning of the illegal conduct.'" *United States v. Elashyi*, 554 F.3d 480, 504 (5th Cir. 2008) (quoting *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (emphasis added). By contrast, "the district court should not instruct the jury on deliberate ignorance when the evidence raises only the inferences that the defendant had *actual knowledge* or no knowledge at all of the

facts in question." *Lara-Velasquez*, 919 F.2d at 951 (5th Cir. 1990) (emphasis added).

When he was a Ninth Circuit Judge, Justice Kennedy expounded on the risk inherent in the deliberate ignorance instruction: "that juries will avoid questions of scienter and convict under the standards analogous to negligence." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part). For this reason, the willful blindness instruction must be appurtenant to a specific factual basis establishing "a conscious attempt to avoid incriminating knowledge, not mere negligence." *United States v. Orji-Nwosu*, 549 F.3d 1005, 1010 (5th Cir. 2008).

### D. The District Court Granted the Prosecutor's Request for the Deliberate Ignorance Instruction Without Establishing Any Factual Predicate

This Court requires that, "[b]efore delivering a deliberate ignorance charge, the district court must exercise great care to ensure that the evidence establishes a factual predicate supporting the instruction and to give the instruction only when such a predicate exists." *United States v. Delgado*, 631 F.3d 685, 708 (5th Cir. 2011). This requirement reflects the "*sine qua non* of deliberate ignorance," which is "the *conscious* action of the defendant -- the defendant consciously attempted to escape confirmation of conditions he [subjectively] strongly suspected to exist." *United States v. Mendoza-Medina*, 346 F.3d 121, 133 (5th Cir. 2003).

The District Court introduced this principle, first asking the prosecutor if it contended that the deliberate instruction should be given and by then granting this request without inquiring of any specific evidence:

> THE COURT: Okay. Otherwise, let's see. Page 21, the deliberate ignorance instruction, does the Government maintain that should be given?
>
> MR. SCHATTMAN: Yes, Your Honor. I believe there is sufficient testimony to raise it both certainly as to Mr. Murphy and as to Mr. Anderson.
>
> THE COURT: I agree with you. So that will stay in. The boldface language on 21 will stay in.
>
> MR. LECHTENBERGER: We would object to that, Judge.
>
> THE COURT: Okay. The charge will be as I have already presented it to you, with the comments that I just made.

R.1845.

Rather than "great care" to ensure that the evidence establishes a factual predicate the District Court exhibited 'no care.' To wit, the District Court did not identify (much less inquire of the prosecutor) ANY evidence that suggested in effect, "Don't tell me, I don't want to know." *United States v. Newell,* 315 F.3d 510, 528 (5th Cir. 2002).

### E. Neither The Evidence Adduced By the Prosecutor or Anderson Suggested Any Effort to Avoid Knowledge of Facts

It was error for the district court to instruct the jury on deliberate ignorance. The government tried its case on the theory that Anderson had *actual knowledge* of Gerry's narcotics activities and knowingly furthered that conduct.

Anderson's strategy at trial was to concede that Gerry agreed with others to violate narcotics laws but to deny knowing of Gerry's conspiracy and to deny knowingly participating in this conduct. This Court has recently reiterated that, "[d]enial of knowledge, alone, may be insufficient to warrant a deliberate ignorance instruction." *United States v. Barrera*, 2011 U.S. App. LEXIS 18792, *11 (5th Cir. 2011). Against this factual and doctrinal backdrop is Anderson's testimony that he knew Gerry was involved with drugs but did not knowingly further his activities (if he was telling the truth):

> Q. You knew he was dealing drugs?
> A. Yes, sir. Yes, sir, I did.
>
> Q. You hoped that he wasn't, but you knew?
> A. Yes, sir. **It was pretty obvious.**

R.1756 (emphasis added).

Anderson's own testimony that Gerry's drug dealing was "pretty obvious" is diametrically opposed to the contention that Anderson consciously tried to avoid learning of Gerry's narcotics activities**.** *United States v. Ojebode,* 957 F.2d 1218,

1229 (5th Cir. 1992). Similarly, there is no evidence to show that Anderson consciously attempted to escape confirmation of conditions or events he strongly suspected to exist or engaged in actions that suggested in effect, "Don't tell me, I don't want to know." *Newell*, 315 F.3d at 528. Anderson testified that he asked Gerry to move out in February 2006 based on rumored dealing by Gerry. R. 1754.

This court has explained that evidence suggesting that "the defendant[] knew that his conduct was criminal and took elaborate measures to hide it" is not sufficient to support an instruction on deliberate ignorance; rather, such evidence is the "opposite" of purposeful contrivance to remain ignorant of a crime. *See United States v. Threadgill*, 172 F.3d 357, 369 (5th Cir. 1999). Anderson's situation operationalizes the holding of *Threadgill* even more strongly than did the facts in that case. If "elaborate measure to hide" criminal conduct is the "opposite" of deliberate ignorance, a defendant's own statement that another's criminal conduct is "pretty obvious" must be regarded as antithetical to any contention of willful blindness.

### F. Error Was Not Harmless

Anderson recognizes that even if the district court errs in its decision to give the deliberate ignorance instruction, any such error is harmless "where substantial evidence of actual knowledge was presented [at trial]." *United States v. Ricardo*, 472 F.3d 277, 286 (5th Cir. 2006). However, the lack of this "substantial

evidence" is the most conspicuous aspect of the government's case. In his closing statement, the prosecutor argued:

> How is it that Thomas Gerry gathered up, made this organization, and distributed all of this dope that you have seen, the hundreds and hundreds of grams of methamphetamine? He did it with Andy Anderson's phone, he did it with Andy Anderson's car, he did it using Andy Anderson's house, he did it using Andy Anderson's gun safe to store his money, he did it using Andy Anderson's name,…

R.1861.

It is salient that the prosecutor could point to no evidence that Anderson knowingly *did* anything to advance Gerry's purposes, but rather only that Gerry utilized innocuous everyday items of Anderson's. The prosecutor took full advantage of the erroneous jury instruction to aver that Anderson consciously avoided learning of Gerry's purposes despite using Anderson's property items.

## V. SENTENCING: THE DISTRICT COURT ERRED IN THE DETERMINATION OF DRUG QUANTITY

### A. Anderson Preserved His Objections to Procedural and Substantive Reasonableness

Anderson recognizes that "[w]hen a defendant fails to raise a procedural objection below, appellate review is for plain error only." *United States v. Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir. 2008); *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). However, Anderson specifically objected on the grounds of both procedural and substantive reasonableness to preserve these grounds for appellate review:

> MR. LECHTENBERGER: The other issue, Judge, I would just object, as I have to, for reasonableness substantively and procedurally. That's all I have, Judge.
>
> THE COURT: Okay. Thank you.

R.1153.

### B. The District Court Erred Its Quantity Determination for Drugs Actually Possessed

The District Court's errors in the determination of drug quantity were three-fold. Part of the total quantity ascribed to Anderson comprised the drugs bought by Gerry from a Mr. Medina on June 5. The district court determined this amount was 2 kilograms when, in fact, trial testimony and the PSR were clear that this transaction involved only 1 kilogram.

The other part of the total quantity ascribed was derived by converting $210,000 of cash given to Anderson by Gerry into an equivalent amount of weight. This approach is countenanced by U.S.S.G. § 2D1.1 Application Note 12; unfortunately, the District Court ignored the procedural prerequisites required for this Application Note by failing to make a finding that "the amount seized does not

reflect the scale of the offense. Such a finding is expressly required by this Court's precedent in *United States v. Henderson*, 254 F.3d 543 (5th Cir. 2001).

Furthermore, the purchase price/conversion ratio urged by Probation is materially untrue. No witness testified that methamphetamine was retailed in kilogram increments; to the contrary, at least one witness testified that he could not sell as much methamphetamine as Gerry asked him to.

As a result, Anderson's Base Offense Level was wrongfully inflated from Level 36 to Level 36.

#### 1. The June 5 Meeting With Medina Involved Only One Kilogram of Methamphetamine

##### a. The Prosecutor Misled The District Court As to The Quantity Attributable to the June 5 Transaction With Medina

At the end of the first sentencing hearing, confusion arose as to the quantity of methamphetamine attributable to Anderson's June 5 meeting with Medina:

THE COURT: What about the one where he was present? What was that?

MR. SCHATTMAN: That is June –

THE COURT: June 5.

MR. SCHATTMAN: Yes, June 5.

THE COURT: Well, what's the quantity we're talking about?

MR. SCHATTMAN: That's also the two kilos.

MR. BURNS: Yes. That's the two kilo, Your Honor.

THE COURT: Are there two two kilo transactions?

MR. SCHATTMAN: Yes.

THE COURT: One where he was present. The other where he delivered the money? Is that right, Mr. Schattman?

MR. SCHATTMAN: Yes, Your Honor. There was testimony.

THE COURT: **So we've got four kilos that there really can't be any serious argument about that.**

R.1101 (emphasis added).

**b. Trial Evidence Established One Kilo Was Sold at the June 5 Meeting with Medina**

Steven Adams testified:

A: Mr. Anderson was interpreting English to Spanish for Mr. Medina. And there was something about being $4,000 short for the price of what was asked for ***the kilo***…

R.1618.

**c. The PSR Concluded That the June 5 Transaction Was For Only One Kilogram**

The Third Addendum stated that, "on June 5, 2009, the defendant was present for the 1 kilogram purchase of methamphetamine from Medina…". (Third Addendum, p. 3).

#### d. Conclusion

The District Court clearly erred with regard to the factual determination as to how many kilograms were attributable to the June 5 purchase. Steven Adams provided the only trial testimony about June 5; Adams was unambiguous that there was only one kilogram involved. Similarly, the Third Addendum to the PSR ascribed only one kilogram. The error in the court's conclusion is manifest: rather than "four kilos that there really can't be any serious argument about", R.1101, there were at most only ***three*** such kilos (holding constant the other two kilograms bought from the Cruz brothers on June 11).

### C. The District Court Erred In Its Determination of Quantity of Methamphetamine Discerned From the Use of Cash As A Proxy

#### 1. The District Court Implicitly Rejected At Least Part of the Third Addendum's Conversion Paradigm

##### a. The District Court Recognized That Ascribing Quantities Corresponding to Anderson's Cash-on-Hand Would Constitute "Double Counting"

Neither the PSR, the First Addendum, or the Second Addendum presented any form of cash conversion under § 2D1.1. This methodology appeared for the first time in the Third Addendum which was delivered the day before sentencing was set to commence:

During this time frame, the defendant participated in the following: the

> defendant stored the $50,000 'rainy day fund;' $l60,000 borrowed from Gerry for the purchase of the Hardbody's property; on June 5, 2009, the defendant was present for the 1 kilogram purchase of methamphetamine from Medina; and on June 10,2009, the defendant provided the $60,000 used to purchase 2 kilograms of methamphetamine from the Cruz brothers on June 10 and 11, 2009. Thus, within 60 days, the defendant aided and abetted Gerry's distribution of approximately 8.9 kilograms of methamphetamine. This amount of methamphetamine is calculated by dividing the $270,000 by the methamphetamine kilogram purchase price (provided by investigators) of $39,000, which is 6.9 kilograms of methamphetamine; plus the 1 kilogram purchased by Gerry (on each date), in the defendant's presence, in or about April or May 2009 (from Perez-Leon) and on June 5, 2009 (from Medina).

It is striking that even here, Probation never identified Application Note 12 as the basis for its analysis.

At the second sentencing hearing, the district court stated, **"**I'm having a little bit of a problem attributing the whole **$210,000** to the defendant as drug proceeds…". R.1118 (emphasis added). By subtracting $60,000 from the gross sum urged by Probation ($50,000+$160,000+$60,000) the District Court must have necessarily concluded that it would be illogical to include $60,000 used to purchase the 2 kilograms from the Cruz brothers since this amount came directly from the $160,000 transferred. Unfortunately, the District Court did not reject the other aspects of Probation's sophistry.

### b. "Anderson Wasn't Directly Involved In $210,00 Worth of Transactions"

The Court struggled with Probation's attempt to ascribe the entire cash hoard to Anderson as a proxy for narcotics:

> Well, the problem – I'm having a little bit of a problem attributing the whole $210,000 to the defendant as drug proceeds -- as a quantity of drugs for guideline calculation purposes, because we run into this frequently, that the defendant will be a part of the conspiracy throughout the whole time of the conspiracy as this defendant was, but we only hold that defendant accountable for drug -- and for forfeiture purposes, you would look at the total quantities of drugs, in terms of the conspiracy, generally, or proceeds, but it seems to me like we generally only hold the defendant accountable for those transaction that he was directly involved in somehow.
>
> And in this case he wasn't directly involved in the $210,000 worth of transactions. He was directly involved in the part of that that represented money taken out of that to go buy the two kilos.

R.1118.

### c. Prosecutor's Response Made No Mention of the Amount Seized

The prosecutor responded:

> That's a separate transaction altogether, because you have the money that has been accumulated from prior transactions that is foreseeable to this man, and then that money is then used to bring more drugs into the trafficking organization, which is then sold. So you have the drugs represented by the money, and then you have the new drugs that came in, and those are two separate items.

R.1120.

### d. District Court Recanted Its Erstwhile Concerns, Yet Failed to Make Any Finding That Amounts Actually Seized Failed to Reflect the Scale of the Offense

Without any finding that the actual drug seizure failed to reflect the scale of the offense, the District Court adopted the very reasoning it had earlier rejected:

> Well, if your position is that he can' be held accountable for it because he couldn't foresee it, then I'm going to deny the objection, because there's no doubt in my mind that your client knew that significant amounts of money were being accumulated by Gerry from his methamphetamine drug trafficking, and your client reasonably should have foreseen, if he didn't know, that Gerry would be accumulating significant amounts of money from his drug trafficking, and that drug trafficking was part of the jointly undertaken activity between Gerry and your client.

R.1121.

## 2. Prerequisites to the Conversion of Cash Into A Discernible Drug Quantity

U.S.S.G. § 2D1.1 Application Note 12 provides:

> When there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of controlled substances.

This Court has long held that drug quantity may be inferred from cash proceeds of drug trafficking. *United States v. Johnston*, 127 F.3d 380,403 (5th Cir. 1997); *see also United States v. Keszthelyi*, 308 F.3d 557, 576-78 (6th Cir. 2002) (upholding conversion of currency to drug quantity and observing that "government must prove by a preponderance of the evidence both the amount of

money attributable to drug activity and the conversion ratio -- i.e., the price per unit of drugs"); *United States v. Otis,* 127 F.3d 829, 836 (9th Cir. 1997) (upholding conversion of currency to drug quantity where "evidence connect[ed] the money to drug-related activities" and "[t]here was evidence of the going rate for cocaine in Chicago which supported the conversion rate").

In this case, there was a seizure of drugs the quantity of which was included in Anderson's relevant conduct. *See* Part V.B, *supra*. The first clause of Application Note 12 is therefore inapplicable. Despite the lengthy amount of time (over two sentencing hearings) devoted to the quantity issues regarding the drugs which were actually seized, the District Court made no finding that "the amount seized does not reflect the scale of the offense' under Application Note 12's second clause.

### 3. This Court Admonished Sentencing Judges Not to Ignore Application Note 12's Second Clause in *United States v. Henderson*

The hallmark Fifth Circuit case on the limitations embedded within Application Note 12 is *United States v. Henderson*, 254 F.3d 543 (5th Cir. 2001). Henderson argued that the district court erred in calculating the amount of drugs attributable to him by considering $1,560 in cash found at his home as the equivalent of seven grams of cocaine base, when there was no evidence that this

cash was actually drug proceeds. *Id*. at 544. Unfortunately for Henderson, he had not preserved this objection in the trial court, and this Court found that plain error was not established. *Id*.

Even more unfortunately for Henderson, he only argued that there was no reason for the district court to conclude that the $1,560 was in fact drug proceeds. Specially Concurring, Judges Garza and Parker noted that Henderson might have fared better had he pointed out that, "A review of the record reveals no finding by the district court that the drugs seized failed to reflect the scale of Henderson's offense." *Id*. While this fact could be of no help to Henderson since he did not present it,[5] the Court "emphasized" that a specific order of operations controls in an analysis under Application Note 12:

> [T]here is no authority independent of U.S.S.G. § 2D1.1 Application Note 12 that allows the district court to convert money into drug quantity in order to increase the base level of an offense. Application Note 12 specifically provides that 'where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substances.' The Sentencing Guidelines make no other provision for the conversion of cash to drug quantity. Thus, the district court must make a finding that one of these two situations is present. Only after such a finding can the district court proceed to convert cash into drug quantity.

*Id*.

[5] Issues not raised in an appellant's initial brief as required by FED. R. APP. P. 28 are deemed waived. *United States v. Ogle*, 415 F.3d 382, 384 n.1 (5th Cir. 2005).

Judge Garza also qualified this Court's earlier opinions in cases such as *Johnston*:

> [Because] Henderson challenges only the district court's finding that the money constituted drug proceeds, not that the court failed to comply with § 2D1.1… we are compelled to follow *United States v. Fitzgerald*, 89 F.3d 218 (5th Cir. 1997) and *United States v. Johnston*, 127 F.3d 380, 403 (5th Cir. 1997). I would note only that although the courts in *Fitzgerald* and *Johnston* may have conducted the analysis required by § 2D1.1, it is not evident from our opinions in these cases. **As such, they provide no authority for the conversion of cash to drug quantity without a § 2D1.1 analysis.**

*Id.* (emphasis added).

The District Court made precisely the sort of error *Henderson* inveighed against. "A review of the record reveals no finding by the district court that the drugs seized failed to reflect the scale of [Anderson's] offense." *Id.* No such finding was articulated on the record, in the Addenda to the PSR, or in the Statement of Reasons. To the contrary, the District Court declared:

> [T]here's no doubt in my mind that your client knew that significant amounts of money were being accumulated by Gerry from his methamphetamine drug trafficking, and your client reasonably should have foreseen, if he didn't know, that Gerry would be accumulating significant amounts of money from his drug trafficking…

R.1121.

This nebulous statement about reasonable foreseeability and relevant conduct makes clear that drugs seized *did* capture the full span of the Gerry DTO.

If anything, the government's theory of this case countermands the District Court's logic in the context of Application Note 12. Throughout this case, the government maintained that Anderson was a repository for Gerry's stock of working capital. Since this inventory turned over rapidly, the stock of drugs was necessarily co-extensive with its cash flows. For these reasons, the drugs seized accurately represented the scale the offense, and interpolating additional drug quantities from the cash pierces the outer limits of § 2D1.1.

### D. Probation's Urged Purchase Price is Materially Untrue

#### 1. PSR Is Impermissibly Vague As to Source of its Urged Selling Price

In Probation's logic, $270,000 converts into 6.9 kilograms at a rate of $39,000 per kilogram. The only authority offered for this "purchase price" is that it was "provided by investigators." (Third Addendum, p. 3). Anderson recognizes that a district court need only determine the quantity of drugs attributable to a defendant by "a preponderance of the relevant and sufficiently reliable evidence." *United States v. Betancourt*, 422 F.3d 240, 247 (5th Cir. 2005) (internal quotation marks and citation omitted). Anderson also recognizes that extrapolation of the quantity of drugs is permissible from "any information that has sufficient indicia of reliability to support its probable accuracy." *United States v. Valdez*, 453 F.3d 252, 267 (5th Cir. 2006) (internal quotation marks and citations omitted).

However, the District Court's analysis fails even at this low threshold of sufficient indicia. No case has ever countenanced a mere aversion that a purchase price was "provided by investigators." In *United States v. Harrison*, this Court affirmed the methodological approach through which, "[t]he probation officer relied on a case agent's statement that a rock of cocaine base (0.2 grams) generally sold for $20 to conclude that the seized currency was the equivalent of 11.46 grams of cocaine base." 2011 U.S. App. LEXIS 18242, *3 (5th Cir. August 31, 2011). The District Court was even more thorough in *United States v. Anderson*, requiring live testimony from the case agent at sentencing to explain his analysis:

> Officer Hixson arrived at the three-pound figure through legitimate methods. Officer Hixson testified clearly that he arrived at the three-pound figure by taking the price of methamphetamine, which he knew through his 'involvement in drug investigations,' J.A. at 118, and '[c]onverting money into dope.' J.A. at 116, 118. The district court had advised Officer Hixson that 'it's fair to approximate drug quantities using money that could have been used to . . . purchase drugs.' J.A. at 116. It is clear that Officer Hixson did just that, because the evidence established that Ms. Anderson had delivered $20,000 on at least two occasions so that Dennis Anderson could purchase drugs and that Ms. Anderson had picked up at least $ 50,000 of drug money from Dennis Anderson on at least one occasion.

526 F.3d 319, 326 (6th Cir. 2008).

The Third Addendum falls short of the PSR's statement found to be adequate in *Harrison* because the case agent who relayed the information (on the eve of sentencing) is not identified. In both *Harrison* and *Anderson*, the case agents testified from their experience with drug dealing. By contrast, Probation

failed to offer any verification of its urged figure, such as comparable selling prices.

### 2. No Witness Ever Testified That Methamphetamine Was Retailed in Kilogram Increments

Probation's urged conversion is materially untrue because no witness ever testified (nor was any other reliable evidence introduced) that this conspiracy retailed methamphetamine in kilogram increments. To the contrary, trial testimony was clear Gerry's salesman were selling in increments of ounces for one week's supply.

For example, Robert Bays testified that he could not sell as much methamphetamine as Gerry asked him to do originally, and that these diminished sales later fell off:

> Q: Did you stay in the drug business after that January arrest?
> A: Yes, sir.
>
> Q: All right. Still doing the same amount or not?
> A: **No, sir. It dropped drastically.**
>
> Q: What was the problem?
> A. The problem was the quality and the money.
>
> Q: All right. And what was the problem with the money?
> A: Well, I couldn't get rid of the stuff. **I was fronting it out to my customers on credit and they didn't want to pay for it because it wasn't any good.**

R.1467 (emphasis added).

THE COURT: What caused it decline?

A: Well, I had just worked up to paying cash for the pound when I got busted the first time. Then when I got released and went back over there and told him I had gotten busted, then I only picked up a quarter of a pound, and it was gave to me to help get an attorney or whatever. And after that I would just pick up like a quarter of a pound. And then the quality got so bad I couldn't even sell that, and **it just dwindled down until where I was picking up two ounces a week, and then it got down to half of an ounce a week, and I went out of business.**

R.1470.

Had Probation discerned the actual selling price, the corresponding conversion quantity would have been orders of magnitude lower. *United States v. Jackson*, 990 F.2d 251, 254 (6th Cir. 1993) (remanding where there was insufficient evidence to support conversion ratio of $1,000 per ounce of crack cocaine); *United States v. Duarte*, 950 F.2d 1255, 1265-66 (7th Cir. 1991) (same).

## VI. The District Court Erroneously Applied A Strict-Liability *Mens Rea* Standard in its Application of § 2D1.1(b)(4)

### A. Section 2D1.1(b)(4) Requires Actual Knowledge

#### 1. Fifth Circuit Caselaw Has Left This Issue Open

A Specific Offense Characteristic applies if a defendant had knowledge that methamphetamine was imported:

> If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant ***knew were imported*** unlawfully,

> and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

§ 2D1.1(b)(4)[6] (emphasis added).

In *United States v. Rodriguez-Monge*, this Court held that, "**[a]ssuming, without deciding, that proof of knowledge is required**, the record evidence was sufficient for the district court to find by a preponderance of the evidence that… [the Specific Offense Characteristic applied]." 218 Fed. Appx. 352, 353 (5th Cir. 2007) (unpublished per curiam). Similarly, in *United States v. Vasquez-Munoz*, this Court held that "***even if*** knowledge is a required element of a § 2D1.1(b)(4)…" the defendant failed to establish plain error when he failed to object on these grounds before his sentencing court. 236 Fed. Appx. 989, 990 (5th Cir. 2007) (per curiam). Hence, this appears to be an open question (if not an issue of first impression) in the Fifth Circuit.

### 2. The Tenth Circuit Reached A Different Conclusion in *Beltran-Aguilar*

In seeming contrast to this Court's holdings in dicta in *Rodriguez-Monge* and *Vasquez-Munoz*, is a recent opinion from Tenth Circuit which cleaved a distinction between the first clause (possession of methamphetamine) and the second clause (knowledge of the importation of precursor chemicals):

---

[6] This Specific Offense Characteristic was renumbered §2D1.1(b)(5) in the Guidelines effective November 1, 2011.

> The plain language of § 2D1.1(b)(4) appears to impose a scienter requirement only when 'the offense involved . . . the manufacture of . . . methamphetamine from listed chemicals that the defendant knew were imported unlawfully.' **When the offense is the importation of methamphetamine, the Guideline is silent regarding knowledge of the drug's foreign origination.**

*United States v. Beltran-Aguilar*, 412 Fed. Appx. 171, 174 (10th Cir. 2011) (emphasis added) (per curiam).

Anderson respectfully urges this Court to reject the Tenth Circuit's reasoning in *Beltran-Aguilar* and to affirm the logic 'assumed but not decided' in *Rodriguez-Monge* and *Vasquez-Munoz.*

### 3. Most Cases Applying § 2D1.1(b)(4) Involve Factual Situations Where There Was Explicit Evidence Of The Defendant's Involvement With the Importation of Methamphetamine From Mexico

There is relatively little case law surrounding this largely unused Specific Offense Characteristic. In most instances, challenges to the application of the sentencing enhancement have occurred when there was explicit evidence of the defendant's involvement with the importation of methamphetamine from Mexico. *See United States v. Holguin*, 2007 WL 4273400, *2 (10th Cir. December 5, 2007) (unpublished) (Direct evidence through telephone intercepts of defendant's purchase of methamphetamine from Mexico); *United States v. Perez-Oliveros*, 479 F.3d 779, 783-784 (11th Cir. 2007) (Defendant drove truck containing methamphetamine across the border from Mexico); *United States v. Konsavich*,

2007 WL 1381591 (4th Cir. April 5, 2007) (unpublished) (Defendant arranged for mail order chemicals from Canada used in the manufacturing of methamphetamine).

In each cited case the defendant was directly linked through either his own statements or direct actions to the importation of the methamphetamine. In effect, there was no question as to the origin of the drugs or the defendant's knowledge thereof. In marked contrast to the reported cases cited above, there was decidedly no evidence that Anderson was involved in importing any drugs from Mexico.

### B. Probation Urged A Strict-Liability or Reasonably Foreseeable Standard

The first version of the PSR did not recommend application of § 2D1.1(b)(4); the First Addendum sought to justify this latent oversight for the reason that:

> [T]he defendant was present and, at times, involved in the drug transactions in ***some way***; thus, the defendant knew the methamphetamine was unlawfully imported.

First Addendum, p. 5 (emphasis added).

The words "some way" epitomize vagueness and ambiguity. Conceivably, Probation urged the imposition of a 'reasonably foreseeable' standard similar to that which governs the determination of relevant conduct under § 1B1.3(a)(1)(B). As a practical matter (and far more deleteriously), Probation urged the imposition

of a strict-liability standard. The sophistry in Probation's reasoning is that § 2D1.1(b)(4) requires actual knowledge; a 'reasonably foreseeable' standard is beneath the irreducible minimum of this Specific Offense Characteristic and a strict-liability standard falls even further away from the mark.

### C. The Prosecutor Urged A Strict Liability Standard

#### 1. In the Prosecutor's View, "Defendant's Knowledge Is Not An Issue"

At sentencing, the Prosecutor argued:

> First, Your Honor, the phrasing of that enhancement provides -- if you read the enhancement paragraph, it is if the offense involved methamphetamine which was imported, or involves methamphetamine manufactured from the chemicals that the defendants knew were imported. So if the offense involved imported methamphetamine, the enhancement stands regardless, and t***he defendant's knowledge is not an issue***…

R.1093 (emphasis added).

### D. The District Court Enunciated A Strict-Liability Standard, Buttressed By Negligence Standard in the Alternative

Overruling Anderson's objection to § 2D1.1(b)(4), the District Court explained:

> I find that the probation officer correctly concluded -- yes, I see -- that =the enhancement should be given, and I find that the drugs involved in the conspiracy, at least some of them, were imported from Mexico, and I find it's necessary for the enhancement to be applicable. I'm satisfied that the defendant knew the conspirators were dealing drugs in Mexico as part of their conspiratorial activities. Those were activities that were jointly

undertaken in furtherance of the conspiracy and that the defendant ***knew or should have known*** of those facts. So I overrule that objection.

R.1095 (emphasis added).

### E. Three Erroneous Facts Arched the District Court's Reasoning

The district court imposed the adjustment here based on one of two theories: (1) that because the methamphetamine Anderson's co-conspirators possessed had been imported, Anderson's actual knowledge of the importation was irrelevant, or (2) that Anderson could reasonably have foreseen importation and was thus liable under § 1B1.3(a). The former approximates the Tenth Circuit's sophistry *Beltran-Aguilar*, and is addressed in Part VI, F-I, *infra*.

However, even if the second theory is correct, the court's application of it in this case was based on at least three (3) clearly erroneous fact-findings. First, there was no evidence that the methamphetamine was imported from Mexico; even if the drug-dealers were actually from Mexico, there is no reason to think that they did not acquire the methamphetamine domestically. The second erroneous fact is derivative of the first: there was no evidence that the drug dealers were actually from Mexico; the only evidence established that the drug dealers spoke Spanish. The third erroneous fact is a correlate of the first two: many "Mexican" people are born in the United States and live here for years without ever setting foot in their ancestral homeland. It is the epitome of prejudice to aver that Spanish-speaking

people of Mexican heritage have necessarily come from Mexico themselves. Even more so that they brought methamphetamine with them just because the contraband was subsequently found in the United States.

### F. Section 1B1.3(a) Does Not Countenance A 'Reasonable Foreseeability' In the Context of § 2D1.1(b)(4) Because Such Liability Applies Only "Unless otherwise specified" By The Applicable Guideline

The District Court's conclusion that Anderson "should have known of those facts" is an incorrect statement of the law because while the relevant-conduct guideline sometimes permits sentencing determinations based on reasonably foreseeable conduct taken by joint actors, such liability applies only "[u]nless otherwise specified" by the applicable guideline. U.S.S.G. § 1B1.3(a).

Here, the applicable guideline specifies a different standard. Guideline § 2D1.1(b)(4) applies only when a defendant knew that importation was involved in an offense, not when importation was "reasonably foreseeable." Proof of "knowledge" is substantially different from proof of "reasonable foreseeability." Compare BLACK'S LAW DICTIONARY at 872 (6th ed.) (knowledge requires "acquaintance with fact or truth"); MODEL PENAL CODE § 2.02 (knowledge of a fact is found when the defendant is "aware of a high probability of its existence, unless he actually believes that it does not exist"), with BLACK'S LAW

DICTIONARY at 649 (6th ed.) ("reasonable foreseeability exists when reasonable person should have reasonably anticipated a fact").

### G. Rule of Lenity

Neither the term "know" or "import" appears in the Guidelines' definitions section, 1B1.1 Application Notes. To the extent that the term "knew were imported" is ambiguous, this Court should apply the Rule of Lenity to narrow the reach of § 2D1.1(b)(4) with a knowledge requirement as to both the importation of methamphetamine as well as its precursor chemicals.

"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).

Because of the crucial impact the application of 2D1.1(b)(4) can have on the sentence a defendant receives, an application of lenity is warranted if the Court finds the statute ambiguous. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (lenity applies to sentencing statutes); *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.").

### H. A Discreet "Knowledge" Element Is Prevalent in the Doctrine of Unlawful Importation of Controlled Substances

#### 1 The District Court Answered the Wrong Question

In *United States v. Tenorio*, the Ninth Circuit has framed the issued differently than did Judge McBryde and the Tenth Circuit in *Beltran-Aguilar*; the question to be answered under § 2D1.1(b)(4) is not whether importation was involved in the offense; it is whether the defendant knew of this fact. 24 Fed. Appx. 695, 696 (9th Cir. 2001) (observing that "the two-level enhancement [applies] for knowing importation of methamphetamine") (vacating and remanding for resentencing). The plain language of the guideline requires proof that "importation" of methamphetamine was involved in the offense. Indeed, the Sentencing Commission expressly stated that the enhancement was "directed" at importation activity. 18 U.S.C. Appx C, Amend 555 (November 1, 1997).

#### 2 The Substantive Offense Of Unlawful Importation of Controlled Substances Under 21 U.S.C. §§ 952(a) and 960(a)(1) Has A Discreet Knowledge Element

"Importation" of controlled substances requires more than mere proof of imported drugs; it requires that the defendant knew of the importation. *See United States v. Moreno*, 185 F.3d 465, 471 (5th Cir. 1999) (elements of importation of

controlled substances include that defendant knew the substance would enter United States from another country); FIFTH CIRCUIT PATTERN JURY INSTRUCTION § 2.92 (West 2001) (same).

A strict liability standard would alleviate for purposes of sentencing an element of scienter necessary for conviction in a parallel context.

## I. Conclusion

That knowledge is required by the term "importation" is clear from the next portion of the guideline, which applies the two-level enhancement when the offense involved "the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully." U.S.S.G. § 2D1.1(b)(4).[7] Had the Commission wished to punish mere possession more severely, it would not have expressly included knowledge in this sentence.

Similarly, had mere possession of imported methamphetamine been sufficient, the Sentencing Commission would have said so. The Commission used the word "knew," to clarify that knowledge is required before the adjustment can apply to importation of precursor chemicals, just as it must be with criminal importation of controlled substances. Because the district court did not require

[7] In 1997, when the Commission drafted §2D1.1(b)(4), it was not a crime, in itself, to import precursor chemicals. In 2006, Congress amended 21 U.S.C.§ 952(a) to criminalize the importation of methamphetamine precursor chemicals. See Pub. L. 109-177, Title VII, § 715 (March 9, 2006).

such proof, it applied an incorrect standard in determining whether the two-level enhancement applied in Anderson's case.

## VII. The District Court Misapplied U.S.S.G. § 2S1.1(a)(1)

### A. In the Context of U.S.S.G. § 2S1.1(a)(1), Chapter Three Adjustments Must be Germane to Money Laundering Rather than the Underlying Offense From Which the Laundered Funds Were Derived

U.S.S.G. § 1B1.5(c) enunciates rules for the cross-referencing of Guidelines, "[i]f the offense level is determined by reference to another guideline . . ., the adjustments in Chapter three (Adjustments) also are determined in respect to the referenced offense guideline, **except as otherwise expressly provided**." (emphasis added). U.S.S.G. 2S1.1, Application Note 2(C), precisely establishes such an exception:

> Application of Chapter Three Adjustments. Notwithstanding § 1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.

In *United States v. Anderson*, a defendant pled guilty to § 1956 (a)(1)(B)(i) for helping to conceal proceeds from her son's methamphetamine dealing. 526 F.3d 319 (6th Cir. 2008). The sentencing court correctly applied § 2S1.1(a)(1) by cross-reference to § 2D1.1. *Id*. at 325-326. However, after applying the Specific Offense Characteristics of § 2D1.1, the court incorrectly remained in the narcotics

framework when it came time to apply Chapter Three Adjustments. While Mrs. Anderson's involvement in money laundering was fairly extensive, her involvement with drugs was comparatively nil; accordingly, the court afforded a 4-level minimal participant role reduction under § 3B1.2(a). *Id*. at 328.

The government cross-appealed, and the Sixth Circuit reversed relying on Application Note 2(C): "[w]hen determining whether Ms. Anderson deserved a reduction under § 3B1.2(a) based upon her role in the offense **where the offense is money laundering**, it is clear that Mrs. Anderson deserved no reduction." *Id*. at 328 (emphasis added).

Unfortunately, the District Court committed the same logical fallacy as did the sentencing court in *Anderson*: Application Note 2(C) was violated by denying relief under § 3B1.2 by utilizing as the point of reference Anderson's conduct germane to Count One (narcotics) rather than actions specific to Count Five (money laundering).

### B. Anderson Should Have Been Afforded A Mitigating Role Adjustment

Throughout sentencing, the District Court was focused on Anderson's role in the narcotics conspiracy:

> I'm satisfied that Mr. Anderson was a member of Gerry's drug trafficking organization, if that's the proper name for it, during the entire time. **It might be properly defined as the Anderson drug trafficking organization**

**because they were so intimately involved with each other in the activities.**

R.1083 (emphasis added).

However, as the Sixth Circuit explained in *Anderson*, once the sentencing paradigm shifts from § 2D to § 2S(a)(1), the cynosure for Chapter Three adjustments remains rooted in the context of money laundering. There is no indication in the record that the District Court evaluated § 3B1.2 through the lens of the latter rather than the former. *United States v. Labbe*, 588 F.3d 139 (2d Cir. 2009) (reversing and remanding when district court failed to explain why it rejected a § 3B1.2 role reduction). Moreover, Anderson affirmatively warranted a § 3B1.2 role reduction because his conduct regarding money laundering was minimal.

Most obviously, the jury acquitted Anderson of the alleged § 1956(a)(1)(B) violation, Count 4. Anderson recognizes the requirement of multiple participants and that he be regarded as less culpable than average. Application Notes 2 and 3. With these thoughts in mind, it is even more significant that the PSR spends three pages detailing Gerry's money laundering activities. PSR; ¶¶25-39. Very few of these incidents of money laundering involve Anderson at all. *See also* PSR ¶20 (noting that "Gerry noticeably acquired more expensive assets with his drug profits, including a Chevrolet Corvette, a motor home, and several motorcycles.

Gerry eventually used some of his drug proceeds to establish a remodeling company, and he purchased interest in various local businesses…").

### C. Conclusion

In *Anderson*, the defendant pled guilty to money laundering and had a relatively minor role in the drug conspiracy; the court erroneously *granted* relief under § 3B1.2 because it looked to the narcotics-specific conduct rather then conduct relevant to money laundering. *Anderson*'s logic applies even more straightforwardly to the case at bar: the District Court erroneously *withheld* relief under § 3B1.2 because it viewed Anderson through the lens of narcotics-specific conduct rather than conduct relevant to his money-laundering. Anderson's role in the money-laundering count was necessarily minimal.

## VIII. The District Court Misapplied § 3C1.1

### A. District Court Adopted the PSR Without Change

Overruling Anderson's objection to the enhancement for obstruction of justice regarding his allegedly false testimony at trial, the District Court explained:

> I've obtained the partial transcript that shows the testimony the probation officer referred to, and one of the things in question -- the defendant was asked:
>
> On June 5, 2009, you were at Mr. Gerry's house when Alfredo Medina delivered a large amount of methamphetamine to him?

And the answer was: No, sir, I was not.

And then the question: You were not?

And then the answer: No, sir, I was not.

Then the question: Did you see Mr. Medina that day?

And the answer: I've never seen Mr. Medina. I don't know who he is.

I find that that testimony was false, that Mr. Anderson was at the house when Mr. Medina delivered a significant amount of methamphetamine to Mr. Gerry, and that, in fact, Mr. Anderson saw Mr. Medina that day.

And then on the next page of the transcript, Mr. Lechtenberger asked Mr. Anderson, do you speak Spanish?

And Mr. Anderson said, no, sir.

I find that's false. **The information in the presentence report indicates that, not only did he speak Spanish, but that he conversed in Spanish at Mr. Gerry's house to assist Mr. Gerry in that drug transaction that Medina was involved in.**

I find that in both instances Mr. Anderson gave that false testimony intentionally with knowledge that he was giving false testimony, and I find that in each instance that false testimony was material. It was given to Mr. Anderson with the intent to try to persuade the jury to find that he was not guilty of one or more of the offenses charged in the indictment. I find that it was not given by accident or mistake or because of some understanding. As I indicated, it was given intentionally to try to mislead the jury and persuade you to rule in his favor.
R.1085-1086 (emphasis added).

## B. The PSR Based the Enhancement for Obstruction on Testimony Which Was Contrary to How It Was Presented

The PSR's argument concerning Obstruction is found in paragraph 114:

> Adams, in his PSR interview, stated that the defendant not only was present for the meeting but also facilitated the drug transactions by speaking Spanish with Medina.

Adams' trial testimony does not admit to the proposition ascribed by Probation. As explained more fully in Part I.D.1, *supra*, the only Spanish term that Adams understood was the phrase, "no problema." R.1618. "No problema" is a very simple cognate which any English speaker could have comprehended. However, Adams had no idea (and certainly did not testify) as to what Anderson was told by Medina and what, in turn, he translated for Medina. *See, e.g., United States v. Ben-Shimon*, 249 F.3d 98 (2d Cir. 2001) (reversing where findings in PSR were insufficient to support obstruction increase); *United States v. Fiorelli*, 133 F.3d 218 (3d Cir. 1998) (same).

## IX. Cumulative Procedural Errors Were Not Harmless

### A. Properly Calculated Total Offense Level is 38 or 36

Anderson's Base Offense Level was properly calculated at 36; a 2-level Specific Offense Characteristic under § 2D1.1(b)(1) yields an intermediate Total Offense Level of 38, which corresponds to a range of 235-293 months . A minor role reduction under § 3B1.1 (relative to the money laundering rather than the drug conspiracy to which the court mistakenly looked) reduced the Total Offense Level to 36 with a range of 188-235 months.

### B. The "Departure" Took the Form And Substance of A Variance

Although denominated a "downward departure", R.1147, the District Court was primarily concerned with a comparison of the sentences meted out to Anderson's co-defendants. R. 1145 (noting that Gerry received a sentence of 360 months); R.1146 (noting that Adams received a sentence of 400 months, Medina received 480 months, and Perez-Leon 327 months). This reasoning more aptly fits within the contours of a variance under § 3553(a)(6), unwarranted sentence disparities among co-defendants.

### C. The District Court Stated That "It Might" Impose A Different Sentence

At sentencing, the District Court explained:

> I'm inclined to sentence this defendant to a term of imprisonment of 360 months instead of life. Maybe that doesn't make a lot of difference. **It might.**

R.1147 (emphasis added).

### D. An Identical Variance Rationale Would Have Started From A Lower Point of Embarkation

Through the words, "[i]t might", the District Court expressly left open the likelihood that it would have afforded the same variance rationale and percentage

reduction, but starting from a substantially lower point of embarkation, had the Guidelines range been properly computed.

## X. Sentencing: 360 Months is A Substantively Unreasonable Sentence

In light of the manifold procedural misapplications to which Anderson properly preserved his objections, this Court should reverse and without reaching the issue of substantive reasonableness. *Gall v. United States*, 128 S. Ct. 586, 597 (2007). If, however, this Court proceeds past the District Court's procedural errors, it should still reverse because a sentence of 360 months is substantively unreasonable for a first time offender with no criminal history.

The statute governing sentencing, "as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing" set out by 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Anderson's sentence was greater than necessary to meet these goals and was therefore unreasonable. *See, e.g., United States v. Rajwani*, 476 F.3d 243, 252 (5th Cir. 2007) (reversing as substantively unreasonable a sentence twice the top of the Guidelines range); *see also United States v. Thurston*, 456 F.3d 211, 220 (1st Cir. 2006) (vacating sentence imposed as unreasonable and remanding with instructions

setting a floor for resentencing); *United States v. Moreland*, 437 F.3d 424, 437 (4th Cir. 2006) (same).

Moreover, Anderson's personal characteristics show that a sentence of no more than 20 years would have been just and sufficient. Cf. 18 U.S.C. § 3553(a)(1), (a)(2)(A). A number of letters testifying to Anderson's gentle and good character were submitted to the district court. R.1128. Anderson's longtime friend, Ft. Worth attorney John White, testified about Anderson's longtime support for a local charity called the Margarita Society, R.1133, and donations made after Hurrican Katrina. R.1134-35. Another friend, John Thomas, testified to Anderson's involvement with Toys for Tots and Salvation Army. R.1138.

Anderson has shown bad judgment, but he has also shown great promise.

## CONCLUSION

Anderson's conviction(s) must be reversed and rendered if the court finds that the evidence was insufficient as to either or both Counts 1 and/or 5. In the first alternative that this Court finds the evidence was sufficient to sustain both Counts, and this Court finds that the "deliberate ignorance" instruction was given in error, Anderson's convictions must be reversed and remanded for retrial with a proper set of jury instructions. In the second alternative that this Court finds the

evidence sufficient and no error in the jury instructions, Anderson's sentences must be vacated and remanded for resentencing.

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 21,736 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: November 28, 2011 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 28th day of November, 2011. 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 Herbert Philip Anderson, Register Number 39049-177, on the 28th day of November, 2011:

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