07-1684-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-1684-cr(L)
08-1814-cr(Con)

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSE SANTIAGO VERA, also known as Max,
EDUARDO CASIANO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Mark R. Kravitz, J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On October 19, 2006, the defendant-appellant Eduardo Casiano, changed his plea to guilty as to Count Eight of the Second Superseding Indictment, which charged him with possession with intent to distribute marijuana. CA26.[1] On October 27, 2006, a jury found Casiano guilty of Count One of the Second Superseding Indictment, which charged him with conspiracy to possess with the intent to distribute one kilogram or more of heroin, Count Three of the Second Superseding Indictment, which charged him with conspiracy to possess with the intent to distribute five hundred grams or more of cocaine, Count Four of the Second Superseding Indictment, which charged him with distribution of one hundred grams or more of heroin, and Count Five of the Second Superseding Indictment, which charged him with possession with intent to distribute heroin. CA1-CA5, CA27. On April 11, 2008, the district court sentenced Casiano to concurrent terms of incarceration of 240 months on Counts One, Three, Four and Five and 120 months on Count Eight, and to concurrent terms of supervised release of ten years on

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[1] The Appendix for Casiano will be cited as "CA" followed by the page number. It should be noted that not every page of Casiano's Appendix is numbered.

Counts One, Three and Four, six years on Count Five and four years on Count Eight. CA33, CA36. Judgment entered on April 14, 2008. CA36. The defendant filed a timely notice of appeal on April 15, 2008 pursuant to Fed. R. App. P. 4(b), CSA65,[2] and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

On October 27, 2006, a jury found the defendant-appellant Jose Santiago Vera guilty of Count One of the Second Superseding Indictment, which charged him with conspiracy to possess with the intent to distribute one hundred grams or more of heroin and Count Four of the Second Superseding Indictment, which charged him with distribution of one hundred grams or more of heroin. CA1-CA5, VA18.[3] On April 10, 2007, the district court sentenced Vera as to Counts One and Four to concurrent terms of incarceration of 160 months and concurrent terms of supervised release of eight years. V21-VA22. Judgment entered on April 10, 2007. VA21-VA22. The defendant filed a timely notice of appeal on April 18, 2007 pursuant to Fed. R. App. P. 4(b), VA351, and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

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[2] The Supplemental Appendix for Casiano will be cited as "CSA" followed by the page number.

[3] The Appendix for Vera will be cited as "VA" followed by the page number.

Statement of the Issues Presented

I. Did the district court abuse its discretion in excusing for cause a juror who was unable to follow the court's instructions to accept the accuracy of the English translations of the certified Spanish interpreter?

II. Did the district court abuse its discretion in refusing to conduct a post-verdict, *in camera*, inquiry of a juror who, after attending a sentencing hearing for one of the defendants, submitted a post-verdict letter to the court complaining about the evidence relied upon by the Government both at trial and at the sentencing hearing?

III. Did the district court commit plain error in admitting testimony by an investigative agent regarding certain provisions of the proffer and cooperation agreements that had already been admitted into evidence as full exhibits?

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UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSE SANTIAGO VERA, also known as Max,
EDUARDO CASIANO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In February, 2005, the FBI began an investigation which involved the interception of wire communications over cellular telephones used by Carlos Roman and Eduardo Casiano. Wire interceptions revealed that Casiano supplied Roman and others in Connecticut with various quantities of heroin, cocaine and marijuana, and that

Casiano was obtaining these narcotics from various sources of supply, including, among others, co-defendant Jose Santiago Vera. For example, just in the period of time between May 6, 2005 and May 18, 2005, intercepted wire communications, seizures and physical surveillance revealed that a supplier delivered, on several occasions, between one and three hundred gram quantities of heroin to Casiano, which Casiano in turn sold to several wholesale distributers. Casiano also used various individuals to perform roles within his organization. For example, he used some co-defendants who were drug addicts to test shipments of heroin and cocaine for quality, and used Vera to coordinate the purchase and delivery of heroin from suppliers in New York.

On July 19, 2005, Casiano, Vera, Roman and several other co-defendants were arrested based on complaints and arrest warrants charging them with various narcotics violations. On August 2, 2005, a federal grand jury sitting in New Haven returned a ten-count Indictment against Casiano, Vera and twenty-three other individuals. On September 7, 2005, the same grand jury returned a fourteen-count Superseding Indictment against Casiano, Vera, the same twenty-three narcotics associates and four additional defendants.

Twenty-three of the twenty-nine defendants charged in the Superseding Indictment entered guilty pleas prior to September, 2006. On September 13, 2006, a federal grand jury sitting in Hartford returned a nine-count Second Superseding Indictment against Casiano, Vera and the four other remaining defendants; all but Casiano and Vera

pleaded guilty prior to the start of trial on October 12, 2006. After a two-week trial, the jury convicted Casiano and Vera of all of the counts against them, including the most serious count, which charged Casiano with conspiracy to distribute one kilogram or more of heroin and Vera with conspiracy to distribute one hundred grams or more of heroin. The court sentenced Vera to a total effective term of 160 months in prison and Casiano to a total effective term of 240 months in prison.

In this appeal, Casiano and Vera make three claims. First, they argue that the district court abused its discretion in dismissing a juror who indicated that she could not follow the court's instruction to accept the English translations provided by the certified Spanish translator because she disagreed with the accuracy of the translations based on her own knowledge of Spanish. Second, they argue that the court abused its discretion in refusing to conduct an *in camera* inquiry of a juror who sent a post-verdict letter to the court questioning the evidence relied upon at trial and at the sentencing. Third, they argue that the court committed plain error in permitting an investigative agent to testify as an expert witness about the content of proffer and cooperation agreements which had already been admitted as full exhibits.

For the reasons that follow, these claims have no merit, and the defendants' convictions should be affirmed.

Statement of the Case

On August 2, 2005, a federal grand jury sitting in New Haven returned a ten-count Indictment against Casiano, Vera and twenty-three other individuals. VA24-VA33. On September 7, 2005, the same grand jury returned a fourteen-count Superseding Indictment against Casiano, Vera, the same twenty-three narcotics associates and four additional defendants. On September 13, 2006, a federal grand jury sitting in Hartford returned a nine-count Second Superseding Indictment against Casiano, Vera and the four other remaining defendants who had not yet pleaded guilty. CA1-CA9. All of the defendants other than Casiano and Vera pleaded guilty prior to the start of trial on October 12, 2006.

The Second Superseding Indictment charged Casiano in Count One with conspiracy to possess with the intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, in Count Three with conspiracy to possess with the intent to distribute five hundred grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, in Count Four with possession with the intent to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), in Count Five with possession with the intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), in Count Seven with conspiracy to possess with the intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D) and 846, and in Count Eight with possession with the intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

CA1-CA7. The Second Superseding Indictment charged Vera in Count One with conspiracy to possess with the intent to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, in Count Four with possession with the intent to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and in Count Nine with making a false statement, in violation of 18 U.S.C. § 1001. CA1-CA7. On September 25, 2006, the Government filed separate second offender notices as to Casiano and Vera, based on allegations that each had sustained at least one prior felony narcotics conviction. VA14, CA24.

On October 11, 2006, the Government moved to dismiss Count Seven of the Second Superseding Indictment, and on October 19, 2006, Casiano changed his plea to guilty as to Count Eight of the Second Superseding Indictment. CA24, CA26. In addition, on October 12, 2006, Vera executed a written waiver of his right to a jury trial as to Count Nine of the Second Superseding Indictment. VA15; Tr. at 5.[4]

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[4] The trial transcript, with the exception of the last four trial days, is contained in one sequentially paginated volume and will be referred to as "Tr." and the page number. The transcript for October 24, 2006 incorrectly starts at page 1282, despite the fact that the previous day's transcriptions ended at page 1510, and the transcripts for October 25, October 26 and October 27 are sequentially paginated based on the incorrect page number used in the October 24th transcripts. Thus, any citation to the transcript for the proceedings on October 24, 25,
(continued...)

Trial commenced on October 12, 2006 and continued through October 27, 2006, at which time the jury returned guilty verdicts as to each defendant and as to all remaining counts (Counts One, Three, Four and Five for Casiano, and Counts One and Four for Vera). VA18, CA27.

Both Vera and Casiano filed motions for judgment of acquittal on October 23, 2006, at the conclusion of the Government's evidence, and the court denied them without prejudice to renewal. VA17. Neither defendant renewed those motions after the jury's verdict, and neither submitted timely motions for a new trial. VA17.

On April 9, 2007, the court (Mark R. Kravitz, J.) sentenced Vera to concurrent terms of 160 months' incarceration and 8 years' supervised release on his convictions of Counts One and Four of the Second Superseding Indictment. VA21-VA22. The Government moved to dismiss Count Nine of the Second Superseding Indictment, and the court granted that motion. VA21. Judgment entered on April 10, 2007, and Vera filed a timely notice of appeal on April 18, 2007. VA21-VA22, VA351.

On May 17, 2007, Vera and Casiano submitted a joint motion for an *in camera* inquiry of a juror, and, on June 11, 2007, the court denied the motion by a written ruling and order. CA38-CA48. On March 3, 2008, Casiano

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[4] (...continued)
26, or 27 will be referred to as "Tr." with the applicable date and page number.

submitted, for the first time, a motion for a new trial, and on April 11, 2008, the court denied the motion as untimely. CA33. On April 11, 2008, the court sentenced Casiano to concurrent terms of incarceration of 240 months on Counts One, Three, Four and Five and 120 months on Count Eight, and to concurrent terms of supervised release of ten years on Counts One, Three and Four, six years on Count Five and four years on Count Eight. CA33, CA36. Judgment entered on April 14, 2008, and Casiano filed a timely notice of appeal on April 15, 2009. CA34, CA36, CA65. Both defendants have been in custody since their federal arrest on July 19, 2005 and are currently serving their sentences.

Statement of Facts

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:[5]

In December, 2004, the FBI in Cleveland, Ohio began an investigation into a Drug Trafficking Organization ("DTO") operating in there. Tr. at 52. This Title III investigation revealed that an individual named Gonzalo Sanchez was operating a large DTO that purchased kilogram quantities of cocaine and heroin for re-distribution and, in particular, that Sanchez was responsible for distributing large quantities of heroin to an associate identified as Carlos Roman, from Willimantic, Connecticut. Tr. at 53-54, 131, 134, 157-158. Wire interceptions also revealed that Juan Carlos Iniguez, who resided in Chicago, Illinois, was Sanchez's cocaine and heroin supplier. Tr. at 128, 157-158. On May 26, 2005, the FBI in Cleveland and Chicago initiated the conclusion of

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[5] At trial, during its case-in-chief, the Government presented approximately 125 intercepted telephone calls, the testimony of three cooperating witnesses (Carlos Roman, Raul Montalban and Nazariel Gonzalez), several physical exhibits, including various narcotics seized during the course of the investigation, and the testimony of law enforcement witnesses, including FBI Special Agents William Aldenberg, Genaro Medina, and Robert Bornstein, DEA Special Agent Raymond Walczyk, Hartford Police Detective Pedro Rivera, Willimantic Police Officer Daniel Ortiz, Willimantic Police Detective Robert Rosado, and Connecticut State Police Trooper Dwight Washington.

their cases by arresting Sanchez, Iniguez, and all of their associates, and seizing several kilograms of heroin and cocaine. Tr. at 78, 134. On or about May 23, 2005, Melvin Ortega, Sanchez's brother-in-law and narcotics associate, agreed to bring Roman three to four hundred grams of heroin from Cleveland to Willimantic, but the delivery never occurred due to the arrests a few days later. Tr. at 138.

In approximately February, 2005, wire interceptions over Sanchez's cellular telephone revealed that he had delivered slightly less than two kilograms of heroin to Roman in Willimantic for redistribution to others. Tr. at 131, 134, 156, 295-296. Based on the interceptions over Sanchez's cellular telephones, the FBI in Connecticut, with court authorization, began intercepting communications over Roman's cellular telephone on April 3, 2005. Tr. at 66, 74, 156. These interceptions continued over two different cellular telephones utilized by Roman, with periodic interruption, until June 19, 2005. Tr. at 66-73.

Roman utilized his cellular telephones to conduct his DTO in Connecticut. Wire interceptions between April 3, 2005 and June 19, 2005 revealed that Roman was a large scale distributor of heroin in Willimantic, Connecticut and the surrounding area. He utilized the residence of his cousin, Felix A. Roman, at 82 Boston Post Road, Apt. A4, North Windham, Connecticut, to package and/or store these narcotics. Tr. at 290-291, 295-296. In fact, at the time of Roman's July 19, 2005 arrest, FBI special agents seized 14.6 grams of Roman's heroin at the 82 Boston

Post Road address. Tr. at 305, 1015-1016; Ex. 6 (heroin); Court Ex. 3. Roman also used Casiano as a primary source of supply for heroin and cocaine, especially after Sanchez's May 26, 2005 arrest. Tr. at 299-300, 302-303; Exs. 101A, 102A, 103A, 109A, 110A, 118A and 138A.[6]

The FBI, with court authorization, began intercepting communications over Casinao's cellular telephone on May 6, 2005. Tr. at 72, 610-611. These interceptions continued over two different cellular telephones utilized by Casiano, with periodic interruption, until July 19, 2005. Tr. at 72-73. Wire interceptions revealed that Casiano operated a drug trafficking enterprise from his residence at 285 Willimantic Road, in Chaplin, Connecticut and that he regularly sold quantities of heroin, cocaine and marijuana to various customers in Willimantic and elsewhere. Tr. at 299-303. For example, between May 6, 2005 and May 18, 2005, intercepted wire communications and physical surveillance revealed that one of Casiano's heroin suppliers was co-defendant Hector David Espinosa. Tr. at 609-612, 664-691. During this period of time, Espinosa, on several occasions, delivered between one and three hundred gram quantities of heroin to Casiano, who then distributed the heroin in smaller quantities to his various

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[6] The Government admitted approximately 125 recorded wiretap calls during the trial and marked them, beginning with Exhibit 100, so that the numbered exhibit (Exhibit 100) referred to the audio recording for the intercepted call and the exhibit number with the "A" designation (Exhibit 100A) referred to the transcript, which was admitted as a full exhibit for each of the Spanish language calls.

customers, including co-defendants Roman, Carlos Pacheco, Helen Aponte, and John Abell. Tr. at 359, 609-612, 664-691; Exs. 110A, 113A, 115A, 116A, 118A, 121A, 123A, 124A, 128A, 129A, 130A, 131A, 134A, 135A, 136A, 137A, 138A, 139A, 140A, 141A, 142A, 143A, 144A, 145A, 146A, 147A, 148A.

The intercepted calls on May 17, 2005 established that, on that date alone, Casiano purchased approximately 300 grams of heroin from Espinosa and redistributed it in smaller quantities to his customers. Tr. at 365; Exs. 137A, 138A, 139A, 140A, 141A, 142A, 143A, 144A, 145A, 146A, 147A, 148A. The FBI coordinated the arrest of Abell as he left Casiano's residence early in the morning on May 17 and found him in possession of just over five grams of heroin. Tr. at 678-681, 742-747; Exs. 2, 3 (five grams of heroin), 140A and 143A; Court Ex. 4. As to Aponte, intercepted communications revealed that, on May 17, Casiano sold her six "fingers" of heroin, each weighing ten grams. Tr. at 1389; Exs. 144A, 145A, and 147A. At night, on May 17, Casiano called Espinosa and ordered an additional quantity of heroin. Tr. at 688; Ex. 148A.

On May 18, 2005, as Espinosa approached Casiano's residence, the FBI arrested him and found him to be in possession of approximately 204 grams of heroin. Tr. at 522, 526, 528-529; Ex. 4 (seized heroin); Court Exhibit 3 (stipulation regarding chemist testimony). Just before his arrest, Espinosa was intercepted calling Casiano and telling him that he was only ten minutes from Casiano's residence. Ex. 150A. Also, several intercepted telephone calls after Espinosa's arrest revealed that Casiano was

indeed awaiting a shipment of heroin from Espinosa, but that the shipment never made it as a result of Espinosa's arrest. Exs. 148A, 149A, 151A, 152A, 154A, 155A and 156A. On that same date, Casiano replaced his cellular telephone and stopped using the telephone that had been subject to the Title III order. Tr. at 72-73, 712; Exs. 157A and 158A. The FBI did not obtain authorization to intercept wire communications over Casiano's new telephone until May 27, 2005. Tr. at 72-73, 713-714.

On several occasions, Casiano and Roman were intercepted discussing in detail Sanchez's May 26, 2005 arrest, including the fact that the FBI had seized approximately four kilograms of heroin from him. Tr. at 389; Exs. 162A and 173A. After the Cleveland and Chicago arrests, Roman and Casiano decided to be much more careful in how they operated their DTOs so that they could avoid getting caught. Tr. at 393. Casiano also needed to locate a new source of supply for heroin. In June, 2005, he decided to try to obtain heroin using Vera, who was from New York City and had previously been a source of supply of marijuana for Casiano. Tr. at 400-401; Ex. 180A. Casiano decided to use Vera as a middleman for a New York source of supply of heroin, and began purchasing larger quantities of heroin, which he broke down and sold to his wholesale customers such as Roman. Tr. at 405-406; Exs. 214A and 215A.

On May 28, 2005, a call was intercepted between Casiano and a narcotics associate in Florida. Ex. 163A. During that telephone call, Casiano acknowledged that Sanchez had been arrested with four kilograms of heroin

and that he had been planning to deliver some of that heroin to Casiano in Chaplin. Ex. 163A. Casiano also acknowledged that Espinosa had been another one of his heroin sources, but had been arrested just prior to making a delivery of 300 grams of heroin (which turned out, after laboratory analysis, to be 204 grams of heroin, without packaging). Ex. 163A. In discussing Espinosa, Casiano stated that, during previous trips, Espinosa had delivered "two of those things." Ex. 163A. Casiano stated, "[T]he other time I bought [from] him two of those things . . . . But it was the other stuff, the white," referring to two kilograms of powder cocaine. Ex. 163A.

Roman testified at trial. Tr. at 279. As to Sanchez, Roman stated that he had brought approximately 1800 grams of heroin from Cleveland to Willimantic in April, 2005, and that Roman had taken 900 grams of that supply. Tr. at 382-388, 450; Ex. 161A. Roman testified that he tried to sell this heroin to his customers, but it was of poor quality. Tr. at 383; Ex. 161A. He also testified that Sanchez stored the remaining 900 grams of heroin on Casiano's property. Tr. at 294-297, 311-312, 450. Specifically, Roman testified that Sanchez stored the remaining heroin in an apartment in a second house, separate from the main house, located on Casiano's property. Tr. at 311-312.

Roman explained that he regularly purchased quantities of heroin and cocaine from Casiano for redistribution to various customers in Willimantic. Tr. at 297-300; Exs. 104A, 105A, 106A, 107A. He explained that he purchased quantities of raw heroin, often in five, ten and fifteen gram

quantities, which he then resold for profit in smaller quantities to his customers. Tr. at 299. Roman also testified that he and Casiano would add various materials as cut or diluents to the heroin and cocaine to add to the volume of the product and thereby increase the profits. Tr. at 305-306, 346-347, 354. He stated that he would most often order the heroin and cocaine from Casiano over the telephone, and that they used code words to refer to the various drugs, referring to heroin as "comida," "clothes," "monteca," and "mantequilla," and cocaine as "snow," "nieve," and "perico." Tr. at 302-303. At times, Roman had a key to Casiano's residence and permission from him to go there and retrieve quantities of narcotics for customers as necessary. Tr. at 350-351, 515. Whenever Casiano purchased heroin and re-sold some of it to Roman, they made sure to find heroin users who could test the product to make sure it was high quality and would satisfy their customers. Tr. at 367-369, 375, 377-378; Exs. 133A and 138A.

Raul Montalban also testified at trial. Tr. at 898. He explained that he had a serious drug addiction and regularly purchased quantities of cocaine and heroin from Casiano. Tr. at 900-901, 908-909, 911. He testified that he purchased gram quantities of heroin to resell to others for profit and that he purchased smaller quantities of cocaine for his own personal use. Tr. at 911, 914-915. He explained that he sometimes tested the cocaine that Casiano had purchased to see how well it converted to crack cocaine. Tr. at 919, 939. Montalban testified that, on one occasion during the time period of the conspiracy, he went to the basement of Casiano's main residence and

observed two kilograms of powder cocaine. Tr. at 951-953. At that time, Casiano broke off a small one-gram piece from one of the kilograms and had Montalban cook it and convert it into crack cocaine. Tr. at 953. Montalban did so and was able to produce approximately .8 grams of cocaine base, which, according to him, was a good return and showed that the cocaine was of reasonable quality. Tr. at 939.

Montalban also interpreted some of the intercepted telephone calls between himself and Casiano. On May 6, 2005, Montalban was intercepted ordering from Casiano "three" (grams of heroin) and "45 of the white," which he also referred to as "perico," a common term for cocaine. Tr. at 914; Ex. 112A. On May 7, 2005, Montalban ordered "four and one half" (grams of heroin) from Casiano. Tr. at 916; Ex. 114A. On May 9, 2005, Montalban ordered "five already weighed," which was a reference to five grams of heroin. Tr. at 924; Ex. 122A. On May 10, 2005, Montalban and Casiano engaged in a lengthy conversation about the price that Casiano was charging for heroin. Ex. 126A. Montalban wanted Casiano to reduce the price of his heroin to $80 per gram so that he could resell it at $85 per gram. Tr. at 929; Ex. 126A. When Montalban talked about adding cut to the heroin to make more money, Casiano got mad at him and told him that he would lose customers and money if he ruined the quality of the heroin. Tr. at 930-931; Ex. 126A. On June 6, 2005, Montalban ordered "seven of the white" (a reference to seven grams of cocaine) and then told Casiano that "these people . . . sell rock." Tr. at 937; Exs. 176A and 177A. Casiano responded that "every gram brings you eight," which was

a reference to conversion of powder cocaine to cocaine base. Tr. at 937-938; Exs. 176A and 177A.

Nazariel Gonzalez also testified at trial. Tr. at 1199. In short, he explained that, after having met Casiano for the first time on July 6, 2005 and having discussed a heroin transaction with him at that time, on July 7, 2005, he sold Casiano 100 grams of heroin in exchange for $6500 in cash. Tr. at 1206-1223; Exs. 217A, 218A, 220A. The FBI observed that transaction after intercepting several telephone calls between Casiano and Gonzalez indicating that Gonzalez was planning to sell Casiano the 100 grams of heroin. Tr. at 775-784. After observing Gonzalez, co-defendant Angel Vellon, Casiano, and Vera meet near a gas station in Hartford, Connecticut, the FBI observed an individual later identified as Miguel Rodriguez arrive at the scene on a motorcycle and deliver something to the vehicle driven by Casiano and Vera. Tr. at 782-785. According to Gonzalez, Rodriguez dropped the heroin into the front passenger seat of Casiano's vehicle and picked up the cash from that same area. Tr. at 1244. Gonzalez testified that, at that point, Vera checked the heroin and indicated that it was all there; at the same time, Rodriguez advised Gonzalez that the money was all there. Tr. at 1244, 1290.

The FBI followed Rodriguez, arrested him outside of a residence at 43 Heath Street, in Hartford, and found $6500 in cash in his backpack. Tr. at 787-789. After receiving a state search warrant for the garage at 43 Heath Street, FBI agents seized 50 grams of heroin from underneath the seat of an all-terrain vehicle parked inside

the garage. Tr. at 792-793, 1394-1395; Exs. 5F, 5G, 5H, 5I, 5L, 5M (photographs of the heroin); Court Ex. 3. Subsequent intercepted conversations between Casiano and Gonzalez, and between Casiano and Vellon, revealed that Gonzalez and Casiano were blaming each other for the fact that the police had stopped Rodriguez and were trying to come up with ways in which Rodriguez could prevent the police from seizing the money. Tr. at 1247-1255, 1261; Exs. 221A, 222A and 223A. Shortly after Rodriguez's arrest, Gonzalez was intercepted telling Casiano to have Vera take the heroin out of his vehicle and find a taxi, in case the police decided to stop Casiano's vehicle. Tr. at 1248; Ex. 221A.

As to Vera and his role in Casiano's drug enterprise, Roman testified that, after the arrests of Espinosa and Sanchez, Casiano was in search of a new source of supply for heroin. Tr. at 405-406; Exs. 214A and 215A. He decided to call Vera, who had previously been a source of supply for marijuana. Tr. at 405-406; Exs. 214A and 215A. Vera lived in New York, and Casiano had hopes that Vera would be able to reach out to drug suppliers in New York to purchase heroin, in addition to marijuana. Vera was able to do this. Between May 29, 2005 and June 25, 2005, Vera made numerous trips from New York to Chaplin and delivered quantities of heroin to Casiano. For example, on June 1, 2005, Vera delivered a quantity of heroin to Casiano, and on June 7, 2005, he again arrived with approximately 280 grams of heroin for Casiano. Tr. at 1024-1036, 1174-1185; Exs. 52, 53 (surveillance videos), 164A, 165A, 166A, 167A, 168A, 169A, 170A, 171A, 174A, 175A, 178A, 179A, and 180A. After

numerous telephone calls with different New York suppliers between June 20 and June 24, Vera again delivered a large quantity of raw heroin to Casiano for resale. Tr. at 1036-1051, 1107-1133; Exs. 185A, 186A, 187A, 188A, 189A, 190A, 192A, 193A, 194A, 195A, 196A, 197A, 198A, 199A, 200A, 201A, 201C, 202A, 203A, 204A, 207A, 208A, 209A, 210A, 211A, and 212A.

During the intercepted telephone calls involving Vera, he identified himself only as "Max." Tr. at 839. On July 6, 2005, the FBI observed the individual previously identified as Max being picked up at the Hartford bus station by Casiano. Tr. at 1000-1002; Ex. 215A. At that time, the FBI twice called the cellular telephone that Max used to discuss narcotics transactions with Casiano. Special Agent Medina observed Vera answer this cellular telephone and indicate, "I am Jose." Tr. at 1001-1002.

Later that day, the East Hartford Police, at the FBI's direction, stopped Casiano's vehicle. Tr. at 550-555. Roman and Vera were inside the vehicle with Casiano. Tr. at 555. The police officers observed a large quantity of cash and several bars of manitol, a common cutting agent for heroin, inside the center console of the vehicle. Tr. at 561, 586-588. Vera was photographed to aid the FBI in identifying him. Tr. at 593-594, 840-842; Exs. 5A, 5B and 5D (photographs of Vera). He presented false identification both at that time and at the time of his July 19, 2005 arrest. Tr. at 555. Each time, he identified himself as Carlos Rivera and Carlos Benitez. Tr. at 555.

In summary, Casiano sold heroin to several wholesale distributers in Willimantic, including Roman, Carlos Pacheco, Aponte, Albert Gomez, Christian Ortega Melendez, Roberto Suarez, Christian Melendez and Montalban. He used various individuals to perform roles in his organization; he used Abell, Manuel Laureano and Montalban, all of whom are drug addicts, to test various shipments of heroin and cocaine, and he used Vera as a runner to deliver drugs from New York to Connecticut. Tr. at 400-401, 405-406, 725-726.

In this case, there were two search warrants executed at Casiano's residence. During the execution of the July 19, 2005 warrant, the FBI discovered, among other things, packaging material in Casiano's bedroom, several pictures depicting Casiano and Vera posing inside a recently purchased Lincoln Navigator, and approximately 439 grams of marijuana located in a white plastic bag on the floor of the master bedroom. Tr. at 758-759, 766-769; Exs. 10, 10A, 10B, 10C, 10D, 10E, 10G, 10H, 10I, and 10J. During the execution of the August 4, 2005 warrant, the FBI discovered in a detached garage on Casiano's property approximately 8.7 grams of raw heroin hidden inside a secret compartment of a degreaser canister, which heroin was the subject of the charge in Count Five of the Superseding Indictment. Tr. at 91-95.

Vera did not call any witnesses or present any evidence during his case, but did claim through cross examination of the Government witnesses and in closing argument that he had been a marijuana supplier for Casiano, not a heroin supplier. Specifically, Vera's counsel had Roman confirm

that "Mr. Casiano used to get pounds and pounds of marijuana from New York, . . . and Mr. Vera used to bring him that marijuana . . . ." Tr. at 475. Through cross examination of Roman, Vera's counsel established that he was "a runner for Mr. Casiano" and that he used to bring marijuana from New York to Willimantic for Casiano. Tr. at 475-476. Although Vera attempted to rely on some of the intercepted telephone calls to support his theory that he had been supplying marijuana, not heroin, to Casiano, the Government witnesses did not support his theory. Tr. at 508, 615 (Roman testifying that, in Exhibit 180A, co-defendant Albert Gomez had informed him that Vera had brought 280 grams of heroin to Casiano).

Casiano called only one witness to the stand, who was FBI Special Agent William Aldenberg. Through Aldenberg, Casiano brought out various alleged inconsistencies between some of the cooperating witnesses' testimony and statements made during proffer sessions. Tr. at 1495-1500.[7]

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[7] The trial transcript in this case was just under 2000 pages, and the bilingual transcripts admitted into evidence span over 500 pages. Because the appellants have not challenged the sufficiency of the evidence supporting their various convictions, nor have they raised any preserved evidentiary claims, the Government has not included the entire trial transcript or the transcripts of the intercepted telephone calls in its appendix. The Government has, however, tried to be over inclusive in its appendix by including in it all of the trial transcripts and exhibits that bear some relevance to the three issues on appeal, including the entire trial testimony of FBI (continued...)

Summary of Argument

I. The district court properly exercised its discretion in removing, *sua sponte*, a juror who indicated that she thought a Spanish interpreter's translations were inaccurate and who, unlike her fellow jurors, one of whom was a native Spanish speaker, could not follow the court's instructions to put aside her own knowledge of Spanish and accept as accurate the English translations. The court removed the juror only after engaging in extensive voir dire with her, which spanned two trial days, and which revealed that she could not, despite her best efforts, assure the court that her own knowledge of Spanish would not be used during jury deliberations in analyzing any evidence that was subject to translation from Spanish to English.

II. The district court properly exercised its discretion in refusing to conduct a post-verdict, *in camera* hearing in response to a juror's letter regarding her impression of a sentencing hearing she attended for Vera. The letter did not suggest that any improper influence or extrinsic evidence had impacted jury deliberations and, to the contrary, acknowledged that the guilty verdicts were

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[7] (...continued)
Special Agent William Aldenberg, Carlos Roman and Raul Montalban, and the full transcript of the colloquy concerning Juror Arroyo, which transcript is only partially excerpted in Vera's appendix. The Government can certainly submit a supplemental appendix with the entire trial transcript and/or the transcripts of the intercepted telephone calls should the Court deem it appropriate.

unanimous and were the product of deliberations with her fellow jurors, with proper guidance from the court's instructions. Instead, the letter simply complained about the cooperating witnesses relied upon by the Government at trial and at Vera's sentencing and expressed dismay at the length of the potential sentences that Vera and Casiano faced.

III. The district court did not commit plain error in admitting testimony by Special Agent Aldenberg regarding the proffer and cooperation agreements that had already been admitted as full exhibits at trial. The defendants' claim, raised for the first time on appeal, that Aldenberg was testifying as an unnoticed expert witness lacks merit because his testimony on this narrow topic was not expert testimony and simply consisted of reading and reviewing provisions of written agreements that had already been admitted as full exhibits.

Argument

I. The district court did not abuse its discretion in excusing a juror for cause who could not accept the English translations provided by the certified Spanish interpreter.

A. Relevant factual background

At jury selection, the parties, by agreement, selected a jury of twelve along with four alternates. One of the voir dire questions suggested by the Government and asked by the district court, without objection, was whether any juror understood Spanish. GA6.[8] As a follow-up question, the Government suggested, and the court asked (in substance), "For those of you who do understand Spanish, I will instruct you that you must accept the transcripts that are provided to you as the correct translations of the calls and that you may not translate the calls yourselves. Will you be able to follow that instruction?" GA6.[9]

On October 12, 2006, the first day of trial, the district court questioned Juror Arroyo, among others, about a letter it had received from her employer. GA9. In summary, the letter had indicated that Arroyo's jury

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[8] The Government's Appendix will be referred to as "GA" followed by the page number.

[9] The Government ordered the transcript of the jury selection proceedings, but, as of the filing of its brief, has not received that transcript.

service was creating a hardship for the employer because Arroyo performed a vital task that was time sensitive. GA9-GA10. In response to the court's questions, Arroyo indicated that, although it was a "close call" as to whether she felt comfortable serving on the jury, she did not "feel pressured by [her] co-workers to get it over with and get back quickly." GA12. At the conclusion of the voir dire, the court asked for counsels' position as to Arroyo's continued service. Both the Government's and Vera's counsel indicated that Arroyo should continue to serve as a juror. GA14. Casiano's counsel, however, argued that Arroyo should be excused. GA14. He pointed out that Arroyo would be under a lot of pressure at work since she was just hired and that she would have trouble paying attention to the case. GA15. The court denied Casiano's request and found that, based on Arroyo's answers to the various questions, there was no basis or justification to excuse her for cause. GA15.

Juror Arroyo contacted the court again during the trial, but not because she was having employment issues. Instead, after the trial day on October 17, 2006, which was the fourth day of trial, she contacted the courtroom deputy to advise him that she was not satisfied with the English translations provided by Mary Bean, a certified Spanish language interpreter who had been providing translations for Carlos Roman that day. GA273. Bean had been the third different Spanish interpreter used in connection with Roman's testimony, which had occurred over the course of three trial days, and she took over because neither of the first interpreters were available. GA16-GA272. Prior to Roman's testimony on October 17, 2006, Bean was sworn

in as the interpreter and stated her qualifications as follows: "I worked full time for the State of Connecticut as an interpreter for 23 years. I retired ten years ago and I have been working free-lance here since then." GA253. No counsel raised any objection to her qualifications or claimed that she could not "justly, truly and accurately interpret these proceedings." GA253.

The courtroom deputy advised Arroyo to write a note to the court outlining her concerns, and not to share her concerns with her fellow jurors. GA273. Arroyo wrote a note, and the court distributed it to the parties on October 18, 2006. GA253; GA345 (Court Ex. 5). The note read as follows:

> The reason I am writing to you is because as you instructed the jurors we are not to speak to anyone about the case. But, I do need to let you know that with yesterday's translation I was very much in disagreement. The translation from English to Spanish and from Spanish to English to me it was inaccurate. I do remember the day of selection, you asking how I would feel with the translation, at the time I thought nothing of it, but with yesterdays translation I was very frustrated.
>
> Also, I remember that you instructed us regarding the translation that we would have to go by what the interpreter would translate into English but, what was being translated from the three lawyers and from the witness again, to me it was not accurate. I

> do not know what you will do about this, but I just had to let someone know.

GA345.

In response to the note, the court advised the parties that it would have to tell Arroyo individually, and the jury as a group, "that they're not to use their Spanish at all and they're to use whatever the interpretations are, they're to accept whatever the interpretations are, and whatever the translations are, they view the translations as accurate, and they're not to use their own Spanish." GA274. The court had already twice provided this instruction to the jury, once at voir dire, and once at the start of Carlos Roman's testimony. GA16. Specifically, the court had advised:

> I guess I would say one thing to the jury, I mentioned this at voir dire, I'm going to mention it at other points during this case and at the end. To the extent that some of you have a facility with the Spanish language, you need to put that aside and use only the English interpretation from the interpreter of the answers that she is giving. She's the official interpreter and her interpretation is the official answers of the witness that governs in this case, and not any knowledge you may have of Spanish yourself, okay?

GA16-GA17. The court repeated this instruction again just before the Government began playing the intercepted wiretap calls, stating, in reference to the transcripts, "You should not, though, rely in any way on any knowledge any

of you may have of [the] Spanish language spoken in the recordings. Your consideration of the transcripts should be instead based on the evidence that's introduced at trial." GA56. The final jury instructions at the close of evidence contained a similar instruction. Tr.10/25/06 at 1387.

The court asked the parties whether further inquiry should be made of Arroyo, and whether anything needed to be done as to the English translations provided in court the previous day. GA274.[10] The Government indicated that it too "was very frustrated with the translator. I heard Mr. Roman's answers and they didn't bear similarity to what Ms. Bean would say." GA274. For example, "the question I asked about the government's promise or something like that, . . . she bungled that in the translation." GA264, GA274. "Then he was trying to answer on the call 180A and I'm hearing him say the answer that I've heard him say before, in court I think, and she's simply not saying it." GA267-GA269, GA274. The Government explained, "He was trying to use words that he's used with the other translators. But we went with it and, you know, if I had that large of a problem that I felt that the jury was

[10] During the trial, the court utilized several different certified Spanish interpreters. One Spanish language interpreter was used to translate the proceedings for Casiano and Vera, neither of whom was fluent in English. Three different Spanish language interpreters were used to translate the proceedings for Carlos Roman, who was a Government witness and testified on October 13, 2006, October 16, 2006 and October 17, 2006.

confused, I would have said something." GA274-GA275.[11] It then suggested as a remedy, "I do think it makes sense to bring her out and to instruct her that . . . she's not allowed to use her own Spanish and it might make sense to inquire whether she's having issues with following that instruction." GA275.

Casiano's counsel also expressed some concern over the accuracy of the translation provided by the interpreter for Roman. He stated, "I had spectators yesterday, they're Spanish speakers, after the trial, at about 3:30, very vehemently tell me that they had some real problems with the translations and it was my plan . . . to sit down with those people and go through some of these transcripts . . . . ." GA276.[12] He further indicated, "I do believe we should ask the juror what the source of her disagreement with the translation was so we have a better feel for the substance. . . . Then, of course, based on [the] inquiry, if

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[11] It bears note that Vera's counsel likewise appeared frustrated with Roman's answers at this point in his testimony, GA270-GA271, and made a specific request that he be "subject to recall and admonished not to discuss the case with anybody until the case is concluded." GA272. He was never recalled as a witness.

[12] The court invited defense counsel to consider whether "there's something that needs clarification that wasn't clarified" so that "we could always bring Mr. Roman back on the stand with another translator and try to nail down some of these . . . areas [that] might be problematic." GA277. Neither defendant asked to undertake this procedure.

she could put that aside, I think she should proceed." GA277.

Vera's counsel agreed that there was a "need to inquire of the juror." GA277. He also expressed a "global concern" regarding the "jury as a whole" because several individuals had expressed some knowledge of Spanish at jury selection. GA278.

Prior to bringing Arroyo into the courtroom for questioning, Casiano's counsel advised the court that his agreement as to the translator's competence was solely based on the fact that she was on the list of court-certified interpreters. GA279. In response, the court stated, "That's why I had her state her credentials, so anybody can inquire. And let me just say for the record, I think it is the obligation of all counsel . . . to make inquiry and make sure that the person is competent." GA279. The court further explained, "I've not had personally any issues with Ms. Bean. She has done a number of pleas and other things. Not any trial proceedings with me. She obviously is on the list so she has been doing this in federal courts." GA280.

At that point, the court brought Juror Arroyo into the courtroom and instructed her regarding the use of Spanish language interpretations. GA280. Specifically, the court advised:

> I wanted to do a couple of things. First, to remind you, and I know you know this, but I'll say it again, for better or worse, we have to use interpreters and

> they're trained people and they get sworn in to tell the truth and do the best they can, and we all have to kind of live with their official translation, unless there's some manifest defect in the trial that has to be corrected. But basically the jury needs to follow that official translation because some of the jurors only understand English and some don't understand Spanish, so to have multiple answers from a single witness, one for the Spanish speakers and one for the English speakers, would be problematic. That's the issue that we face.

GA280-GA281.

The court then stated, "I don't think I'm saying anything that would strike you as odd, Ms. Bean was having some difficulty understanding Mr. Roman." GA281. The court asked, "I know you felt that some of her translations might not have been accurate. Could you give us an example of anything that comes to mind?" GA281. Arroyo did not provide an example, but explained that the questions from the lawyers and the answers of the witness were not being translated accurately. GA281.

The court then asked, "I have to ask you now, since you had this issue, this is the question I asked you at voir dire, and everybody at voir dire: [t]hose of you, and there are others, who speak Spanish, are you able to suppress that knowledge both in terms of what you hear in the courtroom as well as what you are going to be reading in terms of any Spanish documents or the wiretaps and the like, suppress that Spanish and only focus on using the

English and the official translations that are provided by the interpreter? Do you feel, having gone through yesterday, that you are going to be able to do that?" GA282. Arroyo replied, "To tell you the truth, I really don't know because, because I know what's being said. So I don't know." GA282. The court confirmed that Arroyo had, thus far, been able to suppress her knowledge of Spanish for the other interpreters. GA282. The court then asked, "So you think that there's some concern that you will actually take into account the Spanish answers that Mr. Roman gave yesterday as opposed to the English translations of them by the interpreter?" GA282-GA283. Arroyo replied, "Probably." GA283.

In response, the court provided further instruction:

> I think that's a problem for us and the problem, as I said, it's not your problem, it's not a problem of yours at all, but we can't have the person sitting next to you, say, who doesn't speak Spanish, realize that Mr. Roman said one thing and you sitting next to him speaking Spanish, say, base your verdict on the fact that you believe Mr. Roman said another thing. There has to be one official translation, and not 17, and it happens to be the English version of it. So if I gave you that instruction knowing how important it is, do you feel that you could follow it?

GA283. Arroyo replied, "I could try." GA283. The court stated, "I think what it really requires is for you to ignore . . . whatever Spanish was said yesterday and stick, for good or ill . . . follow the English translations by Ms. Bean

yesterday. Knowing how important that is, do you think you could do that for us?" GA283. Arroyo responded, "I don't know. I'm being honest." GA283. The court clarified, "So what you would say is you would try but you are not sure that you could." GA283-GA284. Arroyo answered, "I'm not sure." GA284. When asked again for specific examples of errors in the translations, Arroyo could not think of one, but explained, "Okay. I don't know. I'm being honest, I really don't know how I will . . . just go by the English." GA284. The court asked, "Even if I told you that you could not go by the Spanish, you must go by the English, you would have difficulty following that instruction?" GA284. Arroyo replied, "I guess I would, yes." GA284.

At that point, the court opened the questioning up to the parties. The Government asked whether Arroyo had discussed the issue with other jurors, and Arroyo said she had not. GA285. Casiano's counsel asked if Arroyo would try to follow the court's instructions, and she indicated that she would try. GA285. Vera's counsel asked if Arroyo could think of any specific examples of errors in translation, but Arroyo could not. GA285.

The court then excused Arroyo and asked if there was any motion with respect to her. GA286. The Government deferred to defense counsel, but neither counsel sought to have her excused. GA286. Casiano's counsel, apparently no longer concerned about her employment situation, stated, "[I]t appears she said she could certainly try, which isn't as much as we would like, obviously, but I think it should be coupled with her response that she doesn't

remember anything of the specifics." GA286. Vera's counsel agreed with Casiano's counsel and did not seek Arroyo's removal. GA287.

At that point, the Government stated,

> Frankly, I'm puzzled. What she said here, she has to be removed. I don't see how we can't remove her. Do I want her removed? Do I think she could be fair? Sure, I think she could be fair. So, I'm a little puzzled. I guess, you know, she answered the court pretty clearly that she's not sure she can put aside her Spanish. . . . I have no problem waiting. I would like her to sit. I like her as a juror.

GA287.

The court thought that "Ms. Arroyo was being completely honest with us" and that it was "a natural tendency of human nature to not really be able to know how one will actually react until one gets put in a situation." GA287. The court observed, "I think all she was saying was if I instructed her that way, she would try as mightily as she could but she could not guarantee us." GA287. At that point, the court was weighing whether to dismiss her, or to allow her to stay on as a juror if she could promise that she would not mention her concerns about the translations to the other jurors and that she not bring her knowledge of Spanish into jury deliberations. GA288.

The Government indicated that Arroyo probably should be removed based on her answers, but it was willing to defer decision:

> Frankly, I don't see how we could keep her but I'm willing to defer for now and just go on with today's evidence. We have several more days of evidence. You know, to me, her answers are – part of the reason I'm hesitating is because I recognize that she's Latin American, that I have no interest in striking her. I have no interest in asking for her to be removed. I think she can be fair. I wanted her on this jury. And frankly the mistranslations that I heard yesterday were hurting my case. I mean, the mistranslations that I believe she's referring to were mistranslations that hurt my case, that I tried to then fix. But I'll defer to counsel for now and with the idea that I can come back [later in the case].

GA289.

Casiano's counsel indicated that, provided Arroyo could follow the court's instructions, there was no problem retaining her as a juror. GA290. Vera's counsel agreed. GA290.

The court stated that it would take the issue under advisement and do some research. GA290. The court concluded that Arroyo was very sincere and conscientious. GA290. It proposed to bring her into the courtroom and tell her three things: (1) that she not discuss the issue of the accuracy of the translations with any other jurors; (2)

that she not state during deliberations that she knew the real content of a particular Spanish speaking witness based on her own knowledge of Spanish; and (3) that she should send out a note if she subsequently changes her mind on the first two issues. GA291. The parties agreed with this procedure. GA292-GA293.

The court brought Arroyo back into the courtroom and asked her first whether she could promise not to mention her translation issues to her fellow jurors. GA293. She said she could do so. GA293. Next, the court asked whether she could assure that she would not bring her own knowledge of Spanish into the jury room by advising other jurors during deliberations of what she thought a particular Spanish-speaking witness said, based on her knowledge of Spanish. GA294. She indicated, "I will try. You asked me the question, if I will be able to suppress it." Tr. at GA294. The court asked the question again: "[D]uring the course of deliberations, you won't . . . relate to your fellow members of the jury what you believe the Spanish was for which we have official translations. Can you assure me of that or not?" GA295. Arroyo replied, "I could try. I really don't know ahead how I'm going to be thinking." GA295.

At that point, the court excused Arroyo and asked counsel if they had any comment. GA295. The court stated, "I assumed that she would at least assure me that she wouldn't share her own Spanish with her fellow jurors." GA295. Neither defense counsel changed his position. GA296. The Government stated, "As an officer of the court, forget about what our roles are in the case, to

me, there's no question that regardless of how we personally feel about this juror, she has to be dismissed, and I think it should be a joint motion, I don't think it should be a government motion." GA296.

The court asked if it was okay to defer decision on the issue until the next trial day, and the Government agreed that it could. GA296. Both defense counsel asked the court to address all of the Spanish-speaking jurors to see if they were influenced by Bean's translations. GA296. Casiano's counsel asked that the court conduct the voir dire immediately. GA297.

The court stated, "My problem is I would like to keep her on the jury but was hoping she would at least tell me that she would not bring out her own Spanish during the course of deliberations . . . ." GA297. As the court explained, "[I]f she cannot assure us that she's not going to be pulling out her own Spanish during the course of deliberations and using it to contradict what somebody says the English translation is, I think that we can't have that happen as much as we all like to have her on the jury." GA297. The court concluded, "So if you would like me to decide this right now, I think my inclination would be that there's too great a risk that she will not only be affected herself but infect other jurors and I don't think we, any of us, can have that happen. So I would be inclined to excuse her." GA297. The court explained, "I heard her say . . . that . . . [s]he would try but she really couldn't assure me that she wouldn't bring her own Spanish during the course of deliberations, depending upon what happened during deliberations." GA298.

Casiano's counsel disagreed. He claimed that Arroyo stated she would not share her concerns with other jurors and that he did not recall her stating that she might bring her own knowledge of Spanish into deliberations. GA298-GA299. The court then had the full colloquy of the Arroyo voir dire read back by the court reporter and, in doing so, explained, "I understand you have your interests for your clients here, we've got interest in justice here too, and I want to be sure we are all on the same wavelength and if not, we'll bring her back out and inquire further." GA299. After the read-back, the court stated, "If there's any doubt about her inability to give us the assurance we need, then we can bring her back, that's pretty easy. Is there any doubt about her inability to assure us that she would not bring her Spanish to bear with her fellow jurors during deliberations?" GA299.

The Government indicated that there was not. GA299. Vera's counsel did not answer the question and instead suggested that "we keep her on until tomorrow morning and bring her back in once we've had a few days to separate her from this . . . ." GA299. After some discussion, Casiano's counsel adopted that same position, and the court agreed to defer decision. GA300.

At that point, both defense counsel asked that the court inquire of all the Spanish-speaking jurors as to whether they could follow the court's instructions regarding accepting the Spanish translations. GA301-GA302. The Government pointed out that such an inquiry appeared to be unnecessary given defense counsel's collective position that Juror Arroyo, who indicated she was not sure she

could follow the court's instructions on the issue, should remain on the jury. GA302. The Government stated, "All I'm trying to say is before we do this procedure. I'm trying to figure out what answers these jurors could give that would dissatisfy defense counsel." GA303.

The court then brought the entire jury into the courtroom. GA304. It asked the panel to indicate whether anyone had "some knowledge of Spanish, in terms of being able to understand Spanish." GA304. Four jurors (not including Arroyo) raised their hands. GA305. The court then individually questioned each of these jurors. GA305.

Juror Holden indicated that she understood some basic Spanish and had been able to abide by the English translations without being affected by her knowledge of Spanish. GA305-GA306. Juror Gallagher stated that she was a native Spanish speaker, and that, other than the fact that she took "offense to grammar errors in any language," she was not having any trouble accepting the English translations. GA307. Unlike Arroyo, Gallagher was unequivocal in her answer to the court's question as to whether she could put her own knowledge of Spanish aside. GA308. Juror Cottle, who had taken Spanish in high school, said that he was not having any trouble following the court's instructions regarding the English translations. GA309. Juror Shoop, who had also taken Spanish classes in high school, said that she was having no trouble accepting the English translations and was not affected by her knowledge of Spanish. GA311. Finally, the court again brought Arroyo into the courtroom, told her that it had not

yet made a decision as to what to do based on her concerns and advised her, "[I]t's absolutely essential that until I get back to you that you not talk to your fellow juror members about this discussion, of anything we've discussed here on your note, and it's essential that you not say to them that you've had some difficulties with the English translation." GA313.

At the conclusion of the trial day on October 18, 2006, the court stated, "[L]et me just say on this, having read some of these cases again, I think I'm going to make another run at Ms. Arroyo. I'm hopeful we can convince her to agree not to use her Spanish in the jury room, and that we can keep her, . . . and I want to try to make another run at that." GA314. At the start of the proceedings on October 20, 2006, which was the next trial day after October 18, 2006, the court stated, as to Juror Arroyo:

> I read some more cases, none of which are particularly apt, and I've actually taken the opportunity to speak to a number of my colleagues to see if they've ever encountered this as well. My inclination, well I'm concerned that we are down to two alternates, too, as well, but my inclination, at this point, I would like you to address this, is to put her, bring her back, see if I can get her to say and commit that . . . she's going to rely on the English and she's not going to pull out her Spanish during deliberations and if she will do those things and make those commitments to us, I think we should leave her.

GA315. The parties agreed to this procedure. GA316.

The court then brought Arroyo into the courtroom to talk to her about the issue and explain its concerns. It stated, "[W]e only have one record and it's the one that . . . our court reporter is taking down, and she's actually taking down the English, not the Spanish, okay?" GA317. The court explained that the proceedings are recorded in this manner in case the jurors need testimony read back and to provide a record of the case for future proceedings. GA317. "The only record of this case is going to be what she took down, and that record is [in] English. It's not [in] Spanish. . . . That's why we say to jurors that they have to decide the case . . . based on the English, not on the Spanish." GA317. The court provided various justifications for this rule: "First, any of the jurors who don't speak Spanish are at a disadvantage versus those who speak Spanish because they're relying on the English record. . . . And if you were to bring to bear your Spanish to say, no, this is what the testimony is, . . . you would be in effect deciding the case on something that wasn't here in this courtroom." GA317-GA318. "The other thing is if you were to decide the case on the basis of something other than the English translation, the Court of Appeals, they can't review that because they don't know what happens in the jury room and they certainly don't know what Spanish you are bringing to bear." GA318. The court also assured Arroyo that the "lawyers are aware of this issue, some of them speak Spanish themselves, they have Spanish resources as well, and so they have the ability to elicit more testimony if they were unhappy with the English translation in some way." GA318.

The court then instructed, "So your job now at this point is to stick to that English translation and not, either for yourself or for others, really get into, if you were a translator, how would you have translated. . . . [T]he interpreter has been sworn in, she actually was under oath when she was interpreting, and it's the interpreter's version that is the official version." GA319. The court asked, "So we need your assurances that . . . you will not . . . resort to your own Spanish in the jury room, that you will stick with the English. I know you will try to do that but actually at this point, I think trying isn't good enough. We really need your commitment that you are going to follow that instruction. . . . Can you give us that commitment?" GA319-GA320.

Arroyo hesitated. GA320. The court said, "I know it's hard, but again, we are just asking you to follow really the same instructions I'm giving the others. . . . Other people here speak Spanish or have some facility with Spanish and we've told them the same thing, and they've told us . . . that they're going to put aside their Spanish and they're just going to decide this on the English, and we are hoping that you could give us the same commitment." GA320. Arroyo replied, "I'm really truly going to try. It's hard." GA320. The court asked, "I know it's hard. I know it's hard. . . . [I]t's not a question of trying. [I need you to state that] I will only follow the English and I will not follow the Spanish. I need that commitment from you." GA320. Arroyo said, "Okay." GA320. The court asked, "Can I count on it?" GA320. Arroyo replied, "Yes." GA320. The court again asked, "It's not a question of trying. It really is, if you find yourself slipping into the Spanish or wanting to

go to the Spanish, you really need to say to yourself, listen, I made a commitment to the Judge, to these people who are sitting here, that I'm not going to do that and I'm going to decide this on the basis of English and keep focused on the English. You will do that, won't you ma'am?" GA321. Arroyo replied, "Yes." GA321.

At that point, the court asked if the parties had questions, and the Government asked, "Are you telling the judge you will do it because you don't want to upset him, . . . [o]r are you telling that judge that you will do it because you really think that you will do it?" GA321. Arroyo said, "I think I could do it. I hope I can do it." GA321. The Government asked, "I think the most important thing for everyone is if you feel you can't do it, before deliberations, will you let us know?" GA321. Arroyo said, "Yes." GA322.

At that point, the court had follow-up questions, based on the Government's questions. The court stated, "So we really need – what we really need from you is just a promise – and I know sometimes when people make promises, you hope to comply with your promise but really here we need your promise – and commitment, not just to me and don't say this just to please me, please. I won't get angry." GA322. The court said, "We can't have seven different translators in here. We can only have one. . . . We hope they're good but if they make a mistake, the lawyers can correct the mistake if they're aware of it and try to change the record through further testimony, but the mistake can't be corrected by each individual juror in their own mind, you understand that, right?" GA322-GA323.

Arroyo said, “Uh hum. Yes.” GA323. The court asked, “We need you to make this commitment to us because you intend to follow it. Okay? Can you give us that commitment?” GA323. Arroyo replied, “I don’t think so.” GA323. The court asked again, “So you think that despite understanding what the issue is here, you would be, you might be, unable to follow the English translation and you would use your own Spanish?” GA323. Arroyo replied, “I could follow it. It’s just that as I think about it, I start thinking as to what was said and then it’s just like weighing it.” GA323.

At that point, the court asked Arroyo for specific examples of where there were errors in the translations “[b]ecause that would help us to know the extent of the problem . . . .” GA323. Arroyo answered, “There was like – you want to know exactly what was said?” GA324. The court clarified, “So what I’m saying to you is: Give me an example of something that you heard in English that you heard in Spanish that you would feel compelled to follow because you felt that the English translation was wrong. Can you give me an example?” GA324. Arroyo replied, “No.” GA324. The court asked again if Arroyo felt she could abide by the English translation and she again said, “No.” GA325.

Casiano’s counsel then reminded her that she had previously indicated that she could put her knowledge of Spanish aside and asked her if she could recall specific examples where she had trouble doing that. GA325. Arroyo stated, “There was the part about the way it was translated what was said about, it was a trick and she

translated it – I can't remember exactly but they got tricked and she just said it completely different. I can't remember what was she said." GA325-GA326. Casiano's counsel then asked, "So ma'am, what you are doing is assuring us that you are going to try to put that out of your head, you believe you can but you are not completely sure?" GA326. Arroyo replied, "I'm not sure because I just think about it and it's just, like, I feel like if I put it aside, am I lying? Because I'm hearing something different. We are dealing with people's lives here." GA326.

The court asked again whether Arroyo could commit to putting aside her own knowledge of Spanish in jury deliberations, and Arroyo indicated that she was not comfortable "making that promise." GA327. Casiano's counsel then asked, "But ma'am, you could try to do that and if you were unable to do it, you would alert the court, as you've done previously?" GA327. Arroyo said, "Yes." GA327. Vera's counsel asked if Arroyo had any issues with the translations that had been provided for the intercepted telephone calls, and she indicated that she did not. GA327-GA328. He asked, "So really this all comes down to the brief period of the morning Mr. Roman testified and some of those questions, that you question the translation that was provided." GA328. Arroyo replied, "Yes." GA328.

The court then excused Arroyo and heard argument from counsel. GA328. Casiano's counsel stated, "I believe she was very candid, I believe she made it very clear to the court that she would try to do this and I know that's probably not enough to satisfy the court, but I believe it is,

because she went on to say she couldn't give any examples." GA329. The court disagreed:

> Well, she did give one example, the thing about [the] trick. The thing I'm concerned about the inability to provide examples actually might be better if we know what the examples are. What my concern is that they get back there in the middle of deliberations and, listen, Mr. Roman is an important witness here. We are not talking about a peripheral witness in the case. He's one of the central witnesses. And they start focusing on a particular phone call and, you know, that phone call, that 280 or whatever it was is an important one for Mr. Vera, I think, and people start saying, oh, well, you know, this, that or the other thing; or they ask for a readback, you know? . . . And she says, let me tell you that this is what he said. I don't care what the English translation is. And I gave her so many opportunities to say to me, listen, I will follow the English no matter what, but she's obviously troubled, she feels that would be a lie, that she would be potentially either convicting or finding not guilty people based on something that's not the truth, and I think that's troublesome.

GA329-GA330.

Vera's counsel replied, "I think the concern would be if there was some alternate translation she had in mind that she was going to put before the jury, and she clearly said she doesn't have that." GA330. The court replied, "I

understand that, but again, having explained to her the purpose at stake, having told her that other jurors who know Spanish are going to only follow the English, having told her that you all are aware of this issue and could repair it if you felt that a repair was needed, and all I'm asking her to just tell me is . . . I'm going to do it on the basis of the English, whether it's right or not. And she keeps saying she can't follow that instruction." GA330-GA331. The court acknowledged that Arroyo said she would try, but was troubled by the fact that she could not promise or commit that her verdict would be based on the English translations. GA331. When Casiano's counsel challenged the court's characterization of Arroyo's answers, the court offered to bring her back out for more questioning and stated, "I heard her say initially that she would make the commitment. She thought more about it, she listened to everybody, and she just said to me she could not make that commitment." GA332. The Government pointed out, and the court agreed, that "she said very clearly that she doesn't want to upset anybody" and that "[w]hen she [initially] said to you she could [follow the instructions], she obviously looked worried." GA332.

The court asked whether Casiano's counsel had heard when "she explained why she couldn't give us a commitment because she said for her it would be a lie and people's lives were at stake." GA334. The court inquired, "Did you not hear that, Mr. Bansley, or you just didn't believe it?" GA334. Casiano's counsel replied, "No, your honor, I heard that. . . . I don't believe she said she was unwilling because I believe she repeated several times that

she was going to try to do that." GA334. The court responded, "Right, and I kept saying to her that trying was not good enough, we needed an assurance and a commitment . . . . She said no, because it would be a lie and she feels that people's lives are at stake and she would be – if she was required to follow the English, when she knew that was not the testimony, it would be a lie for her." GA334-GA335. Casiano's counsel agreed with the court's characterization, but urged that Arroyo's later answers had to be "coupled with her earlier comments that she would try to follow the judge's instructions." GA335. He also pointed out that both defendants wanted Arroyo to serve as a juror because she is Hispanic. GA335.

The Government responded, "[R]ace aside, the government likes her as a juror. We picked her. We think that based on her answers at jury selection, that she would be a good juror. I think her answers now, answers that if any other juror had given at jury selection, they would not have – they would have been stricken for cause by agreement." GA336. Casiano's counsel agreed with this assertion, but pointed out that Arroyo had indicated that, if she had trouble with any future English translations, she would alert the court. GA336. The Government asked, "What happens if the alert comes during deliberations? That's the obvious concern." GA337.

After confirming that both defendants wanted Arroyo to remain as a juror, the court *sua sponte* removed Arroyo for cause. It ruled as follows:

> This is my own motion. I am distressed about that. I want to have a racially diverse jury. I think it is a shame that dual speakers of any language somehow find themselves not able to participate, but we have somebody, Ms. Gallagher, who's a native Spanish speaker who says, listen, you tell me to rely on the English, I'm going to rely on the English no matter what I think.
>
> For whatever reason, and I understand fully, Ms. Arroyo cannot give us that assurance and also cannot give us the assurance that she won't taint the rest of the panel by either impeaching the translator in general or in specifics. And Mr. Roman is a very, very important witness. I have given her so much opportunity to just say to us: I'll give you that commitment, judge, I'll follow it. And the fact that she's unable to do that, after all the openings we've given her, suggests to me that she simply cannot do it.
>
> For that reason, I will strike her for cause with enormous regret because she also has clearly been paying close attention to the testimony, I believe she would be a diligent juror, but there is too great a risk I think of taint in the jury panel and that . . . outweighs all these other considerations.

GA338-GA339.

In response to the court's ruling, both defendants moved for a mistrial, and the court denied both motions.

GA342. In dismissing Arroyo, the court asked her again whether she had discussed the translation issue with any other jurors, and she indicated that she had not done so. GA343-GA344.

B. Applicable legal principles

The Sixth Amendment to the United States Constitution grants criminal defendants the right to be tried "by an impartial jury." *United States v. Nelson*, 277 F.3d 164, 201 (2d Cir. 2002) (quoting U.S. Const. Amend. VI). "[O]ne touchstone of a fair trial is an impartial trier of fact-a jury capable and willing to decide the case solely on the evidence before it." *Id.* (internal quotation marks omitted).

Under Fed. R. Crim. P. 24(c), a district court may "impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties." *Id.* A district court has "broad discretion under Rule 24(c) to replace a juror at any time before the jury retires if there is reasonable cause to do so, and a reviewing court will only find abuse of that discretion where there is bias or prejudice to the defendant." *United States v. Thompson*, 528 F.3d 110, 121 (2d Cir.) (internal brackets omitted)(quoting *United States v. Purdy*, 144 F.3d 241, 247 (2d Cir. 1998)), 528 F.3d 110 (2d Cir.), *cert denied*, 129 S. Ct. 218 (2008), 129 S. Ct. 1359 (2009), 129 S. Ct. 1384 (2009). "'Prejudice' in this context exists when the discharge is without factual support, or for a legally irrelevant reason." *Purdy*, 144 F.3d at 247 (internal quotation marks omitted).

"[A] presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during the course of trial." *United States v. Thomas*, 116 F.3d 606, 617 (2d Cir. 1997). A juror is "unable or disqualified" under Rule 24(c) if she is "intent on nullifying the applicable law" and thereby violating her oath to "render a true verdict according to the law and the evidence." *Thomas*, 116 F.3d at 617 (emphasis omitted).

A district court's decision as to whether to remove a juror for cause under Rule 24(c) is reviewed for abuse of discretion. *See Nelson*, 277 F.3d at 202. "Indeed, there are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury." *Id.* (internal brackets and quotation marks omitted). "This is especially true when . . . a for cause challenge to a juror's impartiality rests on a claim that the juror suffers from . . . 'actual bias,' that is, 'the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.'" *Id.* (internal quotation marks omitted). "A district court's findings concerning actual bias are based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.* (internal quotation marks omitted) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

This Court has "called it 'crucial' that in spite of these predispositions, a prospective juror should state in effect

that she would do her best to determine the case on the evidence presented, and that she has made clear that her predispositions would not affect her judgment, and that she would determine the case solely on the evidence presented." *Nelson*, 277 F.3d at 202 (internal brackets and quotation marks omitted). "Thus, it is important that a juror who has expressed doubts about his or her impartiality also *unambiguously* assure the district court, in the face of these doubts, of her willingness to exert truly best efforts to decide the case without reference to the predispositions and based solely on the evidence presented at trial." *Id.* at 202-203 (emphasis in original).

C. Discussion

The defendants argue that the district court abused its discretion by striking Juror Arroyo. Neither counsel claims that the court acted in a discriminatory manner in striking Arroyo. Instead, they argue that the court "prejudiced" the defendants by dismissing Arroyo without factual support or legal justification and, in this way, abused its discretion.

The defendants' argument is contradicted by the lengthy factual record set forth above. The district court removed Arroyo as a juror because she indicated that she could not follow the court's instructions to discard her own knowledge of Spanish and rely instead on the English translations provided by the Spanish interpreter. Arroyo was troubled by what she perceived to be inaccuracies in the English translations provided by the Spanish interpreter used during a portion of Roman's testimony. She could not assure the court that she would refrain from

bringing her own knowledge of Spanish into the jury deliberation room.

The court engaged in a lengthy colloquy with Arroyo over the course of two trial days and gave her every opportunity to assert and affirm that she could follow the trial court's instructions. At times, during this colloquy, she indicated that she would try to follow the court's instructions and that she would do her best to do so. In the end, however, she indicated quite explicitly and candidly that she did not feel she could follow the court's instruction to accept the English translations and put aside her own knowledge of Spanish. The court, concerned that Arroyo would discuss with her fellow jurors her own translations and interpretations of what Roman said, appropriately decided to remove her. It bears note that, before removing Arroyo, the court went to great lengths to explain to her why it was so important for the integrity of the trial that all of the jurors accept as accurate the English translations provided by the certified Spanish interpreters. It also bears note that, in conducting voir dire of the other jurors who had some background in speaking Spanish, all of those jurors, including one who was a native Spanish speaker, indicated that they would have absolutely no problem accepting the English translations.

In determining whether the court abused its discretion in this case, this Court should consider the extent of the court's voir dire of the juror, the specific reasons the court had for removing the juror, and the extent to which the court provided the juror with an opportunity to rehabilitate herself. Here, the court did not act hastily or without

factual basis. To the contrary, the court engaged Juror Arroyo in a lengthy and detailed voir dire which spanned two trial days and over two hundred pages of trial transcript (including the arguments of counsel). During this discussion, the court explained to Arroyo quite well why it was so important for her to accept the English translations and why the integrity of the process could be called into question if she used her own knowledge of Spanish to determine that a witness said something different from what was translated in court. The court also gave Arroyo multiple opportunities to indicate that she could follow the instructions as to the English translations, but, in the end, she was definitive about her inability to do so.

On appeal, the defendants quote *Hernandez v. United States*, 500 U.S. 352 (1991), to argue that "[i]t is a harsh paradox that one may become proficient enough in English to participate in trial . . . only to encounter disqualification because he knows a second language as well." *Id.* at 371. The defendants claim that the district court did not have to strike Arroyo as a result of her proficiency in Spanish and, instead, could have given her a curative instruction.

First, the decision in *Hernandez* is not on point because it simply held that a prosecutor did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986) by exercising a peremptory strike against two Spanish- speaking venirepersons for fear that, based on their answers and demeanor at jury selection, they would be unable to set their own knowledge of Spanish aside and defer to the official translation of Spanish-language testimony. *See Hernandez*,

500 U.S. at 360-361. Still, a portion of the *Hernandez* decision is instructive and supports the district court's decision here. In *Hernandez*, the Court explained,

> If we deemed the prosecutor's reason for striking these jurors a racial classification on its face, it would follow that a trial judge could not excuse for cause a juror whose hesitation convinced the judge of the juror's inability to accept the official translation of foreign-language testimony. If the explanation is not race neutral for the prosecutor, it is no more so for the trial judge. While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause, . . . , the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.

Id. at 361. Thus, the Supreme Court has specifically recognized, albeit in dicta, that a "juror's inability to accept the official translation of foreign language testimony" is a valid basis for a trial judge to strike that juror from the panel.

Second, as discussed in detail above, the district court attempted several times to provide Arroyo with a curative instruction, but, in the end, she indicated that she was unable to follow the instruction. The district court gave Arroyo several opportunities to state that she would put her own knowledge of Spanish aside and accept the official English translations, and she could not do so.

II. The district court did not abuse its discretion in refusing to conduct a hearing based on a post-verdict letter sent to the court by a juror

Casiano and Vera claim that the district court abused its discretion in refusing to hold a hearing based on a juror's post-verdict letter to the court addressing her dissatisfaction with a sentencing hearing she witnessed involving Vera. This claim has no merit. The letter did not suggest that any misconduct occurred during the course of deliberations and did not provide any basis for further inquiry, in light of the limitations placed on such inquiry under Fed. R. Evid. 606(b).

A. Relevant factual background

The jury returned guilty verdicts as to all counts and as to both defendants on October 27, 2006. GA346-GA348; CA38-CA39. The court polled the jury at the request of the defendants, and each individual juror confirmed his or her guilty verdicts. GA349-GA351; CA39.

Vera's sentencing hearings occurred on March 21, 2007 and April 9, 2007. Vera's Pre-Sentence Report ("VPSR") found that the base offense level, under Chapter Two of the Sentencing Guidelines, was 30 by virtue of the 700-1000 gram quantity of heroin attributable to the defendant's conduct. *See* VPSR ¶ 22. The PSR added two levels to the adjusted offense level for obstruction of justice. *See* VPSR ¶ 26. The PSR also did not reduce the defendant's offense level at all for acceptance of responsibility in light of his decision to challenge the

Government's evidence at trial. *See* VPSR ¶ 28. The PSR concluded that the total adjusted offense level was 32. *See* VPSR ¶ 29.

As to criminal history, the PSR concluded that the defendant had accumulated a total of 12 criminal history points, placing him in Criminal History Category V. *See* VPSR ¶ 34. The resulting guideline incarceration range was 188-235 months. *See* VPSR ¶ 54.

Vera filed a sentencing memorandum requesting a sentence of 120 months, which was the statutory mandatory minimum penalty. GA361-GA364. In support of this request, Vera challenged the PSR's quantity finding, took issue with the obstruction of justice enhancement and claimed that he was in Criminal History Category IV. GA358-GA361, GA365. Specifically, Vera claimed, and the Government agreed, that because his October 13, 2005 Connecticut conviction for escape had been vacated, he had accumulated nine criminal history points, not twelve criminal history points. GA365.

The district court agreed with Vera's arguments as to criminal history and the potential obstruction of justice enhancement, but applied the quantity finding set forth in the PSR, so that the ultimate sentencing guideline range was 135-168 months' incarceration. At the March 21, 2007 sentencing hearing, two Government witnesses testified in support of the Government's contention that a sentence within this guideline range was appropriate. CA39. Specifically, Luis Diaz testified that, on or about July 24, 2004, Vera shot him during a verbal altercation

outside of a bar in Willimantic. GA401-GA407; CA39. In addition, Isail Reyes testified that, in 2001, he and Vera were paid several thousand dollars by Casiano to kill a "Coco" (Luis Velasquez) and a "Chito." GA422-GA424; CA39. Reyes claimed that Casiano had supplied him and Vera with the firearms to commit the crime. GA425-GA426; CA39. On April 9, 2007, the court determined that a guidelines sentence was appropriate and imposed an incarceration term of 160 months on Vera. CA40.

Prior to March 21, 2007, a juror ("Juror #2")[13] from the trial contacted the court to find out the date of the sentencing hearing for the defendants. CA39. Juror #2 attended the March 21, 2007 hearing, during which both Diaz and Reyes testified. CA39. On March 30, 2007, Juror #2 sent the court a letter, which read as follows:

> Had I been a jury of one, after the conclusion of the evidence, Mr. Vera would have been not guilty and Mr. Casiano would have been guilty of conspiracy to distribute and/or sell under 500 grams of heroin. During deliberations, after discussion of the instructions, unanimous verdicts were reached.
>
> I went to the sentencing of Jose Vera, truly, just hoping to see what everyone else saw and learn how long he would be imprisoned. I assumed it would be a fairly routine procedure. I still don't

[13] Vera and Casiano have decided not to refer to Juror #2 by name in their briefs, and, to be consistent, the Government will do the same.

> understand what happened. Now Mr. Vera is . . . a hit man for Eddie Casiano. How do we know this? Because yet another Spanish speaking convicted felon told us so. And if that isn't enough, Mr. Vera is also a psychopath who tr[ies] to kill innocent pipe fitters for no reason. How do we know this? Because the innocent pipe fitter told us so. Do the above represent "aggravating factors"? Do you have to prove anything in federal court?
>
> If Mr. Vera is going to prison for '135-168' for his conviction, I can only assume that Mr. Casiano is going away for life. Nozariel Gonsalez, by his own admission, dealt 300 grams of heroin every three to four days. Because of his plea agreement, if I remember correctly, he'll be out in five to six years.
>
> You told the jury not to be concerned with sentencing. I couldn't do that. To me, the two phases are inseparable. If the government exacts the highest penalties, it has the obligation to exact the highest burden of proof. That did not happen in this case.
>
> A great deal of time, human resources and financial resources were expended in prosecuting Mr. Casiano and Mr. Vera. I hope that on every level it was worth it. I won't be attending future proceedings in this matter.

CA40 (marked as Court Exhibit 1 at the sentencing hearing on April 9, 2007).

On May 17, 2007, Casiano and Vera filed a joint motion for an *in camera* inquiry of Juror #2. CA45-CA48. They claimed that, viewed independently, "the tone and tenor of [the] statements [in the letter] call the validity of the verdict into question." CA46. At a minimum, according to the defendants, the letter required additional inquiry. Specifically, they claimed that the juror "unwittingly invited[] the requested inquiry by voicing serious concerns that included an assertion that she would have acquitted Mr. Vera and convicted Mr. Casiano of a single, less serious offense if deliberating independently." CA47. They argued that the letter showed "that even after the verdict was rendered, [Juror #2] had not fully adopted the perspectives of the other jurors, who were apparently not as troubled by the case . . . ." CA47. The defendants asked the court to conduct an "on-the-record *in camera* meeting with the juror, wherein the parties can submit proposed questions and/or areas of inquiry for the Court's review and procure a transcript of the exchange." CA48.

The Government submitted an opposition to the defendants' motion on May 23, 2007. CA49-CA59. The Government argued that Juror #2 had been heavily influenced by her observation of Vera's March 21, 2007 sentencing hearing and her newly acquired knowledge regarding Vera's potential sentence. CA56. The Government further pointed out that Juror #2's letter acknowledged that the guilty verdicts in this case had been unanimous and that her opinion had been influenced by the group deliberations that had occurred. CA56-CA57. Finally, the Government argued that Juror #2 made no

reference in her letter to any improper outside influence. CA57.[14]

On June 7, 2007, the district court issued a written ruling and order denying the defendants' joint motion for an *in camera* inquiry of Juror #2. The court reasoned that, although it had "not only the power, but sometimes the obligation, to make inquiry of jurors[,]" when "faced with circumstances warranting an investigation into juror conduct," in this case, "Juror #2's letter does not present circumstances that warrant further investigation." CA41. Noting the "limited enterprise" of a district court's role in reviewing a jury's deliberations, the court concluded that such a review was not warranted in this case. CA41, CA44.

The court pointed out that Juror #2's letter did not "even remotely suggest that any extraneous prejudicial information was improperly brought to the jury's attention or that any outside influence was improperly brought to bear upon any juror." CA43 (quoting Fed. R. Evid. 606(b); internal quotation marks omitted). In addition, the court

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[14] The Government also argued that the district court lacked jurisdiction over Vera's case because he had already filed a Notice of Appeal as to his conviction and sentence in the case, and the filing of the Notice of Appeal usually divests the district court of jurisdiction. *See United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The district court did not reach the issue because it concluded that it had jurisdiction over Casiano's motion.

found that the juror's letter did not "suggest that the verdict entered on the verdict form was anything other than the verdict reached, or that there was any juror misconduct of any kind." CA43. Instead, the court concluded that the letter expressed Juror #2's "concerns about the sentencing process and the length of sentences that Mr. Vera and Mr. Casiano now face." CA43. The court reasoned:

> As a result, the juror may now have misgivings about her own verdict or the wisdom of our criminal justice system. Even if true, however, that would not be a proper grounds for disturbing the verdict or even pursuing any inquiry of the juror regarding her views. . . . The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.

CA43 (quoting Fed. R. Evid. 606(b); internal quotation marks omitted).

The court also noted that, in amending Rule 606(b) to permit juror testimony regarding some mistake in entering the verdict on the verdict form, "the drafters rejected a broader exception that would have allowed the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result they had reached." CA43, n.1. The court pointed out that the "broader exception" was rejected because it allowed

for an inquiry into "the jurors' mental processes underlying the verdict." CA43, n.1.

Finally, the court absolutely rejected any suggestion that the concern raised by Juror #2's letter was similar to the concern raised by Juror Arroyo's failure to follow court instructions during trial. CA43, n.2. Referring to this claim as an "outlandish suggestion," the court explained that there were no similarities between the pre-verdict claims by Arroyo that she could not follow the court instructions to accept the Spanish-speaking interpreter's translations, and the post-verdict statements by Juror #2 that she was dissatisfied with the sentencing process. CA44.

In the end, the court found that there were "no circumstances suggested by Juror #2's letter that would permit any legitimate inquiry of any juror under Rule 606(b) or relevant case law." CA44. It held that, "given the content of Juror #2's letter, it is apparent that the letter itself may not even be received by this Court for purposes of challenging or questioning the validity of the verdict in any way." CA44.

B. Applicable legal principles

The sanctity of jury deliberations and a jury's verdict has long been protected by the Supreme Court, which has explained that if "verdicts solemnly made and publicly returned in court [could] be attacked and set aside on the testimony of those who took part in their publication[,]. . . [j]urors would be harassed and beset by the defeated party

in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *MacDonald v. Pless*, 238 U.S. 264, 267-68 (1915). The Court was concerned that, "[i]f evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." *Id.*

More recently, this Court has held that "the sanctity of the jury room is among the basic tenets of our system of justice." *Attridge v. Cencorp Div. of Dover Techs. Int'l., Inc.*, 836 F.2d 113, 114 (2d Cir. 1987). "Inquiries into the thought processes underlying a verdict have long been viewed as dangerous intrusions into the deliberative process. They undermine the finality of verdicts and invite fraud and abuse." *Id.*

To that end, Fed. R. Evid. 606(b) was promulgated and provides:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether

> extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. Rule 606(b) "serves three principle purposes: to promote free and uninhibited discourse during deliberations, to protect jurors from attempts to influence them after trial, and to preserve the finality of verdicts." *Attridge*, 836 F.2d at 116.

Given the very real potential to undermine the sanctity of jury deliberations, this Circuit has concluded that neither a new trial, nor a post-trial evidentiary hearing regarding alleged juror misconduct is warranted unless the defendant "comes forward with 'clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred.'" *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). This Court has explained, "We are always reluctant to 'haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.'" *Ianniello*, 866 F.2d at 543 (quoting *Moon*, 718 F.2d at 1234). "This court has consistently refused to allow a defendant to investigate 'jurors merely to conduct a fishing expedition.'" *Ianniello*, 866 F.2d at 543 (quoting *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978)).

"[W]hen reasonable grounds exist to believe that the jury may have been exposed to . . . an improper influence, the entire picture should be explored." *See United States v. Schwarz*, 283 F.3d 76, 97 (2d Cir. 2002) (internal brackets and quotation marks omitted). There must be some good faith basis to believe that one or more jurors was improperly exposed to, or influenced by, extrinsic information. *See id.* "[P]ost-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting jury room deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *Id.* "[I]t is up to the trial judge to determine the effect of potentially prejudicial occurrences, and the reviewing court's concern is to determine only whether the trial judge abused his discretion when so deciding." *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (internal quotations marks omitted).

C. Discussion

The district court did not abuse its discretion in refusing to hold an evidentiary hearing or conduct an *in camera* inquiry. Juror #2's letter made no allegations of juror misconduct or of any outside influence on deliberations. The letter provided no information which would suggest that anything improper or inappropriate occurred during jury deliberations. To the contrary, although the letter began by stating that the juror had concluded independently that Vera was not guilty and Casiano was guilty of a lesser offense, it quickly acknowledged that the guilty verdicts were unanimous and

a result of deliberations, aided by the proper consideration of the court's instructions.

The primary focus of the letter was to complain to the court about Vera's sentencing. Juror #2 had attended Vera's first sentencing hearing and was upset by her impression of the witnesses who testified at the hearing and who had accused Vera of engaging in separate acts of violence. Based on the information that she learned at Vera's sentencing, she made certain incorrect assumptions about the sentence that Casiano would face and felt it was not fair that one of the Government's cooperating witnesses would serve far less time in jail. As the district court found, Juror #2's misgivings about her verdict based on information she learned about the potential penalties facing the defendants can hardly be considered a legitimate basis for post-verdict inquiry. Jurors are instructed that they are not to consider a defendant's potential punishment in reaching a verdict, and Juror #2's letter illustrates what can happen if a jury is aware of the potential punishment. She stated in the letter that, since such high penalties resulted from the verdicts, the highest standard of proof should govern at trial.

Casiano and Vera argue that the court should have conducted an inquiry into what Juror #2 meant when she stated that her own independent judgment would have resulted in a different verdict than the verdict which resulted after the jury was properly instructed and engaged in reasoned deliberations. As the district court explained, nothing in this portion of the letter raised any concern that the verdict had been based on improper information or

outside influence. To the contrary, it was entirely appropriate for the juror to change her independent view of the evidence based on her consideration of the jury instructions and the opinions of her fellow jurors.

In Casiano's first brief, he speculates that, because "[t]here was no evidence submitted at trial describing the sentencing phase or terms of imprisonment in the event the jury returned a guilty verdict[,] . . . Juror #2 had to have learned through an outside contact or communication that imprisonment would be attached to a guilty finding[,]" Casiano's Brief (7/2/08) at 12, which outside contact would constitute "extraneous information," as defined by this Court in *United States v. Stewart*, 433 F.3d 273, 308 (2d Cir. 2006). In making this claim, Casiano ignores two principle facts which explain why Juror #2 speculated in her letter, "I can only assume that Mr. Casiano is going away for life." CA40. First and foremost, Juror #2 attended Vera's sentencing hearing on March 21, 2007 and thereby learned that Vera, who indisputably played a subservient role to Casiano in the drug conspiracy, was facing a maximum penalty of life in prison and a guideline incarceration range of 135-168 months. Second, during the trial itself, three different cooperating witnesses (Roman, Montalban and Gonzalez), all of whom were indicted with Casiano and pleaded guilty to having participated with Casiano in the distribution of heroin, testified as to the potential penalties they faced at sentencing. Thus, there is no reason based in fact to conclude that any statements in Juror #2's letter suggest an exposure to extraneous information or outside influence during the trial.

Casiano's initial brief also claims that Juror #2's concerns about the sentencing phase, as expressed in her letter, show that she was unable to separate the trial phase and the sentencing phase during deliberations. In fact, Juror #2's letter leads to the opposite conclusion. In the letter, she acknowledges that the unanimous verdict in this case was based on a consideration of the court's instructions, which included an instruction that the jury not concern itself with any potential penalty stemming from their verdicts. Juror #2 discusses her inability to separate the sentencing phase from the trial phase in the context of explaining why she attended Vera's sentencing hearing and not, as the defendants argue, in reference to any improper consideration of potential penalties during jury deliberations. There was absolutely no information in the letter or presented during jury selection and trial to suggest that Juror #2 was unable to follow the court's instructions. Indeed, the court asked the jury panel at jury selection whether they would have any difficulty following the instruction that they would have to disregard any concern about the potential punishment stemming from their verdicts, and Juror #2 did not indicate that she would have such a difficulty.

Casiano's supplemental brief offers little more insight on the issue, but does make three additional points: First, he states that "the jury deliberated for a short time despite a lengthy trial with many witnesses." Casiano's Brief (7/10/09) at 46. Second, he argues that the letter's reference to "'what everyone else saw' implied extraneous information." *Id.* Vera's counsel makes an identical argument with respect to this phrase. *See* Vera's Brief at

41. Third, Casiano stated that, because the proposed post-verdict *in camera* inquiry would have been limited and unintrusive, it could have been done without violating the policy behind Rule 606(b). *See* Casiano's Brief (7/10/09) at 46.

These claims likewise have no merit. First, the length of jury deliberations bears no relevance at all to the issue of whether Juror #2's post-verdict letter warrants further inquiry. Moreover, jury deliberations were not brief. After hearing approximately seven days of evidence, the jury began deliberating at approximately 10:13 a.m. on October 26, 2006, sent several notes to the court during deliberations, and reached its verdict at approximately 1:55 p.m. on October 27, 2006. Tr.10/26/06 at 1632; Tr.10/27/06 at 1674. Second, a plain reading of the letter shows that the phrase "what everyone else saw" was a reference to what her fellow jurors saw during the trial and not a reference to any juror's consideration of extraneous or outside information. It would be pure speculation to suggest that this phrase was a reference the jury's consideration of something proper that was not part of the evidence admitted at trial. Third, the limited nature of the post-verdict inquiry, in this circumstance, would not satisfy the policy concerns underlying Rule 606(b). That rule, and the cases underlying the rule, are concerned with preserving the finality of a jury's verdict and protecting the sanctity of jury deliberations. Any inquiry in this case would undoubtedly have required Juror #2 to discuss the substance of jury deliberations and, in particular, how her individual judgment was transformed by her consideration of the court's instructions and input from her fellow jurors.

III. The district court's admission of the case agent's testimony regarding the proffer and cooperation agreements did not constitute plain error

Casiano and Vera argue for the first time on appeal that the Government's case agent, FBI Special Agent William Aldenberg, improperly testified as an expert witness regarding the cooperating witnesses' proffer and cooperation agreements which had been admitted as full exhibits. This argument lacks merit. Aldenberg's testimony regarding these agreements was properly admitted as lay testimony and was cumulative of other similar evidence which had already been admitted.

A. Relevant factual background

FBI Special Agent William Aldenberg, who was the Government's case agent, testified several times throughout the trial. Prior to the start of trial, the parties had agreed that, for the sake of judicial economy, the Government could recall him as a witness as many times as necessary during its case-in-chief.

The Government called Aldenberg as its first witness to discuss the background of the investigation and to identify some exhibits which would be used during the course of the trial. He testified as to his qualifications and experience, having been a Massachusetts police officer for approximately four years and an FBI special agent for approximately four years, and having obtained a law degree from the New England School of Law. GA460-GA461. He discussed his various duties as an FBI special

agent and described his task force, which was comprised of local police officers and federal agents. GA461-GA462.

Next, he reviewed the information that led to the Connecticut wiretap investigation, explained how the wiretap investigation was conducted, identified the telephones that were the subject of the investigation, articulated the period of time for which wiretap interceptions were authorized, and detailed the rules governing the operation of the wiretap investigation. GA463-GA488. Aldenberg also described the FBI's use of various other investigative techniques, such as pen registers, physical surveillance, including aerial surveillance, and walled-off arrests. GA490-GA498.

He then reviewed specific items of evidence, which were admitted as full exhibits, including photographs of residences belonging to various defendants, a map of the Willimantic, Connecticut area showing the locations of the defendants' residences, and items seized during the various searches conducted in the case. GA495-GA503. For example, he described the seizure, on August 4, 2005, of just under ten grams of heroin hidden inside the false bottom of a degreaser canister which was found during a search of Casiano's garage. GA501-GA505. Finally, he identified the disk which contained all of the recorded wiretap calls that would be offered during the trial. GA508. At no time during this testimony did either defendant object on the basis that Aldenberg was testifying as an expert witness.

The Government next called Aldenberg as a witness on October 16, 2006, which was the third day of trial. At that point, Roman had been in the middle of his testimony, but the certified Spanish interpreter had been unavailable due to another court proceeding, and the Government had been calling other witnesses to fill in the time until the interpreter became available. GA577. During Aldenberg's testimony on this date, the Government played a few of the intercepted telephone calls between Casiano and Espinosa. GA578-GA582.

The Government re-called Aldenberg as a witness at the conclusion of Roman's testimony on October 17, 2006. GA584. Through Aldenberg, the Government finished playing all of the intercepted telephone calls between May 6, 2005 through May 18, 2005, involving Casiano and Espinosa, and Casiano and his customers. These calls established that, during this time period, Espinosa was Casiano's primary heroin supplier and had supplied him with almost one thousand grams of heroin. GA584-GA640.

The Government next re-called Aldenberg at the end of the trial day on October 17, at a point when the Government did not have another available witness. GA651. During this portion of Aldenberg's direct testimony, the Government played additional intercepted telephone calls involving Casiano and some of his narcotics customers. GA654-GA655; Exs. 224A and 225A. Again, at no time during Aldenberg's testimony at these different times did either defendant claim that he had improperly offered expert testimony.

On October 23, 2006, which was the last day of trial testimony, Aldenberg testified twice, once as a witness called by the Government and once as a witness called by Casiano. GA659, GA731. During his testimony as a Government witness, Aldenberg discussed several exhibits, some of which were already admitted as full exhibits and some of which were admitted as full exhibits during his testimony. First, he discussed photographs of the 50 grams of heroin seized in connection with the FBI's surveillance of the July 7, 2005 100 gram heroin transaction involving Casiano and Gonzalez. GA660-GA661. Next, he testified as to the chicken coop and shed that he observed on Casiano's property during the investigation. GA661-GA662. He also testified as to the FBI's arrests of Casiano and Vera on July 19, 2005, describing the facts underlying the arrests and various items seized at the time of the arrests. GA663-GA670. He introduced a map of the Willimantic area and several photographs of residences relevant to the investigation. Tr. at GA670-GA674.

At that point, the Government asked Aldenberg about the cooperation and proffer agreements used in the case. GA674. Vera's counsel had questioned Montalban as to why he was only being held responsible for a certain quantity of heroin in his plea agreement, why certain charges were being dismissed, and why he was not facing a mandatory minimum penalty. GA902-GA906. During Montalban's testimony, even the court had expressed some concern over the tone of Vera's counsel's questions. GA908. At the time, the Government argued that, because Montalban had decided to cooperate approximately four

months after the time of his guilty plea, it was misleading to suggest to the jury that, as a result of his cooperation, he had benefitted by not having to accept responsibility at the time of his plea for criminal conduct that he discussed during his subsequent proffer interviews. GA908-GA910. The Government's questions to Aldenberg were designed to clarify the provision of the written agreements which stated that, with few exceptions, information provided by a defendant during a proffer session could not be used as substantive evidence against him. GA904-GA905; Ex. 43.

In response to the Government's question to Aldenberg, "And what does that [agreement] tell the defendant as it relates to the information he provides?" Vera's counsel objected, claiming that the agreements, which had been admitted as full exhibits, "speak for themselves." GA675. The Government offered to refer to the full exhibit itself, at which point Vera's counsel objected to the question as "asked and answered." GA675. The court stated that it was not sure Aldenberg had been asked about the exhibits. GA675. At that point, the Government asked if Aldenberg had participated in the charging decisions in the case and whether anyone had been charged with "a lesser offense" than "what you could prove." GA676. Aldenberg replied, "We would charge what we believed we could prove, sir." GA676. The Government also asked whether any of the cooperating witnesses had been charged with a lesser crime, and Aldenberg replied, "No, they were charged before they cooperated" and were charged with the "most serious crime" that the Government "could prove." GA676.

Vera's counsel objected and asked for a sidebar. He claimed that, because it was the United States Attorney's office that made the charging decisions, Aldenberg should not be testifying about those decisions. GA677. The court stated, "I thought he testified as a predicate that he was involved in the charging decisions." GA677. Vera's counsel also objected on relevance grounds. GA677.

In response, the Government argued, "The defense misled the jury on this issue. I'm going to ask for an instruction. They've got the jury thinking somebody can give information in a cooperation session which under the guidelines . . . can't be used against them and they're suggesting that it can. It's misleading." GA677-GA678. The court asked what else the Government was planning to elicit on this topic. GA678. In response, the Government indicated that it would be asking Aldenberg questions about the proffer agreement "to make it clear that we can't use information that's given in a proffer session against somebody when you charge them." GA678.

Vera's counsel, joined later by Casiano's counsel, objected as well to this line of questioning and stated, "Generally to the extent that the government's had concerns about this, I would assume it could have been before one of the earlier witnesses and they've not objected previously." GA678. The Government responded, "I did object, we had a side bar, a heated side bar, while Mr. Montalban was on the stand. So I did object and made it quite clear that I felt it was inappropriate." GA678. The court ruled, "I think everybody's been okay right now, I

think these are all fair lines of inquiry, and I'll overrule the objection." GA679. At no time during this sidebar discussion or this portion of Aldenberg's testimony did either defendant object on the ground that Aldenberg was offering expert testimony or was providing testimony that went beyond his qualifications as a lay law enforcement witness.

At that point, Aldenberg resumed his testimony, and the Government showed him Exhibit 44A, which was a full exhibit and was the March 31, 2006 proffer agreement between the Government and Raul Montalban. GA679. The Government asked Aldenberg to read from a portion of the document, and he read, "Any statements made by your client at this meeting will not be offered against him in the government's direct case in the federal criminal case currently pending against him in this district, unless he breaches this agreement as provided in 8 below." GA679. The Government asked Aldenberg to explain his understanding of the provision, and he stated, "That when we interview the defendants, if they tell us the truth, . . . that we can't use . . . anything they tell us against them, any facts they might, like if they implicate themselves, we can't use it against them." GA680. The Government then asked, "[I]f, in a proffer session, a defendant admits to you that he sold three kilograms of heroin and you haven't charged him with that, and you don't have independent proof of that, can you use his statements to then charge him with that offense?" GA680. Aldenberg replied, "No, sir." GA680.

The Government had Aldenberg read the section of the agreement covering a potential breach of the agreement. Aldenberg read from the exhibit as follows: "It is understood that nothing in this agreement shall be construed to protect your client from prosecution for perjury, false statement or obstruction of justice, or any other offense he commits after the date of this agreement, and the statements and information your client provides at this meeting may be used against him without limitation in any such prosecutions." GA680. The Government then asked what that paragraph meant, and Aldenberg replied, "Essentially if it's determined that they lied to us during these proffer agreements, anything they said could be used against them." GA681. The Government clarified, "So if they lie during the proffer sessions, you can use the statements to charge them with something[,]" but "if they don't lie, and tell you the truth, then you can't." GA681. Aldenberg replied, "Correct." GA681.

Next, the Government asked Aldenberg to read a paragraph from Gonzalez's cooperation agreement, which was marked as a full exhibit and was Exhibit 48. GA681. Aldenberg read as follows,

> Except as provided below, the government will not use any information disclosed by the defendant during the course of his cooperation against him in any subsequent, unrelated criminal prosecution. The defendant understands that under Section 1B1.8 of the Sentencing Guidelines, the information that he discloses must be brought to the attention of the Court. The government will ask that such

> information not be considered by the Court in tailoring an appropriate sentence.
>
> However, the defendant also understands, as set forth below, that if he breaches this agreement, such information, statements or testimony will be considered by the Court in connection with sentencing, and the government may prosecute him for any federal criminal violation and may use any information, statements or testimony provided by him, as well as leads or evidence derived therefrom, in such prosecution.
>
> Nothing in this agreement shall be construed to protect the defendant from prosecution for perjury, false statement, or obstruction of justice, or any other offense committed by him after the date of this agreement, and the information provided by the defendant may be used against him in any such prosecutions.

GA681-GA682. Aldenberg clarified that the proffer and cooperation agreements protected the defendants from having their own statements used against them, but did not prevent the officers from investigating independently any specific crime. GA683. Aldenberg also testified that, if a defendant breached one of the agreements, his statements then could be used against him. GA683. He provided an example of a breach: "For example, say he testifies in a trial and he lies at the trial and denies everything that he told us at the proffer." GA683.

On cross examination, Casiano's counsel asked Aldenberg whether his testimony regarding the proffer agreements was based on his own understanding of those agreements, and not on the cooperating witnesses' understanding of the agreements. GA699. Aldenberg confirmed that it was. GA699. Later in his examination, he asked Aldenberg again about his testimony that the Government does not charge anyone with a lesser charge than it can prove and clarified that the Government does routinely dismiss charges for defendants who plead guilty. GA701. Near the end of his cross, Casiano's counsel asked Aldenberg whether he felt Roman had testified truthfully. GA705. The Government objected to the question because it asked the witness to characterize the credibility of other witnesses, and Casiano's counsel withdrew the question. GA705.

During his cross examination, Vera's counsel first attempted to elicit information about the marijuana conspiracy charge that the Government dismissed prior to the start of trial. GA708. Both the Government and Casiano's counsel objected because the explanation as to why the charge was withdrawn would have required testimony that Casiano had pleaded guilty to the substantive marijuana charge during the trial. GA710. The Court sustained the objection and instructed the jury to disregard entirely the question and to focus only on the charges before them. GA711.

Next, Vera's counsel asked about proffer agreements. GA711. Aldenberg testified that the agreements used standard language drafted by the United States Attorney's

Office. GA712. He had Aldenberg read a portion of the agreement covering the fact that the Government could pursue any investigative leads suggested by the defendant's statements and charge the defendant based on evidence developed through those leads. GA712-GA713. He also had Aldenberg read the portion of the agreement which indicated that nothing in it protected the defendant from prosecution for perjury, false statement or obstruction of justice. GA714. Through Aldenberg, Vera's counsel clarified that, if a defendant lied during the proffer, his statements could be used against him. GA714. He then asked whether Aldenberg had any say in what witnesses were called by the Government, and, specifically, whether he felt it was a good idea to call Gonzalez as a witness. GA719. In this context, Vera's counsel asked Aldenberg to comment on whether Gonzalez testified truthfully, which drew objections from the Government and Casiano's counsel. GA721-GA722. The court advised Vera's counsel that the proffer agreements were in evidence and could be used without limitation, but that he should stay away from any questions seeking comment on the supposed contradictions between the testimony of Gonzalez and other witnesses. GA722.

On redirect, Aldenberg explained that the decision to call Gonzalez as a witness was influenced by a number of factors including the surveillance conducted on July 6, 2005 and July 7, 2005, the intercepted telephone calls on July 7, 2005, and the seizure of $6,500 in cash at the conclusion of the July 7, 2005 transaction between Gonzalez and Casiano. GA727. Aldenberg also clarified that Vellon was charged with the same offenses as

Gonzalez. GA727. Finally, he testified that the Government dismissed lesser charges for individuals who pleaded guilty, but did not cooperate. GA727.[15] At the conclusion of Aldenberg's testimony, neither defense counsel raised any additional objections regarding his testimony, and the Government rested its case-in-chief. GA730.

Casiano then called Aldenberg back to the stand as his only witness. GA732. He had Aldenberg confirm that, during a proffer session, Gonzalez had claimed that the heroin seized from the garage at 43 Heath Street on July 7, 2005 belonged to Vellon, and not Gonzalez. GA733. He also had Aldenberg discuss some information that Gonzalez had failed to discuss or disclose during his initial proffer sessions. GA734-GA735. Finally, he asked Aldenberg to confirm that Roman had lied during his first interview with the FBI in August, 2005. GA736-GA737.

Although the Government did not seek to elicit expert testimony from Aldenberg, nor did it notice Aldenberg as an expert witness, it did give advance notice that an expert witness would testify regarding the methodology of street-level heroin and cocaine distribution. In response to

[15] Prior to the Government's closing rebuttal argument, and in response to the Government's objections to the defendant's closing argument, the court instructed the jury as follows: "I want to instruct you that the parties have agreed that there is no evidence in this case that any cooperating witness was ever charged with a lesser offense because of his cooperation." Tr. at 1589.

concerns expressed by the defendants to the Government original plan to re-call FBI Special Agent Robert Bornstein, who had been a fact witness, as its expert witness, the Government decided to call as its expert a DEA agent who had no connection to the case. Tr. at 632. In response to Vera's objections regarding any potential expert testimony as to code words for narcotics, the Government indicated, "I'm going to offer him on prices, various ways that the drugs are sold, quantities, grams, ounces, that kind of thing, how it's packaged, all that stuff, but I will also get into standard terms [such as] . . . bags, bundles, stacks [for heroin] . . . . [but] I will not offer him on montecha, perico, mantequilla. I will not offer him on those code words." Tr. at 849.

On October 23, 2006, DEA Special Agent Raymond Walczyk testified as the Government's narcotics expert. GA743, GA761. He testified as to the various tools that narcotics dealers use to prepare and package narcotics for resale. GA754-GA755. He also testified as to the typical prices charged for various quantities of marijuana, heroin and cocaine. GA765-GA778. He discussed the various roles that individuals can play in a drug distribution organization. GA778. Other than Special Agent Walcyzk, the Government did not offer any other agent as an expert witness.

B. Applicable legal principles

Rule 701 of the Federal Rules of Evidence governs the admission of lay witness testimony. It limits the testimony of a lay witness to "those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

"Under Federal Rule of Evidence 702, in those situations where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, testimony by a witness qualified as an expert by knowledge, skill, experience, training, or education is permissible so long as (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *United States v. Mejia*, 545 F.3d 179, 188 (2d Cir. 2008) (internal quotation marks omitted). "The broad phrasing of the description scientific, technical, or other specialized knowledge brings within the scope of the Rule both experts in the strict sense of the word, such as scientists, and the large group sometimes called skilled witnesses, such as bankers or landowners testifying to land values." *Id.* at 188-89 (internal quotation marks omitted). "[E]xpert testimony is called for when the untrained layman would be unable intelligently to determine the particular issue in

the absence of guidance from an expert." *Id.* at 189 (internal quotation marks omitted).

A district court has "wide discretion in determining the admissibility of evidence under the Federal Rules," and this Court reviews the admission of evidence for abuse of that discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). A district court abuses its discretion when it "act[s] arbitrarily and irrationally," *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992), or its rulings are "manifestly erroneous," *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (internal quotation marks omitted).

If a defendant fails to object to an evidentiary ruling at trial, the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important

distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

The defendants do not concede that plain error review applies here and appear to claim, at least implicitly, that they both preserved an objection to Special Agent Aldenberg's alleged expert testimony at the conclusion of the Government's case. They both claim that the nature of their objection at trial, which is repeated here on appeal, was that Aldenberg's testimony regarding the proffer and cooperation agreements constituted unnoticed expert testimony that was improperly admitted under *Mejia* and its progeny.

As set forth above, however, the defendants did not object to Aldenberg's testimony on the ground that it constituted improper expert testimony. Instead, they objected on three other grounds: (1) the testimony sought

to describe and interpret full exhibits which "speak for themselves," (2) the testimony would answer questions about these exhibits had been previously asked and answered, and (3) the testimony was not relevant. Had the parties objected on the ground now raised on appeal, they would have given the trial court a chance to consider whether Aldenberg's testimony was indeed beyond the scope of permissible lay witness testimony and further would have given the Government the opportunity to do as it did throughout the trial and tailor its questions to avoid the objectionable area. Thus, the defendant's argument for the first time on appeal that Aldenberg gave improper expert testimony under Rule 702 should be reviewed for plain error. *See United States v. Dukagjini*, 326 F.2d 45, 61 (2d Cir. 2003) (holding that hearsay objection did not preserve Confrontation Clause claim); *United States v. Hutcher*, 622 F.2d 1083, 1087 (2d Cir. 1980) (holding that single, general objection at trial did not preserve specific issue for appeal).

The trial court did not abuse its discretion in admitting this testimony because Aldenberg did not provide expert testimony. He simply reviewed portions of written proffer and cooperation agreements that had already been admitted as full exhibits. The Government, in order to clarify some misleading questions that had been asked of Montalban during cross examination, confirmed with Aldenberg that, under both the written proffer and cooperation agreements, a defendant's truthful answers provided in the context of a proffer session could not be used against him in his underlying criminal case. More specifically, the Government sought to clarify that, if a

defendant admitted to distributing quantities of narcotics in proffer sessions, those statements could not be used to enhance his guideline range. The Government also clarified that, if a defendant breached either agreement by providing false, material information, then everything that he said during the proffer interviews could be used against him, and that he could be prosecuted for perjury, making a false statement, obstruction of justice and any substantive offenses which could be proven based on his statements. At worst, Aldenberg's testimony on these issues was cumulative in that it simply regurgitated statements contained in documents that had already been admitted as full exhibits.

Defense counsel argue that Aldenberg, by virtue of his law school education, was a qualified expert and discussed the written agreements as such. His testimony, however, did not interpret any complicated legal doctrine or statute, nor did it bring to bear his legal background on any factual issue before the jury. He simply re-read and reviewed provisions of two different written agreements that several cooperating witnesses had signed and had understood. Given Montalban's difficulties in answering misleading questions by Vera's counsel, which improperly suggested to the jury that information he had provided during his proffer sessions (which occurred several months after his guilty plea) could have been used against him in calculating his guideline and statutory penalties, it was entirely appropriate for Aldenberg to review the agreements entered into between the various cooperating witnesses and the Government.

The defendants grossly overstate the nature and value of the testimony at issue by suggesting that Aldenberg was improperly bolstering the cooperating witnesses by offering expert testimony to opine to the jury that the witnesses were telling the truth. This argument misrepresents the record. Aldenberg did not bolster the witnesses' credibility. He simply reviewed and clarified certain provisions of the proffer and cooperation agreements that were already in evidence. Specifically, he clarified that, under the plain language of the agreements, truthful statements made during the course of a witness's cooperation cannot be used against him. He also clarified that each of the defendants was charged with the most serious, readily provable offense based on the evidence that the Government had accumulated against him. In addition, Aldenberg was never qualified as an expert under Rule 702, so there was no judicial acknowledgment of any area of expertise. Indeed, the discussion of his qualifications, which occurred at the start of his testimony on the first day of trial, was quite limited. GA460-GA461. Thus, there is no merit to the defendants' claim that the jury was so overwhelmed by Aldenberg's expertise that it failed to make independent determinations of the credibility of the cooperating witnesses.

Even if the court abused its discretion in allowing Aldenberg's testimony regarding the proffer and cooperation agreements, such error was not prejudicial and did not affect the outcome of the trial. "Reversal is necessary only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *Dukagjini*, 326 F.3d at 61-62 (internal quotation marks

omitted). "The principal factors for such an inquiry are the importance of the witness's wrongly admitted testimony and the overall strength of the prosecution's case." *Id.* at 62 (internal quotation marks omitted).

As discussed above, the contested portion of Aldenberg's testimony involved him describing, and quoting from, documents that had already been admitted as full exhibits. At most, his testimony regarding specific provisions of the agreements could be considered cumulative, given the fact that the Government had already reviewed each of these agreements with the various cooperating witnesses. The defendants had ample opportunity to cross examine each of the Government's cooperating witnesses as to the benefits they were receiving as a result of their testimony, and the defendants took full advantage of those opportunities.

Moreover, as demonstrated above, the testimony at issue represented a very small portion of Aldenberg's direct testimony, and an even smaller portion of the Government's evidence. In a trial that lasted almost two weeks and involved the admission of approximately 125 intercepted telephone calls, various quantities of seized heroin and marijuana and the testimony of over thirteen Government witnesses, including three cooperating co-defendants, the admission of Aldenberg's testimony regarding provisions of the proffer and cooperation agreements that had already been admitted as full exhibits can hardly be considered to have affected the defendants' substantial rights.

Finally, even if the defendants met their burden under the first three prongs of the plain error standard, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735; *see* Fed. R. Crim. P. 52(b) (plain errors "may be noticed" by the reviewing court). In exercising this discretionary power, this Court "should correct a plain forfeited error affecting substantial rights" only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The Supreme Court has further cautioned that "a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737. In this case, the court's admission of Aldenberg's testimony clarifying and reviewing certain provisions of the proffer and cooperation agreements did not undermine the integrity of the court proceedings or otherwise affect the integrity of the judicial process.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 9, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
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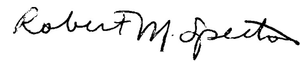

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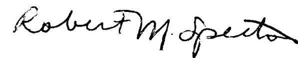
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 23,353 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. On November 2, 2009, the Government filed a motion to submit an oversized brief of 25,000 words and, as of today, the Court has not acted on that motion.



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Addendum

Fed. R. Evid. 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Fed. R. Evid. 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Crim. P. 24. Trial Jurors

. . . .

(c) Alternate Jurors.

(1) In General. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

. . . .

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Vera

Docket Number: 07-1684-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/9/2009) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: November 9, 2009

CERTIFICATE OF SERVICE

07-1684-cr(L) USA v. Vera

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November 9, 2009

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Notary Public, State of New York
No. 01HO6118731
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