No. _____

In The
Supreme Court of the United States

JOSE LUIS CEPEDA-CORTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM REAGAN WYNN
Counsel of Record
rwynn@kearneywynn.com

JEFF KEARNEY
jkearney@kearneywynn.com

KEARNEY | WYNN, Attorneys at Law
3100 West 7th Street, Suite 420
Fort Worth, Texas 76107
(817) 336-5600
(817) 336-5610 (fax)

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Twenty-five years ago, in *Zafiro v. United States*, 506 U.S. 534 (1993), this Court gave its only guidance to lower federal courts and federal criminal practitioners concerning the proper application of Rule 14(a), Federal Rules of Criminal Procedure, in determining if a criminal defendant was entitled to a separate trial due to prejudice accruing from the "spill-over" effect of evidence concerning a co-defendant's extraneous bad acts that would not have been admissible in an individual trial. The standard annunciated in *Zafiro* was whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, *or* prevent the jury from making a reliable judgment about guilt or innocence." However, this Court failed to elaborate on the circumstances in which there might be such a "serious risk" that "evidence of a codefendant's wrongdoing . . . erroneously could lead a jury to conclude that a defendant was guilty" as to require severance or the factors and considerations lower courts should take into account in making such a decision. In light of the amorphous standard, lower courts are untethered to any particular factors or considerations in determining when a Rule 14(a) severance is required and when it is not. This has resulted in unpredictability in lower court rulings and inconsistency in application of Rule 14(a) to similarly situated federal criminal defendants.

Does a fair and consistent application of Rule 14(a) require this Court to re-examine its decision in *Zafiro* and clarify the factors to be considered in

QUESTION PRESENTED – Continued

determining if a federal criminal defendant suffered a serious risk that the jury was unable to make a reliable judgment as to his guilt because of prejudice from the "spill-over" effect of evidence admitted in a joint trial establishing numerous brutal violent extraneous criminal acts committed by a co-defendant so that Rule 14(a) required the remedy of severance and individual trial?

LIST OF PARTIES TO THE PROCEEDING

Attorneys for Respondent, United States of America:

Hon. Joshua T. Burgess — Government's Counsel
Hon. Aisha Saleem — at Trial

United States Attorney's Office
Burnet Plaza, Suite 1700
801 Cherry Street
Fort Worth, Texas 76102

Hon. Erin Nealy Cox — Government's Counsel
Hon. Gail Hayworth — on Appeal

United States Attorney's Office
1100 Commerce Street, Third Floor
Dallas, Texas 75242

Attorneys for Petitioner, Jose Luis Cepeda-Cortes:

Hon. Robert H. Rogers — Petitioner's Trial
4711 Gaston Avenue — Counsel
Dallas, Texas 75246

Hon. J. Stephen Cooper — Petitioner's Trial
4711 Gaston Avenue — Counsel
Dallas, Texas 75246

Hon. Bruce E. Anton — Petitioner's Counsel
Udashen | Anton — in Pretrial Hearings
2311 Cedar Springs, Suite 250
Dallas, Texas 75201

Wm. Reagan Wynn — Petitioner's Counsel
Jeff Kearney — on Appeal

Kearney | Wynn, Attorneys at Law
3100 West 7th Street, Suite 420
Fort Worth, Texas 76102

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO THE RELEVANT OPINIONS AND ORDERS

In a published Opinion, the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction. *United States v. Ledezma-Cepeda*, No. 16-11731, slip op., 894 F.3d 686 (5th Cir. July 3, 2018). A copy of the Fifth Circuit's Opinion is attached as Appendix 1.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the district court's Judgment in a Criminal Case on July 3, 2018. A copy of the Fifth Circuit's Opinion is attached in Appendix 1.

Jurisdiction is conferred upon this Court by Title 28, Section 1254, United States Code, providing for review by *writ of certiorari* of all final judgments of the courts of appeals. *See* 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 14, Federal Rules of Criminal Procedure, provides in relevant part:

> **Rule 14. Relief from Prejudicial Joinder**
>
> **(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
>
> . . . .

FED R. CRIM. PROC. 14(a).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case

Petitioner Jose Luis Cepeda-Cortes (hereinafter "Cepeda"), co-defendant Jesus Gerardo Ledezma-Cepeda (hereinafter "Ledezma"), and Ledezma's son, co-defendant Jesus Gerardo Ledezma-Campano (hereinafter "Campano"), were indicted for their alleged roles in the murder of Juan Guerrero-Chapa (hereinafter "Chapa"). Campano ultimately entered into a plea agreement with the Government and testified against Ledezma and Cepeda. Ledezma and Cepeda were convicted by a jury of all counts, sentenced to life

in prison, and their convictions were affirmed on appeal.

Rodolfo Villareal-Hernandez (hereinafter "Gato") is or was a leader in the Beltran-Leyva Organization (hereinafter "the BLO"), a drug cartel in Mexico. In May 2013, Chapa was shot to death in the parking lot of a shopping center in Southlake, Texas, by two people associated with the BLO. It is undisputed that Ledezma, a private investigator by trade in his native Mexico, was instructed by Gato to locate Chapa so he could be murdered. It is also undisputed that Ledezma's son, Campano, and cousin, Cepeda (a naturalized American citizen who was fluent in English), assisted Ledezma in his search for Chapa.

Cepeda's defense was lack of the requisite *mens rea*. Essentially, Cepeda argued he believed he was assisting Ledezma in conducting a legitimate investigation searching for Chapa based on his knowledge of his cousin as a talented, law-abiding private investigator in Mexico and Ledezma's affirmative representations to him that Chapa had stolen a large sum of money from banks and businesses in Mexico and Ledezma had been lawfully hired to locate Chapa so he could be brought to justice.

At trial, Ledezma claimed the defense of duress, claiming he had to follow Gato's instructions because failure to do so would have resulted in death or serious harm to his family members and/or himself. In response to Ledezma's duress claim, the Government was allowed, over Cepeda's repeated objections and

requests for severance pursuant to Rule 14, Federal Rules of Criminal Procedure, to present evidence indicating that, both before and after Chapa was killed, Ledezma, at Gato's direction, "tracked" nine to ten other people who were subsequently murdered, or at least targeted to be murdered, by Gato and the BLO.

Cepeda's only argument on appeal was that the trial court abused its discretion by denying his repeated requests for relief from prejudicial joinder pursuant to Rule 14, Federal Rules of Criminal Procedure, in the form of a severance and separate trial from Ledezma in which the jury would not be subjected to a cascade of often graphic evidence concerning numerous extraneous cartel-related murders and then asked to, somehow, ignore all of that evidence when determining if the Government had proven beyond a reasonable doubt Cepeda's knowledge and intent. Although it appears the prejudice accruing to Cepeda as a result of the joint trial in this case is at least as severe, if not more severe, than the prejudice in similar cases where the Fifth Circuit had granted appellate relief on Rule 14 grounds, the court of appeals affirmed Cepeda's conviction and sentence in a 10-page published opinion.

Course of Proceedings and Disposition Below

A. Proceedings Below

1. Conviction and Sentence

By a Second Superceding Indictment filed January 13, 2016, Ledezma, Campano, and Cepeda were

charged with one count of Interstate Stalking in violation of 18 U.S.C. § 2261A(1)(a)(i) (Count One) and one count of Conspiracy to Commit Murder for Hire in violation of 18 U.S.C. § 1958(a) (Count Two).[R. 8166-68] Additionally, Cepeda was individually charged with one count of Tampering With Documents or Proceedings in violation of 18 U.S.C. § 1512(c)(1) (Count Three).[R. 8169]

On April 25, 2016, a jury was selected, seated, and sworn.[R. 8878, 9269-9409] On April 26, 2016, Cepeda was arraigned in front of the jury and pleaded "not guilty" to all charges.[R. 9426-29] Thereafter, over nine days from April 26, 2016, through May 10, 2016, the Government, Ledezma, and Cepeda presented evidence to the jury. On May 12, 2016, the district court submitted the case to the jury.[R. 8934-61; 11448-76] The jury deliberated over portions of May 12, 2016, and May 13, 2016, before returning verdicts of "guilty" against Ledezma and Cepeda with regard to all counts.[R. 8966-67; 11569]

On December 1, 2016, the district court sentenced Cepeda to incarceration in the custody of the Federal Bureau of Prisons for life as to Counts One and Two and 240 months as to Count Three, with all sentences to run concurrently.[R. 11577] The district court entered its Judgment on December 1, 2016.[R. 9104-06]

2. Direct Appeal

Cepeda perfected appeal of his conviction and sentence by timely giving written Notice of Appeal on December 7, 2016.[1][R. 9107-08] In his sole issue presented to the Fifth Circuit, Cepeda argued the trial court abused its discretion by denying his repeated request for relief from misjoinder pursuant to Rule 14, Federal Rules of Criminal Procedure, because the record reflects a serious risk the joint trial compromised his specific trial right to be judged by the jury on the basis of only the evidence lawfully admissible against him and also prevented the jury from making a reliable judgment about his guilt or innocence.

In a published opinion, the Fifth Circuit overruled Cepeda's sole point of error and affirmed his conviction and sentence. *Ledezma-Cepeda*, slip op. at 6-10, 894 F.3d at 689-92.

B. Summary of Portions of Appellate Record Relevant to Rule 14 Issue

Beginning pretrial, Ledezma's defense to the stalking and murder for hire charges was duress, namely, arguing he was compelled to commit the offenses out of a fear of what Gato and the BLO would

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[1] The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal as an appeal from a final judgment of conviction and sentence in the United States District Court for the Northern District of Texas. *See* 28 U.S.C. § 1291. Notice of appeal was timely filed within 14 days after the entry of the judgment. *See* FED. R. APP. P. 4(b).

do to him and his family if he failed to comply with Gato's command. In response, the Government gave notice it intended to introduce evidence Ledezma "tracked" several other people, both before and after the killing of Chapa, who were ultimately murdered by the BLO and ultimately carried through on its notice by presenting voluminous testimony and evidence concerning these extraneous murders. Based on the evidence presented at trial, Cepeda was not, in any way, involved in any of these extraneous murders or "trackings."

Prior to trial, the Government filed its Notice of Intent to Use 404(b) Evidence describing Ledezma's and Campano's involvement in at least four extraneous murders[2] and five other murders and/or disappearances of persons presumed murdered.[3][R. 7760-62] Finally, the Government indicated it intended to present evidence indicating Ledezma and Campano were actively searching for two persons, Arturo Anacleto and Armando Guerrero-Chapa, on behalf of the cartel at the time of their arrest.[R. 7761]

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[2] The victims of these alleged murders were Luis Cortes Ochoa (hereinafter "Cortes"), Eliseo Martinez Elizondo (hereinafter "Elizondo"), Artemio Gonzalez-Wong (hereinafter "Wong"), and Rolando Caballero Diaz (hereinafter "Diaz").[R. 7760-61]

[3] The victims of these purported murders/disappearances were Dionicio Cantu-Rendon (hereinafter "Rendon"), Felipe Cantu-Lozano (hereinafter "Lozano"), Juan Cantu-Cuellar (hereinafter "Cuellar"), Hector Javier Alvarez Reyna (hereinafter "Reyna"), and Moises Tijerina de la Garza (hereinafter "de la Garza").[R. 7760-62]

In response to the Government's Notice, Cepeda filed his First Amended Motion and Memorandum for Severance.[R. 7907-12] In this motion, Cepeda argued the spillover effect from the introduction of evidence concerning these extraneous murders, occurring over a period of more than five years and linked to drug cartel violence, would deny Cepeda the right to have the jury weigh only the evidence against him in determining his individual guilt, specifically arguing limiting instructions would not be sufficient to ameliorate the prejudice to him because of the volume and nature of the evidence concerning the extraneous murders in which he was not involved.[R. 7908-11]

The district court denied this Motion via written order stating, "[a]ssuming that the evidence at issue is admitted against one but not both defendants under Federal Rule of Evidence 404(b), the Court concludes that adequate instructions to the jury can be given, upon request by Defendant, that will ensure against any prejudicial spillover effect and that will require the jury to properly consider the evidence admitted against each defendant separately."[R. 8160]. In a subsequent pretrial conference, the Government alerted the district court it fully intended to present evidence of the extraneous murders to rebut Ledezma's duress claim and anticipated "there will be multiple witnesses that will testify about multiple deaths."[R. 9248, 9250]

In total, trial on the merits in this matter spanned 15 calendar days beginning with the first day of testimony on April 26, 2016, and ending with closing arguments on May 12, 2016. Of those 15 calendar days,

there were nine days of testimony and one final day of closing argument. On seven of the nine days of testimony, the Government presented evidence concerning the extraneous murders and the evidence of those extraneous offenses figured prominently into the Government's closing arguments.

On the first day of trial on the merits, over Cepeda's objection and renewed request for severance, the Government presented extensive testimony from the FBI Agent who interviewed Ledezma upon his arrest concerning Ledezma's statements regarding: the Elizondo extraneous murder, two of the three "active trackings" Ledezma was engaged in at the time of his arrest on behalf of Gato, and the Wong extraneous murder.[R. 9583-88]

On the second day of trial on the merits, the Government did not elicit any evidence of the alleged extraneous offenses. However, on the third day, over Cepeda's objections and renewed requests for severance [R. 9874-77], the Government called co-defendant Campano to testify and, prior to asking questions about the murder alleged in the indictment, questioned him extensively about the Cortes extraneous murder.[R. 9884-92] The Government went on to question Campano about: the Elizondo extraneous murder, the Wong extraneous murder, the "active tracking" assignments he and Ledezma were carrying out for Gato at the time of their arrest, the Cuellar extraneous murder, and the Lozano extraneous murder.[R. 9961-94] On cross-examination, Ledezma's counsel questioned

Campano concerning the Cortes extraneous murder.[R. 10004-14]

On the fourth day of trial on the merits, Ledezma continued his cross-examination of Campano concerning the extraneous "trackings" they had undertaken at Gato's direction following the murder at issue in the indictment.[R. 1039-42] The Government then questioned Campano about the extraneous Elizondo murder.[R. 10101-06]

The fifth day of trial was not until four days later, May 3, 2016, because of a long weekend. On the fifth day, the district court allowed counsel for all parties to make an interim summation argument to the jury. During its interim summation, delivered with no limiting instructions given, the Government focused on the Elizondo extraneous murder occurring shortly prior to the murder alleged in the indictment [R. 10228], the Cortes extraneous murder [R. 10230], and one of the other extraneous murders.[R. 10232-33]

Following interim summations, over repeated objections and requests for severance by Cepeda, the Government presented extensive testimony from four witnesses concerning the extraneous murders.[R. 10351-420] As part of this testimony, the Government called Elizondo's brother, a physician who had examined his brother's body post mortem, to give graphic testimony concerning graphic photographs explaining how Elizondo had essentially been tortured to death.[R. 10352-58] Additionally, the Government presented testimony through a case agent indicating

Elizondo was murdered on April 25, 2013, less than one month prior to the murder of Chapa alleged in the indictment. Further, the Government proved that Cepeda and Ledezma had been in Mexico together on April 16, 2013, nine days prior to Elizondo's murder.[R. 10389-90] The Government's testimony also established that one of the same GPS tracking devices used to locate Chapa in the murder at issue in the indictment had been used to track Elizondo in that extraneous murder.[R. 10378-79, 10385-86, 10388-89; 12535; 13195]

Additionally, the Government presented testimony from a case agent summarizing how documentary exhibits demonstrate Ledezma's continued "tracking" of other members of Chapa's family after Chapa had been killed.[R. 10411-13] Finally, to close the fifth day, the Government presented evidence through a case agent of documentary evidence linking Ledezma to the Lozano extraneous murder, the Cuellar extraneous murder, and other related "trackings."[R. 10416-20; 13223; 13742-43; 13745-46]

The sixth day of trial, May 4, 2016, featured more Government testimony from a case agent concerning 2011 emails related to Ledezma "tracking" other members of Chapa's family for Gato and the extraneous murder of Wong.[R. 10449-57; 13529]

On the seventh day of trial, May 5, 2016, the Government rested its case without presenting any further evidence concerning the extraneous offenses. Cepeda's renewed request for a severance was again denied.[R.

10746-47] Thereafter, Ledezma began testifying in his own defense. He completed direct examination and partial cross-examination by Cepeda's counsel without any evidence of the alleged extraneous murders being elicited.

On the eighth day of trial, May 6, 2016, the Government began a lengthy cross-examination of Ledezma. Approximately seven pages of transcript into its cross-examination, the Government began, over Cepeda's repeated objections and requests for severance, extensively questioning Ledezma about the numerous extraneous murders and "trackings." Topics included in this lengthy portion of cross-examination included: the Cortes extraneous murder, the Rendon extraneous murder in 2011, the Elizondo extraneous murder, the Lozano extraneous murder, the Cuellar extraneous murder in September 2013 (a few months after the murder at issue in the indictment), the Reyna extraneous murder in Fall 2013, the Wong extraneous murder, the "active trackings" in which he was engaged at the time of his arrest, and another extraneous murder involving the driver of a red Mini Cooper.[R. 11036-70] Notably, the Government elicited testimony from Ledezma that Cepeda was actually in Mexico with Ledezma at the time Ledezma placed a GPS tracking device – a device also used in the Chapa murder at issue in the indictment – on Elizondo's vehicle, although, according to Ledezma, Cepeda did not know the reason for placing the tracker on Elizondo's vehicle.[R. 11044-46] After a brief portion of cross-examination concerning other topics related to the offense alleged in the

indictment [R. 11070-80], the trial was recessed for a four day weekend.[R. 11089]

The Government's cross-examination of Ledezma resumed on the ninth and final day of testimony, May 10, 2016. Throughout this final portion of its cross-examination, the Government sprinkled questions concerning the numerous extraneous murders and the "active trackings" in which Ledezma was engaged on Gato's behalf at the time of his arrest.[R. 11236, 11246-48] On redirect, over Cepeda's renewed severance request, Ledezma's counsel questioned Ledezma to establish that Ledezma did "track down" people on "multiple" occasions and those people were killed.[R. 11278-79] Finally, after Ledezma called an expert witness to testify, generally, about drug cartel violence and violence related to the BLO in particular, the Government presented evidence through cross-examination concerning an October 2010 email "chat" between Ledezma and Gato appearing to establish another extraneous murder of a person on a motorcycle.[R. 11353-54; 13507-09]

After Ledezma rested his case [R. 11356], Cepeda presented testimony from nine witnesses.[R. 11357-436] No more evidence concerning the numerous extraneous murders and other "trackings" was presented before all parties rested and closed the evidence.[R. 11439-40]

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RE-EXAMINE ITS 1993 DECISION IN *ZAFIRO V. UNITED STATES* AND CLARIFY THE FACTORS TO BE CONSIDERED IN DETERMINING IF A FEDERAL CRIMINAL DEFENDANT SUFFERS A SERIOUS RISK THE JURY WILL BE UNABLE TO MAKE A RELIABLE JUDGMENT AS TO HIS GUILT BECAUSE OF PREJUDICE FROM THE "SPILL-OVER" EFFECT OF EVIDENCE ADMITTED IN A JOINT TRIAL ESTABLISHING NUMEROUS BRUTAL VIOLENT EXTRANEOUS CRIMINAL ACTS COMMITTED BY A CO-DEFENDANT SO THAT RULE 14, FEDERAL RULES OF CRIMINAL PROCEDURE, REQUIRES THE REMEDY OF SEVERANCE AND INDIVIDUAL TRIAL.

A) The *Zafiro* Decision

"If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. PROC. 14(a). Federal courts applying Rule 14 do not demonstrate "a 'liberal attitude toward severance.'" *See Ledezma-Cepeda*, slip op. at 6, 894 F.3d at 689 (quoting *United States v. McRae*, 702 F.3d 806, 822 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 2037 (2013)). Thus, "[i]t is the rule, . . . not the

exception, that persons indicted together should be tried together, especially in conspiracy cases." *See McRae*, 702 F.3d at 821.

In 1993, this Court explained that, under Rule 14, the exceptions to the general rule in favor of joint trials occur when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, *or* prevent the jury from making a reliable judgment about guilt or innocence." *See Zafiro v. United States*, 506 U.S. 534, 539 (1993). Relevant to the case at bar, this Court specifically identified the situation where the "spill-over" effect of evidence the jury should not consider against one defendant was admitted against another defendant, caused prejudice to the first defendant, and would have been inadmissible if the first defendant had been tried alone. *See id*. Specifically, this Court noted that, in a situation where "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty," there might be such a "serious risk" as to require severance. *See id.*

Since deciding *Zafiro* in 1993, this Court has neither addressed the application of Rule 14 in the "spill-over" evidence scenario nor given any further guidance as to how lower courts should determine if the risk a joint trial will either: (a) compromise a specific trial right of one defendant, or (b) prevent the jury from

making a reliable judgment, is "serious" enough to require severance.[4]

B) Petitioner's Argument Below

In his Brief filed in the Fifth Circuit, Cepeda argued this case presents one of the rare situations described in *Zafiro* where the record does reveal a serious risk that the joint trial both: (a) compromised Cepeda's specific trial right to be judged by the jury on the basis of *only* the evidence lawfully admissible against him, and (b) prevented the jury from making a reliable judgment about Cepeda's guilt or innocence.

First, Cepeda pointed out that the only real contested issue at trial was whether Cepeda possessed the culpable mental state to commit the offenses alleged in Counts One and Two, *i.e.*, whether he acted "with the intent to kill, injure, harass and intimidate"[5] Chapa

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[4] Undersigned counsel are only able to locate one opinion from this Court citing *Zafiro* since it was handed down in 1993. *See Kansas v. Carr*, 136 S. Ct. 633 (2016). In *Carr*, this Court did not address the proper application of Rule 14 to a federal trial because that case involved the question of whether joint sentencing proceedings in state capital murder death penalty trials violate the Eighth Amendment. *See id.* at 644-46. Additionally, undersigned counsel are unable to locate any majority opinion from this Court addressing the appropriate application of Rule 14 since *Zafiro* was handed down in 1993.

[5] *See* 18 U.S.C. § 2261A(1) ("Whoever . . . travels in interstate or foreign commerce . . . *with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person*, and in the course of, or as a result of, such travel or presence engages in conduct that . . . places that person in reasonable fear of the death of, or serious

and whether he acted with the specific "intent to murder"[6] Chapa. While the evidence presented to the jury overwhelmingly established Cepeda assisted Ledezma in numerous ways and fully participated in the search for Chapa, the issue of whether Cepeda acted with the requisite *mens rea* at the time he was assisting Ledezma was close at best.

Cepeda was able to present direct evidence in the form of Ledezma's testimony indicating he, Cepeda, had not been told the true nature of the search for Chapa. Further, Campano's testimony circumstantially indicated Cepeda lacked the necessary knowledge and intent in that Campano failed to testify about any statements or conduct witnessed by Campano *prior to Chapa's murder* consistent with Cepeda possessing either the necessary knowledge or intent. On the other hand, Cepeda was able to argue the Government's most compelling evidence presented to show Cepeda's alleged criminal intent was all contested and much of it could be argued to support Cepeda's position as much as it supported the Government's.

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bodily injury to . . . that person . . . shall be punished. . . .") (emphasis added).

[6] *See* 18 U.S.C. § 1958(a) ("Whoever travels in . . . interstate or foreign commerce, . . . *with intent that a murder be committed* in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned. . . .") (emphasis added).

Second, to demonstrate the context in which the jurors were asked to determine if the Government had proven *mens rea* beyond a reasonable doubt, Cepeda pointed out that, because of "potential security issues" the district court selected an "anonymous jury" meaning names and street addresses of venire and jurors withheld from counsel, parties, public, and most court employees.[R. 8117-19] The jurors had to know this was an unusual process and would have likely inferred the case involved an extremely scary or dangerous topic. Then, the jurors learned in opening statements this case involved a drug cartel-related murder committed in broad daylight in the middle of an upscale shopping and dining area in an American Suburb. At that point, the jurors could have reasonably been expected to believe they were hearing a trial similar to a storyline in a movie or television show. Then, the jurors were presented with voluminous evidence concerning horrific acts perpetrated by the BLO and other drug cartels as that evidence was necessary to Ledezma's duress defense.

Third, with the single narrow issue for the jury's determination identified and the context in which that decision was to be made explained, Cepeda argued there was no way the jury could make a reliable judgment on the close contested issue of *mens rea* in light of the cascade of evidence establishing Ledezma's involvement in nine to ten brutal, cartel-related murders that cast a long shadow over the entire trial.

Cepeda argued the overkill presentation by the Government of those extraneous murders on all but

two days of trial on the merits constituted large portions of the Government's case-in-chief and an extremely large portion of the two-day cross-examination of Ledezma. Cepeda pointed out this resulted in the jury being constantly reminded of the extraneous murders. Additionally, the Government did not present evidence of these matters in the abstract – instead they called witnesses to describe, in detail, how Elizondo was tortured and murdered, and gleefully produced evidence indicating Ledezma and Gato joked about these matters.

Cepeda was on trial claiming innocent intent based on reliance on his cousin, Ledezma, who he believed to be a legitimate private investigator working on a legitimate case. The Government effectively proved Ledezma was a cartel operative responsible for 10 or more murders without any proof Cepeda was aware of, much less knowingly participated in, any of them. The net effect of this could hardly be anything other than to make the jury feel it would be impossible for any reasonable person to rely on Ledezma, regardless of the fact there was no evidence establishing Cepeda's knowledge of any of these extraneous acts. Effectively, the evidence of the extraneous murders invited the jury to find Cepeda guilty by his association with Ledezma.

Additionally, Cepeda argued there were several instances where the prejudice accrued to him from the cascade of evidence concerning Ledezma's extraneous conduct is evident simply from reviewing the record:

- While examining the case agent concerning Elizondo's murder on the fourth day of trial on the merits, the Government pointed out Cepeda and Ledezma crossed the border back into the United States together on April 16, 2013, nine days prior to Elizondo's murder.[R. 10389-90] Immediately after eliciting this testimony, counsel for the Government stated "Okay. *I want to move on from the killing of Mr. Elizondo*. Let's talk about April 17, and 18. . . ."[R. 10390 (emphasis added)] In this manner, the Government implied Cepeda must have been involved in Elizondo's torture and murder due to him being present in Mexico with Ledezma during the relevant time period.

- There were numerous instances where the district court administered varying limiting instructions to the jury concerning the evidence of the extraneous offenses only being admissible against Ledezma and not being admissible against Cepeda. However, those instructions were not consistently administered upon request.

- While the Government was examining the case agent concerning Gov. Ex. 132, Ledezma's notebook containing handwritten notes, Cepeda's attorney objected: "Your Honor, I'll object. This is asked and answered. We've done this before on another day with this witness. We've done the notebook. We've done all this 404(b)

stuff. I'll make my objection again, 404(b) motion to sever, and 403, but, also, 403. We've already done this exhibit with these same questions I believe with the same witness."[R. 10415] The district court overruled the objection and allowed the Government to continue and also failed to administer any type of limiting instruction at that point.[R. 10415] The Government then discussed the portions of Ledezma's notebook discussing the extraneous murder of Wong.[R. 10415; 13215] The timing in this exchange is crucial: the district court's abrupt ruling and lack of limiting instruction coupled with the Government going into an extraneous matter would make it appear to the jury Cepeda's counsel was wrong to object and that they were permitted to consider that evidence against Cepeda.

- On the sixth day of trial on the merits, while the Government was attempting to offer an email concerning an extraneous matter, the district court instructed the jury, "Just keep remembering that when you hear the words 404(b) – so far I haven't heard any 404(b) material that's been offered against Mr. Cepeda. Is that correct?" to which counsel for the Government stated, "I don't think we have thus far, no, Your Honor, ***not today***."[R. 10450] In fact, there was no evidence connecting Cepeda to any alleged extraneous offense. This instruction coupled with the Government's reply communicated to the

jury that there had, in fact, been extraneous offense evidence admitted against Cepeda on previous days or that there would be such evidence admitted in the future. In light of the extensive testimony concerning the extraneous offenses set out above, the jury could easily have concluded at that point that at least some of the evidence of extraneous murders they heard earlier in the trial did apply to Cepeda.

- On the ninth day of trial (the third day Ledezma was on the stand and the second day he was under cross-examination by the Government after a four day break), the Government was in the process of questioning Ledezma about the amount of assistance he received from Cepeda in searching for Chapa in 2013. In the middle of that questioning, the Government circled back to ask Ledezma for at least a second time if he had "active trackers" on "people in Mexico" including "an independent drug dealer who was selling cocaine without giving payment to [Gato]" at the time he was arrested in September 2014 and Ledezma confirmed this was true.[R. 11246] The Government immediately then went back to questioning Ledezma about Cepeda's assistance in Florida in 2013.[R. 11246] By sandwiching this evidence concerning extraneous acts in September 2014 between evidence concerning Cepeda's uncontested conduct in Spring 2013, the Government created

a situation whereby the jurors could infer Cepeda was somehow involved in the "trackings" occurring a year and a half after the offense alleged in the indictment.

- When viewed as a whole, the jury charge was hopelessly conflicted. The district court first gave a boilerplate extraneous offense instruction indicating the jury could consider the extraneous evidence to determine Ledezma's state of mind, plan or preparation, lack of mistake or accident, intent, and whether he acted in duress. However, later in the charge, after all of the application paragraphs setting forth the elements of the offenses in Counts One and Two and instructing the jury on how to address the elements, the district court instructed the jurors they could consider as evidence "against *any* defendant *any* acts done or statements made by *any* members of the conspiracy, *during the existence of and to further the objectives of* the conspiracy. You may consider these acts and statements even if they were done and made in a particular defendant's absence and without his or her knowledge."[R. 8956 (emphasis added)] In light of the extensive testimony concerning Ledezma's involvement in the murder of Elizondo while the search for Chapa was active, this instruction invited the jurors to consider at least that extraneous murder against Cepeda.

Based on his thorough recitation of the record as a whole, Cepeda argued his case fell in line with several other Fifth Circuit decisions in which district courts had been found to have erred by refusing severance under arguably less prejudicial circumstances.

First, much like the defendant at issue in *McRae*, Cepeda "has not sat on his hands in this respect." *See McRae*, 702 F.3d at 822. Cepeda repeatedly and vociferously requested a severance at nearly every available opportunity as the Government presented the deluge of evidence concerning Ledezma's and Campano's involvement in ten extraneous murders. Just as was the case in *McRae*, the district court was not receptive and denied each motion, opting instead to give the jury limiting instructions. *See id.* Cepeda argued that, given the repeated, pervasive, and graphic presentation of evidence of the ten extraneous murders, the court of appeals could not conclude the district court's attempts at limiting instructions "did, or could have cured the prejudice of the spillover effect" from the Government's case against Ledezma. *See id.* at 827. Just as was the case in *McRae*, while the district court may have been able to reasonably conclude a severance was not required pretrial, as the trial progressed, the evidence presented by the Government to rebut Ledezma's duress defense "became irrelevant and unusable against" Cepeda and "increasingly inflammatory to him" making it so that "limiting instructions could not mitigate the prejudice." *See id.*

Second, just as was the case in *United States v. Erwin*, as the trial progressed in this case, very little of

the "mountainous evidence" concerning the ten extraneous killings was usable against Cepeda or even related to him. *See United States v. Erwin*, 793 F.2d 656, 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986). Thus, in *Erwin*, the Fifth Circuit found the prejudice from the joint trial "far outweighed" any benefit of judicial economy. *See id.* In this case, Ledezma's relationship with Gato and involvement in numerous extraneous murders at Gato's direction was wholly irrelevant to the issue of whether Cepeda acted with the requisite *mens rea* and, as the trial progressed, it should have become increasingly apparent to the district court that none of that voluminous evidence could be lawfully applied to Cepeda's case.

Third, Cepeda argued that, since he was required to sit through trial while the Government and Ledezma presented a mountain of evidence concerning the violent operations of the BLO and ten murders committed at the direction of Gato with Ledezma's assistance, his case is similar to the situation presented in *United States v. Cortinas*. In *Cortinas*, the Fifth Circuit reversed a conspiracy conviction because evidence was presented of numerous bad acts committed by members of a motorcycle gang the defendant was not associated with and that evidence was "highly inflammatory." *See United States v. Cortinas*, 142 F.3d 242, 248 (5th Cir.), *cert. denied sub nom. Villegas v. United States*, 525 U.S. 1032 (1998).

C) The Fifth Circuit Opinion Below

In overruling Cepeda's Rule 14 severance claim and addressing his specific arguments set out above, the Fifth Circuit stated,

> None of these contentions reveals a degree of prejudice sufficient to over-come our extreme deference to the district court's discretion. As an initial matter, Cepeda's various interpretations of the above events, and the kind of speculation that they might invite, are contestable at best. But regardless, an "invitation to speculate" and potentially confusing out-of-order questions do not rise to the level of specific compelling evidence. And as for the jury charge, there was no confusion: The murder of Elizondo plainly did not "further the [conspiracy's] objective[]" of murdering Chapa. Most importantly, the court dispelled any scent of ambiguity or prejudicial inference by carefully and repeatedly instructing the jury, throughout trial, that it consider the Rule 404(b) evidence as admissible only against Ledezma and only for limited purposes.

Ledezma-Cepeda, slip op. at 9-10, 894 F.3d at 691-92 (footnotes omitted).

In responding to Cepeda's argument that his case was in line with *McRae*, *Erwin*, and *Cortinas*, the Fifth Circuit stated,

> Cepeda cites several authorities as standing for the proposition that the volume and

> gruesome nature of the Rule 404(b) evidence against Ledezma render the instructions insufficient. But each of those cases is easily distinguishable: In each, the prevailing party was not a member of the conspiracy or had committed crimes qualitatively less severe than those of his co-defendants. In contrast, Cepeda and Ledezma were charged together, for the very same crime, committed at the same time. At bottom, Cepeda's appeal is based on no more than a discrepancy in the quantity (rather than quality) of crimes and general "spillover" concerns – precisely the type of codefendant evidence we presume limiting instructions can cure. Because the district court "ably parsed" the evidence and "instructed the jury many times . . . to consider certain evidence only against [Ledezma] [and] only for limited purposes," it did not abuse its discretion by denying Cepeda's multiple motions to sever.

Ledezma-Cepeda, slip op. at 9-10, 894 F.3d at 691-92 (footnotes omitted).

D) The *Zafiro* Formulation Allows for Unacceptably Inconsistent Applications of Rule 14 to Similar Cases and This Court Should Grant Certiorari to Pronounce a More Detailed Standard That Will Result in a More Consistent Application of Rule 14 in the Lower Courts

As one prominent criminal defense attorney has noted,

> Anyone who has tried a multidefendant conspiracy case knows the disadvantages of a joint trial. The defendants and their counsel huddle around the defense table, directly across the courtroom from the jurors, looking for all the world like . . . conspirators. Evidence comes in against one defendant subject to limiting instructions that jurors quickly forget, and thus spills onto the other defendants. . . . The prejudice to the defense from a joint trial of conspirators is powerful and undeniable. Yet so strong is the cry for efficiency that severances are as rare as unicorns.

See John D. Cline, *It Is Time to Fix the Federal Criminal System*, CHAMPION, Sept. 2011, at 34, 38. The question of how Rule 14 applies, especially in "spill-over effect" cases such as this one is of major import to federal criminal practitioners across the country and review of decisions addressing Rule 14 demonstrate that the issue comes up repeatedly.

As set out in detail above, for the last 25 years, federal courts have attempted to determine if the record reflected a "serious risk" that a joint trial "compromised a specific trial right" or "prevented the jury from making a reliable judgment about guilt or innocence" in resolving Rule 14 issues. *See Zafiro*, 506 U.S. at 539. Unfortunately, at least in the context of "spill-over effect" cases such as this one, this standard is so amorphous that it provides no real guidance as to when a Rule 14 severance is required or not. Put a different way, there is no guidance from this Court as to what circumstances would demonstrate such a "serious risk"

that "evidence of a codefendant's wrongdoing . . . erroneously could lead a jury to conclude that a defendant was guilty," so as to require severance. *See id.*

Without a more specific and detailed standard explaining the considerations lower courts must make to determine if those circumstances exist, lower courts are free to render seemingly incongruent decisions applying the Rule, all the while paying homage to this Court's language in *Zafiro*.

Cepeda respectfully submits this case is a prime example of the problem. There is no principled way to determine Cepeda suffered less prejudice from sitting through days and hours of testimony concerning horrific drug-cartel related violence and nine to ten brutal murders in a case where his only defense was that he had no idea he was working for the cartel than the police officer defendant in *McRae* on trial for the unjustified and unlawful killing of a civilian following Hurricane Katrina who argued he was prejudiced by being tried alongside the other police officers accused of covering up the unauthorized killing. Yet, applying the *Zafiro* standard in two published opinions, the Fifth Circuit reached opposite conclusions in this case and *McRae*.

Likewise, there is no principled way to determine Cepeda suffered less prejudice from sitting through days and hours of testimony concerning horrific drug-cartel related violence and nine to ten brutal murders in a case where his only defense was that he had no idea he was working for the cartel than the two

defendants on trial in the large drug conspiracy at issue in *Cortinas* who, although they were not members of the Bandido Nation Motorcycle Club, were forced to sit through days and hours of testimony concerning the numerous horrific violent acts committed by the Bandidos. Yet, applying the *Zafiro* standard in two published opinions, the Fifth Circuit reached opposite conclusions in this case and *Cortinas*.

Without a definite list of factors to be considered from this Court, criminal practitioners across the nation are left without any meaningful predictability as to how these types of Rule 14 issues will play out. Obviously, this makes adequately advising clients about the relative merits of proceeding to trial as opposed to resolving cases via pleas of guilty extremely difficult. Moreover, it provides unacceptable uncertainty as to how appellate courts will rule if district courts follow the trend and deny severance. As Justice Scalia noted, "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. . . . Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all." Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

Petitioner respectfully submits that this Court should grant *certiorari* and, for the first time in 25 years, address the issue of how Rule 14 applies in situations where two defendants are tried together and substantial, prejudicial evidence of extraneous criminal acts – including horrific acts of violence such as

those at issue in this case – will be admissible against one defendant but not the other. This is an important issue of wide application in federal criminal trials across the country that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(c).

CONCLUSION

Petitioner therefore prays that this Court will grant this Petition, order such further briefing as this Court feels appropriate, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and remand this cause to that court for further proceedings.

Respectfully submitted,

WILLIAM REAGAN WYNN
Counsel of Record

JEFF KEARNEY

KEARNEY | WYNN, Attorneys at Law
3100 West 7th Street, Suite 420
Fort Worth, Texas 76107
(817) 336-5600
(817) 336-5610 (fax)

Attorneys for Petitioner