IN THE
SUPREME COURT OF THE UNITED STATES

RODOLFO PORTELA,
Petitioner,

vs. Number

UNITED STATES OF AMERICA
Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the petitioner, RODOLFO PORTELA, by and through undersigned counsel and pursuant to Sup. Ct. R.39, and moves this Honorable Court for leave to file the attached Petition for Certiorari in the Supreme Court of the United States without costs and to proceed in forma pauperis.

In the lower courts, the Petitioner was formally adjudicated unable to afford counsel and undersigned counsel was appointed for him under 18 U.S.C. Section 3006(a) of the Criminal Justice Act; accordingly, the Petitioner has not attached an affidavit of insolvency.

Respectfully Submitted,

s/Gregory A. Samms
GREGORY A. SAMMS, ESQ.
Counsel for Petitioner
113 Almeria Avenue
Coral Gables, FL 33134
(786) 953-5802 (tel)
(786) 513-3191 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail upon The Solicitor General, United States Department of Justice, Washington, D.C. 20530 and upon all counsel of record, this 29th day of November, 2018.

s/Gregory A. Samms
Gregory A. Samms, Esq
Florida Bar No. 438863

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PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

DECLARATION VERIFYING TIMELY FILING

Petitioner, Rodolfo Portela, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first-class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 29th day of November, 2018.

GREGORY A. SAMMS, ESQ.

Attorney for the Petitioner

By: s/Gregory A. Samms

Gregory A. Samms, Esq.
113 Almeria Avenue
Coral Gables, FL, Florida 33134
Telephone No. (786) 953-5802

November 29, 2018

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GREGORY A. SAMMS, ESQ.
COUNSEL FOR PETITIONER
113 Almeria Avenue
Coral Gables, FL 33134
(786) 953-5802 (tel)
(786) 513-3191 (fax)
Florida Bar No. 438863

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PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

RODOLFO PORTELA respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Judicial Circuit rendered and entered in Case No. 15-14354 of that Honorable Court as a mandate on AUGUST 24, 2018, which affirmed the judgement and sentence of the United States District Court for the Southern District of Florida.

QUESTIONS PRESENTED

1. Whether The District Court, Erred When It Found That There was Sufficient Evidence That the Appellant had Committed the Acts Alleged in Count I, Conspiracy to Possess With Intent to Distribute a Controlled Substance, in That There was not Sufficient Evidence that the Appellant Could Reasonably Foresee That 280 Grams or more of Crack Cocaine was Attributed to him.

2. The Court Erred When It Did Not Grant A Judgment of Acquittal on Count V, Possessing a Firearm in Furtherance of a Drug Trafficking Crime, Because There Was Insufficient Evidence That Appellant Possessed Marijuana In Furtherance of a Drug Trafficking Crime.

3. The Court Erred When Appellant's Motion to Suppress a Firearm, Ammunition and Post Arrest Statements That Were Procured on November 18, 2013, Were Denied. The Court Further Erred When Post Arrest Statements Stemming From The Arrest on November 18, 2013 That Were Procured as Fruit of the Poisonous Tree and Taken From the Appellant on November 27 Were Not Suppressed.

4. Whether the Court Made a Sufficient Determination That the Appellant Was Competent to Waive His Right to Appeal & Whether the Trial Court Should Determine if the Appellant was Competent During the Course of His Trial.

5. The Court Failed To Conduct a Competency Hearing When the Evidence of Plaintiff's Mental Infirmities Were Presented.

LIST OF PARTIES

The parties in this proceeding or persons who have an interest in the outcome of this case are as follows:

Altamirano, Christopher

Balboa, Mario

Benjamin, James, Esquire

Bozanic, Zeljka, Esquire

Cano, Mario, Esquire

Caruso, Michael, Federal Public Defender

Castro, Steven

Chacon, Maurin

Clay, William, Esquire

Darce, Fernando

DeFabio, Joel, Esquire

Diaz, Joel

Diaz, Kevin

Dispoto, Mark, Assistant United States Attorney

Dixon, James

Donet, David Jr., Esquire

Dopico, Hector, Assistant Federal Public Defender

Ferrer, Wifredo A.,United States Attorney

Flores, Jay Anthony

Forte, Dwight

Garber, Hon. Barry L., United States Magistrate Judge

Gonzalez, Manuel, Esquire

Goodman, Hon. Jonathan, United States Magistrate Judge

Guzman, Nadim

Hermida, Ricardo, Esquire

Hodge, David, Esquire

Horowitz, Philip R., Esquire

Horstman, Brittany, Esquire

Hosseini, Ilham, Assistant United States Attorney

Houlihan, Richard, Esquire

Korchin, Paul, Assistant Federal Public Defender

Kreiss, Jason, Esquire

Louis, Marshal Dore, Esquire

Marcus, Jeffrey, Esquire

Martinez, Angel

McAliley, Hon. Chris M., United States Magistrate Judge

Mendez, Joaquin, Esquire

Moore, Raymond

O'Sullivan, Hon. John J., United States Magistrate Judge

Otazo-Reyes, Hon. Alicia, United States Magistrate Judge

Pinero, Michael, Esquire

Portela, Rodolfo

Ramirez, Christian

Richardson, Lonnie, Esquire

Rodriguez, Miguel

Rubio, Herman Frank, Esquire

Salas, Alioth

Salas, Luis

Samms, Gregory, Esquire

Simonton, Hon. Andrea M. United States Magistrate Judge

Smachetti, Emily Assistant United States Attorney

Smith, Michael Gary, Esquire

Smith, Sky, Esquire

Solomon, Harry, Esquire

Sombuntham, Nalina, Assistant United States Attorney

Stonick, Anthony, Esquire

Suri, Arnaldo, Esquire

Thompson, Joseph

Tinoco, Carlos

Torres, Hon. Edwin G., United States Magistrate Judge

Turnoff, Hon. William C., United States Magistrate Judge

Upson, Keith Wayne, Esquire

Vazquez, Ignacio, Assistant United States Attorney

Walkins, Arimentha, Assistant United States Attorney

White, Kenneth, Esquire

White, Hon. Patrick A., United States Magistrate Judge

Williams, Hon. Kathleen, United States District Judge

Zacca, Deric, Esquire

Zerquera, Dayaan

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REFERENCE TO THE OPINION BELOW

The trail court issued no written opinions in this matter. The Eleventh Circuit Court of Appeals did issue a written, published opinion which, along with the judgement of the trial court, is included in the appendix to this petition.

STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Petitioner was the defendant in the district court, and will be referred to by name, the defendant or as the Petitioner. The respondent, United States of America, will be referred to as the government. The record will be noted by reference to the document and page number of the Record on Appeal as prescribed by the rules of this Court. The petitioner is incarcerated.

From January 2011 through June 2014 law enforcement began receiving complaints of a group of individuals who referred to themselves as the Big Money Team. (BMT). The group operated in the Little Havana and Allapattah areas of Miami and allegedly sold illegal narcotics. [D.E. 1412, p.7].

On July 26, 2013, during a surveillance operation in the suspected areas, the Petitioner was seen walking with a group of suspected BMT members. [Trans.

7/26/13 p. 98]. A police detective approached the group and activated his emergency lights. Petitioner began walking away and was observed tossing a firearm underneath a parked vehicle. [Trans. 7/26/13 p. 98]. The gun was recovered and the Petitioner was arrested.

On November 18, 2013, the Petitioner was a passenger in car being driven by his girlfriend Jessica Gonzalez. [D.E. 1435, p. 105]. The couple was proceeding to a store located at northwest 51st and 22nd avenue in Miami Florida. [D.E. 1435, p. 9]. According to Detective Segovia of the Miami-Dade Police Department the car was driving on the wrong side of the road. [D.E. 1435, p. 9]. Based on Detective Segovia's observation he conducted a traffic stop by engaging his emergency lights and pulling the vehicle over. [D.E. 1435, p. 10]. The stop occurred between 7:45 and 8:00 p.m. at night. [D.E. 1435, p. 110]. The Petitioner had in his front left pocket a half-gram of marijuana. [D.E. 1435, p. 111]. Officer Segovia approaches the driver's side and asks Ms. Gonzalez for her driver's license. [D.E. 1435, p. 112]. Ms. Gonzalez looks for the license and after a search in the car tells the officer that it is in the trunk of her car. [D.E. 1435, p. 112]. Officer Segovia tells her to retrieve the license and Ms. Gonzalez goes to the trunk to find it. [D.E. 1435, p. 112]. Officer Segovia then goes to Petitioner and orders him out of the car. [D.E. 1435, p. 112]. Petitioner got out of the car and closed the

door behind him. [D.E. 1435, p. 114]. Officer Segovia asked Petitioner if he had any drugs on him. [D.E. 1435, p. 114]. After initially denying any drugs, Petitioner reached into his pocket and showed Officer Segovia the half bag of marijuana that he had in his possession. [D.E. 1435, p. 114]. The Petitioner intended to throw it out since it was such a small amount but Officer Segovia told Petitioner to keep it and the Petitioner put it back in his pocket. [D.E. 1435 p. 115].

Two other officers appeared on the scene and one of them went to the driver's side door and attempted to open the door. [D.E. 1435, p. 116]. At that point Ms. Gonzalez objected and told the officer she did not want him to search her car. [D.E. 1435, p. 116]. The officer about to search the vehicle then grabbed Ms. Gonzalez shook her and told her to move. [D.E. 1435, p. 116]. The Petitioner walked towards the trunk of the vehicle in an attempt to assist Ms. Gonzalez. [D.E. 1435, p. 116]. Officer Segovia then handcuffed the Petitioner and walked him back to his car and placed the Petitioner in the back seat of the police vehicle. [D.E. 1435, p. 116]. When the Petitioner was secured in the back seat the officer that was with Ms. Gonzalez commenced searching the interior of the car. [D.E. 1435, p. 116]. At the time the search began both car doors were closed. [D.E. 1435, p. 116-117]. The Petitioner testified that neither he nor Ms. Gonzalez had

smoked any marijuana that day in the vehicle. [D.E. 1435, p. 117]. This is in contrast to Officer Segovia, who testified that when he initiated the stop and approached the vehicle he noticed the smell of marijuana emanating from the interior. [D.E. 1435, p. 11].

Officer Segovia testifies that once the Petitioner was outside of the vehicle that he sent him away from the vehicle to talk with the other officers on the scene after the Petitioner admitted that he had marijuana on his person. [D.E. 1435, p. 11]. After the Petitioner was ordered away from the vehicle he entered the car and conducted a search of the interior. [D.E. 1435, p. 11]. While conducting his search of the car's interior Segovia sees a firearm tucked under the passenger seat and small particles of marijuana on the floorboard. [D.E. 1435, p. 11-12]. When Officer Segovia returned to his unit he was told by one of the other officers on the scene that the Petitioner had a warrant for his arrest. [D.E. 1435, p. 12]. The Petitioner was then charged with possession of a firearm by a convicted felon, possession of marijuana and the outstanding warrant. [D.E. 1435, p. 14].

Once under arrest Detective Weaver of the Miami-Dade Police Department questioned the Petitioner. [D.E. 1435, p. 43-44]. Detective Weaver had the Petitioner execute a Miranda Waiver form. [D.E. 1435, p. 43]. After the form was executed, Detective Weaver took an unrecorded statement from Petitioner.

[D.E. 1435, p. 45]. The Petitioner allegedly told the Detective that he had purchased the gun a day prior to his arrest in Little Havana. The Petitioner allegedly further stated that he placed the gun under the seat as the car was stopping but before he realized officers were stopping him. [D.E. 1435, p. 46]. Detective Weaver knew at the time of the interview that the Petitioner was a convicted felon. [D.E. 1435, p. 46].

During the suppression hearing the Petitioner took the stand and testified about the day of his arrest and his connection to the vehicle that was searched on November 18, 2013. [D.E. 1435, p. 105]. The Petitioner had used the car on many occasions in the past. [D.E. 1435, p. 106]. He has paid to fix the car such as repairing the brakes on the car. [D.E. 1435, p. 107]. Petitioner paid for gas in the car. [D.E. 1435, p. 107]. Petitioner had permission to use the car anytime that he wanted. [D.E. 1435, p. 107]. He had his own key to the vehicle, which was entered into evidence. [D.E. 1435, p. 108, 159]. Petitioner would leave his personal items in the car such as his sandals and hats. [D.E. 1435, p. 109]. He would also leave his house keys in the vehicle. [D.E. 1435, p. 110].

After the Petitioner's arrest for the charges on November 18, 2013, he had an appearance in state court where he was appointed a public defender on November 19, 2013. [D.E. 1435 p. 118]. At that time the Petitioner signed an Invocation of

Right to Counsel Form and a Plea of Not Guilty form. [D.E. 1435, p. 94].[1] Subsequent to signing his written statement of his desire not be interviewed by anyone without presence of counsel, Petitioner was visited in the jail by Detective Bernat and Agent Perez. [D.E. 1435, p. 58]. Agent Perez is an agent of ATF who was investigating BMT and became aware of the arrest of Petitioner that occurred on November 19, 2013. [D.E. 1435, p. 56]. Agent Perez went to the Dade County Jail on November 27, 2013 with a search warrant for DNA evidence from the Petitioner. [D.E. 1435, pp. 63-64]. Detective Bernat of the City of Miami gang unit accompanied agent Perez. [D.E. 1435, p. 64]. Perez and Bernat told Petitioner that they had a warrant for his DNA. [D.E. 1435, p. 121]. Bernat told the Petitioner that this was big because it was the Feds and that since he was already on the psych floor that he would have a nurse come in and stick him with a needle if he didn't give him the DNA sample. [D.E. 1435, p. 121]. After being threatened the Petitioner agreed to give a sample. Bernat gave the Petitioner a document separate from the warrant and told Petitioner to initial it and sign it. [D.E. 1435, p. 122]. The document was not read to him. [D.E. 1435, pp. 123]. Further, the Petitioner never read this additional document, which turned out to be a Miranda Rights Waiver Form. [D.E. 1435, pp. 122-123]. Bernat told Petitioner that if he didn't

[1] The Invocation of Rights form and the Plea of Not Guilty were attached to the Supplemental Motion to Suppress D.E. 121.

give them DNA he would get 30 years for both guns and that he would never see his daughter again. [D.E. 1435, p. 124]. Based on the statements made to Petitioner and additional statements attempting to tie the Petitioner to murders, Petitioner gave a statement. [D.E. 1435, p. 125].

Agent Perez stated that the Petitioner said he was not aware that the Feds were looking for him and he wanted a deal. Agent Perez testified that she was not in a position to give the Petitioner a deal. [D.E. 1435, p. 65]. Petitioner allegedly told Detective Perez that he found a gun on July 26th and that he saw some individuals trying to hide it. [D.E. 1435, p. 69]. Petitioner allegedly admitted that he knew the indicted members of BMT. [D.E. 1435, p. 69]. Petitioner also allegedly admitted the facts of his arrest on November 18, 2013. [D.E. 1435, p. 70].

On March 9th, 2015, the Petitioner was convicted of Counts I through V of the Indictment which were all the counts that pertained to the Petitioner. [D.E. 907]. On January 29, 2016 the Petitioner was sentenced by the District Court to a total term of 360 months. [D.E. 1410]. At sentencing the parties entered into a letter agreement where the Petitioner agreed to accept the jury findings of guilt and accept a thirty year sentence rather than the mandatory life sentenced mandated by Count I, 21 U.S.C. § 841. [D.E. 1431]. On February 26, 2016 the

Petitioner timely filed his Notice of Appeal. [D.E. 48]. On August 24, 2018, the Eleventh Circuit issued its opinion and mandate and this Writ follows.

ARGUMENT

LEGAL ARGUMENT

I. Whether The District Court, Erred When It Found That There was Sufficient Evidence to Find the Petitioner had Committed the Acts Alleged in Count I Conspiracy to Possess With Intent to Distribute a Controlled Substance, in That There was not Sufficient Evidence that the Petitioner Either Sold or Reasonably Foresaw That 28 Grams of Crack Cocaine was Sold as Part of the Conspiracy.

A. The Petitioner was not Shown to Have Sold 28 grams or More of crack cocaine as Alleged in Count I of the Indictment.

In Count I of the Second Superseding Indictment the Petitioner was charged with violating 21 U.S.C. § 841 conspiracy to possess with intent to distribute a controlled substance, to wit crack cocaine, marijuana and meth also known as MDMC. However, the evidence adduced at trial never demonstrated that the Petitioner ever sold 28 grams of crack, marijuana or meth. The government alleged that the Petitioner was a member of BMT (Big Money Team) and that he along with his alleged co-conspirators established a coordinated effort to sell illegal drugs for profit. Though there was ample testimony of illegal activities by

other members of the alleged conspiracy, evidence attributed against the defendant was scant. The government relies on the testimony of two cooperating defendants and two detectives to attempt to establish that the Petitioner sold 28 grams of crack cocaine.

Detective Perez's testimony established initially that the Petitioner has been continuously incarcerated since November 18th, 2013. [D.E. 1497, p.7]. This is important because the conspiracy allegations in Count I run from January of 2013 to July of 2014. [D.E. 1497, p.8]. This means that the defendant could not sell any drugs after November 18th, 2013. Detective Perez had no evidence of the defendant selling any drugs. [D.E. 1497, p.8-9]. When Detective Perez was asked if he could identify any dates in which the defendant sold any drugs he was unable to name any dates when the defendant conducted any drug sales. [D.E. 1497, p.8]. Further there was no date in which Petitioner sold meth or marijuana. [D.E. 1497, p.9]. Although on November 18 of 2013 the Petitioner was arrested with a half a gram of marijuana the detective could not state that the Petitioner was ever involved in a transaction where he was selling marijuana. [D.E. 1497, p.9]. Without any evidence that the Petitioner conducted marijuana sales, there is insufficient evidence that the Petitioner was ever engaged in any marijuana sales.

The government also presented the testimony of cooperating defendant Guzman. Mr. Guzman identified a number of individuals that he recognized in court namely Jay Flores, James Dixon, Maurin Chacon, Christopher Altamirano and the Petitioner. [Trans. 2/12/15 p.m. session, p. 52]. Mr. Guzman was then asked what he did with these men and he responded "hung out, we smoked and we sold drugs." [Trans. 2/12/15 p.m. session, p. 53]. The government did not ask any follow up questions to determine which of the defendants sold drugs. It could be that the Petitioner hung out with Mr. Guzman and never sold drugs with him. This type of vague questioning without any specificity as to the Petitioner, leaves the trier of fact with no basis to determine if the Petitioner sold any drugs, what kind and in what amounts.

Mr. Guzman is then asked to identify a government exhibit 50 which is a building located at 14th avenue and 3rd street. [Trans. 2/12/15 p.m. session, p. 54]. Mr. Guzman then indicated that he sold drugs from that building and identified co-defendants Maurin Chacon and Christopher Altamirano as the individuals he sold drugs with specifically excluding the Petitioner. [Trans. 2/12/15 p.m. session, p. 55]. Mr. Guzman identifies government exhibit 24 which is a building located between 5th and 6th street N.W. and 11th Avenue. [Trans. 2/12/15 p.m. session, p. 56]. He testified that Maurin Chacon and Christopher Altamirano sold drugs from

that location. [Trans. 2/12/15 p.m. session, p. 56]. Once again, the Petitioner was specifically excluded from any drug sales.

The government next had Mr. Guzman identify government's exhibit number 42 which is a building located at 11th avenue and 5th street N.W. Mr. Guzman identified the Petitioner as one of four alleged BMT members that he saw at that building. [Trans. 2/12/15 p.m. session, p. 56]. He then states that all of the co-defendants sold drugs there except for the Petitioner. [Trans. 2/12/15 p.m. session, p. 56]. Mr. Guzman then identifies government exhibit number 36 another building on 11th Avenue and 5th street. He testified that he saw Maurin Chacon, Christopher Altamirano, Rodolfo Portela, and James Dixon at that house. [Trans. 2/12/15 p.m. session, p. 57]. He then was asked what happened at the building. [Trans. 2/12/15 p.m. session, p. 57]. He responded that drugs were sold from marijuana to crack cocaine to pills. [Trans. 2/12/15 p.m. session, p. 57]. Mr. Guzman then is not asked whether the Petitioner was one of the individuals that sold the drugs, which drugs and in what amounts.

Mr. Guzman is asked by the government to go through 16 different names of individuals that he has identified as selling drugs. [Trans. 2/12/15 p.m. session, pp. 52-65]. None of the people he identified was the Petitioner. [Trans. 2/12/15 p.m. session, pp. 52-65]. The government then specifically asks if there were any BMT

members that sold drugs at night. [Trans. 2/17/15, p. 12]. Mr. Guzman then says that one individual sold at night, Angel Martinez. [Trans. 2/17/15, p. 12-13]. The government then inquired of Mr. Guzman who sold during the day. [Trans. 2/17/15, p. 13]. Mr. Guzman gave a roll call of BMT members; Christopher Altamirano, Maurin Chacon, myself, Raymond Moore, James Dixon, Carlos Tinoco. [Trans. 2/17/15, p. 13]. Noticeably absent was the Petitioner. The testimony of Mr. Guzman established that the Petitioner doesn't sell drugs in the day or at night. The conclusion from Mr. Guzman's testimony is that the Petitioner doesn't sell drugs with BMT members.

Mr. Guzman testified about a store that BMT members hung out and sold to drug customers on 12th avenue and 4th Street. [Trans. 2/17/15, p. 14]. Mr. Guzman described how BMT members would hang out at the store and sell to customers every day. [Trans. 2/17/15, p. 14]. He then named the BMT members that conducted that activity; Christopher Altamirano, Maurin Chacon, myself, Raymond Moore, Angel Martinez and Luis Salas. [Trans. 2/17/15, p. 14]. Noticeably absent from the list of drug sellers is the Petitioner.

In regards to attempting to establish the amount of cocaine being sold the government uses the testimony of Mr. Guzman to extrapolate an amount. [Trans. 2/17/15, p. 19]. He testified that he sold drugs everyday amounting to 1 to 2

grams per sale. [Trans. 2/17/15, p. 19]. Mr. Guzman is then asked was he present when BMT members would sell drugs and what BMT members were present when he would sell drugs. [Trans. 2/17/15, p. 19]. He stated 5 BMT members and includes Petitioner as one of those individuals that was present. [Trans. 2/17/15, p. 19]. Notably he earlier testified that the Petitioner was not one of the individuals that sold in the day or night. [Trans. 2/17/15, p. 12-13]. The question was phrased by the government as to who was present when he sold. Not who was selling with him. Thus taking Mr. Guzman's testimony as a whole he affirms that Petitioner was not selling drugs with him. He is then asked if he was present while those individuals sold drugs and he responded in the affirmative. However, that is inconsistent to his earlier testimony when he was asked to specifically name who sold drugs during the day and the night and omitted Petitioner as being a seller of drugs during the day or night. [Trans. 2/17/15, p. 12-13].

Mr. Guzman testifies that he was present when BMT members would join up with others to purchase drugs but he never indicated which BMT members he was referring to. [Trans. 2/17/15, p. 20].

In regards to firearms being possessed by Petitioner the government relies on the testimony of Mr. Guzman who states that in 2013 the Petitioner would be present with a firearm when he was selling narcotics. [Trans. 2/17/15, p. 22]. Mr.

Guzman stated that this happened between five to seven times in 2013. [Trans. 2/17/15, p. 22]. Mr. Guzman did not state any quantities of drugs that were being sold during those 5 to 7 times and also did not state that Petitioner sold drugs during those occasions. [Trans. 2/17/15, p. 19-22]. Mr. Guzman guesses that he knew the Petitioner for only 3 to 4 months in 2013. [Trans. 2/17/15, p. 94-95]. Therefore, his basis of knowledge is only for a short time in 2013. Mr. Guzman does not state whether he knew at the time he met Petitioner if he was aware if Petitioner was a member of the conspiracy or whether at that time if he knew the amount of drugs that BMT was selling.

The testimony of defendant Zerquera corroborates that Petitioner was not selling drugs out of any of the BMT traps as early as 2008 and going into 2014. [Trans. 2/19/15, p. 39]. When he was asked who would be at the BMT traps he named in addition to himself Ali, Patron and C-Lo. [Trans. 2/18/15, p. 64]. Then when asked who was out at the traps in 2014 he said the "same people." [Trans. 2/18/15, p. 64-65]. Again, specifically not naming the Petitioner as being involved in any trap activity. [Trans. 2/18/15, p. 64-65].

The government then went on to use Mr. Zerquera's testimony to attempt to nail down amounts being sold by the conspiracy. Mr. Zerquera stated that he would sell three grams of cocaine and crack cocaine a day [Trans. 2/18/15, p. 83].

When asked about BMT members as a group Mr. Zerquera stated that with 6 people working they would sell between 16 to 18 grams a day. [Trans. 2/18/15, p. 84]. However, when specifically asked if he ever saw Petitioner selling drugs he stated "no." [Trans. 2/19/15, p. 25]. What Mr. Zerquera's testimony established is that BMT members were selling drugs however Petitioner was not one of them.

A conspirator is responsible for conspiracy activities in which he is involved, and for drugs involved in those activities, and for subsequent acts and conduct of co-conspirators, and drugs involved in those acts or conduct, that are in furtherance of the conspiracy and are reasonably foreseeable to him. *United States v. Chitty*, 15 F.3d 159, 162 (11th Cir. 1994); quoting *U.S. v. Beasley*, 2 F.3d 1551, 1561 (11th Cir.1993); *U.S. v. Ismond*, 993 F.2d 1498, 1499 (11th Cir.1993). To determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation. If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports that amount of drugs attributed to the defendant. The government

must establish the quantity of drugs by the preponderance of the evidence. *United States v. Beasley*, 2 F.3d 1551, 1561 (11th Cir. 1993).

In the case of United *States v. Ismond*, 993 F.2d 1498 (11th Cir. 1993), the Defendants were convicted of possession of cocaine and related drug charges. The trial court imposed enhanced sentences, and defendants sought review. They contended that the trial court erred when it imposed sentences based on the total amount of drugs and that the trial court was required to make a finding of the amounts of drugs attributable to them individually and to base the sentence on the individual amounts. The court reversed and remanded. It found that under U.S. Sentencing Guidelines Manual § 1B1.3, the trial court was required to make individualized findings that pertained to the scope of criminal activity undertaken by a particular defendant and that the government was required to establish the quantity of drugs by the preponderance of evidence. Therefore, the trial court was required to make a finding of the individual amount attributable to each defendant. *Id* at.1499.

In the case *sub judice* there was no particularized finding of the amount of crack cocaine attributable to the Petitioner. The testimony established that in fact no cooperating defendant or special agent ever established what quantities of crack, marijuana or meth was ever sold by the Petitioner. Therefore, there is

insufficient evidence to state that the Petitioner was entitled to be enhanced to a mandatory sentence for selling more than 28 grams of crack cocaine as stated in count I of the Superseding Indictment.

B. It Was Not Shown That It Was Reasonably Foreseeable for the Petitioner to Be Held Responsible for 28 grams of Crack Cocaine as Part of a Conspiracy as Alleged in Count I of the Second Superseding Indictment.

Count I of the Superseding Indictment includes a reasonable foreseeability requirement, it states:

> Did knowingly and willfully combine, conspire, and agree with each other and with other persons known and unknown to the Grand Jury to possess with intent distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of title 21, United States Code, Section 846.
>
> With respect to each defendant, the controlled substance involved in the conspiracy attributable to each defendant as a result of his own conduct, and the conduct of other conspirators **reasonably foreseeable to him**, is two hundred eighty (28) grams of crack cocaine, commonly referred to as "crack cocaine," in violation of Title 21 United States Code, Section 841(b)(1)(A)(iii). *(Emphasis added)*

In order for the Petitioner to be held responsible for 28 grams of crack cocaine as alleged in Count I, the government can prove that the Petitioner himself sold or distributed 28 grams of crack cocaine or that it was reasonably foreseeable by the Petitioner that his co-conspirators did. As discussed *supra* the testimony does not establish that the Petitioner reasonably foresaw the amounts being sold by alleged co-conspirators. This is highlighted by the fact that when these amounts of drugs were sold the defendant was not even present. None of the cooperating witnesses established that the defendant knew how much or what was being sold. Therefore, the government never established what amounts of drugs were reasonably foreseeable to the Petitioner.

II. The Court Erred When Petitioner's Motion to Suppress a Firearm, Ammunition and Post Arrest Statements That Were Procured on November 18, 2013 Were Denied. The Court Further Erred When Post Arrest Statements Stemming From The Arrest on November 18, 2013 That Were Procured as Fruit of the Poisonous Tree and Taken From the Petitioner on November 27 Were Not Suppressed.

A. The Petitioner Had Standing. The Circuit Court's Finding That There was no Standing to Contest the Search of the Motor Vehicle is in Conflict with the Third and Fifth Circuit Court of Appeals.

The Petitioner vehicle in which he was a passenger was stopped after officers claimed that the vehicle was driving on the wrong side of the road. [D.E. 1435, p. 10]. That stop was not challenged by the Petitioner in the District court. However, the search of the vehicle was. [D.E. 32]. Since the Petitioner was a passenger in the vehicle, the threshold issue raised by the facts in this case is whether the Petitioner has standing to challenge the search of his girlfriend's car where the officers discovered the firearm. A defendant challenging a search and seizure based upon the Constitution's Fourth Amendment bears the burden of showing standing, i.e., establishing that the government violated his or her own rights. *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978). The *Rakas* court did set out general guidelines for determining standing to challenge a search, indicating that a movant must have had a "legitimate expectation of privacy" in the premises being searched in order to challenge the search. *United States v. Miller*, 821 F.2d 546, 548 (11th Cir. 1987). "Standing to challenge a search requires that the individual challenging the search have a reasonable expectation of privacy in the property searched . . . and that he manifests a subjective expectation of privacy in the property searched." *United States v. Baker*, 221 F.3d 438, 441 (3d Cir. 2000). "The individual's expectation, viewed objectively, [must be] justifiable under the circumstances." *Smith v. Maryland*, 442 U.S. 735, 740-41, (1979). The individual

challenging the search bears the burdens of proof and persuasion. *United States v. Cooper*, 133 F.3d 1394, 1398 (11th Cir. 1998)

In the case *sub judice* the Petitioner had a plethora of criteria that established a justifiable reasonable expectation of privacy in the search of the passenger side of the car. Petitioner used the car many times in the past. [D.E. 1435, p. 106]. He paid to repair the car. [D.E. 1435, p. 107]. He put gas in the car and had permission to use any time he wanted. [D.E. 1435, p. 107]. He had his own key to the car which gives him access to the car without having to ask the owner when he wants to use it. [D.E. 1435, pp. 107-108]. He would leave his personal belongings in the car including his house keys. [D.E. 1435, pp.109-110].

There have been many instances where a non-owner of a vehicle has been found to possess standing to challenge a Fourth Amendment search.[2] On the other hand, a driver using a vehicle with the permission of an absent owner has been found to possess a reasonable expectation of privacy therein. See *United States v. Garcia*, 897 F.2d 1413, 1416-18 (7th Cir.1990). At least one court has extended this privacy right to a driver who had the absent renter's permission. See *United*

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[2] *United States v. Cooper*, 133 F.3d 1394, 1398 (11th Cir. 1998) (finding standing to challenge search of car borrowed from friend), cert. denied, 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241 (1981); United States v. Posey, 663 F.2d 37, 41 (7th Cir. 1981) (car borrowed from wife), cert. denied, 455 U.S. 959, 102 S. Ct. 1473, 71 L. Ed. 2d 679 (1982); United States v. Williams, 714 F.2d 777, 779 (8th Cir. 1983) (car borrowed from uncle's girlfriend); United States v. Griffin, 729 F.2d 475, 483 (7th Cir.) (car borrowed from brother), cert. denied, 469 U.S. 830, 105 S. Ct. 117, 83 L. Ed. 2d 60 (1984); United States v. Rose, 731 F.2d 1337, 1343 (8th Cir.) (car borrowed from sister), cert. denied, 469 U.S. 931, 105 S. Ct. 326, 83 L. Ed. 2d 263 (1984).

States v. Kye Soo Lee, 898 F.2d 1034, 1038 (5th Cir.1990). "No one circumstance is talismanic to the *Rakas* inquiry." *U.S. v. Pitt*, 717 F.2d 1334 (11th Cir 1983). The *Kye Soo Lee* Court found that "while property rights are clearly a factor to be considered, they are neither the beginning nor the end of the inquiry. Other factors to be considered in making a determination of whether a defendant has an expectation of privacy whether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises." *Kye Soo Lee* at 1155.

The Third Circuit in *Baker* (supra), made it clear that a person who borrows a car from its owner has standing to challenge the search of that vehicle. To the extent that the Eleventh Circuit has denied standing in this case the Eleventh Circuit is directly in contravention to the Third Circuit who would clearly grant the Petitioner standing in this case.

The Petitioner presented ample evidence to the District court that he had a possessory interest in the vehicle. His personal items, house keys and his own personal key to the car that he entered into evidence demonstrates that he would have every reason to believe that he would be free from government invasion while

he was in the vehicle. It is abundantly clear that he has standing to contest the unconstitutional search in this case.

B. The Officers Did Not Have A Valid Basis To Search The Automobile.

All searches that are conducted without a warrant must comport with the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "The burden is on those seeking the exemption to show the need for it. *Coolidge v. N.H.*, 403 U.S. 443, 454-55, (1971). The government may assert that the search of the automobile can be justified as incident to a lawful arrest. *United States v. Robinson*, 414 U.S. 218, 233 (1973). A warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel v. California*, 395 U.S. 752, 760 (1969).

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search of it is reasonable to believe the vehicle contains evidence of the offense of

arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009).

It is undisputed that at the time the officers searched the Petitioner's girlfriend's vehicle he was not in the vehicle. [D.E. 1435, p. 11]. He was ordered to move to the police vehicle to the assisting officers by Officer Segovia. [D.E. 1435, p. 11]. Once he was away from the subject vehicle it was searched without consent of the Petitioner or his girlfriend. [D.E. 1435, p. 116]. He could not exert any control of the vehicle nor could he destroy any potential evidence. In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. *Arizona v. Gant*, 556 U.S. 332, 343, (2009).

The Petitioner gave no basis to believe that there was any criminal material within the automobile. He readily admitted that he had a bag of marijuana in his pocket not in his car. He told Officer Segovia that the marijuana was on his person while he was outside the vehicle. [D.E. 1435, pp. 113-114]. He then showed Officer Segovia the marijuana while he was outside the vehicle. [D.E. 1435, p. 114]. The marijuana was clearly a small personal use amount and there was nothing about the Petitioner's assertion that indicated there would be other criminal

materials inside the car. The officer indicated that he saw small crumbs of marijuana on the floorboards but that was after the officer had entered the vehicle without a warrant and while the Petitioner was removed from the vehicle. [D.E. 1435, p. 11]. Officer Segovia claimed that he smelled marijuana coming from the car. [D.E. 1435, p. 11]. However, that was denied by the Petitioner who testified neither he nor his girlfriend smoked marijuana that day and the car had been cleaned so no odor existed. [D.E. 1435, p. 117]. Further, Officer Weaver testified that when he looked inside the car he saw no granules of marijuana on the floor board nor did he smell any marijuana emanating from the car. [D.E. 1435 p. 50]. Thus, the automobile exception to the search of the vehicle does not apply.

Lastly, the government may claim that the firearm and the marijuana was in plain view and therefore the search would be subject to the plain view exception. The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. *Texas v. Brown*, 460 U.S. 730, 738, and n. 4, 741-742 (1983). The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in

that item is lost; the owner may retain the incidents of title and possession but not privacy. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

The testimony in this case reveals that Officer Segovia did not see the firearm while he was outside the car. [D.E. 1435, pp. 11-12]. After the Petitioner was moved from away from the vehicle the officer searched the car. [D.E. 1435, pp. 11-12]. It was at that time that office Segovia claims that he saw small marijuana granules on the car floor. [D.E. 1435, pp. 11-12]. His testimony did not reveal that he saw the marijuana on the floor or the gun underneath the seat prior to entering the car. [D.E. 1435, pp. 11-12]. Therefore, the plain view exception does not apply here.

C. The In Custody Statement Given By Petitioner on November 27, 2013 Was Taken in Violation of Petitioner's Sixth Amendment Right To Counsel and the Eleventh Circuit's Decision is in Conflict With the Second and Eight Circuit Courts of Appeal.

On November 27, 2013 Agent Perez and Detective Bernat went to the Dade County Jail to serve a warrant for DNA on the Petitioner. [D.E. 1435, pp. 63-64]. The officers knew that the Petitioner had been placed under arrest for the November 18th charge of felon in possession of a firearm by the Miami-Dade Police Department. [D.E. 1435, p. 56]. The officers being experienced law

enforcement knew that the Petitioner would have had to attend a bond hearing in the state system the day after the arrest and would have received counsel at that appearance. [D.E. 1435 pp. 58, 94, 118]. At the time of the interview nine days had passed since the Petitioner's arrest. [D.E. 1435, pp. 63-64]. The parties did not dispute that Petitioner had been appointed a public defender on November 19th, 2013, the day after his arrest and that a written invocation of rights had been filed on Petitioner's behalf. [D.E. 1435 pp. 58, 94, 118].

The government argued at the suppression hearing that the application of the dual sovereignty doctrine superseded Petitioner's prior invocation of his right to counsel for the charged state offense. Under the dual sovereignty doctrine the right to counsel does not attach to Petitioner's uncharged federal drug offenses, if the federal offenses are separate from the state drug offense. *U.S v. Burgest,* 519 F.3d 1307 (11th Cir. 2008). In *Burgest*, the defendant was charged in state court with possession of cocaine and had invoked his right to counsel on those state charges. Subsequently, Burgest was interviewed by federal agents on a separate case with a charge of possession of crack cocaine with intent to distribute. The *Burgest* court held that "because the Sixth Amendment right to counsel is offense specific, Burgest's prior invocation of his right to counsel for the charged state offense did

not attach to Burgest's uncharged federal drug offenses if the federal offenses are separate offenses from the state drug offense. *Id.* at 1310.

The facts indicate that the federal case and the state case were in fact the same case. The agent and detective were at the jail to serve a warrant for DNA to get samples for the gun that was found in an incident that occurred on July 26, 2013, where the Petitioner was charged with possession of a firearm and possession of ammunition. [D.E. 1435, p. 62; p. 75]. However, the agent was fully aware of the November 13th, 2013 arrest and charges of the Petitioner for possession of a firearm by a convicted felon and possession of marijuana prior to going to serve the warrant on the Petitioner. [D.E. 1435, p. 61; p. 14]. The agent placed in his warrant the new November 13th arrest. [D.E. 1435, p. 61]. Detective Bernant had told Agent Perez that Petitioner was a member of BMT. [D.E. 1435, p. 63]. Detective Bernant was also the detective involved in the arrest of Petitioner on July 26, 2013. [D.E. 1435, p. 62].

The dual sovereignty doctrine has been rejected by the Second and the Eight Circuits. In *United States v. Mills*, 412 F.3d 325 (2d Cir. 2005). The Second Circuit rejected the government's argument that because the state gun charges (unrelated to the federal charge) were prosecuted by separate sovereigns,

Defendant's Sixth Amendment right to counsel did not attach as to the federal charge:

> We hold that the statements obtained in violation of Mills' right to counsel as to the state proceedings must also be suppressed in the federal proceedings because the two proceedings were for the "same offense," each requiring proof of identical essential elements. Under [Texas v.] Cobb, the Sixth Amendment right of counsel extends to offenses considered to be the "same offense" as those to which the right has already attached even when they are prosecuted by different sovereigns.
>
> *Mills* at 327

In *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002), the Eighth Circuit rejected the government's separate sovereign argument that the tribal and federal criminal complaints for the same rape did not charge the same offense, because the rape violated the laws of two separate sovereigns. In that case, the Eighth Circuit noted that "the tribe and the U.S. worked in tandem to investigate the rape." *Id.* at 715. The *Red Bird* court specifically rejected the application of the dual sovereign argument finding that the Sixth Amendment right to counsel attaches after adversarial proceedings are initiated against the defendant. *Red Bird* at 715.

Clearly, Agent Perez knew that she was going to see Petitioner on the same case that he had been arrested for on November 13th. The November 13th arrest was a part of the warrant. Therefore, because the state case was the same case for which the Petitioner was indicted, the dual sovereignty doctrine does not apply.

The Sixth Amendment right to counsel still attaches to the Petitioner and therefore all statements that were taken by Agent Perez are subject to suppression. The Petitioner was charged federally for the November 18th arrest in Counts III, IV and V of the Superseding Indictment.

In the alternative, if the court finds that the dual sovereignty doctrine applies, an exception to the doctrine exists. This exception arises when "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery" of the other sovereign or "if it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's Sixth Amendment right to counsel." *Burgest*, at 1311 n.5 (11th Cir. 2008)

It was clear that the federal government was dominating and controlling the prosecution of the Petitioner. Agent Perez had gathered the arrest documents on Petitioner's July arrest from the City of Miami to review the case for possible federal charges. [D.E. 1435, p. 77]. Agent Perez then met with a City of Miami Detective to gather even more information on Petitioner for the possible usurpation of federal jurisdiction. [D.E. 1435, p. 78]. The Agent also received a City of Miami operational plan that was specific to the arrest and prosecution of Petitioner on state charges as well as a gang clearing house statement. [D.E. 1435, p. 78]. The City of Miami informed Agent Perez that the Petitioner's arrest on July 26th

was due to the City's investigation of BMT. [D.E. 1435, p. 79]. Agent Perez then contacted an Assistant United States Attorney to request working together to obtain a DNA search warrant for Petitioner. [D.E. 1435, p. 80]. ATF subsequently joined with the City of Miami for a joint task force to investigate BMT. [D.E. 1435, p. 81]. ATF then provided funds for buy and walk operations where narcotics are purchased from suspected BMT members. [D.E. 1435, p. 82]. The City of Miami and ATF then entered into a joint operational plan to investigate BMT. [D.E. 1435, p. 85]. It was the idea of Agent Perez to prepare a federal search warrant as opposed to the City of Miami proceeding on a state warrant. [D.E. 1435, p. 103]. The federal government took progressive steps to dominate the prosecution of the defendant. The City was doing their own investigation until the federal government took over the case, financed it, and issued federal warrants and then federal charges. The federal agent circumvented the Petitioner's Sixth Amendment rights though he had reason to know that the Petitioner was represented by state counsel and had invoked his Sixth Amendment privilege. As such all of the statements given to the Agent and the Detective on November 27, 2013 should be suppressed by the court.

III. The Court Erred When It Did Not Grant A Judgment of Acquittal on Count V, Possessing a Firearm in Furtherance of a Drug Trafficking Crime, Because There Was Insufficient Evidence That Petitioner Possessed Marijuana In Furtherance of a Drug Trafficking Crime.

Count V charged Petitioner with possessing a firearm in furtherance of a drug trafficking crime on November 18, 2013, in violation of 18 U.S.C. § 924(c)(1)(A)(i). [D.E. 39]. The Eleventh Circuit has determined that to prove possession "in furtherance of" a drug crime under 18 U.S.C. § 924(c)(1)(A), the government must establish that "the firearm helped, furthered, promoted, or advanced the drug trafficking." *United States v. Mercer*, 541 F.3d 1070, 1076 (11th Cir. 2008). In *Mercer* a nexus was found where two bags containing a "crystal substance" were found in a hotel room along with a handgun, baggies and a drug ledger under a bed mattress.

In the instant case the Petitioner's possession of half a gram of marijuana is insufficient evidence of a drug trafficking crime. There was no other evidence confiscated where it could be inferred that a drug trafficking crime was being engaged in such as in *Mercer*.[3] Further, there is no nexus between the firearm and

[3] See Also *United States v. Molina*, 443 F.3d 824 (11th Cir. 2006) - nexus found where firearm was located in night stand drawer in close proximity to almost 40 grams of cocaine, two digital scales and almost $300,000 in currency; *United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002) – nexus found where two firearms were located on top of

ammunition found underneath the seat and a drug trafficking crime. The Petitioner testified that he was on the way to the store to purchase a cigarette that he would empty and place the marijuana inside to personally smoke it. [D.E. 1435, p. 114-115]. The marijuana was packaged in a single baggie not multiple baggies that may indicate sale. [D.E. 1435, p. 114-115].

Additionally, there is insufficient evidence that the Petitioner was engaged in a drug trafficking crime at the time of his arrest. Petitioner was a passenger in a car stopped outside a store. There was no evidence presented that he was meeting someone at the store to conduct a drug trafficking crime. Half a gram of marijuana can hardly be said to be the subject of drug trafficking. Clearly, the government overcharged the defendant. With many states making lawful personal use and Miami-Dade County now giving officers discretion as to whether to criminally charge defendants with personal amounts of marijuana, it is a stretch to treat a half a gram of marijuana as being indicative of a drug trafficking crime. Therefore, the court erred in not granting a judgment of acquittal on Count V.

IV Whether the Court Made a Sufficient Determination That the Petitioner Was Competent to Waive His Right To Appeal.

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a stove top oven in defendant's apartment in close proximity to a bullet-proof vest, over 35 grams of crack cocaine in the stove and under the cushions of a couch and $350.00 inside a drawer under the stove.

During the sentencing hearing the counsel for the Petitioner and the government entered into a letter agreement where the government agreed to pursue one predicate conviction In the United States' Notice of Intent to Seek Enhanced Penalties Pursuant to 21 U.S.C. 851 that the government had filed on February 6, 2015. [D.E. 1431 p. 2; D.E. 801].[4] The effect of the letter agreement was to take the Petitioner from being subject to a mandatory life sentence for the violation of Count I, 21 U.S.C. 851 for having two or more predicate felonies, to a minimum term of 20 years and a maximum term up to life with the agreement to only use one predicate felony. [D.E. 1431, ¶ 3]. However, the evidence in possession of defense counsel clearly showed that the defendant had cognitive deficits that would not allow the defendant to be able to make a cogent decision involving the letter agreement that had contained many complex terms involving the sentencing guidelines and mandatory sentences.

The Petitioner's defense counsel cited a neuro-psychological evaluation that was done on the Petitioner by Dr. Rolle. [D.E. 1465, p. 10]. He is an expert that has worked on cases related to the NFL and chronic head injuries. [D.E. 1465, p. 10]. Defense counsel read from Dr. Rolle's report at sentencing and stated how he was puzzled why the defendant made so many bad decisions and what he found

[4] The Petitioner had a total of three drug felony predicates that were cited in the government's Notice of Enhancement. [D.E. 801].

was that the defendant's "IQ was full scale at 78." [D.E. 1465, p. 10]. The Petitioner has a history of traumatic head injuries which impairs his ability to learn. His higher executive function is impaired and his impulse control is impaired due to deficits in his frontal lobe. [D.E. 1465, p. 11]. The attorney for the defendant used the information from Dr. Rolle for negotiating a letter agreement rather than understanding that the defendant cannot fully comprehend the letter agreement due to its complexity and the defendant's cognitive deficits. This complete lack of understanding was evidenced by the defendant's letter to the court that was written 10 days after he was sentenced. The letter reveals that the defendant has no comprehension that he was sentenced to 30 years mandatory. The defendant is asking the court to correct the PSI to lower his point total. [D.E. 1430]. He has no comprehension that none of that matters in light of the mandatory provisions of Count I, 21 U.S.C. 841.

The validity of a sentence-appeal waiver is a question of law that is reviewed de novo. *United States v. Copeland*, 381 F.3d 1101, 1104 (11th Cir. 2004). The Eleventh Circuit has consistently held that a sentence-appeal waiver is valid if a defendant enters into it knowingly and voluntarily. *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006). In order to establish that the waiver was knowing and voluntary, the government must demonstrate that either "'(1) the

district court specifically questioned the defendant about the waiver during the plea colloquy, or (2) the record clearly shows that the defendant otherwise understood the full significance of the waiver.'" *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir.)

The record shows that the court did not question the defendant as to his understanding of the terms of the letter agreement. The Court was specifically asked about the knowing and voluntary requirement for purposes of the plea waiver and the court stated as follows:

> Mr. Vasquez: I don't know if the Court wants to find this appeal waiver—the Court makes a finding it is knowing and voluntary. I'm not sure; since he signed that he agreed to such waiver by the letter agreement.
>
> The Court: I think by the letter agreement it was required that the Court make a finding; and therefore based on my discussion with Mr. Portela earlier today I do find that the waiver was knowing and voluntary.[5] [D.E. 1465, p. 21].

The court engaged in a standard set of questions that were leading in nature requiring the defendant to respond yes or no. In light of the particularized knowledge that was at the court's disposal about the defendant's mental status the court was required to ensure that the defendant understood the minimum mandatory sentence, the guidelines and that he was agreeing to thirty years and

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[5] The Court did inquire in a leading fashion if the defendant signed the agreement; talked about it with his lawyer; that an 851 enhancement was filed against him which required a mandatory life sentence; that based on one prior felony that the recommendation was 30 years; that his motions were being withdrawn; whether he was forced or threatened. [D.E. , pp. 6-8].

waiving any right to contest the proceedings by giving up his right to appeal. A standard set of leading questions to a person who had been diagnosed with Cognitive Disorder Not Otherwise Specified related to multiple traumatic brain injuries does not manifest a knowing and voluntary relinquishment of appellate rights. [Ex. 2 sealed, p.7]. At the time he was evaluated the defendant had a current diagnoses of "atypical depressive disorder and unspecified psychosis." [Ex. 2 sealed, p. 2]. The medical records also state that he has a significant psychiatric history and has been psychiatrically hospitalized and has a history of suicide attempts. [Ex. 2 sealed, p. 2]. While incarcerated in the federal system the defendant was receiving antidepressant and antipsychotic medications. [Ex. 2 sealed, p. 2]. The defendant has a history of chronic mental illness and treatment for psychiatric symptoms of depression, bipolar disorder and psychosis. His general cognitive ability was found to be in the Boderline Intellectually Impaired range of intellectual functioning. [Ex. 2 sealed, p. 4]. The Petitioner's IQ was in the Borderline Intellectually Impaired range and better than only 7% of the normative sample. [Ex. 2 sealed, p. 6]. The Petitioner was found to have significant diminished general intellect. [Ex. 2 sealed, p. 6].

This is even more problematic because the attorney representing the defendant at sentencing was not the attorney who represented the defendant at trial.

The trial attorney had retired and the court appointed new counsel for purposes of sentencing. [D.E. 1041]. The relationship between the defendant and sentencing counsel did not have sufficient time to develop and trial counsel did not see the fact that the defendant lacked the ability to make an informed decision on the appellate waiver or the consequences of accepting the plea. Therefore, in light of the psychological knowledge of the defendant that was given to the court and in the possession of defense counsel, the record does not reflect a knowing and voluntary relinquishment of the right to appeal.

V. The Court Failed To Conduct a Competency Hearing When the Evidence of Plaintiff's Mental Infirmities Were Presented

Based on all the evidence of mental infirmities aforementioned the court should have *sua sponte* conducted a competency hearing to determine if the defendant was competent to plead guilty and fully understand the legal ramifications of his actions. The court violated the defendant's procedural due process rights by failing to conduct, *sua sponte*, a competency hearing. The *Due Process Clause* prohibits the state from trying and convicting a mentally incompetent defendant. *Drope v. Missouri*, 420 U.S. 162, (1975); *James v. Singletary*, 957 F.2d 1562, 1569 (11th Cir. 1992) A defendant's competence to stand trial depends on whether he "has sufficient present ability to consult with his

lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." *Drope*, 420 U.S. at 172 . In *Pate v. Robinson,* 383 U.S. 375 (1966), the Supreme Court established that due process requires a trial court to conduct a competency hearing, on its own initiative, when the objective facts known to the trial court at the time create a "bona fide doubt" as to the criminal defendant's competency. *Pate* at 385; see also *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983) (standard of review is "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial"). Relevant factors to consider when assessing whether there existed a bona fide doubt regarding competency include: (1) a defendant's irrational behavior; (2) his demeanor at trial; and (3) any prior medical opinion on his competence to stand trial. *Drope*, at 180.

It is clear that when the court was faced with the depth of traumatic brain injury and mental deficits that the Petitioner presented that a *sua sponte* hearing should have been conducted to determine the Petitioner's competency. "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused

unable to meet the standards of competence." *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

The trial court and the Eleventh Circuit's decision to affirm the trial court is in contravention and in conflict with, this Court's decision in *Drope v. Missouri* (supra). *Drope* is unequivocal in its requirement that an accused must be competent at important points of a legal proceeding including plea colloquies. The trial court's failure to conduct an inquiry into the Petitioner's mental capacity was fatal to the plea itself.

Based on the psychological evaluation, doubt has been cast as to whether the Petitioner was competent to stand trial in the first instance. The court's competency hearing should also consider whether the trial should be vacated for the defendant's inability to participate in the trial while competent. As stated in *Drope supra*, the government violates due process by convicting an individual that is incompetent. The case should thus be remanded for retrial if the court deems the competency issue tainted the Petitioner's trial or a competency hearing to determine if resentencing is capable in light of the medical evidence that shows the Petitioner's due process rights were violated.

REASONS FOR GRANTING THE WRIT

The Eleventh circuit improperly found that there was sufficient evidence to conclude that the Petitioner was foreseeably responsible for 28 grams of cocaine in violation of Count I. The Court erred when it found that the Petitioner did not have standing to challenge the illegal search of the vehicle which led to criminal fruits of a small amount of marijuana and a firearm. The Court further erred when it failed to suppress a firearm and ammunition that was unconstitutionally obtained and to suppress statements flowing from the illegal search. The Court erred when it found sufficient evidence that the Petitioner possessed marijuana in furtherance of a drug trafficking crime. The Court erred when it did not conduct a *sua sponte* hearing to determine the Petitioner's competency. The counsel for the defense was legally ineffective for his failure to not request a competency hearing.

CONCLUSION

For the reasons stated here the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted
GREGORY A. SAMMS, ESQ.
Counsel for Petitioner
113 Almeria Avenue
Miami, FL 33137

(786) 953-5802 (tel)
(786) 513-3191 (fax)
Florida Bar No. 438863

BY: s/Gregory A. Samms

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was served via U.S. Mail upon the Solicitor General of the United States, U.S. Department of Justice, Washington D.C. 20530 and upon all counsel of record this 29th day of November, 2018.

BY:s/Gregory A. Samms

GREGORY A. SAMMS, ESQ.
Florida Bar No. 438863

Appendix

A 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14354

D.C. Docket No. 1:14-cr-20017-KMW-9

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES DIXON,
MAURIN CHACON,
RODOLFO PORTELA,
CHRISTOPHER ALTAMIRANO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 24, 2018)

Before WILLIAM PRYOR, JILL PRYOR, Circuit Judges, and RESTANI,* Judge.

WILLIAM PRYOR, Circuit Judge:

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* Honorable Jane A. Restani, United States Judge for the Court of International Trade, sitting by designation.

These consolidated appeals involve the convictions of four defendants who participated in a drug conspiracy in Little Havana, Miami. Maurin Chacon, Christopher Altamirano, Rodolfo Portela, and James Dixon were members of the self-described "Big Money Team," a gang of drug dealers who also committed robberies and illegally possessed guns as part of their conspiracy. A jury convicted the defendants of conspiracy to distribute 280 grams of cocaine base and several other charges of drug trafficking, firearm possession, armed robbery, and assault. All four defendants argue that the government presented insufficient evidence of a conspiracy. And they raise individual challenges about the sufficiency of the evidence for separate charges, the denial of a motion to suppress evidence, the refusal to give a jury instruction on entrapment, the admission of evidence of uncharged conduct, the prosecutor's closing argument, the failure to conduct a competency hearing, and the reasonableness of their sentences. We affirm.

I. BACKGROUND

For several years, the "Big Money Team," a gang of drug dealers in Little Havana, Miami, maintained a set of "traps," locations where members of the Team—and only members of the Team or their associates—sold drugs. Individual dealers cooperated to establish a marketplace with a reliable supply of drugs to attract customers to the exclusive territory of the Team. They manned a cluster of locations in close proximity. Some members of the Team also committed robberies

to sustain supplies. And some carried guns, especially when they were at the traps at night.

Two cooperating witnesses, Nadim Guzman and Dayaan Zerquera, provided key testimony about the Team. Guzman explained that being a member of the Team meant "[t]hat you [could] sell drugs and make money with them." He testified that members of the Team coordinated to supply drugs to the customers who visited the traps to buy drugs. Guzman explained that "if you had [what a customer wanted] on you, you could sell it." Otherwise, members would "bring[] customers to one another" to satisfy customers' demands and facilitate each other's sales. Some members also pooled their money to buy larger supplies of drugs. And they guarded against competition and disruption by warning nonmembers not to sell drugs near the traps, and by serving as lookouts for each other.

Guzman explained that he sold one to two grams a day of cocaine base, also known as crack cocaine, for 11 months in 2013. He also estimated that three to six members sold drugs at the traps at a time and that each sold about one gram a day. Zerquera testified that he sold two to three grams a day and estimated that the Team as a whole sold three to 18 grams a day, with average sales falling between 16 and 18 grams a day.

Chacon, Altamirano, Portela, and Dixon were all members of the Team. Although the Team had no official "boss" who gave members orders, the Team

had an internal hierarchy. Members would "gain respect" or "lose respect" based on perceived contributions, including a reputation for violence and participation in robberies. Chacon and Altamirano were "top guys" who "call[ed] shots." They also participated in robberies and carried guns. Portela also carried guns.

The City of Miami Police Department started to investigate the Team in the summer of 2013. Detective David Bernat of the Gang Intelligence Unit coordinated surveillance of the traps and arranged for purchases of narcotics by a confidential informant. An undercover detective, Kenneth Veloz, also conducted controlled purchases from members of the Team and made video and audio recordings of their interactions.

On November 18, 2013, Officer David Segovia of the Miami-Dade Police Department stopped a car driving on the wrong side of the road. The driver was Portela's girlfriend, and Portela was in the front passenger seat. During the stop, Segovia "smell[ed] . . . marijuana" wafting from the vehicle, and Portela admitted to Segovia that he had a bag of marijuana on his person. Segovia looked inside the car and saw "loose particles" of marijuana on the floorboard. He also observed a gun under the front passenger seat. Another officer then informed him that there was an outstanding warrant for Portela's arrest. Segovia arrested Portela and put him in the police car.

Detective Thomas Wever arrived on the scene approximately two hours later and interviewed Portela. After Wever warned Portela of his rights to remain silent and to counsel, Portela signed a waiver of rights form. He explained that he bought the gun for protection, that it was loaded, and that he had been carrying the gun on his person before the stop, at which point he placed it under the seat.

Meanwhile, Agent Rosniel Perez of the Bureau of Alcohol, Tobacco, Firearms, and Explosives was investigating a separate incident involving Portela's illegal possession of a gun. Although Perez was still "considering whether to open a formal federal investigation," he obtained a search warrant for Portela's DNA shortly after Portela's arrest at the traffic stop. Perez then executed the warrant at the jail where Portela was being held on state charges after having been appointed counsel. When Perez presented the warrant, Portela initiated a conversation and stated that he "wanted to cooperate and make a deal." After Perez warned Portela of his rights and that Perez could not make any deals with him at that time, Portela waived his rights and made incriminating statements.

On November 20, 2013, Altamirano left a trap to go on a "mission" with another member. The duo robbed five people at gunpoint, taking cash and cell phones. As they fled the scene, Altamirano fired a shot from his gun. Altamirano and the other member then returned to the trap, where the robbers "talk[ed] about [the] robbery . . . and show[ed] [other Team members] . . . a phone and a wallet

they took." Police officers traced one of the stolen phones to the trap, where they found Chacon, Guzman, other members of the Team, cocaine base, other drugs, and a gun. The officers found Altamirano one block away.

On February 25, 2014, Veloz, the undercover detective, asked Chacon if he had guns for sale during a recorded conversation. Chacon said that he had a "couple" but "need[ed] some more" and mentioned that guns were "expensive right [then]." At a later meeting in Veloz's car, Chacon sold Veloz a revolver that he referred to as "[his] baby."

Also in 2014, Perez obtained search warrants for Team members' social media accounts. He collected posts in which members of the Team identified themselves, boasted about drug sales and violence, brandished weapons, and displayed the Team hand sign.

A federal grand jury indicted Chacon, Altamirano, Portela, Dixon, and several codefendants on one count of conspiracy to possess with intent to distribute 280 grams or more of cocaine base, 21 U.S.C. §§ 841(a), (b)(1)(A)(iii), 846, between 2011 and October 2014. The grand jury also indicted Portela on two counts of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1), one count of possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1), and one count of possession of a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c). The grand jury indicted Altamirano for assault with a dangerous

weapon in aid of a racketeering enterprise, *id.* § 1959(a)(3), for possession of a firearm in furtherance of a crime of violence, *id.* § 924(c), and for possession of cocaine base with intent to distribute, 21 U.S.C. § 841(a)(1). The grand jury indicted Chacon for two charges stemming from the same robbery—assault with a dangerous weapon in aid of a racketeering enterprise, 18 U.S.C. § 1959(a)(3), and possession of a firearm in furtherance of a crime of violence, *id.* § 924(c). The grand jury also indicted Chacon for possession with intent to distribute cocaine base, 21 U.S.C. § 841(a)(1), and possession of a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c), on the basis of the drugs and the gun that police found when they searched the trap after the November 20 armed robbery. And the grand jury indicted Chacon for possession of a firearm by a convicted felon, *id.* § 922(g)(1).

Before trial, Portela filed a motion to suppress the gun that police found in his girlfriend's car, his statements to Wever after he was arrested, and the statements he later made at the jail. After an evidentiary hearing, the magistrate judge recommended denying the motion. The district court adopted the report and recommendation of the magistrate judge.

The four defendants, as well as a fifth codefendant, went to trial in February 2015. After the parties rested, the district court granted Chacon's motion for a judgment of acquittal of the two charges against him for the November 20 armed

robbery. But the government argued in closing that the jury should convict Chacon of one of those charges. The district court then granted Chacon's motion to strike and instructed the jury to disregard the references to the acquitted counts. Chacon moved for a mistrial, but the district court denied the motion. The district court also refused Chacon's request for a jury instruction on entrapment as a defense to the count of possession of a firearm by a convicted felon. 18 U.S.C. § 922(g)(1). The jury convicted the four defendants on the counts involved in this appeal, but it acquitted the fifth codefendant.

The district court sentenced Chacon to 420 months of imprisonment, Altamirano to 235 months of imprisonment, and Dixon to 144 months of imprisonment. It sentenced Portela, who was facing a mandatory life sentence, to a term of 360 months after he negotiated a deal with the government not to appeal his sentence. At the sentencing hearing, Portela introduced some evidence that he had diminished mental capacity, but the district court found that he had knowingly and voluntarily waived his right to appeal.

II. DISCUSSION

We divide our discussion in several parts. First, we explain that sufficient evidence supports each defendant's conviction for the drug conspiracy. Next, we explain that the district court correctly denied Portela's motion to suppress evidence, that sufficient evidence supports his conviction for possession of a

firearm in furtherance of a drug-trafficking crime, that he was not entitled to a competency hearing, and that he waived his right to appeal his sentence. We then explain that sufficient evidence supports Altamirano's conviction for a violent crime in aid of racketeering. We next explain that sufficient evidence supports Chacon's convictions for possession of a firearm and for possession of narcotics and that the district court did not err when it admitted evidence of his uncharged conduct, when it refused to instruct the jury on entrapment, or when it denied his motion for a mistrial. We also explain that Chacon's sentence is procedurally and substantively reasonable. Finally, we explain that the remaining issues raised by the defendants are meritless.

A. Sufficient Evidence Supports Each Conviction for Conspiracy to Distribute 280 Grams of Cocaine Base

Chacon, Altamirano, Portela, and Dixon challenge the sufficiency of the evidence for their convictions for conspiracy to possess with intent to distribute 280 grams or more of cocaine base, 21 U.S.C. §§ 841(a), (b)(1)(A)(iii), 846, on several grounds. They argue that the government failed to prove the existence of a single conspiracy to sell drugs. And each defendant contends that insufficient evidence establishes that he joined that conspiracy. They also attack the sufficiency of the evidence about the quantity of drugs they conspired to distribute. "We review *de novo* the sufficiency of evidence." *United States v. Duperval*, 777 F.3d 1324, 1331 (11th Cir. 2015). But we must "view the evidence in the light most

favorable to the government and draw all reasonable inferences and credibility choices in favor of the jury's verdict." *Id.* (alterations adopted) (quoting *United States v. Demarest*, 570 F.3d 1232, 1239 (11th Cir. 2009)).

To establish a conspiracy, the government must prove that "a conspiracy (or agreement) existed," that the defendants "knew the essential [unlawful] objects of the conspiracy," and that the defendants "knowingly and voluntarily participated." *United States v. Green*, 818 F.3d 1258, 1274 (11th Cir. 2016) (quoting *United States v. Westry*, 524 F.3d 1198, 1212 (11th Cir. 2008)). And when the government attempts to prove that defendants were part of a single overarching conspiracy and not multiple smaller conspiracies, it may rely on evidence such as "whether a common goal existed [among the conspirators]," "the nature of the underlying scheme," and "the overlap of participants." *United States v. Richardson*, 532 F.3d 1279, 1284 (11th Cir. 2008) (quoting *United States v. Moore*, 525 F.3d 1033, 1042 (11th Cir. 2008)). "It is important to note that 'separate transactions are not necessarily separate conspiracies, so long as the conspirators act in concert to further a common goal. If a defendant's actions facilitated the endeavors of other co-conspirators, or facilitated the venture as a whole, a single conspiracy is established.'" *Id.* (alteration adopted) (emphases omitted) (quoting *Moore*, 525 F.3d at 1042).

The government presented ample evidence of a single conspiracy to sell drugs by members of the self-described "Big Money Team." It offered evidence of a common goal when Guzman testified that membership in the Team meant "[t]hat you [could] sell drugs and make money with them." It also introduced evidence that the Team maintained a set of "traps" where members of the Team—and only members or associates of the Team—sold drugs, shared customers, kept lookout for one another, and cooperated to supply the drugs that consumers demanded. For example, Guzman explained that "customer[s] would come" to the traps to buy narcotics, "and if you had [the drugs] on you, you could sell [them]." Otherwise, Team members would "bring[] customers to one another." He also testified that Team members would "split money" from certain drug sales. And Veloz testified about "an undercover drug [deal]" with Dixon and another member of the Team, whom Dixon asked to sell Veloz the "additional crack rock" needed to complete the deal. As we concluded in a similar case that also involved a common sales area and the sharing of customers and money, "[f]rom this evidence the jury was free to infer that [members of the Team] had a common goal: to deal in cocaine [base] and to provide a marketplace for cocaine [base], and an overlap of participants." *United States v. Brown*, 587 F.3d 1082, 1090 (11th Cir. 2009). Indeed, we have explained that such a "'marketplace' is at the heart of [a] conspiracy because those seeking cocaine [will] be drawn to a location and not to a particular dealer." *Id.* The

evidence established that members of the Team "facilitated the endeavors of other co-conspirators" and "the venture as a whole." *Richardson*, 532 F.3d at 1284 (emphasis omitted) (quoting *Moore*, 525 F.3d at 1042).

The defendants respond that the evidence instead establishes "several different conspiracies to buy and sell illegal drugs and to commit robberies" that involved only some of the defendants. They assert that individual dealers operated independent drug businesses at the traps. They stress that "[e]veryone bought for themselves and sold for themselves" and that "[t]here was no boss" who gave them "orders" about their drug sales. And they cite Zerquera's testimony that no one assigned Team members specific shifts at the traps and that "everybody would be selling at their own risk."

These arguments assume that a unified conspiracy requires a command-and-control structure, with one or more "boss" conspirators coordinating the actions of each player. But our precedents hold otherwise. We explained in *Westry* that "[individual] drug dealers" who collaborate "to achieve the overall results of their several efforts" can be conspirators—even if they "sometimes, or even always, compete for supplies or customers." *Westry*, 524 F.3d at 1213 (quoting *United States v. Johnson*, 54 F.3d 1150, 1154–55 (4th Cir. 1995)). Although the dealers in *Westry* sold drugs at separate locations and engaged in "healthy competition" with one another, we held that the "interrelatedness" of their operations and the manner

in which "their combined efforts produced a haven for the illegal distribution of drugs" established a conspiracy. *Id.* The same is true in this appeal. Members of the Team "act[ed] in concert to further a common goal," *Richardson*, 532 F.3d at 1284 (emphasis omitted) (quoting *Moore*, 525 F.3d at 1042), by "engaging in a consistent series of smaller transactions that furthered [the Team's] ultimate object of supplying the consumer demand of the market," *Westry*, 524 F.3d at 1213 (citation and internal quotation marks omitted). And even if the government did need to establish that the conspiracy had an internal control structure, the evidence suggests at least an unofficial hierarchy. Guzman testified that Chacon and Altamirano were "top guys" who "call[ed] shots"; indeed, they would "[t]ell people how to do [things], how to sell, where to go, who[m] to talk to, [and] who[m] not to talk to."

The defendants' individual arguments that the government failed to prove that they were members of the larger conspiracy are also unavailing. "Once the existence of a conspiracy is established, only slight evidence is necessary to connect a particular defendant to the conspiracy." *United States v. Garcia*, 405 F.3d 1260, 1270 (11th Cir. 2005) (quoting *United States v. Clavis*, 956 F.2d 1079, 1085 (11th Cir. 1992)). The cooperators identified all four defendants as Team members who sold drugs at the traps. Indeed, Guzman testified that he had served as a lookout for each of them.

The government also presented substantial corroborating evidence that the defendants "knowingly and voluntarily participated" in a single conspiracy. *Green*, 818 F.3d at 1274 (quoting *Westry*, 524 F.3d at 1212). Guzman distinguished between "an official member" of the Team and a mere "associate," and the defendants were members. Chacon boasted about the Team, saying "BMT we run the block" and "the block, we took it over." Altamirano forbade nonmembers from selling at the traps and warned Chacon about threats to the Team from possible informants or cooperators. These "efforts to conceal a conspiracy may support the inference that [Chacon] knew of the conspiracy and joined it." *United States v. Reeves*, 742 F.3d 487, 500 (11th Cir. 2014). Portela also attempted to "conceal [the] conspiracy," *id.*, when, after his arrest, he warned Chacon and "[the] boys" to "clear" out drugs. Although Dixon asserts that he never sold drugs "with anyone else," the testimony of a detective that he "participate[d] in an undercover drug transaction with . . . Dixon" contradicts his assertion. And Dixon displayed the Team hand sign in a picture with other members that was posted on social media.

The defendants respond that "mere presence at the scene of a crime is insufficient to support a conspiracy conviction" by itself, *United States v. McDowell*, 250 F.3d 1354, 1365 (11th Cir. 2001), but this argument misses the mark. The government did not rely only on evidence that the defendants were discovered at the scene of drug trafficking. It instead presented testimony that each

defendant in fact sold drugs, and it connected these sales through Guzman's testimony that he served as a lookout for each defendant. In any event, we have explained that "repeated presence" at trafficking sites is "material and probative" evidence "that the jury may consider." *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997) (citation and internal quotation marks omitted). Indeed, evidence that a defendant participated in just two drug transactions can establish that he joined the conspiracy. *See United States v. Lyons*, 53 F.3d 1198, 1202–03 (11th Cir. 1995). And the government presented evidence that the defendant with the briefest tenure on the Team, Dixon, sold drugs at the traps "[m]ore than a dozen" times. The evidence of frequent, coordinated drug sales rebuts each defendant's argument that he merely "decided to sell drugs by himself, for his own account, in front of the same areas where some of the people he knew were also selling."

The defendants also attack the veracity of the cooperators' testimony about the quantity of drugs that they conspired to distribute, but this challenge fails because "the jury has exclusive province over [witness credibility] and we may not revisit the question." *Green*, 818 F.3d at 1274 (quoting *United States v. Hernandez*, 743 F.3d 812, 814 (11th Cir. 2014)). Indeed, "[w]e will not disturb the jury's verdict 'unless the testimony is incredible as a matter of law.'" *Id.* (quoting *United States v. Flores*, 572 F.3d 1254, 1263 (11th Cir. 2009)). And "[f]or testimony of a

government witness to be incredible as a matter of law, it must be unbelievable on its face. It must be testimony as to facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *Calderon*, 127 F.3d at 1325 (alteration adopted) (citations and internal quotation marks omitted). The defendants provide no reason to conclude that the cooperating conspirators could not have possibly observed the operations of the conspiracy and the quantity of drugs sold by its members. The jury was entitled to credit their testimony.

B. The District Court Correctly Denied Portela's Motion to Suppress

Portela argues that the district court should have suppressed both the gun found in his girlfriend's car and his post-arrest statements because the search of the car violated his rights under the Fourth Amendment. He also contends that the district court should have suppressed statements he later made while in jail because of a violation of his Sixth Amendment right to counsel. A mixed standard of review applies to the denial of a motion to suppress. *See United States v. Barber*, 777 F.3d 1303, 1304 (11th Cir. 2015). "We review the district court's findings of fact for clear error and its legal conclusions *de novo*. All facts are construed in the light most favorable to the party prevailing below." *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015) (quoting *United States v. Virden*, 488 F.3d 1317, 1321 (11th Cir. 2007)).

1. Portela's Challenge to the Search of his Girlfriend's Car Fails

Portela's challenge to the warrantless search of the car fails for two independent reasons. First, he lacks standing to challenge the search because he lacked a reasonable expectation of privacy in the car. Second, the officers were entitled to search the car.

The Fourth Amendment prohibits "unreasonable searches and seizures," U.S. Const. Amend. IV, and this prohibition extends to cars, *see Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). But not every occupant has standing to challenge a flawed search. Instead, "[a] defendant has standing to challenge a . . . search if the defendant had a 'legitimate expectation of privacy' in the property when it was searched." *United States v. Gibson*, 708 F.3d 1256, 1276 (11th Cir. 2013) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). An expectation of privacy is reasonable if "it 'has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). "We have held that a 'passenger in a private car, who has no possessory interest in the automobile, does not have a legitimate expectation of privacy in the interior of the automobile because he does not have the right to exclude others from the car.'" *United States v. Lee*, 586 F.3d 859, 864 (11th Cir.

2009) (alterations adopted) (quoting *United States v. Harris*, 526 F.3d 1334, 1338 (11th Cir. 2008)).

Portela argues that the district court erred when it concluded that he lacked standing to challenge the search of the car. Although Portela admits that he was only a passenger in a car that he did not own, he nonetheless asserts that he had a reasonable expectation of privacy because "he had a possessory interest in the vehicle."

Portela lacked a possessory interest in the vehicle. The term "possessory interest" means "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner"; or "[a] present or future right to the exclusive use and possession of property." *Possessory interest*, Black's Law Dictionary (10th ed. 2014); *see also Byrd*, 138 S. Ct. at 1527 ("One of the main rights attaching to property is the right to exclude others, and, in the main, one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." (citation and internal quotation marks omitted)). Portela falls short of this definition because he had no legal interest in the vehicle and, at the time of the search, was a passenger with no power to control the vehicle or exclude others from it. *See Lee*, 586 F.3d at 864. To be sure, Portela maintains that he had "permission to use [the car] any time he wanted" and that he had the spare key to the car. He also asserts that he "le[ft]

personal belongings in the car," paid to repair the car, and sometimes purchased gas. But these connections to the car hardly establish an interest that is grounded in "property law or . . . recognized and permitted by society." *Byrd*, 138 S. Ct. at 1527 (citation and internal quotation marks omitted). Portela did not have "exclusive custody and control" of the car, *Gibson*, 708 F.3d at 1278, when the legal owner was driving it and he was a mere passenger. That he may have used the car on other occasions, even frequently, does not give him a durable interest in the car equivalent to that of the legal owner and driver.

In any case, other evidence suggests that Portela overstates his connections to the car. For example, Portela "did not have a driver's license," and his girlfriend "permitted him to drive her car by himself" only the "short distance from his residence to the corner store." And Portela "never used" the spare key. Because Portela lacked a personal Fourth Amendment interest in the car, his challenge to the search of the car and its fruits fails.

In any event, the officers were entitled to search the car without a warrant under the automobile exception. "[T]he automobile exception permits warrantless vehicle searches if the vehicle is operational and agents have probable cause to believe the vehicle contains evidence of a crime." *United States v. Tamari*, 454 F.3d 1259, 1264 (11th Cir. 2006); *accord United States v. Lanzon*, 639 F.3d 1293, 1299–300 (11th Cir. 2011). "Probable cause exists when there is a fair probability

that contraband or evidence of a crime will be found in the vehicle under the totality of the circumstances." *Lanzon*, 639 F.3d at 1300. We have explained that an officer's credible testimony that he smelled marijuana can establish probable cause. *See United States v. Tobin*, 923 F.2d 1506, 1512 (11th Cir. 1991) (en banc).

The automobile exception applies to the search of Portela's girlfriend's car. There is no doubt that "the vehicle [was] operational," *Tamari*, 454 F.3d at 1264, because she was driving it—albeit on the wrong side of the road—before the stop. And the officers had probable cause to search the car. Segovia testified that he "smelled the odor of marijuana" when he approached the passenger side of the car and that he "saw small buds of marijuana on the floorboard," and the district court did not clearly err when it credited this testimony. Although Portela contended that it was "impossible" that Segovia smelled marijuana, the magistrate judge, who saw and heard the witnesses testify, found that "Portela was not credible whe[n he] contradicted the testimony of [the officers]." Portela also stresses that Wever did not notice the smell of marijuana. But the magistrate judge explained that Wever's testimony did not conflict with Segovia's because Wever did not arrive until at least two hours after Segovia stopped the car. The district court was entitled to deny Portela's motion to suppress the gun and his later inculpatory statements.

2. The Interview at the Jail Did Not Violate Portela's Right to Counsel

The Sixth Amendment entitles criminal defendants to counsel, *United States v. Burgest*, 519 F.3d 1307, 1309–10 (11th Cir. 2008), and this right "attach[es] [when] a prosecution is commenced . . . [by] the initiation of adversary judicial criminal proceedings," *id.* at 1310 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). Once the right attaches, the government may not "initiate interrogation" of the defendant. *Id.* (quoting *Michigan v. Jackson*, 475 U.S. 625, 636 (1986)). But this right "is offense specific" and ordinarily binds only the sovereign that has charged the defendant. *Id.* In other words, a defendant's "invocation of his right to counsel for [a] charged state offense d[oes] not attach to [an] uncharged federal . . . offense[] if the federal offense[] [is a] separate offense[] from the state . . . offense." *Id.* "[W]here conduct violates laws of separate sovereigns, the offenses are distinct . . . ." *Id.*

Portela contends that the district court should have suppressed statements he made to Perez and Bernat while in jail after his arrest on state charges, but this argument fails. Portela highlights that he had been appointed counsel for the state offense, and he contends that the state charges concerned the same case as the federal investigation. But these contentions are irrelevant. The Sixth Amendment bars only the "*police* [from] initiat[ing] interrogation after a defendant's assertion [of his right to counsel]." *Id.* (emphasis added) (citation and internal quotation

marks omitted). Here, the magistrate judge found that *Portela* "initiated the conversation with Agent Perez concerning the federal investigation," and Portela has not challenged this finding, much less established that it is clearly erroneous. And Portela acknowledged in the district court that if he "initiated the conversation regarding the federal investigation, . . . there was no violation of his right to counsel based on the prior invocation of his rights." Because Portela initiated the conversation, his Sixth Amendment challenge fails.

C. Sufficient Evidence Supports Portela's Conviction for Possession of a Firearm in Furtherance of a Drug-Trafficking Crime

Portela argues that the government failed to present sufficient evidence that he possessed the gun found in his girlfriend's car in furtherance of a drug-trafficking crime. He maintains that the "half a gram of marijuana [discovered during the search] is insufficient evidence of . . . drug trafficking" and that "no other evidence . . . [suggests] that a drug trafficking crime was being engaged in." He also argues that, even if he were engaged in drug trafficking, "the firearm and ammunition found underneath the seat" lacked a "nexus" to the offense.

Federal law forbids the possession of a firearm "in furtherance of [a drug-trafficking crime]." 18 U.S.C. § 924(c)(1)(A). We have explained that the "in furtherance" requirement demands that the government "establish that 'the firearm helped, furthered, promoted, or advanced the drug trafficking.'" *United States v. Mercer*, 541 F.3d 1070, 1076 (11th Cir. 2008) (quoting *United States v. Timmons*,

283 F.3d 1246, 1252 (11th Cir. 2002)). In other words, the government must "show[] . . . some nexus between the firearm and the drug selling operation." *Id.* (quoting *Timmons*, 283 F.3d at 1253). Evidence of a nexus may include "the kind of drug activity . . . being conducted, accessibility of the firearm, the type of firearm, whether the firearm is stolen, the status of the possession (legitimate or illegal), whether the firearm is loaded, proximity of the firearm to the drugs or drug profits, and the time and circumstances under which the firearm is found." *Id.* at 1076–77. We review the sufficiency of the evidence *de novo*. *Id.* at 1074.

The jury was entitled to find that Portela was engaged in drug trafficking and that the firearm had a nexus to the offense. The government introduced a conversation between Portela and another person on the day of the stop in which that person requested marijuana from Portela. And it introduced a recording in which Portela explained that he told his girlfriend to get the car that night because "[he] was trying to go do something and get some money . . . ." Based on these interactions and the marijuana found in the car, a reasonable jury could infer that Portela was on his way to sell drugs when the police stopped the car. And sufficient evidence connected the gun to this offense. The jury heard testimony from the officers that the firearm was in "proximity" to the drugs found in the car, *id.* at 1077, that the firearm found under the seat was "accessib[le]" to Portela, *id.* at 1076, that "the firearm [was] loaded," *id.* at 1077, and that Portela "illegal[ly]"

possessed the gun, *id.* Indeed, Portela admitted to the officers that he had marijuana on his person and had the gun on his person before the traffic stop.

D. Portela's Arguments About His Competency and Sentence Fail

Portela makes two arguments related to his "traumatic brain injury and mental deficits." He contends that the district court violated his procedural due process rights by not "*sua sponte* conduct[ing] a competency hearing to determine if [he] was competent to plead guilty and fully underst[oo]d the legal ramifications of his actions." And he argues that his impairments render invalid the waiver of his right to appeal his sentence. We reject both arguments.

1. The District Court Did Not Abuse Its Discretion when It Failed to Order a Competency Hearing *Sua Sponte*

"Due process requires that a defendant not be made to stand trial for a criminal charge unless he is mentally competent." *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987). In other words, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as factual understanding of the proceedings against him." *United States v. Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). If the district court has "reasonable cause to believe that the defendant [is not competent]," it must *sua sponte* order a competency hearing. 18 U.S.C. § 4241(a); *see also United States v. Wingo*, 789 F.3d 1226, 1235–36 (11th Cir. 2015). In deciding whether to

order a hearing, the district court should consider "evidence of the defendant's irrational behavior," his "demeanor at trial," and "prior medical opinion regarding the defendant's competence." *Wingo*, 789 F.3d at 1236 (quoting *Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990)). "We review for abuse of discretion a district court's failure to *sua sponte* order a hearing on the defendant's competency under [s]ection 4241." *Id.*

Portela contends that the district court should have ordered a competency hearing. He highlights that he informed the district court of a "neuro-psychological evaluation" that found that he had an IQ of 78, his "history of traumatic head injuries," and his "impaired" "higher executive function" and "impulse control." On appeal he also cites for the first time a medical report that shows a history of mental issues.

The district court did not abuse its discretion when it declined to order a hearing. Although Portela presented evidence of mental problems, the district court also possessed evidence that Portela was both competent and feigning illness to avoid responsibility. For example, during recorded prison calls Portela instructed an associate to "tell hi[s lawyer] that . . . [Portela is] kind of crazy" and stated that he was "trying to" be "sen[t] . . . to a crazy hospital." He also told his doctor to prescribe him medication because he "[had] to work [his] magic on this [case]." We have explained that evidence that a defendant's "behavior was the product of a

competent, calculating mind" is grounds to deny a competency hearing. *United States v. Perkins*, 787 F.3d 1329, 1340 (11th Cir. 2015); *see also Hance v. Zant*, 696 F.2d 940, 948 (11th Cir. 1983) (affirming the denial of a competency hearing when evidence "could . . . easily be interpreted to be evidence [of] . . . a rational, albeit immature, plan of deception"), *overruled on other grounds by Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc). The district court also had the advantage of assessing this evidence in combination with its firsthand observations of Portela's "demeanor at trial." *Wingo*, 789 F.3d at 1236 (quoting *Tiller*, 911 F.2d at 576). We see no abuse of discretion.

2. Portela Waived His Right to Appeal His Sentence

Portela attempts to appeal his sentence despite an agreement in which the government agreed to recommend a sentence of 360 months of imprisonment if Portela waived his right to appeal. He contends that, although the district court questioned him about the waiver at the plea hearing, his "cognitive deficits" prevented him from "mak[ing] a cogent decision." He concludes that "the record does not reflect a knowing and voluntary relinquishment of [his] right to appeal."

A defendant's waiver of his right to appeal his sentence "is valid if [he] enters into it knowingly and voluntarily." *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006). We have explained that a waiver is knowing and voluntary if "either: (1) the district court specifically questioned the defendant

about the waiver during the plea colloquy, or (2) the record clearly shows that the defendant otherwise understood the full significance of the waiver." *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005) (emphasis omitted) (quoting *United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (11th Cir. 1997)).

Portela's waiver was valid. "[T]he district court specifically questioned [Portela] about the waiver during the plea colloquy," *id.*, when it asked if he "underst[oo]d" that he "[would] not appeal [his] sentence to a [h]igher [c]ourt." Portela unambiguously responded, "Yes, I do, Your Honor." The district court also specifically found "that the waiver was knowing and voluntary." And Portela cannot rely on his mental issues to avoid responsibility for his answer in the light of the evidence that he was competent and attempted to exaggerate his impairments.

E. Sufficient Evidence Supports Altamirano's Conviction for a Violent Crime in Aid of Racketeering

Federal law punishes anyone who, "for the purpose of . . . maintaining or increasing [his] position in an enterprise engaged in racketeering activity, . . . [commits] assault[] with a dangerous weapon." 18 U.S.C. § 1959(a). The government can establish the motive element with evidence "that [the defendant] committed [the violent crime] because he knew it was expected of him by reason of his membership in [the gang] or that he committed [the violent crime] in furtherance of that membership." *United States v. Robertson*, 736 F.3d 1317, 1330

(11th Cir. 2013) (citation and internal quotation marks omitted). For example, evidence that "violence was a part of the group's culture," "that the group expected its members to . . . engag[e] in violent acts," or that the defendant reported his actions to prove himself or "to brag," *id.*, supports the inference that the defendant "was motivated" by his membership, *id.* at 1331. We review the sufficiency of the evidence *de novo*. *Mercer*, 541 F.3d at 1074.

Altamirano argues that the government failed to prove that he acted with the requisite motive of "maintaining or increasing [his] position in [the] enterprise," 18 U.S.C. § 1959(a), but we disagree. Zerquera explained that some members of the Team "had more . . . authority than others" within the gang and that the members who "carrie[d] the most respect" had reputations for violence. Guzman also testified that "the money for the drugs" came "[f]rom robberies" and that a member would "lose respect" if he refused to help with a robbery. He also explained that Altamirano was "one of the top guys." This close connection between violence, participation in robberies, and status entitled the jury to conclude that Altamirano "committed [robberies] because he knew it was expected of him by reason of his membership in [the Team]." *Robertson*, 736 F.3d at 1330 (quoting *United States v. Whitten*, 610 F.3d 168, 178 (2d Cir. 2010)); *see also id.* at 1331. Indeed, after the November 20, 2013, armed robbery, Altamirano and the other robber returned to other Team members at the trap, where they "talk[ed] about [the] robbery" and

"show[ed] [off] . . . a phone and a wallet they took." This evidence of boasting also supported the jury's verdict. For these reasons, we reject Altamirano's challenge to his conviction under section 1959(a).

F. Sufficient Evidence Supports Chacon's Convictions for Possession with Intent to Distribute Cocaine Base and for Possession of a Firearm in Furtherance of a Drug-Trafficking Crime

Chacon challenges the sufficiency of the evidence for his convictions for possession with intent to distribute cocaine base, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and possession of a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A), that stem from the drugs and gun that the police found at the trap after the armed robbery. He contends that because no evidence suggests he joined a conspiracy concerning these offenses, the district court erred when it gave an instruction that allowed the jury to convict him based on his role in the conspiracy under the doctrine established in *Pinkerton v. United States*, 328 U.S. 640 (1946). Chacon argues that although he was present at the trap when the police searched it after the armed robbery, no evidence "proved that [he] was []aware of the . . . drugs" or "of the gun." And he confusingly contends that the jury could not have convicted him for possessing the gun in furtherance of a drug-trafficking offense because the gun was the same weapon used in the robbery and the district court dismissed the charges against Chacon related to the robbery.

Under *Pinkerton*, a "member of a conspiracy . . . is criminally liable" for the "reasonably foreseeable crimes" that other conspirators commit "during the course of and in furtherance of the conspiracy." *United States v. Moran*, 778 F.3d 942, 961 (11th Cir. 2015). To establish that the defendant was part of a conspiracy, "the [g]overnment must prove that a conspiracy existed, that the defendant had knowledge of the essential aims of the conspiracy, and that with such knowledge, the defendant joined the conspiracy." *United States v. Newton*, 44 F.3d 913, 921 (11th Cir. 1995). Once it does so, the defendant may be liable for substantive offenses committed by fellow conspirators even if he "lack[ed] . . . knowledge thereof," *United States v. Silvestri*, 409 F.3d 1311, 1335 (11th Cir. 2005) (emphasis omitted) (quoting *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996)). "[A] district court does not err in giving a *Pinkerton* instruction if 'the evidence was sufficient for a reasonable jury to have concluded, beyond a reasonable doubt, that the [crimes] were reasonably foreseeable consequences of the conspiracy.'" *United States v. Shabazz*, 887 F.3d 1204, 1219 (11th Cir. 2018) (alterations adopted) (quoting *United States v. Alvarez*, 755 F.2d 830, 848 (11th Cir. 1985)). We review the sufficiency of the evidence *de novo*. *Mercer*, 541 F.3d at 1074.

The district court was entitled to give a *Pinkerton* instruction, and the jury was entitled to find Chacon guilty for the drug and firearm offenses based on his

role in the conspiracy. As explained above, ample evidence establishes that Chacon was part of the conspiracy. For example, Guzman testified that Chacon "was one of the top guys" in the Team. The possession of cocaine base at one of the traps from which the Team sold drugs naturally was a "reasonably foreseeable crime[]" "during the course of and in furtherance of the conspiracy." *Moran*, 778 F.3d at 961. The possession of the gun also was reasonably foreseeable and occurred during the course of and in furtherance of the conspiracy in the light of Guzman's testimony that the Team looked favorably on violence, that "the money for the drugs" came "[f]rom robberies," and that Chacon, Altamirano, and Portela carried guns when they sold out of the traps at night. This evidence about the connection between drugs, violence, and robberies also establishes that the gun had the necessary "nexus," *Mercer*, 541 F.3d at 1076 (quoting *Timmons*, 283 F.3d at 1253), to a drug-trafficking crime under section 924(c)(1)(A). And Chacon's argument that the dismissal of the robbery charges absolves him of responsibility for the gun fails because the prohibition in section 924(c) on possessing a gun in furtherance of drug trafficking defines a freestanding criminal offense that does not depend on any other charges or convictions.

G. *The District Court Did Not Err when It Admitted Evidence of Chacon's Uncharged Conduct*

Chacon contends that the district court abused its discretion when it admitted certain evidence about his conduct that was not charged in the conspiracy. This

evidence includes a video of Chacon robbing an elderly man in 2014, a police officer's testimony that he twice seized marijuana from Chacon, a neighbor's testimony that he witnessed Chacon commit robberies and fire a gun in front of the traps, and testimony about a fight that started when Chacon robbed the witness's girlfriend.

Federal Rule of Evidence 404 provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). But this Rule does not apply to "evidence of uncharged offenses that are intrinsic to the charged conduct." *United States v. Holt*, 777 F.3d 1234, 1262 (11th Cir. 2015). Evidence is intrinsic if "arose out of the same transaction or series of transactions as the charged offense," "is necessary to complete the story of the crime," or "is inextricably intertwined with the evidence regarding the charged offense." *Id.* (quoting *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998)). Intrinsic evidence is still subject to Rule 403, *see United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007), which provides that a district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice," Fed. R. Evid. 403. We review evidentiary rulings for abuse of discretion. *See Gibson*, 708 F.3d at 1275.

The government offers several procedural responses to Chacon's arguments, but we need not address them because Chacon's arguments fail on the merits. The video of the robbery and the testimony about robberies and the gun were intrinsic because they were "linked in time and circumstances with the charged [conspiracy]," *Holt*, 777 F.3d at 1262 (quoting *McLean*, 138 F.3d at 1403). More specifically, the government described a conspiracy in which "the money for the drugs" came "[f]rom robberies" and the status of members was tied to robberies and violence, so it was entitled to offer examples of such robberies to the jury. Chacon's objection to the testimony about the fight likewise fails because this fight was prompted by "a robbery [of the witness's] girlfriend." Chacon's marijuana possession was also intrinsic because it naturally was "linked in time and circumstances" with a conspiracy centered on drug trafficking. *Id.* (quoting *McLean*, 138 F.3d at 1403). For example, Guzman testified that the conspiracy involved sales of marijuana and that he sold marijuana to Chacon, so this evidence helped establish Chacon's association with the Team.

The intrinsic evidence also satisfied Rule 403. Its probative value in illustrating the nature of the conspiracy and the operations of the Team was not substantially outweighed by the risk of unfair prejudice. Indeed, "Rule 403 is an extraordinary remedy that must be used sparingly because it results in the exclusion of concededly probative evidence," *United States v. U.S. Infrastructure,*

Inc., 576 F.3d 1195, 1211 (11th Cir. 2009), and "the balance 'should be struck in favor of admissibility.'" *Edouard*, 485 F.3d at 1344 n.8 (quoting *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006)). The district court did not abuse its discretion when it admitted evidence of Chacon's uncharged conduct.

H. The District Court Correctly Denied Chacon's Motion for a Mistrial Based on Prosecutorial Misconduct During Closing Arguments

Chacon complains about references in the prosecution's closing argument to charges against him that the district court had dismissed. He underscores that the government asserted that Chacon should have foreseen Altamirano's robbery and the use of the gun in the robbery and that the government showed the jury a slideshow that listed these charges. Chacon contends that these references prejudiced his substantial rights because they "put before the jury speculation that he was tied []to these counts" and "conveyed to the jury [that he] was guilty" of them. He also argues that the district court's instruction that the jury "disregard any reference" to the charges and the government's concession to the jury that it had erred were insufficient to cure the mistake.

The government commits misconduct at trial when it makes "improper" remarks that "prejudicially affect the substantial rights of the defendant." *Reeves*, 742 F.3d at 505 (quoting *United States v. Gonzalez*, 122 F.3d 1383, 1389 (11th Cir. 1997)). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial

would have been different." *Id.* (quoting *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). Accordingly, our analysis considers the remarks "in the context of the trial as a whole" and examines whether the comments "had a tendency to mislead the jury or prejudice the defendant," "whether the comments were isolated or extensive," whether the government intentionally made the comments, and the "strength of the [evidence]." *Id.* Importantly, "[b]ecause statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered." *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (quoting *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990)). "Even if [the] comments [are] inappropriate, reversal is only warranted if the entire trial is so replete with errors that [the defendant] was denied a fair trial." *Eckhardt*, 466 F.3d at 947. We review this issue "*de novo* because it is a mixed question of law and fact." *Id.*

No error occurred, and Chacon is not entitled to a new trial. Although the prosecutor misspoke, this mistake did not amount to misconduct because it did not "prejudicially affect [Chacon's] substantial rights." *Reeves*, 742 F.3d at 505 (quoting *Gonzalez*, 122 F.3d at 1389). The references to the dismissed charges were not "extensive," nothing suggests that the prosecutor acted "deliberately," extensive evidence "establish[ed] the guilt of [Chacon]," and the prosecutor's

quick admission of error reduced the possibility that the jury was "misle[d]." *Id.* The district court also took an adequate "curative measure" when it promptly instructed the jury to disregard all references to the acquitted counts, *see Lopez*, 590 F.3d at 1256, and "we must presume that [the] jur[y] follow[ed this] instruction[]," *United States v. Zitron*, 810 F.3d 1253, 1258 (11th Cir. 2016) (quoting *Johnson v. Breeden*, 280 F.3d 1308, 1319 (11th Cir. 2002)). The district court committed no error when it denied Chacon's motion for a mistrial.

I. The District Court Did Not Err when It Refused to Instruct the Jury on Entrapment

Chacon argues that the district court erred when it refused his request for an entrapment instruction. "The entrapment defense involves two separate elements: (1) [g]overnment inducement of the crime, and (2) lack of predisposition on the part of the defendant." *United States v. Isnadin*, 742 F.3d 1278, 1297 (11th Cir. 2014) (emphasis omitted). "The defendant bears an initial burden of production to show . . . [g]overnment inducement." *Id.* (emphasis omitted). He can satisfy this burden by "produc[ing] any evidence sufficient to raise a jury issue 'that the [g]overnment's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *Id.* (quoting *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985)). If the defendant does satisfy this burden, "the burden shifts to the [g]overnment to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id.* A

defendant who asserts the affirmative defense of entrapment "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988).

We review the refusal of a district court to grant an entrapment instruction *de novo*, although we acknowledge the inconsistency in our precedents that have alternatively "applied a *de novo* standard of review" and "purported to review the question for an abuse of discretion." *United States v. Sistrunk*, 622 F.3d 1328, 1333 (11th Cir. 2010) (collecting cases). The correct standard of review is *de novo*. Whether a defendant is entitled to an entrapment instruction depends on whether "there is *sufficient evidence* from which a reasonable jury could find entrapment," *Mathews*, 485 U.S. at 62 (emphasis added), and the sufficiency of the evidence is a legal question that we review *de novo*, *see Sistrunk*, 622 F.3d at 1332–33 ("We have long held that the sufficiency of the defendant's evidence of government inducement is a legal issue to be decided by the trial court."); *see also, e.g.*, *Calderon*, 127 F.3d at 1329 ("The issue of whether the defense produced sufficient evidence to sustain a particular instruction such as a multiple conspiracy instruction, is generally a question of law subject to *de novo* review." (italics added) (citation and internal quotation marks omitted)); *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990) ("Whether there was sufficient

evidence to support a conviction is a question of law subject to *de novo* review by this Court." (italics added)). In any event, our precedents that apply the *de novo* standard predate our precedents that review for abuse of discretion. *Compare United States v. Parr*, 716 F.2d 796, 802 (11th Cir. 1983) (reviewing *de novo* and citing decisions by the former Fifth Circuit), *with United States v. Alston*, 895 F.2d 1362, 1368 (11th Cir. 1990) (reviewing for abuse of discretion). And "the earliest panel opinion resolving the issue in question binds this circuit until the [C]ourt resolves the issue en banc." *United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994) (quoting *Clark v. Hous. Auth. of Alma*, 971 F.2d 723, 726 n.4 (11th Cir. 1992)).

Chacon argues that he was entitled to have the jury instructed on entrapment in relation to his conviction for possession of a firearm by a felon, 18 U.S.C. § 922(g)(1), but his argument misconceives the charge and evidence against him. Chacon's wished-for entrapment defense rests on an undercover detective's attempts to persuade Chacon to sell him a gun. But Chacon was not prosecuted for *selling* the gun. He was prosecuted for *possessing* the gun, and no "evidence adduced at trial" suggests that the government induced Chacon to possess the gun that he later sold. *United States v. LaFond*, 783 F.3d 1216, 1224 (11th Cir. 2015) (quoting *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995)). Indeed, his affectionate nickname for the gun—"[his] baby"—suggests that he possessed it

before the government entered the picture. That the detective's actions produced the *evidence* of this possession does not make the government responsible for the underlying offense. The district court was right to deny Chacon's requested instruction.

J. Chacon's Sentence Is Procedurally and Substantively Reasonable

Chacon challenges his sentence on four grounds. First, he contends that the district court clearly erred when it applied an enhancement for his role as a leader of the drug conspiracy. Second, he contends that the district court clearly erred when it determined that he was liable for at least 2.8 kilograms of cocaine base. Third, he contends that the district court erred when it calculated his criminal history. Fourth, he contends that his sentence is substantively unreasonable. These arguments fail.

"The district court's determination of the defendant's role in the criminal offense is a finding of fact we review for clear error." *United States v. Hill*, 783 F.3d 842, 846 (11th Cir. 2015). We also "review[] for clear error the district court's underlying determination of the drug quantity attributable to a defendant." *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012). When a defendant fails to raise an objection to the calculation of his sentence before the district court, we review for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). And "[w]e review the substantive reasonableness of a

sentence imposed by the district court for abuse of discretion." *United States v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008).

1. The District Court Did Not Clearly Err when It Applied an Enhancement for Chacon's Role as a Leader of the Drug Conspiracy

The Sentencing Guidelines provide a four-level enhancement "[i]f the defendant was an organizer or leader of [certain] criminal activity." United States Sentencing Guidelines Manual § 3B1.1(a) (Nov. 2014). The commentary explains that "titles such as 'kingpin' or 'boss' are not controlling." *Id.* § 3B1.1 cmt. n.4. Instead, the sentencing judge considers the following factors:

> (1) [the] exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others.

United States v. Martinez, 584 F.3d 1022, 1026 (11th Cir. 2009) (quoting *United States v. Gupta*, 463 F.3d 1182, 1198 (11th Cir. 2006)); *accord* U.S.S.G. § 3B1.1 cmt. n.4. But "[t]here is no requirement that all of the considerations have to be present," *Martinez*, 584 F.3d at 1026 (quoting *United States v. Ramirez*, 426 F.3d 1344, 1356 (11th Cir. 2005)), and "[t]here can . . . be more than one person who qualifies as a leader," U.S.S.G. § 3B1.1 cmt. n.4. Indeed, section 3B1.1 requires only "evidence that the defendant exerted some control, influence or decision-

making authority over another participant in the criminal activity." *Martinez*, 584 F.3d at 1026.

Chacon argues that the district court clearly erred when it found that he was a leader of the conspiracy. He contends that it erroneously relied on evidence that members described Chacon as a "shot caller" and that he described himself as the boss. Chacon stresses that Guzman and Zerquera testified that "Chacon was not [their] boss" and that he "did not give [them] orders" about drug sales. Chacon also cites testimony that someone else recruited Guzman and that the cooperators "never had to give [Chacon] a cut" of their profits.

The district court did not clearly err. It correctly explained that "being characterized as boss is not controlling" and instead considered specific facts that established Chacon's role as a leader. For example, it highlighted that although "[t]here wasn't any strict hierarchy [in the Team]," "[e]verybody who testified . . . agree[d]" that Chacon was a "shot caller[]" who "inspired or promoted or directed the activities" of the Team. The district court also heard evidence that Chacon "le[d]" the videos that the Team posted on YouTube to boost their "image," that Chacon had declared both that he "r[a]n th[e] block" and that other Team members "[had] to give [him] money," and that a Team member stated that he had to "respect what [Chacon] sa[id]." And Guzman testified that, after he began cooperating with the police, Chacon called him and accused him of "snitching" and

then later came to his house and physically attacked him. The district court was entitled to find that Chacon was a leader in the criminal activity of the Team.

2. The District Court Did Not Err when It Determined that Chacon Was Responsible for the Sale of at Least 2.8 Kilograms of Cocaine Base

The Guidelines establish a base offense level of 34 for an offense involving between 2.8 and 8.4 kilograms of cocaine base. U.S.S.G. § 2D1.1(c)(3). "When the amount of the drugs [actually] seized does not reflect the scale of the offense, the district court [instead] must approximate the drug quantity attributable to the defendant." *Reeves*, 742 F.3d at 506. In doing so, it "may rely on evidence demonstrating the average frequency and amount of a defendant's drug sales over a given period of time." *Id.* "This determination may be based on fair, accurate, and conservative estimates of the drug quantity attributable to a defendant, but it cannot be based on calculations of drug quantities that are merely speculative." *Id.* (alteration adopted) (quoting *Almedina*, 686 F.3d at 1316). Relevant here, when a district court sentences a member of a "jointly undertaken criminal activity," it may consider the conduct of "others that was . . . in furtherance of the jointly undertaken criminal activity" and "reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3 cmt. n.2. This analysis requires the district court to "first determine the scope of the criminal activity the particular defendant agreed to jointly undertake." *Id.*

The district court did not clearly err when it found that Chacon was responsible for at least 2.8 kilograms of cocaine base. As explained above, the evidence established the Chacon was a leader in a broad drug-trafficking conspiracy. And the district court was entitled to rely on the cooperators' testimony about Team activities to "approximate the drug quantity attributable to [Chacon]." *Reeves*, 742 F.3d at 506. Guzman testified that he sold one to two grams of cocaine base a day for 11 months in 2013. He also estimated that three to six other Team members sold one gram a day during his tenure with the Team. Zerquera testified that he sold two to three grams a day and estimated that the Team members he worked with sold three to 18 grams a day, with average daily sales between 16 and 18 grams. If the Team sold only 10 grams a day for 11 months—about 330 days—that would be 3.3 kilograms. So even a "conservative estimate[]" based on Guzman's numbers, *id.*, establishes that Chacon was responsible for more than 2.8 kilograms in the light of his substantial role in the conspiracy and the "jointly undertaken criminal activity," U.S.S.G. § 1B1.3 cmt. n.2.

3. The District Court Did Not Commit Reversible Error when It Calculated Chacon's Criminal History

Chacon argues that the district court erred when it calculated his criminal-history score under section 4A1.1 of the Guidelines. He asserts that the district court erred when it counted a juvenile offense over his objection. And on appeal he argues for the first time that the district court erred when it counted five offenses

for which the court withheld adjudication of guilt. He contends that these supposed errors require remand for resentencing. We disagree.

a. The Juvenile Offense

The district court did not err when it counted Chacon's 2005 juvenile conviction for robbery. The Guidelines direct a district court to add one point for a "juvenile sentence imposed *within five years* of the defendant's commencement of the instant offense." U.S.S.G. § 4A1.2(d)(2)(B) (emphasis added). Chacon contends that his juvenile sentence fell outside the five-year window, but the district court was entitled to find otherwise, because Zerquera testified that Chacon was involved with the Team in 2008, fewer than five years after the 2005 sentence.

b. The Five Offenses for Which Adjudication Was Withheld

Under section 4A1.1(c), a district court must assign one criminal-history point, up to a total of four points, for each "prior sentence" of less than a term of imprisonment of 60 days. U.S.S.G. § 4A1.1(c). A "prior sentence" is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*." *Id.* § 4A1.2(a)(1). Ordinarily, "a sentence where adjudication of guilt is withheld" does not count. *United States v. Wright*, 862 F.3d 1265, 1280 (11th Cir. 2017); *see also United States v. Baptiste*, 876 F.3d 1057, 1062 (11th Cir. 2017). But if a defendant pleaded guilty or *nolo contendere* to an offense for which the state court withheld adjudication, that "prior offense is a diversionary

disposition that is properly counted as a prior sentence under [section] 4A1.1(c)." *Wright*, 862 F.3d at 1280 (citation and internal quotation marks omitted); *accord* U.S.S.G. § 4A1.2(f). The commentary to section 4A1.1(c) confirms that "[a] diversionary disposition is counted . . . where there is a finding or admission of guilt in a judicial proceeding." U.S.S.G § 4A1.1(c) cmt. n.3.

The presentence report assigned Chacon eight criminal-history points based on eight earlier offenses. It assigned one criminal-history point under section 4A1.1(c) for the 2005 juvenile robbery. It assigned two points under section 4A1.1(b) for a 2006 robbery for which adjudication was withheld in state court and Chacon was sentenced to two years of probation. It assigned one point under section 4A1.1(c) for a 2007 burglary and possession of a concealed weapon for which adjudication was withheld and Chacon was sentenced to two years of probation. It assigned two points under section 4A1.1(b) for a 2007 cocaine possession for which Chacon was adjudicated guilty and sentenced to 364 days of imprisonment. It assigned one point under section 4A1.1(c) for a 2010 marijuana possession for which adjudication was withheld and only fines and court costs were imposed. It assigned one point under section 4A1.1(c) for a 2011 marijuana possession for which adjudication was withheld and only fines and court costs were imposed. And it assigned one point under section 4A1.1(c) for a 2013 marijuana possession for which adjudication was withheld and only fines and court

costs were imposed. The presentence report assigned a total of nine points, but because section 4A1.1(c) allows only a maximum of four points for covered offenses, his final criminal-history score was eight. This score gave Chacon a criminal-history category of IV, which, coupled with his offense level of 40, produced a guideline range of 360 months to life imprisonment. *See* U.S.S.G. ch. 5, pt. A.

Chacon contends that the district court erroneously assigned criminal-history points for the five offenses for which adjudication was withheld, but he failed to make this argument to the district court, so we review only for plain error. *See United States v. Shelton*, 400 F.3d 1325, 1328 (11th Cir. 2005). Under this standard, the defendant must establish "that there is an error, it is plain, and it affects [his] substantial rights." *United States v. Suarez*, 893 F.3d 1330, 1335 (11th Cir. 2018).

No plain error occurred. Chacon had sufficient criminal-history points to produce a guideline range of 360 months to life imprisonment, so any error did not "affect[] [his] substantial rights." *Id.* The district court correctly assigned one criminal history point for the 2005 juvenile robbery. *See* U.S.S.G. § 4A1.2(d)(2)(B). It also correctly assigned two points for the 2007 cocaine possession for which the court sentenced Chacon to 364 days of imprisonment. *See id.* § 4A1.1(b). The 2006 robbery and 2007 burglary and firearm possession for

which adjudication was withheld and Chacon was sentenced to probation also add one point each because the record does not plainly establish that Chacon did not plead guilty or *nolo contendere* to these charges. *See Wright*, 862 F.3d at 1280. These five criminal-history points establish an offense level of III, which, when combined with the base offense level of 40, produces the same guideline range considered by the district court. *See* U.S.S.G. ch. 5, pt. A.

4. Chacon's Sentence Is Substantively Reasonable

A district court must consider several factors before it imposes a sentence, including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). A sentence is substantively unreasonable if the district court "fails to afford consideration to relevant factors that were due significant weight," "gives significant weight to an improper or irrelevant factor," or "commits a clear error of judgment in considering the proper factors." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015) (quoting *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc)). But "it is only the rare sentence that will be substantively unreasonable," *id.* (quoting *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013)), and we must respect "the institutional advantage that district courts have in applying and weighing the [relevant] factors," *United States v. Pugh*, 515 F.3d 1179, 1190–91 (11th Cir. 2008). "The party challenging a

sentence has the burden of showing that the sentence is unreasonable in light of the entire record, the [statutory] factors, and the substantial deference afforded [to] sentencing courts." *Rosales-Bruno*, 789 F.3d at 1256. We "ordinarily expect a sentence within the [g]uidelines range to be reasonable," although we do not "automatically presume" that it is. *Hunt*, 526 F.3d at 746 (alteration adopted) (quoting *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005)).

Chacon asserts that his sentence of 420 months of imprisonment is substantively unreasonable, but we disagree. His sentence was within the guidelines range of 360 months to life imprisonment, *see* U.S.S.G. ch. 5, pt. A, so we "expect [it] to be reasonable," *Hunt*, 526 F.3d at 746 (quoting *Talley*, 431 F.3d at 788). Chacon complains that he received "more than triple the sentence [length]" of other members of the Team, *see* 18 U.S.C. § 3553(a)(6), but he overlooks that he is not "similarly situated to the defendants to whom he compares himself," *Duperval*, 777 F.3d at 1338. The members who received the shortest sentences cooperated with the government, and "[w]e have held that defendants who cooperate with the government and enter a written plea agreement are not similarly situated to a defendant who provides no assistance to the government and proceeds to trial." *United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009). And two other Team members who went to trial received lengthy sentences of 360 and 235 months. As explained above, Chacon's leadership role also supports a longer

sentence. The district court did not abuse its discretion in imposing a 420-month sentence.

K. The Defendants' Other Arguments Are Meritless

The defendants raise a number of other arguments about the sufficiency of the evidence, interpretation of the statutes of conviction, and alleged errors by counsel and the district court, but we have reviewed the record and determined that these contentions are meritless. These arguments contradict the record, are insufficiently developed, misunderstand the relevant statutes, or are not ripe for review.

III. CONCLUSION

We **AFFIRM** the convictions and sentences of Dixon, Chacon, Portela, and Altamirano.

A 2

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of Florida

UNITED STATES OF AMERICA

v.

RODOLFO PORTELA

JUDGMENT IN A CRIMINAL CASE

Case Number: 113C 1:14-20017-CR-WILLIAMS-03

USM Number: 04702-104

Hector Dopico, AFPD
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s)

pleaded nolo contendere to count(s)
which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, 4 and 5 of the Second Superseding Indictment.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §846	Conspiracy to possess with intent to distribute 280 grams or more of crack cocaine and detectable amounts of marijuana and 3,4 Methylenedioxymethcathinone.	1/31/2011	1
18 USC §922(g)(1)& §924(e)(1)	Possession of a firearm by a convicted felon.	11/18/2013	2 & 3

The defendant is sentenced as provided in pages 2 7 of this judgment. The sentence is imposed the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

Count(s) ☐ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/29/16
Date of Imposition of Judgment

Signature of Judge

KATHLEEN M. WILLIAMS, United States District Judge
Name and Title of Judge

2/5/16
Date

DEFENDANT: Rodolfo Portela
CASE NUMBER: 113C 1:14-20017-CR-WILLIAMS-03

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §841(a)(1)	Possession with intent to distribute a detectable amount of marijuana.	11/18/2013	4
18 U.S.C. §924(c)(1)(A)	Possession of a firearm during or in furtherance of a drug trafficking crime.	11/18/2013	5

DEFENDANT: Rodolfo Portela
CASE NUMBER: 113C 1:14-20017-CR-WILLIAMS-03

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

(360) MONTHS. The term consist of (300) Months as to Counts 1,2 and 3, (240) Months as to Count 4, all terms to run concurrently followed by a consecutive term of (60) Months as to Count 5 of the Second Superseding Indictment.

X The court makes the following recommendations to the Bureau of Prisons:
That the Defendant be designated to a facility in South Florida and participate in the following programs: RDAP, BRAVE, GED and Vocational. It is further recommended that the Defendant be evaluated and receive Mental Health treatment.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Rodolfo Portela
CASE NUMBER: 113C 1: 14-20017-CR-WILLIAMS-03

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
(10) YEARS. The term consist of (10) Years as to Count 1, (5) Years as to Counts 2,3 and 5 and (6) Years as to Count 4, all terms to run concurrently and with the following special conditions imposed.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Rodolfo Portea
CASE NUMBER: 113C 1: 14-20017-CR-WILLIAMS-03

SPECIAL CONDITIONS OF SUPERVISION

Anger Control/Domestic Violence Treatment:

The Defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Mental Health Treatment:

The Defendant shall participate in an approved inpatient/outpatient mental health treatment program. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Substance Abuse Treatment:

The Defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search:

The Defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: Rodolfo Portela
CASE NUMBER: 113C 1: 14-20017-CR-WILLIAMS-03

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Rodolfo Portela
CASE NUMBER: 113C 1: 14-20017-CR-WILLIAMS-03

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 500.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

A 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20017-CR-WILLIAMS/SIMONTON(s)(s)

UNITED STATES OF AMERICA,

Plaintiff,

v.

RODOLFO PORTELA,

Defendant.
_____/

REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS

Presently pending before this Court is Defendant Rodolfo Portela's Motion to Suppress, ECF No. [32] and Supplement, ECF No. [121]. The Government has responded in opposition, ECF Nos. [36] and [163]. Defendant Portela did not file a reply. This motion was referred to the undersigned Magistrate Judge by the Honorable Kathleen M. Williams, United States District Judge, ECF No. [633] An evidentiary hearing was held on Friday, January 9, 2015. A Notice of Intended Ruling to recommend denial of the above motions was filed on January 15, 2015, ECF No. [687]. Based upon the Findings of Fact and Conclusions of Law set forth below, the undersigned RECOMMENDS that the Motion and Supplement be DENIED.

I. BACKGROUND

Defendant Rodolfo Portela is charged in five counts of the Second Superseding Indictment with conspiracy to possess with intent to distribute crack cocaine, marijuana, and MDMC between January 2011 and October 2014 (Count 1); possession of a firearm by a convicted felon on July 26, 2013 (Count 2) and November 18, 2013 (Count 3); possession of marijuana with intent to distribute it on November 18, 2013 (Count 4); and possession of a firearm in furtherance of a drug trafficking crime on November 18, 2013 (Count 5).

In the presently pending motions, Mr. Portela challenges the search of a car in which he was a passenger on November 18, 2013, and seeks to suppress the firearm that forms the basis for Counts 3 and 5, which was seized from the car during that search, ECF No. [32]. He also seeks to suppress statements he made on that date as fruits of the unlawful search, ECF No. [32]. Although the Motion to Suppress may be read to also challenge the waiver of *Miranda* rights and the voluntariness of the statements made on November 18, 2013, at the hearing, counsel stated that the only grounds upon which he sought to suppress those statements was as fruits of the illegal search of the car. Counsel also confirmed that he was not contesting the validity of the traffic stop of the car, which was based on the car traveling on the wrong side of the road.

Mr. Portela also challenges statements he made to ATF Agent Rosniel Perez and City of Miami Police Detective David Bernat on November 27, 2013, while he was in state custody in connection with state charges brought regarding that firearm. Mr. Portela contends that he was not advised of his *Miranda* rights, did not waive those rights, and that the statements were involuntary, ECF No. [32]. In addition, in his Supplement, Mr. Portela contends that he was represented by counsel in connection with the state charges at the time he was questioned, and that the questioning was in violation of his Sixth Amendment right to counsel. In this regard, Mr. Portela contends that the federal and state investigations were linked in such a way that the dual sovereignty doctrine does not apply, ECF No. [121].

In opposition, the Government asserts that Mr. Portela did not have a reasonable expectation of privacy in the car in which he was riding as a passenger on November 18, 2013. Moreover, even if he did, the Government asserts that the search was based on probable cause to believe that the car contained marijuana, based upon the fact that Mr. Portela admitted he was in possession of marijuana prior to the search, and that

Detective Segovia smelled the odor of marijuana when he approached the passenger side of the car and directed Mr. Portela to leave the vehicle, ECF No. [36].

With respect to the statements made on November 27, 2013, while Mr. Portela was in custody and represented by counsel on state charges, the Government contends that there was no violation of Mr. Portela's Sixth Amendment right to counsel because this right is offense specific, and the federal government was not involved with the events which formed the basis for the state charges; therefore, the dual sovereignty doctrine permitted the questioning of Mr. Portela concerning federal offenses. In the alternative, the Government asserts that Mr. Portela initiated the conversation when government agents arrived to execute a federal search warrant to obtain DNA swabs, and thereafter knowingly and voluntarily waived his right to counsel as well as his Fifth Amendment right to remain silent after being advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), ECF No. [163].

II. FINDINGS OF FACT[1]

A. The November 18, 2013 Car Search

1. *Defendant Portela's Expectation of Privacy in the Car*

The car that was stopped on November 18, 2013, a Pontiac Grand Am, was owned by the driver, Jessica Gonzalez. Mr. Portela provided the following testimony regarding his reasonable expectation of privacy in the car. Ms. Gonzalez had been Mr. Portela's girlfriend for approximately four or five months at the time of the stop. During this time, Mr. Portela lived with his mother, and Ms. Gonzalez lived at a different residence with her children, her mother and other relatives. Ms. Gonzalez spent several nights a week at Mr. Portela's residence. Mr. Portela did not have a driver's license, but Ms. Gonzalez permitted him to drive her car by himself a short distance from his residence to the

[1] To the extent that these Findings of Fact are more properly characterized as Conclusions of Law, the undersigned intends that they be treated as such, and vice versa.

corner store. In addition, sometimes Mr. Portela would drive the car when he was with Ms. Gonzalez if she didn't feel well or was tired. Mr. Portela did not want to drive the car far because he did not have a driver's license. Ms. Gonzalez gave Mr. Portela a spare key to her car, which he left on a shelf in his mother's house. He testified that she gave him permission to use the car whenever he wanted. He never used the key because he always used Ms. Gonzalez' key when he drove the car. On one occasion, Mr. Portela gave Ms. Gonzalez approximately $120.00 to have the brakes on the car fixed, and on another occasion, Mr. Portela arranged for a friend to fix the bumper on her car. He also paid for gas at times, particularly if she had given him a ride somewhere. Mr. Portela testified that he kept his personal belongings in the car, such as clothes or shoes. He also testified that he would leave his house keys in the car when they went out because he tended to lose them when he kept them in his pocket, and sometimes he forgot his cellphone and left it in the car. On the evening of Monday, November 18, 2013, Mr. Portela testified that he had a jacket in the car, as well as paperwork regarding a ticket he had received for driving without a license. He testified that most of his clothes had been removed from the car when they had done the laundry over the weekend.

Mr. Portela's testimony regarding his possession of a key to the car was corroborated by Mr. Stuart Sands, a defense investigator who retrieved the key from Mr. Portela's residence, and testified that it matched the size and shape of a key used to operate a Pontiac Grand Am. Mr. Sands also testified that he had spoken to Ms. Gonzalez, and she confirmed that Mr. Portela had access to the car, and that she had permitted him to use it.

Based upon the above testimony, the undersigned finds that Ms. Gonzalez controlled the use of her car, and permitted Mr. Portela to use the car to run short errands to the corner store without her, or on occasions when they went out together and she was too tired to drive. She gave him a spare key to keep at his house, but he

never used it. She spent the night at his house four or five nights a week. The undersigned also credits Mr. Portela's testimony that on occasion he left clothes in the car. Based upon the description provided, however, the undersigned finds that this was limited to clothes he brought with him to wear if the need arose during the trip, such as a jacket, hat, or shoes if he was wearing sandals. Mr. Portela assisted Ms. Gonzalez financially by reimbursing her for gas, and giving her the money to have her brakes fixed.

2. *The Stop and Search of the Car on November 18, 2013*

The following facts are based upon the testimony of Officer David Segovia and Detective Thomas Wever, which the undersigned credits over the contrary testimony of Mr. Portela.[2]

On the evening of November 18, 2013, Miami-Dade police officer David Segovia was assigned as a detective to work the Northside District as part of the robbery intervention detail. As he was patrolling the streets, he saw a Pontiac being driven on the wrong side of the road, and he stopped the car due to this traffic infraction. The driver of the car was Jessica Gonzalez, and Mr. Portela was in the right front passenger seat. The only evidence regarding the time of this stop was the testimony of Mr. Portela, who stated that he and Jessica Gonzalez had just left his mother's house to drive to the corner store at about 7:45 or 8:00 p.m. Officer Segovia asked Ms. Gonzalez for her identification, and she could not immediately produce it. At that time, Mr. Portela

[2] This determination is based on the demeanor of Officer Segovia and Detective Wever while testifying and the consistency of their testimony with the objective evidence, including the photographs taken at the scene. The testimony of Mr. Portela was not credible where it contradicted the testimony of Officer Segovia and Detective Wever. Mr. Portela is a convicted felon and he has a motive to fabricate the events. His testimony contradicted the testimony of not only Officer Segovia, but the testimony of Detective Wever concerning the administration of his *Miranda* rights on November 18, 2013. Moreover, as discussed *infra.,* he contradicted the testimony of Special Agent Perez regarding the events that transpired on November 27, 2013, including the administration of his *Miranda* rights on that date. His denials that he was advised of his rights, or that he even understood that the forms that he signed were Advice of Rights forms, were so unbelievable that it tainted the remainder of his testimony as well.

attempted to leave the car, and Officer Segovia told him to remain in the vehicle. Officer Segovia then went to the passenger side of the car, which had an open door, and smelled the odor of marijuana. Mr. Portela appeared to be nervous, since his hands were shaking. Officer Segovia asked Mr. Portela why he was nervous, and Mr. Portela responded that he "had some weed on him." Officer Segovia then told Mr. Portela to relax and to walk over to his partner and provide her with his information.

Officer Segovia then looked inside the car to search for marijuana. He saw small buds of marijuana on the floorboard of the car, mixed in with dirt; and, he saw a revolver under the front passenger seat. Officer Segovia then walked to where Mr. Portela was standing with his partner, and was advised that there was an outstanding warrant for Mr. Portela's arrest. Mr. Portela was arrested and handcuffed, and Officer Segovia walked him toward his police car. At that time, Mr. Portela again advised Officer Segovia that he had marijuana on him. Officer Segovia loosened the handcuffs and Mr. Portela retrieved from his clothing a plastic bag containing approximately 1 gram of marijuana and gave it to Officer Segovia. Mr. Portela was then placed in the back of the police car.

Detective Thomas Wever was then called and advised of this arrest. Detective Wever is employed by the Miami-Dade Police Department, and is also designated as a Task Force Officer assigned to the ATF Miami field division. Detective Wever was called to investigate the case as a Task Force Officer concerning whether Mr. Portela would be prosecuted for the federal offense of possession of a firearm by a convicted felon. Detective Wever arrived on the scene at about 10:30 p.m., which was approximately 30 minutes after he had been called by Officer Segovia. Based on the testimony of Mr. Portela that he had left his house at around 8:00 p.m. and was stopped en route to the corner store, this was approximately two hours after the search of the car by Officer Segovia.

Detective Wever first spoke to Officer Segovia, who stated that he had recovered a firearm from the vehicle and that Mr. Portela was a convicted felon. Officer Segovia stated that he had smelled marijuana and that during his inspection of the car for marijuana he had recovered the firearm. Detective Wever then entered the back of the police car and sat next to Mr. Portela. At Detective Wever's request, the handcuffs were removed from Mr. Portela, and Detective Wever gave Mr. Portela a *Miranda* rights waiver form (Govt. Ex. 1). Detective Wever requested Mr. Portela to read each of the rights contained on the form out loud. As Mr. Portela read each statement, Detective Wever asked him if he understood what he read, and Mr. Portela responded that he did. Detective Wever then asked Mr. Portela to initial each statement to reflect that he understood it. After Mr. Portela was advised of his rights, he agreed to waive his rights and to speak to Detective Wever. The waiver of rights form was signed at 11:20 p.m.

Mr. Portela stated that he had bought the firearm the day before in Little Havana. He said that he needed it for protection because he lived on the streets and things were rough out there. He said that he had fired the gun, and that the gun was loaded with ammunition. Mr. Portela said that he had been carrying the gun on his person but that he put it under the seat when he realized they were being stopped by the police.

After he finished his interview with Mr. Portela, Detective Wever asked Mr. Portela if he would consent to provide a DNA sample. Mr. Portela stated that he would do so if Detective Wever could offer him a plea deal or reduction in his sentence. Detective Wever responded that he could not make such an offer, and Mr. Portela then declined to consent to a DNA sample, explaining that he knew his DNA would be found on the gun.

Detective Wever examined the car to see where the firearm had been found; and, at that time he did not smell any marijuana or notice any marijuana buds on the floorboard of the car; Detective Wever did not closely examine the area of the floorboard. Detective Wever did not recall whether his examination of the car occurred

before or after he spoke to Mr. Portela. Based upon the totality of the circumstances, including the estimated time at which Mr. Portela departed his residence, the events that occurred before Detective Wever was called, and the fact that it took approximately one half hour for Detective Wever to drive to the scene, the undersigned finds that more than two hours elapsed from the time Officer Segovia smelled marijuana to the time Detective Wever arrived. There was no testimony regarding how keen or diminished a sense of smell was possessed by either Officer Segovia or Detective Wever; but, based upon the passage of time between the observations, the undersigned finds that the absence of detection of a marijuana odor by Detective Wever does not undermine the observation by Officer Segovia.

Mr. Portela was arrested by Officer Segovia for being a felon in possession of a firearm on that date. In addition, there was an outstanding state warrant for Mr. Portela charging him with being a felon in possession of a firearm on July 26, 2013. The July incident was based on observations made by City of Miami police detectives who saw Mr. Portela discard a firearm when he was approached by the those detectives.

B. *The Events Following Mr. Portela's Arrest*

Mr. Portela appeared in state court in connection with the above arrests, and was appointed counsel to represent him. As set forth in Defendant's Exhibit 11, on November 19, 2013, Mr. Portela's counsel filed a Notice which states that Mr. Portela invoked his right to counsel and did not want to be questioned by law enforcement authorities in the absence of his counsel.

Special Agent Rosniel Perez of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") provided credible testimony concerning the involvement of federal law enforcement agents concerning the events that led to the federal prosecution of Mr. Portela, including the questioning of Mr. Portela following his appearance in state court.

Special Agent Perez explained the relationship of local police detectives and the ATF regarding the prosecution of firearms offenses. The police departments of the City of Miami and Miami-Dade County both assign local detectives to serve as Task Force Officers who work with a designated ATF squad. Agent Perez works with the task force officers from the City of Miami. The task force officers from Miami-Dade County, such as Detective Wever, work with a different ATF squad. Prior to Mr. Portela's arrest on November 18, 2013, Agent Perez was aware of the July incident and had begun an investigation regarding whether Mr. Portela should be charged under federal law for that offense.

In connection with Agent Perez' investigation of Mr. Portela on federal charges, on November 26, 2013, Agent Perez obtained a search warrant for Mr. Portela's DNA (Deft. Ex. 13). At the request of Agent Perez, City of Miami Police Detective David Bernat accompanied Agent Perez to execute the warrant on Mr. Portela at the Dade County Jail. Detective Bernat was one of the officers involved in the arrest of Mr. Portela on the July offense.

During the same period of time that Agent Perez was investigating the potential federal firearms charges against Mr. Portela, he was also involved with the City of Miami Police Department's investigation of a gang known as the Big Money Team or BMT. ATF was assisting the City of Miami with respect to that investigation. Detective Bernat, who was assigned to the City of Miami Police Department Gang Intelligence Unit, was the lead detective investigating BMT, and he told Agent Perez that Mr. Portela was a member of the BMT gang. Agent Perez was considering whether to open a formal federal investigation of BMT, but had not done so yet. Even though there was no official open investigation targeting BMT, ATF was involved in assisting the City of Miami with its investigation beginning in October 2013, and had provided $60.00 for the City of Miami to

use to purchase narcotics from a member of BMT. ATF also assisted in a similar transaction on November 19, 2013. Neither of these transactions involved Mr. Portela.

At the time Agent Perez obtained the search warrant for Mr. Portela's DNA on the afternoon of November 26, 2013, he was looking at the potential firearms charges against Mr. Portela as a stand-alone case. Federal law enforcement agents did not have any involvement in the decisions to arrest and/or charge Mr. Portela with the state firearms offenses. The Miami-Dade County Police Department (including Officer Segovia and Detective Wever) was not involved in the City of Miami's BMT investigation.

ATF policy requires that at least two law enforcement officers execute a search warrant. Agent Perez asked Detective Bernat to assist him in executing the search warrant since November 27th was the day before Thanksgiving and there was nobody available in Agent Perez' department to assist him. Agent Perez knew Detective Bernat due to his connection with the BMT investigation.

Agent Perez and Detective Bernat met Mr. Portela inside the Dade County Jail and explained that they had a federal search warrant and were there to collect his DNA. They gave a copy of the warrant to Mr. Portela, who read it, asked certain questions, and then agreed to provide the DNA as required by the warrant. Mr. Portela then stated that he wanted to talk to them about the case, stating that he wanted to cooperate and make a deal. Agent Perez told Mr. Portela that he could not make any deals with him; that Mr. Portela would have to do that once he was appointed an attorney if they decided to charge him with a federal crime. Agent Perez told Mr. Portela that if he wanted to speak to them he would have to go through the process of waiving his rights. Agent Perez then provided Mr. Portela a *Miranda* waiver form and told Mr. Portela that they needed to make sure he understood his rights before he spoke to them. Agent Perez told Mr. Portela to read the form aloud to make sure that he understood what he was reading; and asked Mr. Portela to initial each line that he read. Mr. Portela told them that he had attended high

school through the 10th grade, and he read the form. A copy of the *Miranda* waiver form was introduced into evidence as Government's Exhibit 3. Mr. Portela signed the Waiver portion of the form and agreed to speak to Agent Perez and Detective Bernat. The waiver portion of the form signed by Mr. Portela expressly states, "I have read this statement of my rights or it has been read to me and I understand these rights. At this time I'm willing to answer questions without a lawyer present. No promises or threats have been made to me and no pressure or force of any kind has been used against me." During his testimony at the hearing, Mr. Portela acknowledged that he had not been threatened before he signed the waiver. Following his waiver of rights, Mr. Portela then discussed both of the incidents where he had been apprehended with firearms.

Mr. Portela's testimony that he did not know what the form was, that he had not read the form, and that he had been told to sign the form as part of the search warrant procedure was wholly incredible. The testimony that Mr. Portela is able to read is uncontradicted and form clearly states that it is a Statement of Rights and Waiver. Mr. Portela had previously seen a similar form when Detective Wever spoke to him at the time of his arrest on November 18th, although Mr. Portela denied this as well. As previously stated, based upon the demeanor of Mr. Portela, as contrasted with the demeanor of the government's witnesses, and the corroboration of their testimony by waiver forms signed by Mr. Portela, the undersigned finds that Mr. Portela was not a credible witness regarding these events.

Based upon the above testimony and credibility determinations, the undersigned makes the following specific findings:

The federal investigation of Mr. Portela was separate from the state charges and the federal government had no role in the decision of the local police to arrest Mr. Portela for either the July 26, 2013 or November 18, 2013 firearms offenses; similarly, although the local police were providing information to Agent Perez, they were not directing or

controlling the federal investigation. Although ATF was assisting the City of Miami with its investigation of BMT, and Agent Perez was investigating the possibility of a federal investigation, there was no official federal investigation of BMT at the time of the November 26, 2013 interview of Mr. Portela. This is corroborated by the fact that the initial federal charges against Mr. Portela were brought on January 9, 2014, in a two-count Indictment which charged him alone with being a felon in possession of ammunition and a firearm on the two dates described above, ECF No. [1]. A Superseding Indictment charging a drug conspiracy and firearms offenses against various persons now alleged to be members of BMT was not returned until June 13, 2014, ECF No. [39]. The federal law enforcement authorities had not had any contact with the State Attorney's Office at the time of the interview, nor were they aware that Mr. Portela had counsel on the state charges at that time. The only relationship between the federal agents and the local police officers was that the police officers advised the federal agents when there was an arrest made on firearms charges that might fit the criteria for a federal prosecution. When Agent Perez was notified of the potential federal charges against Mr. Portela, he then undertook his own investigation to determine whether to present the case to the U.S. Attorney's Office for federal prosecution.

When Agent Perez met Mr. Portela at the Dade County Jail and advised him of the search warrant, Mr. Portela initiated the conversation with Agent Perez concerning the federal investigation. Mr. Portela was then advised of his *Miranda* rights in a written form, which he read aloud, initialed and signed. There were no threats or promises, and Mr. Portela understood those rights and voluntarily waived them before speaking to Agent Perez and Detective Bernat. The atmosphere did not appear unduly coercive, and Mr. Portela was cooperative. Under the totality of the circumstances, the statements Mr. Portela made following his waiver of rights were voluntarily made.

III. CONCLUSIONS OF LAW

1. As conceded by defense counsel at the hearing, the car in which Mr. Portela was riding as a passenger on November 18, 2013, was validly stopped as a result of a traffic infraction. *Whren v. United States*, 517 U.S. 806 (1996).

2. Although it is a close question, the undersigned concludes that Mr. Portela did not have a reasonable expectation of privacy in that car and therefore does not have standing to challenge the search. In this regard, the undersigned notes that it is not necessary to reach this issue since, even assuming Mr. Portela had standing, the search was lawful. The following brief analysis is provided for purposes of completeness.

It is well-settled that a mere passenger in a car does not have a reasonable expectation of privacy in that car and therefore does not have standing to challenge a search of that car. *Rakas v. Illinois*, 439 U.S. 128 (1978). Under certain circumstances, however, a passenger may have a sufficient interest in the car to establish standing. *See, e.g., United States v. Gibson*, 708 F.3d 1256, 1277 (11th Cir. 2013) (defendant who paid for insurance and maintenance of car and often drove it did not have standing to challenge search where he was not owner of car, did not have exclusive custody and control of car, and was neither driver nor passenger in car at time of search); *United States v. Cooper*, 133 F.3d 1394, 1398-1402 (11th Cir. 1998) (driver/renter of overdue rental car had standing to challenge search of car); *United States v. Miller*, 821 F.2d 546, 548 (11th Cir. 1987) (driver who borrowed car from friend had standing). As described by the Court in *United States v. Walton*, 763 F.3d 665 (7th Cir. 2014), the determination of whether a person has standing to challenge the search of a car is based on the totality of the circumstances, and includes such factors as ownership, possession and/or control, historical use of the car, and the ability to regulate access. Recently, in *United States v. Jones*, 132 S. Ct. 945, 949 n.2 (2012), the United States Supreme Court implicitly recognized the uncertainty of the contours of the boundary between standing and lack of

standing by expressly noting that, based upon the government's failure to challenge the issue, it did not consider the Fourth Amendment significance of a driver's status as the exclusive driver of a car registered solely to his wife.

To support his claim of standing, Defendant Portela has urged the Court to adopt the rationale used in *United States v. Turner*, No. 13-40050-01-JAR, 2013 WL 5727404 (D. Kan. Oct. 22, 2013), which he contends involves facts almost identical to the facts in the case at bar. In *Turner*, the defendant sought to suppress evidence seized from a car which was owned by his girlfriend and in which he was a passenger. The defendant did not have a driver's license, but he and his girlfriend shared the car, it was their primary form of transportation, he had full access to the car and drove it frequently with her permission, he had possessions in the car, and he put his own money toward gas and repairs.

In the case at bar, Mr. Portela's use of the car was sporadic and primarily limited to times of short duration when his girlfriend (also of short duration) was at his house and did not want to drive. To the extent that Mr. Portela implied more frequent use of the car, the undersigned does not credit his self-serving testimony. There was no testimony from his girlfriend, Ms. Gonzalez, regarding Mr. Portela's access to or use of the car, and the hearsay related by defense investigator Sands concerning Ms. Gonzalez' statements was sparse. Mr. Portela and his girlfriend did not live together or share the use of the car in the same way that the defendant in *Turner* shared the car with his girlfriend. The limited nature of Mr. Portela's use of the car is illustrated by the fact that when the brakes needed to be fixed, he testified that he gave his girlfriend the money to do so, rather than directly arranging for the repair himself. Moreover, it is difficult to see how he could have a reasonable expectation of privacy in a car owned by a person who lived separately from him in a location where the car was kept for a significant part of each week. Under the circumstances of this case, the undersigned finds that Mr. Portela falls

closer to the status of the mere passengers in *Rakas* than the joint possessor in *Turner*. Therefore, he does not have standing to challenge the search.

3. Officer Segovia had probable cause to search the car based upon Mr. Portela's statement that he had marijuana on him and the odor of marijuana which emanated from the car. Defense counsel conceded that if I credited the testimony of Officer Segovia that he smelled the odor of marijuana emanating from the car, there was probable cause to search the car. *See, e.g., United States v. Smith*, No. 14-11852, 2015 WL 51505 (11th Cir. Jan. 5, 2015), and cases cited therein. Officer Segovia's clear and unequivocal testimony that he smelled marijuana in the car, corroborated by the fact that Mr. Portela was in actual possession of marijuana, provided probable cause to believe that the car contained marijuana. The search of the car therefore did not run afoul of the Fourth Amendment.[3]

Since the search was lawful, the subsequent questioning of Mr. Portela by Detective Wever was not the fruit of an unlawful search.[4]

4. Mr. Portela's right to counsel was not violated when he was interviewed by Agent Perez and Detective Bernat at the Dade County Jail on November 27, 2013. The interview concerned independent federal charges, although those charges were based on the same events that formed the basis for his state arrest.

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[3] In view of this disposition, it is unnecessary to consider the Government's alternative argument that the search was valid as a search incident to arrest under the requirements set forth in *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

[4] The only challenge made to the statement made by Mr. Portela on November 18, 2013, was based on the contention that it was the fruit of an unlawful search. Even if he had challenged the validity of his waiver of *Miranda* rights, the challenge would not be successful since the record clearly establishes that he was fully advised of those rights and that he knowingly, intelligently and voluntarily waived those rights and that the statements he made thereafter were made voluntarily.

Both parties recognized that, under the dual sovereignty doctrine as explained by the Eleventh Circuit Court of Appeals in *United States v. Burgest*, 519 F.3d 1307 (11th Cir. 2008) and *United States v. Knight*, 562 F.3d 1314 (11th Cir. 2009), a defendant's invocation of his right to counsel in connection with a charged state offense does not attach to the defendant's uncharged federal offenses, even if the federal offenses under investigation arise from the same underlying facts. *Accord United States v. Jackson*, 292 Fed. App'x 770 (11th Cir. 2008).

To avoid the dual sovereignty doctrine, Mr. Portela seeks to avail himself of an exception applied by some courts where " 'one sovereign so thoroughly dominates or manipulates the prosecutorial machinery' of the other sovereign or 'if it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's Sixth Amendment right to counsel.'" *Burgest*, 519 F.3d at 1311 n.5. In the case at bar, however, the evidence established that there was no domination or manipulation of the state proceedings by the federal government, or vice versa. Moreover, there is no evidence that there was any attempt to circumvent Mr. Portela's right to counsel. The state charges, both on July 26th and November 18th, were the result of reactive arrests made when local police officers found Mr. Portela in possession of firearms. These arrests were not directed, in any way, by the federal authorities. Once advised of these arrests, ATF Agent Perez initiated a federal investigation to determine whether the activities of Mr. Portela warranted federal prosecution. There was no contact with the State Attorney's Office during the relevant time, and the local and federal investigations proceeded on separate tracks. This fact is not altered by the fact that Detective Bernat, who was involved in the arrest of Mr. Portela for the July 26th offense, accompanied Agent Perez to execute the DNA search warrant. Detective Bernat had not been involved in the November arrest of Mr. Portela, had not spoken to the State Attorney's Office since Mr. Portela's arrest, and was not aware that Mr. Portela had been appointed counsel; he

had been asked to assist in the execution of the search warrant since ATF policy required that two law enforcement officers be present, and there was nobody from Agent Perez' ATF group available due to the Thanksgiving holiday. Thus, the state and federal prosecutions were sufficiently independent such that, under the dual sovereignty doctrine, Mr. Portela's prior invocation of his right to counsel on the state charges did not apply to the federal investigation.

5. Mr. Portela initiated the conversation with Agent Perez and Detective Bernat regarding the potential federal charges when they served Mr. Portela with the search warrant for his DNA. Mr. Portela was fully advised of his constitutional rights as required by *Miranda v. Arizona*, and he knowingly, intelligently and voluntarily waived those rights. The statements that he made thereafter were voluntarily made and not the result of any threats, promises or coercion.

Counsel for Mr. Portela conceded at the hearing that if Mr. Portela initiated the conversation regarding the federal investigation, that there was no violation of his right to counsel based on the prior invocation of his rights.

Moreover, the undersigned has credited the testimony of Agent Perez that he fully advised Mr. Portela of his *Miranda* rights, that Mr. Portela fully understood those rights. and that he waived those rights. There is no credible evidence of any undue influence, threats, promises or other coercion. Under the totality of the circumstances, Mr. Portela made a knowing, voluntary and intelligent waiver of his *Miranda* rights, and his ensuing statements were voluntarily made. Therefore, the statements were lawfully obtained and are admissible at trial. *Moran v. Burbine*, 475 U.S. 412, 420-23 (1986); *Miranda v. Arizona*, 384 U.S. 436 (1966).

IV. CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Defendant Rodolfo Portela's Motion to Suppress, ECF No. [32] and Supplement, ECF No. [121] be **DENIED**.

Pursuant to S.D. Fla. Magistrate Judge Rule 4(b), the parties shall file any written objections to this Report and Recommendation on or before February 4, 2015. Pursuant to Fed. R. Crim. P. 59(b)(2), failure to file objections timely waives a party's right to review, and bars the parties from attacking on appeal any legal rulings and factual findings contained herein. *See Thomas v. Arn*, 474 U.S. 140 (1985).

Andrea M. Simonton

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished via CM/ECF to:
The Honorable Kathleen M. Williams, United States District Judge
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-20017-CR-WILLIAMS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RODOLFO PORTELA, *et al.*,

Defendants.
_____/

ORDER

The Court held hearings in this matter on February 2, and February 3, 2015. In accordance with the oral rulings made at the hearings and based upon a review of the record and applicable case law, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant Fernando Roberto Darce's motion responding to Government's 404(b) notice and objections to the evidence (DE 407) is **DENIED AS MOOT** in light of Mr. Darce's guilty plea.

2. Defendant Luis Salas's motion for separate trial on certain counts (DE 428) is **DENIED AS MOOT** in light of Mr. Salas's guilty plea.

3. Defendant Carlos Tinoco's motion *in limine* to exclude testimony pertaining to Mr. Portela's post-arrest extortion related conduct (DE 487) is **GRANTED.** To the extent statements exist relating to conduct directed at witnesses in this case or co-defendants, the Government may, with the appropriate predicate, introduce those statements at trial.

4. Defendant Rodolfo Portela's motion *in limine* (DE 560) is **DENIED.** At the hearings, the Government represented that it would not be offering the following 404(b)

evidence at trial: (1) Allegation of False Imprisonment and Battery, Miami-Dade County Circuit Court Case No. F13-12116; and (2) Conviction for Burglary of a Structure, Miami-Dade County Circuit Court Case No. F07-9474. However, Mr. Portela's motion *in limine* to exclude the remaining 404(b) evidence: (1) Conviction for Carrying a Concealed Firearm, Miami-Dade County Circuit Court Case No. F05-16780; (2) Conviction for cocaine possession with intent to distribute within 1,000 feet of a school, Miami-Dade County Circuit Court Case No. F07-6123; and (3) Conviction for cocaine possession with intent to distribute, Miami-Dade County Circuit Court Case No. F10-32264C is **DENIED.** Mr. Portela's motion to exclude inextricably intertwined evidence is also **DENIED.** Nonetheless, to the extent that an appropriate predicate is not offered at trial linking certain activities to the conspiracy or to particular defendants (*i.e.*, the trespass or prostitution related activities discussed by the Court at the hearings), that evidence will not be admitted.

5. Defendant Steven Castro's motion to exclude unfairly prejudicial opinion evidence as to criminal guilt or association and motion for hearing under *Daubert* to determine admissibility of opinion testimony (DE 563) is **DENIED.** The Court ordered that the Government produce to the defendants: (1) the testifying expert FBI agent's curriculum vitae; (2) a list of all cases (with case numbers) where he has been qualified as an expert; and (3) his educational credentials and any courses he has taught or programs he has attended in his field of expertise.

6. Defendant Dayaan Zerquera's motion to suppress physical evidence (DE 564) is **DENIED AS MOOT** in light of Mr. Zerquera's guilty plea.[1]

[1] The motion is also denied in accordance with the findings of Magistrate Judge Andrea M. Simonton (DE 667).

7. Defendant Jay Anthony Flores's motion *in limine* (DE 569) to exclude 404(b) evidence is **GRANTED.**

8. Defendant Maurin Chacon's motion to sever (DE 577) is **DENIED.**

9. Defendant Maurin Chacon's motions *in limine* to exclude 404(b) evidence and inextricably intertwined evidence (DE 581) and (DE 594) are **GRANTED IN PART AND DENIED IN PART.** Defendant Maurin Chacon's motion to exclude 404(b) evidence is **GRANTED** with respect to the 2005 purse snatching, Case No. J05-1095 and the 2006 chain robbery, Case No. F06-43668, and the 2007 burglary of an unoccupied vehicle, Case No. F07-8866. The Court **RESERVES** ruling with respect to the May 23, 2014 attempted murder occurring at 428 Northwest 11th Avenue, Miami, Florida.[2] The motion to exclude is **GRANTED** with respect to the video of a 2012 fight occurring near 1057 Washington Ave., Miami Beach.[3]

10. Defendant Luis Salas's motion to suppress statements and evidence (DE 587) is **DENIED AS MOOT** in light of Mr. Salas's guilty plea.

11. Defendant Raymond Moore's motion *in limine* to exclude 404(b) and inextricably intertwined evidence (DE 595) is **DENIED AS MOOT** in light of Mr. Moore's guilty plea.

12. Defendant Carlos Tinoco's motion to exclude certain Facebook posting and comments thereon (DE 613) is **DENIED.** The Government represented at the

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[2] As the Court explained at the hearings, the Court would require the Government to produce a witness (*i.e.*, the victim) to the May 23, 2014 attempted murder incident who can testify as to the events that day and how those events relate to the charged offenses.

[3] With respect to the 2012 fight video, should the Government have additional evidence linking the fight to the conspiracy and the charged offenses, the Government may reargue the admissibility of the video at trial.

hearings that the Facebook postings and other social media pictures would be appropriately redacted.

13. Defendant Luis Salas's motion to be tried in second trial group (DE 626) is **DENIED AS MOOT** in light of Mr. Salas's guilty plea.

14. Defendant Rodolfo Portela's *ex parte* motion regarding DNA analysis (DE 698) is **DENIED.**

15. Defendant Jay Anthony Flores's supplemental motion for reconsideration of motion to sever (DE 703) is **DENIED.**

16. Defendant Christopher Altamirano's motion for additional preemptory challenges (DE 709) and the Government's motion for additional preemptory challenges (DE 712) are **GRANTED IN PART AND DENIED IN PART.** The defendants shall have **12** preemptory challenges and the Government shall have **7**.

17. Defendant Maurin Chacon's motion *in limine* to exclude post-arrest statements based on *Crawford v.* Washington, 541 U.S. 36 (2004) (DE 716) is **DENIED.** At the hearings, the Government represented that the persons to whom the statements were made will testify. The Government also represented that it would redact those statements that may inculpate co-defendants. Consequently, each defendant will have the opportunity to cross-examine any such witnesses about the statements he is alleged to have made.

18. Defendant Christopher Altamirano's motion for reconsideration (DE 761) is **GRANTED.** In accordance with the Court's oral rulings, Defendants Maurin Chacon, Rodolfo Portela, Alioth Salas, Joseph Thompson, James Dixon, Joel Diaz, and Jay

Anthony Flores shall submit to fingerprint collection on **Monday, February 9, 2015 at 1:30 p.m.**

19. Upon a review of the record, Magistrate Judge Andrea M. Simonton's Report and Recommendation, and based upon the arguments and objections made by counsel to the Report, and the oral argument and rulings made by the Court during the hearing on February 2, 2015, the Court hereby **ADOPTS AND AFFIRMS** Magistrate Judge Andrea M. Simonton's Report and Recommendations (DE 766). Defendant Rodolfo Portela's motion to suppress (DE 32) and Supplement (DE 121) are **DENIED.**

20. Defendant Jay Anthony Flores's motion for a written report and recommendation (DE 767) is **DENIED AS MOOT.** (*See* DE 771).

21. Defendant James Dixon's motion to exclude 404(b) evidence (DE 768) is **GRANTED** as to the juvenile robbery conviction. The Court **RESERVES** on the remaining 404(b) evidence and requests that the Government provide additional authority for its admission.

22. Defendant Christopher Altamirano's motion for disclosure of additional expert material (DE 779) is **GRANTED.** The Government shall provide the defendants with the curriculum vitaes of the witnesses in question.

DONE AND ORDERED in chambers in Miami, Florida, this 18th day of February, 2015.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE