

No.

In the
Supreme Court of the United States of America

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDILBERTO MASO DIAZ,

Defendant-Appellant.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Did the Fifth Circuit err by affirming the district court admission of hearsay statements made by an unindicted co-conspirator over the objection of Appellant's trial counsel?
- 2) Did the Fifth Circuit err by affirming the district court's failure to include Andres Torres in the jury instructions admonishing jurors regarding the reliability of the statements of co-conspirators?
- 3) Do the above described errors rise to the level of cumulative error?
- 4) Did the government present sufficient evidence at trial so that any reasonable trier of fact could find Appellant guilty when it relied wholly on the contradictory statements of co-conspirators to connect Appellant to the alleged conspiracy?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1. Shannon W. Locke**, (Appellate Attorney for Defendant-Appellant)
- 2. Carmen Castillo Mitchell**, (Assistant United States Attorney for Appellee)
- 3. Eileen K. Wilson**, (Assistant United States Attorney for Appellee)
- 4. Kenneth Magidson**, (United States Attorney);
- 5. Edilberto Maso Diaz**, (Defendant-Appellant);
- 6. Chad Cowan**, (Assistant United States Attorney);
- 7. Amanda Gould**, (Assistant United States Attorney);
- 8. Randall Barrera**, (Defense Trial Attorney).

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

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

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The judgment of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

1 Jurisdiction in the Court of Appeals. This is a direct appeal from an affirmation of a final decision of the United States District Court for the Southern District of Texas, which entered judgment of criminal conviction and sentence under the Sentencing Reform Act of 1984. The date on which the United States of Appeal decided my case was November 21, 2018. The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254 (1).

2 Subject Matter Jurisdiction in the District Court. This case arose from the prosecution of an alleged offense against the laws of the United States. The date on which the highest state court decided my case was December 20, 2016. A copy of that decision appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 801 (d)(2)(E)

Under Federal Rule of Evidence 801(d)(2)(E), "[a] statement is not hearsay if it is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy and is offered against the party." *United States v. Graham*, 711 F.3d 445, 453 (4th Cir. 2013) (internal quotation marks omitted). To properly admit such evidence, the government must prove by preponderance of the evidence "(1) the existence of a conspiracy, (2) the statement was made by a co-conspirator of the party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy." *United States v. Robinson*, 367 F.3d 278, 291-92 (5th Cir. 2004) (quoting *United States v. Solis*, 299 F.3d 420, 443 (5th Cir. 2002)). The conspiracy cannot be established initially by the out-of-court statement at issue; rather, "[t]here must be proof from another source of the existence of the conspiracy and of [defendant]'s connection with it before [the out-of-court statement] can become admissible against [defendant]." *United States v. Stroupe*, 538 F.2d 1063, 1065 (4th Cir. 1976). Thus, the Government must introduce "substantial, independent evidence of the conspiracy." *Id.*

STATEMENT OF THE CASE

A. Proceedings Below

On December 9, 2015, Appellant was named in five counts of a seven count indictment. (ROA.13-17) This indictment was amended twice, and for purposes of this appeal, Appellant will use the final amended indictment filed on January 7, 2016. (ROA.72) Count One alleged that from October 1, 2012 to December 8, 2015 he conspired with Margil Ozuna-Barrera, Jorge Cruz-Rabell, Rafael Torres Nimer, Emilio Rodriguez, and other persons known and unknown to the Grand Jury to possess or distribute more than 1,000 kilograms of marihuana, more than one kilogram of heroin, and 500 kilograms of methamphetamine. (ROA.72) Count Two alleged that on or about March 27, 2013, Appellant knowingly possessed 1110 kilograms of marihuana. (ROA.73) Count Three alleged that on May 10, 2013, Appellant knowingly and intentionally possessed with intent to distribute approximately 348.24 kilograms of marihuana. (ROA.73-74) Count Four alleged that Appellant and Jorge Cruz-Rabell possessed with intent to distribute 815.28 kilograms of marihuana on September 6, 2013. (ROA.74) Count Five alleged that on September 24,

2014 Appellant and Jorge Cruz-Rabell knowingly and intentionally possessed with intent to distribute 254.54 kilograms of marihuana. (ROA.74-75)

On March 28, 2016, Appellant appeared for a jury trial. (ROA.267) Appellant's counsel stipulated to the admissibility of Exhibits 1 through 35. (ROA.267) However, the indictment was amended to remove the heroin and methamphetamine from Count One. (ROA.268) Additionally, the Government moved to dismiss Count Five and opted to proceed only on Counts One through Four. (ROA.268-269)

On November 21, 2018, the Fifth Circuit Court of Appeals affirmed the Trial Court's rulings and affirmed Appellant's conviction.

B. Statement of the Facts

During Appellant's one day jury trial, the Government called ten witnesses. (ROA.265) The Government's first witness, Renee Tuinstra, was a Border Patrol agent who had been working the Falfurrias check point on March 27, 2013. (ROA.285) That day, Tuinstra came into contact with Pablo Aroche-Calderon (Aroche). (ROA.286) A search of the truck driven by Aroche-Calderon revealed bundles of marihuana mixed in with pallets of

broccoli. (ROA.288) Agent Tuinstra also established that Appellant had crossed the Border Patrol Checkpoint on April 10, 2013 or August 10, 2013 (the record conflicts) when a canine alerted to the truck but no contraband was found after a seven-point inspection. (ROA.297)

Next, the Government called Miguel Garcia, a Task Force District Attorney Agent assigned to the High Intensity Drug Trafficking Area's (HIDTA) task force. (ROA.302) On March 27, 2013, Agent Garcia responded after a tractor trailer he had put a Be On the Look Out (BOLO) was stopped at the Falfurrias checkpoint. (ROA.302) Agent Garcia testified that the weight of the marihuana exceeded 2,200 pounds. (ROA.304) During cross examination, Agent Garcia admitted that the driver of the tractor trailer, Aroche, took responsibility for the marihuana. (ROA.306) The Government then called Border Patrol Agent Frank Flores, who worked the Falfurrias check point on May 10, 2013. (ROA.308) On that day, Flores seized a marihuana load from a tractor trailer driven by Julio Santana. (ROA.308-309) He testified that he could not remember to whom the tractor trailer belonged. (ROA.311) Additionally, Flores testified that the total weight of the marihuana was about, "700, 770, 774" pounds, and that Appellant was not present as Santana was

alone in the tractor trailer. (ROA.314) During his interview, Santana denied knowing that the marihuana was in the tractor trailer. (ROA.315) The Government followed up with former Border Patrol Agent Jacob Tubbs who, on September 6, 2013, was working the primary checkpoint in Falfurrias and came across a tractor trailer driven by Aroche. (ROA.316-317) When the tractor trailer was directed to secondary, a search revealed watermelons comingled with marihuana. (ROA.317) Tubbs testified that the weight of the marihuana in question was 892 kilograms or approximately 1900 pounds. (ROA.318) Tubbs took custody of Aroche and verified that he was the same person who had come through the checkpoint with marihuana five months earlier. (ROA.323) Tubbs also identified Government's Exhibit 18 which showed a decal with E & E Trucking that was present on the tractor trailer driven by Aroche. (ROA.323) Tubbs conceded that he was aware of prior occurrences of such decals being fabricated. (ROA.324) Agent Olivarez from Homeland Security also responded to the Falfurrias checkpoint on September 6, 2013. (ROA.325) Olivarez took control of the marihuana and was responsible for weighing the packaging and subtracting that from the total weight of the marihuana for a net weight of 815 kilograms. (ROA.328)

At that point, the Government called Rodolfo Rodriguez to the stand. (ROA.334) A bench conference ensued due to the witness' involvement with the previously dismissed Count Five. (ROA.334) As a result of the bench conference, the Government withdrew or acknowledged that it would have to withdraw the exhibits that related to Count Five. (ROA.335) Agent Rodriguez, who at the time was working with HIDTA, interviewed Appellant at the HIDTA office in Edinburg, Texas on October 1, 2014. (ROA.338-342) The purpose of the interview was to determine what steps had been taken by Appellant to address the issues of his drivers being involved in marihuana seizures. (ROA.345) Appellant denied any knowledge of what the drivers were doing, but was aware that the drivers had been arrested. (ROA.346) Appellant informed Agent Rodriguez that Aroche had been fired. (ROA.348) Agent Rodriguez also established that E and E Trucking had a history of operating legitimate loads. (ROA.350) Agent Rodriguez further stated that the government had returned the trailer seized in the marihuana arrest back to Appellant. (ROA.354)

After Agent Rodriguez, the Government called three alleged co-conspirators Mr. Aroche-Calderin (Aroche), Mr. Rafael Nimer Torres

(Torres), and Mr. Benigno Grey-Ramirez (Grey). A truck driver of 32 years, (ROA.358) Aroche admitted to having been arrested in March and September of 2013 for possession of marihuana. (ROA.356-357) During his direct examination, Aroche was asked to identify Appellant whom he acknowledged was in the courtroom, but did not identify. (ROA.357) During direct examination, Aroche stated Appellant never used the word marihuana. (ROA.361) Aroche further stated that someone else (not Appellant) had directed him to where the load would be picked up. (ROA.362) Additionally, Aroche stated that Juaso (later determined to be Benigno Grey) called him and gave him a reference point. (ROA.362) Aroche acknowledged that he was hoping for a lesser sentence and that he had been sentenced to 60 months. (ROA.397) During cross-examination, Aroche acknowledged that during his first interview he had stated that the conspiracy only involved Grey, and that he only involved Appellant after he had been sentenced. (ROA.399) At one point Aroche seems to indicate that because Appellant owned the trucks he could not deny his participation. (ROA.399-400) Aroche also acknowledged that Appellant did not tell him about the marihuana or where to pick it up, and that Grey (and not Appellant) was the per-

son telling him how much he would get paid. (ROA.401-402) Aroche was not present for any conversation between Appellant and Grey relating to the drug trade. (ROA.403) Aroche repeated these assertions when asked about the second arrest, Grey paid for his ticket and took him to where he was to pick up the marihuana. (ROA.404) Aroche acknowledged in re-cross examination that he only implicated Appellant after he was shown photos by Agent Bishop after he was sentenced to 60 months. (ROA.397, 406)

When Torres testified, he stated that he had not dealt with Appellant. (ROA.412) However, Torres testified that Appellant was present during a conversation between Torres a man named Andres and Appellant. (ROA.415) Trial counsel objected, and the trial court overruled the objection finding that Andres was a co-conspirator. (ROA.416) Torres then described a conversation where Andres asked Torres if he was interested in trafficking marihuana, and Andres told him that Appellant had devoted himself to trafficking marihuana. (ROA.416) During cross-examination, Torres acknowledged that he never had any conversation with Appellant regarding trafficking drugs. (ROA.424) The final co-conspirator to testify was Grey. Grey testified that Appellant had agreed to provide the transportation for the mari-

huana and that Grey would be the middleman. (ROA.431) Grey identified Appellant for the record. (ROA.432) However, Grey contradicted Aroche saying he did not have dealings with Aroche. (ROA.437, 442) Still, Grey admitted to having hired a lawyer for Aroche because they were both “Cuban and Cubans all help each other out.” (ROA.443)

The Government concluded its case by calling the case agent, David Bishop, to the stand. Agent Bishop testified that Jorge Santana worked for E and E Trucking and that Mr. Santana had been arrested with 348 kilograms of marihuana on May 10, 2013. (ROA.456-457) Agent Bishop also established that the March 27 seizure involved 815 kilograms. (ROA.458) Trial counsel made a motion for a directed verdict, and the trial court denied that motion without argument. (ROA.476)

The defense rested after Appellant testified and denied any involvement with the conspiracy. (ROA.488) Trial counsel renewed his motion for a directed verdict which was denied. (ROA.503) After closing arguments, the trial court instructed the jury without objection from either counsel. (ROA.517-518) The trial court cautioned the jury that, “it’s your duty to determine the facts. In doing so, you must consider only the evidence present-

ed during the trial, including the sworn testimony of witnesses and exhibits.”

(ROA.519) The trial court advised that the Government had called three alleged accomplices: Grey, Torres, and Aroche. (ROA.524) The court informed the jury that the testimony of such accomplices, “is always to be received with caution and weighed with great care”. (ROA.524-525) The court instructed that, “mere presence at the scene of an event without—even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.”

(ROA.529)

REASONS FOR GRANTING THE PETITION

The trial court abused its discretion by allowing the hearsay statements of an unindicted co-conspirator, Andres, to be admitted into evidence, through co-conspirator Torres. The trial court committed separate and cumulative error by failing to list Andres in the admonishments it included in the jury instructions related to the testimony of co-conspirators. Finally, when the evidence is viewed in a light most favorable to sustaining the verdict, the Government's evidence was insufficient to support a finding of guilt in this case, and Appellant's case should be dismissed. These errors were duplicated by the Fifth Circuit Court of Appeals when it affirmed Appellant's conviction.

CONCLUSION

Appellant respectfully requests that his case be dismissed or, in the alternative, remanded for a new trial.

Respectfully submitted.

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PROOF OF SERVICE

I Shannon W. Locke, hereby certify that on the 3rd of May, 2019, I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. To the following:

- 1.) Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W. Washington, D.C. 20530-0001.
- 2.) Carmen Castillo Mitchell, U.S. Attorney's Office for the Southern District of Texas, 1000 Louisiana, Ste. 2300, Houston, Texas 77002.
- 3.) Edilberto Maso Diaz, 4909 FM 2826, Robstown, Texas 78380.

//S// Shannon W. Locke
SHANNON W. LOCKE
Attorney for Defendant-Appellant

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40125

United States Court of Appeals
Fifth Circuit

FILED

November 21, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

EDILBERTO MASO DIAZ,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-1077-3

Before DENNIS, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Edilberto Maso Diaz (Maso) appeals his jury convictions for three counts of possession with intent to distribute marijuana and one count of conspiracy to commit the same. He contends that the district court reversibly erred by permitting the Government to present inadmissible hearsay statements from an alleged coconspirator and by not offering a cautionary instruction about that declarant's statements. He alternatively alleges that these two errors

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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together amounted to cumulative error that deprived him of the right to a fair trial. Finally, he challenges the sufficiency of the evidence against him. We conclude that any erroneous admission of hearsay evidence was harmless and that his remaining arguments are without merit. AFFIRMED.

I

At Maso's two-day jury trial, the Government called as witnesses border patrol and law enforcement agents who detailed three incidents in March, May, and September of 2013 when drivers employed by Maso's trucking company, E&E Trucking, were arrested at the Mexican-American border after large quantities of marijuana were discovered among produce in the backs of the trucks. The Government then presented witness testimony from three alleged coconspirators, Pablo Aroche-Calderin (Aroche), Rafael Nimer Torres (Torres), and Benigno "Juaso" Grey-Ramirez (Grey), all of whom had already pleaded guilty to related conduct. These three witnesses each admitted during their testimony that they hoped to receive reduced sentences for testifying against Maso. As discussed in more detail below, Torres testified to out-of-court statements made by Andres, another alleged coconspirator, that Maso challenges as inadmissible hearsay.

Aroche, the first coconspirator witness, testified that he was arrested in March and September 2013 for possession of marijuana when, while driving a truck for E&E, he knowingly attempted to drive loads of marijuana over the border. Aroche specifically stated that it was his understanding that Maso and Grey had a business relationship in "drug trafficking, marijuana." He testified that, in March, he was sitting in the truck readying to pick up a load of broccoli when Maso and Grey came up to talk to him. Maso told him that there was another load that he would be picking up as well, but did not specify what it was. Grey later called Aroche and told him where to pick up the load. Aroche

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testified that Maso and Grey were both present at the pick-up site while marijuana was loaded into the truck.

Aroche also gave his account of the September attempt to transport the load of marijuana, similarly stating that Maso gave him separate delivery instructions for the load of watermelons and “another load,” which turned out to be marijuana, that was already in the truck. Aroche testified that Grey told him that Maso would pay him for the March and September marijuana loads if they arrived successfully. On cross-examination, Aroche acknowledged that he initially implicated Grey but not Maso in the marijuana conspiracy, only claiming Maso’s involvement after he, Aroche, had been sentenced and the investigating agent asked about Maso.

Torres, who testified next, spoke primarily about a conversation between him and a man named Andres that occurred while Maso was present. Andres’s relation to Maso is not clear from the totality of the trial testimony; witnesses seemed uncertain as to whether he was Maso’s brother, cousin, or friend. Torres testified that Andres told him that “if [Torres] was willing to traffic marijuana, they had trucks.” Torres further testified that Andres “told me Maso devoted himself to trafficking marijuana, that’s what he told me, I never saw it.” Torres later reiterated: “I knew that Andres and [Maso] devote themselves to carrying drugs. Maso never told me anything like that, nor did he insinuate it, but Andres had told me that’s what they devoted themselves to, Andres told me that.” Torres acknowledged that Maso himself never said anything to him about trafficking drugs. The defense contemporaneously objected to the admission of Andres’s statements through Torres’s testimony as hearsay. The district court overruled the objection, accepting the Government’s justification that Andres was Maso’s coconspirator. Torres stated that he declined to be involved with the marijuana trafficking, but

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admitted to later being involved with Andres and Grey in trafficking different controlled substances, including methamphetamine, and asserted Grey was also involved. Torres never mentioned any involvement by Maso in these different drug transactions.

Grey, who testified next, stated that Maso came to his house in 2012 and "There we talked like the two adults that we were, came to an agreement. He would provide the means of transportation, I would provide the marijuana." Grey said he believed, but was not certain, that he and Maso were present when Aroche's truck was loaded with marijuana in March 2013. Grey further confirmed that Maso's drivers were paid the way Aroche had testified: Grey would pay Maso, who would then pay his drivers directly. Grey also testified that Andres "was not involved in this conspiracy" to traffic marijuana. Consistent with Torres's testimony, Grey did state that he had different drug dealings with Andres and Torres to traffic other substances. However, he clarified that "[w]ith Mr. Maso I just did marijuana."

The Government's final witness, Agent David Bishop, a case agent who investigated and arrested Maso, also testified about Andres's involvement or lack thereof. Bishop affirmed that he believed Grey's testimony that "Andres had nothing to do with this particular transaction." Bishop further stated that "whether or not Andres was involved in the drug trafficking we haven't been able to prove yet." When asked what he suspected of Andres's activities, Bishop stated:

I believe [Torres] was the transporter, [Grey] was the broker in the Valley and I believe Andres was the recipient. . . . I believe [Torres] was going to get paid for transporting the batteries. I believe [Torres] got the batteries from [Grey]. I don't know if [Grey] knew that Andres was involved in that transaction. . . . I suspect Andres was [involved in that transaction].

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Finally, Maso testified in his defense, stating that Grey had proposed to him that they carry drugs, but that he refused; that he was not present when Aroche was told about or loading the drugs; and that he otherwise had no involvement in his drivers' drug smuggling using his trucks or any knowledge of the trafficking incidents until drugs were seized.

When instructing the jury, the court stated the following:

In this case, the government called as witnesses three alleged accomplices . . . Rafael Nimer Torres, Benigno Grey-Ramirez . . . and Pablo Aroche-Calderin . . . all three of whom the government has entered into a plea agreement providing for the dismissal of some charges and a lesser sentence than the co-defendant would otherwise be exposed to for the offense to which the co-defendant pled guilty. . . . You should keep in mind that [their] testimony is always to be received with caution and weighed with great care. You should never convict the defendant upon the unsupported testimony of an alleged accomplice, unless you believe that testimony beyond a reasonable doubt.

The court did not mention Andres in this list of alleged accomplices. Maso raised no contemporaneous objection, nor did he request an alternative instruction.

The jury subsequently convicted Maso, and he was sentenced to 160 months of imprisonment. Maso timely appeals.

II

Hearsay—out-of-court statements presented for the truth of the matter asserted—are not admissible in a jury trial unless an enumerated exception applies. FED. R. EVID. 801, 802. Rule 801(d)(2)(e) provides that such statements are admissible when they are used against a party and were “made by the party’s coconspirator during and in furtherance of the conspiracy.” We review the district court’s decision to admit this evidence for an abuse of discretion. *United States v. Hall*, 500 F.3d 439, 443 (5th Cir. 2007). The

district court does not abuse its discretion if the Government proves by a preponderance of the evidence “(1) the existence of the conspiracy; (2) the statement was made by a coconspirator of the party; (3) the statement was made during the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.” *Id.*; *see* FED. R. EVID. 801(d)(2)(e). In assessing whether these elements are satisfied, “[t]he statement[s] [themselves] must be considered[,] but cannot by [themselves] establish the existence of the conspiracy or participation in it.” *United States v. Nelson*, 732 F.3d 504, 516 (5th Cir. 2013) (citations and quotation marks omitted). “There must be ‘independent evidence’ establishing the conspiracy.” *Id.*

Maso contends that Andres’s statements were not admissible under the coconspirator exception because there was no independent evidence that they were in furtherance of any conspiracy Maso and Andres participated in together. *See generally United States v. Arce*, 997 F.2d 1123, 1128 (5th Cir. 1993) (“The conspiracy that forms the basis for admitting coconspirators’ statements need not be the same conspiracy for which the defendant is indicted.”). Though there was independent evidence that Maso was involved in marijuana trafficking and Andres with methamphetamine trafficking with at least one overlapping coconspirator—Grey—none of this evidence connected Maso to the methamphetamine or Andres to the marijuana.

However, though Maso’s arguments call the admissibility of these hearsay statements into question, we conclude that reversal is not warranted because any error was harmless. “[E]rrors in evidentiary rulings are subject to the doctrine of harmless error.” *United States v. Cornett*, 195 F.3d 776, 785 (5th Cir. 1999) (citations omitted). Under this doctrine, “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” FED. R. CRIM. P. 52(a). “Under a harmless error analysis, the

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issue is whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” *Cornett*, 195 F.3d at 785 (citations and quotation marks omitted). “Thus, the error will not require reversal if ‘beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.’” *Id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).¹ The burden of proving harmlessness falls to the Government. *United States v. Olano*, 507 U.S. 725, 741 (1993).

Here, Aroche and Grey specifically implicated Maso in the marijuana trafficking independent of Andres’s statements. Grey explicitly discussed how he and Maso entered into a drug trafficking arrangement and detailed his subsequent marijuana dealings with Maso. Aroche, similarly, testified that Maso instructed him to get directions from Grey on where to go to pick up another unspecified load, and that Maso was then present at the designated pick-up site while marijuana was subsequently loaded into the truck. Further, Aroche specifically told the jury that Maso and Grey had a business relationship in “drug trafficking, marijuana.”

This is not a case, as in *Cornett*, where there was otherwise “no direct evidence” that the defendant committed the crime, 195 F.3d at 785, or, as in *United States v. Sumlin*, where the “case was a close one, and even the district judge remarked that he would not have been surprised had the jury returned a different verdict,” 489 F.3d 683, 692 (5th Cir. 2007). Moreover, the Government’s closing argument indicates that Torres’s testimony was not

¹ Our circuit has alternatively applied a less stringent standard to determine whether a potential evidentiary error was harmless. See *United States v. Gil-Cruz*, 808 F.3d 274, 276 (5th Cir. 2015) (“An error affects substantial rights if there is a *reasonable probability* that the improperly admitted evidence contributed to the conviction” (citing *United States v. Sumlin*, 489 F.3d 683, 688 (5th Cir. 2007)) (emphasis added). Here, we hold that Maso is not entitled to relief under either standard.

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critical to its case: referring to Torres as “more of a background witness” and making no reference to Andres’s statements about Maso devoting himself to the trafficking of marijuana. Because we conclude beyond reasonable doubt that the jury would therefore have delivered the same verdict without hearing the challenged hearsay statements, their admission thus does not justify reversal.²

For similar reasons, we also reject Maso’s argument that there was insufficient evidence to support his guilty verdict. We must affirm a guilty verdict if “after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution,” we determine that “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Vargas-O’Campo*, 747 F.3d 299, 301 (5th Cir. 2014) (emphasis in original). Because we hold that the jury would have returned the same verdict even without Andres’s testimony, there is certainly enough evidence to sustain the verdict when considering all evidence, including Andres’s testimony, in the light most favorable to this verdict.

² Maso alleges that he may not have been found guilty without Andres’s statements because Aroche and Grey were unreliable witnesses who contradicted each other. This argument, however, relies on a mischaracterization of Grey’s testimony. Maso claims that when Grey testified he did not have any “dealings” with Aroche, he was denying ever meeting or knowing him, which would be inconsistent with Aroche’s account. Grey’s testimony as a whole, however, clarifies that his statement instead addressed the structure of the conspiracy, emphasizing that he coordinated with Maso directly and Maso then handled the specifics of hiring and paying his drivers. (“I have said from the beginning that my dealings have been with Mr. Maso, not with any driver. . . . I never had any business with Aroche.”).

Indeed, Grey made similar statements about Torres, a member of the methamphetamine trafficking activities with which Grey also admitted his involvement. Grey stated he had met Torres, but felt it necessary to clarify that Torres “was never hired by me to handle any drugs. . . . The fact that I was involved does not mean that I hired him.”

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III

We review a party's claim that the district court erred in its jury instructions for abuse of discretion, asking "whether the charge, as a whole, is a correct statement of law." *United States v. Bennett*, 874 F.3d 236, 242 (5th Cir. 2017) (cleaned up). Where, as here, the appellant failed to object at trial, the instructions are reviewed for plain error only. Under this standard of review, Maso must establish a forfeited error that is clear or obvious and that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he satisfies the first three prongs of the plain error analysis, this court has the discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up).

Maso alleges that the district court abused its discretion by not including Andres in the list of alleged accomplices who the jury was instructed to believe only with caution and great care. Maso's argues on appeal that there is no valid reason for not including Andres in this instruction. However, Maso here ignores the critical distinction that Andres, unlike the testifying witnesses, did not make the prejudicial statements in hopes of receiving a reduced sentence after a guilty plea. Maso makes no further attempt to engage with *Bennett*'s demanding standard. The district court's instruction was not an abuse of discretion, plain or otherwise.

Accordingly, Maso's contention that the hearsay admission and jury instructions together constitute cumulative error is also meritless. "The cumulative error doctrine provides for reversal when an aggregation of non-reversible errors, *i.e.*, plain and harmless errors that do not individually warrant reversal, cumulatively deny a defendant's constitutional right to a fair trial." *United States v. Cervantes*, 706 F.3d 603, 619 (5th Cir. 2013) (citing *United States v. Delgado*, 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc)).

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“Allegations of non-errors do not play a role in cumulative error analysis since there is nothing to accumulate.” *Cervantes*, 706 F.3d at 619. Because the jury instructions were not themselves error, Maso cannot succeed under this alternative theory.

For these reasons, we AFFIRM Edilberto Maso Diaz’s conviction and sentence.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40125

United States Court of Appeals
Fifth Circuit

FILED

November 21, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

EDILBERTO MASO DIAZ,

Defendant - Appellant

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

Before DENNIS, OWEN, and SOUTHWICK, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the sentence and conviction of the District Court are affirmed.



Certified as a true copy and issued
as the mandate on Dec 13, 2018

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

ENTERED

December 20, 2016
David J. Bradley, ClerkUNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Corpus ChristiUNITED STATES OF AMERICA
v.
EDILBERTO MASO DIAZ

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 2:15CR01077-003
USM NUMBER: 52151-177 See Additional Aliases

THE DEFENDANT:

pleaded guilty to count(s) _____

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

was found guilty on count(s) 1-4 on March 29, 2016 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, 841(a)(1) and 841(b)(1)(A)	Conspiracy to Possess With Intent to Distribute More Than 1,000 Kilograms of Marihuana	12/08/2015	1
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)	Possession with Intent to Distribute 1,110 Kilograms of Marihuana	03/27/2013	2
21 U.S.C. §§ 841(a)(1), and 841(b)(1)(B)	Possession with Intent to Distribute 348.24 Kilograms of Marihuana	05/10/2013	3
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)	Possession with Intent to Distribute 815.28 Kilograms of Marihuana	09/06/2013	4

 See Additional Counts of Conviction

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to 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.

December 15, 2016
Date of Imposition of Judgment
Signature of JudgeJANIS GRAHAM JACK
SENIOR UNITED STATES DISTRICT JUDGE
Name and Title of Judge

December 19, 2016

MMH J 2063542
VOV

17-40125-125

DEFENDANT: **EDILBERTO MASO DIAZ**
CASE NUMBER: 2:15CR01077-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 160 months.

The sentence imposed is to each of Counts 1 through 4, to be served concurrently.

See Additional Imprisonment Terms

The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in a facility near Dallas, Texas, as long as the security needs of the Bureau of Prisons are met.

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 _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL.

17-40125.126

DEFENDANT: EDILBERTO MASO DIAZ
CASE NUMBER: 2:15CR01077-003**SUPERVISED RELEASE**

Upon release from imprisonment you will be on supervised release for a term of: 5 years.
The sentence imposed is to each of Counts 1 through 4, to be served concurrently.

See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (check if applicable)
4. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
5. You must 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 you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6. You must participate in an approved program for domestic violence. (check if applicable)

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

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or lasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: EDILBERTO MASO DIAZ
CASE NUMBER: 2:15CR01077-003

SPECIAL CONDITIONS OF SUPERVISION

DEPORTATION: If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

See Additional Special Conditions of Supervision

17-40125.128

DEFENDANT: EDILBERTO MASO DIAZ
CASE NUMBER: 2:15CR01077-003

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$400.00		

The special assessment consists of \$100.00 as to each of Counts 1 through 4, to be paid consecutively.

See Additional Terms for Criminal Monetary Penalties

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 payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

See Additional Restitution Payees.

TOTALS	<u>\$0.00</u>	<u>\$0.00</u>
<input type="checkbox"/> Restitution amount ordered pursuant to plea agreement \$ _____		
<input type="checkbox"/> 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).		
<input type="checkbox"/> The court determined that the defendant does not have the ability to pay interest and it is ordered that:		
<input type="checkbox"/> the interest requirement is waived for the <input type="checkbox"/> fine <input type="checkbox"/> restitution.		
<input type="checkbox"/> the interest requirement for the <input type="checkbox"/> fine <input type="checkbox"/> restitution is modified as follows:		
<input type="checkbox"/> Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.		

* 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: EDILBERTO MASO DIAZ
CASE NUMBER: 2:15CR01077-003

SCHEDULE OF PAYMENTS

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

A Lump sum payment of _____ due immediately, balance due
 not later than _____, or
 in accordance with 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 _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ 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:

Payable to: The special assessment shall be paid during the term of supervised release at a rate of \$30.00 per month, beginning 30 days after placement on supervised release.

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

Case Number

Defendant and Co-Defendant Names
(including defendant number)Total AmountJoint and Several
AmountCorresponding Payee,
if appropriate

See Additional Defendants and Co-Defendants Held Joint and Several

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:

See Additional Forfeited Property

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.

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