ORIGINAL

No: 19-5014

In the
Supreme Court of the United States

RICARDO DONATE-CARDONA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ricardo Donate-Cardona being first duly sworn according to law, depose and say that I am the Petitioner in the above-entitled cause, and in support of my application for leave to proceed without being required I prepay costs or fees, state (A) because of my poverty I am unable to pay the cost of the cause; (B) I am unable to give security for the same;

(C) I believe that I am entitled to the redress I seek in the cause; (D) this review is sought in good faith; (E) the nature of the cause is briefly stated as a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit; (F) the petition raises substantial questions of constitutional law, as set forth more fully in my Petition filed herewith.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1) I am presently unemployed.

2) I have not received within the last 12 months any income from a business, profession of other form of self-employment, in the form of rent payments, interest, dividend, or other source.

3) I do not own cash or a checking or savings account.

4) I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5) I have no persons dependent on me for support.

6) I have read the foregoing and state that it is true and correct.

Done this 25, day of June 2019.

Ricardo Donate-Cardona
Reg. # 35253-069
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521

19-5014 ORIGINAL

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Ricardo Donate-Cardona, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Self-employment	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Income from real property (such as rental income)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Interest and dividends	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Gifts	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Alimony	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Child Support	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Retirement (such as social security, pensions, annuities, insurance)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Disability (such as social security, insurance payments)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Unemployment payments	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Public-assistance (such as welfare)	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Other (specify): _____	$ 0.00	$ 0.00	$ 0.00	$ 0.00
Total monthly income:	$ 0.00	$ 0.00	$ 0.00	$ 0.00

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
	N/A		$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$	$
		$ N/A	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description N/A
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
	N/A	

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0.00	$ 0.00
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0.00	$ 0.00
Home maintenance (repairs and upkeep)	$ 0.00	$ 0.00
Food	$ 0.00	$ 0.00
Clothing	$ 0.00	$ 0.00
Laundry and dry-cleaning	$ 0.00	$ 0.00
Medical and dental expenses	$ 0.00	$ 0.00

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0.00	$ 0.00
Recreation, entertainment, newspapers, magazines, etc.	$ 0.00	$ 0.00
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0.00	$ 0.00
Life	$ 0.00	$ 0.00
Health	$ 0.00	$ 0.00
Motor Vehicle	$ 0.00	$ 0.00
Other: _____	$ 0.00	$ 0.00
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0.00	$ 0.00
Installment payments		
Motor Vehicle	$ 0.00	$ 0.00
Credit card(s)	$ 0.00	$ 0.00
Department store(s)	$ 0.00	$ 0.00
Other: _____	$ 0.00	$ 0.00
Alimony, maintenance, and support paid to others	$ 0.00	$ 0.00
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0.00	$ 0.00
Other (specify): _____	$ 0.00	$ 0.00
Total monthly expenses:	$ 0.00	$ 0.00

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Currenly Incarcerated and I have no Income

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 06/25/19, 20___

_____

(Signature)

No: 19-5014

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Coleman, FL 33521

QUESTIONS PRESENTED FOR REVIEW

Should Donate Cardona's conviction on Count 4, possession of a firearm by a convicted felon, be vacated in light of this court's decision in *Rehaif v. United States*, 17-9560, 2019 U.S. LEXIS 4199 (June 21, 2019).

When a Jencks act violation could have affected the outcome of the trial, should the harmless error still apply?

Should a Non-Article III Judge serve indefinite terms?

Was this court's decision in *Bullcoming v. New Mexico,* 561 U.S. 1058 (2010) violated by the District Court of U.S.V.I?

Does the lack of a multiple conspiracy jury instruction require an automatic remand for a new trial?

Can Donate-Cardona be held responsible for 150 but less than 450 kilograms of cocaine when he did not possess ample funds for the drug transaction?

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Third Circuit, the United States District Court for the U.S.V.I., St. Thomas.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Ricardo Donate-Cardona, ("Donate-Cardona") the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit, denying Donate-Cardona's direct appeal whose judgment is herein sought to be reviewed, is an unpublished opinion *United States v. Donate-Cardona,* No. 17-1178, 2019 U.S. App. LEXIS 9985 (3d Cir. Apr. 4, 2019) and is reprinted as Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 18 U.S.C. § 3500 provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it

may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Id. Title 18 U.S.C. § 3500.

U.S. CONST. art. III, § 1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferiorCourts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services,

a Compensation, which shall not be diminished during their Continuance in Office.

Id. U.S. CONST. art. III, § 1

The Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541, et seq., established the District Court of the Virgin Islands and provided for judges of that court. As to the appointment and tenure of the judges of the District Court of the Virgin Islands, "[t]he President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and until their successors are chosen and qualified, unless sooner removed by the President for cause." 48 U.S.C. § 1614(a)

STATEMENT OF THE CASE

On January 15, 2016, a superseding indictment was returned by a grand jury sitting in the United States Virgin Islands, St. Thomas Division, charging Donate-Cardona and other co-defendants of four counts; count one, conspiracy to distribute narcotics (21 U.S.C. § 846); count two, attempted possession with intent to distribute narcotics (21 U.S.C. § 841(a)(1); count three, possession of a firearm during a drug trafficking offense (18 U.S.C. § 924(c)(1)(A)); and, count four, possession

of a firearm by a convicted felon, aided and abetted by, inter alia, Alexandro Gerardino-Aracena (18 U.S.C. § 922(g)(1).

After a 3 day trial Donate-Cardona was found guilty of counts one through four. The District Court sentenced Donate-Cardona to 214 months as to counts one and two, 60 months as to count three, and 120 months as to count four. The sentences in counts one, two, and four were imposed concurrent to each other and the sentence as to count three was imposed consecutive to all the other counts. A five-year term of supervised release as to counts one through three was imposed, and a three-year term of supervised release as to count four. All terms of supervised release were imposed concurrently with each other.

On appeal, Donate-Cardona argued that the District Court had erred in not granting a new trial in light of a governmetn conceded, Jenks violation. The Third Circuit Court of Appeals, while ackowleding the error as well, did not grant relief. This error as well as the errors raised on the appeal and in this petition, warrant relief.

A. Evidence Presented in District Court.

This case originated from a narcotics investigation culminated in Puerto Rico. The Drug Enforcement Administration ("DEA") Field

Office in Puerto Rico, utilized a confidential informant, Marvin Cruz Molina ("Molina") to initiate a narcotics investigation in Puerto Rico. Molina had been working with the DEA for years, started the investigation into a drug trafficking organization in Puerto Rico which was the catalyst for the prosecution in St. Thomas.

Molina originaly negotiated to sell large quantities of cocaine to a few individuals in Puerto Rico, including Ruben De La Cruz-Alvarez ("De La Cruz"). Initially, there was no mention of St. Thomas. The transaction was structured for 75 kilograms of cocaine and from there the quantities were raised. Eventually the quantity of cocaine reached 150 kilograms and the price settled at $13,000.00 per kilogram. The supposed breakdown was 50 kilograms for "Ricardo and Manny" and 100 kilograms for the individuals in Puerto Rico. "Ricardo" was identified as Donate-Cardona. In essence, two agrements were reached. One for a quantity of cocaine for Puerto Rico and one for a quantity of cocaine for St. Thomas. Part of the payment for the St. Thomas agreement were three AK 47 firearms and a cash payment involving the St. Thomas transaction would be picked up by Molina in St. Thomas.

B. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) Violation

Chad Foreman ("Foreman"), an agent with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") testified that between *September and October 2015,* ATF Agent Steve Waters ("Waters") took possession of the firearms for the DEA in St. Thomas and prepared a report on the firearms nexus. Foreman examined Waters' report for interstate nexus and prepared a report of his findings on *February 17, 2016*. The report was prepared for eventual trial prosecution. Waters' report summarized the interstate nexus requirement, establishing where the firearms were manufactured; however, he did not testify at trial. Foreman's testimony and the report were premised on Waters' report. All *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) objections were overruled.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. SHOULD DONATE-CARDONA'S CONVICTION ON COUNT 4, POSSESSION OF A FIREARM BY A CONVICTED FELON, BE VACATED IN LIGHT OF THIS COURT'S DECISION IN *REHAIF v. UNITED STATES*, No. 17-9560, 2019 U.S. LEXIS 4199 (June 21, 2019).

In Count 4 of the indictment, Donate-Cardona was charged with being a felon in possession of a firearm. The jury was instructed on the following:

> Count 4 charges possession of a firearm by a felon. In order to sustain its burden of proof for the crime of possession of a firearm by a felon, the government must prove the following essential elements beyond a reasonable doubt:
>
> First, that Ricardo Donate-Cardona has been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year.
>
> Second, that after this conviction, Ricardo Donate-Cardona knowingly possessed the firearm as described in Count 4 of the indictment.
>
> And, third, that Ricardo Donate-Cardona's possession was in or affecting interstate or foreign commerce.
>
> If you are convinced that each element has been proven beyond a reasonable doubt with respect to the defendant on this count, then it is your duty to return a verdict of guilty as to the Defendant Cardona on this count. However, if you have a reasonable doubt as to any of these elements with respect to this count, then it is your duty to return a verdict of not guilty as to the defendant on the count. The third element that the government must prove beyond a reasonable doubt is that the firearm specified

> in the indictment was in or affecting interstate commerce. This means that the government must prove that at some time before the defendant's possession, the firearm had traveled in interstate commerce. It is sufficient for the government to satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line or border. The government does not need to prove that a defendant carried it across the state line or border, or prove who carried it across or how it was transported. It is also not necessary for the government to prove that a defendant knew that the firearm had traveled in interstate commerce. You are permitted to infer that a firearm manufactured in a different state or country other than that in which the firearm was found has traveled in interstate commerce. However, you are not required to do so.

During trial, there was no stipulation that Donate-Cardona was a convicted felon, nor that he knew "he belonged to the relevant category of persons barred from possessing a firearm." On June 21, 2019 this Court decided *Rehaif v. United States*, 2019 U.S. Lexis 4199 (June 21, 2019), where the court held "that a defendant commits a crime if he "knowingly" violates §922(g), which makes possession of a firearm unlawful when the following elements are satisfied: (1) a status element (here "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition"). *Id.* at *2. In the instant case, the jury was required to prove only 3 of the 4 elements required for a conviction of

Title 18 U.S.C. § 922(g). *See Rehaif at *1.* (To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and that he knew he had the relevant status when he possessed it.)

A. The Supreme Court's decision in *Rehaif v. United States*, 2019 U.S. Lexis 4199 (June 21, 2019) applies to pending, non-final criminal cases on direct appellate review and should be applied to vacate Donate-Cardona's conviction on Count 4.

By applying the *Rehaif* decision to non-final criminal cases pending on direct review at the time of the decision is consistent with (1) longstanding authority applying favorable decisions retroactively to cases pending on appeal when the law changes. Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring). "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." Id. (quoting *Yeaton v. United States*, 5 Cranch 281, 283 (1809)). The common law principle that repeal of a criminal statute

abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties and "even when the penalty [is] reduced." *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review). *Bradley v. School Board of City of Richmon*d, 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the principle that an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary." Id., 711, 715. It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner Peggy,* 1 Cranch 103 (1801): "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." *Id.*, 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring

while a case is pending on appeal is to be given effect "even where the intervening law does not explicitly recite that it is to be applied to pending cases...." *Bradley*, 416 U.S. at 715. The Court applied this principle when it vacated the convictions of defendants who had staged sit-ins at lunch counters that refused to provide services based on race in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). After the defendants were convicted of trespass but before their convictions became final on direct appellate review, Congress passed the Civil Rights Act of 1964, which forbad discrimination in places of public accommodation and prohibited prosecution for peaceful sit-ins. Applying this positive change in the law to cases pending on appeal "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive." *Id.*, 313-14. The Court reiterated that the principle requiring courts to give effect to positive changes in the law occurring while a case is on appeal does not depend on the existence of specific language in a statute reflecting that intent; rather, it "is to be read wherever applicable as part of the background against which Congress acts." *Id.*, 313-14.

As such, based on this Court's decision in *Rehaif v. United States*, 2019 U.S. Lexis 4199 (June 21, 2019), the government was required to prove both that Donate-Cardona knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. That element was missing in this case requiring vacatur of Count 4 of the indictment.

II. WHEN A JENCKS ACT VIOLATION COULD HAVE AFFECTED THE OUTCOME OF THE TRIAL, SHOULD HARMLESS ERROR STILL APPLY.

During trial, the Government tendered ome Jencks Act material. Statements from Special Agents Gabriel Hill ("Hill") and Agent Michael Day ("Day") were not timely disclosed. Although neither Hill's nor Day's statements were disclosed, the Government nonetheless introduced Hill's and Day's testimony as for the first two trial witnesses. On cross examination, both Hill and Day admitted – following the District Court's admonishment to the Government of their obligations to produce prior statements for cross examination of its witnesses – that they generated reports or notes that were subject to disclosure pursuant to 18 U.S.C. § 3500. This was the first time § 3500 regarding these witnesses were addressed. The prosecution did not

deny that Jencks Act statements existed and were in their possession, they simply made a conscious decision to maintain the confidentiality of the contents and of the statements. Under these circumstances, the Jencks Act explicitly permitted the trial judge to strike the witness "testimony or to declare a mistrial." *United States v. Jackson*, 649 F.2d 967 (3d Cir. 1981) (Under the Jencks Act, the court could have declared a mistrial).

Hill prepared reports as the "Confidential Source's Handler" during the span of the conspiracy alleged in the indictment. Confronted with a potential Jencks Act infraction and resulting consequences, the Government originally averred that it lacked a legal responsibility to produce Hill's reports. In response, the Court ordered the production of Hill's statements *after* the Government sought to excuse him from the proceedings. The Government produced four (4) separate reports prepared by Hill. Two of the reports contained information regarding the confidential source's debriefings. A third report contained a summary of redacted information of *yet another confidential source* that was utilized at the start of the investigation, while in Puerto Rico. This informant was never announced to the defense. The final report

contained information pertaining to currency seized in Puerto Rico and utilized as substantive evidence against Donate-Cardona. Following the review of the Government's belated production, the Government then altered its argument. The subsequently alleged that the documents were not in possession of "this government," but in possession of "Puerto Rico." This court has addressed proper remedies in the past. *Jencks v. United States,* 353 U.S. 657, 672 (1957) permits for a dismissal of an indictment for nonproduction of reports or statements relevant to trial preparation. *Roviaro v. United States,* 353 U.S. 53 (1957). Thus once a defendant makes a prima facie case of the existence of a *Jencks Act* statement and resulting Government's violation of its production obligations, the prosecution must demonstrate that it acted in good faith, either by omission or excusable negligence, in order to avoid sanctions pursuant to Title 18 U.S.C. § 3500(d). Here, the government made no attempt to locate the documents, all along knowing two conspiracy's existed. The lower court refused to grant a new trial, rendering Title 18 U.S.C. § 3500 a moot statute.

Cases under the *Jencks Act* have indicated that the Act calls not only for timely disclosure of statements but also for the preservation of statements for future disclosure." *United States v. Lieberman*, 608 F.2d 889, 895 (1st Cir. 1979). In this case, the Government's withholding of memorandums written by a Government witness that were highly critical of a Government informant's integrity and role during the course of an undercover drug investigation, violated the *Jencks Act* since the withheld evidence *could* have affected the outcome of the trial. *United States v. Brumel-Alvarez,* 991 F.2d 1452, 1464-65 (9th Cir. 1992) (The Court concluded that because "the withheld evidence *could have* affected the outcome of the trial, the Jencks error was not "more than likely harmless.") *Jencks Act* sanction language was established to remedy a situation in which the Government made *conscious* choices not to comply with a production order. In said circumstances, it seems an appropriate result that the prosecution suffers the consequences of its election.

It is different, however, if the nonproduction is the result of oversight or negligent conduct not amounting to a conscious election. In such situations, a "good-faith" exception may not entail an automatic

application of the sanctions provided by the statute. Here, the Government did not maintain there was a legitimate excuse for the nondisclosure. To the contrary, it took the position that it had no obligation under the *Jencks Act* to produce the statements. To aggravate matters, Hill's reports were instrumental in trial preparation as they pertain to the Government's principal witness, Molina, the confidential source who was unknown to the defense at the time. Furthermore, Hill's reports contained information of *another confidential source* who was only discovered after the *Jencks Act* violation. To that effect, the Government's nondisclosure of Hill's Jencks Act material approached the same level as that presented in *Brumel-Alvarez,* 976 F.2d at 1237 (9th Cir. 1992). In *Brumel-Alvarez*, the court concluded that a memorandum written by a DEA group supervisor was relevant since it contained information necessary to prepare cross-examination of the witness that issues the report, as well as the Government's main source of information. In this case, the main source of information were the informants, not only Molina, but a second undisclosed informant.

The non-disclosure was critical to Donate-Cardona's due process rights. As such the granting of writ of certiorari on this violation is required.

III. SHOULD A NON-ARTICLE III JUDGE SERVE INDEFENITE TERMS.

"Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch." *Stern,* 564 U.S. 483 (cleaned up). "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Id.*

> By appointing judges *to serve without term limits*, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the clear heads and honest hearts deemed essential to good judges.

Id. at 484. Indeed, "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." Id.

Undoubtably "[t]he District Court of the Virgin Islands derives its jurisdiction from Article IV, § 3 of the United States Constitution, which authorizes Congress to regulate the territories of the United States." *United States v. Gillette*, 738 F.3d 63, 70 (3d Cir. 2013). By operation of the 1984 amendments to the Revised Organic Act, the District Court of the Virgin Islands "now possesses the jurisdiction of an Article III District Court of the United States, though it remains an Article IV Court." *Birdman v. Office of the Governor*, 677 F.3d 167, 175 (3d Cir. 2012) (cleaned up).

While the District Court of the Virgin Islands is an Article IV court,

> it is not a court of the United States created under Article III, section 1. The fact that its judges do not hold office during good behavior and that the court is thus excluded from the definition of 'court of the United States' which is contained in 28 U.S.C. s 451 is confirmatory of this.

United States v. George, 625 F.2d 1081, 1088-89 (3d Cir. 1980). *See also Mookini v. United States*, 303 U.S. 201, 205 (1938) (holding that "vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States'"). "While [the District Court of the Virgin Islands] has the jurisdiction of a District Court of the United States, its judges

serve for a term of ten years and not for life. 48 U.S.C. §§ 1612(a) and 1614(a)." *Semper v. Gomez*, 2013 WL 2451711, at *4 (D.V.I. June 4, 2013) aff'd in part, remanded in part, 747 F.3d 229 (3d Cir. 2014). *See also Santillan v. Sharmouj*, 289 F. App'x 491, 497 (3d Cir. 2008) ("the judges who sit on the District Court of the Virgin Islands have terms that are capped at 10 years.") Donate-Cardona asserted below that once a District Court of the Virgin Islands judge's term expires he/she cannot sit on the bench because doing so would violate the Constitution. Accordingly, since the Hon. Curtis V. Gomez has been presiding since 2005, Judge Gomez's ten-year term had expired and absent another constitutionally compliant appointment his tenure and attendant rulings in the case below were constitutionally void *ab initio.*

Given that the ten-year term established by Section 1614(a) expired, at the latest by 2015, how can a District Court of the Virgin Islands judge (who as an Article IV judge never had lifetime appointment) serve after the expiration of his statutory term? The answer is that one cannot; although Section 1614(a) provides the statutory authority to do so, the application of Section 1614(a) violates Article III. The Court of Appeals erroneously concluded that because "a

successor may be chosen and qualified at any time," Ayala, 917 F.3d at 758, such did not offend Article III. But there is no limiting principle for this conclusion. Taken to its logical conclusion, a judge could be appointed to position of a limited term (e.g. one year), but sit on the bench indefinitely (limited only by retirement or death) because the President, subject to the advice and consent of the Senate, potentially could appoint a successor (but may never do so).

This Court has never held whether indefinite terms for non-Article III judges pass constitutional muster, but should do so with this case as it addresses an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

IV. WAS THIS COURT'S DECISION IN *BULLCOMING v. NEW MEXICO*, 561 U.S. 1058 (2010) VIOLATED BY THE DISTRICT COURT OF THE U.S.V.I.

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees an accused the right to be confronted with witnesses who are giving testimony against him unless the witnesses are unavailable to appear at trial, and the accused had a prior opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36 (2004). This Court expanded upon this issue in *Melendez-Diaz v.*

Massachusetts, 557 U.S. 305 (2009), by establishing that documents prepared for criminal prosecution, are confrontational in nature.

In *Bullcoming,* 564 U.S. 647 (2011), this Court was asked a question that addresses the same scenario as occurred in Donate-Cardona's trial:

> Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

This Court's response was straight forward: "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Id.* at 657. In this case, ATF Agent Waters took possession of the firearms and prepared a report on the firearms nexus. Foreman <u>*examined Waters' report*</u> for interstate nexus and prepared a report of his findings on February 17, 2016. The report was prepared for eventual trial prosecution. Donate-Cardona's case followed the same sequence of events as in *Bullcommings,* but with different results. Donate was uable to cross-examine the Waters, the initial report preparer. The Sixth Amendment's Confrontation Clause confers upon

the accused "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." *Id.* at 658. In *Crawford*, the Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had interpreted the Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. See *Roberts*, 448 U.S. at 66. Rejecting *Roberts*' "amorphous notions of 'reliability'[,]" the court held that fidelity to the Confrontation Clause permitted admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, *and only where the defendant has had a prior opportunity to cross-examine.*" *Crawford*, 541 U.S. at 59, 61 (emphasis added); See *Michigan* v. *Bryant*, 562 U.S. 344, 354 (2011) ("[F]or testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability [of the witness] *and a prior opportunity for cross-examination*.'") (quoting *Crawford*, 541 U.S. at 68) (emphasis added). Even in *Melendez-Diaz,* who relied on *Crawford's* rationale, refused to create a "forensic evidence" exception to this rule. *Melendez-Diaz*, 557 U.S. at 317-21. An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is "testimonial,"

and therefore within the compass of the Confrontation Clause. *Id.* at 321-24.

Foreman examined and identified the firearms, noting that the examination was conducted on information he received on "February 17, 2016" *from a prior report* that was generated by Waters. Foreman also testified directly from the report prepared by Waters as to the manufacturing location of the firearms. Any reliance on Waters' report as presented by Foreman or otherwise, was a clear violation of both *Bullcoming* and Crawford. Nonetheless, all Bullcoming related objections were denied. As this court made clear in *Melendez-Diaz*, 557 U.S. at 319, "... the analyst who writes reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" As such the granting of writ of certiorari on this violation is required.

V. DOES THE LACK OF A MULTIPLE CONSPIRACY JURY INSTRUCTION REQUIRE AN AUTOMATIC REMAND FOR A NEW TRIAL

The evidence presented at trial established two distinct conspiracies. One, the charged in the St. Thomas, Virgin Islands and one initiated by

Molina in Puerto Rico ("Puerto Rico conspiracy"). The defendants in the Puerto Rico conspiracy were arrested, charged, and prosecuted in Puerto Rico for their own quantity of cocaine based on their own conspiracy. See, *United States v. De La Cruz-Alvarez,* 3:15cr579. After the jury charge was completed, counsel renewed his motion for specific instructions regarding multiple conspiracies and sentencing manipulation. The District Court denied both requests.

In order to determine whether the evidence presented at trial established the existence of a single conspiracy or multiple independent conspiracies, this Court considers three factors: "(1) 'whether there was a common goal among the conspirators'; (2) 'whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators'; and (3) 'the extent to which the participants overlap in the various dealings.'" *United States v. Kemp,* 500 F.3d 257, 287 (3d Cir. 2007) (quoting *United States v. Kelly,* 892 F.2d 255, 259). The absence of any one of these factors is not dispositive. *United States v. Greenidge,* 495 F.3d 85, 93 (3d Cir. 2007) (quoting *United States v. Padilla,* 982 F.2d 110, 115 (3d Cir. 1992)). Moreover, "[t]he Government need not prove that each

[conspirator] knew all of the conspiracy's details, goals, or other participants" in order to demonstrate the existence of a single overall conspiracy. *United States v. Perez*, 280 F.3d 318, 343 (3d Cir. 2002) (citing *United States v. Theodoropoulos*, 866 F.2d 587, 593 (3d Cir. 1989)).

The facts of this case support a multiple conspiracy charge. Molina arrived in Puerto Rico to "sell a large quantity of cocaine to individuals in Puerto Rico." Hill met De La Cruz (a conspirator in the Puerto Rico conspiracy) on September 3, 2015, with an informant, not Molina, who was also working on behalf of the DEA in Puerto Rico. The bulk of the money to pay the drugs in Puerto Rico were seized in Puerto Rico from De La Cruz. Not only was there a transaction in Puerto Rico that was going to be paid with the cash that was confiscated in Puerto Rico, but multiple confidential informants were used in Puerto Rico and most if not all recordings were made in Puerto Rico. Finally, the Government chose to prosecute the Puerto Rico conspiracy distinct and apart from the St. Thomas conspiracy based on those violations. Multiple conspiracies are "separate networks operating independently of each other." *United States v. Barr*, 963 F.2d 641, 648 (3d Cir. 1992). The

evidence, in this case, showed one distinct conspiracy, that was paid and prosecuted in Puerto Rico, and a separate distinct conspiracy that was to be financed through illegal firearms seized in St. Thomas. The fact that the same informant, Molina, was used for both conspiracies should not be dispositive.

The jury heard and saw pictures of the $1,483,036.00 seized in Puerto Rico on the day of that arrest. The jury also related the money from the Puerto Rico arrest to the St. Thomas incident severely prejudicing Donate-Cardona. As such the granting of writ of certiorari on this violation is required.

VI. CAN DONATE-CARDONA BE HELD RESPONSIBLE FOR 150 BUT LESS THAN 450 KILOGRAMS OF COCAINE WHEN HE DID NOT POSSESS AMPLE FUNDS FOR DRUGS

Donate-Cardona did not have ample funds to pay 150 kilograms of cocaine. At sentencing, "the government bears the burden of [proving drug quantity] by a preponderance of the evidence." *United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir. 1993). While "some degree of estimation must be permitted," *United States v. Collado,* 975 F.2d 985, 998 (3d Cir. 1992), the district court must satisfy itself that the evidentiary basis for its estimate has sufficient indicia of reliability.

"'Indicia of reliability may come from . . . corroboration by or consistency with other evidence . . . '" *United States v. Freeman*, 763 F.3d 322, 337 (3d Cir. 2014) (quoting *United States v. Smith,* 674 F.3d 722, 732 (7th Cir. 2012)). At sentencing several objections were lodged, without success, to the drug quantity attributed to Donate-Cardona. The 150-kilogram threshold is not supported based on a combination of Molina's and Agent Hill's testimony. The trial testimony presented in the St. Thomas conspiracy established a varying amount of cocaine; however, the 150-kilogram threshold was never established:

> Q. And Agent Hill, you said that that represented approximately 100 kilograms?
>
> A. It was over – depends on how many bales you put in a particular – how many kilos that you put in a particular bale. It varies. So that would be over 100 kilos, well over – if I look at it – because I didn't count the individual kilos – but typically it would be about 120 or so.
>
> A. I know those particular four kilograms [sic] was approximately 120 kilos.

Molina who was the individual responsible for orchestrating the scheme on behalf of the DEA testified at trial on April 12, 2016, that he intended to manipulate the drug quantities in order to make the deal as

large as possible because that would mean that he personally would make more money:

> Q. So if a deal starts out and you're talking about 50 kilograms of cocaine, you want to push that up to a hundred, 200, 300, because there's going to be more money in it for you' correct?

Further confirming that they gave him funds in St. Thomas for the delivery of 100 kilograms of cocaine and that Gerardino called him when in St. Thomas to deliver the funds for the 100 kilograms of cocaine:

> A. And such it happened that they gave me some money here in St. Thomas, and I agreed to deliver the 100 kilos.
>
> A. For them to bring the money and pick up the hundred kilos.
>
> A. When I moved --.I saw the money, saw that everything–as fine, and I asked the one in the back, "Who's going to take the 100 kilos in truck?

Based on the agreed cost for the cocaine, "$13,000.00 a kilogram" and a total seizure of 1,483,036.00 were seized in the Puerto Rico conspiracy and $250,000 in St. Thomas, the total combined funds, ($1,733,036.00), could only purchase 133 kilograms of cocaine.

The United States Sentencing Commission Guidelines Manual Application Notes is particularly helpful in determining the amount of drugs that can be attributed to this transaction or conspiracy. Section

2D1.1, Application Note 5. Determining Drug Types and Drug Quantities provides:

> "In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. *If, however, the defendant establishes that the defendant...was not reasonably capable of ... purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant...was not reasonably capable of ... purchasing."* (emphasis added)

The sentencing guidelines have concluded that when a defendant establishes that he "...was not reasonably capable of ...purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant...was not reasonably capable of ... purchasing." Thus, the correct advisory guideline under § 2D1.1(c)(2), should have been calculated at 50 kilograms but less than 150 kilograms of cocaine with a base offense level of 34, which would have lowered the final recommended sentencing exposure to 210 months, substantially lower than determined by the original PSI recommendation.

Any sentence above that determined drug quantity violates Donate-Cardona's due process rights to be punished solely on the charged offense. As such the granting of writ of certiorari on this violation is required.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Third Circuit.

Done this 25, day of June 2019.

Ricardo Donate-Cardona
Reg. # 35253-069
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521