No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

FERNANDO DURAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Appendix to Petition for Writ of Certiorari

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 17-cr-135-RBJ

UNITED STATES OF AMERICA,

Plaintiff,

v.

7. FERNANDO DURAN,

Defendant.

DEFENDANT DURAN'S MOTION FOR JUDGMENT OF ACQUITTAL

Defendant Fernando Duran, through his court-appointed counsel, Daniel J. Sears, P. C., pursuant to F. R. Crim. P. Rule 29(a), respectfully requests this Honorable Court to enter a judgment of acquittal on Counts Twenty-Two, Twenty-Four, Thirty-Four, Thirty-Five and Thirty-Six of the First Superseding Indictment on the grounds that the government's evidence is insufficient to sustain a conviction on each of the counts.

STATEMENT OF CASE

On April 27, 2017, a Colorado federal grand jury indicted Defendant Fernando Duran, along with thirteen others, on a single count of conspiracy to distribute, and to possess with intent to distribute, a detectable amount of cocaine hydrochloride, and 28 grams or more of a detectable amount of cocaine base. ECF Document 1 at 2-3 of 19. Defendant Duran was also charged with Co-Defendant Birch in Counts Twenty-Two and Twenty-Four, of distributing, and possessing with intent to distribute, a detectable amount of cocaine hydrochloride, and cocaine base. ECF Document 1 at 12-13 of 19.

On July 25, 2017, a Colorado federal grand jury returned a First Superseding Indictment against Duran and thirteen others alleging thirty-six separate counts against fourteen named defendants. Count One charged a conspiracy between September 1, 2016, and March 31, 2017, to distribute and possess with intent to distribute controlled substances, naming twelve conspirators, but not Duran. ECF Document 192 at 2 to 3 of 20. In the original indictment, Duran had been named in a conspiracy continuing from September 1, 2016, to March 31, 2017, with thirteen others to distribute and possess with intent to distribute cocaine and cocaine base. ECF Document 1 at 2-3 of 19. In the Superseding Indictment, however, the grand jury narrowed the charged conspiracy to a period from between February 1, 2017, and March 31, 2017, and specifically named only Fernando Duran as conspiring with "J.B." and others known and unknown to the Grand Jury. "J.B." is not identified by the grand jury, and no other "known" conspirator is named. Count Thirty-Four, ECF Document 192 at 16-17 of 20.[1]

The grand jury included two counts from the original indictment, Counts Twenty-Two and Twenty-Four, charging distribution and possession with intent to distribute, cocaine and cocaine base, respectively, with Jerrell Birch, and added two telephone counts, Counts Thirty-Five and Thirty-Six, alleging use of a telephone in facilitating a drug-trafficking offense on the same respective dates as the distribution charges. ECF Document 192 at 17 to 18 of 20.

The government has completed its proof and rested its case. To summarize the evidence presented during the trial, even in the light most favorable to the government,

[1] It is perplexing that Jerrell Birch is specifically named as a co-defendant with Fernando Duran in Counts Twenty-Two and Twenty-Four charging distribution and possession with intent to distribute, but his identity is masked in Count Thirty-Four.

the government's proof consisted of testimony by multiple investigative agents of the Metro Gang Task Force who recounted numerous occasions of conducting surveillance of Defendant Duran, Jerrell Birch and others. Agents first observed him on February 18, 2017, outside Rod's Cars in Aurora, Colorado, and photographed him in the presence of Birch and others. Officer Justin Shipley conducted a traffic stop of Duran and his family on the premise that Duran had run a red light. Duran contended that he had not run the red light and, curiously, Shipley did not issue a traffic citation. Whether the traffic stop was pre-textual or not, the agents on surveillance at Rod's Cars and Officer Shipley observed no activity by Duran that supported any of the charges in the First Superseding Indictment.

Multiple officers subsequently conducted extensive surveillance of Duran and Birch, including on the two days on which they are alleged to have distributed and possessed with intent to distribute cocaine and cocaine base, respectively, on March 8, 2017 [Count Twenty-Two], and March 11, 2017, [Count Twenty-Four]. The direct and cross-examination produced no evidence that Duran was observed in the possession of controlled substances, had distributed controlled substances, or had received controlled substances. No controlled buys from Duran were arranged or witnessed, and no cocaine or crack cocaine was obtained by investigators to present to the Court or the jury.

The grand jury returned two counts charging Duran with using a telephone in facilitating the commission of knowingly and intentionally manufacturing, distributing and possessing with intent to distribute crack cocaine on March 8, 2017 (Count Thirty-Five) and March 11, 2017 (Count Thirty-Six). ECF Document 192 at 17-18 of 20. Count

Thirty-Five specifically references call #13363, and Count Thirty-Six refers to call #14298. A review of the recording of the intercepted call on March 8, 2017 (call #13363) discloses a call from Birch to Duran in which Duran, in fairly colorful language, asks Birch, where he's at and what he's doing. Duran says "Unc" is here and happy as a motherfucker. Birch asks when he arrived and Duran responds "raindrops" - - "super raindrop". Duran and Birch agree to meet at four. Duran later says "Alright cause fucking ah I want you to raindrop it."

During call #14298, Birch calls Duran who inquires whether Birch is going to be at Colorado Mills. Birch responds that he's at Colfax and Kipling. Duran asks Birch for help to "get this dude out the way . . ." Duran indicates that he is supposed to meet "Unc" and that he's still got "one and a heezy (PH)". Birch asks "what that hard that I give you?" Duran answers "Yeah, if you want that you don't have to fuckin' do nothin' to it, just get on it" Birch inquires where Duran is at, who indicates that he is with his daughter, will drop her off, and will be going to the Mills.

From call #13363, the government contends that Duran's reference to "Unc" means his drug supplier, and upon Birch's inquiry as to when "Unc" arrived and Duran's response "raindrops" and that he wants Birch to raindrop it, the Court and jury must conclude that these utterances meant what the government's expert contends - that Birch and Duran were distributing and possessing with intent to distribute crack cocaine on March 8, 2017. Without supporting evidence, Defendant Duran contends that it is a significant reach, and encourages substantial speculation and conjecture, for the Court and jury to conclude that "Unc" is Duran's supplier, and that the use of the words "raindrops" or "raindrop it" results in Fernando Duran distributing or possessing with

intent to distribute powder cocaine on March 8, 2017, that he conspired with Birch to do so, or that he used the telephone to facilitate the trafficking of cocaine on said date.

Referring to call #14298, from Duran's statement that he is supposed to meet "Unc", that he's got "one and a heezy" of hard that Birch gave him, and that Duran responds that he doesn't have to do nothing to it, the Court and the jury are asked to conclude that such dialogue meant that on March 11, 2017, Duran is to meet his supplier (*i.e.* "Unc"), that Duran had received, and thereby possessed, one and a half grams of crack cocaine, that the "one and a heezy" of hard meant one and a half ounces of crack cocaine which was a quantity that Duran intended to distribute, that he conspired with Birch to do so and, that by using these words on the telephone, Duran facilitated the trafficking of crack cocaine on March 11, 2017. To agree with the prosecution's assertions that the use of such words constitutes sufficient evidence to convict on Counts Twenty-Four, Thirty-Four and Thirty-Six, the Court and jury must agree with the government's expert that "Unc" is, in fact, Duran's supplier rather than a relative or acquaintance, that "one and a heezy" must mean one and half ounces of crack cocaine, rather than a quantity of some other substance, that "hard" relates solely to crack cocaine, that Duran's receipt and, thereby possession of, one and a half ounces of crack raises the inference that Duran would intend to distribute it. By uttering these words on the telephone, the Court and jury must accept the government's thesis that such use facilitated the trafficking of cocaine, as alleged in Count Thirty-Six.

To prove the charges in Counts Twenty-Two and Twenty-Four, and the conspiracy in Count Thirty-Four, but for these utterances, the government's evidence provides no testimonial or photographic evidence of Duran handing or receiving any

controlled substances or monies to or from anyone. The government's investigation produced no powder cocaine or crack cocaine that sustain its proof that Duran possessed or distributed any drugs, let alone powder cocaine and crack cocaine, on March 8 and 11, 2017, respectively.

Though presented with many opportunities, the investigators failed to obtain any search warrants for any premises, residential, commercial, or vehicular, where Duran was under surveillance or was suspected of engaging in any untowards activity, no controlled buys by cooperating individuals were arranged relating to Duran, no wiretap orders for phones used by Duran were obtained, and court orders for pole cameras or GPS devices provided no visual evidence of Duran and Birch engaging in any drug-trafficking activity. In other words, the government provided no physical evidence to the Court or jury of any cocaine or crack cocaine which Duran is alleged to have distributed or possessed with intent to distribute on March 8 or 11, 2017, no surveillance evidence of his engaging in such activities with Birch or anyone else, no physical evidence seized from his residence, business establishments where he was observed, or vehicles which he occupied or was seen operating. The only evidence provided to the Court and jury were recordings of phone and text communications between Duran and Birch which, on occasion, contained words the meaning of which are unknown in common parlance, but which the government's expert contends were coded words to disguise Duran's and Birch's drug-trafficking in powder cocaine or crack cocaine.

These coded words interpreted by the government's expert included such words as "bread", "two racks", "blowing me up", "paper", "put that shit in the water", "motherfucker can't get in the kitchen", "shit is chunky", "I want you to raindrop it",

"whip", "one and a heezy", "hard", "ticket", "loot", and "fronting". Many of the words singled out by the expert as being tied to drug-trafficking, such as bread, paper, whip, hard, ticket, loot and fronting have multiple meanings, many of which are used in everyday language relating to purely innocent activity. Many of the intercepted communications related to Birch giving Duran directions to his home, difficulties Duran was having in collecting on debts, their respective work schedules or commitments they had to family members.

The government's expert, FBI Agent Donald Peterson, while describing extensive significant investigative experience in drug-trafficking investigations, and though subpoenaed to produce documents evidencing same, failed to produce evidence from his prior case experiences which demonstrated that the scrutinized coded words or phrases such as "put that shit in the water", "heezy", and "I want you to raindrop it" had been encountered in the drug-trafficking investigations in which he had been involved for approximately seventeen years. When asked to review the DEA's publication of "Drug Slang Code Words", the only word from those interpreted by Peterson from the intercepted communications between Duran and Birch was the word "hard" which, admittedly, has multiple meanings, many which are completely innocent and unrelated to drug activity.

ARGUMENT I

COUNTS CHARGING DEFENDANT DURAN WITH DRUG-TRAFFICKING CAN ONLY BE PROVEN BY PILING INFERENCE UPON INFERENCE.

a) The government's case.

The government's proffered evidence to establish Duran's knowing and intentional participation in the conspiracy charged in Count Thirty-Four, the distribution and possession with intent to distribute charges in Counts Twenty-Two and Twenty-Four, and even the telephone counts alleged in Counts Thirty-Five and Thirty-Six, asks the Court and the jury to pile inference upon inference in finding the Defendant guilty of any one of the charges. The evidence consists entirely of a pre-textual traffic stop to discover who Duran was, visiting a Jeep dealership where his car was being serviced, and surveillance activities which show nothing more than Duran being observed at his residence, his workplace, and being the company of Jerrell Birch and others. He was observed on March 8, 2017, the day of the alleged distribution or possession with intent to distribute charged in Count Twenty-Two, entering an apartment building with Birch. Investigators observed no illicit activity, and no effort was made to seek a search warrant to determine what Duran and Birch were doing in the apartment building. No evidence of drugs or money exchanging hands or being found in Duran's possession, the seizure of drugs, paraphernalia or records evidencing drug-trafficking activities, or of controlled buys from Duran, was obtained or, seemingly, even attempted.

The government's entire case depends on the testimony of an FBI agent who, while well-experienced in drug investigations, had no involvement in the investigation of Fernando Duran until his appearance as an expert was solicited. Peterson had previously been qualified as an expert on a single occasion to testify as an expert in a *Daubert* hearing in another case, but had never testified

as an expert in a federal criminal jury trial. From his involvement in prior drug investigations, and through his conferring, and prior interviews, with witnesses, former defendants, informants and others involved in illegal drug-trafficking, he formulated his opinions of the meaning of several coded words extracted from the intercepted communications between Duran and Birch.

b) Piling inference upon inference.

The government seeks to have the Court and jury believe that its observations of Birch and Duran associating on different occasions suggests that they were engaged in nefarious activity. Evidence to support such a premise, however, is totally lacking. The law is clear that one's mere association with another alleged conspirator, or one's knowledge of wrongdoing, is not sufficient to convict one of participating in a conspiracy. *United States v. Cintolo*, 818 F.2d 980, 1003 (1st Cir. 1987), *cert. den*. 484 U. S. 913 (1987); *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984). Merely associating with one involved in a criminal venture is insufficient to prove participation in that venture. *United States v. Holcomb*, 797 F.2d 1320, 1327 (5th Cir. 1986). Even knowledge of an illegal act or association with an individual engaged in illegal conduct is not enough to prove that a person has joined a conspiracy. *United States v. Raymond*, 793 F.2d 928, 932 (8th Cir. 1986). A jury must be cautioned against finding guilt by association. *United States v. Rawwad*, 807 F.2d 294, 296 (1st Cir. 1986), *cert. den.* 482 U. S. 909 (1987).

The government's case seeking to prove that Duran conspired with Birch to distribute and possess with intent to distribute cocaine and, particularly, 28

grams or more of crack cocaine, depends entirely on a number of inferences drawn from the opinions expressed by Donald Peterson regarding the meaning of select words. Those words are, primarily, “raindrop”, “super raindrop”, “shit is chunky”, “hard”, and the phrase “one and a half heezy”. Peterson opined that the words raindrop and super raindrops, in his subjective opinion, referred to converting powder cocaine to crack cocaine. He could not point to any other authoritative source that agreed with his opinion. “Hard”, rather than meaning firm, solid, or rigid, or even relating to heroin, or opium, or some other substance, means crack cocaine. One and a half heezy, though referring to a weight measure, must mean one and a half ounces of crack cocaine.

Accepting his opinions as valid for purposes of this motion, if the Court and/or jury attach weight and credibility to his assertions, the only path from the Defendant’s utterance of these words and his interpretation of their meaning, to reach the ultimate conclusion that Duran was engaging in the distribution of, or possession with intent to distribute, crack cocaine with Birch, is to pile inference upon inference. Extended further, to reach the conclusion required in Counts Twenty-Four and Thirty-Four that Duran engaged in the distribution and possession with intent to distribute 28 grams or more of crack cocaine, or a conspiracy to do so, the Court and jury must further infer that the use of the words one and a half heezy means one and a half ounces, and though uttered separately from raindrops, must be deemed to mean 28 grams or more of crack cocaine.

The jury must infer that Duran, speaking the word "raindrops" is using the word in a manner consistent with Peterson's interpretation, *i. e.* converting powder cocaine to crack cocaine. Having adopted such an inference, then the jury has to infer that Duran intended to provide Birch with a quantity of powder cocaine to be converted to crack. By providing Birch with the powder cocaine, it must be inferred that Duran possessed it before giving it to Birch. Then the jury must infer that Birch, after receiving the powder cocaine, added water and converted the powder cocaine to crack. After such conversion, then it must be inferred that Birch and Duran had produced a quantity that they intend to distribute, rather than use for personal consumption. Moreover, to prove that Duran and Birch conspired to distribute and possess with intent to distribute 28 grams or more of crack cocaine as alleged in Count Thirty-Four, the Court and jury must infer that the use of the phrase one and a half heezy, though uttered separately from raindrops, must result in the inference that their objective was the production of 28 grams or more of crack cocaine, which would justify the inference that such quantity was intended for distribution, rather than for holding or for personal consumption..

In *United States v. Jones*, 44 F.3d 860 (10th Cir. 1995), defendants were charged, as in the present case, with conspiracy to possess cocaine with intent to distribute it in violation of 21 U. S. C. §846. A Wyoming Highway Patrolman stopped a car for exceeding the speed limit. The patrolman noted that the car, occupied by two females, exhibited California plates and learned that it had been rented. The officer inquired about the occupants' travel itinerary and asked for

their driver's licenses and the rental agreement for the car. After conducting a record check and being unable to confirm the validity of one of the operator's licenses, the patrolman detained them. He thereafter became suspicious that they might be transporting drugs. A request to search the vehicle was refused. After determining that one of the car's occupants had a suspended driver's license, the officer issued a citation, and escorted them to the station to post bond. The vehicle, at the request of the rental car agency, was subsequently seized and searched. A search of a suitcase on the back seat produced several bricks of cocaine. Additional drugs were found concealed in luggage and in the trunk of the car.

After pretrial motions to suppress were denied, one of the defendants, an occupant of the car, challenged the sufficiency of the evidence to sustain her conspiracy conviction.

In reversing the conspiracy conviction, the Tenth Circuit ruled that the government's evidence must show that there was an agreement to violate the law, the defendant whose case was being reviewed knew the essential objectives of the conspiracy, that defendant knowingly and voluntarily took part in the conspiracy, and that the conspirators were interdependent. *Jones, supra* at 864-65 *citing United States v. Anderson*, 981 F.2d 1560, 1563 (10th Cir. 1992) (*citing United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992), *cert. den.* 122 L. Ed.2d 680, 113 S. Ct. 1288 (1993). The Court noted that mere association with conspirators does not support a conspiracy conviction. (*Citations omitted*). *Id.* at 865-66. Evidence, direct or circumstantial, the court held, was lacking that the

defendant knew that the car contained cocaine, or that she participated in a plan to distribute it. *Id.* at 866. Because of the lack of evidence to support an inference that the defendant, as a mere occupant of the car, knew of the presence of the drugs, the evidence was equally insufficient to support the defendant's possession conviction. *Id.* at 870.

> "A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. Such [an inference] is infirm because it is not based on the evidence." *Jones, supra* at 865 *quoting from United States v. Jones*, 1994 U.S. App. LEXIS 36030, Nos. 93-4240, 94-4030, at 10 (10th Cir. filed) (*quoting Tose v. First Pennsylvania Bank, N.A.,* 648 F.2d 879, 895 (3d Cir.), *cert. den*, 454 U. S. 893, 70 L. Ed.2d 208, 102 S. Ct. 390 (1981).

A conspiracy conviction cannot be sustained by piling one inference upon another. *United States v. Ingram*, 360 U. S. 672, 681 (1959) (*quoting Direct Sales*, 319 U. S. 703, 711 (1943)) (reversing two defendants' conspiracy convictions to evade payment of federal taxes where the court would have to pile "inference upon inference" to conclude that the defendants knew of the tax liability and intended to evade that liability). The inferences that arise from "keeping bad company" are not enough to convict a defendant for conspiracy. *United States v. Wexler*, 838 F.2d 88, 91 (3rd Cir. 1988).

> "Evidence . . . which requires conjecture and inference upon inference, is insufficient to sustain a conviction for conspiracy." *United States v. Coppin*, 1 F. App'x 283, 289 (6th Cir. 2001).

In *United States v. Michel*, 446 F.3d 1122, 1127-28 (10th Cir. 2006), the Tenth Circuit reaffirmed the principles expressed in *United States v. Jones*, by reemphasing the following:

> "While the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and

> conjecture to be reasonable, and caution must be taken that the conviction cannot be obtained by piling inference on inference . . . A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. Such [an inference] is infirm because it is not based on the evidence. *Michel, supra* at 1128." (Emphasis added). *United States v. Jones*, *supra* at 865.

ARGUMENT II

STANDARD OF REVIEW

When the defense moves for a judgment of acquittal, the Court –

> "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If [it] concludes that upon the evidence there must be such a doubt on a reasonable mind, [it] must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind night fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If [it] concludes that either of the two results, a reasonable doubt or no reasonable doubt, [it] must let the jury decide the matter. (footnotes omitted).

United States v. Mariani, supra at 865 (*Citations omitted*).

WHEREFORE, Defendant Duran respectfully requests that the Court enter a judgment of acquittal on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2017, I electronically filed the foregoing motion for judgment of acquittal with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record.

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THE COURT: Okay. Thank you. You're excused, free to go.

Mr. McNeilly.

MR. MCNEILLY: Your Honor, the Government rests.

THE COURT: Okay. All right. So, ladies and gentlemen, we need to take a recess here so that I can discuss some matters with the parties and lawyers. And this will take a little longer than doing it at the bench, so why don't you please take a hopefully short recess, and we'll be back in touch as soon as possible.

THE COURTROOM DEPUTY: All rise for the jury.

(Jury left the courtroom at 2:25 p.m.)

THE COURT: All right. Mr. Sears, you probably want to make a motion?

MR. SEARS: Yes. Thank you, Your Honor. As the Court is well aware, in the early hours of this morning I did electronically file my motion for judgment of acquittal. I've tendered a copy of that motion to the United States attorney. I filed it early this morning because I expected we were going to be tied up in court and I would not have an opportunity to get back to the office and file it at the close of the Government's case, so I would appreciate the Court's consideration of it at this time.

I'm not going to prolong this, Your Honor. There's been a lot of testimony, a lot of opinions offered. The Court

is well aware from my repeated questions that there are no controlled buys, there's no evidence of distribution, there's no evidence of cooking cocaine, there's no evidence of possession with intent to distribute cocaine.

THE COURT: Well, what do you mean there's no evidence of cooking cocaine?

MR. SEARS: Well, I'm getting to that, but for the testimony of Agent Peterson and Mr. Rossi, it all has to be based on the jury's acceptance of those opinions and conclusions. Quite frankly, I think those opinions cross the line as expert testimony because they invade the province of the jury in deciding the ultimate question as to whether there was distribution, whether there was possession with intent to distribute.

But other than that, I will rest on my written motion and ask the Court to grant a judgment of acquittal on all the counts of the superseding indictment. Thank you.

THE COURT: Thank you, Mr. Sears.

Mr. McNeilly.

MR. MCNEILLY: Thank you, Your Honor. Your Honor, our response is obviously that at this point in the light most favorable to the Government the Court must find that a jury could return a verdict of guilty based on the evidence that has come out thus far in the trial. With regard to the conspiracy count, first, that two or more persons agreed to

violate the federal drug laws, there are ample phone calls in which it is clear that these two individuals had an ongoing agreement and understanding. Things about exchanging money, comments like -- such as, Like we always do, and things along that line. Saying that he's trying to get work started for him, the criticism that they never had work consistently.

These stand as evidence that these two people, Mr. Birch and Mr. Duran, did, in fact, agree to violate the federal drug laws. We could also add in persons known and unknown, Unc's and another source of supply --

THE COURT: Well, you say it's clear. It's only clear if the jury credits the interpretation of the language and opinions that have been provided by the expert and the case manager.

MR. MCNEILLY: Well, we clearly believe those are necessary and probative evidence that have been offered in this trial.

THE COURT: And the opinions of the case manager were simply admitted to show what he did and why he did what he did.

MR. MCNEILLY: I agree with that.

THE COURT: The expert opinions as to what all this means really came from --

MR. MCNEILLY: Special Agent Peterson.

THE COURT: Peterson, that's right.

MR. MCNEILLY: I agree with that, Your Honor.

THE COURT: If they don't agree with Peterson, or they don't agree beyond a reasonable doubt that what Peterson said is accurate, then you lose, right?

MR. MCNEILLY: I think that's how this works, Your Honor. But at this stage in the proceedings, it's in the light most favorable to the Government. So there's not been anything in the impeachment of his credibility or the attack on his opinions that should shift this balance at this point such that the Court should say there's not a way a jury could return a verdict of guilty.

THE COURT: Okay. That's maybe right on the conspiracy charge. Talk to me about what proof there is on the specific days of March 8th and March 11th that there was possession with the intent to distribute or distribution.

MR. MCNEILLY: Sure. So -- and you want me to leave aside the phone counts at this point, Your Honor, and just focus on the substantive 841 counts for March 8th and March 11th?

THE COURT: One follows the other.

MR. MCNEILLY: They do go hand in hand.

THE COURT: They were talking on the phone.

MR. MCNEILLY: Right.

THE COURT: So talk to me about what you've proven for March 8th.

MR. MCNEILLY: So with regard to March 8th, Your Honor, the controlled substance alleged is a mixture and substance containing a detectable amount of cocaine. We've got a call -- the sort of the inception of the March 8th transaction is the call alleged in the phone count -- I believe it's 34. And the defendant is elated. He says he's fucking happy as a motherfucker, because Unc's has showed up, and he's brought that super super raindrop.

And then towards the end of the call, he says, I want you to raindrop it for me. Again, on its face some of these things are apparent without the opinion of an expert witness. Obviously, the pop culture reference to a song in which the lyrics are raindrop drop top, and then shortly thereafter they say cooking dope in a crock pot, is helpful in substantiating the opinion that, in fact, what he's doing is he's announcing to his buyer that his source of supply has showed up with cocaine, he's got some, he's going to meet up with him, and he wants him to turn it into crack cocaine.

That interpretation is further informed by the fact that they move on from using raindrop and drop top, and they move on to things like, We're about to see that bullshit work, and then Mr. Birch in his excitement, says, Yeah, we're about to see that gooey, that gooey-gooey, that goo-goo. To which the defendant says, After this you're going to be like where you at, bro-bro? All of these work in conjunction to back up

the opinion of what we're dealing with is Mr. Duran has a mixture and substance containing a detectable amount of cocaine.

THE COURT: So there's your possession.

MR. MCNEILLY: So there's our possession. He's bringing it to him. And we have other phone calls where Mr. Birch says, I'm not about to be giving you money without getting something in return. And we know that that's one of the things that goes on in times when they meet based on those sorts of calls.

THE COURT: Well, I'm focusing on March 8th now. So you've got your evidence of possession. What about your evidence of distribution on March 8th?

MR. MCNEILLY: Is Your Honor saying we've got our evidence of possession with intent to distribute or simply possession?

THE COURT: I'm saying your argument is that you have evidence of possession with the intent to distribute.

MR. MCNEILLY: Right.

THE COURT: Are you claiming that there was distribution on March 8th?

MR. MCNEILLY: Yes, Your Honor. So once they go there, given the rest of the context of the phone calls, it is also clear that one thing -- it's not just that he simply gives him a commission fee to make crack -- that the defendant

simply pays a commission fee to Mr. Birch to make crack for him. Mr. Birch is a crack dealer. The defendant deals cocaine to him so that Mr. Birch can convert it to crack and then distribute it on to others.

THE COURT: What's the definition of distribution?

MR. MCNEILLY: Distribution means to deliver or to transfer possession or control of something from one person to another. So in a pure sense, I suppose he actually did that when he gave it to Mr. Birch so that Mr. Birch can put it in the glassware and turn it into crack cocaine. But I think --

THE COURT: And you're saying he gave it to him on March 8th?

MR. MCNEILLY: Yes, Your Honor, at 1650 Paris when they met for between an hour and a half and two hours.

THE COURT: Because your interpretation is that on that specific day, during that hour and a half to two hours they were cooking cocaine into crack cocaine.

MR. MCNEILLY: That's right. And then --

THE COURT: What about March 11th?

MR. MCNEILLY: So on March 8th the defendant left with at least an ounce and a half of crack that was made on March 8th. We turn to that -- just like March 8th, March 11th has five phone calls as well. We basically have the phone call that is the inception of the next drug transaction, three administrative phone calls, and then the ultimate phone call

that did immediately precede their meeting.

In that first phone call on the 11th, the defendant tells Mr. Birch that he needs to pay Unc's. I'm about to meet up with him when I go out of here or leave out of here is what he says. And he's acting to Mr. Birch like you've got to help me, because I don't have enough money to do it. One thing he volunteers about perhaps why Birch would give him money is I still have that one and a heezy you gave me. Mr. Birch says, The hard I gave you? And the defendant confirms, Yes. And that's when Mr. Birch asks, What's the ticket? Basically what's it going to cost me for you to sell me back that ounce and a half of crack that I made the last time they were together.

And there's no intervening phone calls between March 8 and March 11th when they have this conversation. They have three administrative phone calls where they basically confirm who's at what mall, you know, the defendant talks about paying parking at Cherry Creek Mall, but he's going to go over to the 7-Eleven near I think it's 10th and Federal initially, and then he changes the location because there's five fucking cameras at the 7-Eleven. So he moves it to the Hamburger Stand. We have no more phone communications between them.

And then on the 12th we see that he's still looking to collect money. Mr. Birch apparently didn't give him all of the money for whatever crack the defendant gave to Mr. Birch,

because he says, For that one last night. And then again, we go on and can further substantiate this by seeing the talk about how -- not one time have you had something that comes back right. And this is all in the context of them talking about the defendant being in touch with Unc's and trying to get some of his bread back. That Unc's said he would bring him a different one, which sounds like a unit of drugs to replace one that probably did not cook well on March 8th.

And so that we would submit is both possession with intent to distribute on March 11th of crack cocaine, so that's the substance alleged on that date. And then also that he, in fact, did distribute it, because we have the arrangement of the meeting, they part ways, and then the next day Birch says, The one from last night. That charge alleges 28 grams or more of crack cocaine, because it's one and a heezy. One ounce would be 28 grams. One and a heezy would be -- we're over 40 grams -- I think it's 44 grams. I'm not confident in that.

THE COURT: 42.

MR. MCNEILLY: 42. So with that, Your Honor, in the light most favorable to the Government, and I've mentioned both of the phone calls that were used as an inception of these drug deals on each of those occasions, obviously the number of them is in the record, but it's the first call on March 8th and the first call on March 11th.

THE COURT: Okay.

MR. MCNEILLY: Do you have any further questions for me, Your Honor?

THE COURT: No.

MR. MCNEILLY: Thank you.

THE COURT: Mr. Sears, you find it irresistible to respond?

MR. SEARS: I'm fighting the temptation, Your Honor. First of all, I think the deficiency in the Government's argument is -- and I think one of the infirmities of Agent Peterson's testimony is that he drew from some hip-hop or rap song that used the word raindrops that we are supposed to conclude that Mr. Duran and even Mr. Birch, who Mr. McNeilly characterizes as a crack dealer, knew about that song, knew the manner in which the lyrics are delivered, and signed on to that use of interpretation in their discussions. I think that's how attenuated Agent Peterson's opinion is.

THE COURT: Isn't that a matter for argument on the strength of the case as opposed to whether they've satisfied the requirements for a prima facie case?

MR. SEARS: Well, I agree with that, Your Honor, and I think the weight to be attributed to Agent Peterson's testimony is going to be a decision of the jury.

Now, with respect to whether or not they established possession with intent to distribute, or distribution of cocaine on March 8th, I think this plays right into my motion

for a judgment of acquittal of piling inference upon inference. So if we accept Agent Peterson's testimony that Unc's means it's a source of supply, and if we accept the testimony that Mr. Birch is a crack dealer, and his association with Mr. Duran thereby makes him an associate in crack trafficking or crack production, I think we are piling inference upon an inference.

You've got -- again, it's going to go to the weight and the acceptability of Agent Peterson's testimony, but you have to go from the proposition that Unc means that that was a source for Mr. Duran, that Unc is supplying Mr. Duran with cocaine, Mr. Duran is then taking the cocaine and conversing with Mr. Birch about converting it to crack cocaine, and then the ultimate inference is that they had to be converting powder cocaine to crack cocaine because they were at 1650 Paris for one-half to two hours, which could mean they were doing anything at 1650 Paris.

And that's why I've spent so much time on no controlled buys, no search warrants. You know, if the Government wants to complete an effective investigation, then you institute these investigative techniques to find out exactly what is going on at 1650 Paris on March 8th. On March 11th, Mr. McNeilly references the five phone calls. And the first is needed to pay Unc's, so we're supposed to infer that the reason why he would be paying Unc's is because Unc's

is a supplier of cocaine to Mr. Duran, that any financial transactions between Mr. Duran and Mr. Birch have to be cocaine trafficking rather than dealing in cars or any other innocent activity.

And so, Your Honor, again, I think the Government's position, even in the light most favorable to the Government, is quite shaky, particularly I think, as the Court has recognized, on Counts 22 and 24, which charge not only possession, but it's got to be possession with intent to distribute or distribution. And other than Agent Peterson's testimony of his interpretation of innocent words falling in with words that he interprets as coded drug words, I think is insufficient, at least particularly on those two counts to go to the jury.

THE COURT: All right. Well, first, briefly, I want to explain, not just for the record, but for Mr. Duran in particular and anyone supportive of his side of the case, that what the judge does now is not to interpret who wins or to determine whether the Government has a great case or not. That's not the judge's role at all. But what the law is is that the judge at this point in response to the motion for judgment of acquittal, and Mr. Sears properly alluded to this, must construe the evidence in the Government's favor. The evidence and reasonable inferences from the Government's evidence in the Government's favor.

In other words, the Court at this point assumes that the jury will find credible, believe, accept the evidence as presented, the inferences reasonably drawable from the evidence. And then the test is whether, if the jury does all of that, a jury could rationally find beyond a reasonable doubt that the defendant is guilty. And, again, I emphasize that that does not mean I'm construing the evidence that way at all. Personally, I'm just saying that's what I'm required to do at this stage for purposes of ruling on such a motion.

And I also want to say to Mr. Duran that Mr. Sears has put up one heck of a fight and has done, in my opinion, a masterful job of challenging the Government's evidence and creating or attempting to create reasonable doubt. It's an odd case for many of the reasons Mr. Sears has emphasized. There is no cocaine, there is no evidence that somebody saw cocaine pass between him and Birch. There wasn't a search warrant executed. There wasn't any controlled buy.

And the Government's case hinges on the interpretation of the telephone calls, the statements the Court has admitted as statements of a coconspirator, the statements the Court has admitted as admissions of the defendant, and the corroboration through surveillance, photographs, and things of that nature. It's an unusual case to have in a sense so little, and I think we've seen in some of the jury's questions that certainly the defense has gotten

their attention. And Mr. Sears hammering on these potential weaknesses has certainly been understood by the jurors asking some of the questions.

Having said all of that, however, if the jury finds the testimony of the Government's witnesses, and in particular the interpretation of the slang language by the expert, Mr. Peterson, it is at least rational that the jury could conclude beyond a reasonable doubt that there was possession of cocaine on March 8th. I don't think that the jury has to necessarily infer that Duran and Birch were aficionados of Lil Wayne or his music, but they do have to find credible the opinions as to what the term super raindrop meant on that day, among other things.

But there is evidence from Duran and from Birch that could be interpreted as Mr. Peterson has interpreted to indicate that there was possession on March 8th, there was an intent to distribute on March 8th, as between these two people, that Unc's was a source and so forth. I'm not saying those things are true. I'm saying that evidence that will support them and the same with respect to March 11th. When you put the March 11th phone calls into context with March 12th phone calls, you could conclude, again accepting what Peterson has told us, that they had a meeting at the Hamburger Stand, that cocaine was exchanged, that cocaine was cooked.

The reference on the 12th to last night and payment

for the last amount, the so-called exchange on March 11th could be a rational interpretation. Mr. Sears has emphasized that a lot of this is based on inference and inferences upon inferences, and I don't necessarily disagree with him. But as one of the jury instructions -- actually, two of the jury instructions I believe explain, it is fair game for the jury to draw inferences from direct evidence.

Circumstantial evidence is, in fact, inferences. And the instruction I think informs the jury that direct and circumstantial evidence are not distinguished in terms of value by the law. There is, of course, obvious room for argument, because there wasn't any -- forgive the pun -- hard evidence, as I've mentioned, but then the Government has an explanation for that, and if you buy the explanation, maybe you find it credible.

The explanation being that in effect, Mr. Duran was sort of a peewee in the overall scheme of things, and they didn't want to do a search warrant, for example, and search his house or his business or his vehicle or his phone if it would give away the fact that they have a much bigger investigation going on, an investigation that ultimately involves some 50 or so individuals, as I understand it.

And they had an explanation for why they didn't do a controlled buy. They've got explanations for what happened here. They may or may not be persuasive to the jury, but

applying the law as I am required to apply it, I have to deny the motion for acquittal and let the jury make the decision, which is ultimately the way the system works, unless the Government simply can't put even a prima facie case interpreting everything their way, and my finding and conclusion is that they've done at least that much. And Mr. Sears is going to have to make his arguments to the jury in terms of what they should find credible.

Now, that's the ruling on the motion. The next thing we have to talk about is whether the defense is going to present any additional evidence, and before I ask Mr. Sears that question, I'll ask Mr. Sears a different question, and that is, other than your client, are you going to call any other witnesses?

MR. SEARS: I am not, Your Honor. And -- well, I'll stop right there at this point.

THE COURT: And with respect to your client, the defendant, Mr. Duran, we had a discussion most recently at the end of business yesterday. Remember that when I talked with you about your rights to testify or not to testify, the possible consequences of that decision, I urged you to get advice -- additional advice from your lawyer about that to think about. It's a very, very important decision, and I explained that it's your decision ultimately to make. Have you done what I asked you to do and that is think about it and

No. 18-1062

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FERNANDO DURAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable R. Brooke Jackson
District Court No. 1:17-cr-00135-RBJ

Mr. Duran's Opening Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Constitutional Provisions

Statement of Related Cases

There are no previous or related cases.

Introduction

This case raises a fundamental question about the government's burden to prove a defendant's guilt beyond all reasonable doubt. The jury here convicted Fernando Duran of four drug-related charges based on nothing more than a series of recorded phone calls in which he and his alleged co-conspirator employed so-called drug slang. But no actual drugs were observed, recovered, or tested; no search warrants were issued or executed; and no controlled buys were conducted. No one—not a single person—ever saw Mr. Duran in the presence of drugs. And at most, the recorded phone calls show nothing more than Mr. Duran referencing the possession of drugs by someone else or a plan to get drugs at some later date. The government had no evidence that Mr. Duran possessed drugs on the date alleged in the indictment, and Mr. Duran never admitted to such possession. If due process is to mean anything, it must mean that the government's case against Mr. Duran fell well short of proof beyond a reasonable doubt.

Jurisdictional Statement

On August 31, 2017, a jury convicted Mr. Duran of four counts involving controlled substances. The district court sentenced Mr. Duran on January 18, 2018. Mr. Duran filed a timely notice of appeal on February 16, 2018. This Court granted

Mr. Duran up to and including October 11, 2018, within which to file his opening brief. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the government presented sufficient evidence to prove Mr. Duran's guilt beyond a reasonable doubt as to Counts 22, 35, and 36, when no drugs were observed, recovered, or tested, no controlled buys or sales conducted, and no witness ever observed Mr. Duran possessing or distributing drugs.

2. Whether the district court reversibly erred in allowing the case agent to testify regarding three controlled buys of drugs, none of which involved Mr. Duran, and all of which predated his alleged involvement in the conspiracy.

3. Whether the district court reversibly erred in allowing: (1) the case agent to testify under Rule 701 regarding his subjective belief in Mr. Duran's guilt; and (2) a government witness to testify as an "expert" under Rule 702 in so-called drug code and to "translate" recorded phone calls for the jury.

Statement of the Case

The charges. In a superseding indictment, the government charged Mr. Duran with five counts:

- Distribution and possession with intent to distribute cocaine on March 8, 2017 (Count 22);

- Distribution and possession with intent to distribute 28 grams or more of crack cocaine on March 11, 2017 (Count 24);
- Conspiracy to distribute and to possess with intent to distribute cocaine and crack cocaine, from February 1, 2017 to March 31, 2017 (Count 34);
- Using a telephone to facilitate the manufacture, distribution, and possession with intent to distribute crack cocaine on March 8, 2017 (Count 35); and
- Using a telephone to facilitate the manufacture, distribution, and possession with intent to distribute crack cocaine on March 11, 2017 (Count 36).

(R. Vol. I, pp 148–49, 152–54).[1] The jury acquitted Mr. Duran of Count 24 but convicted him of the remaining counts. (*Id.* at 406–09). As to the conspiracy count, the jury concluded that Mr. Duran conspired to distribute and possess with intent to distribute cocaine; the jury rejected the claim that he conspired to distribute and possess with intent to distribute crack cocaine. (*Id.* at 407–08). The district court

[1] The record consists of six volumes containing the pleadings and transcripts, (which will be cited as R. Vol. ___), and one supplemental CD containing the government's trial exhibits, (which will be cited as Supp R. Ex. ___).

imposed forty-six-month concurrent sentences on each of the four counts. (*Id.* at 559).

Jerome Birch. In Count 34, the government charged that Mr. Duran conspired with Jerome Birch to distribute and possess with intent to distribute cocaine and 28 grams or more of crack cocaine. (*Id.* at 152–53). The indictment charged that the conspiracy occurred between February 1, 2017 and March 31, 2017. (*Id.* at 152).

This case arises out of an investigation by the Metro Gang Task Force. (R. Vol. III, pp 93–96). At trial, Task Force Case Agent Frank Fania testified for the government that the "eyes of the [task force's] investigation" were on Mr. Birch from March 2016 to March 2017, the year preceding Mr. Duran's alleged involvement in the conspiracy. (*Id.* at 95–96). Over objection, Agent Fania testified that during this one-year period, the task force conducted three controlled buys involving Mr. Birch and a confidential human source (CHS). (*Id.* at 98, 107–10). The first controlled buy took place on March 11, 2016, the second occurred on March 25, 2016, and the third occurred in January 2017. (*Id.* at 107–08, 110). None of the transactions between the CHS and Mr. Birch involved or implicated Mr. Duran—his involvement in the conspiracy did not allegedly begin until February

2017—and none involved Agent Fania in an undercover role. (*See id.*at 106–10, 123).

Indeed, as Agent Fania was forced to admit, the government never conducted a controlled buy involving Mr. Duran. (*Id.* at 123). Nor was the government ever able to tie Mr. Duran to specific drugs; no drugs were observed, recovered, or tested; and no drugs were admitted into evidence at trial. (*Id.* at 123–27).

The wiretaps. As part of its investigation, the task force obtained wire taps on two of Mr. Birch's phones. (*Id.* at 111). The task force tapped one phone from February 1, 2017 to March 31, 2017, and the other phone from March 2, 2017 to March 31, 2017. (*Id.* at 112). In listening to Mr. Birch's phones, the task force recorded various calls between Mr. Birch and Mr. Duran, which led to—and were the exclusive basis of—the charges against Mr. Duran in this case. (*Id.* at 266-68).

The first call between Mr. Duran and Mr. Birch occurred on February 7, 2017. (Supp. R, Ex. 1A). In the call, Mr. Duran explained that "Unc" had been "blowing [him] up every fucking day." (*Id.* at 2). Mr. Duran told Mr. Birch that, "I owe this dude that fucking, all that bread, that two racks and more. But I need to get that bread from you to get this fucking dude out the way." (*Id.*)

At this point, the task force had not identified Mr. Duran. (R. Vol. III, p 164). That identification occurred on February 18, after surveillance officers saw Mr. Duran at Rod's Cars, where Mr. Birch worked. (*Id.* at 144, 159, 164). As Mr. Duran drove away, officers conducted a pretextual traffic stop based on an alleged red-light violation to contact Mr. Duran in his car and identify him from his driver's license. (*Id.* at 168, 176–77).

March 8, 2017. The task force conducted extensive surveillance on Mr. Birch on March 8, 2017. (*Id.* at 205–06). At approximately 2:00 p.m. that afternoon, officers followed Mr. Birch in a grey BMW SUV to the RINO neighborhood of Denver. (*Id.*) Mr. Birch parked his car and went inside a restaurant/bar called Cold Crush, where he worked in addition to Rod's Cars. (*Id.* at 206, 288). At some point, Mr. Birch came back outside and got "something" out of his car. (*Id.* at 235). He put the object in his hoodie and walked away. (*Id.*) For his part, Mr. Duran was nowhere around. (*See id.* at 205–07). Officers then lost sight of Mr. Birch until he was observed back at his apartment at 16th & Paris. (*Id.* at 206–07, 235). His BMW remained parked outside Cold Crush. (*Id.* at 206).

Later, Mr. Birch left his apartment in a black Cadillac, drove around for a while, filled the car with gas, and returned to his apartment. (*Id.* at 208–09, 211–12). After Mr. Birch returned to his apartment in the Cadillac, Mr. Duran arrived at

Paris Street driving the grey BMW. (*Id.* at 239). Mr. Duran got out of the BMW and joined Mr. Birch in the Cadillac, and they drove away. (*Id.* at 239–40).

They returned to the apartment a short time later and went inside. They were inside for approximately 1 ½ hours, after which Mr. Duran drove the BMW to a house on Leona Street in Aurora, Colorado. (*Id.* at 241–42). At that point, officers terminated surveillance. (*Id.* at 242). Later investigation revealed that the BMW was registered to Christina Fierro, who resided at the Leona Street address. (*Id.* at 254-55).

Throughout the afternoon of March 8, Mr. Birch and Mr. Duran exchanged five phone calls. (Supp. R., Exs. 9–13, 9A–13A). On the first, at 12:14 p.m., Mr. Birch called Mr. Duran and asked, "what's up." (Ex. 9A, p 2). Mr. Duran responded that "Unc's" here and that he was "happy as a motherfucker" because he had "raindrops, drop tops." (*Id.*) Mr. Duran said he would meet Mr. Birch at "four when I get off." (*Id.* at 3).

On the second call, at 3:56 p.m., Mr. Duran called Mr. Birch. (Ex. 10A, p 1). Mr. Birch said they would have to meet at his place in Aurora. (*Id.* at 2). Mr. Duran said he would leave in 15 minutes and call when he was on his way. (*Id.*)

On the third call, at 4:46 p.m., Mr. Duran called Mr. Birch to tell him that he was "ready to shoot that way." (Ex. 11A, p 2). Mr. Birch told him to come to his crib on Peoria. (*Id.*)

On the fourth call, at 5:28 p.m., Mr. Duran called Mr. Birch and told him he was "at [his] crib." (Ex. 12A, p 2). Mr. Birch responded that he was ten minutes away. (*Id.*)

On the final call, at 5:42 p.m., Mr. Duran called Mr. Birch and told him he thought he was on the wrong street. (Ex. 13A, p 2). Most of the call was Mr. Birch giving Mr. Duran directions to his apartment and making fun of him for going to the wrong location. (*Id.* at 2–4, 6–8, 9–11). At one point in the call, Mr. Birch said, "Yeah I'm about to see that gooey, gooey." (*Id.* at 5). Mr. Duran responded, "Yeah right motherfucker." (*Id.*) Eventually, Mr. Duran found his way to Mr. Birch's apartment and he parked his car. (*Id.* at 11).

At no point on March 8 did officers observe any drug transactions. (*Id.* at 222). Nor did they observe Mr. Duran and Mr. Birch exchange anything or deliver anything. (*Id.*). They observed both individuals drive cars around town, eventually meeting at Mr. Birch's apartment, and they saw Mr. Birch get "something" or "some object" out of his car earlier in the day. (*Id.* at 250). That's it. Nothing more.

March 11, 2017. The government had even less evidence of what happened on March 11, 2017. According to the government, Mr. Duran and Mr. Birch planned to meet at a 7-Eleven to exchange one and one-half ounces of crack cocaine, but Mr. Birch changed the meeting location to a Hamburger Stand. (*Id.* at 491). No officer or witness observed Mr. Duran and Mr. Birch meet that day, however. (*See, e.g., id.* at 375). Instead, the government's evidence regarding March 11 was limited five phone calls recorded that day. (Supp. R. Exs. 14–18, 14A–18A).

On the first call at 6:52 p.m., Mr. Birch told Mr. Duran that he was at Colorado Mills Mall, while Mr. Duran told Mr. Birch he was at the Cherry Creek Mall buying a prom dress for his daughter. (Ex. 14A, p 1–2). Mr. Duran told Mr. Birch that he still had that "one and a heezy" of hard. (*Id.* at 3).

On the second call at 7:44 p.m., Mr. Duran suggested he and Mr. Birch meet at a 7-Eleven after Mr. Duran dropped off his daughter. (Ex. 15A, p 1). Mr. Birch told Mr. Duran that he didn't want to drive all that way and to meet him somewhere else. (*Id.* at 2). Mr. Duran said he would call him back. (*Id.* at 3).

On the third call, at 8:20 p.m., Mr. Birch complained that he was still at Colorado Mills Mall and would be stuck there for another thirty minutes. (Ex. 16A,

p 2). Mr. Duran told Mr. Birch to call him when he left and that they could meet at the same spot on Tenth. (*Id.* at 3).

On the fourth call, at 9:01 p.m., Mr. Birch said he was on his way. (Ex. 17A, p 2). Mr. Duran said he would meet Mr. Birch there. (*Id.*)

On the final call, at 9:27 p.m., Mr. Birch told Mr. Duran to meet him at the Hamburger Stand because the 7-Eleven had five cameras. (Ex. 18A, p 2).

The government's case agent and its "expert" witness. Because no one ever saw Mr. Duran possess or distribute drugs, and because no drugs were ever recovered or tested, the government's case depended entirely on the phone calls between Mr. Duran and Mr. Birch. In turn, the government relied upon the testimony of Co-Case Agent Kevin Rossi and Agent Donny Peterson. As explained in more detail below, *infra* Part III.A.1, Agent Rossi testified to the subjective conclusions he reached as the case agent, including his belief that Mr. Duran and Mr. Birch were part of a conspiracy to distribute drugs and that Mr. Duran was Mr. Birch's supplier. (R. Vol. III, pp 292, 311–12, 330). For example, Agent Rossi testified that he "believed" and that the investigation "determined" that "Mr. Duran and Mr. Birch had a very close relationship" and that Mr. Duran was Mr. Birch's "source of supply" and they were involved in drug distribution together. (*Id.* at 292, 311–12). He also said: "I believed -- and other investigators as well

believed that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's." (*Id.* at 330).

For his part, Agent Peterson testified over objection as an "expert" in drug code/slang. *Infra* Part III.A.2. Among others, Agent Peterson offered the following "expert" opinions:

- Drug dealers don't use the words "cocaine" or "crack" when talking on the phone, (R. Vol. III, p 462);
- Within drug trafficking, drug dealers refer to money as "bread," "loot," "paperwork," and "titles," (*id.*);
- A "rack" is a code word "used for a thousand-dollar increment of money," (*id.* at 463);
- Drug dealers commonly refer to cocaine and crack cocaine as "work," (*id.*);
- Drug dealers differentiate between cocaine and crack cocaine by referring to the former as "soft" and the latter has "hard," (*id.* at 464);
- In terms of quantity, "heezy" means half a kilo or half an ounce, (*id.*); and

- By using the terms "raindrop" and "gooey-gooey," Mr. Duran and Mr. Birch were referring to the process of "cooking" cocaine and turning it into crack cocaine, (*id.* at 484–88).

Applying these opinions to the recorded calls between Mr. Duran and Mr. Birch, Agent Peterson concluded that Mr. Duran possessed cocaine on March 8 and that he was boasting about the quality of his drugs. (*E.g.*, *id.* at 488). Regarding March 11, Agent Peterson opined that Mr. Duran distributed and possessed with intent to distribute one and one-half ounces of "hard," that is, crack cocaine. (*E.g.*, *id.* at 497–98).

Summary of the Argument

1. As to Counts 22, 35, and 36, due process required the government to prove beyond a reasonable doubt that Mr. Duran distributed and possessed with intent to distribute a controlled substance (Count 22), and that he knowingly and intentionally used a telephone to facilitate his distribution and possession with intent to distribute a controlled substance (Counts 35 and 36). But no drugs were observed, recovered, or tested, no controlled buys or sales conducted, and no witness ever observed Mr. Duran possessing or distributing drugs. The government, therefore, failed to prove Mr. Duran's guilt beyond a reasonable

doubt. This Court should vacate the convictions and sentences on Counts 22, 35, and 36.

2. Due process and the Federal Rules of Evidence prohibit the admission of irrelevant and unfairly prejudicial evidence that undermines the fundamental fairness of the trial. Here, the district court allowed the case agent to testify regarding three controlled buys of drugs involving Mr. Birch and a confidential source, none of which involved Mr. Duran, and all of which predated his alleged involvement in the conspiracy. The testimony was irrelevant and prejudicial (because it could only have tarred Mr. Duran as guilty by association based on conduct he was not involved in and knew nothing about); it was based on inadmissible hearsay (because the case agent's testimony communicated to the jury the out-of-court statements of the non-testifying and unidentified confidential source); and Agent Fania lacked the personal knowledge required to offer it (because he did not personally participate in the controlled buys). This Court should reverse all four convictions.

3. Federal Rule of Evidence 701 prohibits testimony about a defendant's substantive guilt and excludes testimony where the witness is no better suited than the jury to make the judgment at issue. In turn, Rule 702 prohibits unqualified individuals from offering so-called "expert" testimony absent specific, on-the-

record findings that the testimony is reliable. Here, the district court reversibly erred in allowing: (1) the case agent to testify under Rule 701 regarding his subjective belief in Mr. Duran's guilt; and (2) a government witness to testify as an "expert" under Rule 702 in so-called drug code/slang and to "translate" recorded phone calls for the jury. Because the government's evidence was exceptionally weak, and because this inadmissible evidence tipped the scales in favor of guilt, this Court should reverse all four convictions.

Argument

I. The government failed to prove Mr. Duran's guilt beyond a reasonable doubt as to Counts 22, 35, and 36, because no drugs were observed, recovered, or tested, no controlled buys or sales conducted, and no witness ever observed Mr. Duran possessing or distributing drugs.

Standard of review. This Court reviews the sufficiency of the evidence de novo. *United States v. Summers*, 414 F.3d 1287, 1293 (10th Cir. 2005).

Preservation. Mr. Duran preserved this issue for appeal. At the close of the government's evidence, defense counsel moved for a judgment of acquittal, both in writing and orally, which the district court denied. (R. Vol. I, pp 357–71; R. Vol. III, pp 561–76).

Nevertheless, the district court acknowledged the weakness of the government's case, saying: "It's an odd case for many of the reasons [defense counsel] has emphasized. There is no cocaine, there is no evidence that somebody

saw cocaine pass between [Mr. Duran] and [Mr.] Birch. There wasn't a search warrant executed. There wasn't any controlled buy." (R. Vol. III, p 573). The court continued: "[Defense counsel] has emphasized that a lot of this is based on inference and inferences upon inferences, and I don't necessarily disagree with him." (*Id.* at 575). Notwithstanding these misgivings, the court denied the motion for a judgment of acquittal. (*Id.* at 572–76).

Discussion. The United States Constitution guarantees due process of law, U.S. CONST. AMEND. V, which in a criminal case requires the government to prove a defendant's guilt beyond all reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970). The government's burden extends to and encompasses each element of a charged offense. *United States v. Dunmire*, 403 F.3d 722, 724 (10th Cir. 2005). "Viewing the evidence in its entirety, a conviction must be grounded on more than a suspicion of guilt." *Summers*, 414 F.3d at 1294 (citing *United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir. 1990)). The government's evidence must be substantial. *Beachum v. Tansy*, 903 F.2d 1321, 1332 (10th Cir. 1990) (citing *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987)). "[A] conviction cannot be sustained if obtained by 'piling inference on inference.'" *Id.* (quoting *Dunmire*, 403 F.3d at 724).

A. This Court should vacate the conviction on Count 22.

This Court should reverse the conviction on Count 22 for a simple reason: There are no drugs. "To establish a violation of 21 U.S.C. § 841(a)(1), the Government must prove the defendant: (1) possessed the *controlled substance* . . . ." *United States v. Bowen*, 437 F.3d 1009, 1014 (10th Cir. 2006) (emphasis added).

The government's evidence on this point was completely lacking. No controlled substances were recovered or tested or observed. Even if "lay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in an alleged narcotics transaction," *United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976), the government must present *some* evidence that the substance existed. *See United States v. Hall*, 473 F.3d 1295, 1306–09 (10th Cir. 2007) (reversing conviction based exclusively on the defendant's inculpatory statements on recorded phone calls when no witness testified that they saw the defendant with drugs or that they obtained drugs from the defendant); *United States v. Bryce*, 208 F.3d 346 (2d Cir. 1999) (Sotomayor, J., & Jacobs, J.) (reversing defendant's drug conviction, when no drugs were observed or recovered, because "inculpatory statements alone are [in]sufficient to convict [the defendant] of narcotics possession and distribution"); *United States v. Baggett*, 890 F.2d 1095, 1097 (10th Cir. 1989) ("If the prosecution

is not going to present direct evidence of drug possession, its circumstantial evidence must include some testimony linking defendant to *an observed substance* that a jury can infer to be a narcotic." (emphasis added)). In the absence of any evidence of actual drugs (as opposed to talk about drugs), Mr. Duran could not have been found guilty of possessing and distributing a controlled substance (Count 22).

In *United States v. Baggett*, this Court reversed a drug possession conviction due to insufficient evidence in a case almost exactly like this one. 890 F.2d 1095. There,

> [t]he evidence that the defendant possessed the drugs in question on the day listed in the indictment included three recorded phone calls made by the defendant to a suspected drug dealer during which she arranged to purchase cocaine and heroin. *Id.* at 1096. Also during the call, the defendant arranged to meet the dealer at a specified time and place. *Id.* Police officers then surveilled the area and saw the drug dealer meeting with a "white female" driving a car registered to the defendant. *Id.* No witness observed a drug exchange between the two; nor did anyone testify to seeing the defendant with any drugs that day. *Id.* at 1097. The transaction was alleged to have taken place when the defendant briefly entered the drug dealer's car. *Id.* at 1096. The defendant later admitted to using heroin around the time alleged in the indictment. *Id.* [This Court] held that the evidence was insufficient to establish that the defendant possessed heroin. *Id.*

Hall, 473 F.3d at 1307 (citing *Baggett*).

In *United States v. Hall*, this Court reached the same common-sense result. There, the trial record revealed the following:

> The Government did not introduce into evidence crack-cocaine related to the alleged April 7 transaction; eyewitness testimony or video surveillance evidence putting Mr. Hall in possession of crack-cocaine on or around April 7; or testimony from any persons alleged to have purchased crack-cocaine from Mr. Hall on or about that date. The evidence related to this count of conviction included the transcripts of three telephone calls made between Mr. Hall and Mr. Small on April 6 and April 7 purporting to orchestrate a drug transaction. During the first call, the two discuss the price of drugs. Mr. Hall seeks to buy "four" but not at the price at which Mr. Small is willing to sell them. "Four" refers to the number of ounces of drugs Mr. Hall wishes to purchase. In the next phone call, the pair agree to meet the following morning, April 7. They speak again on April 7 when they agree to "do two for ... sixteen" (meaning two ounces for sixteen hundred dollars). Video surveillance on April 7, shortly after the last telephone call, showed one man exiting a white pick-up truck and briefly entering Mr. Small's car. While watching the video at trial, City of Aurora Police Officer Steven Stanton identified Mr. Hall as the man who entered Mr. Small's car.

Id. at 1307. As in *Baggett*, this Court held that the evidence was insufficient to support a finding, *beyond a reasonable doubt*, that the defendant possessed crack cocaine on the date charged in the indictment. *Id.*

This case is like *Baggett* and *Hall*. There is no evidence of actual drugs; no drugs were observed, recovered, or tested; no search warrants were executed on Mr. Duran's property, nor were there any controlled buys. No witness—not one—testified that Mr. Duran possessed drugs. "If the prosecution is not going to present direct evidence of drug possession, its circumstantial evidence must include some testimony linking defendant to *an observed substance* that a jury can

infer to be a narcotic." *Baggett*, 890 F.2d at 1097 (emphasis added); *cf. United States v. Castaneda*, 368 F. App'x 859, 863 (10th Cir. No. 09-1080, Feb. 25, 2010) (unpublished) (affirming conviction and distinguishing *Hall* because *Hall* "did not include a seized substance alleged to be crack cocaine. . . . Here the government presented 'an observed substance that a jury can infer to be a narcotic.'" (quoting *Hall*, 473 F.3d at 1308 (internal citation omitted))). The prosecution had no such evidence in this case.

This Court's decision in *United States v. Marquez* is not to the contrary. 898 F.3d 1036 (10th Cir. 2018). In that case, this Court affirmed the Marquez's conviction for possession of methamphetamine with intent to distribute, even though the "government's only evidence for this count was one intercepted phone call between Marquez and Christner on March 16." *Id.* at 1044. In this Court's view, the phone call was sufficient evidence because Marquez "unequivocally" and "reliably" admitted to possessing two batches of methamphetamine and to distributing only the low-quality batch on the date is question (March 16). *Id.* at 1045.

In reaching this conclusion, this Court distinguished *Hall* and *Baggett*, as well as the Second Circuit's decision in *United States v. Bryce*, all three of which reversed possession convictions based exclusively on recorded phone calls

containing statements by the defendants. *Id.* at 1044–45 (citing *Hall*, 473 F.3d at 1307, 1309; *Baggett*, 890 F.2d at 1096–97; *Bryce*, 208 F.3d at 353, 356).

This Court reasoned that *Baggett* and *Hall* involved phone calls from "individuals arranging to *buy* drugs," while the phone call in *Marquez* didn't show the defendant "arranging to *buy* methamphetamine." *Id.* at 1044 (emphases in original). Instead, the defendant in *Marquez* "specifically discussed distributing the methamphetamine he already possessed." *Id.*

As to *Bryce*, the defendant's statements in that case were "unreliable." *Id.* at 1045. In particular, "the defendant's statements, standing alone, weren't sufficient to support a possession conviction because they 'raise[d] questions as to whether or not [the defendant] actually possessed or distributed cocaine on the relevant dates.'" *Id.* at 1044 (quoting *Bryce*, 208 F.3d at 356).

The outcome in this case follows from *Hall*, *Baggett*, and *Bryce*, not from *Marquez*.[2] As in *Hall* and *Baggett*, Mr. Duran's statements on March 8 speak to a

[2] In distinguishing *Hall* and *Baggett*, this Court's decision in *Marquez* failed to appreciate the reasoning and holdings in those cases. Neither *Hall* nor *Baggett* indicates that the result turned on the fact that the phone calls were placed by "individuals arranging to buy drugs" instead of "specifically discuss[ing] . . . [drugs] already possessed." Nevertheless, the evidence here was insufficient even under *Marquez*'s cramped reading of *Hall* and *Baggett*.

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plan to possess cocaine or crack cocaine at some future point, as opposed to current possession of drugs, or they speak to the possession of cocaine or crack cocaine by someone else.[3] In the first call on March 8, Mr. Duran says that "Unc's is here" and that he's "Happy as a motherfucker." (Ex. 9A, p 2). Mr. Birch asks, "When did he get," to which Mr. Duran responds, "Raindrops, drop tops." (*Id.*)

At most, Mr. Duran's reference to "raindrops, drop tops" refers to possession of crack cocaine by Unc, not by Mr. Duran.[4] Recall that Mr. Duran's statement "raindrops, drop tops" came in response to Mr. Birch's question about *Unc*: "What did he [Unc] get?" In any case, as even the government was forced to admit in closing argument, Mr. Duran's references to "raindrops" on this call are "virtually nonsensical." (R. Vol. III, p 596).

The second, third, and fourth calls on March 8 don't mention drugs at all. (Exs. 10A–12A). That leaves the final call, which also includes no statements of the sort at issue in *Marquez*. (Ex. 13A). As described above, most of the call is Mr. Birch giving Mr. Duran directions to his apartment and making fun of him for going

[3] In making this argument, Mr. Duran assumes *arguendo* that the district court properly allowed government to present testimony "translating" drug slang/code for the jury. But for the reasons given below, that decision was erroneous. *Infra* Part III.A.2.

[4] According to Agent Peterson, "raindrops" means the process of cooking crack cocaine. (R. Vol. III, p 484).

to the wrong location. And when drug slang is employed during the call (in just one exchange in an eleven-page transcript), the significant statements are made by Mr. Birch, not Mr. Duran, and they are all conditional and forward-looking:

> DURAN: We're about to see bullshit work.
>
> Beeping
>
> BIRCH: Yeah I'm bout to see that gooey, that gooey, gooey.
>
> DURAN: Yeah right motherfucker.
>
> Beeping
>
> BIRCH: That gooe, gooe (PH). . .

(*Id.* at 5). On this call, it is Mr. Birch, not Mr. Duran, who refers to the "gooey, gooey," and even then, Mr. Birch is saying *he is about* "to see that gooey, that gooey, gooey," not that he *presently has* the "gooey, gooey." (*Id.*)[5] At no point during this call, or any other call on March 8, does Mr. Duran admit (even in code) to presently possessing drugs.[6] That is insufficient to sustain the conviction for possessing and distributing cocaine on March 8.

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[5] Agent Peterson testified that "gooey, gooey" referred to crack cocaine or making crack cocaine. (R. Vol. III, pp 487–88).

[6] Calls between Mr. Duran and Mr. Birch on other days are likewise insufficient to support a conviction for possessing and distributing cocaine on March 8. This Court in *Hall* addressed and rejected the argument that evidence of

—footnote cont'd on next page—

In any event, like the statements at issue in *Bryce*, Mr. Duran's statements here were equivocal and unreliable. For example, the most direct statement from Mr. Duran purporting to possess drugs came in a call on March 11, when he told Mr. Birch that "I still got that, that one and a heezy [of hard] still." (Ex. 14A, p 3).

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possession of drugs on one date could support a conviction for possessing drugs on an altogether different date:

> The Government suggests that other evidence supports the jury's conclusion that Mr. Hall possessed crack-cocaine: (1) law enforcement officers intercepted a call on April 9, 2001 during which Mr. Hall seeks to buy powder cocaine from Mr. Small; (2) law enforcement officers intercepted a call on April 10, during which Mr. Hall and Mr. Small discuss how to cook powder cocaine; (3) a witness testified that she delivered cocaine (powdered or crack—she was not sure which) to Mr. Hall at Mr. Small's request at some other time; and (4) on June 7, law enforcement officers executed a search warrant at Mr. Hall's residence and found drug paraphernalia including scales with cocaine residue on them and $2,700 in cash. While this evidence may be sufficient to establish that Mr. Hall possessed crack-cocaine at some time, the indictment charged Mr. Hall with possession and distribution on or about April 7, 2001. None of this evidence shows that Mr. Hall possessed or distributed crack-cocaine at that time. *See* Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith); *see also Bryce*, 208 F.3d at 352 (evidence that defendant possessed narcotic at some other time does not prove that he possessed it at the time specified in the indictment). In sum, we conclude that the Government's evidence is insufficient to sustain the possession and distribution conviction.

Hall, 474 F.3d at 1309.

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> DURAN: I still fucking ah, Unc's is supposed to be, I'm supposed to meet him when I leave out of here, but I still got that, that one and a heezy still.
>
> BIRCH: What the hard that I gave you?
>
> DURAN: Yeah, you want that you don't have to fucking do nothing to it just get on it.

(*Id.*) According to Agent Peterson, this statement from Mr. Duran meant that he possessed 1 and ½ ounces of crack cocaine, i.e., more than 28 grams of crack cocaine as charged in Count 24 of the indictment. (R. Vol. III, pp 489–90).[7] But the jury in this case *acquitted* Mr. Duran of possession and distribution on March 11, necessarily determining that this statement was unreliable. And if the March 11 statement is unreliable, then all of the March 8 statements are as well, if only because they are more equivocal and vague than the statement on March 11.[8]

For these reasons, under *Baggett*, *Hall*, and *Bryce*, this Court should vacate Mr. Duran's conviction for distributing and possessing with intent to distribute cocaine on March 8, 2017 (Count 22).

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[7] There are 28 grams in one ounce. (R. Vol. III, p 455).

[8] Moreover, and in any event, under this Court's holding in *Hall*, an admission to possessing drugs on March 11 could not be used to support a conviction for possessing drugs on March 8. *Hall*, 473 F.2d at 1307; *supra* Note 6.

B. This Court should vacate the convictions on Counts 35 and 36.

The convictions on Counts 35 and 36 fail as well. If Mr. Duran did not possess and distribute a controlled substance, then he could not have used a telephone to facilitate that distribution and possession. "Proof of the actual commission of the underlying felony . . . is an essential element of a § 843(b) telephone facilitation offense." *United States v. Iennaco*, 893 F.2d 394, 395 (D.C. Cir. 1990) (Ginsburg, J); *see United States v. Pickel*, 863 F.3d 1240, 1257 (10th Cir. 2017) ("To obtain a conviction under § 843(b), the government must prove the defendant: (1) knowingly or intentionally (2) used a telephone or other communications facility (3) to commit, cause or facilitate any act constituting a drug felony.").

The conviction on Count 36 fails even if this Court concludes that sufficient evidence supports the conviction on Count 22—the jury acquitted Mr. Duran of Count 24. The telephone charge alleged in Count 36 was tied to the possession and distribution charge alleged in Count 24. Because "[p]roof of the actual commission of the underlying felony . . . is an essential element of a § 843(b) telephone facilitation offense," *Iennaco*, 893 F.2d at 395, the jury's acquittal on Count 24 requires an acquittal on Count 36 as well.

C. Conclusion.

This Court should vacate the convictions on Counts 22, 35, and 36.

II. The district court reversibly erred in allowing the case agent to testify regarding three controlled buys of drugs, none of which involved Mr. Duran, and all of which predated his alleged involvement in the conspiracy.

Standard of Review. This Court reviews the district court's evidentiary rulings for an abuse of discretion. *See United States v. Commanche*, 577 F.3d 1261, 1266 (10th Cir. 2009) (evidentiary rulings reviewed for an abuse of discretion).

Preservation. Mr. Duran preserved this issue for appeal by twice objecting to Case Agent Fania's testimony. (R. Vol. III, pp 107–09).

Discussion. The government's first witness was Agent Frank Fania, who served as Co-Case Agent with Agent Kevin Rossi. Over objection, Agent Fania testified regarding three prior controlled buys of drugs involving only Mr. Birch, none of which involved or implicated Mr. Duran and all of which predated the charged conduct in this case. In admitting this testimony, the district court reversibly erred. The court contravened Rules 401, 402, and 403; it violated the prohibition against hearsay under Rule 802; and it permitted testimony by a witness who lacked the personal knowledge and capacity to offer it, in violation of Rule 602. In so ruling, the district court deprived Mr. Duran of his constitutionally guaranteed right to a fair trial.

Due process of law guarantees fair trials by impartial juries. U.S. CONST. AMEND. V. This guarantee entitles a defendant to a trial free from the influence of

irrelevant and prejudicial evidence that undermines the fundamental fairness of the trial. *See United States v. Castillo,* 140 F.3d 874, 883 (10th Cir. 1998) (citing *Scrivner v. Tansy*, 68 F.3d 1234, 1239–40 (10th Cir. 1995)).

The Federal Rules of Evidence protect the right to due process by excluding irrelevant and unfairly prejudicial evidence, Fed. R. Evid. 401–403, prohibiting unreliable hearsay, Fed. R. Evid. 802, and precluding testimony offered by a witness lacking personal knowledge, Fed. R. Evid. 602. The district court here violated each of the prohibitions.

A. Agent Fania's testimony was irrelevant and unfairly prejudicial.

Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence is generally admissible, while irrelevant evidence is categorically inadmissible. Fed. R. Evid. 402. In turn, relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of one more of the following: unfair prejudice, confusing the issues, [or] misleading the jury. . . ." Fed. R. Evid. 403.

The evidence of controlled buys involving Mr. Birch and the CHS, not involving Mr. Duran and predating his alleged participation in the conspiracy by up

to one year, was irrelevant. The evidence (mostly from 2016) does not make it more likely Mr. Duran distributed or possessed with intent to distribute cocaine in 2017 or that he used a telephone to facilitate such a crime. Nor does it make it more likely that Mr. Duran conspired with Mr. Birch, given the lack of any evidence that Mr. Duran knew of the controlled buys in 2016 (let alone was involved in them).

In overruling defense counsel's objections, the district court said, "I take it that this is some background that has to do with Birch." (R. Vol. III, p 109). But this "background on Birch" had nothing to do with the charges against Mr. Duran, who was not alleged to have known about the controlled buys or been involved in them. Again, the controlled buys involving the CHS and Mr. Birch occurred up to one year before Mr. Duran allegedly entered the conspiracy.

To the extent the "background" the court referenced was the "background" of the investigation and the Metro Drug Task Force, courts have repeatedly recognized the marginal relevance of such testimony, particularly when compared to its potential for abuse. *E.g.*, *United States v. Brooks*, 736 F.3d 921, 931 (10th Cir. 2013); *United States v. Evans*, 216 F.3d 80, 87 (D.C. Cir. 2000). That is especially true in this case.

On the one hand, for the reasons given above, the "background" of the investigation, and Mr. Birch's illegal conduct in 2016, has nothing to do with Mr.

Duran in 2017. Mr. Duran was not involved with Mr. Birch until February 2017, and there was no allegation or evidence he even knew about Mr. Birch's conduct one year earlier. At most, the "background" of the task force's investigation was marginally relevant.

On the other hand, Agent Fania's testimony was highly prejudicial. *See* Fed. R. Evid. 403. As recognized by this Court, such evidence "is susceptible to abuse." *Id.* In particular, overview or background testimony allows government "witnesses (usually law enforcement) to testify on matters about which they have no personal knowledge or that are based on hearsay." *Brooks*, 736 F.3d at 930.

> [S]uch testimony raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence. . . . Overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government.

Id. at 930–31 (quoting *United States v. Casas*, 356 F.3d 104, 119–20 (1st Cir. 2004)). Each of the dangers was realized in this case.

If the government really needed to explain that the task force investigated Mr. Duran because of his association with Mr. Birch, whom the task force had already been investigating, Agent Fania should have said just that: The task force was investigating Mr. Birch and came to investigate Mr. Duran after seeing the two individuals together and hearing them exchange phone calls. Agent Fania did not

need to tell the jury *why* the task force was investigating Mr. Birch, or the specifics of three controlled buys involving Mr. Birch and an undisclosed and non-testifying confidential source.

Ultimately, the only point of Agent Fania's testimony was to paint Mr. Duran as guilty by association. Because no one ever observed Mr. Duran possess or distribute drugs; because no drugs were recovered or tested; and because the government's case against Mr. Duran was exceptionally (and we contend, unconstitutionally) weak, *supra* Part I; the government attempted to taint Mr. Duran with Mr. Birch's criminal conduct. That is precisely what happened, and this is precisely why this Court should reverse.

B. Agent Fania's testimony violated the prohibition against hearsay.

Hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Hearsay is generally inadmissible. Fed. R. Evid. 802.

In this case, Agent Fania offered inadmissible hearsay testimony when he told the jury that the confidential source engaged in three controlled buys with Mr. Birch prior to Mr. Duran's alleged involvement in the conspiracy. There was no testimony that Agent Fania was personally involved in those controlled buys. His

knowledge of them came from the CHS, or maybe even other officers assigned to the Metro Gang Task Force, who themselves heard the details of the controlled buys from the CHS.

In turn, through Agent Fania's testimony, the government offered and used the statements of the confidential source for their truth: To show that Mr. Birch possessed and distributed controlled substances on each of the three occasions. In relaying to the jury the substance of out-of-court statements from the CHS, who was not identified and did not testify, Agent Fania testified to inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. Agent Fania's "hearsay-laden or hearsay-based overview testimony at the onset of [Mr. Duran's] trial [w]as a rather blatant prosecutorial attempt to circumvent hearsay rules." *See United States v. Smith*, 640 F.3d 358, 367 (D.C. Cir. 2011).

It is immaterial that the prosecution and district court may have believed that the statements of the confidential source were admissible as "overview" or "background" evidence—that is, not for their truth but instead to show why Mr. Duran eventually became a target of the task force's efforts based on his association with Mr. Birch. Nor does it matter that Agent Fania did not specifically quote "actual statements" by the confidential source. As the First Circuit recognized:

> We take it to be common ground that the government may not have an agent testify, "X told us that the defendant was involved in the

> crime." Quoting X's out-of-court accusation remains impermissible if the agents testimony is changed to say, "We began to investigate the defendant because X told us that the defendant was involved in the crime," and the government seeks to justify it by arguing that X's out-of-court statement was offered not for its truth but only to explain why the agent focused on (or arrested) the defendant. Nor does the result change if, instead of quoting the out-of-court statement, the government communicates its content to the jury by implication.

United States v. Meises, 645 F.3d 5, 22 n.25 (1st Cir. 2011). The admission of the substance of statements by the confidential source, through the testimony of Agent Fania, violated the ban on hearsay.

In any event, whatever the reason the prosecutor thought the evidence was being offered, the relevant question is how the jury likely *used* the information. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (noting that the Confrontation Clause "does not bar the *use* of testimonial statements for purposes other than establishing the truth of the matter asserted" (emphasis added)); *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993) ("If the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose."). In this case, the jurors likely used the statements for their truth,

particularly because they were never told to limit their consideration of the testimony for any other purpose.[9]

The Seventh Circuit's decision in *United States v. Silva* illustrates the point. 380 F.3d 1018 (7th Cir. 2004). In that case, a DEA Agent testified to various out-of-court statements by a confidential informant identifying Silva as a drug supplier. *Id.* at 1019. Although the district court initially gave a limiting instruction, during closing argument it permitted the jury to "determine what the evidence shows and why it was admitted." *Id.* at 1021. On appeal, as in this case, the prosecutor attempted to justify the statements on the theory that they were not being offered for their truth. *Id.* at 1019. In a unanimous opinion by Judge Easterbrook, the

[9] Indeed, relaying to the jury the out-of-court statements of the confidential source through the testimony of Agent Fania also violates the confrontation clause. *See* U.S. CONST. AMEND. VI. Any statements the CHS made to Agent Fania or other task force members were undoubtedly testimonial; the statements were made for law enforcement purposes and to facilitate a future prosecution. *See Crawford*, 541 U.S. at 51 (a statement is testimonial when the declarant would "reasonably expect [it] to be sued prosecutorially"). Moreover, there was no showing that the CHS was unavailable to testify at Mr. Duran's trial, and Mr. Duran had no prior opportunity to cross examine the CHS, whose identity was never disclosed. *See id.* at 53–54, 59 n.9 (holding that a declarant's testimonial out-of-court statements are inadmissible unless (1) the declarant testifies, (2) the declarant is unavailable and the defendant had a prior opportunity for cross-examination, or (3) the statements are used for purposes other than establishing the truth of the matter asserted).

Seventh Circuit found that theory "surprising, for the evidence directly inculpated Silva." *Id.*

> So to what issue *other* than truth might the testimony have been relevant? The prosecutor contends that most of the statements were admissible to show "the actions taken by [each] witness." Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule. . . . Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers. *See Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.E2d 177 (2004).

Silva, 380 F.3d at 1020.

As in *Silva*, the prosecution in this case introduced testimonial hearsay that inculpated Mr. Duran by suggesting that, through his association with Mr. Birch, he was guilty of conspiring to possess and distribute and of actually possessing and distributing controlled substances. As in *Silva*, the jury here was not told that the evidence was to be used for anything other than its truth. Accordingly, as in *Silva*, the jury likely understood the evidence to show exactly what the government intended it to show: Mr. Birch sold drugs to the CHS in 2016 and early 2017 and, by associating with Mr. Birch later in 2017, Mr. Duran was guilty of conspiracy and the other charges as well. *See Conley v. State*, 620 So. 2d 180, 183 (Fla. 1993)

("Regardless of the purpose for which the State claims it offered the evidence, the State used the evidence to prove the truth of the matter asserted.").

The decision in *United States v. Evans* recognizes the significant danger of the district court's decision to allow such testimony. 216 F.3d 80 (D.C. Cir. 2000). In *Evans*, the government offered testimony from a law enforcement agent that the FBI "had received information that Mr. Evans was involved in drug trafficking." *Id.* at 85. The government defended the testimony on appeal by arguing that it was offered only as background to show why the officers "did what they did." *Id.* at 87. The United States Court of Appeals for the District of Columbia Circuit did not agree. *Id.* at 87-89. If the evidence was relevant, the Court explained, "it was only barely so." *Id.* And because the trial court failed to instruct the jury not to use the evidence for that improper purpose, it "may have committed error under Rules 801 and 802 by permitting the jury to use the testimony for its truth." *Id.* at 88.

The *Evans* decision thus recognizes that the relevant inquiry is whether a jury will, in violation of the ban on hearsay, likely misuse evidence that the government claims is not offered for its truth. As described above, *supra* Parts I.A & II.A, the risk of misuse is at its maximum in a case such as this, when the "background" evidence is only minimally if at all relevant and the other evidence against the defendant is woefully lacking.

C. Agent Fania lacked the requisite personal knowledge.

Rule of Evidence 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Agent Fania's testimony about Mr. Birch's controlled buys violated this prohibition. The buys involved the confidential source and Mr. Birch; they did not involve Agent Fania acting in an undercover capacity. As a result, Agent Fania lacked the personal knowledge to testify that Mr. Birch sold drugs to the confidential source. His testimony should have been excluded on the basis as well.

D. The trial court's error was not harmless.

The trial court's error here was not harmless. "A harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect." *Commanche*, 577 F.3d at 1269 (reversing conviction based on improper admission of prejudicial evidence). The government's evidence against Mr. Duran was exceptionally weak (and as to Counts 22, 35, and 36, unconstitutionally weak). The government did not observe, recover, or test, any controlled substances. And the surveillance of Mr. Birch and Mr. Duran disclosed nothing nefarious.

As a result, the government's case depended upon its ability to paint Mr. Duran as guilty because of his association with Mr. Birch, whom the government

repeatedly referred to as a "known crack dealer," a "proven crack dealer," a "known crack distributor," and a "known drug dealer." (R. Vol. III, pp 586, 626, 628). The government's conspiracy case depended upon the jury's acceptance of Mr. Birch as a known and proven crack dealer based on Agent Fania's testimony. After all, the government's theory as to conspiracy was that Mr. Duran and Mr. Birch agreed that Mr. Duran would be Mr. Birch's "source of supply." (*Id.* at 586, 592–95). But absent any evidence of actual supply, the government had to rely on three controlled buys involving Mr. Birch and a confidential source, none of which involved Mr. Duran, and all of which predated his alleged involvement in the conspiracy.

The prejudice of Agent Fania's testimony was compounded by the improper testimony offered by his Co-Case Agent, Kevin Rossi. *Infra* Part III.A.1. This Court and numerous others have recognized the significant risks posed by the type of testimony Agent's Fania and Rossi offered here: Non-expert testimony laden with hearsay and prejudicial information, encompassing opinions and conclusions that are properly left to the jury. *See Brooks*, 736 F.3d at 930–32 & n.2 (citing cases). In this case, the government's first witness was Agent Fania and its second-to-last witness was Agent Rossi. This case was bookended by impropriety. The erroneous admission of that evidence was not harmless.

III. The district court reversibly erred in allowing: (1) the case agent to testify under Rule 701 regarding his subjective belief in Mr. Duran's guilt; and (2) a government witness to testify as an "expert" under Rule 702 in so-called drug code and to "translate" recorded phone calls for the jury.

Standard of Review. The district court's decision to admit lay and expert testimony is reviewed for an abuse of discretion. *Brooks*, 736 F.3d at 929.

Preservation. Mr. Duran preserved this issue for appeal. (R. Vol. III, pp 311–12, 329–31, 430–44).

Discussion. The government's final two witnesses were Agent Kevin Rossi and Agent Donald Peterson. Agent Rossi, who served as Co-Case Agent with Agent Fania, provided extensive testimony expressing his subjective belief as to Mr. Duran's guilt. (*E.g.*, R. Vol. III, pp 292, 311–12, 329–31). For his part, Agent Peterson was qualified as an expert in drug trafficking trends, patterns, and communications. (*Id.* at 430, 444). Agent Peterson purported to interpret for the jury the content of the phone calls between Mr. Duran and Mr. Birch, concluding that they were talking in slang or code about cocaine, crack cocaine, and drug distribution. (*E.g.*, *id.* at 462–64, 484–88, 497–98).

The district court should not have allowed any of this. In concluding otherwise, the district court violated Rules 403, 701, and 702 and deprived Mr. Duran of a fair trial. *See* U.S. Const. AMEND. V.

A. The district court erred.

1. Agent Rossi's testimony violated Rule 701 and Rule 403.

Federal Rule of Evidence 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. "As a general matter, testimony about a defendant's substantive guilt in a conspiracy should . . . not be permitted as lay opinion under Rule 701." *Brooks*, 736 F.3d at 931 n.2. "With respect to lay opinions, Rule 701's intention is 'to exclude testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions which merely tell the jury what result to reach.'" *Id.* (quoting *Meises*, 645 F.3d at 16). "In no instance can a witness be permitted to define the law of the case." *Specht v. Jensen*, 853 F.2d 805, 810 (10th Cir. 1988) (en banc).

Here, Case Agent Rossi (who was not qualified as an expert) repeatedly offered testimony opining on Mr. Duran's guilt and the strength of the government's case. *See United States v. Moore*, 651 F.3d 30, 61 (D.C. Cir. 2011), *aff'd in part sub nom. Smith v. United States*, 568 U.S. 106 (2013) (it is error for a

witness to "express an opinion, directly or indirectly, about the strength of that evidence or the credibility of any of the government's potential witnesses").

Regarding a phone call on February 7, Agent Rossi said:

> There were several different comments made within the call, specifically Mr. Duran was asking and almost hounding Mr. Birch for money. Through my experience and my training, that is very indicative of drug traffickers. At that particular time, *we believed* that Mr. Duran -- although we didn't have his identity at that time, *we believed that Mr. Duran was potentially a source -- a source of supply for Mr. Birch*.

(R. Vol. III, p 292 (emphases added)). He continued:

> At that time, *we determined* that through the conversations that it was clear to us that Mr. Duran and Mr. Birch had a very close relationship, trusted one another. *And it appeared that Mr. Duran was sourcing -- was a source of supply for Mr. Birch* based on the persistent nature of the calls, the repeated calls about asking for money. It was very indicative to us about what was taking place. Additionally, throughout this investigation and others, many times when an individual would call and ask for money, it is very indicative of drug trafficking.

(*Id.* (emphases added)). All of this testimony was improper under Rule 701, because Agent Rossi was simply stating his own subjective beliefs and "offering his non-expert opinions about the charged conspiracy and [Mr. Duran and Mr. Birch,] [and] vouching for the reliability of the investigation. . . ." *See Moore*, 651 F.3d at 60.

The district court inadvertently recognized the impropriety in response to one of defense counsel's many objections:

> Q. (By MR. MCNEILLY) Beyond what we had already discussed with regard to the first phone call, what, if anything, in this phone call stood out to you as the case agent on this case?
>
> A. After listening to this particular telephone call, there were a few comments made by Mr. Birch and Mr. Duran that were indicative of drug distribution.
>
> MR. SEARS: Your Honor, I'm going to object to that and move that it be stricken. Again, he has not been endorsed as an expert and he's reaching conclusions that are for the jury to decide here.
>
> THE COURT: Yes, but he's reaching conclusions that he reached as the case agent, which explain where he's coming from in this case. It's certainly up to the jury to decide if they agree with him. Overruled.
>
> MR. SEARS: Your Honor, I don't know why we got an expert report and why we're having an expert testify if he's going to be testifying to the ultimate conclusions here.
>
> THE COURT: Okay. Onward

(R. Vol. III, pp 311–12). As the district court itself recognized, Agent Rossi "was reaching conclusion that he reached as the case agent," conclusions that, under Rule 701, are legally the province of the jury.

Despite this recognition, and over continued objection, the district court allowed Agent Rossi to offer ever more inadmissible opinion. (*Id.* at 329–31). Regarding the March 8 calls:

> Q. . What did you believe was happening based on these calls.
>
> MR. SEARS: I'm going to object to that. Calls for a conclusion, and, again, I think that's -- I'm going to object under 702, 703, 402, 403.
>
> THE COURT: Overruled.

> A. It was my belief at that time throughout all of these calls, the latter calls --
>
> MR. SEARS: Your Honor, I believe his question was what did he believe in response to this call. Now he's going back to all the calls.
>
> THE COURT: I don't remember the question.
>
> MR. MCNEILLY: Your Honor, I believe my question referenced the ones on March 8th. I might have said these calls.
>
> THE COURT: Actually you said what did you believe was happening based on these calls?
>
> MR. MCNEILLY: I'll be more specific, Your Honor.
>
> Q. (By MR. MCNEILLY) What did you believe was happening in response -- in regard to these five calls on March 8th?
>
> A. On March 8th, based on the calls, I believed that Mr. Duran was going to meet Mr. Birch at his residence on Paris -- at 1650 Paris. During that, Mr. Duran was going to provide Mr. Birch with what Unc's had provided him, which we believed to be powder cocaine. Based on the comments made between Mr. Duran and Mr. Birch, I believed -- and other investigators as well believed that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's. The surveillance -- well, as further calls indicated, they did, in fact, meet and confirm what had the calls -- the surveillance confirmed what the calls were[.]

(*Id.*) This testimony is improper for numerous reasons. For one thing, Agent Rossi expressed his subjective belief as to Mr. Duran's guilt: "*I believed* . . . that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's." *See Brooks*, 736 F.3d at 930 (it is improper for witnesses to "stray into matters that are reserved for the jury, such as opinions about a

defendant's guilt"). For another, by its own terms, it is based on inadmissible hearsay: "I believed -- *and other investigators as well believed* that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's." *See id.* at 931 (it is improper for "witnesses (usually law enforcement) to testify on matters about which they have no personal knowledge or that are based on hearsay" (citing *Moore*, 651 F.3d at 56)); *see also* Fed. R. Evid. 602, 801, 802.

Finally, Agent Rossi's testimony violated Rule 403, in that it risked jurors accepting Agent Rossi's testimony as gospel at the expense of their independent duty to evaluate the evidence and decide whether the government met its burden of proof. *See United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001) ("Unfair prejudice in the Rule 403 context 'means an undue tendency to suggest decision on an improper basis. . . .' (quoting Fed. R. Evid. 403 advisory committee's note)). The jury, not Agent Rossi, was responsible for determining whether Mr. Duran was guilty.

Accordingly, Agent Rossi's testimony ran afoul of this Court's decisions and the Rules of Evidence.

2. Agent Peterson's Testimony violated Rule 702.

While Agent Rossi's testimony violated Rule 701 and related prohibitions, Agent Peterson's testimony violated Rule 702. That rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Among others, Agent Peterson offered the following "expert" opinions:

- Drug dealers don't use the words "cocaine" or "crack" when talking on the phone, (R. Vol. III, p 462);
- Within drug trafficking, drug dealers refer to money as "bread," "loot," "paperwork," and "titles," (*id.*);
- A "rack" is a code word "used for a thousand-dollar increment of money," (*id.* at 463);

- Drug dealers commonly refer to cocaine and crack cocaine as "work," (*id.*);
- Drug dealers differentiate between cocaine and crack cocaine by referring to the former as "soft" and the latter has "hard," (*id.* at 464);
- In terms of quantity, "heezy" means half a kilo or half an ounce, (*id.*); and
- By using the terms "raindrop" and "gooey-gooey," Mr. Duran and Mr. Birch were referring to the process of "cooking" cocaine and turning it into crack cocaine, (*id.* at 484–88).

Applying these opinions to the recorded calls between Mr. Duran and Mr. Birch, Agent Peterson concluded that Mr. Duran possessed cocaine on March 8 and that he was boasting about the quality of his drugs. (*E.g.*, *id.* at 488). Regarding March 11, Agent Peterson opined that Mr. Duran distributed and possessed with intent to distribute one and one-half ounces of "hard," that is, crack cocaine. (*E.g.*, *id.* at 497–98). In a one-sentence finding, the district court concluded "that by training and experience [Agent Peterson] has sufficient expertise to at least be permitted to express opinions." (*Id.* at 444).

For at least two reasons, the trial court's decision to admit Agent Peterson's expert opinions was improper under Rule 702. First, Agent Peterson was not

qualified to offer the opinions he professed. As disclosed during defense counsel's voir dire, Agent Peterson had never before testified as an expert in a jury trial. (*Id.* at 432). *See United States v. Medina-Copete*, 757 F.3d 1092, 1105 (10th Cir. 2014) (reversing district court's decision to allow a witness "to testify as an expert based on his experience without considering the relevance or breadth of that experience, thereby eliding the 'facts or data' requirement found in Rule 702(b)"). Although Agent Peterson claimed to have given speeches about drug code, details of those speeches were lacking, and he admitted that those speeches never involved the term "raindrops" and that he couldn't remember if he used the word "heezy." (R. Vol. III, pp 433–44). Recall that "raindrops" and "heezy" are essential terms in this case. Finally, in preparing for his testimony, Agent Peterson did not rely on any publications or print resources as a basis for his opinions. (*Id.* at 443). Given this background, Agent Peterson was not qualified to offer the testimony he gave.

Second, the district court failed "to make specific, on-the-record findings that the testimony is reliable under *Daubert*." *See United States v. Roach*, 582 F.3d 1192, 1207 (10th Cir. 2009) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 (1993)). The district court's finding allowing Agent Peterson to testify consisted exclusively of this:

> THE COURT: All right. The objection is overruled. The Court finds that by training and experience he has sufficient expertise to at

> least be permitted to express opinions. The Court offers no opinion at all as to merit or lack of merit of those opinions, and they are subject to cross-examination as well.
>
> Onward.

(R. Vol. III, p 444). This conclusory finding is insufficient under this Court's decision in *United States v. Roach*.

The district court's inadequate findings are crucial in a case such as this, where the expert testimony is central (indeed, essential) to the government's case and yet it lacks a foundation in the evidence and is otherwise of questionable reliability. For one thing, Agent Peterson's testimony was not corroborated by actual evidence of drugs. There was no way to know, for example, if Agent Peterson could reliably opine that the word "hard" referred to crack cocaine absent any evidence of actual crack cocaine. And his belief that "one and heezy" meant one and one-half ounces was entirely speculative, absent the recovery of any drugs, let alone one and one-half ounces of drugs. For another thing, as revealed on cross examination, some of the terms Agent Peterson translated (for example, "heezy" and "raindrops") were not in the DEA's Dictionary of Drug Slang Code Words. (*Id.* at 525, 534; *see* R. Vol. I, p 293).

Agent Peterson was not qualified to offer "expert" opinions, and the district court's findings to the contrary were inadequate.

B. The error requires reversal.

The trial court's violation of Rules 403, 701, and 702 was not harmless. *See Commanche*, 577 F.3d at 1269 (articulating standard). Again, the government's case was exceptionally weak, given the lack of any actual, observed drugs. The government made up for that weakness by having Agent Rossi opine on Mr. Duran's guilt and express his non-expert opinion that Mr. Duran and Mr. Birch were part of a conspiracy to possess and distribute drugs. In turn, Agent Peterson's "interpretation" of the phone calls for the jury was essential to the government's case against Mr. Duran. For these reasons, and particularly in the context of Agent Fania's prejudicially inadmissible testimony, *supra* Part II, the district court's error was not harmless, and this Court should reverse all four convictions.

Conclusion and Request for Oral Argument

Oral argument is essential in this case. Few criminal drug cases make it to trial in federal court, and few (if any) cases are as weak as this one. The first issue explains why the government's evidence was insufficient as a matter of law. The second and third issues, which address the improper and prejudicial allowance of inadmissible evidence, show why the government was able to convince the jury to overlook its lack of proof. Each issue is related to the other two, and any one of them should prompt this Court to vacate or reverse the judgment. Oral argument

will aid this Court's review of the government's unconstitutionally inadequate evidence and the district court's numerous errors.

For these reasons, this Court should order oral argument and either vacate or reverse Mr. Duran's convictions and sentences.

October 1, 2018.

Respectfully submitted,

s/ Adam Mueller

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Certificate of Compliance with Rule 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 11,509 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(III).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14 pt. Equity.

s/ Adam Mueller

Certificate of Digital Submission

All required privacy redactions have been made and, with the exceptions of those redactions, every document submitted in Digital Form or PDF format is an exact copy of the written document filed with the Clerk.

This digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Webroot SecureAnywhere, updated October 1, 2018) and, according to the program, are free of viruses.

s/ Adam Mueller

Certificate of Service

I certify that on October 1, 2018, a copy of the foregoing *Mr. Duran's Opening Brief* was served via CM/ECF on the following:

James C. Murphy
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s/ Andrea Rosso

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
FERNANDO DURAN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17-cr-00135-RBJ-07

USM Number: 44128-013

Daniel Joseph Sears
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to counts

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

☒ was found guilty on count(s) 22, 34, 35 and 36 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Distribution and Possession with Intent to Distribute a Mixture and Substance Containing a Detectable Amount of Cocaine, a Schedule II Controlled Substance	03/08/17	22
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Conspiracy to Distribute and Possess with Intent to Distribute a Detectable Amount of Cocaine	03/31/17	34
21 U.S.C. § 843(b) and (d)	Use of a Communication Facility to Commit a Felony Controlled Substance Offense	03/08/17	35
21 U.S.C. § 843(b) and (d)	Use of a Communication Facility to Commit a Felony Controlled Substance Offense	03/11/17	36

The defendant is sentenced as provided in pages 2 through 7 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) 24 of the Superseding Indictment ☒ 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.

January 18, 2018
Date of Imposition of Judgment

Signature of Judge

R. Brooke Jackson, United States District Judge
Name and Title of Judge

January 19, 2018
Date

ATTACHMENT 1

DEFENDANT: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: Forty-six (46) months as to each Count, to run concurrent.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ 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

DEFENDANT: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: three (3) years as to each of Counts 22 and 34, to run concurrent, and one (1) year as to each of Counts 35 and 36, to run concurrent to all Counts.

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 make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ 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 the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ 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.

DEFENDANT: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

STANDARD 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 tasers).
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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. You must participate in a cognitive behavioral treatment (CBT) program as directed by the probation officer until such time as you are released from the program by the probation officer. You must pay the cost of treatment as directed by the probation officer.
3. You must not associate with or have contact with any gang members and must not participate in gang activity, to include displaying gang paraphernalia.

DEFENDANT: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$** 400.00	**$** 0.00	**$** 0.00	**$** 0.00

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

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	**$** _____	**$** _____

☐ Restitution amount ordered pursuant to plea agreement **$** _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** 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: FERNANDO DURAN
CASE NUMBER: 1:17-cr-00135-RBJ-07

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

THE COURT: Okay. Thank you. You're excused, free to go.

Mr. McNeilly.

MR. MCNEILLY: Your Honor, the Government rests.

THE COURT: Okay. All right. So, ladies and gentlemen, we need to take a recess here so that I can discuss some matters with the parties and lawyers. And this will take a little longer than doing it at the bench, so why don't you please take a hopefully short recess, and we'll be back in touch as soon as possible.

THE COURTROOM DEPUTY: All rise for the jury.

(Jury left the courtroom at 2:25 p.m.)

THE COURT: All right. Mr. Sears, you probably want to make a motion?

MR. SEARS: Yes. Thank you, Your Honor. As the Court is well aware, in the early hours of this morning I did electronically file my motion for judgment of acquittal. I've tendered a copy of that motion to the United States attorney. I filed it early this morning because I expected we were going to be tied up in court and I would not have an opportunity to get back to the office and file it at the close of the Government's case, so I would appreciate the Court's consideration of it at this time.

I'm not going to prolong this, Your Honor. There's been a lot of testimony, a lot of opinions offered. The Court

is well aware from my repeated questions that there are no controlled buys, there's no evidence of distribution, there's no evidence of cooking cocaine, there's no evidence of possession with intent to distribute cocaine.

THE COURT: Well, what do you mean there's no evidence of cooking cocaine?

MR. SEARS: Well, I'm getting to that, but for the testimony of Agent Peterson and Mr. Rossi, it all has to be based on the jury's acceptance of those opinions and conclusions. Quite frankly, I think those opinions cross the line as expert testimony because they invade the province of the jury in deciding the ultimate question as to whether there was distribution, whether there was possession with intent to distribute.

But other than that, I will rest on my written motion and ask the Court to grant a judgment of acquittal on all the counts of the superseding indictment. Thank you.

THE COURT: Thank you, Mr. Sears.

Mr. McNeilly.

MR. MCNEILLY: Thank you, Your Honor. Your Honor, our response is obviously that at this point in the light most favorable to the Government the Court must find that a jury could return a verdict of guilty based on the evidence that has come out thus far in the trial. With regard to the conspiracy count, first, that two or more persons agreed to

violate the federal drug laws, there are ample phone calls in which it is clear that these two individuals had an ongoing agreement and understanding. Things about exchanging money, comments like -- such as, Like we always do, and things along that line. Saying that he's trying to get work started for him, the criticism that they never had work consistently.

These stand as evidence that these two people, Mr. Birch and Mr. Duran, did, in fact, agree to violate the federal drug laws. We could also add in persons known and unknown, Unc's and another source of supply --

THE COURT: Well, you say it's clear. It's only clear if the jury credits the interpretation of the language and opinions that have been provided by the expert and the case manager.

MR. MCNEILLY: Well, we clearly believe those are necessary and probative evidence that have been offered in this trial.

THE COURT: And the opinions of the case manager were simply admitted to show what he did and why he did what he did.

MR. MCNEILLY: I agree with that.

THE COURT: The expert opinions as to what all this means really came from --

MR. MCNEILLY: Special Agent Peterson.

THE COURT: Peterson, that's right.

MR. MCNEILLY: I agree with that, Your Honor.

THE COURT: If they don't agree with Peterson, or they don't agree beyond a reasonable doubt that what Peterson said is accurate, then you lose, right?

MR. MCNEILLY: I think that's how this works, Your Honor. But at this stage in the proceedings, it's in the light most favorable to the Government. So there's not been anything in the impeachment of his credibility or the attack on his opinions that should shift this balance at this point such that the Court should say there's not a way a jury could return a verdict of guilty.

THE COURT: Okay. That's maybe right on the conspiracy charge. Talk to me about what proof there is on the specific days of March 8th and March 11th that there was possession with the intent to distribute or distribution.

MR. MCNEILLY: Sure. So -- and you want me to leave aside the phone counts at this point, Your Honor, and just focus on the substantive 841 counts for March 8th and March 11th?

THE COURT: One follows the other.

MR. MCNEILLY: They do go hand in hand.

THE COURT: They were talking on the phone.

MR. MCNEILLY: Right.

THE COURT: So talk to me about what you've proven for March 8th.

MR. MCNEILLY: So with regard to March 8th, Your Honor, the controlled substance alleged is a mixture and substance containing a detectable amount of cocaine. We've got a call -- the sort of the inception of the March 8th transaction is the call alleged in the phone count -- I believe it's 34. And the defendant is elated. He says he's fucking happy as a motherfucker, because Unc's has showed up, and he's brought that super super raindrop.

And then towards the end of the call, he says, I want you to raindrop it for me. Again, on its face some of these things are apparent without the opinion of an expert witness. Obviously, the pop culture reference to a song in which the lyrics are raindrop drop top, and then shortly thereafter they say cooking dope in a crock pot, is helpful in substantiating the opinion that, in fact, what he's doing is he's announcing to his buyer that his source of supply has showed up with cocaine, he's got some, he's going to meet up with him, and he wants him to turn it into crack cocaine.

That interpretation is further informed by the fact that they move on from using raindrop and drop top, and they move on to things like, We're about to see that bullshit work, and then Mr. Birch in his excitement, says, Yeah, we're about to see that gooey, that gooey-gooey, that goo-goo. To which the defendant says, After this you're going to be like where you at, bro-bro? All of these work in conjunction to back up

the opinion of what we're dealing with is Mr. Duran has a mixture and substance containing a detectable amount of cocaine.

THE COURT: So there's your possession.

MR. MCNEILLY: So there's our possession. He's bringing it to him. And we have other phone calls where Mr. Birch says, I'm not about to be giving you money without getting something in return. And we know that that's one of the things that goes on in times when they meet based on those sorts of calls.

THE COURT: Well, I'm focusing on March 8th now. So you've got your evidence of possession. What about your evidence of distribution on March 8th?

MR. MCNEILLY: Is Your Honor saying we've got our evidence of possession with intent to distribute or simply possession?

THE COURT: I'm saying your argument is that you have evidence of possession with the intent to distribute.

MR. MCNEILLY: Right.

THE COURT: Are you claiming that there was distribution on March 8th?

MR. MCNEILLY: Yes, Your Honor. So once they go there, given the rest of the context of the phone calls, it is also clear that one thing -- it's not just that he simply gives him a commission fee to make crack -- that the defendant

simply pays a commission fee to Mr. Birch to make crack for him. Mr. Birch is a crack dealer. The defendant deals cocaine to him so that Mr. Birch can convert it to crack and then distribute it on to others.

THE COURT: What's the definition of distribution?

MR. MCNEILLY: Distribution means to deliver or to transfer possession or control of something from one person to another. So in a pure sense, I suppose he actually did that when he gave it to Mr. Birch so that Mr. Birch can put it in the glassware and turn it into crack cocaine. But I think --

THE COURT: And you're saying he gave it to him on March 8th?

MR. MCNEILLY: Yes, Your Honor, at 1650 Paris when they met for between an hour and a half and two hours.

THE COURT: Because your interpretation is that on that specific day, during that hour and a half to two hours they were cooking cocaine into crack cocaine.

MR. MCNEILLY: That's right. And then --

THE COURT: What about March 11th?

MR. MCNEILLY: So on March 8th the defendant left with at least an ounce and a half of crack that was made on March 8th. We turn to that -- just like March 8th, March 11th has five phone calls as well. We basically have the phone call that is the inception of the next drug transaction, three administrative phone calls, and then the ultimate phone call

that did immediately precede their meeting.

In that first phone call on the 11th, the defendant tells Mr. Birch that he needs to pay Unc's. I'm about to meet up with him when I go out of here or leave out of here is what he says. And he's acting to Mr. Birch like you've got to help me, because I don't have enough money to do it. One thing he volunteers about perhaps why Birch would give him money is I still have that one and a heezy you gave me. Mr. Birch says, The hard I gave you? And the defendant confirms, Yes. And that's when Mr. Birch asks, What's the ticket? Basically what's it going to cost me for you to sell me back that ounce and a half of crack that I made the last time they were together.

And there's no intervening phone calls between March 8 and March 11th when they have this conversation. They have three administrative phone calls where they basically confirm who's at what mall, you know, the defendant talks about paying parking at Cherry Creek Mall, but he's going to go over to the 7-Eleven near I think it's 10th and Federal initially, and then he changes the location because there's five fucking cameras at the 7-Eleven. So he moves it to the Hamburger Stand. We have no more phone communications between them.

And then on the 12th we see that he's still looking to collect money. Mr. Birch apparently didn't give him all of the money for whatever crack the defendant gave to Mr. Birch,

because he says, For that one last night. And then again, we go on and can further substantiate this by seeing the talk about how -- not one time have you had something that comes back right. And this is all in the context of them talking about the defendant being in touch with Unc's and trying to get some of his bread back. That Unc's said he would bring him a different one, which sounds like a unit of drugs to replace one that probably did not cook well on March 8th.

And so that we would submit is both possession with intent to distribute on March 11th of crack cocaine, so that's the substance alleged on that date. And then also that he, in fact, did distribute it, because we have the arrangement of the meeting, they part ways, and then the next day Birch says, The one from last night. That charge alleges 28 grams or more of crack cocaine, because it's one and a heezy. One ounce would be 28 grams. One and a heezy would be -- we're over 40 grams -- I think it's 44 grams. I'm not confident in that.

THE COURT: 42.

MR. MCNEILLY: 42. So with that, Your Honor, in the light most favorable to the Government, and I've mentioned both of the phone calls that were used as an inception of these drug deals on each of those occasions, obviously the number of them is in the record, but it's the first call on March 8th and the first call on March 11th.

THE COURT: Okay.

MR. MCNEILLY: Do you have any further questions for me, Your Honor?

THE COURT: No.

MR. MCNEILLY: Thank you.

THE COURT: Mr. Sears, you find it irresistible to respond?

MR. SEARS: I'm fighting the temptation, Your Honor. First of all, I think the deficiency in the Government's argument is -- and I think one of the infirmities of Agent Peterson's testimony is that he drew from some hip-hop or rap song that used the word raindrops that we are supposed to conclude that Mr. Duran and even Mr. Birch, who Mr. McNeilly characterizes as a crack dealer, knew about that song, knew the manner in which the lyrics are delivered, and signed on to that use of interpretation in their discussions. I think that's how attenuated Agent Peterson's opinion is.

THE COURT: Isn't that a matter for argument on the strength of the case as opposed to whether they've satisfied the requirements for a prima facie case?

MR. SEARS: Well, I agree with that, Your Honor, and I think the weight to be attributed to Agent Peterson's testimony is going to be a decision of the jury.

Now, with respect to whether or not they established possession with intent to distribute, or distribution of cocaine on March 8th, I think this plays right into my motion

for a judgment of acquittal of piling inference upon inference. So if we accept Agent Peterson's testimony that Unc's means it's a source of supply, and if we accept the testimony that Mr. Birch is a crack dealer, and his association with Mr. Duran thereby makes him an associate in crack trafficking or crack production, I think we are piling inference upon an inference.

You've got -- again, it's going to go to the weight and the acceptability of Agent Peterson's testimony, but you have to go from the proposition that Unc means that that was a source for Mr. Duran, that Unc is supplying Mr. Duran with cocaine, Mr. Duran is then taking the cocaine and conversing with Mr. Birch about converting it to crack cocaine, and then the ultimate inference is that they had to be converting powder cocaine to crack cocaine because they were at 1650 Paris for one-half to two hours, which could mean they were doing anything at 1650 Paris.

And that's why I've spent so much time on no controlled buys, no search warrants. You know, if the Government wants to complete an effective investigation, then you institute these investigative techniques to find out exactly what is going on at 1650 Paris on March 8th. On March 11th, Mr. McNeilly references the five phone calls. And the first is needed to pay Unc's, so we're supposed to infer that the reason why he would be paying Unc's is because Unc's

is a supplier of cocaine to Mr. Duran, that any financial transactions between Mr. Duran and Mr. Birch have to be cocaine trafficking rather than dealing in cars or any other innocent activity.

And so, Your Honor, again, I think the Government's position, even in the light most favorable to the Government, is quite shaky, particularly I think, as the Court has recognized, on Counts 22 and 24, which charge not only possession, but it's got to be possession with intent to distribute or distribution. And other than Agent Peterson's testimony of his interpretation of innocent words falling in with words that he interprets as coded drug words, I think is insufficient, at least particularly on those two counts to go to the jury.

THE COURT: All right. Well, first, briefly, I want to explain, not just for the record, but for Mr. Duran in particular and anyone supportive of his side of the case, that what the judge does now is not to interpret who wins or to determine whether the Government has a great case or not. That's not the judge's role at all. But what the law is is that the judge at this point in response to the motion for judgment of acquittal, and Mr. Sears properly alluded to this, must construe the evidence in the Government's favor. The evidence and reasonable inferences from the Government's evidence in the Government's favor.

In other words, the Court at this point assumes that the jury will find credible, believe, accept the evidence as presented, the inferences reasonably drawable from the evidence. And then the test is whether, if the jury does all of that, a jury could rationally find beyond a reasonable doubt that the defendant is guilty. And, again, I emphasize that that does not mean I'm construing the evidence that way at all. Personally, I'm just saying that's what I'm required to do at this stage for purposes of ruling on such a motion.

And I also want to say to Mr. Duran that Mr. Sears has put up one heck of a fight and has done, in my opinion, a masterful job of challenging the Government's evidence and creating or attempting to create reasonable doubt. It's an odd case for many of the reasons Mr. Sears has emphasized. There is no cocaine, there is no evidence that somebody saw cocaine pass between him and Birch. There wasn't a search warrant executed. There wasn't any controlled buy.

And the Government's case hinges on the interpretation of the telephone calls, the statements the Court has admitted as statements of a coconspirator, the statements the Court has admitted as admissions of the defendant, and the corroboration through surveillance, photographs, and things of that nature. It's an unusual case to have in a sense so little, and I think we've seen in some of the jury's questions that certainly the defense has gotten

their attention. And Mr. Sears hammering on these potential weaknesses has certainly been understood by the jurors asking some of the questions.

Having said all of that, however, if the jury finds the testimony of the Government's witnesses, and in particular the interpretation of the slang language by the expert, Mr. Peterson, it is at least rational that the jury could conclude beyond a reasonable doubt that there was possession of cocaine on March 8th. I don't think that the jury has to necessarily infer that Duran and Birch were aficionados of Lil Wayne or his music, but they do have to find credible the opinions as to what the term super raindrop meant on that day, among other things.

But there is evidence from Duran and from Birch that could be interpreted as Mr. Peterson has interpreted to indicate that there was possession on March 8th, there was an intent to distribute on March 8th, as between these two people, that Unc's was a source and so forth. I'm not saying those things are true. I'm saying that evidence that will support them and the same with respect to March 11th. When you put the March 11th phone calls into context with March 12th phone calls, you could conclude, again accepting what Peterson has told us, that they had a meeting at the Hamburger Stand, that cocaine was exchanged, that cocaine was cooked.

The reference on the 12th to last night and payment

for the last amount, the so-called exchange on March 11th could be a rational interpretation. Mr. Sears has emphasized that a lot of this is based on inference and inferences upon inferences, and I don't necessarily disagree with him. But as one of the jury instructions -- actually, two of the jury instructions I believe explain, it is fair game for the jury to draw inferences from direct evidence.

Circumstantial evidence is, in fact, inferences. And the instruction I think informs the jury that direct and circumstantial evidence are not distinguished in terms of value by the law. There is, of course, obvious room for argument, because there wasn't any -- forgive the pun -- hard evidence, as I've mentioned, but then the Government has an explanation for that, and if you buy the explanation, maybe you find it credible.

The explanation being that in effect, Mr. Duran was sort of a peewee in the overall scheme of things, and they didn't want to do a search warrant, for example, and search his house or his business or his vehicle or his phone if it would give away the fact that they have a much bigger investigation going on, an investigation that ultimately involves some 50 or so individuals, as I understand it.

And they had an explanation for why they didn't do a controlled buy. They've got explanations for what happened here. They may or may not be persuasive to the jury, but

applying the law as I am required to apply it, I have to deny the motion for acquittal and let the jury make the decision, which is ultimately the way the system works, unless the Government simply can't put even a prima facie case interpreting everything their way, and my finding and conclusion is that they've done at least that much. And Mr. Sears is going to have to make his arguments to the jury in terms of what they should find credible.

Now, that's the ruling on the motion. The next thing we have to talk about is whether the defense is going to present any additional evidence, and before I ask Mr. Sears that question, I'll ask Mr. Sears a different question, and that is, other than your client, are you going to call any other witnesses?

MR. SEARS: I am not, Your Honor. And -- well, I'll stop right there at this point.

THE COURT: And with respect to your client, the defendant, Mr. Duran, we had a discussion most recently at the end of business yesterday. Remember that when I talked with you about your rights to testify or not to testify, the possible consequences of that decision, I urged you to get advice -- additional advice from your lawyer about that to think about. It's a very, very important decision, and I explained that it's your decision ultimately to make. Have you done what I asked you to do and that is think about it and

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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FERNANDO DURAN, Defendant - Appellant.	No. 18-1062

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CR-00135-RBJ-7)

Adam Mueller, Haddon, Morgan, and Foreman, P.C., Denver, Colorado, for the Defendant - Appellant.

James C. Murphy, Assistant United States Attorney (Jason R. Dunn, United States Attorney, with him on the brief) Office of the United States Attorney, District of Colorado, for Plaintiff - Appellee.

Before **BACHARACH**, **BALDOCK**, and **EBEL**, Circuit Judges.

BACHARACH, Circuit Judge.

After a jury trial, Mr. Fernando Duran was convicted on drug charges. He appeals, arguing that

- the evidence was insufficient to convict on three of the counts and

- the district court abused its discretion in admitting testimony regarding prior drug transactions and interpretations of recorded calls.

We reject these arguments.

1. An investigation into Mr. Jerrell Birch leads to the convictions of Mr. Duran.

The case against Mr. Duran stemmed from an investigation involving Mr. Jerrell Birch. The investigation included three controlled buys of crack cocaine from Mr. Birch and wiretaps on two of his telephones. The telephone calls aroused suspicion that Mr. Birch was buying cocaine from Mr. Duran, and these suspicions led to the prosecution of Mr. Duran. At trial, the government presented

- recorded telephone calls between Mr. Birch and Mr. Duran and

- testimony from law-enforcement officers describing the investigation and interpreting the conversations.

The jury found Mr. Duran guilty on four counts:

- Count 22: distributing and possessing cocaine with the intent to distribute on March 8, 2017 (*see* 21 U.S.C. § 841(a)(1) and (b)(1)(C)),

- Count 34: conspiring to distribute and possess cocaine and crack cocaine with the intent to distribute between February 1, 2017, and March 31, 2017 (*see* 21 U.S.C. §§ 841(a) and 846), and

- Counts 35 and 36: using a telephone to facilitate the manufacture, distribution, and possession with intent to

distribute crack cocaine on March 8 and 11, 2017 (*see* 21 U.S.C. § 843(b)).[1]

2. The evidence was sufficient to convict on Counts 22, 35, and 36.

Mr. Duran challenges the sufficiency of the evidence supporting Counts 22, 35, and 36. We reject these challenges.

A. Standard of Review

We engage in de novo review, viewing the evidence in the light most favorable to the government. *United States v. Mirabal*, 876 F.3d 1029, 1038 (10th Cir. 2017). Viewing "the evidence in this light, we will reverse only if the trier of fact could not rationally have found guilt beyond a reasonable doubt." *Id.*

B. Count 22: Distributing and Possessing Cocaine on March 8, 2017

On Count 22, the government presented evidence that included both recorded calls and surveillance.

1. On March 8, after expressing happiness from Unc's visit, Mr. Duran directs Mr. Birch to "raindrop it," with the expectation of seeing "gooey, gooey."

Two of the calls took place on March 8, 2017. In these calls, Mr. Duran acknowledged the presence of someone named "Unc," telling Mr.

[1] Mr. Duran was acquitted on Count 24: distributing and possessing cocaine with intent to distribute 28 grams or more of a substance containing cocaine base (crack cocaine) on March 11, 2017.

Birch to "raindrop it." And Mr. Birch noted his anticipation of "gooey, gooey."

The first conversation took place early in the afternoon. In this call, Mr. Duran expressed happiness about a visit from Unc and told Mr. Birch to "raindrop it":

Duran: Fucking Unc's is here.

Birch: Oh yeah.

Duran: Yeah.

Birch: That's crazy.

Duran: Fucking happy as a motherfucker.

Birch: When did he get

Duran: Raindrops, drop tops.

Birch: Raindrops?

Duran: (Unintelligible) its super, super raindrop.

Birch: Yeah right.

Duran: I swear, on everything.

. . . .

Duran: Where you gonna be at [at 4 pm]

Birch: I'll be in the hood. You already know where I'm gonna be at.

Duran: Alright cause fucking ah I want you to raindrop it.

Govt. Exh. 9a at 57–58.

In another call that evening, Mr. Birch supplied directions to Mr. Duran for a meeting. As Mr. Duran drove, Mr. Birch noted that he was "about to see that gooey, gooey":

Duran: Motherfucker all I do is work.

Birch: Yeah all you do, sell bull shit work.

Duran: Yeah right motherfucker. Fuck you.

Birch: (Laughs)

Duran: We're about to see bull shit work.

Birch: Yeah I'm about to see that gooey, that gooey, gooey.

Duran: Yeah right motherfucker.

Birch: That goo. . . .

Duran: After this you're gonna be like where you at bro, bro. (Laughs)

Govt. Exh. 13a at 70–71.

2. Mr. Duran and Mr. Birch meet later the same day for about 1-1/2 hours.

The government also presented testimony from law-enforcement officers about their visual surveillance of Mr. Duran and Mr. Birch. On March 8, 2017, the officers saw the two men meet at an apartment complex for about 1-1/2 hours.

3. Mr. Duran later acknowledges that he still had the "hard" given to him by Mr. Birch.

Three days later, Mr. Duran acknowledges that he still had the "hard" given by Mr. Birch:

> Duran: Unc's is supposed to be, I'm supposed to meet him when I leave out of here, but I still got that, that one and a heezy still.
>
> Birch: What the hard that I gave you?
>
> Duran: Yeah, you want that you don't have to fucking do nothing to it just get on it.

Govt. Exh. 14a at 84.

4. Testimony defines the terms used: "Gooey, gooey" and "raindrops" refer to the upcoming conversion of powder cocaine into crack cocaine, and Mr. Duran's expression of happiness refers to the quality of Unc's cocaine.

Law-enforcement officers testified about the meaning of the terms used in these calls. According to this testimony, Unc was Mr. Duran's supplier, "gooey, gooey" and "raindrops" referred to the making of crack cocaine, and "hard" was code for crack cocaine. The officers also testified that

- Mr. Birch was poking fun at the quality of the cocaine that Mr. Duran had previously furnished and
- Mr. Duran was telling Mr. Birch that the quality of this cocaine would leave him wanting more of it.

5. Mr. Duran challenges the sufficiency of evidence showing his actual possession on March 8.

Mr. Duran argues that this combination of evidence was insufficient because there was no physical evidence of the drugs or testimony from anyone who had seen Mr. Duran with the cocaine. According to Mr. Duran, the government showed only that Unc had possessed cocaine, not that he had given it to Mr. Duran.

6. Our prior opinions recognize two categories of evidence: one is sufficient to show possession, the other insufficient.

We have previously addressed the sufficiency of the evidence of drug possession in the absence of controlled purchases or actual observation of the drugs. Our prior cases address

- recorded calls when the defendant expects to obtain drugs and
- recorded calls when the defendant acknowledges possession of the drugs.

Our case does not comfortably fit entirely into either category.

a. The government needed to present circumstantial or direct evidence of possession on March 8.

Regardless of the category, the government needed to present either direct evidence of drug possession or "enough circumstantial evidence to support an inference that the defendant actually did possess the drugs in

question" on March 8. *United States v. Baggett*, 890 F.2d 1095, 1096 (10th Cir. 1989).

b. Circumstantial evidence is insufficient if the jury could not reasonably infer actual possession on March 8.

Mr. Duran argues that

- the government presented no testimony showing that he had obtained the cocaine on March 8 and
- guilt requires direct or circumstantial evidence linking him to an observed illegal substance.

For this argument, Mr. Duran compares the government's proof to the evidence that we regarded as insufficient in *United States v. Baggett* and *United States v. Hall*.

In *Baggett*, the government presented

- recordings of three telephone calls indicating that the defendant had arranged to buy illegal drugs,
- testimony that law-enforcement officers had seen the defendant meet a suspected drug dealer, and
- the defendant's acknowledgment of drug use during a one-month period.

890 F.2d 1095, 1096-97 (10th Cir. 1989). We concluded that this combination of evidence did not reasonably support a finding that the defendant possessed the drugs on the pertinent date. *Id.*

And in *Hall*, the government presented

- telephone calls in which the defendant and a drug dealer discussed the price of drugs and agreed to meet and

- video surveillance showing that the defendant had briefly entered the drug dealer's car.

473 F.3d 1295, 1307 (10th Cir. 2007). We concluded that this evidence did not show possession of drugs on the pertinent date. *Id.* at 1308–09.

c. The circumstantial evidence may suffice even if it does not include observation of illegal drugs.

Mr. Duran points out that the government did not present evidence of a controlled buy or observation of drugs on March 8. Given the absence of this evidence, Mr. Duran contends that the government's proof was insufficient.

For this contention, Mr. Duran points out that in *Baggett*, the court said that a conviction must include "testimony linking defendant to *an observed substance* that a jury can infer to be a narcotic." Appellant's Opening Br. at 18–19 (emphasis in original) (quoting 890 F.2d at 1097). To interpret this passage, we consider the context. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (stating that the Supreme Court often reads general language in opinions "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering"); *see also Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) ("Judges expect their pronunciamentos to be read in context.").

This passage appeared in the court's discussion of a surveillance operation. Law-enforcement officers had watched the defendant meet with a suspected drug dealer, and the government argued that evidence of the meeting could prove drug possession. The court rejected this argument, remarking that the officers had not seen any illegal drugs. *Id.* at 1096. With this remark, the court did not purport to announce a blanket requirement for testimony by someone who had seen the drugs. Indeed, the *Baggett* court elsewhere acknowledged that circumstantial evidence of possession could include

- proof of "secrecy or deviousness" or
- use of code words when referring to a substance.

Id. These examples would make little sense if the *Baggett* court had meant to require observation of the drugs whenever possession is an element.[2] In context, the *Baggett* court was referring to the importance of an "observed substance" when the government's evidence involves physical surveillance.

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[2] In the next paragraph, the *Baggett* court discussed *United States v. Iacopelli*, where the Second Circuit had regarded the evidence of possession as sufficient based on records showing that the defendant purchased and received controlled substances from a medical supplier. 483 F.2d 159, 161 (2d Cir. 1973). The *Baggett* court distinguished *Iacopelli* on the grounds that "[s]uch strong circumstantial evidence is not present in this case." 890 F.2d at 1097. But *Iacopelli*'s "strong circumstantial evidence" did not include an "observed substance." *Id.*

d. Direct evidence can include a contemporaneous acknowledgement of possession.

Observation of illegal drugs is also unnecessary when the government presents direct evidence of possession. An example appears in *United States v. Marquez*, where we held that the government had sufficiently proven possession based on recorded telephone calls despite the absence of any testimony involving observation of drugs or controlled buys. 898 F.3d 1036, 1044 (10th Cir.), *cert. denied*, 139 S. Ct. 654 (2018). In *Marquez*, we treated the recorded calls as direct evidence of possession. *Id.* at 1045.

There the government presented a recording of a telephone call between the defendant and a drug dealer. *Id.* In this call, the defendant and drug dealer used code language to discuss the distribution of methamphetamine. For one batch of methamphetamine, the defendant said: "I still have it." *Id.* And for another batch, he said: "I haven't even got to that yet." *Id.* We held that these statements constituted direct evidence of drug possession: "If the jury believed Marquez' statements that he 'still' had the low-quality methamphetamine and 'ha[d]n't even got[ten] to' the high-quality methamphetamine, no further inference was necessary to

conclude that he possessed methamphetamine." *Id.* Because no further inference was necessary, the evidence was considered direct. *Id.*

7. Our case lacks direct evidence but has greater circumstantial evidence than was in *Baggett* or *Hall*.

In contrast, the evidence against Mr. Duran was indirect. From the first call on March 8, the jury could reasonably infer three facts:

1. Unc had brought powder cocaine and planned to give it to Mr. Duran.

2. Mr. Duran expected to get the powder cocaine from Unc.

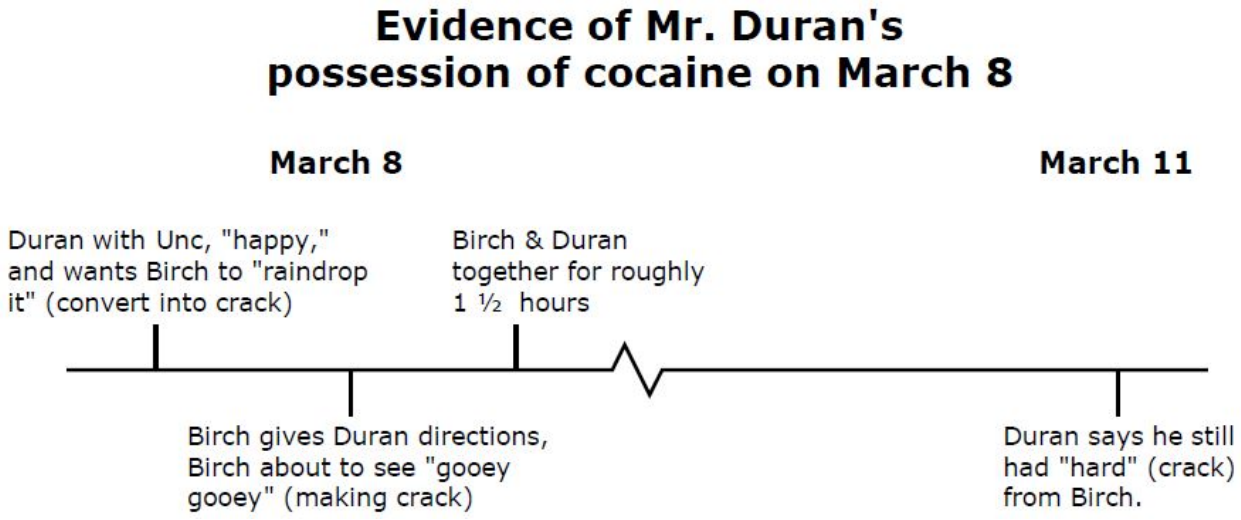
3. Mr. Duran was arranging for Mr. Birch to convert the powder cocaine into crack cocaine.

But more was needed to infer that Unc had given the powder cocaine to Mr. Duran.

The need for additional circumstantial evidence distinguishes this case from *Marquez*. There too no one testified about seeing the illegal drugs. But the defendant was heard saying that he still had "it," referring to the drugs. *See* p. 11, above. Given this express statement of current possession, the evidence against the *Marquez* defendant was considered direct. *See* p. 11, above. Here, though, Mr. Duran never expressly acknowledged in the call that he had obtained the cocaine from Unc. Thus, the first recorded call on March 8 does not constitute direct evidence of Mr. Duran's possession on March 8.

But other circumstantial evidence against Mr. Duran could lead to a reasonable inference that he had obtained the cocaine from Unc. While driving to Mr. Birch's apartment complex, Mr. Duran and Mr. Birch talked on the telephone for roughly eighteen minutes. During this call, the only audible voices were theirs and no one mentioned Unc's presence. *See* Gov. Exh. 13a. Mr. Duran told Mr. Birch: "We're about to see bull shit work." And Mr. Birch replied: "Yeah I'm about to see that gooey, that gooey, gooey." *See* p. 5, above. Law-enforcement officers explained that "gooey, gooey" referred to the conversion of powder cocaine into crack cocaine.

After Mr. Duran arrived, he spent roughly 1-1/2 hours with Mr. Birch, which law-enforcement officers testified was enough time to convert the powder cocaine into crack cocaine. Then, on March 11, Mr. Duran acknowledged that he still had "the hard" (crack cocaine) that he had obtained from Mr. Birch. Govt. Exh. 14a at 84.



Considering these additional facts, a jury could reasonably find that on March 8, Mr. Duran had

- obtained powder cocaine from Unc,
- referred to the powder cocaine as "it" (in the statement "I want you to raindrop it"),
- brought the powder cocaine to a meeting with Mr. Birch,
- spent roughly 1-1/2 hours with Mr. Birch, converting the powder cocaine into crack cocaine, and
- received crack cocaine from Mr. Birch (which he still had three days later).

This is "enough circumstantial evidence to support an inference that the defendant actually did possess the drugs in question" on March 8. *United States v. Baggett*, 890 F.2d 1095, 1096 (10th Cir. 1989). We thus reject Mr. Duran's challenge to the sufficiency of the evidence on Count 22.

C. Counts 35 and 36: Use of a Telephone to Facilitate a Drug Offense on March 8 and 11, 2017

Mr. Duran also challenges his convictions for using a telephone to facilitate the commission of a drug offense on March 8 and March 11, 2017. *See* 21 U.S.C. § 843(b). According to Mr. Duran, he could not have facilitated a drug offense

- on March 8 because the government had failed to prove that Unc gave the cocaine to Mr. Duran or
- on March 11 because the jury had found Mr. Duran not guilty of possessing cocaine that day.

We reject these challenges.

The government needed to prove that Mr. Duran had

- knowingly and intentionally used a telephone or other communications device
- to commit, cause, or facilitate any act constituting a drug felony.

United States v. Pickle, 863 F.3d 1240, 1257 (10th Cir. 2017). These elements required proof that Mr. Duran's use of a telephone made the underlying drug crimes easier to commit. *Id*. But Mr. Duran could be guilty of facilitation even if someone else had committed the underlying drug crime. *See United States v. Orihuela*, 320 F.3d 1302, 1304 (11th Cir. 2003) ("[O]ne of the elements of an offense under § 843(b) is the commission by someone of an underlying controlled substance offense.").

The government presented sufficient evidence of Mr. Duran's facilitation of drug crimes on March 8 and 11. He had knowingly and intentionally used a telephone, and the factfinder could reasonably infer that the calls had helped Mr. Birch to buy cocaine and convert it into crack cocaine.

Mr. Duran argues that his partial acquittal suggested that the jury hadn't believed that he possessed cocaine on March 11. But an acquittal on the underlying drug crime does not prevent a conviction on the facilitation charges. *See United States v. Powell*, 469 U.S. 57, 64–65 (1984) (holding that a defendant can be convicted of telephone facilitation despite an

acquittal on the predicate felony); *see also United States v. Milton*, 62 F.3d 1292, 1294 (10th Cir. 1995) ("[T]he Supreme Court has held that even if a defendant is acquitted on the underlying felony, a facilitation conviction may still stand.").[3] The factfinder could thus reasonably conclude that Mr. Duran had facilitated commission of a drug crime on March 11 as well as on March 8.

3. The district court acted within its discretion in allowing Officer Fania to testify about controlled buys from Mr. Birch.

Officer Frank Fania briefly testified about a confidential informant's controlled buys from Mr. Birch in March 2016 and January 2017. Mr. Duran argues that the testimony should have been excluded based on

[3] In his reply brief, Mr. Duran argues that the government failed to prove the possession of *any* drugs on March 11, foreclosing the possibility that Mr. Duran could have facilitated the commission of a felony on that day. But Mr. Duran did not make this argument in his opening brief. There he had relied solely on his acquittal on Count 24, which charged distribution and possession of cocaine with intent to distribute 28 grams or more of a substance containing cocaine base (crack cocaine) on March 11. Expanding the argument in his reply brief was too late. *United States v. Mendoza*, 468 F.3d 1256, 1260–61 (10th Cir. 2006).

irrelevance, unfair prejudice, hearsay, and lack of personal knowledge. We reject these arguments.

A. Standard of Review

We review the district court's evidentiary rulings for an abuse of discretion. *United States v Banks*, 884 F.3d 998, 1023 (10th Cir. 2018).

B. Relevance and Unfair Prejudice

In applying the abuse-of-discretion standard, "we give the evidence its maximum reasonable degree of relevance and its minimum reasonable danger of unfair prejudice." *United States v. Tee*, 881 F.3d 1258, 1273 (10th Cir. 2018). The district court may then exclude the evidence if the danger of unfair prejudice substantially outweighs the probative value. *United States v. Silva*, 889 F.3d 704, 712 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

Officer Fania testified about the investigation of Mr. Birch and described the events triggering the investigation of Mr. Duran. During the investigation of Mr. Birch, Officer Fania was in charge of the surveillance. The district court could reasonably regard his testimony as relevant.

The prosecution can ordinarily present overview testimony describing the start of, and techniques in, the investigation. *United States v. Brooks*, 736 F.3d 921, 930 (10th Cir. 2013). Here, for example, an overview could help the jury understand the content and significance of the conversations between Mr. Duran and Mr. Birch. These conversations

include language that Mr. Birch had previously used when referring to cocaine and its conversion into crack cocaine. Given this prior use of language, the jury could reasonably infer that the code words had shown involvement in converting powder cocaine into crack cocaine.

Mr. Duran also contends that even if the testimony had been relevant, it would have created unfair prejudice. The testimony might have been unfairly prejudicial if it had suggested guilt by association, unfairly impugned the defendant's credibility, or included statements unsupported by personal knowledge. *See United States v. Banks*, 884 F.3d 998, 1023 (10th Cir. 2018). But the district court could reasonably regard these dangers as absent, for the government did not use Mr. Birch's prior drug sales to

- show that Mr. Duran had possessed or sold cocaine in March 2017 or
- impugn Mr. Duran's credibility.

See United States v. Banks, 884 F.3d 998, 1024 (10th Cir. 2018) (upholding the admissibility of overview testimony that had not included an opinion on the witnesses' trustworthiness or guilt). The district court could thus reasonably conclude that Officer Fania's overview testimony had not created unfair prejudice.

C. Hearsay

Mr. Duran also regards Officer Fania's testimony as inadmissible hearsay.[4] We disagree.

At trial, Mr. Duran raised only one hearsay objection to Officer Fania's testimony. The government asked Officer Fania: "What about those controlled purchases you had talked about?" R., vol. III, at 107.[5] Mr. Duran objected, and the district court overruled the objection. Officer Fania answered without referring to any out-of-court statements:

> A. We were using an informant who made a controlled purchase from Jerrell Birch that day.
>
> Q. On March 11th?
>
> A. Correct. March 11, 2016.
>
> Q. And I apologize. I might have -- I might have misunderstood you. Did you say there were two in March of 2016?
>
> A. There were.
>
> Q. So March 11th, and what was the other day?
>
> A. I believe the second one was March 25th.

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[4] In a footnote, Mr. Duran also contends that Officer Fania's testimony violated the Confrontation Clause. Appellant's Opening Br. at 33 n.9. This contention was inadequately developed. *See United States v. Hardiman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.").

[5] Officer Fania had previously testified that the agents were working with a confidential informant who could make a controlled buy from Mr. Birch. *See* R., vol. III, at 96.

Q. And you indicated you used a confidential human source?

A. Correct.

Q. Were the steps that you previously described as to both of these purchases used?

A. They were all of them used.

Q. Okay. So it was audio-recorded and surveillance observed these?

A. That is correct.

Q. And transpired during those controlled purchases in terms of the deal?

A. The informant made phone contact with Jerrell. Ultimately they met, and on, I believe, March 11th purchased -- or the informant purchased one ounce of crack cocaine. On the second one, on March 25th, the informant purchased two ounces of crack cocaine from Jerrell Birch?

Q. And so did those controlled purchases further your investigation of Jerrell Birch?

A. They absolutely did.

Id. at 108-09. Given the absence of any mention of an out-of-court statement, the district court acted within its discretion in overruling the hearsay objection. After this exchange, Mr. Duran never lodged another hearsay objection to Officer Fania's testimony.

Despite the absence of further objection, Mr. Duran suggests that some of the follow-up questions elicited hearsay. Hearsay consists of an out-of-court statement offered for the truth of the matter asserted. Fed. R.

Evid. 801(c). But a law-enforcement officer's "out of court statements are not hearsay when offered for the limited purpose of explaining why a Government investigation was undertaken." *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987).

Mr. Duran suggests that some of the follow-up questions went beyond this limited purpose.[6] But Mr. Duran does not identify any improper questions. *See United States v. Marquez*, 898 F.3d 1036, 1052 (10th Cir. 2018) (stating that the issue was inadequately briefed when the defendant broadly challenged the introduction of overview testimony without identifying any particular testimony that had been improperly admitted or explaining why that particular testimony had been inadmissible). Rather than identify any improper questions, Mr. Duran states that Officer Fania "told the jury that the confidential source [had] engaged in three controlled buys with Mr. Birch prior to Mr. Duran's alleged involvement in the conspiracy." Appellant's Opening Br. at 30. But Mr. Duran does not identify any of the informant's hearsay statements.[7]

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[6] Mr. Duran also contends that if the testimony had a limited purpose, the district court should have given a limiting instruction. But Mr. Duran did not request a limiting instruction, and the district court did not err in declining to give one sua sponte. *See United States v. Record*, 873 F.2d 1363, 1376 (10th Cir. 1989) ("[I]t is not error for a trial court to fail to [issue a limiting instruction] in the absence of a request by counsel.").

[7] Mr. Duran argues that the testimony could constitute hearsay even if Officer Fania hadn't identified the informant's actual statements. Appellant's Opening Br. at 31–32. For this argument, Mr. Duran relies on a

Mr. Duran contends that even if Officer Fania hadn't recited the actual statements, he narrated the substance of what the informant had said. But Mr. Duran does not identify a single out-of-court statement recollected by Officer Fania. And even if Mr. Duran had identified the purported hearsay testimony, he forfeited further hearsay arguments because he never asserted another hearsay objection to any of the questions put to Officer Fania. *See United States v. Norman T.*, 129 F.3d 1099, 1106 (10th Cir. 1997).[8]

D. Lack of Personal Knowledge

Mr. Duran argues that Officer Fania lacked personal knowledge of the controlled buys from Mr. Birch. This argument is unpreserved and invalid.

We address preservation in our local rules. Rule 28.1(A) requires appellants to cite in the record where the issue was raised and decided. Mr.

First Circuit opinion: *United States v. Meises*, 645 F.3d 5, 22 n.25 (1st Cir. 2011). But we have declined to follow *Meises*. *See, e.g.*, *United States v. Fletcher*, 497 F. App'x 795, 804–05 (10th Cir. 2012) (unpublished) (declining to follow *Meises* and upholding law-enforcement testimony about the roles played by various participants in illegal activities); *see also United States v. Marquez*, 898 F.3d 1036, 1051–52 (10th Cir. 2018) (stating that *Meises* does not "establish the well-settled law of this circuit").

[8] Despite the forfeiture, Mr. Duran could have argued plain error. *United States v. Kearn*, 863 F.3d 1299, 1313 (10th Cir. 2017). But he didn't. *See id*. (declining to consider a forfeited contention based on the failure to urge plain error).

Duran complied with this rule by citing Volume III, pages 107–09. But these pages do not contain any objection to Officer Fania's testimony based on a lack of personal knowledge. Indeed, we have scoured the record and find no objection to Officer Fania's testimony based on a lack of personal knowledge.

Mr. Duran did object to one question on the ground that it called for hearsay. *See* p. 19, above. But the rules governing hearsay and personal knowledge are distinct and address different evidentiary defects. *See United States v. Mandel*, 591 F.2d 1347, 1369 (4th Cir. 1979) (discussing the differences between the rules addressing hearsay and personal knowledge); *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989) ("Knowledge acquired through others may still be personal knowledge within the meaning of Fed. R. Evid. 602, rather than hearsay, which is the repetition of a statement made by someone else—a statement offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness."). So the assertion of a hearsay objection did not preserve an argument that Officer Fania lacked personal knowledge. *See Schulenberg v. BNSF Rw. Co.*, 911 F.3d 1276, 1288 n.6 (10th Cir. 2018) (concluding that the appellant's objection on hearsay grounds failed to preserve an objection involving a lack of personal knowledge).

Even if Mr. Duran had preserved the objection, however, it would have failed. The foundational requirement for personal knowledge "is not difficult to meet." *United States v. de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014). The district court considers only whether "a rational juror could conclude based on a witness's testimony that he or she has personal knowledge of a fact." *Id.*

Officer Fania testified that he had participated in the arrangements for the controlled buys. Given this testimony, the district court had the discretion to find personal knowledge for Officer Fania's testimony about the controlled buys. *See United States v. Marquez*, 898 F.3d 1036, 1049 (10th Cir. 2018) (holding that an officer's knowledge of recorded conversations provided personal knowledge).[9] We would thus reject this appellate argument even if it had been preserved.

4. The district court acted within its discretion in allowing Officer Rossi to testify about the meaning of recorded calls.

After the government played recordings of calls in February 2017 and on March 8, 2017, Officer Rossi interpreted some of the language. On

[9] The government points out that Officer Fania testified as one of the two case agents, using the first-person "we" to describe what his team of investigators had done. In response, Mr. Duran denies that Officer Fania's use of the pronoun "we" was enough to show personal knowledge. But a rational factfinder could conclude that Officer Fania, as one of the two case agents, knew what his team of investigators had done. *See United States v. Decoud*, 456 F.3d 996, 1012 (9th Cir. 2006) (concluding that a case agent had personal knowledge based on his participation in the surveillance and interactions with a confidential informant).

appeal, Mr. Duran argues that the testimony was inadmissible because Officer Rossi had improperly (1) expressed an opinion on Mr. Duran's guilt, (2) based his opinion on inadmissible hearsay, and (3) expressed views that were unfairly prejudicial. We reject these arguments.

A. Calls in February 2017

For the calls in February 2017, Officer Rossi testified that

- Mr. Duran appeared to be trying to collect money from Mr. Birch and
- the discussion of "putting it in the water" suggested drug dealing.

Mr. Duran did not object to any of this testimony. As a result, he forfeited his current appellate challenge to this part of the testimony. *United States v. Wardell*, 591 F.3d 1309–10 (10th Cir. 2009). Though we could entertain an argument involving plain error, Mr. Duran has not urged plain error. *See* note 8, above. We would thus ordinarily decline to consider this argument. *See* note 8, above.

But Mr. Duran's appellate argument would fail even if he had preserved the challenge. If the challenge had been preserved, we would apply the abuse-of-discretion standard. *United States v. Comanche*, 577 F.3d 1261, 1266 (10th Cir. 2009). Applying this standard, we would consider Officer Rossi's testimony, which had used the recorded calls to explain why his team broadened the investigation to include Mr. Duran.

Mr. Duran argues that Officer Rossi was improperly providing his lay opinion about the conspiracy and the reliability of the investigation. But Mr. Rossi did not testify about his conclusions from the February calls; he simply explained why investigators had turned their attention to Mr. Duran. *See United States v. Warman*, 578 F.3d 320, 348 (6th Cir. 2009) (concluding that law-enforcement officers' testimony, which identified the defendant as a supplier, had been relevant and not unfairly prejudicial because the testimony had "explained the reason for the government's investigation" of the defendant and others). So even if Mr. Duran had objected, the district court would have had the discretion to permit this part of Officer Rossi's testimony.

B. Calls on March 8, 2017

Officer Rossi also testified about his interpretation of five calls made on March 8, 2017. According to Officer Rossi, these calls showed that Mr. Duran had obtained cocaine from Unc, arranged to meet Mr. Birch, and provided Mr. Birch with cocaine. In Officer Rossi's view, two later telephone calls confirmed that the two men had met on March 8 to convert the powder cocaine into crack cocaine. Mr. Duran contends that the testimony improperly communicated Officer Rossi's opinions on guilt and

the meaning of code words, was based on hearsay, and was unfairly prejudicial. We reject these contentions.

1. Opinions on Guilt and the Meaning of Code Words

Mr. Duran contends that Officer Rossi improperly testified about his own beliefs of Mr. Duran's guilt and the meaning of code words. We reject these contentions.

According to Mr. Duran, this testimony improperly waded into guilt or innocence, a matter reserved for the jury. We reject this argument.

Law-enforcement agents can ordinarily testify that the defendants were engaged in drug trafficking because this testimony constitutes opinion evidence on a fact issue. *See United States v. Barbee*, 968 F.2d 1026, 1031–32 (10th Cir. 1992); *see also United States v. Marquez*, 898 F.3d 1039, 1048–49 (10th Cir. 2018) (holding that a law-enforcement officer could testify about a defendant's role as a drug distributor because the testimony was factual and objectively based on the officer's knowledge of recorded telephone calls).

Mr. Duran contends that Officer Rossi went too far by expressing his belief that Mr. Duran was guilty. We disagree with this characterization of the testimony. Officer Rossi simply explained why he had turned his attention toward Mr. Duran: After surveilling Mr. Birch and listening to his calls, Officer Rossi broadened the investigation because he thought that Mr. Duran would help Mr. Birch convert the powder cocaine into crack

cocaine. *See United States v. MacKay*, 715 F.3d 807, 838 (10th Cir. 2013) (holding that the district court did not err in allowing an expert witness to testify about her observation based on the evidence rather than simply tell the jury what result to reach). Officer Rossi thus framed his opinion in the past tense by referring to his earlier beliefs based on what he had observed:

> On March 8, based on the calls, I *believed* that Mr. Duran was going to meet Mr. Birch at his residence on Paris -- at 1650 Paris. During that, Mr. Duran was going to provide Mr. Birch with what Unc's had provided him, which we *believed* -- and other investigators as well *believed* that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's.

R., vol. III, at 330–31 (emphasis added). The district court did not abuse its discretion by allowing Officer Rossi to testify about how his earlier beliefs had led the officers to broaden their investigation.

Officer Rossi also testified about the meaning of code words used by Mr. Duran and Mr. Birch. The district court did not err in allowing this testimony, for it could reasonably be considered a lay opinion based on information learned through the investigation. *See United States v. Cheek*, 740 F.3d 440, 447–48 (7th Cir. 2014) (holding that an agent's testimony about the meaning of drug-code words was admissible as a lay opinion based on personal observations and perceptions derived from his investigation); *see also United States v. Akins*, 746 F.3d 590, 599 (5th Cir. 2014) ("[T]estimony about the meaning of drug code words can be within

the proper ambit of a lay witness with extensive involvement in the underlying investigation.").

2. Hearsay

Mr. Duran also argues that Officer Rossi based his testimony on hearsay. But Mr. Duran forfeited this argument by failing to lodge a hearsay objection to Officer Rossi's testimony about the March 8 calls. *See* p. 22, above. We could ordinarily consider the possibility of plain error. *See* note 8, above. But Mr. Duran has not alleged plain error, so we decline to consider Mr. Duran's appellate challenge. *See* note 8, above.

3. Unfair Prejudice

Mr. Duran also contends that the testimony was unfairly prejudicial because the jury might have accepted Officer Rossi's testimony "as gospel." Appellant's Opening Br. at 43. For this contention, the district court considers whether the danger of unfair prejudice substantially outweighs the testimony's relevance. Fed. R. Evid. 403. In addressing this inquiry, we give the evidence its "maximum reasonable degree of relevance and its minimum reasonable danger of unfair prejudice." *United States v. Tee*, 881 F.3d 1258, 1273 (10th Cir. 2018); *see* p. 17, above.

Viewing the evidence in this light, we conclude that the district court need not have viewed the unfair prejudice as substantially greater than the testimony's relevance. The calls on March 8 used peculiar language that would have made little sense in the absence of guidance about how Mr.

Duran and Mr. Birch had communicated with one other. The district court could thus reasonably conclude that the testimony was admissible despite the possibility of unfair prejudice. *See United States v. Valbrun*, 877 F.3d 440, 444–45 (1st Cir. 2017) (concluding that the district court had the discretion to find lay testimony about drug-code words admissible and rejecting an appellate argument based on the danger of unfair prejudice).

The district court also took measures to ensure that the jury viewed Officer Rossi's testimony with the proper perspective. During the testimony, the court told the jury that

- Officer Rossi was "reaching conclusions as the case agent, which explain where he's coming from in this case" and
- the jury was "to decide if they agree with him."[10]

And after the close of the evidence, the district court instructed the jury to "[r]emember at all times that [they were] judges of the facts" and were to decide if the government had proven guilt "beyond a reasonable doubt."[11]

Given these instructions, Officer Rossi's testimony did not impede the jury's assessment of the evidence. The district court thus did not abuse its discretion in overruling Mr. Duran's objection involving unfair prejudice.

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[10] R., vol. III, at 311.

[11] R., vol. I, at 329.

* * *

In summary, the district court did not err in allowing Officer Rossi to testify about the meaning of the recorded calls. Mr. Duran forfeited his appellate argument about the calls recorded in February 2017. For the calls recorded on March 8, 2017, the district court acted within its discretion in allowing the testimony.

5. The district court acted within its discretion in allowing Agent Peterson to testify about coded language.

Finally, Mr. Duran contends that the district court erred in admitting expert testimony by Agent Donald Peterson. The government presented Agent Peterson as an expert on drug-trafficking trends, patterns, and communications. Mr. Duran objected to Agent Peterson's qualifications as an expert on drug dealers' use of code language. The district court overruled the objection, concluding that "by training and experience [Agent Peterson] has sufficient expertise to at least be permitted to express opinions." R. vol. III, at 444.

With this objection overruled, Agent Peterson testified that drug dealers typically do not use the words "crack" or "cocaine" when speaking on the telephone, noting that drug dealers often use code words like "bread," "loot," "paperwork," "titles" (money), "rack" (a thousand dollars), "work" (cocaine), "soft" (powder cocaine"), "hard" (crack cocaine), "heezy" (half of a kilogram or half of an ounce), "raindrop," and

"gooey, gooey" (the process of converting cocaine into crack cocaine). *See* R., vol. III, at 462–64, 484, 487–88.

Mr. Duran argues that

- the district court failed to make adequate findings on the reliability of the testimony and
- Agent Peterson was not qualified to testify about the use of code language.

Mr. Duran observes that Agent Peterson had never testified as an expert in a jury trial, had never spoken about the term "raindrops," had not remembered speaking about the term "heezy," and had not relied on any publications.

The district court must act as a gatekeeper, ensuring that the proffered opinions rest on a reliable foundation and are relevant to the issues. *United States v. Roach*, 582 F.3d 1192, 1206 (10th Cir. 2009). Although "the gatekeeper inquiry under Rule 702 is ultimately a flexible determination, . . . a district court, when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel v. Denver & Rio Grande W. R.R. Co.,* 215 F.3d 1083, 1088 (10th Cir. 2000).

We consider de novo whether the court applied the proper standard for allowing expert testimony and made sufficient findings. *Roach*, 582 F.3d at 1206. We then determine whether the rulings fell within the district court's discretion. *Id.*

The district court's findings were adequate. The court found sufficient expertise based on Agent Peterson's training and expertise; more detailed findings were not required. *See, e.g.*, *United States v. Cui Qin Zhang*, 458 F.3d 1126, 1129 (10th Cir. 2006).

These findings were supported by the record. Agent Peterson had extensive experience with drug trafficking cases: over 16 years' experience in law enforcement, including observation of 75 to 100 drug deals and more than 50 controlled buys. In light of this experience, the district court acted within its discretion in allowing Agent Peterson to testify about the use of coded language.

6. Conclusion

We thus affirm Mr. Duran's convictions.