[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11616
Non-Argument Calendar

D.C. Docket No. 8:17-cr-00222-JDW-JSS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LENIN LUGO,

Defendant-Appellant.

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

(October 8, 2019)

Before TJOFLAT, JORDAN and BLACK, Circuit Judges.

PER CURIAM:

Lenin Lugo appeals his conviction for one count of conspiracy to distribute and possess with intent to distribute five or more kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a), 70506(a)

and (b), and 21 U.S.C. § 960(b)(1)(B)(ii). First, Lugo contends the Government did not offer sufficient evidence to support his conviction, as the United States Coast Guard (USCG) personnel who interdicted his vessel did not find any direct evidence of cocaine aboard the vessel or recover any contraband jettisoned from the vessel. Second, Lugo asserts the district court erred in allowing the Government to introduce witness testimony from a jailhouse informant regarding Lugo's confession to the informant absent a sufficient determination of *corpus delicti*, and in denying his motion to suppress, on Sixth Amendment grounds, witness testimony from the jailhouse informant regarding Lugo's confession. Lastly, Lugo asserts the district court abused its discretion in allowing the Government to introduce testimony from USCG personnel opining that items jettisoned from the go-fast vessel were cocaine bales. We address each issue in turn, and after review, affirm Lugo's conviction.

I. DISCUSSION

A. Sufficiency of the Evidence

We review "a challenge to the sufficiency of the evidence and the denial of a Rule 29 motion for judgment of acquittal *de novo*." *United States v. Chafin*, 808 F.3d 1263, 1268 (11th Cir. 2015) (quotations omitted). We view the facts, and draw all reasonable inferences therefrom, in the light most favorable to the jury's verdict. *United States v. Clay*, 832 F.3d 1259, 1293 (11th Cir. 2016).

The district court did not err in denying Lugo's motion for judgment of acquittal, as the Government offered sufficient evidence by which a reasonable jury could find Lugo guilty beyond a reasonable doubt. *See United States v. Holmes*, 814 F.3d 1246, 1250 (11th Cir. 2016) (stating we will uphold the district court's denial of a motion for judgment of acquittal if a reasonable trier of fact could conclude the evidence establishes the defendant's guilt beyond a reasonable doubt). The Government submitted substantial circumstantial evidence Lugo was trafficking cocaine, including video recordings and testimony showing that: Lugo and 2 other crewmembers were found idling in the open sea aboard a blue-colored panga-style go-fast vessel, the type typically used by drug smugglers; the crewmembers were wearing gloves and a trash bag; after Lugo spotted a USCG aircraft and pointed it out, the crewmembers combined fuel tanks, poured fuel throughout their ship, and accelerated through the sea while jettisoning objects; and, the jettisoned objects included fuel tanks, a whip antenna, extra layers of clothing, a tarp, small electronic devices, and 15 heavy objects which USCG personnel and Baron testified, based on their observations and experience, appeared to be cocaine bales. Moreover, the Government offered testimony from Lugo's jail mate, Ivan Jose Baron Palacios (Baron), that Lugo confessed to transporting and jettisoning cocaine, and it was the province of the jury to determine Baron's credibility. *See United States v. Croteau*, 819 F.3d 1293, 1304 (11th Cir. 2016) ("It is well established that credibility determinations are the exclusive province of the jury."). As for Lugo's reliance on

the negative IonScan samples and his evidence suggesting he was transporting gasoline, the Government offered testimony explaining why a negative IonScan sample did not disprove the presence of cocaine, and this evidence did not preclude a reasonable trier of fact from finding the evidence established Lugo's guilt beyond a reasonable doubt. *See United States v. Isnadin*, 742 F.3d 1278, 1303 (11th Cir. 2014) (stating it is not necessary the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt). Sufficient evidence supports Lugo's conviction.

B. Jailhouse Informant Testimony

1. Corpus Delicti

A conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963). The Supreme Court, in considering the extent of corroborating evidence necessary to sustain a conviction based on an admission, has held the corroborative evidence need not be sufficient, independent of the admission, to establish the entire *corpus delicti*, but instead only has to corroborate the credibility of the admission itself. *Opper v. United States*, 348 U.S. 84, 93 (1954).

The *corpus delicti* rule is inapplicable as the Government did not rely solely on Lugo's confession to

support his conviction, but instead offered video recordings, testimony from USCG personnel, and lay opinion testimony that Lugo possessed and jettisoned cocaine. *See Wong Sun*, 371 U.S. at 488-89. Accordingly, there was sufficient evidence to sustain Lugo's conviction, and the district court did not err or abuse its discretion by allowing Baron to testify as to Lugo's confession.

2. Sixth Amendment

The district court also did not err by denying Lugo's motion to suppress Baron's testimony regarding his confession on Sixth Amendment grounds. *See United States v. Gari*, 572 F.3d 1352, 1361 (11th Cir. 2009) (reviewing *de novo* a defendant's claim the district court violated his Sixth Amendment rights). Even assuming Baron was acting as a Government agent during his conversation with Lugo, Lugo has not offered any evidence that Baron deliberately elicited any information from Lugo. *See Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987) (stating to establish a Sixth Amendment violation in a jailhouse informant case, the accused must show the informing inmate (1) acted as a government agent and (2) deliberately elicited incriminating statements from the accused). Baron testified he merely listened to Lugo and did not make any efforts to stimulate conversations about the crime charged or otherwise elicit any information, and Agent Thomas Oates testified he never asked Baron to elicit information from Lugo. *See Kuhlmann v. Wilson*, 477 U.S. 436, 456, 459 (1986) (explaining deliberate

elicitation is more than mere listening, and requires the informant to make efforts to stimulate conversations about the crime charged, and the Sixth Amendment is not violated when, by luck or happenstance, the government acquires incriminating statements from the accused after the right to counsel has attached). Lugo has offered no evidence to contradict this testimony or to support his conclusory assertion that Baron deliberately elicited information from him.

C. Lay Testimony

We review for abuse of discretion a district court's decision to admit law-enforcement personnel's lay opinion testimony under Federal Rule of Evidence 701. *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). A district court may admit opinion testimony of a lay witness if the testimony 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 that would qualify the witness as an expert under Federal Rule of Evidence 702. Fed. R. Evid. 701. In determining the admissibility of testimony under Rule 701, the central question is whether the witness's testimony is based on scientific, technical, or other specialized knowledge, such that it should be governed by Rule 702's expert testimony requirements rather than Rule 701's lay opinion standard. *United States v. Williams*, 865 F.3d 1328, 1341 (11th Cir. 2017).

In *Williams*, we approved the admission of lay opinion testimony of USCG witnesses that the jettisoned objects they saw through a forward-looking infrared system resembled cocaine bales they had found in previous drug interdictions. *Id.* at 1341-42. We determined that, because the USCG witnesses' opinions were not based on any scientific or technical knowledge, but instead on their rationally based perceptions of the size and shape of objects, the district court acted within its discretion in admitting the testimony under Rule 701. *Id.*

The district court did not abuse its discretion in admitting lay opinion testimony from the USCG personnel opining that objects jettisoned from the go-fast vessel were cocaine bales.[1] "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences." *United States v. Hill*, 643 F.3d 807, 841 (11th Cir. 2011). The USCG personnel's lay opinion

[1] To the extent Lugo argues the USCG personnel's opinion testimony is objectionable because it embraces an ultimate issue, that argument fails. An opinion is not objectionable merely because it embraces an ultimate issue. *See* Fed. R. Evid. 704(a). Moreover, the USCG personnel's testimony was based on their personal observations and was helpful to the jury, as it provided insight into the observations and opinions of the USCG personnel who participated in the interdiction of the go-fast vessel. *See United States v. Campo*, 840 F.3d 1249, 1267 (11th Cir. 2016) (stating lay opinions regarding the ultimate issue in a case are properly admitted if they are based on the personal observations of the witness); Fed. R. Evid. 704, Advisory Committee Note (providing the basic approach to lay opinions is to admit them when helpful to the trier of fact and that Rule 704 specifically abolished the "ultimate issue" rule).

testimony was admissible under Rule 701 as their testimony was rationally based on the USCG personnel's professional experiences, rather than scientific or technical knowledge. *See Williams*, 865 F.3d at 1341. Each of the testifying USCG personnel participated directly in the interdiction of the go-fast vessel and testified as to their opinions of what they actually observed, and were entitled to draw on their professional experiences to guide their opinions.[2] *See United States v. Jeri*, 869 F.3d 1247, 1265 (11th Cir.), *cert. denied*, 138 S. Ct. 529 (2017) (explaining "[l]ay witnesses may draw on their professional experiences to guide their opinions without being treated as expert witnesses"); *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999) (stating the opinion of a lay witness on a matter is admissible only if it is based on first-hand knowledge or observation).

Lastly, as for Lugo's assertion this testimony should have been excluded because it was speculative and unsupported by the evidence, Lugo does not rely on any legal rule or principle to support this argument. To the extent Lugo seeks to argue this evidence should have been excluded under Federal Rule of Evidence 403, the district court did not abuse its discretion in determining the USCG personnel's opinion testimony, viewed in the light most favorable to its admission, was not overly prejudicial because it was based on the USCG officers' personal observations and experiences

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[2] Guillermo Velazquez, the only testifying USCG officer not directly involved in the interdiction in this case, testified in his capacity as an expert.

and was helpful to the jury, as discussed above. *See* Fed. R. Evid. 403 (permitting a court to exclude relevant evidence if its probative value is substantially outweighed by danger of one or more of the following: "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"); *United States v. Alfaro-Moncada*, 607 F.3d 720, 734 (11th Cir. 2010) (stating in reviewing issues under Rule 403, we look at the evidence in the "light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact").

II. CONCLUSION

The district court did not err in allowing Baron to testify regarding Lugo's confession and did not abuse its discretion in allowing the Government to introduce testimony from USCG personnel opining the items jettisoned from Lugo's vessel were cocaine bales. Further, sufficient evidence supports Lugo's conviction. Finding no error, we affirm Lugo's conviction.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

v.

LENIN LUGO, et al. /

Case No: 8:17-cr-222-T-27JSS

ORDER

(Filed Jan. 23, 2018)

BEFORE THE COURT is Defendant's Amended Motion for Judgment of Acquittal (Dkt. 216). A response is unnecessary. Upon consideration, the Amended Motion for Judgment of Acquittal (Dkt. 216) is DENIED.[1]

In his motion, Defendant challenges the sufficiency of the evidence supporting his conviction on Count One, conspiracy to distribute and possess with the intent to distribute five of more kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States. His Rule 29 motion was denied. He essentially makes the same sufficiency of the evidence argument. Specifically, Defendant renews his argument that "there was no evidence of a plan or scheme for Lugo and the other crew members . . . to

[1] To the extent Defendant relies on transcripts of the depositions taken of defense witnesses, those transcripts will not be considered. The video-taped depositions were introduced as exhibits, not the transcripts. (See Dkt. 215).

agree to take cocaine on the go-fast vessel to distribute or deliver to someone else [sic] somewhere else to establish the charge of conspiracy."

"To prove participation in a conspiracy, the government must have proven beyond a reasonable doubt, even if only by circumstantial evidence, that a conspiracy existed and that the defendant knowingly and voluntarily joined the conspiracy." *United States v. Miranda*, 425 F.3d 953, 959 (11th Cir. 2005), quoting *United States v. Garcia*, 405 F.3d 1260, 1269 (11th Cir.2005). The evidence need not prove that the defendant knew all of the details of the conspiracy or participated in every aspect of the conspiracy. *Garcia*, 405 F.3d at 1269-70. What the evidence must prove is that Defendant knew the essential nature of the conspiracy and knowingly joined the conspiracy, and that may be proven by direct or circumstantial evidence, "including inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *Id.*

In summary, the evidence established that Coast Guard personnel on board a Coast Guard C 130 observed Defendant and two others on a go-fast panga style vessel in the Caribbean approximately 70 miles off the coast of Columbia. Defendant was at the helm and pointed to the Coast Guard aircraft as it circled the vessel. A number of barrels and what appeared to be bales could be seen on the go-fast vessel. The crew began combining fuel in the barrels and the vessel "took off," accelerating in heavy seas. The crew members were seen and video-taped jettisoning fuel barrels. In addition to barrels, the crew members jettisoned as

many as fifteen rectangular objects, together with a tarp, and what appeared to be a VHF whip antenna. Relying on their experience in prior cocaine interdictions, several of the Coast Guard witnesses testified that the bales, based on their size and shape, appeared to be cocaine bales. *See United States v. Williams*, 865 F.3d 1328, 1342 (11th Cir. 2017).

As the Coast Guard boarding vessel chased the go-fast, the crew saw what appeared to be a whip antenna in the water. When the go-fast vessel was finally stopped, the crew was discovered to be soaked in gasoline. And gasoline had been poured on the deck of the go-fast vessel. Officer Velaquez testified that drug traffickers use gasoline to mask cocaine and minimize trace evidence and tarps to lower their profile on the water.

ION scans of the crew and vessel were negative. Although the coordinates of the debris field had been radioed to the Coast Guard Cutter Diligence, no cocaine was recovered. A small radio microphone was found in the water in a three to five mile line behind the go-fast vessel. The Coast Guard witnesses testified that, based on their experience, the location of the go-fast vessel was consistent with drug trafficking routes between Columbia and the Island of Hispaniola. And a business card with geo-coordinates consistent with drug trafficking from the north coast of Columbia was found in Marquez-Carvajal' s fanny pack on the go-fast vessel.

The evidence is considered "in the light most favorable to the government, with all inferences and credibility choices drawn in the government's favor." *United States v. LeCroy*, 441 F.3d 914, 924 (11th Cir.2006). Only if no reasonable jury could find proof beyond a reasonable doubt will a conviction be vacated. *See United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir.1990) (citation omitted). Applying this standard, the evidence and reasonable inferences drawn from the evidence was sufficient to prove beyond a reasonable doubt that Defendant is guilty of the cocaine conspiracy charged in Count One.

In addition to his argument directed to the sufficiency of the evidence, Defendant contends that the redacted Indictment sent to the jury constituted an improper amendment. Without any supporting argument or explanation, he alleges that "[t]he wording of the redacted Indictment (Doc 208) presented to the jury for its use in deliberations was "flawed and/or an improper amendment." The only redaction in the Indictment was the deletion of the named co-conspirators/co-defendants, who were dismissed on motion of the United States at the commencement of trial. Defense counsel had the opportunity to review the redacted Indictment before it was sent to the jury, and expressed no objection to it. That contention is therefore denied.

Defendant's contention that the verdict is inconsistent is likewise denied. He was convicted on Count One of conspiracy and acquitted of possession as charged in Count Two. There is nothing inherently inconsistent in this verdict. The jury found beyond a

reasonable doubt that Defendant conspired with others to possess and distribute cocaine while on board a vessel subject to the jurisdiction of the United States. As noted, the evidence, considered in the light most favorable to the United States, and drawing all inferences and credibility choices from the evidence in its favor, was sufficient to establish beyond a reasonable doubt that the charged conspiracy existed and that Defendant knowingly and voluntarily joined in it. That he was acquitted on Count Two, the possession charge, is not, considering the facts, inconsistent.

As noted, no cocaine was recovered. And the significance of the negative ION scans of the crew and go-fast vessel was the subject of conflicting testimony. The jury was therefore entitled to conclude that the evidence did not prove possession beyond a reasonable doubt. In any event, any perceived inconsistency between the verdicts on Counts One and Two does not support a judgment of acquittal. *See United States v. Brito*, 721 F.2d 743, 749 (11th Cir. 1983) (inconsistency in a jury's verdict does not require reversal). And "[t]his is true even where the jury convicts a defendant of conspiracy to commit an underlying substantive offense but finds the defendant not guilty of committing the underlying offense." *Id.* Where, as here, a defendant is convicted of conspiracy but acquitted of the substantive offense, the only question is whether the evidence at trial is sufficient to support Defendant's conviction of conspiracy. *Id* at 750. As summarized above, the evidence amply supported Defendant's conviction of conspiracy.

Defendant makes two primary arguments relating to the sufficiency of the evidence. First, he recounts the testimony of several defense witnesses, essentially contending that the testimony supports his theory that he was involved in gasoline smuggling rather than cocaine smuggling. But the jury was entitled to reject that testimony, which it apparently did. And, for purposes of assessing the sufficiency of the evidence, "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Harris*, 20 F.3d 445, 452 (11th Cir.1994).

Finally, Defendant contends, as he did when he made his Rule 29 motion, that the testimony of the jail house informant, Palacios, "was the only testimony adduced to establish the *corpus delicti* of the conspiracy . . . " and that "none of the Government's other witnesses or other evidence established the cocaine conspiracy." (Dkt. 216 at p. 7). He is mistaken. For the same reasons his argument on his Rule 29 motion was denied, this argument is denied.

As Defendant accurately recounts, Palacios testified that Defendant admitted to him that he and the crew members on the go-fast vessel were on a cocaine smuggling venture and that the cocaine on the go-fast vessel was wrapped in a tarp to prevent ION scans from detecting it. A confession of this nature "can be introduced before the *corpus delicti* has been proved,

but there must be proof at some stage of the trial that a crime has in fact been committed." *United States v. Khandjian*, 489 F.2d 133, 136 (5th Cir. 1974). Specifically, "there is no requirement that the *corpus delicti* be proved before the defendant's confession can be admitted into evidence, but that the *corpus delicti*—the fact that a crime was committed—must be proved at trial, and that the defendant's confession alone is not sufficient proof of the corpus delicti." In other words, "a conviction cannot be based on the uncorroborated confession of the accused." Id. at 136–37; *United States v. Valdez*, 880 F.2d 1230, 1233 (11th Cir. 1989).

That does not mean, as Defendant seemingly contends, that the evidence must, independent of the confession, establish the *corpus delicti.* In *Opper v. United States*, 348 U.S. 93, 75 S.Ct. 164-165, the Supreme Court explained:

> We think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, (99 L.Ed. 192.). It is sufficient if the corroboration supports the essential facts admitted sufficiently

> to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

Palacios and Defendant are both Wayuu from the same region in Columbia, and knew each other casually in Columbia. Their encounter at the jail was not planned or orchestrated by Government agents. It was a chance encounter. Defendant approached Palacios as he was eating, and initiated the conversation. The United States introduced substantial independent evidence that tended to establish that the statements attributed to Defendant by Palacios were trustworthy. Specifically, the evidence corroborated the essential facts Defendant admitted to in his conversation with Palacios, sufficiently for the jury to have inferred them to be truthful.

As noted, based on their experience, several Coast Guard witnesses testified that the items they saw jettisoned from the go-fast vessel appeared to be cocaine bales. They had seen similar bales jettisoned from go-fast boats in prior interdictions which turned out to be cocaine. And the cocaine bales were wrapped in a tarp, which was jettisoned with the bales. Officer Velazquez testified that this technique was used by cocaine traffickers in an attempt to avoid a positive ION scan. And, as noted, he testified that gasoline was used by smugglers to mask cocaine and minimize trace evidence of cocaine. The location of the go-fast vessel and the

geo-coordinates on the business card found in Marquez-Carvajal's fanny pack were consistent with drug trafficking from the north coast of Columbia.

The jury was therefore free to consider Defendant's admissions he made to Palacios in connection with all the other evidence in the case and to decide whether his guilt had been established beyond a reasonable doubt. *Opper*, 348 U.S. at 94. The jury found that it was, and that

finding is supported by substantial evidence. *Id.*

For these reasons, Defendant's Amended Motion for Judgment of Acquittal (Dkt. 216) is DENIED.

DONE AND ORDERED this 23rd day of January, 2018.

/s/ J Whittemore
JAMES D. WHITTEMORE
United States District Judge

Copy to: Counsel of record

App. 19

APPEAL NO. 18-11616-DD
DISTRICT COURT NO. 8:11-CR-00222-JDW-JSS-2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LENIN LUGO
Defendant-Appellant,

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF FLORIDA, TAMPA DIVISION

APPELLANT'S INITIAL BRIEF
CRIMINAL CASE

(Filed Oct. 2, 2018)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a list of persons that have an interest in the outcome of this case:

1. Baeza, Daniel M., Assistant United States Attorney;
2. Lopez, Maria Chapa, Unites States Attorney;
3. Lugo, Lenin, Defendant-appellant;
4. Marzullo, Ronald J., Esq.;
5. Muldrow, W. Stephen, former Acting United States Attorney;
6. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;
7. Rhodes, Yvette, Assistant United States Attorney;
8. Ruddy, Joseph K., Assistant United States Attorney;
9. Sneed, Hon. Julie S., Unites States Magistrate Judge;
10. Stanley, Stephen J., Esq.;
11. Whittemore, Hon. James D., Unites States District Judge; and
12. Wilson, Hon. Thomas G., Unites States Magistrate Judge.

No publicly traded company or corporation has an interest in the outcome of this appeal.

[i] STATEMENT OF JURISDICTION

This is a direct criminal appeal of a final judgment in a criminal case and the sentence imposed by the United States District Court for the Middle District of Florida following a jury trial. Accordingly, this Court's jurisdiction over the instant appeal emanates from 28 U.S.C. § 1291.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant submits that oral argument would be helpful, and the decisional process would be significantly aided by its allowance. This request is made pursuant to Federal Rules of Appellate Procedure 34(a)(2)(C) and 11th Circuit Rule 28-1(c).

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[vii] **STATEMENT OF THE ISSUES**

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II. WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE STATEMENTS MADE BY LUGO ABSENT A SUFFICIENT DETERMINATION OF CORPUS DELICTI.

III. WHETHER THE DISTRICT COURT ERRED IN DENYING LUGO'S MOTION TO SUPPRESS AND EXCLUDE THE TESTIMONY OF THE GOVERNMENT'S COOPERATING WITNESS REGARDING STATEMENTS MADE BY LUGO

IV. THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE SPECULATIVE STATEMENTS REGARDING JETTISONING BALES OF COCAINE

[1] **STATEMENT OF THE CASE**

On May 9, 2017, Appellant, Lenin Lugo ("Lugo"), along with Co-Defendants Ernesto Nicolas Marquez Carvajal ("Carvajal"), and Adelberto Aguilar ("Aguilar"), were indicted together in a two-count indictment. (Doc.1). Count One charged conspiracy with intent to distribute five kilograms or more of cocaine, while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a), and 70506(a) and (b), and 21 U.S.C. § 960(b)(1)(B)(ii). Id. Count Two alleged that from an unknown date through on or about May 2, 2017, while on board a vessel subject to the jurisdiction of the United States the three above named defendants did knowingly and willingly and intentionally possess with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of 46 U.S.C. §§ 70503(a) and 70506(a), 18 U.S.C. Section 960(b)(1)(B)(ii). Id.

Prior to trial, Lugo filed a motion to dismiss (alleging the bad faith destruction of evidence) or in the alternative in support of a negative inference (Doc.109), which motion the district court denied. (Doc.110). In the motion, the defense contended that the clothing worn by Lugo and the other Defendants at the time of their arrest could have provided the defense with exculpatory evidence, and that it was destroyed by the government in bad faith, absent sufficient justification. (Doc.109).

[2] Lugo also adopted a motion to exclude speculative statements offered by various government witnesses, identifying objects being discarded from a ship, as being bales of cocaine. (Doc.136). In the motion, the defense argued that it was unreasonable to allow officers to guess as to what they believed was inside of the objects discarded from the ship, especially in light of the fact that officers were unable to find any evidence of cocaine on the vessel (or anywhere else). Id. The district court denied the motion at trial. (Doc.149).

In addition, Lugo moved to exclude his own statement absent a finding of corpus delicti, (Doc.144), which was denied by the Court at trial. (Doc.193). Lugo also filed a motion to suppress and exclude statements made by the cooperating witness, Ivan Jose Baron Palacios (Doc.142), which was denied by the court at trial. (Doc.192).

During discussions regarding pre-trial motions, it came to the attention of the parties, that there may be a possible *Bruton* issue. (Doc.243, p.9). By testifying about Lugo's admission, Baron-Palacios was implicating both co-defendants Carvajal, and Aguilar. Id. A decision was made to reserve on the issue until such time that the court was able to evaluate the implications of *Bruton*. (Doc.243-44).

The case proceeded to trial on January 2, 2018. (Doc.175). On January 3, 2018, after the jury was first sworn, the government dismissed the indictment against Defendants, Carvajal and Aguilar, thereby negating any possible *Bruton* [3] issue. (Doc.178). The names

Ernesto Nicolas Marquez Carvajal and *Adelberto Aguilar* were removed from the Indictment that was eventually presented to the jury, when it retired to deliberate the case. (Doc.208). Following the presentation of the Government's case-in-chief, Lugo moved to strike the testimony of the cooperating witness, and for a judgment of acquittal as to both Counts One and Two. (Doc.196; Doc.197). As to the judgment of acquittal, Lugo argued that the government failed to prove beyond a reasonable doubt that the Defendant Lugo was guilty of the offenses alleged. Id. The court denied the motions. Id. On January 11, 2018, at the conclusion of the trial, Lugo was found guilty as to Count One, the conspiracy charge. (Doc.209). The jury determined that Lugo was not guilty of Count Two, the substantive charge of possession with intent to distribute. Id. All prior motions and objections were renewed during and after each phase of the proceeding.

On January 18, 2018, Lugo filed a post-verdict motion for judgment of acquittal, which was denied. (Doc.213; Doc.218). On April 12, 2018, Mr. Lugo was sentenced to 188 months in prison, to be followed by 5 years of supervised release. (Doc.231). Lugo filed a timely notice of appeal on April 19, 2018, (Doc.233), and is currently in the custody of the Bureau of Prisons serving his sentence.

[4] **STATEMENT OF THE FACTS**

On May 1, 2017, a United States Coast Guard government aircraft observed Lugo, Aguilar, and Carvajal

on board a thirty (30) foot "go-fast" panga style vessel, about 70 miles off the coast of Barranquilla, Colombia. (Doc.245-53, 70-84). The State presented three witnesses (United States Coast Guard Officers) that were on board the aircraft—including Officer Tison James Velez, Officer Bob Baquero, and Officer Aaron Such. (Doc.245-36, 168, 199). Lugo was observed at the helm of the go-fast vessel, who pointed to the aircraft as it circled above. (Doc.245-74, 178). Several barrels were observed, and—what appeared to be—cannisters and bales on the go-fast vessel. (Doc.245-192-93, 207-211). The Coast Guard aircraft notified assets below, and the Coast Guard Cutter "Diligence" approached on the high seas to investigate. (Doc.245-84, 105, 111, 210, 212).

When the three crew members spotted the Coast Guard Cutter Diligence in the distance, they began combining fuel in the barrels, and the go-fast vessel then accelerated rapidly and "took off." (Doc.245-55, 75). A chase ensued, during which Coast Guard Officers in the aircraft above claimed they observed the crew members jettisoning fuel barrels and as many as fifteen rectangular objects as the go-fast vessel fled from the Cutter Diligence. (Doc.245-76, 79, 106, 159). Video evidence provided by the Government which was filmed from the Maritime Patrol Aircraft (MPA) shows the defendants throwing about 12 to 15 canisters and [5] (arguably) other items overboard while travelling at a relatively high rate of speed. (Doc.245-88-12-15, Government Exhibit 2). The Coast Guard Aircraft marked the geo-coordinates of the debris field. (Doc.

245-40). Some of the officers testified that based on their training and experience, and the size and shape of the items, that the rectangular objects appeared to be bales of cocaine. (Doc. 245-55, 179, 229).

U.S. Coast Guard Officers Jussen Gonzalez, and Ryan Christopher Stone, were on the Coast Guard ship that gave chase and eventually boarded the "go fast" vessel. In addition to the barrels and bales, a tarp and a VHF whip antenna were seen being discarded from the "go-fast" vessel. (Doc. 246-19, 49-51, 84, 193). After chasing the go-fast vessel for about four miles, the Coast Guard Officers were finally able to stop and board the boat. (Doc.246-19, 41, 65, 126, 191-94).

Once on board, the crew was identified, and it was noted that the go-fast vessel was still carrying a relatively large quantity of gasoline, contained in four (4) drums of fifty-five gallons each, and several smaller 15-gallon canisters. (Doc.246-18, 34, 42-47). The several plastic 15-galon canisters appeared similar to the canisters which were thrown overboard in the video. (Doc. 246-208). Additionally, it was noted that the deck of the boat was soaked in gasoline, as was the clothing worn by the crew. (Doc.246-41, 42). There was testimony that gasoline was commonly used by traffickers to mask cocaine and minimize trace evidence. (Doc.245-85, 86; Doc. 246-38, 39, 40). Also, that tarps were often used [6] to conceal such ships (engaged in cocaine trafficking) from being detected by law enforcement. (Doc.245-80, 101-02, 142-45, 162-63).

An exhaustive search of the go-fast vessel and its occupants ensued. (Doc.246-124, 129, 198-200). Officer Ryan Stone asked—and was granted permission by his superiors—to drill five minimally invasive holes in different locations of the boat, as a means of searching for hidden compartments. (Doc.246-124, 125-129, 213, 214). The comprehensive detailed search did not yield any cocaine or other contraband. (Doc. 246-71, 213-214).

While the boarding crew occupied and investigated the "go-fast" vessel, the debris field was searched by the Coast Guard Aircraft from above (Doc.245-56, 57, 188, 213, 216), as well as a small boat launched by the Coast Guard Cutter Diligence—known as Diligence 2. (Doc. 246-107, 108, 143, 169). U.S. Coast Guard Officers Richard Dallas Pridgen and Officer Robert Vanlandingham were on board the Diligence 2. (Doc.246-106, 107-109, 170). There was hope that the Coast Guard might recover some of the objects that were jettisoned from the go-fast vessel as it fled from the Cutter Diligence. However, an exhaustive search of the debris field by the additional Coast Guard vessel did not result in the recovery of any bales of cocaine or contraband. (Doc.246-143, 176). Other than a few small items of trash, only a small radio microphone was recovered in the water in a three to five-mile line behind the go-fast vessel. (Doc.246-219).

[7] Officer Pridgen later boarded the "go fast" vessel and swiped for IonScans. He testified that he conducted seven (7) IonScan tests of the bodies of the suspects and the vessel itself, which yield negative

results. (Doc.246-112, 113-119). He noted that he followed all protocols, was meticulous in obtaining the samples, and took measures to prevent cross contamination. Id. All the IonScan tests were found to be negative for cocaine or other illicit drugs. Id.

At around 5:00 A.M., when the search was completed, Lugo, Aguilar, and Carvajal were asked to leave their vessel and board the Coast Guard Cutter Diligence. Prior to leaving the area, the Coast Guard ordered the go-fast vessel be scuttled, along with all its appurtenances—including a large amount of fuel barrels forward of the console. (Doc.246-217, 218). Photographs were taken of the vessel and its contents before scuttling. Id.

After being arrested, Lugo was interviewed by Homeland Security Special Agent Maria Guzman on May 10, 2017. (Doc.247-49, 50-67, 69-95). There are no audio or video recordings of the interview. Id. The law enforcement agent prepared a report of the interview of Lugo. Id. In summation, Lugo denied that the vessel upon which he was apprehended was transporting cocaine. Id. Lugo asserted that he was only transporting gasoline, an illegal activity punishable by imprisonment in his home country. Id. Special agent Guzman testified on behalf of the Government, that Lugo told her that he was to take a boat that contained barrels of [8] fuel from Riohacha and to wait until the next day to meet again at a different part of the river (Riohacha). Id. Lugo denied that there were any drugs aboard the boat. Id.

The clothing worn by Lugo and the other two defendants was placed with other evidence taken from the interdiction and processed by FBI Special Agent Julio Mena. (Doc.247-20). Agent Mena testified that the clothing was contaminated with seawater and gasoline, and therefore had to be discarded and destroyed. (Doc.247-22). On cross examination, Agent Mena admitted that he did not know that there was no drug evidence found in this case and that clothing can sometimes contains evidence. (Doc.247, p.37). Agent Mena also testified that a business card was found in the wallet of Carvajal with geo-coordinates that pointed to the coast of Haiti. (Doc.247, p.26-9).

Ivan Jose Baron-Palacios, was essentially a jailhouse informant that testified that Lugo made certain incriminating statements to him. (Doc.247, p.190). Baron-Palacios and Lugo were both Wayuu Indians from the same region in Columbia. (Doc.247, p.186). Baron-Palacios also had a federal cocaine trafficking case pending (though it was unrelated) and was in custody in the Pinellas County jail when he ran into Lugo. (Doc.247, p.157-58, 183). Initially, Baron-Palacios spoke to investigators and was asked to cooperate, but he claimed he did not know Lugo when he was shown a photograph and asked questions. (Doc.247, p.185-86).

[9] Baron-Palacios later claimed that this was done because he feared violence that might result if he gave authorities information about Lugo. Id. As to his separate drug trafficking case, Baron-Palacios accepted a plea agreement with the government for 120

months in prison. (Doc.247, p.192). This agreement contained a cooperation provision. Id.

At the end of September, while being held in the Citrus County Florida Jail, Baron-Palacios reached out to investigators, and changed his story. (Doc.247, p.192-93). He admitted he lied the first time, around. Id. He claimed that he knew Lugo, since they were both Wayuu from the same region. (Doc.247, p.186). According to Baron-Palacios, Lugo approached him in the jail cafeteria while Baron-Palacios was eating soup and struck up a conversation with him. (Doc.247, p.190-92). Lugo confided in him (Baron-Palacios) about his case, stating that he and the crew were on a cocaine smuggling venture to the Dominican Republic, that the cocaine was wrapped within a tarp, that he and the crew threw the cocaine bales, tarp, and electronics overboard, and that the reason for the negative IonScan was due to the cocaine bales being wrapped within the tarp. (Doc.247, p.190-92).

The Defenses' case started off with expert chemist witness, Janine Arvizu. (Doc.248, p.58). Arvizu testified that based on the Government's theory of the quantity of cocaine allegedly on the Defendants' boat, evidence of cocaine would be everywhere on the boat and on the Defendants themselves. (Doc.248, p.75-78). [10] Arvizu was adamant that if there was any trace of cocaine, part of a nanogram, on the go-fast vessel, the IonScan would have been positive for cocaine. Id.

Arvizu further testified that gasoline was not a masking agent, the way it was described by the State's

witnesses, and that neither gasoline, seawater, or wind—or any combination of the three—would inhibit an IonScan from detecting cocaine. Id. The implication being that the negative IonScan samples weren't a result of masking agents, rather an accurate reflection that cocaine had never been present on the vessel to begin with.

The defense called the custodian of the Pinellas County Jail Records, Mark Cogneti, who testified that jail records indicated that Baron-Palacios and Lugo were not housed in the same unit during the month of May, making it impossible for a conversation to take place, the way it was described by Baron-Palacios. (Doc.248, p.97-108). What's more, Cogneti testified that there was no separate cafeteria for inmates to eat meals, also contradicting the claims made by Baron-Palacios—that he was approached by Lugo while eating soup in the cafeteria. (Doc.248, p.107-08).

The defense put on Special Agent Thomas Oats who testified that he first interviewed Baron-Palacios on June 22, of 2017. (Doc.248, p.175). Present during the interview was himself (Oats), DEA Agent Carlos Galloza, Baron-Palacios, and Baron-Palacios' counsel—Federal Assistant Public Defender Adam Nate. [11] (Doc.248, p.175-76). Both Agent Oats and Agent Galloza spoke fluent Spanish. (Doc.248, p.176). There was no interpreter. Id. Agent Oats testified that when he spoke to Baron-Palacios on June 22, 2017, Baron-Palacios had already pled guilty to the charges in his case on June 6, 2017. (Doc.248, p.178).

The first meeting is when Baron-Palacios claimed he did not know Lugo, however, they met again for a second interview at Baron-Palacios' request on September 26, 2017. (Doc.248, p.179). Baron-Palacios was sentenced on September 13, 2017. (Doc.248, p.188). The second interview included the same parties as the first, and again there was no interpreter. (Doc.248, p.180).

The second interview is when Baron-Palacios told the agents about the statements Lugo made to him regarding Lugo's pending case. Id. Agent Oats testified that he initially understood that the meeting between Baron-Palacios and Lugo occurred in May. (Doc.248, p.182). However, the Friday and Saturday after the start of the trial in this matter, Agent Oats met with Baron-Palacios, and Agent Oats (after being told by Baron-Palacios) realized that he had mistakenly understood what Baron-Palacios had told him during the second interview, and in fact, Barron-Palacio had met with Lugo and heard the statement at a later date after May.(Doc 248, p.181-83).

In summation, the government claimed the confession had occurred in the middle of May in the Pinellas County Jail, then on the even of trial, after the [12] defense had prepared to rebut the claim, the date of the confession was changed to a later time. (Doc.248, p.183).

After the testimony of Agent Oats, the defense put on four video depositions of witnesses who were located in Columbia, including Luis Lubo Larrada,

Juliana Gonzalez Vergara, Jose Bueno Lopez, and Estercilia Simanca Pushaina.

Witness Luis Lubo Larrada was the brother of Lugo, a Wayuu Indian from La Rancheria in the community of Piru Atamana. (Doc. 214-1, p. 4-6). Larrada testified that he had smuggled gasoline with his brother (Lugo) in the past, and that it was a common practice in their hometown. (Doc. 214-1 p.10). He testified that barrels and small containers are commonly used, and that gasoline is smuggled by land and by sea. (Doc. 214, p.11).

Juliana Gonzalez Vergara, the wife of Lugo, testified that he (Lugo) did traffic in gasoline frequently to provide income for the family. (Doc. 212-2, p.5-6). She also testified that she had seen Lugo pouring gasoline into containers like the ones on the go-fast vessel. (Doc.214-2, p.11).

Jose Bueno Lopez, a childhood friend of Lugo, testified that he saw Lugo last on La Cachaca Beach, where he assisted Lugo and two others in loading gasoline onto the go-fast vessel. (Doc. 229-3, p.6-8). He testified that they loaded approximately twenty-five small tanks, and six large ones. (Doc. 229-3, p.8). According to Mr. Bueno Lopez, Lugo was smuggling gasoline on the boat, and [13] doing so on the sea rather than land, to avoid the numerous checkpoints. (Doc.229-3, p.9). He looked at photos of the go-fast vessel, and identified it, along with the barrels onboard, as the ones filled with gasoline for transport. (Doc.229-3, p.20).

Bueno Lopez also watched the video of the chase and interdiction, and identified the objects being jettisoned as fuel tanks. (Doc.229-3, p.18-19). He also noted that the three gentlemen on board in the video, were the same people that were present, when the vessel was loaded up with gasoline at La Cachaca Beach. Id. According to Bueno Lopez, the go-fast vessel was loaded up with gasoline on May 1, 2017 at La Cachaca beach, (Lugo was present) and the plan was for Bueno Lopez to travel to Santa Marta and be present and assist with unloading the boat the following day at 11:00 P.M. (Doc. 229-3, p.6-16). He did in fact travel to Santa Marta and waited at the agreed upon location, but the go-fast vessel with Lugo never came. (Doc. 229-3, p.12).

Estercilia Simanca Pushaina was a native Wayuu from La Guajira Columbia, and a licensed attorney in Columbia. She had expertise in local laws and regulations as they relate to the Wayuu people and the Wayuu culture. (Doc.214-3, p.5-7). Pushaina worked with the Government of the Province of La Guajira, handling the matter of contraband of gasoline and how it affected the legal gasoline market. (Doc.214-3, p.11). She testified as to her knowledge on the prevalence of gasoline smuggling as an everyday matter among the Wayuu people, that [14] smuggling gasoline is a violation of Columbian criminal law punishable by imprisonment—if over 20 gallons. (Doc. 214-3, p.24, 29).

Pushaina provided that gasoline can be purchased from nearby Venezuela extremely cheap, and then smuggled into Columbia to be resold at a much higher

price for profit, and this is the leading source of income among the Wayuu people. (Doc. 214-3, p.32). Smuggled Gasoline has a profit percentage of 100 percent due to the fact that gasoline is subsidized in Venezuela. (Doc.214-3, p.33). Finally, she testified that based on what she saw in the video, that the items being jettisoned from the go-fast vessel were containers used for transporting gasoline. (Doc. 214-3, p.34).

On January 11, 2018, at the conclusion of the trial, Lugo was found guilty as to Count One, the conspiracy charge. (Doc. 209). The jury determined that Lugo was not guilty of Count Two, the substantive charge of possession with intent to distribute. Id. All prior motions and objections were renewed during and after each phase of the proceeding. On April 12, 2018, Mr. Lugo was sentenced to 188 months in prison, to be followed by 5 years of supervised release.

[15] **SUMMARY OF THE ARGUMENT**

The evidence presented at trial was insufficient to find Mr. Lugo guilty of conspiracy to possess cocaine with intent to distribute. There was no competent substantial evidence that an agreement existed, or that defendant knew of such an agreement. Further, the identity of the controlled substance was never established beyond a reasonable doubt.

The District Court erred in allowing the Government to introduce the testimony of Ivan Baron-Palacios, as to the statement made by Mr. Lugo absent a sufficient determination of corpus delicti. First, the

Government failed to introduce sufficient evidence to establish that the criminal conduct at the core of the offense occurred. Second, the Government failed to introduce independent evidence tending to establish the trustworthiness of the admission(s).

The District Court erred in denying Mr. Lugo's motion to suppress and exclude the testimony of Ivan Baron-Palacios as to statements made by Lugo. Mr. Baron-Palacios was acting as a government agent, and he deliberately elicited incriminating statements from Mr. Lugo while the two were incarnated together.

The District Court erred in allowing the Government to introduce speculative statements regarding jettisoning bales of cocaine, because the opinion testimony was an improper infringement on the province of the jury, regarding an ultimate issue in the case. Further, it was improper expert testimony because the [16] Government had not given prior notice as required by Federal Rule of Criminal Procedure 16(a)(1)(E). Finally, the statements presented were mere opinion testimony not supported by admissible evidence, which were highly susceptible to bias, unfair prejudice, and embellishment.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR CONSPIRACY TO POSSESS COCAINE—WITH INTENT TO DISTRIBUTE—BECAUSE THE GOVERNMENT FAILED TO PRODUCE EVIDENCE THAT MR LUGO ENTERED INTO AN UNLAWFUL AGREEMENT, AND THAT HE VOLUNTARILY BECAME PART OF THE CONSPIRACY

Standard of Review:

This Court reviews de novo, the denial of a motion for judgment of acquittal on sufficiency of the evidence grounds. United States v. Friske, 640 F.3d 1288, 1290 (11th Cir. 2011). In reviewing a sufficiency claim, the ultimate question is whether a reasonable trier of fact could have found guilt beyond a reasonable doubt. United States v. Gari, 572 F.3d 1352 (11th Cir. 2009).

Argument:

To obtain a conviction on the drug-conspiracy charge, the government was required to prove that: (1) there was an agreement between two or more people to commit the crime of possession of cocaine with the intent to distribute it; and (2) Lugo joined in the agreement, knowing that it had an unlawful purpose and [17] intending to help accomplish it. United States v. Tran, 568 F.3d 1156, 1164 (9th Cir. 2009). To convict a

defendant for conspiracy to possess with intent to distribute a controlled substance or possession with intent to distribute a controlled substance, "**the identity of the drug must be established beyond a reasonable doubt.**" United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir. 1984).

Courts have allowed for identification of controlled substances using "lay experience based on familiarity through prior use, training, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use, such as testing, weighing, cutting and peculiar ingestion." United States v. Harrell, 737 F.2d 971 (11th Cir. 1984). Additionally, this court has recognized that "the uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue." United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir.1984). Unique to this case, is that the lay opinions don't go to familiarity with the appearance of the drug, but to the packaging it was supposedly contained in, while it was being jettisoned.

In United States v. Williams, 865 F.3d 1328 (11th Cir. 2017) a similar fact pattern and issue was addressed. In Williams, the Coast Guard came across a suspicious vessel off the coast of Columbia and Panama, an area known for drug trafficking. Using a forward-looking infrared system (FLIR) the Coast Guard could [18] see 5 individuals aboard the vessel, acting and moving about nervously. The suspicious vessel increased speed

and began zig zagging in a dangerous manner, given the waves and swells of the ocean that night.

The Coast Guard witnessed the individuals place 15 "bale-like" objects into the fishing net and threw it into the sea, noting that it took all four men to lift the net. The vessel gave chase but was eventually boarded. On board, the officers found no fishing equipment (despite being a fishing boat), two empty fuel drums along with four empty 40-gallon gas containers, and the strong odor of gasoline—despite the boat using diesel fuel. It was noted that the fish hold had more than an inch of gasoline covering the floor.

No drugs were found on board, and none of the items jettisoned were recovered. However, of the 34 IonScan samples taken, 13 tested positive for cocaine, including 4 of the occupants' bodies, the vessel's fish hold, the marine toilet, sink, seat cushions, and a knife.

The court noted that there was compelling evidence that contraband was jettisoned as the Coast Guard approached. **The issue the court grappled with was the identify of the contraband as cocaine**—which the court admitted, was "the difficult issue in this case." Williams at 1345. The court stated as follows:

> Four Coast Guard officers testified that they had made prior drug interdictions in that same area off the coast of Panama and that **only cocaine** was recovered on those occasions. Three Coast Guard [19] witnesses also testified to the size and shape of the packages

> they saw (through the FLIR) being jettisoned by the defendants, and they compared those packages to cocaine bales they had personally recovered and handled during these past interdictions.
>
> Tirado testified that the **IonScan samples from the Rasputin and the defendants resulted in 13 hits positive for cocaine** and no hits positive for any other drugs—even though the IonScan machine could detect up to 40 substances. These included positive hits on the person of four of the five defendants. Tirado also explained that certain swipe results indicated high concentrations of cocaine.

Id. at 1345.

In Williams, the court ruled that "sufficient evidence supported the jury's determination that the jettisoned packages contained cocaine." Id. at 1346. In addressing the instant case, the major difference—and it's a big difference—is that there were no positive IonScan samples. The government vigorously tested the ship, and the hands of the crew, which all tested negative for the presence of cocaine. Rather than view the negative IonScan tests as a lack of evidence, they should perhaps be viewed as affirmative evidence that cocaine was not present on the vessel—much like a negative drug test creates a presumption that the person tested was **not** using drugs.

Defense expert witness Arvizu testified that under the government's theory as to the amount of cocaine alleged to be on the boat, there would have been

detectable cocaine all over the vessel and the occupants themselves. (Doc.248, p.75-78). The government went through great lengths to do damage control, [20] eliciting testimony (from nearly every witness) that the gasoline on board the ship—along with the seawater and winds—could have removed any trace residue of cocaine, and/or masked the IonScan test results. Yet, Arvizu also testified that neither gasoline, seawater, or wind, would mask or hinder cocaine from being detected by IonScan. Id. It's also interesting to note that in Williams, several ion samples found traces of cocaine despite the fact that the boat was soaked in gasoline and exposed to the elements. Williams also differs from the instant case because in Williams the government witnesses testified that **only** cocaine had ever been recovered in their prior missions in the area. That isn't present in this case, because Coast Guard Officers Jussen Gonzalez (Doc.246, p.11), and Ryan Stone (Doc.246, p.184), testified that they had handled marijuana interdictions in the past.

In reaching its conclusion, Williams cited case law demonstrating that lay opinion and/or circumstantial evidence can be sufficient to identify controlled substances. Yet, there are significant differences in the level of evidence these cases provided that established the identify of the controlled substance.

In United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992), a testifying witness actually observed the cocaine itself. "Brooks testified that he entered the premises to check the air conditioning because occupants were complaining of the heat. As he entered he saw on

a table, large amounts of money—fives, tens, [21] twenties, fifties, hundreds—being counted into stacks of thousands. Persons present sought to cover the money. He also saw, on a counter between kitchen and living room, approximately five loaves of white material in plastic bags that "seemed to appear cocaine." Id. at 1086. Further, a subsequent raid of the dwelling yielded glassine bags containing cocaine residue. Id. at 1088.

In United States v. Baggett, 954 F.2d 674, 677 (11th Cir. 1992), cocaine was recovered and chemically tested, the only issue being that a chemical analysis report was entered into evidence without the testimony of a forensic expert—who was unavailable at trial. Id. at 676.

In the cases cited in Williams, and in nearly all other cases using circumstantial or lay opinion evidence to establish the identity of the controlled substance, actual physical evidence of the drug itself was present (positive test result, residue, paraphernalia with residue, etc.) or at a very minimum, the substance was directly observed by a witness so that the witness could testify as to the appearance, size, color, texture, and other identifying characteristics—so as to lay a proper foundation to support an opinion as to what the controlled substance was. Neither of those factors are present in the case before us.

There was never any evidence of cocaine in this case. No objects, no bales, no paraphernalia, no trace evidence, no residue. Further, IonScan testing of the

vessel, and the hands of the defendants, found no traces of cocaine. (Doc.246, [22] p.112-19). What's more, the defense's expert testified that neither gasoline, seawater, or wind could mask cocaine from IonScan detection. (Doc.248, p.75-78).

In summation, there was absolutely no physical evidence that cocaine was ever on board the vessel. Lugo's conviction for conspiracy to possess cocaine with intent to distribute, should be reversed, because the government's evidence was insufficient to establish that cocaine was ever present in this case—or jettisoned from the vessel. Even had the presence of cocaine been determined, the government never presented any competent evidence that an unlawful agreement existed, and that Mr. Lugo voluntarily took part in it. For these reasons, the evidence was insufficient to establish that Mr. Lugo was guilty beyond a reasonable doubt of Conspiracy to possess cocaine with intent to distribute.

II. THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE STATEMENTS MADE BY LUGO ABSENT A SUFFICIENT DETERMINATION OF CORPUS DELICTI

Standard of Review:

We review de novo a district court's denial of a motion for judgment of acquittal on sufficiency of evidence grounds. United States v. Browne, 505 F.3d 1229, 1253

(11th Cir. 2007). In determining whether sufficient evidence supports a conviction, we "must view the evidence in the light most favorable to the government and decide whether a reasonable fact finder could have reached a [23] conclusion of guilt beyond a reasonable doubt." United States v. Herrera, 931 F.2d 761, 762 (11th Cir. 1991).

Argument:

At one time, several courts held that evidence independent of an extrajudicial confession must establish the corpus delicti. United States v. Fenwick, 177 F.2d 488, 489-90 (7th Cir.1949). However, in Opper v. United States, 348 U.S. 84 (1954), the Supreme Court rejected the requirement that the corpus delicti be established with independent proof. Rather, the evidence merely must tend to establish the trustworthiness of the confession. Id. A criminal conviction cannot be sustained when the offense is proven solely by an uncorroborated extrajudicial confession. Smith v. United States, 348 U.S. 147, 152 (1954). The corroborating evidence is adequate if it "supports the essential facts admitted sufficiently to justify a jury inference of the truth" of the confession. Opper, 348 U.S. at 93.

Although the government may rely on a defendant's confession to meet its burden of proof, it has nevertheless been long established that, in order to serve as the basis for conviction, the government must also adduce some independent corroborating evidence." United States v. Corona-Garcia, 210 F.3d 973, 978 (9th

Cir 2000). The doctrine's purpose is to protect against the risk of convictions based on false confessions alone. United States v. Lopez-Alvarez, 970 F.2d 583, 592 (9th Cir. 1992).

[24] Lopez-Alverez articulates a two-part test, intended to evaluate if the government has established or otherwise satisfied the corpus delicti doctrine. First, the government "must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable." Id.

As to the first part of the test, the core of the offense in the instant case is conspiracy to possess with intent to distribute cocaine. This was never established because there was never proof that cocaine was ever present—an issue covered in detail in the previous section. Multiple IonScans tested negative for cocaine, and a search of the crew, the debris field, and the ship yielded nothing. There was not a shred of evidence showing that Lugo agreed to be part of a conspiracy, or that any cocaine was ever on board that ship.

The only proof the government ever offered regarding the presence of cocaine, was circumstantial evidence based on the go-fast vessel being far off the shore, in an area known for drug trafficking, and the appearance of items thrown off the boat (jettisoned) as the boat sped away from the coast guard boarding

vessel. The Defendant, from the time he gave a statement at his arrest through his trail, always maintained that he was smuggling gasoline from Venezuela for resale back in Columbia, and the defense put on witnesses who assisted in loading his [25] boat with fuel, cannisters, and other containers before he left, and verified that gasoline smuggling was a prevalent enterprise in the Wayuu territories. Further the defense's expert chemist witness testified that in her opinion, an amount of cocaine on the go-fast vessel as large as what the Government alleged, would likely leave cocaine remnants detectible with IonScans. (Doc.248, p.75-78).

As to the second part, there was no independent evidence that established the admission was trustworthy. On the contrary, the evidence presented showed that the admission was untrustworthy. Baron-Palacios first told investigators that he did not know Lugo. (Doc.248, p.179). A few months later, after he was sentenced on his drug trafficking case, he reached out to investigators, and changed his story admitting that he lied about not knowing Lugo the first time around. Id. He then proceeded to tell them about an encounter that occurred in May (later it was claimed it happened months later) while both Baron-Palacios and Lugo were in custody together at the Pinellas County Jail. (Doc.247, p.190-92). He claimed that Lugo approached him while he was eating soup in the cafeteria and essentially broached the topic of his case, then proceeded to tell him (Barron-Palacios) that he (Lugo) and the crew were on a cocaine smuggling venture to the

Dominican Republic, that the cocaine was wrapped within a tarp, that he and the crew jettisoned the cocaine bales, tarp, and electronics overboard, and that the reason for [26] the negative IonScan was due to the cocaine bales being wrapped within the tarp. Id.

After the start of trial (conveniently), Baron-Palacios contacted authorities to let them know that the two agents who interviewed him (both native Spanish speakers) had somehow misinterpreted him, and that the admission from Lugo actually took place in September, not May—as he'd originally claimed. (Doc.248, p.182). Ostensibly Barron-Palacios did this because he knew that Lugo and his trial attorney had discredited the conversation he initially claimed occurred in May, by verifying with the jail records department, that the two men were not in the same dormitory and could not have spoken to each other. (Doc 248, p. 101-103).

In denying the Defendant's Motion for Judgement of Acquittal on this issue, the trial court found the statements to be reliable because the statement was corroborated by the evidence, mainly that bales had been jettisoned along with electronics, and that the suspected cocaine was wrapped in a tarp to avoid IonScan detection. (Doc.196-97). At first blush, this may seem to strongly corroborate the statement. The problem is that these are all common occurrences regarding cocaine smuggling—or any kind of smuggling for that matter. Baron-Palacios testified that he had been smuggling cocaine at sea for many years. (Doc.247, p.163). Further, these are also occurrences that logically would apply to smuggling gasoline—particularly

from Venezuela to Columbia which is punishable by [27] imprisonment. In summation, none of the statement(s) allegedly made by Lugo, had unique elements that could be corroborated with the independent evidence. Just about every ship smuggling contraband, when stopped by the coast guard, engages in the act of jettisoning objects overboard, including the use of a tarp.

In summation, the District Court failed to satisfy either of the two requirements of corpus delicti, that the core of the offense was established, and that the admission was trustworthy. Therefore, the District Court erred in admitting the statement.

III. THE DISTRICT COURT ERRED IN DENYING LUGO'S MOTION TO SUPPRESS AND EXCLUDE TESTIMONY OF THE GOVERNMENT'S COOPERATING WITNESS REGARDING STATEMENTS MADE BY LUGO

Standard of Review:

In general, we review the district court's evidentiary rulings for abuse of discretion. United States v. Perez-Oliveros, 479 F.3d 779, 783 (11th Cir. 2007). A district court abuses its discretion where its "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." United States v. Baker, 432 F.3d 1189, 1202 (11th Cir. 2005). Evidentiary rulings are subject to harmless-error analysis, meaning we will not reverse the district

court unless there is a reasonable likelihood that the error [28] affected the defendant's substantial rights. United States v. Hawkins, 905 F.2d 1489, 1493 (11th Cir. 1990).

Argument:

Baron-Palacios was acting as an agent on behalf of the government—by virtue of a signed plea agreement requiring cooperation—when he approached Appellant Lugo, and purposefully elicited incriminating information about Lugo's case.

The Sixth Amendment provides for a defendant's right to counsel. U. S. Const., Amend. VI. The right to counsel includes the right to counsel when the government's jailhouse informant deliberately elicits incriminating information from a defendant in the absence of the defendant's counsel. Massiah v. United States, 377 U.S. 201 at 201 (1964). The Eleventh Circuit in Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991), set forth that to establish a claim that the government's agent deliberately elicited incriminating information, the defendant must show (1) that the fellow inmate was a government agent; (2) that the inmate deliberately elicited incriminating statements from him.

The agreement Baron-Palacios signed and accepted (including government cooperation) was entered into prior to the time that Baron-Palacios intentionally sought out Mr. Lugo and elicited incriminating statements from him. (Doc.247, p.192). Baron-Palacios first denied knowing Lugo, when asked by investigators.

[29] (Doc.247, p.185-86). At the time, Baron-Palacios was already working with the government regarding his case, and others. (Doc.247, p.192). After first denying knowing Lugo, and after being sentenced on his current case (with a clause in his plea agreement agreeing to cooperate), Baron-Palacios then sought out Lugo while the two were in custody at the Pinellas County Jail. Baron-Palacios sought Lugo out to deliberately elicit incriminating information to further help him in reducing or mitigating his sentence. The District Court therefore erred in denying Lugo's Motion to Suppress and Exclude the statements elicited by Baron-Palacios.

IV. THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE SPECULATIVE STATEMENTS REGARDING JETTISONING BALES OF COCAINE

Standard of Review:

This Court reviews a district court's evidentiary rulings for a clear abuse of discretion. United States v. Tinoco, 304 F.3d 1088, 1119 (11th Cir. 2002). We will reverse a district court's evidentiary rulings only if the resulting error affected the defendant's substantial rights. United States v. Hands, 184 F.3d 1322, 1329 (11th Cir. 1999).

Argument:

The testimony introduced by several Government witnesses (Officers of the U.S. Coast Guard) that the items jettisoned from the go-fast vessel, were—in their opinion—bales of cocaine, was an improper infringement on the province of the [30] jury because the issue of whether cocaine was on board the vessel (or possessed by the crew) was an ultimate issue in this case. In addition, it was improper expert testimony because the Government had not given prior notice as required by Federal Rule of Criminal Procedure 16(a)(1)(E). Finally, the statements presented were mere opinion testimony not supported by admissible evidence, which were highly susceptible to bias, unfair prejudice, and embellishment.

A. Lay Opinion on an Ultimate Issue:

Rule 701 provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of 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. In addition, Rule 704(a) states that the fact that lay opinion testimony may bear on one of

the ultimate issues in the case is not, of itself, a ground for exclusion:

> Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed.R.Evid. 704(a). These Rules do not, in principle, bar a lay witness from testifying as to whether a defendant in a criminal prosecution had the requisite [31] knowledge. United States v. Fowler, 932 F.2d 306, 312 (4th Cir.1991). Although this rule officially abolished the so-called "ultimate issue" rule, see Fed.R.Evid. 704 advisory committee's note, it did not lower the bar "so as to admit all opinions." Id. "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. Fed. R. Evid.403. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." Id. The touchstone of admissibility of testimony that goes to the ultimate issue, then, is helpfulness to the jury. Kopf v. Skyrm 993 F.2d 374 at 377 (4th Cir. 1993). Thus, the district court's task "is to distinguish helpful opinion testimony that embraces an ultimate fact from unhelpful opinion testimony that states a legal conclusion," a task that we have acknowledged "is not an easy one." United States v. Barile, 286 F.3d 749 at 760 (4th Cir. 2002).

The testimony discussed in the instant case—that based on the training and experience of the officers, the items being jettisoned were bales containing cocaine—was not helpful to the jury's understanding of the issues at trial. This is Rule 701's second requirement. All the U.S. Coast Guard officers that testified about their observations of the items being jettisoned from the vessel (and all the surrounding circumstances) tainted the jury's ability to reach their own conclusion [32] about the evidence as to whether or not the items jettisoned contained cocaine. Allowing the officers to give their opinion that the items were bales of cocaine, was cumulative testimony that did nothing other than draw a legal conclusion on an ultimate issue, and summarily tell the jury which conclusion to reach. It was therefore error to admit it.

B. Improper Expert Testimony

If "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert witness may provide opinion testimony on the issue in question. Fed.R.Evid. 702. The rule recognizes that an intelligent evaluation of the facts by a trier of fact is "often difficult or impossible without the application of some . . . specialized knowledge." Fed.R.Evid. 702 advisory committee's note. "Drug enforcement experts may testify that a defendant's activities were consistent with a common criminal modus operandi." United States v. Webb, 115 F.3d 711, 713-14 (9th Cir. 1997). This testimony "helps the jury to understand complex criminal activities and

alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir.1984). "Further, we even allow modus operandi expert testimony in cases that are not complex." Webb, 115 F.3d at 714.

[33] In United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997), the court took on the issue, of whether the district court abused its discretion by admitting, without proper foundation, opinion testimony of law enforcement officers that Lopez's actions were consistent with those of an experienced drug trafficker. During the trial law enforcement officers testified:

- that Lopez was engaging in countersurveillance driving;
- that certain terms used by Lopez and informant Storm were code words for a drug deal, a common practice of narcotics dealers;
- that Lopez's use of a rental car was consistent with the practices of an experienced drug trafficker;
- that the manner of hiding the cocaine was consistent with the practices of experienced drug traffickers; and
- that the large quantity and high purity of the cocaine indicated that Lopez was close to the source of the cocaine

Id. 1244. The court in Figueroa-Lopez, went on to discuss similar drug cases that properly admitted expert testimony.

> The testimony in the instant case is similar to expert testimony properly admitted in other drug cases. See, e.g., United States v. Cordoba, 104 F.3d 225, 229-30, amended, Jan. 1997 (allowing expert testimony that a sophisticated drug dealer would not entrust large quantities of cocaine to an unknowing dupe); United States v. Espinosa, 827 F.2d 604, 611-12 (9th Cir.1987) (allowing expert testimony regarding the use of apartments as "stash pads" for drugs and money); United States v. Patterson, 819 F.2d 1495, 1507 1245*1245 (9th Cir.1987) (allowing expert testimony on how criminal narcotics conspiracies operate); United States v. Maher, 645 F.2d 780, 783 (9th Cir.1981) (per curiam) (permitting expert testimony that defendant's actions were consistent with the modus operandi of persons transporting drugs and engaging in countersurveillance).

[34] Id. at 1244-1245. Figueroa-Lopez went on to find that the situation at hand resembled the above cases, and therefore fell into the purview of expert testimony under Rule 702. In reaching its decision, the court noted that in the cases above, testimony was necessary to inform the jury of the techniques employed by drug dealers in their illegal trade, techniques which an ordinary juror would most probably be unfamiliar. "Thus, the testimony in the instant case could have been admitted as expert opinion testimony to inform the jury

about the methods and techniques used by experienced drug dealers, if the law-enforcement agents had been called as experts and properly qualified as such pursuant to Rule 104 of the Federal Rules of Evidence." Id.

This exact issue was taken up in Williams, under a nearly identical fact pattern to the case at bar—police testifying that objects jettisoned from a sea vessel during a chase were bales of cocaine. Williams went on to find that such observations did not require expert witness testimony. The Court made a finding that the Coast Guard witnesses compared the packages they saw to packages they had seen in previous cocaine interdictions, an assessment of "the appearance" and "size" of objects that required no scientific or technical knowledge. Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213, 1223 (11th Cir. 2003). Williams cited Tampa Bay Shipbuilding & Repair, pointing to its finding that "the appearance of persons or things, . . . size, weight, and distance" are [35] "prototypical examples of the type of evidence contemplated by . . . Rule 701". Id. at 1222.

Thus, the court in Williams, found the testimony was permissible under Rule 701—lay opinion testimony. However, this analysis ignores the context, and the various other factors that law enforcement considered in rending their opinions in the case at bar. It wasn't simply the size and shape of the objects being jettisoned, that allowed the Coast Guard witnesses to make their determination in this case. There were many other factors, including the location of the vessel in regard to known cocaine trafficking routes, the

appearance and type of vessel occupied by the suspects, why this particular model go-fast vessel was commonly used by cocaine traffickers, the use of the tarp as a masking agent for ion scan detection, the history and purpose of the behavior of fleeing while jettisoning contraband (including the effect on obscuring the debris field), and many others.

The opinions given by the officers as to the bales being cocaine, weren't simply evaluations of the size and shape of the objects, as noted by Williams. The factual scenario in this case fits much better under the scope of Figueroa-Lopez, in that the testimony was necessary to inform the jury of the techniques employed by narcotics smugglers in their illegal trade, techniques which an ordinary juror would most probably be unfamiliar. The testimony was therefore improperly admitted because it fell within the purview of expert testimony under Rule 702, and the [36] Government had not given prior notice as required by Federal Rule of Criminal Procedure 16(a)(1)(E).

C. Speculative Testimony Not Supported by Evidence

One of the most compelling aspects of the Government's case was the opinion testimony that the objects being jettisoned were cocaine. This testimony was particularly important to the Government, since none of the items thrown overboard were recovered, and an exhaustive search of the vessel (including drilling holes in the deck and IonScan swipes) and the crew on board,

yielded no evidence of cocaine. In fact, not a shred of evidence of cocaine was ever found throughout this entire case.

Interestingly, there were three Coast Guard witnesses on board the aircraft that testified at trial—Tison Velez, Bob Baquero, and Aaron Such. And, while all three of them prepared handwritten statements documenting their involvement and observations, none of their reports mentioned anything about cocaine bales, or cocaine being thrown overboard. (Doc.245, p.159, 198, 239).

What's more, Lugo asserted that he was smuggling gasoline (not cocaine), which he corroborated with a significant amount of evidence and testimony. For starters, when boarded by the Coast Guard, the vessel was still carrying a large amount of gasoline in canisters similar to the ones jettisoned on the video. In addition, Post arrest, Lugo maintained that he was merely transporting gasoline, [37] and Defense expert chemist Arvizu, testified that neither gasoline, wind, or seawater would mask cocaine from IonScan detection. (Doc.248, p.75-78).

Jose Bueno Lopez testified that he assisted Lugo and others as they loaded the boat with gasoline prior to the gasoline smuggling trip and that in his opinion, it was gasoline being jettisoned on the video. (Doc.229-3, p.8).

Ms. Simanca Pushaina testified that gasoline smuggling was a common practice among the Wayuu tribe, and in fact was their leading source of income. (Doc. 214-3, p.32).

Lugo's brother, Luis Lubo Larrada, testified that he had smuggled gasoline with Lugo on previous occasions. (Doc. 214-1, p.10).

It was error for the district court to admit this opinion testimony of the Government's witnesses, because it was not supported by evidence, it was nothing other than a speculative guessing, and its probative value was substantially outweighed by its unfair prejudice.

For all the reasons stated above, it was error for the district court to admit the testimony of the Coast Guard Officers, regarding their opinions that the jettisoned objects were bales of cocaine.

[38] **CONCLUSION**

The Appellant, Mr. Lugo, for the reasons detailed above, respectfully requests this Honorable Court to reverse and remand to the lower tribunal. Or, in the

alternative to grant any relief as it deems proper and just.

Respectfully Submitted
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[39] [Certificate Of Service Omitted]

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[40] [Certificate Of Compliance Omitted]

No. 18-11616-DD

In the
UNITED STATES OF AMERICA,
For the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LENIN LUGO,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 8:17-CR-222-T-27JSS-2

BRIEF OF THE UNITED STATES

(Filed Mar. 4, 2019)

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March 4, 2019

[C-1 of 1] **Certificate of Interested Persons and Corporate Disclosure Statement**

The Certificate of Interested Persons and Corporate Disclosure Statement in Lenin Lugo's principal brief is complete.

No publicly traded company or corporation has an interest in the outcome of this appeal.

[i] **Statement Regarding Oral Argument**

The United States respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that oral argument will not significantly aid the Court's decisional process.

[ii] **Table of Contents**

[v] **Table of Citations**

Cases

Statutes

Rules

[x] **Statement of Jurisdiction**

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction, *see* 18 U.S.C. § 3231, and it entered judgment against Lenin Lugo on April 12, 2018, Doc. 231. Lugo timely filed a notice of appeal on April 19, 2018, Doc. 233; *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

[1] **Statement of the Issues**

I. Whether the district court properly denied Lugo's motion for judgment of acquittal because the evidence, including his sufficiently corroborated confession that he had conspired to transport a load of cocaine, was sufficient for a reasonable juror to find him guilty beyond a reasonable doubt. (Lugo's Issue I & II).

II. Whether the district court properly denied Lugo's motion to suppress the testimony that he had confessed to agreeing to transport a load of cocaine, and, if not, whether the error was harmless beyond a reasonable doubt (Lugo's Issue III).

IV. Whether the district court properly admitted the statements of Coast Guard personnel that a videotape depicted the coconspirators' jettisoning

bales of cocaine, and, if not, whether its evidentiary ruling was harmless, given other overwhelming evidence of Lugo's guilt (Lugo's Issue IV).

Statement of the Case

After a Coast Guard airplane spotted Lugo and two cohorts on a "go-fast" boat in international waters, the men ditched their load of contraband. A videotape captured that activity. Authorities failed to recover the contraband or to detect it via ion scans on either the crew or the vessel. The defense said that the load was gasoline. But a jury believed it to be cocaine, based, in part, [2] on Lugo's confession to a jailmate that it was.

In this direct appeal, Lugo challenges the sufficiency of the evidence supporting his cocaine-smuggling conspiracy conviction. He also argues that the district court violated his Sixth Amendment rights by admitting his jailhouse confession and that the court erred by allowing Coast Guard personnel to testify that the unrecovered bales had contained cocaine.

Course of Proceedings

A grand jury returned an indictment charging Lugo and two others with conspiring to distribute and to possess with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a), and with possessing with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the

jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and 18 U.S.C. § 2. Doc. 1.

Lugo moved to exclude, as speculative, anticipated testimony that Coast Guard personnel believed that the coconspirators had jettisoned bales of cocaine. Doc. 243 at 56; *see* Docs. 136, 166; *see also* Doc. 244 at 48. The district court denied the motion, determining that, based on their experience, the Coast Guard personnel were qualified to provide lay witness opinions regarding the contents of the bales that the crew had jettisoned. Doc. 245 at [3] 187.

Lugo also moved to suppress his confession to a jailmate about his cocaine-smuggling activities. Doc. 142. The United States responded in opposition to the motion, Doc. 172, and the district court denied it after an evidentiary hearing. Doc. 192; Doc. 247 at 137-52.

Lugo was tried by a jury. Docs. 175, 177, 183, 189, 191, 195, 200, 201. He moved for a judgment of acquittal at the end of the United States' case, Doc. 248 at 51-54, and at the end of all the evidence, Doc. 249 at 21; Doc. 250 at 12; and the district court denied those motions. Doc. 248 at 54-57; Doc. 249 at 21; Doc. 250 at 12.

The jury found Lugo guilty of the conspiracy charge but acquitted him of the substantive cocaine-possession charge. Docs. 209, 211. The district court sentenced him to serve 188 months in prison. Doc. 230.

This appeal followed. *See* Doc. 233.

Statement of the Facts

1. The Offense Facts

After a Coast Guard marine-patrol aircraft observed items jettisoned from a go-fast vessel, personnel aboard the cutter *Diligence* interdicted the vessel about 70 miles north of Barranquilla, Colombia. Doc. 244 at 58; Doc. 246 at 179, 205. Some of the cutter's personnel were dispatched to the go-fast [4] vessel; others were dispatched toward the vessel's debris field. Doc. 246 at 104, 106-07.

A few minutes before the boarding team reached the vessel, personnel saw a whip antenna (used for VHF radio communication) that had been thrown in the water. Doc. 246 at 19, 49-50; *see* Doc. 246 at 193-94, 209, 211, 219. After an extended pursuit of the go-fast vessel, Coast Guard personnel came alongside it. Doc. 244 at 59, 65; Doc. 246 at 195. Three men were aboard, and they were soaking wet. Doc. 246 at 20, 42-43, 95, 120, 218.

Eventually, personnel received authorization to board the go-fast vessel. Doc. 244 at 72. They found no flag, registration papers, or other indicator of the vessel's place of origin or nationality. Doc. 244 at 72. Ernesto Marquez Carvajal ("Marquez") claimed to be in charge. Doc. 244 at 59; Doc. 246 at 8889. He said that the crew had left from Colombia's La Guajira peninsula and that they were waiting for someone, but he and the other crewmembers did not claim ownership or nationality for the vessel. Doc. 244 at 61-62, 64-65, 69, 72, 90-91, 96. Marquez presented a Colombian

identification card, but the other crewmembers, Lugo and Adalberto Aguilar, did not identify themselves or provide any identification. Doc. 246 at 23-24, 54, 89, 204.

The vessel was a typical panga styled[1] go-fast smuggling vessel. Doc. 246 [5] at 20; *see* Gov. Exh. 5F. It was all blue (to "match[] with the seas"), had three 75-horsepower outboard engines, and had no required navigational lights. Doc. 246 at 20, 52. The vessel also had four, mostly full 50-gallon barrels of fuel, fuel all over the deck and in the bow area, and no fuel tanks. Doc. 246 at 28-29, 32-34, 45, 92, 120, 130, 148, 150, 196-97, 200; *see* Doc. 248 at 8. Instead, hoses connected the fuel barrels to the engines. Doc. 246 at 34, 44-45, 120. Other cylindrical fuel containers were between half-full and empty. Doc. 246 at 32-33. "The forward part of the vessel was just trash and food." Doc. 246 at 78; *see id.* at 120. Boarding-team members had not seen so large a volume of fuel on deck in prior boardings, so they suspected that the crew was trying to conceal the presence of contraband. Doc. 246 at 36-37.

Later during the boarding process, an officer swabbed the hands of the crew and four areas on the vessel for testing that could disclose trace elements of drugs. Doc. 246 at 115-16, 119, 130, 141, 148; *see* Doc. 246 at 159. He also conducted a space-accountability assessment by inserting a bore scope into small holes

[1] A panga is a boat typically used to move drugs in the Eastern Pacific region near Central America. *See United States v. Valencia*, No. 18-11495, 2019 WL 644882, at *1 (11th Cir. Feb. 15, 2019) (unpublished).

drilled into various sections of the go-fast vessel. Doc. 246 at 12426. Finding nothing suspicious in the vessel's void spaces, he patched the holes. Doc. 246 at 126-28, 130, 214.

[6] An ion scan is a tool that detects trace evidence of drugs that is hidden or otherwise invisible. Doc. 246 at 39. Certain environmental conditions, like wind or rain, or substances, including laundry detergent, raw fish, fuel, sea water, or trash strewn about a deck can mask or eliminate trace evidence of drugs aboard a vessel. Doc. 246 at 39-40, 80; Doc. 248 at 25, 50. Methods that smugglers use to impede the detection of drugs aboard smuggling vessels include washing down the vessel with fresh or saltwater, placing drugs on a tarp, storing fuel aboard the vessel, and donning multiple layers of clothing and gloves that can be removed after jettisoning a load. Doc. 248 at 24, 50. The ion scans in this case were negative. Doc. 246 at 82, 86, 164, 167; Doc. 248 at 23. Personnel also found no cocaine aboard the go-fast vessel or in the vessel's debris field. Doc. 246 at 71, 73, 142-43, 176, 178.

The seas had been rough throughout the boarding process, and they continued to deteriorate. Doc. 246 at 127. Personnel decided, accordingly, to transport the vessel's crew to the cutter. Doc. 246 at 126. They then sank the vessel as a navigational hazard. Doc. 246 at 217.

2. The Admission of Lugo's Jailhouse Confession

A. Baron's Drug-Smuggling Experience

Ivan Jose Baron-Palacio ("Baron") lived in Colombia's La Guajira peninsula. Doc. 247 at 158. He, like Lugo, was a Wayuu Indian, the [7] indigenous people of Colombia. Doc. 247 at 159, 186. He was a fisherman who eventually smuggled cocaine from La Guajira to the Dominican Republic and Haiti aboard go-fast vessels. Doc. 247 at 163, 166, 222; Doc. 248 at 6-7. Baron also smuggled gasoline, but he did so aboard a traditional fishing vessel because, in Colombia, go-fast boats are banned and, therefore, subject to seizure. Doc. 247 at 175-76, 195.

For his smuggling ventures, Baron ordinarily transported 15 to 25 bales consisting of about 25 kilograms of cocaine each. Doc. 247 at 164, 169. To facilitate communication between the suppliers and the smugglers, the vessels ordinarily were equipped with a global positioning system, a long-distance radio, a whip antenna, and a microphone. Doc. 247 at 165, 167. Normally, sufficient fuel (400 to 500 gallons) was stored aboard the vessels for the entire round-trip voyage; other times, smugglers secured return fuel in the Dominican Republic. Doc. 247 at 166, 168-69.

Baron testified that, before he had embarked on his previous drug-smuggling trips, some of the suppliers had instructed him to jettison the cocaine if he encountered the Coast Guard and to explain to authorities that the crew was looking for a lost fisherman or shipwrecked vessel. Doc. 247 at 170, 179. Baron

testified further that, to prevent Coast Guard personnel from discovering trace amounts of cocaine aboard their vessels, go-fast crews had [8] placed the cocaine on top of canvases or tarps, and they had washed themselves in gasoline or salt water. Doc. 247 at 173-74, 180.

Baron previously had jettisoned a load of cocaine on one of his smuggling voyages. Doc. 247 at 170, 222; Doc. 248 at 15. Although Baron had not weighed down that jettisoned load, he had heard of smugglers who done so to make their loads sink if necessary. Doc. 247 at 171, 214; Doc. 248 at 15.

While serving as captain for a cocaine-smuggling trip in late April 2017, Baron and three crewmembers were arrested near La Guajira. Doc. 247 at 179-82, 201, 206-09. In early May, authorities took him to a county jail in Florida. Doc. 247 at 183.

B. Lugo's Confession to Baron

After Baron was incarcerated, he saw Lugo in the chapel of a local jail. Doc. 247 at 138. Baron later signed his plea agreement, he cooperated with authorities, and, after granting the United States' substantial-assistance motion, the district court sentenced him to ten years in prison. Doc. 247 at 139-40, 192, 199, 201, 205, 219.

FBI Special Agent Thomas Oates interviewed Baron at a local jail in June 2017. Doc. 247 at 108-09, 123; Doc. 248 at 175, 178. At that time, Baron provided information about his own drug-trafficking activities

and about others whom he believed to be drug traffickers. Doc. 247 at 110, 112, 114-15. Agent [9] Oates showed Baron a photograph of Lugo, but Baron denied knowing him. Doc. 247 at 109, 124, 135, 137-40, 186.

Baron was transferred to a different jail but returned to the first jail in September 2017. Doc. 247 at 144, 187-88. Baron saw Lugo in the cafeteria sometime between September 10 and 12. Doc. 247 at 144, 188; *see* Doc. 248 at 12, 180. Lugo joined Baron at a table, and he began to discuss his cocaine-smuggling trip, without Baron's prompting. Doc. 247 at 120-22, 126-27, 131, 141-42, 190; Doc. 248 at 7. Lugo stated that, while en route to the Dominican Republic, the crew had seen an airplane, so they had tried to flee to La Guajira. Doc. 247 at 190. Lugo said that he had served as the go-fast vessel's captain, that the cocaine had been on a tarp, that the crew had jettisoned the load and the tarp, and that the ion-scan results had been negative. Doc. 247 at 190-91. (Baron testified that he had viewed the videotape of the interdiction of the go-fast vessel in this case and that he had had seen a tarp aboard the vessel, a whip antenna in the ocean, and the crew jettisoning bales of cocaine and the tarp. Doc. 247 at 192.).

After Baron's conversation with Lugo, Baron asked his lawyer to arrange a meeting with the agents in this case. Doc. 247 at 192. Baron was sentenced just after his conversation with Lugo, but the agents were unable to meet with him until a few weeks later. Doc. 247 at 109, 124-25, 127-28, 140-[10]41, 193; Doc. 248 at 15, 179, 188-89.

During that late September interview, Baron identified Lugo in a photograph and admitted that, in the earlier interview, he had lied about not knowing Lugo. Doc. 247 at 109-10, 113-15, 125, 140-41, 193. He explained that he had been afraid because the Wayuu were violent people who might seek retribution against him or his family. Doc. 247 at 109, 114, 124, 131, 135, 186-87, 198-99; Doc. 248 at 178.

Baron told authorities then that he and Lugo were from the same town, that they had seen each other in a fishing community back home, and that, when he saw Lugo in the cafeteria of the local jail in September, Lugo talked about his own case. Doc. 247 at 115-17, 119-20, 125, 141-42. Baron elaborated that, while he was eating soup, Lugo had approached, stating that he and his coconspirators actually had been transporting cocaine bales; that the crew had been paid $34,000 in advance; that he had been the captain aboard the smuggling vessel; that the crew had placed the bales on a tarp to prevent a positive ion-scan for cocaine residue; and that, after seeing an airplane overhead, the crew had jettisoned the load of cocaine and the tarp. Doc. 247 at 117-18, 123, 127, 129-32, 145. Lugo also volunteered that his attorney planned to send investigators to La Guajira to find evidence or witnesses to establish that the crewmembers were gasoline smugglers. Doc. 247 at 128-29, [11] 145, 149; *see* Doc. 248 at 17.

Baron testified that, before that conversation, the agents had not told him to obtain a confession or any admissions from Lugo. Doc. 247 at 141, 144. Agent

Oates confirmed that authorities had not directed Baron to attempt to elicit any information from his fellow jailmates. Doc. 247 at 126, 133-34.

An employee at the jail where Lugo and Baron had been housed testified that Lugo and Baron were housed in that jail until May 10, 2017; that they were in the chapel together on June 6 and June 20, 2017; and that Baron was released to another facility on June 23, 2017, returned to the jail on September 8, 2017, and then housed in the same pod with Lugo. Doc. 248 at 101-05.

In his report of the September 2017 meeting with Baron, Agent Oates misstated that Lugo had confessed to Baron in early May 2017. Doc. 248 at 185-87, 189-90. During an interview with Baron after Lugo's trial commenced, Agent Oates discovered that Lugo actually had confessed in September, just before Baron's sentencing. Doc. 248 at 181-82, 188.

The district court denied Lugo's motion to suppress Baron's testimony. Doc. 247 at 152; Doc. 248 at 54. The court determined that Baron had executed his plea agreement on June 6, 2017; that, during his proffer he had lied to authorities about not knowing Lugo; that authorities had not been involved in the chance meeting between Lugo and Baron in late September [12] 2017; and that, instead, Baron had listened to Lugo's confession after Lugo had approached him. Doc. 247 at 150-52. Because Baron only had listened to Lugo's account of the smuggling voyage, the court determined that Lugo had failed to show that the authorities had

taken any action designed to elicit his confession. Doc. 247 at 150-52. The court determined further that substantial independent evidence of the cocaine-smuggling offense established the trustworthiness of Baron's account of his conversation with Lugo. Doc. 247 at 152-54.

3. The Admission of Testimony That The Go-Fast Crew Had Jettisoned Cocaine.

Coast Guard Petty Officer Jussen Gonzalez, a 12-year veteran, had served for two and one-half years with a tactical law enforcement unit whose exclusive mission is drug interdiction. Doc. 246 at 4-5. His training had included a five-week maritime counter-drug school, and, while stationed previously in the Florida Keys, he had gained additional experience in pursuit of small vessels used for international drug smuggling. Doc. 246 at 6-9. He also had participated in almost 100 boardings and in two prior interdictions involving cocaine and marijuana. Doc. 246 at 11, 36.

The United States' videotape showed two of the coconspirators tossing bales overboard the go-fast vessel; one of the coconspirators donned a plastic bag over his clothing, and the two others wore gloves. Gov. Exhs. 1, 2; Doc. [13] 246 at 45-46, 93, 102-03. Based on his experience, Officer Gonzalez testified that the items depicted in the videotape of this interdiction were "highly similar" to items that he had recovered and tested as bales of cocaine. Doc. 246 at 12, 62, 64-65. Petty Officer Ryan Stone, a six-year veteran who had participated

in five counter-narcotics patrols and six go-fast pursuits in the preceding two and one-half years (one involving the jettisoning of drugs), testified that the activity in the videotape was consistent with the disposal of bales of cocaine and that the bales contained about 30 to 50 kilograms each. Doc. 246 at 182-83, 202-03, 206-08. Similarly, Chief Petty Officer Guillermo Velazquez, who had 15 years' experience in counter-drug boardings, testified that the videotape "absolutely" depicted jettisoning of empty plastic drums, a tarp, gloves, outer layers of clothing, and bales of cocaine. Doc. 248 at 19, 25, 28-31, 42-43, 45. Officer Vasquez also saw an antenna in the water. Doc. 248 at 47. He said that, after the crew jettisoned the load, the go-fast vessel had sped away quickly, which could have washed away trace amounts of drugs. Doc. 248 at 33. Therefore, Velazquez was not surprised that the ion-scan test results had been negative. Doc. 248 at 33.

The bales of jettisoned cargo depicted in the videotape did not float, so Officer Velazquez testified that they had been weighed down. Doc. 248 at 50.

[14] **4. The Defense Case**

Janine Arvizu, a chemist and laboratory-control auditor, confirmed that the ion-scan results for the boarding-team members, the coconspirators, and the go-fast vessel had been negative. Doc. 248 at 59-60,73-75. Arvizu also testified that an ion-scan instrument is capable of detecting cocaine even if petroleum products or seawater are on the ion-scan swab; that, if the

coconspirators had jettisoned cocaine bales, she would have expected to find cocaine residue on their clothing; and that the gasoline and seawater aboard the go-fast vessel would not have interfered with the ion-scan testing. Doc. 248 at 75-77,81-83; *see* Doc. 248 at 78-79. Assuming that the collectors had been properly trained, she concluded that no cocaine had actually been present on the vessel. Doc. 248 at 84. But she admitted that she did not know what drug traffickers do to attempt to avoid ion-scan detection, that wearing gloves or a garbage bag over one's clothing could prevent detection of cocaine particles, and that the presence of cocaine residue aboard a vessel could diminish over time depending on the vessel's exposure to the elements and the activities going on aboard the vessel, including the placement of a tarp. Doc. 248 at 88, 91-92.

University of South Florida physical oceanography professor Robert Weisburg testified that the fuel found aboard the go-fast vessel was a [15] "marginal" amount for a trip from Colombia to Haiti and that the items that the crewmembers had jettisoned were cylindrical and dissimilar to pictures that he previously had viewed showing cocaine floating in the ocean. Doc. 248 at 158, 160, 162, 166, 179; *see, e.g.*, Def. Exh. 2T. On cross-examination, he admitted that he had no experience or expertise in maritime cocaine-smuggling, analyzing cocaine bales, or estimating fuel requirements for maritime vessels. Doc. 248 at 171-73. He admitted further that the crewmembers probably could have seen the United States' large cargo-hauling spotter

plane and that the videotape showed a crewmember actually pointing at it. Doc. 248 at 167-170.

Colombian attorney Estercilia Simanca Pushaina, an administrative-law specialist, testified that gasoline smuggling within Colombia is both commonplace and illegal and that jail time is imposed for offenses involving more than 20 gallons. Def. Exh. 11. She testified that Colombian authorities would have had no reason to arrest the coconspirators for either smuggling gasoline or conspiring to do so because the smuggling had occurred in international waters outside Colombian territory and because Colombian authorities had not interdicted or detained them. *Id.*

Lugo's brother Luis, a fisherman by trade, testified that he supported himself partially by smuggling gasoline in Colombia. Def. Exh. 8. He said that [16] gasoline-smuggling was normal activity in Colombia, that he had smuggled gasoline via land with Lugo and other family members on four or five occasions, that he had never smuggled gasoline via boat, and that he did not know whether Lugo had done so via boat. *Id.*

Similarly, Lugo's wife, Juliana Gonzalez Vergara, testified that Lugo had smuggled gasoline in his car and that he had been detained and placed on house arrest for doing so. Def. Exh. 9. She said that Lugo had not previously transported gasoline via boat, that four of the barrels aboard the go-fast vessel had belonged to Lugo, and that she had borrowed one of the barrels from a gasoline-selling neighbor named "Jorge." *Id.*

Lugo's childhood friend, Jose Francisco Bueno Lopez ("Bueno"), testified that he had last seen Lugo in early May 2017. Def. Exh. 10. At that time, Bueno and two other men had helped Lugo load gasoline, in 25 small tanks and 6 larger ones, aboard a boat. *Id.* Bueno explained that Colombians transported gasoline via boat to avoid checkpoints on land, seizure of the contraband, and possible arrest. *Id.* He said the videotape showed the coconspirators jettisoning some fuel tanks and a tarp. *Id.*

Standard of Review

I. This Court reviews de novo a district court's denial of adefendant's motion for a judgment of acquittal, viewing the evidence in the [17] light most favorable to the jury's verdict and making all reasonable inferences and credibility choices in the United States' favor. *United States v. Merrill*, 513 F.3d 1293, 1299 (11th Cir. 2008). "A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." *Id.* (internal quotation marks omitted).

II. This Court reviews a district court's evidentiary rulings for abuse of discretion, *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002), and it reviews questions of constitutional law de novo, *United States v. Brown*, 364 F.3d 1266, 1268 (11th Cir. 2004).

III. This Court reviews for abuse of discretion a district court's decision to admit law-enforcement personnel's lay opinion testimony under Fed. R. Crim. P.

701. *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). Because Lugo failed argue at trial that the Coast Guard officers' testimony was inadmissible regarding the ultimate issue of whether he actually had possessed cocaine, this Court may that issue only for plain error warranting relief. *See United States v. Chilcote*, 724 F.2d 1498, 1503 (11th Cir. 1984) (citation omitted).

Summary of the Argument

I. The evidence was sufficient to support Lugo's conspiracy conviction. The evidence showed that Lugo and his two coconspirators had [18] been traveling in a known drug-trafficking area aboard a vessel commonly used for international drug smuggling, and, when they saw a Coast Guard airplane overhead, they sped away from authorities, jettisoning bales of cocaine of what appeared to be cocaine, a radio antenna, and a tarp. The videotape of that odyssey also showed Lugo and a coconspirator wearing gloves and the other covered in plastic. Gasoline—a masking agent for cocaine—was stored in several 50-gallon barrels and was free flowing on deck. And Baron and experienced Coast Guard personnel testified that the bales had appeared to be cocaine bales.

Moreover, Baron testified that Lugo had admitted to transporting the load of cocaine, and the United States introduced substantial independent evidence, including the videotape, that corroborated his confession. Based on Lugo's confession and the other

evidence presented, the jury was entitled to find him guilty of the conspiracy offense.

II. The district court's admission of Baron's testimony regarding Lugo's confession did not violate Lugo's Sixth Amendment rights. Although Baron had pleaded guilty and had agreed to cooperate with authorities, he did not deliberately elicit Lugo's confession. Rather, Lugo approached Baron and divulged that the coconspirators had jettisoned the cocaine that they had agreed to smuggle cocaine. Therefore, the court properly denied Lugo's [19] motion to suppress his confession.

Even if the district court erred in admitting Baron's testimony, any error was harmless beyond a reasonable doubt. That testimony was cumulative of the videotape evidence showing Lugo and his coconspirators, donned in gloves and a plastic bag, tossing the load of cocaine into the ocean, and the testimony of Coast Guard personnel that the load was indeed bales of cocaine.

III. The district court properly admitted testimony of Coast Guard personnel that the jettisoned items appeared to be bales of cocaine. Based on their experience in maritime-smuggling interdictions, the testimony was admissible as lay opinion testimony under Fed. R. Evid. 701. And, if not, any error in admitting the testimony was harmless. The officers could have testified as experts under Fed. R. Evid. 702, given their knowledge of and years of experience in maritime drug-smuggling interdictions. Furthermore, the

officers' testimony was cumulative of other evidence. Indeed, Baron, an experienced maritime cocaine smuggler, also testified that the bales resembled cocaine bales.

Lugo also has failed to establish that the district court plainly erred by admitting the officers' testimony regarding what he claims was the ultimate issue in this case. Because, as discussed above, the officers based their testimony on their own observations of the videotaped interdiction, the court [20] did not err, plainly or otherwise, by permitting them to testify that the jettisoned objects appeared to be bales of cocaine.

Argument and Citations of Authority

I. The district court properly denied Lugo's motion for judgment of acquittal because the evidence, including his sufficiently corroborated confession that he had conspired to transport a load of cocaine, was sufficient for a reasonable juror to find him guilty beyond a reasonable doubt (Lugo's Issues I & II).

Lugo contends that that the district court erred in denying his motion for judgment of acquittal for the conspiracy offense because the United States failed to establish that he had knowingly agreed to transport cocaine. Lugo's brief at 16-22. He contends specifically that the United States failed to establish that cocaine had ever been aboard the go-fast vessel. *Id.* He contends further that the court erred in admitting Baron's

testimony regarding his confession because, he claims, the United States failed to introduce independent evidence of the confession's trustworthiness. *Id.* at 23-27. Lugo's contentions afford him no relief from his conspiracy conviction.

This Court reviews de novo the sufficiency of the evidence supporting a criminal conviction. *United States v. Walker*, 490 F.3d 1282,1296 (11th Cir. 2007). In doing so, the Court considers the evidence in the light most favorable to the jury's verdict, drawing all reasonable inferences and making all [21] credibility choices in the United States' favor. *United States v. Haile*, 685 F.3d 1211, 1219 (11th Cir. 2012). It will reverse a conviction based on insufficient evidence only if no reasonable trier of fact could have found guilt beyond a reasonable doubt. *Walker*, 490 F.3d at 1296.

"To establish a conspiracy, the government must prove beyond a reasonable doubt that two or more persons entered into an unlawful agreement to commit an offense, that the defendant knew of the agreement, and that he voluntarily became a part of the conspiracy." *United States v. Cruickshank*, 837 F.3d 1182, 1188 (11th Cir. 2016). "The most basic element of [a drug] conspiracy is an agreement between two or more persons to violate federal narcotic laws." *United States v. Badolato*, 701 F.2d 915, 919-20 (11th Cir. 1983). Identification of a controlled substance does not require direct evidence if available circumstantial evidence establishes its identity beyond a reasonable doubt. *United States v. Sanchez*, 722 F.2d 1501, 1506 (11th Cir. 1984). Such evidence can include lay experience based

on familiarity through prior use, trading, or law enforcement. *United States v. Harrell*, 737 F.2d 971, 978 (11th Cir. 1984).

The United States introduced a videotape of the interdiction, which showed that the coconspirators—two wearing gloves and one wearing plastic over his clothing, Doc. 246 at 102-03—were aboard a go-fast vessel, stopped in [22] the water in a known drug-trafficking area, Doc. 248 at 28; Gov. Exhs. 1, 2. The videotape also showed that, after Lugo spotted the Coast Guard airplane, he accelerated the vessel's engines, and the crewmembers threw overboard a tarp and numerous bales. Gov. Exhs. 1, 2; *see* Doc. 248 at 24, 33, 50. Coast Guard personnel also found aboard the vessel a significant quantity of gasoline—a masking agent for cocaine. Doc. 246 at 35-37, 40. Three Coast Guard officers testified that the bales jettisoned from the vessel resembled bales of cocaine that they had seen in prior drug interdictions. Doc. 246 at 12, 62, 64-65, 182-83, 202-03, 206-08; Doc. Doc. 428 at 25, 28-31, 42-43, 45. Similarly, Baron testified, based on his own drug-smuggling experience, that the bales appeared to be bales of cocaine. Doc. 247 at 192. In addition, Lugo admitted to Baron that he had been paid to smuggle cocaine, not gasoline, aboard the vessel, and that, as the videotape showed, he had seen the Coast Guard airplane overhead and that the crew had jettisoned their load. Doc. 247 at 117-18, 123, 127, 129-22, 145. Those facts sufficiently supported the jury's conclusion that Lugo and the other two coconspirators had conspired to possess the load of cocaine.

Although the defense relied heavily upon the lack of cocaine aboard the go-fast vessel, the negative ion-scan results, and testimony that Lugo had only smuggled gasoline, *see* Def. Exhs. 8A-11A, Lugo has failed to show that the [23] inculpatory evidence to the contrary was insufficient to convict him. Rather, when presented "with two narratives, one tending to establish the defendant's guilt and another tending to establish innocence, the jury [i]s entitled to choose the account offered by the government." *United States v. Jordan*, 582 F.3d 1239, 1247 (11th Cir. 2009) (internal quotation marks omitted); *see United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990) ("[W]e cannot reverse a conviction for insufficiency of the evidence unless we conclude that no reasonable factfinder could find proof of guilt beyond a reasonable doubt."). Because Lugo has failed to show that no reasonable jury could have convicted him, this Court should affirm his conspiracy conviction.

Lugo argues that his confession to Baron was inadmissible because it was insufficiently corroborated. Lugo's brief at 23-27 (citing *Smith v. United States*, 348 U.S. 147 (1954); *Opper v. United States*, 348 U.S. 84 (1954)). But this issue "is not one of admissibility." *Smyly v. United States*, 287 F.2d 760, 764 (5th Cir. 1961). Rather, "[t]he question as *Opper* . . . and *Smith* . . . make so clear is the sufficiency of corroboration to sustain a conviction based upon extrajudicial admission." *Id.*

Here Lugo's conviction was not premised on his confession, so *Opper* and *Smith* are not implicated. The

other evidence *alone* was sufficient to support the jury's guilty verdict. But, regardless, other evidence adequately [24] corroborated Lugo's confession.

In order for a confession to support a finding of guilt, other evidence must "support[ ] the essential facts admitted sufficiently to justify a jury inference of their truth." *Opper*, 348 U.S. at 93). To show that a confession is trustworthy and reliable, independent corroborating evidence need not by itself "prove the offense beyond a reasonable doubt, or even by a preponderance," *Smith*, 348 U.S. at 156. In other words, "it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged." *Smith*, 348 U.S. at 156. Once corroborated, the confession may prove the crime charged. *See id.* (corroborating "independent evidence [may] bolster the confession itself and thereby prove the offense 'through' the statements of the accused"). If the evidence as a whole—including the corroborated confession—is sufficient to prove the defendant's guilt beyond a reasonable doubt, the evidence is sufficient to sustain a conviction. *Id.*

Baron testified that Lugo admitted that he had served as the captain for a smuggling venture from La Guajira in Colombia to the Dominican Republic, that Lugo and his crewmates had seen the Coast Guard airplane overhead, and that they had jettisoned the load of cocaine, communication equipment, and the tarp they had used to contain the cocaine residue. Doc. 247 at 145. Lugo also stated that the crew had transported

several barrels of gasoline but they [25] were not gasoline smugglers. Doc. 247 at 129.

Substantial evidence corroborated Lugo's confession. Evidence established that the Coast Guard had intercepted the go-fast vessel in a known drug-smuggling area, that the boat had contained a large quantity of gasoline (a cocaine-making agent), and that, after spotting the airplane overhead, Lugo had accelerated the vessel as the crew, two wearing gloves and another a plastic covering, had jettisoned bales that appeared to be cocaine. Thus, the United States amply corroborated Lugo's confession. *See United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990) (independent evidence—testimony concerning evasive and erratic maneuvering of defendant's airplane, navigational charts depicting routes to and from Colombia; the weight displacement calculations utilizing 2.2 pounds (one kilogram), a common unit for measuring cocaine, bladder tanks aboard plane to accommodate extra fuel, removal of airplane's seats, and videotape of bundles being jettisoned from defendant's airplane—provided sufficient corroboration for agent's testimony regarding defendant's confession).

Lugo further maintains at pages 26-27 of his brief that the United States failed to establish the reliability of his confession because his admissions regarding the cocaine-smuggling voyage did not contain "unique elements that could be corroborated with the independent evidence." Rather, he asserts, his [26] description of the smuggling voyage consisted of common occurrences for any kind of smuggling, including even

gasoline smuggling from Venezuela to Colombia. *Id.* But "[e]ach case has its own facts admitted and its own corroborative evidence," *Opper*, 348 U.S. at 93, and this Court need only determine whether the United States introduced substantial independent evidence which would tend to establish the trustworthiness of Lugo's confession, *see id.*

As discussed above, the independent evidence of Lugo's participation in cocaine-smuggling activity was adequate to constitute corroboration of Lugo's confession. The jury was free, therefore, to consider Lugo's confession in connection with all the other evidence and to decide whether the United States had established his guilt beyond a reasonable doubt. The jury found Lugo guilty, and substantial evidence supports its verdict. Therefore, the district court did not err in denying his motion for a judgment of acquittal. *See United States v. Micieli*, 594 F.2d 102, 109 (5th Cir. 1979) (affirming defendant's conviction for dealing in firearms without being properly licensed where defendant's admission established element of unlawful dealing and United States' independent evidence satisfied corroboration requirement); *United States v. Frazier*, 434 F.2d 994, 996 (5th Cir. 1970) (defendant's challenge to denial of motion for judgment of acquittal was "so lacking in merit as to require no [27] discussion" in light of evidence of defendant's confession and "more than adequate corroboration").

II. The district court properly denied Lugo's motion to suppress testimony that he had confessed to agreeing to transport the load of cocaine, and, if not, any error was harmless beyond a reasonable doubt (Lugo's Issue III).

Lugo also asserts that the district court erred in denying his motion to suppress Baron's testimony regarding his jailhouse confession because Baron was acting as a government agent and had deliberately elicited incriminating information from Lugo in violation of the Sixth Amendment. Lugo's brief at 27-29. He is entitled to no relief because the record refutes his assertion.

The Sixth Amendment prohibits admission of statements that the United States deliberately elicited from a defendant after adversary criminal proceedings have begun, unless the defendant's counsel is present or the defendant waives his right to counsel. *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *United States v. Gunn*, 369 F.3d 1229, 1237 (11th Cir. 2004). To establish a Sixth Amendment violation, Lugo must show that Baron acted as a government agent and that he deliberately elicited incriminating statements from Lugo. *See Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987).

This Court reviews de novo a defendant's claim that the district court violated his Sixth Amendment rights. *United States v. Gari*, 572 F.3d 1352, 1362 [28] (11th Cir. 2009). Constitutional errors are subject to

harmless-error analysis, so the United States must establish that any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Roy*, 855 F.3d 1133, 1178 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018).

A. Admission of Baron's testimony did not violate Lugo's Sixth Amendment rights.

Baron pleaded guilty in an unrelated case and agreed to cooperate with authorities in exchange for the United States' consideration of whether his cooperation warranted the filing of a motion for a sentence reduction based on that cooperation. Doc. 247 at 107, 139-40; Gov. Exh. 20 (Baron's plea agreement). But Lugo has failed to show that Baron deliberately elicited incriminating statements from Lugo. To the contrary, Baron denied eliciting any information from Lugo. Doc. 247 at 120-22, 126-27, 131, 141, 144. Baron testified, instead, that Lugo had approached him and that Lugo had initiated the conversation about the cocaine-smuggling activity charged in this case. Doc. 247 at 117-18, 123, 129-32, 144. Furthermore, Agent Oates confirmed that authorities had not asked Baron to elicit any information about Lugo's cocaine-smuggling activity. Doc. 247 at 126, 133-34. "Elicitation is more than mere listening," so the district court's admission of Lugo's confession did not violate the Sixth Amendment. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 [29] (1986) ("The Sixth Amendment is not violated when 'by luck or happenstance' the [government] acquires incriminating statements from the accused after

the right to counsel has attached."); *Gunn*, 369 F.3d at 1237 (admission of statements defendants made inside police vehicle did not violate Sixth Amendment); *United States v. Hicks*, 798 F.2d 446, 449 (11th Cir. 1986) (admission of statements did not violate Sixth Amendment where defendant was incarcerated with casual acquaintance who, of her own volition, reported defendant's statements to authorities).

To support his Sixth Amendment claim, Lugo cites only Baron's testimony confirming that Baron had had a plea agreement that contained a cooperation provision and that "at some point in time" after entering his guilty plea, he had asked his attorney to arrange a meeting with the agents. Lugo's brief at 28-29 (citing Doc. 247 at 192). That testimony does not contradict Baron's testimony that he neither initiated the conversation with Lugo nor elicited any information from Lugo or Agent Oates's testimony that authorities never directed Baron to seek any information from Lugo. Moreover, Agent Oates testified that it is common for a cooperating defendant to request more than one interview with authorities when he receives additional information regarding criminal activity. Doc. 248 at 193. Accordingly, the district court found "no evidence whatsoever that the agents were involved, directly or [30] indirectly, in the chance meeting between [Baron and Lugo.]" Doc. 247 at 151-52. That finding was not clearly erroneous.

B. Any error in admitting Baron's testimony was harmless beyond a reasonable doubt.

The beneficiary of a constitutional error has the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Factors that determine whether such an error is harmless include: the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the United States' case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684-85 (1986). More specifically, this Court asks "whether the minds of an average jury would have found the prosecution's case less persuasive if the erroneously admitted evidence had been excluded." *Gari*, 572 F.3d at 1263 (internal quotation marks omitted).

This Court should not vacate Lugo's conviction because any error in admitting Baron's testimony was harmless beyond a reasonable doubt. As discussed above, legally sufficient evidence, including real-time videotaped footage of the coconspirators' spying the Coast Guard airplane as they traveled [31] aboard a drug-smuggling boat in a known drug-smuggling area and then dumping the cocaine load, supported Lugo's conspiracy conviction. Indeed, defense counsel described the videotape as "the best visual evidence in this case." Doc. 250 at 120 (closing argument). Baron's testimony also was largely cumulative of the videotaped depiction

of the interdiction and the testimony of Coast Guard personnel establishing that the load aboard the go-fast vessel had contained cocaine. And Lugo had ample opportunity to object to Baron's testimony and to cross-examine Baron regarding the confession. *See generally* Doc. 247 at 195-224; Doc. 248 at 5-8. Thus, admission of Baron's testimony was harmless beyond a reasonable doubt. *See United States v. Burgest*, 519 F.3d 1307, 1311 (11th Cir. 2008) (even if district court erred in denying defendant's motion to suppress his incriminating statements, error was harmless beyond a reasonable doubt where sufficient evidence—including informant's testimony that he had purchased crack cocaine from defendant, videotape showing defendant selling crack cocaine to informant, and defendant's possession of crack cocaine upon arrest—supported his conviction crack cocaine-possession conviction); *see also Gari*, 572 F.3d at 1363-64 (in alien-smuggling prosecution, admission of narratives in immigration forms was not harmful constitutional error where forms did not "contain statements harmful to the defense that [were] not cumulative of other evidence admitted at trial").

[32] **III. The district court properly admitted the testimony of Coast Guard personnel that the objects depicted in the videotape resembled cocaine bales found in previous interdictions, and, if not, its evidentiary rulings were harmless, given other overwhelming evidence of Lugo's guilt (Lugo's Issue IV).**

Lugo argues at pages 15-16 of his brief that the district court improperly permitted Coast Guard personnel to testify as experts absent proper notice of that testimony as Fed. R. Crim. P. 16 requires.[2] He also argues for the first time that the court erred by allowing personnel to opine about the ultimate issue of whether the objects jettisoned from the go-fast vessel had been cocaine. *Id.* at 15.

A. The officers' testimony was admissible as lay opinion testimony under Fed. R. Evid. 701.

A district court may admit a lay witness's opinion testimony if the testimony 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" that would qualify the

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[2] Fed. R. Crim. P. 16(a)(1)(G) requires the United States to disclose, at the defendant's request, a written summary of expert testimony admissible under Fed. R. Evid. 702, describing "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."

witness as an expert under Fed. R. Evid. 702.[3] *See* Fed. R. [33] Evid. 701. This Court has stated that "the opinion of a lay witness on a matter is admissible only if it is based on first-hand knowledge or observation." *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999). Thus, "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences." *United States v. Hill*, 643 F.3d 807, 841 (11th Cir. 2011); *see United States v. Jeri*, 869 F.3d 1247, 1265 (11th Cir.) ("Lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses."), *cert. denied*, 138 S. Ct. 529 (2017).

This Court reviews for abuse of discretion a district court's evidentiary rulings regarding the admissibility of lay opinion testimony. *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). Even where a court errs regarding the admissibility of evidence, however, reversal is not warranted "if the error had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict." *United States v. Knowles*, 889 F.3d 1251, 1255 (11th Cir. 2018) (internal quotation marks omitted); *see also United States v. Chastain*, 198 F.3d 1338, 1348 (11th Cir. 1999) ("Violations of Rule 16 will result in a reversal of conviction only if such a violation prejudices

[3] Fed. R. Evid. 702 states that "[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," under circumstances not pertinent here.

a [34] defendant's substantial rights.") (internal quotation marks omitted).

In determining the admissibility of testimony under Rule 701, "[t]he central question . . . is whether the . . . witnesses' testimony [i]s based on 'scientific, technical, or other specialized knowledge,' such that it [would be] governed by Rule 702's expert testimony requirements rather than Rule 701's lay opinion standard." *United States v. Williams*, 865 F.3d 1328, 1341 (11th Cir. 2017); *United States v. Toll*, 804 F.3d 1344, 1355 (11th Cir. 2015) (witness may provide lay opinion testimony based on professional experiences if testimony is "rationally based on" those experiences, rather than on scientific or technical knowledge); *see also Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1223 (11th Cir. 2003) (affirming district court's admission of lay opinion testimony where witnesses testified "based upon their particularized knowledge garnered from years of experience within the field," not "based on specialized knowledge subject to Rule 702").

In *Williams*, this Court approved the admission of lay opinion testimony of Coast Guard witnesses "that the jettisoned objects they saw through [a forward-looking infrared system] resembled cocaine bales found in previous drug interdictions." 865 F.3d at 1337, 1341-42. This Court stated, "Because the Coast Guard witnesses' opinions were not based on any scientific or technical knowledge, but instead on their rationally based perceptions of the [35] size and shape of objects, the district court acted within its discretion in

admitting the testimony under Rule 701." *Id.* at 1341-42; *see United States v. Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002) (officer's characterization of vessel as a "go fast" boat was permissible lay testimony under Rule 701); *United States v. Myers*, 972 F.2d 1566, 1577 (11th Cir. 1992) (police officer's testimony that a "reddish burn mark on a victim's back [was] consistent with marks that would left by a stun gun" fell within Rule 701's purview because it was premised on "rational perception" based in part on the officer's past experiences); *see also Tampa Bay Shipbuilding*, 320 F.3d at 1222 (explaining that "prototypical example[s]" of evidence admissible under Rule 701 includes evidence related to "the appearance of persons or things" and "size") (quoting Fed. R. Evid. 701 advisory committee's note—2000 amendments; alteration in original).

Here, the Coast Guard personnel—with two and one-half to 15 years' experience in interdicting drug-smuggling vessels, Doc. 246 at 4-5, 182; Doc. 248 at 19—testified that the objects depicted in the videotape resembled bales of cocaine that they had seen in prior cocaine interdictions, Doc. 246 at 12, 202-03; Doc. 248 at 25, 28-31, 42-43, 45. And they based their testimony on their perceptions of the size and shape of the objects depicted in the videotape, not on any scientific or technical knowledge. Doc. 246 at 12, 206; Doc. 248 at [36] 27-30. Under *Williams*, therefore, the district court properly admitted the lay opinion testimony of the Coast Guard witnesses in this case.

Although Lugo acknowledges at pages 34-35 of his brief that *Williams* involved "a nearly identical fact

pattern to the case at bar," he contends that the "factual scenario in this case fits much better under the scope of the facts presented in the Ninth Circuit's decision in *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244-45 (9th Cir. 1997) (officer's testimony that defendant's actions were consistent with those of experienced drug trafficker improperly admitted as lay opinion testimony under 701). Lugo is wrong, but, even if his contention were correct, this Court is obliged to follow *Williams. See Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 840 (11th Cir. 2003) ("[T]he binding effect of our prior precedents in this circuit is impervious to the decisions of other circuits."); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (explaining that prior-panel-precedent rule binds panel to prior decision's holding even if panel is convinced that prior precedent is incorrect). Moreover, in *United States v. Novaton*, 271 F.3d 968, 1009-10 (11th Cir. 2001), this Court approved the admission of police officers' testimony regarding code words in intercepted telephone calls as lay opinion testimony under Rule 701. In doing so the Court noted the contrary holding in *Figueroa-Lopez* and declined to adopt it. 271 F.3d at 1008.

[37] **B. The district court's admission of the officers' testimony about the contents of the bales was harmless.**

If this Court concludes that the district court should have classified the officers' testimony as experts under Rule 702 and, therefore, that the United States

should have complied with Rule 16(a)'s disclosure requirements, Lugo would be entitled to reversal only if he shows that the violation prejudiced his substantial rights. *See Chastain*, 198 F.3d at 1348 (to determine proper remedy for Rule 16 violation, this Court must consider how violation affected defendant's ability to present a defense; "actual prejudice must be shown"). Lugo has failed to meet his burden.

First, the Coast Guard officers could have qualified to testify as experts under Rule 702. *Cf. Tinoco*, 304 F.3d at 1119 (where Coast Guard officer's characterization of vessel as a "go-fast" boat was based in part on his personal observation of the vessel while pursuing cutter and in part on his past experiences in the line of duty, district court did not err in admitting his testimony as Rule 701 lay opinion testimony even if the testimony also could have been admitted as Rule 702 expert testimony).

Lugo also does not argue that the admission of the testimony was a surprise or that he was unable to otherwise present a defense. Indeed, Professor Weisburg testified that the objects depicted in the videotape could have been [38] gasoline canisters and that they did not appear to be bales of cocaine. Doc. 248 at 161-62. Lugo also vigorously cross-examined the officers regarding their observations. Doc. 246 at 63-65, 205-06; Doc. 248 at 44-49. And the district court instructed the jury it could "believe or disbelieve any witness in whole or in part" and that, in assessing the credibility of each witness, it should consider whether the witness had had "the opportunity and ability to accurately observe

the things about which the witness testified." Doc. 250 at 88. And, even if the officers had qualified as experts under Rule 702, the jurors could have rejected that expert testimony. *Cf. United States v. Barton*, 909 F.3d 1323,1333 (11th Cir. 2018) (district judge appropriately instructed the jury that they were to treat expert scientific testimony like "any other witness's testimony" and "decide for [themselves] whether to rely upon the opinion") (quoting 11th Cir. Pattern Jury Instr. (Grim.) 7 (2016).

For these reasons, Lugo has failed to show that the district court's evidentiary ruling was harmful error warranting reversal of his conviction.

C. The district court did not plainly err by admitting the officers' testimony as ultimate-issue testimony.

Lugo did not argue below that the Coast Guard officers' testimony improperly infringed on the jury's province to determine the ultimate issue in this case: whether the coconspirators had transported cocaine aboard the go-[39]fast vessel. *See* Docs. 136, 166; *see also* Doc. 243 at 56; Doc. 244 at 48. Therefore, this Court may review his argument only for plain error warranting relief. *See United States v. Chilcote*, 724 F.2d 1498, 1503 (11th Cir. 1984). To obtain relief, Lugo must establish (1) error, (2) that is plain, (3) affects his substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of his proceedings.

See United States v. Cotton, 535 U.S. 625, 631-32 (2002). He has failed to meet that burden.

Lugo has failed to establish the first prong of plain-error review because the officers' lay opinion testimony was not inadmissible as ultimate-issue testimony. *See* Fed. R. Evid. 704(a); ("An opinion is not objectionable just because it embraces an ultimate issue."); *see also United States v.* Campo, 840 F.3d 1249, 1266-67 (11th Cir. 2016) ("[E]ven though [witness's] 'opinion' about who killed his brother addresses an ultimate issue in the case, that alone does not make the testimony objectionable just because it embraces an ultimate issue."); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) ("Rule 704 abolishes the per se rule against testimony regarding ultimate issues of fact."). Because the officers based their testimony on their observations of the activity depicted in the videotape and on their experience in counter-drug interdictions, their testimony was admissible. *See Carter v. DecisionOne Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997) (lay opinions regarding the "ultimate issue" in a case [40] "are properly admitted if they are based on the personal observations of the witness"); *United States v. Echevarria*, 238 F. App'x 424, 427 (11th Cir. 2007) (holding, under plain-error review that district court properly admitted detective's lay opinion regarding ultimate issue of whether drugs had been packaged for distribution where he had based testimony on personal observations and experience in making drug arrests). The district court did not err, let alone plainly err, in admitting that testimony.

Lugo also has not shown that admission of the officers' testimony prejudiced his substantial rights, i.e., affected the outcome of his trial. As discussed above, the officers' testimony was not the only evidence supporting Lugo's conviction for conspiring to distribute cocaine. The jury could have reasonably concluded that the bales had contained cocaine based on other evidence, including Baron's testimony that the bales appeared to be cocaine bales. Indeed, Lugo admits at page 32 of his brief that the officers' testimony was cumulative of other evidence. Furthermore, Lugo admitted to Baron that the coconspirators had jettisoned the load of cocaine. In addition, the circumstances of the interdiction (and Lugo's implausible story that he had smuggled gasoline) supported that conclusion that Lugo had agreed to smuggle cocaine. *See Williams*, 865 F.3d at 1344-45 (circumstances supporting identification of unrecovered contraband as cocaine included defendants' [41] traveling in fishing vessel along known international drug-trafficking route with no fish, bait, ice, or fishing equipment aboard; presence of gasoline—a known masking agent—aboard diesel-fueled vessel; and vessel accelerating and moving erratically after Coast Guard hailed it); *United States v. Clavis*, 956 F.2d 1079, 1088 (11th Cir. 1992) (circumstances supporting identification of substance informant had seen at stash house as cocaine included informant's contemporaneous observation of person attempting to hide large amounts of money being counted inside, movement of packages from stash house shortly after informant notified police of drug activity there, and informant's observation of exchanges of packages for money at house's back fence). So, even if the district

court erred in admitting the officers' testimony (which it did not), correcting the error would not have affected the jury's verdict. *See, e.g, Campo*, 840 F.3d at 1267 (in murder prosecution under federal-witness tampering statute, defendant failed to establish that admission of witness's purported lay opinion testimony that defendant had killed witness's brother had prejudiced his substantial rights where evidence of defendant's guilt was overwhelming, even without that opinion).

For these reasons, Lugo is entitled to no relief from his conviction.

[42] **Conclusion**

The United States requests that this Court affirm the judgment of the district court.

Respectfully submitted,

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App. 114

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES
OF AMERICA

V.

Case No: 8: 17-cr-222-T-27JSS

ADELBERTO AGUILAR /

MOTION IN LIMINE TO EXCLUDE SPECULATIVE STATEMENTS BY THE GOVERNMENT REGARDING JETTISONING BALES OF COCAINE

(Filed Dec. 22, 2017)

Comes now Defendant, Adelberto Aguilar ("Aguilar"), by and through undersigned counsel, and respectfully requests the Honorable Court direct the Government to not mention in its opening statement and/or elicit speculative testimony during its case-in-chief that the Defendant and the Co-Defendants Ernesto Marquez Carvajal's (Carvajal) and Lenin Lugo (Lugo), were jettisoning or throwing bales of cocaine from a go-fast vessel in the Caribbean Sea approximately 100 miles north of the coast of Colombia on or about May 1, 2017. In support of this Motion in Limine, Defendant Aguilar further shows:

1. On May 1, 2017, a U. S. Government aircraft encountered an about thirty (30) foot vessel about 71 miles at sea to the north of La Guajira, Colombia. The

aircraft observed the vessel's three crewmembers jettisoning objects into the sea. Subsequently, a U. S. Coast Guard boat crew arrested the three small boat crewmembers.

2. On May 9, 2017, Lugo, Carvajal, and Aguilar were indicted together in a two count indictment. Count One of the Indictment charges that from an unknown date continuing through on or about May 2, 2017, a conspiracy to possess with intent to distribute five kilograms of a mixture or substance containing a detectable amount of cocaine while onboard a vessel subject to the jurisdiction of the United States in violation of Title 46, U. S. C., Sections 70503(a), and 70506(a) and (b), and 21 U. S. C. Section 960(b)(1)(B)(ii). Count Two alleges that from an unknown date through on or about May 2, 2017, while onboard a vessel subject to the jurisdiction of the United States the three named co-defendants did knowingly and willingly and intentionally possess with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of 46 U. S. C. Sections 70503(a) and 70506(a), 18 U. S. C. Section 960(b)(1)(B)(ii).

3. The undersigned has reviewed the government's discovery evidence, pleadings, motions and responses, has met several times with the defendant, and has spoken with the codefendants' attorneys. From all the information provided it appears that this case is significantly different from all or the vast majority of the "boat cases" which have come before this District.

4. In the instant case, based upon a review of the Government's presently provided evidence, Mr. Aguilar and his two co-defendants were found on a go-fast vessel in the Caribbean Sea in International waters approximately 71 to 100 miles off the coast of Colombia. The government's witnesses claim that they observed and recorded the defendants jettisoning bales of cocaine from the go-fast vessel. (Doc 103, ¶ 1). The defendants claim that they were throwing gasoline canisters from the go-fast vessel, not bales of cocaine.

5. Video evidence provided by the Government which was filmed from a Maritime Patrol Aircraft (MPA) shows the defendants throwing about 12 to 15 canisters and arguably possibly other items overboard while travelling at a relatively high rate of speed. The canisters appear to be about fifteen gallons each. The MPA marked the geo-coordinates of the debris field. (Doc 103, ¶ 1).

6. The debris field was searched by the MPA and a small boat launched by the Coast Guard Cutter (CGC) DILIGENCE. (Doc 103, ¶ 2). A search of the debris field by the DILIGENCE's small boat did not result in the recovery of any bales of cocaine or contraband. (Doc 103, ¶ 2).

7. A Coast Guard boarding team boarded the go-fast vessel with the three defendants on board, and found no cocaine or contraband on the go-fast vessel. (Doc 103, ¶ 2). The Government's evidence shows that when boarded by Coast Guard personnel, the go-fast vessel was still carrying a relatively large quantity of

gasoline (Doc 103, ¶ 2), in part, contained in four (4) drums of about fifty-five gallons each, and several about 15-gallon canisters containing gasoline. The several plastic 15-galon canisters were similar to the canisters which were thrown overboard in the video.

8. Reportedly from the Government's discovery evidence, the USCG conducted seven (7) Ion Scan tests of the bodies of the defendants and the "go-fast" vessel. All the Ion Scan tests were found to be negative for cocaine or other illicit drugs. (Doc 103, ¶ 2). The Coast Guard Boarding Team reportedly drilled holes in the defendants' vessel looking for hidden compartments. The Coast Guard did not find any hidden compartments or illicit drugs.

9. According to reports received in discovery from the Government, upon arrival in the Middle District Mr. Aguilar and apparently the other two defendants waived their Miranda rights and were interviewed by federal law enforcement agents. During the interview with the agents Mr. Aguilar denied that he was transporting cocaine on the go-fast vessel and denied any knowledge of cocaine being on the vessel during the voyage. Mr. Aguilar informed the agents that he and the other crew members were transporting gasoline. Mr. Aguilar told the agents that transporting gasoline in the amount that was on the go-fast vessel is illegal in Colombia and is a criminal offense in Colombia. The agents' interviews with the defendants preceded the defendants' initial meetings with defense counsel and was prior to the defendants appearing in court for the first time.

10. The defendants requested that the Government return their clothing as their clothing would show that they had only been in contact with gasoline, not cocaine, consistent with their defense. (Doc 103, ¶ 4). When the defendants arrived in Tampa, FL where they were arrested, questioned and processed, the Government determined the clothes for all three defendants were dirty, wet, and contaminated. Doc 103, ¶ 3). The defendants' clothes were photographed and then discarded. (Doc 103, ¶ 3). The destruction of the defendants' clothes prevents them from presenting the clothes as corroborating evidence that they were illegally smuggling gasoline from Venezuela to Columbia rather than illegally smuggling cocaine. (Doc 103, ¶ 5).

11. The Government's position is that mariners engaged in maritime cocaine smuggling on go-fast vessels routinely come into contact with gasoline, because it is the fuel used by go-fast vessels. (Doc 103, ¶ 5). Moreover the government states that gasoline and sea water are routinely used by mariners smuggling cocaine to disguise or eliminate trace evidence of cocaine on their skin or clothing. (Doc 103, ¶ 5). In addition, the Government's position is the fact that the defendant's clothing was contaminated with gasoline would be equally consistent with illegally smuggling cocaine and/or fuel.

12. The Government has no basis to support any statements that the Defendants were jettisoning bales of cocaine from the go-fast boat on May 1, 2017. Any statements by the Government that the Defendants were jettisoning or throwing bales of cocaine off the

go-fast vessel would be pure speculation and therefore not admissible.

WHEREFORE, the Defendant, Adelberto Aguilar, prays that this Court will enter an order granting his motion in limine prohibiting the Government from mentioning in its opening statement and/or eliciting speculative testimony during its case-in-chief that the Defendants were jettisoning or throwing bales of cocaine from a go-fast vessel in the Caribbean Sea approximately 100 miles north of the coast of Colombia on or about May 1, 2017.

Dated December 22, 2017,

Respectfully submitted,

/Stephen J. Stanley
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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,		
Plaintiff,	CASE NO.:	8:17-cr-222-T-27 JSS
vs.	DATE:	01/02/2018
LENIN LUGO,	TIME:	8:43 a.m.
Defendant.	PAGES:	1 – 262

TRANSCRIPT OF TRIAL DAY 1
BEFORE THE
HONORABLE JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

(Filed Jun. 21, 2018)

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For the Defendant Ernesto Marquez Carvajal:

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Court Reporter: Lynann Nicely, RPR, RMR, CRR

[54] Your Honor.

THE COURT: Could you print that out for me, Charmaine? Mr. Ruddy?

MR. RUDDY: Your Honor, the MPA crew, who are experienced, have done this for years.

THE COURT: Did any of them use the word "cocaine"?

MR. RUDDY: No.

THE COURT: Then you can't say it. You can certainly repeat what they may – you may expect them to say during their testimony, but if they don't use the word cocaine, you shouldn't be using it either.

MR. RUDDY: Well, Your Honor, I anticipate that they will testify that in their opinion based on their observations and experience is that the bales that were thrown were bales of cocaine.

THE COURT: Well, I don't know that that's admissible testimony because that borders on expert testimony and I haven't heard the testimony yet.

MR. RUDDY: Right. I would submit it's admissible under 701.

THE COURT: Lay opinion?

MR. RUDDY: Yes, sir.

THE COURT: I don't think so. Not in a [55] criminal trial. All I'm suggesting – and I'm directing as well as suggesting – is that you not make any statements during opening statement using the word cocaine or attributing to any of the witnesses a statement of fact that will not be within their direct testimony. It's not a ruling on the admissibility yet, but I would be very careful about attributing opinion testimony to those on board the aircraft.

MR. RUDDY: Well, there is also an additional witness, Your Honor, that would be testifying as an expert.

THE COURT: Who is that?

MR. RUDDY: Senior Chief Guillermo Velazquez.

THE COURT: What does he have to do with the [56] case?

MR. RUDDY: He is a member of the Coast Guard and he's been involved in ion scan training and testing, he's been a law enforcement detachment petty

officer for a number of years and has been involved in counter drug operations and training for almost 20 years now.

THE COURT: What's he going to say?

MR. RUDDY: He's going to say that he's reviewed the videotape of the jettisoning and the

* * *

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,		
Plaintiff,	CASE NO.:	8:17-cr-222-T-27 JSS
vs.	DATE:	01/03/2018
LENIN LUGO,	TIME:	9:00 a.m.
Defendant.	PAGES:	1 – 80

TRANSCRIPT OF TRIAL DAY 2
BEFORE THE
HONORABLE JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

(Filed Jun. 21, 2018)

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Court Reporter: Lynann Nicely, RPR, RMR, CRR

[37] MR. RUDDY: 128.

THE COURT: That's the *Hernandez* case, 864 F.3d 1292.

MR. RUDDY: Oh, I'm sorry. I misread. I'm sorry, sir. Yes, sir. The *Williams* case is the case I'm talking about.

THE COURT: Touché. *United States v. Williams*, Mr. Marzullo, 865 F.3d 1328.

MR. RUDDY: Yes. My apologies, Your Honor. In the *Williams* opinion, Your Honor, it deals with a variety of issues very similar to what we have here. They're the same issues that were – we dealt with in a case in this courthouse that I tried in October of last year in front of Judge Kovachevich wherein there were bales that were jettisoned, and both the MPA crew was able to testify about their observations based on their experience and what they observed being jettisoned were consistent with bales of cocaine based upon their prior experience.

The boarding team members similarly were allowed to testify to that, as well as my maritime expert. The ion scan expert was Master Chief Guillermo Velazquez.

In the *Williams* case, Your Honor, the expert from the Coast Guard was Gustavo Tirado who [38] testified for me as an expert in this courthouse in front of Judge Bucklew in January of 2015 regarding ion scan evidence. He has since retired.

Master Chief Velazquez is the new Gus Tirado for the Coast Guard at TACLET South in Opa-Locka, Florida, and has similar experience and background in terms of having been involved in training in ion scan testing procedures with the Coast Guard for over 15 years, and also experienced in tactics of smugglers involved in this type of activity. So –

THE COURT: Does it not depend on the facts, Mr. Ruddy, and the qualifications of the lay witnesses based on their experience?

MR. RUDDY: Yes, sir. I –

THE COURT: Well, I haven't heard that yesterday.

MR. RUDDY: Okay.

THE COURT: I accept what you're saying by way of proffer, but there is a marked distinction between this case and *Williams*, which goes to the ultimate issue, is there not?

MR. RUDDY: Which is?

THE COURT: Do I have to answer my own questions?

MR. RUDDY: Well, the ion scan evidence was [39] negative.

THE COURT: In this case.

MR. RUDDY: Yes.

THE COURT: In *Williams* it was positive.

MR. RUDDY: Correct, and that is –

THE COURT: The Eleventh Circuit said under those circumstances the jury was free to draw reasonable inferences from all of the attendant circumstances.

MR. RUDDY: Right.

THE COURT: To find that the substance in the bales was in fact cocaine. I don't know how we get there in this case.

MR. RUDDY: Well, I – if you'll permit me, the Coast Guard expert will testify, as they did in *Williams* that items such as gasoline, diesel fuel, seawater, clothing, can all be masking agents. Master Chief Velazquez is prepared to testify that those can thwart and mask trace evidence, as well as wind conditions. You leave an item out in the open whether for a period of time, that trace evidence may dissipate, if not disappear entirely. And he is prepared to testify to that based upon his training and experience.

And *Williams* recognizes that in the opinion.

[40] In this case there was gasoline throughout this – when the Coast Guard boarded this vessel, throughout the go-fast vessel, they're seen dumping it on the videotape into the fish hold and places where the cocaine was.

They were driving 25 knots for over half an hour in high seas, 3- to 7-foot seas, and you can see the spray washing up over the vessel. The Coast Guard, the defendants were all soaked with gasoline and fuel in this case at the time it was boarded. And it's not uncommon – and they were wearing – one was wearing gloves, the other one was wearing – appeared to be a garbage bag on his person as a type of a shirt.

All those types of [inaudible] can serve to mask ion scan detection and that's what this expert is prepared to testify to. And I think it's both in the science, and I think that it would be appropriate to explain – for the jury to hear why these ion scan tests are negative.

THE COURT: That may be. And I will hear the evidence. But I'm suggesting that *Williams* goes a step further, and you may have a problem.

MR. RUDDY: I'm sorry? *Williams* has?

THE COURT: *Williams* goes a step further, and [41] you may have a problem. But certainly *Williams* stands for the proposition that a Coast Guard witness as a layperson, based on his or her professional experience, may very well testify that whatever objects they observed resemble or are similar in size or

appearance with bales of cocaine that they have observed on other missions. That's what *Williams* stands for.

MR. RUDDY: Yes, sir.

THE COURT: And I've read that. Mr. Marzullo, I hope that you will read it carefully. You certainly have the right to object if that's what Mr. Ruddy presents. I don't know, I'm assuming that's what he has.

MR. RUDDY: Yes, sir.

THE COURT: But the first I heard about cocaine bales was yesterday. So all I can tell you is that that all may be – in all due respect to my colleagues, those were different cases, different circumstances, and *Williams* begins with the acknowledgment that it's within the district judge's discretion to admit the testimony. And that means I will make an independent determination upon any objection.

You proceed at your risk, as you know, in [42] making an opening statement.

MR. RUDDY: Yes, Your Honor.

THE COURT: But I will still caution you that, unless you have a witness who can definitively say that the contents of these objects that they observed being jettisoned is and was cocaine, that should not be represented by the government in its opening statement.

MR. RUDDY: Right. Now, I can refer to defendant's post-arrest statement and his admissions to the – in the jail.

THE COURT: Well, the waterfront has changed, Mr. Marzullo, in that regard. There is no longer a Bruton problem. This is a statement attributed to your client, an admission against interest, assuming Mr. Palacio testifies as proffered yesterday.

MR. MARZULLO: Well, Your Honor, I agree that – that the landscape has changed. However –

THE COURT: I use "waterfront" because this is a maritime case. But go ahead.

MR. MARZULLO: Your Honor, as far as my client's statement, I would suggest to the court that, unless he testifies, that that statement not be admitted. He did not make any admission in that statement as far as cocaine.

* * *

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CASE NO.: 8:17-cr-222-T-27 JSS
vs.	:	DATE: 01/04/2018
LENIN LUGO,	:	TIME: 9:00 a.m.
Defendant.	:	PAGES: 1 – 241

TRANSCRIPT OF TRIAL DAY 3
BEFORE THE
HONORABLE JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

(Filed Jun. 21, 2018)

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Official Court Reporter
801 N. Florida Avenue, 13B
Tampa, Florida 33602

[101] he's – they have spotted a surface asset. They are talking to each other clearly.

Q Now they're underway?

A Now they're underway.

Q What just happened?

A Based on my experience, that appears to be a bale of cocaine.

MR. MARZULLO: Speculation.

THE COURT: Overruled.

BY MR. RUDDY:

Q What's happening there?

A Another bale of cocaine.

Q What happened there?

A Another bale of cocaine.

MR. MARZULLO: Continuing objection, speculation.

THE COURT: The objection is overruled. You may have a continuing objection.

BY MR. RUDDY:

Q What happened there?

A Another bale of cocaine.

Q What happened there?

A Another bale.

Q What happened there?

A Another bale and a tarp.

[102] Q How do you know it's a tarp?

A Based on my experience, it's used quite frequently in order to keep the sea states. They'll use it whenever they go dead in the water, they will sometimes pull a tarp over them so they blend in the water and they're not easily to detect. Another means is to coat the boat with a tarp in order to keep any trace of cocaine making contact to the vessel.

Q So was there a bale tossed there in addition to the tarp?

A There was one wrapped up in the tarp.

Q Can you see the tarp there?

A You can. Behind the stern of the boat.

Q Up here?

A Right.

Q What happened there?

Oh, my mistake. Excuse me.

What happened there?

A They're getting ready to load another bale out. There it goes.

Q All right. What happened there?

A Throwing out a bale of cocaine.

Q What happened there?

A Throwing out another bale.

[103] MR. MARZULLO: Continuing speculation, Your Honor, please.

THE COURT: Overruled.

(Video played.)

BY MR. RUDDY:

Q What's happening there?

A Just threw out another bale.

Q And you said they range from 35 to 50 kilos in your estimation?

A Correct.

Q What's going on there?

A Just threw out another bale of cocaine.

Q What happened there?

A Threw out a bale of cocaine.

Q What's that?

A Another bale of cocaine.

Q What's that?

A Another bale of cocaine.

Q What's that? A

A That appears to be an empty fuel barrel.

Q And that got airborne, huh?

A That's correct, with one guy.

Q The rest of those bales, how far did they go?

A They barely get them over the side of the boat.

* * *

[150] A Upwards of a hundred.

Q So it would be pretty much – if it's a large bale it would be fairly close to the weight of one of these cannisters of gasoline, correct?

A Full, correct.

Q Is it fair to say you're not 100 percent positive that what was being thrown from that boat were bales of cocaine, are you?

A Based off of my training and 10-plus years and what I've seen from these patrols, I would say that it was a bale of cocaine.

Q And you don't think it could have been anything else.

A Not based off of where they're at, their activity, their demeanor, condition of the boat, I would not speculate it to be anything other than bales of cocaine.

Q You would not speculate.

A I would not.

Q But it is speculation, isn't it?

A Based off any training I believe it was a bale of cocaine.

Q So you're firm on that, but you never actually physically touched any of the items that were on that boat?

[151] A On that boat, no, sir.

Q Would it be fair to say your opinion is an educated guess?

A I would not call it a guess, sir, no.

Q You wouldn't call it an educated guess, based on your training?

A I would say based off my training it was a bale of cocaine.

Q Now, you also testified that you think you saw a satellite phone being thrown overboard?

A We believe it was a small backpack. I did not say it's a – usually in those backpacks in the last items that are jettisoned before apprehension that they are

sat phones, they are GPS, they are number sheets, paperwork, et cetera.

Q Usually, right?

A Yes, sir.

Q Okay. So you cannot say with any degree of certainty that that's what it was because it was in a backpack, you couldn't see what was inside; is that right?

A Yes, sir.

Q So you're speculating.

A On that, right, yes, sir.

Q You're not speculating?

* * *

[179] Q So he points at you, that's a clue, right?

A Yep.

Q All right. So then what happens?

A Typically these guys just seeing us as the air asset, we can't do anything, we can't go down there and detain them or put them under arrest or anything like that. So they talk amongst themselves and that's what they did, they try to come up with a plan, look around, see if there is a boat in sight. Once they see a boat, that's when they start to run and jettison the bales.

Q Okay. And you reviewed the video; is that right?

A Yes, sir.

Q And what did you see being jettisoned by that target of interest?

A Based on my experience bales of cocaine.

Q Anything else?

A Two – initially two fuel drums where you could see them fuelling their main gas tanks. And then at the end of the video it looks like another drum-like object.

Q Did you see them pouring any gasoline onto the deck of the vessel?

A Yeah, I did, as they were fuelling their main

* * *

[187] Q It wasn't a replay of the initial clip, was it?

A No, sir.

THE COURT: Why don't we take a comfort break at this time. Let's take 10 minutes.

(The jury retired to the jury room.)

(Recess was taken from 3:09 until 3:21 p.m.)

THE COURT: I have been overruling objections. You can have a standing objection, but under the Williams case not only this witness but the last witness, based on their testimony and their experience, are able to share lay opinions with the jury and I find those opinions are actually based on their experiences.

We're talking about the bales and what they believe was in the bales.

I apologize for the temperature, although I have no control over it. I'm going to leave this door open unless the marshals or CSOs tell me otherwise, try to get some cross ventilation. The air is blowing, but it's probably just the air handler.

(The jury returned to the courtroom.)

THE COURT: We are ready to resume, Mr. Ruddy?

MR. RUDDY: No further questions, Your Honor.

THE COURT: Cross-examination, Mr. Marzullo?

* * *

[197] A Not based on my experience. They were rectangular, I've never seen a rectangular gasoline canister of that size.

Q You've never seen a rectangular gasoline canister?

A I don't know why they would still have – why would they throw the other gas canisters and keep those.

Q That's a good question, why would they? Would you agree that you were not able to identify any packages or bales of cocaine being thrown overboard

from the aircraft that you were flying in even with the zoom on your camera?

A I myself identified them as bales.

Q You did?

A Yes, based on my experience and the bales that have been recovered in the past, it's the exact same thing.

Q That was on May 1st that you identified them?

A May 1st when I was recording the video, yes.

Q And is it true that you could not identify any small items that you noticed being thrown overboard, identify them?

A Small items specifically? I couldn't tell you exactly. A phone, a GPS. That's typically what it

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