No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

LUIS GOMEZ-CASTRO, Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

_____

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

_____

APPENDIX

_____

839 Fed.Appx. 238
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Luis GOMEZ-CASTRO, Defendant - Appellant.

No. 18-4090
|
FILED December 23, 2020

Synopsis
Background: Defendant was convicted in the United States District Court for the District of Utah, No. 2:16-CR-00267-DN-1), David Nuffer, J., of possession of methamphetamine with intent to distribute, and was sentenced to 151 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Holmes, Circuit Judge, held that:

it would apply plain error standard of review, rather than de novo review, to District Court's challenged jury instructions;

District Court did not commit plain error by repeatedly instructed jurors they could talk about evidence before formal deliberations;

District Court did not abuse its discretion by denying defendant a new trial on basis of newly discovered evidence; and

District Court did not commit clear or obvious error by imposing two-level enhancement for obstruction of justice when sentencing defendant.

Affirmed.

Procedural Posture(s): Appellate Review.

***240** (D.C. No. 2:16-CR-00267-DN-1) (D. Utah)

Attorneys and Law Firms

Elizabethanne Claire Stevens, Esq., Jennifer Paisner Williams, Office of the United States Attorney, Salt Lake City, UT, for Plaintiff-Appellee

Kathleen A. Lord, Lord Law Firm, Denver, CO, for Defendant-Appellant

Before HOLMES, MURPHY, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT[*]

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

Jerome A. Holmes, Circuit Judge

Defendant-Appellant Luis Gomez-Castro appeals from his conviction and sentence for possession of methamphetamine with intent to distribute, pursuant to 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Mr. Gomez-Castro raises three arguments on appeal: first, that the district court committed three reversible errors in its jury instructions; second, that the district court abused its discretion in denying Mr. Gomez-Castro's motion for a new trial; and third, that the district court erred in imposing a sentence enhancement for obstruction of justice.

Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we reject Mr. Gomez-Castro's three arguments and **affirm** his conviction and sentence.

I

In early 2015, law enforcement agents of the Federal

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Bureau of Investigation ("FBI") began investigating Mr. Gomez-Castro—a resident of North Salt Lake, Utah—for suspected drug trafficking. As part of the investigation, a confidential informant named Reuban Morales provided FBI agents with Mr. Gomez-Castro's phone number. On August 14, 2015, the FBI obtained authorization to install a thirty-day wiretap on Mr. Gomez-Castro's phone.

The wire intercepted a series of twenty-nine phone calls by Mr. Gomez-Castro from September 8 to September 12, 2015, in which he arranged to purchase methamphetamine from a Mr. Fernando Lopez and another suspected supplier. At one point during his calls to Mr. Lopez, Mr. Gomez-Castro indicated that a load of methamphetamine was soon headed to the local area. Based on that statement, FBI agents made plans to seize the drugs and arrest Mr. Gomez-Castro. The agents enlisted the confidential informant, Mr. Morales, ***241** to help. At the FBI's direction, Mr. Morales ordered methamphetamine from Mr. Gomez-Castro.

On the morning of September 12, 2015, Mr. Gomez-Castro made several calls to the suspected supplier and arranged to meet him at a house early that afternoon. Mr. Gomez-Castro also called Mr. Morales and told him to come to his apartment. Not long after he arrived, both men left the apartment complex and drove separately to meet the suspected supplier. Two local police officers followed them to the meeting place. When they arrived at the house, they walked down a short driveway and met someone standing outside. The police officer surveilling the men did not want to be spotted, so he drove past the house and parked in a location where he could see Mr. Gomez-Castro's car but not see what exactly the three individuals were doing in the driveway. Nonetheless, after a fairly short period of time, the police officer saw Mr. Gomez-Castro and Mr. Morales walk back toward their vehicles and drive away separately from the house.

At approximately 2:00 p.m. on September 12, 2015, law enforcement officers executed a search warrant for Mr. Gomez-Castro's apartment. When they arrived, the officers found Mr. Gomez-Castro flushing methamphetamine down the toilet. Nonetheless, they managed to recover about forty-two grams of the drug. After his arrest, Mr. Gomez-Castro offered to work as an FBI informant. FBI agents initially agreed to this proposal, but within a few months they ended the arrangement, purportedly because Mr. Gomez-Castro put "very minimal effort" into it. R., Vol. III, at 356 (Trial Tr., dated Oct. 25, 2017).

II

A

On June 1, 2016, the government indicted Mr. Gomez-Castro on one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The indictment also alleged that Mr. Gomez-Castro committed this drug-trafficking offense under an aiding-and-abetting theory, pursuant to 18 U.S.C. § 2.

At trial, Mr. Gomez-Castro testified that his girlfriend, Ms. Elizabeth Figueroa, had become an informant for the Ogden, Utah Police Department to "work off her [drug-related] charges." R., Vol. III at 388 (Trial Tr., dated Oct. 25, 2017). To help Ms. Figueroa do so, Mr. Gomez-Castro claimed that he tried to obtain information on "people who had something so that I could tell her and she could give [the Ogden, Utah police] the information." *Id.* at 388. Mr. Gomez-Castro further claimed that he had also previously worked directly with the Ogden Police Department as an informant, although not at the time of his arrest. Still, Mr. Gomez-Castro testified that he thought that by arranging for a drug deal for Mr. Morales he could "get involved with people who had things so that I could find out who had them so that I could help [Ms. Figueroa]." *Id.* at 390.

Mr. Gomez-Castro also testified that Mr. Morales planted the methamphetamine in his apartment, and that he did not know it was there until the police arrived to execute the search warrant. According to Mr. Gomez-Castro, after meeting with the suspected supplier he drove around for twenty minutes "killing time" while Mr. Morales returned to the apartment and left a box with Ms. Figueroa without explanation. *Id.* at 390–91. Mr. Gomez-Castro insisted that once he returned home he repeatedly tried to call Mr. Morales, but he never answered, and that he only opened the box—which contained the methamphetamine—once he saw the police arriving.

***242** On cross-examination, when questioned about his alleged law enforcement informant handler in the Ogden Police Department, Mr. Gomez-Castro could only remember his first name, "Adam." *Id.* at 417. When asked about the names of the people whose contact information he provided to Adam, he was unable to remember any, other than an "Armando." *Id.* at 417–18. He was also questioned about his interview with an FBI agent on September 12 soon after his arrest. In particular, Mr. Gomez-Castro was asked why he did not tell the FBI

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agent that Mr. Morales had dropped off the methamphetamine in a box while he was gone, or that he was trying to help Ms. Figueroa work off charges from the Ogden police. Mr. Gomez-Castro replied, "[the FBI agent] was the one that was asking the questions there, and I couldn't do anything. He was the one asking the questions, and I just had to answer." *Id.* at 419–20.

The government called three witnesses in rebuttal. The first witness was an Ogden Police Department lieutenant who testified that he had never worked with a detective named "Adam," and that he knew of no detectives named "Adam" on the Ogden Police Department's Weber-Morgan Narcotics Strike Force, a multi-jurisdictional task force in Utah devoted to investigating drug offenses. He further testified that based on his review of the written records of informants working for the Crime Reduction Unit and the Weber-Morgan Narcotics Strike Force, no records indicated that either Mr. Gomez-Castro or Ms. Figueroa had been officially signed up as informants. However, the lieutenant acknowledged that a person could work as an informant without being signed up formally.

The government also called a Salt Lake City police officer who had arrested Ms. Figueroa for obstruction of justice and possession of methamphetamine in October 2014. The officer could not recall if Ms. Figueroa was ever officially signed up as an informant, but when asked if Ms. Figueroa ever worked for him the officer replied, "she never did anything that we would consider [ ] working for us." R., Vol. III, at 450 (Trial Tr., dated Oct. 26, 2017).

Finally, the government called the FBI agent leading the investigation to testify about the numerous drug-related phone calls made by Mr. Gomez-Castro and intercepted by the wiretap. Moreover, the agent testified that he reviewed Mr. Gomez-Castro's phone records and found no evidence that Mr. Gomez-Castro had tried unsuccessfully to call Mr. Morales numerous times after purportedly discovering the box left at his apartment. The agent also said that when he interviewed Mr. Gomez-Castro after his arrest on September 12, Mr. Gomez-Castro made no mention that he had worked, or was working, as an informant for the Ogden Police Department.

B

Partially at issue in this appeal are three instructions given to the jury throughout Mr. Gomez-Castro's trial. As a preliminary matter, we summarize each set of instructions here.

First, throughout the trial proceedings, the district court repeatedly instructed the jurors that they could discuss the evidence before formal deliberations began as long as they were all together in the jury room and no one else was present. For example, in its written preliminary jury instructions, the court informed the jurors:

> [U]ntil this trial is over, the only time that you may discuss the evidence is when you are all together so that (1) each of you is present during the discussion, (2) in the jury room, (3) with no one else present. If one of those three ***243** conditions is not met, you may not discuss the case. That means that under any other circumstances you are not to discuss the case with fellow jurors or anyone else or permit anyone to discuss it with you.

Supp. R., Vol. VI, at 43 (Prelim. Jury Instrs., Instr. No. 13, dated Oct. 24, 2017). At least twice throughout the trial, the district court judge gave similar instructions to the jurors. Mr. Gomez-Castro never objected to the instructions during his trial.

Second, in connection with the allegation that Mr. Gomez-Castro aided and abetted the possession of methamphetamine with the intent to distribute, the district court provided the following final instructions to the jury:

> You may also find the defendant guilty if you find he aided and abetted another in the commission of the crime charged. Aiding and abetting is simply another way of committing the offenses charged. The aiding and abetting statute, Section 2(a) of Title 18 of the United States Code provides that: [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is

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punishable as a principal.

Supp. R., Vol. VI, at 71 (Final Jury Instrs., Instr. No. 38, dated Oct. 17, 2017). At trial, defense counsel lodged several general objections to the court's aiding-and-abetting instructions but did not specify the grounds for the objection.

Finally, the district court supplied the following instructions on the elements of constructive possession for Mr. Gomez-Castro's charge for possession of methamphetamine with intent to distribute:

> As I have instructed you, you must determine whether the defendant "possessed" the controlled substance. The legal concept of possession may differ from the everyday usage of the term, so I will explain it in some detail.
>
> Actual possession is what most of us think of as possession; that is having physical custody or control of an object. For example, if you find that the defendant had the controlled substance on the defendant's person, you may find that the defendant had possession of the controlled substance. However, a person need not have actual physical custody of an object in order to be in legal possession of it. If an individual has the ability to exercise substantial control over an object that he does not have in his physical custody, then he is in possession of that item.
>
> Possession of a controlled substance cannot be found solely on the grounds that the defendant was near or close to the controlled substance. Nor can it be found simply because the defendant was present at a scene where the controlled substance was involved, or solely because the defendant associated with a person who does control the controlled substance or the property where the controlled substance is found. However, these factors may be considered by you, in connection with all other evidence, in making your decision whether the defendant possessed the controlled substance.

Supp. R., Vol. VI, at 63 (Final Jury Instrs., Instr. No. 30, dated Oct. 17, 2017). Mr. Gomez-Castro did not object to these instructions during his trial.

C

On October 26, 2017, a jury found Mr. Gomez-Castro guilty of possession of methamphetamine with intent to distribute. Sometime in mid-November 2017, before his sentencing, Mr. Gomez-Castro claimed that he finally remembered, for the first time, the name of the Ogden Police Department officer for whom he ***244** had worked as an informant: "Don Jensen." R., Vol. I., at 154 (Mot. for New Trial, dated Jun. 11, 2018). An investigator later tracked down a "Don Johnson," a former Weber-Morgan Narcotics detective in the Ogden Police Department. R., Vol. I, at 139 (Decl. of Craig Watson, dated May 10, 2018). Mr. Johnson indicated that he had been a member of the Weber-Morgan Narcotics Task Force in 2013 and 2014, and he recalled having used an informant during that period by the name of Luis Castro. The investigator sent a picture of Mr. Gomez-Castro to Mr. Johnson, and Mr. Johnson confirmed that he had used the person in the photo as a confidential source.

Mr. Gomez-Castro's sentencing hearing centered in part on his alleged work as an informant for Mr. Johnson and the Ogden Police Department. The presentence investigation report ("PSR") recommended a two-level enhancement in Mr. Gomez-Castro's Guidelines offense level. With this enhancement, his total advisory Guidelines sentencing range was 151 to 188 months of imprisonment.[1] The recommended sentence enhancement was based on the prosecution's assertion that Mr. Gomez-Castro had committed perjury at trial—namely, by falsely claiming to have worked as a police informant.

[1] The U.S. Probation Office used the 2016 edition of the Guidelines in calculating Mr. Gomez-Castro's advisory sentencing range. Mr. Gomez-Castro does not challenge this decision. Therefore, we also rely on this edition of the Guidelines in resolving this appeal.

Mr. Gomez-Castro objected to the PSR's recommended enhancement and indicated that the newly discovered Mr. Johnson could confirm his claims. In response, the PSR stated that Mr. Gomez-Castro had testified at trial that he was working for an officer named "Adam," not "Don." Moreover, the PSR concluded that even if the court were to find that Mr. Gomez-Castro was not deliberately untruthful on this matter, the court could still determine that an obstruction-of-justice enhancement was appropriate in light of other aspects of Mr. Gomez-Castro's trial testimony. At the sentencing hearing, Mr. Johnson testified that Mr. Gomez-Castro began working for him as an informant sometime around March 2014 and continued his work for somewhere between six months to a year. Mr. Johnson further testified that although, ideally, task force members formally signed up informants, it was not uncommon for

them to fail to do so.

The district court concluded that Mr. Gomez-Castro was subject to the two-level enhancement for obstruction of justice. The court reasoned that the testimony presented at the hearing established that Mr. Gomez-Castro never had any formal arrangement with the Weber-Morgan Task Force, that he had no formal authorization to purchase drugs, that any relationship he had with Don Johnson terminated well before the transaction in the current case, and that there was no agent or officer named "Adam" associated with the Task Force—despite Mr. Gomez-Castro's various claims at trial to the contrary. The court sentenced Mr. Gomez-Castro to a term of 151 months' imprisonment.

Mr. Gomez-Castro then filed a motion for a new trial. He argued that his recollection of Mr. Johnson's name after trial was newly discovered evidence justifying a new trial under Federal Rule of Criminal Procedure 33. The government countered that a new trial was not warranted because the sudden recollection of Mr. Johnson's name after trial did not make it newly discovered evidence. Moreover, the government argued that Mr. Johnson's testimony would not have changed the outcome of the trial because it merely confirmed several dispositive facts: that on September ***245** 12, 2015, Ms. Figueroa was not working off charges, that Mr. Gomez-Castro was not working for Mr. Johnson and had not worked for him for more than a year, that Mr. Gomez-Castro had never been authorized by Mr. Johnson to directly participate in drug deals, and that Mr. Gomez-Castro never worked for a detective named "Adam."

On July 6, 2018, the district court denied Mr. Gomez-Castro's motion for a new trial "for the reasons stated in the Government's Response." R., Vol. I, at 242 (Order Denying Mot. for New Trial, filed July 6, 2018). Mr. Gomez-Castro then filed this timely appeal from his conviction and sentence.

III

Mr. Gomez-Castro raises three claims in his appeal. First, he argues that three jury instructions from the district court amounted to reversible error: specifically, the court's instruction to the jurors authorizing them to discuss the evidence before formal deliberations, and its instructions concerning aiding-and-abetting liability and constructive possession—both of which allegedly omitted required intent elements. Second, he contends that the district court abused its discretion in denying his motion for a new trial. Finally, he insists that the district court erred in imposing a sentence enhancement for obstruction of justice. We consider—and reject—each of Mr. Gomez-Castro's claims.

A

Mr. Gomez-Castro first argues that the three jury instructions were erroneous. We address each instruction individually. But, we begin by discussing the standard of review that applies to all three jury-instruction claims.

1

Ordinarily, we "review de novo the jury instructions as a whole ... to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Vernon*, 814 F.3d 1091, 1103 (10th Cir. 2016) (quoting *United States v. Richter*, 796 F.3d 1173, 1185 (10th Cir. 2015)). Yet, as we discuss below, Mr. Gomez-Castro failed to properly object during his trial to all three instructions that he challenges here on appeal. That is, he failed to "inform the court of [his] specific objection" before the jury retired to deliberate. FED. R. CRIM. P. 30(d). Therefore, we shall review any alleged error in the instructions under the plain error standard of review. *See* *United States v. Visinaiz*, 428 F.3d 1300, 1308 (10th Cir. 2005) ("When no objection to a jury instruction was made at trial, the adequacy of the instruction is reviewed de novo for plain error."); *see also United States v. Zapata*, 546 F.3d 1179, 1190 (10th Cir. 2008) (noting that "a generalized objection to an instruction is insufficient to preserve a specific objection on appeal" and is "reviewed only for plain error").

A party seeking relief from a plain error must show "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012) (quoting *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011)). "An error seriously affects the defendant's substantial rights, as those terms are used in the plain-error test, when the defendant demonstrates 'that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.' " *United States v. Rosales-Miranda*, 755

F.3d 1253, 1258 (10th Cir. 2014) (quoting ***246** *United States v. Mendoza*, 698 F.3d 1303, 1310 (10th Cir. 2012)).

If these three factors are met, a court may correct the error on appeal if "it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cordery*, 656 F.3d 1103, 1105 (10th Cir. 2011); *see also United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) ("Under the plain error standard, 'even if a defendant demonstrates an error that is plain, we may only take corrective action if that error not only prejudices the defendant's substantial rights, but also seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " (quoting *United States v. Rivas-Macias*, 537 F.3d 1271, 1281 (10th Cir. 2008))).

Mr. Gomez-Castro concedes that he failed to object to two of the instructions—the one authorizing the jurors to discuss the evidence before formal deliberations and the one addressing constructive possession. At trial, Mr. Gomez-Castro lodged a general objection to the instructions on aiding-and-abetting liability. Yet he never specified "the grounds for the objection." FED. R. CRIM. P. 30(d). "Because the purpose of the objection is to give the court an opportunity to correct any mistake before the jury enters deliberations, an excessively vague or general objection to the propriety of a given instruction is insufficient to preserve the issue for appeal." *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 553 (10th Cir. 1999) (citation omitted).

Accordingly, in light of Mr. Gomez-Castro's failure to properly object at trial to the three jury instructions at issue, we review all three instructions under the plain error standard of review.

2

Mr. Gomez-Castro first contends that the district court committed reversible plain error when it repeatedly instructed jurors that they could talk about the evidence in the case before formal deliberations. We disagree. Instead, we conclude that this claim fails to satisfy the second prong of plain-error review, because any alleged error in these instructions was not "clear or obvious under current law." *McGehee*, 672 F.3d at 876.

At several points during the proceedings the district court informed the jurors that they could discuss the trial evidence before formal deliberations had commenced, so long as they were all together in the jury room and no one else was present. In its written preliminary jury instructions, the court instructed the jurors:

> [U]ntil this trial is over, the only time that you may discuss the evidence is when you are all together so that (1) each of you is present during the discussion, (2) in the jury room, (3) with no one else present. If one of those three conditions is not met, you may not discuss the case. That means that under any other circumstances you are not to discuss the case with fellow jurors or anyone else or permit anyone to discuss it with you.

Supp. R., Vol. VI, at 42 (Prelim. Jury Instrs., Instr. No. 13, dated Oct. 24, 2017). Later, during the trial, the district court judge twice reiterated these instructions in similar terms. For example, on the second day of trial the district court judge said:

> Remember you may not discuss the evidence in the case, and you don't have any evidence yet so don't worry about this right now. But you have to be present in the jury room, everybody all present, no one else present, door closed, then you can discuss the evidence.

***247** Supp. R., Vol. III, at 146 (Trial Tr., dated Oct. 25. 2017); *see also id.* at 294–95 (Trial Tr., dated Oct. 25 2017).

Mr. Gomez-Castro argues that these instructions are "contrary to longstanding and well-established law." Aplt.'s Opening Br. at 17. Yet he cites no Tenth Circuit or Supreme Court precedent to this effect. Instead, in his opening brief, he cites only one case from another circuit court, decided more than six decades ago, that merely notes "the generally accepted principle that it is improper for jurors to discuss a case prior to its submission." *Winebrenner v. United States*, 147 F.2d 322, 329 (8th Cir. 1945).

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A reversible plain error must be *plain*, i.e., "clear or obvious under current law." *McGehee*, 672 F.3d at 876. Mr. Gomez-Castro has failed to make this showing. He has not provided—nor have we uncovered—any Tenth Circuit or Supreme Court decision that holds that a district court is prohibited from permitting jurors to discuss evidence before formal deliberations, as the court instructed here.[2] Yet, ordinarily, for an error to be "contrary to well-established law, either the Supreme Court or this court must have addressed the issue." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (quoting *United States v. Thornburgh*, 645 F.3d 1197, 1208 (10th Cir. 2011)). Thus, even if the jury instructions here were erroneous, that error was hardly plain.

[2] We note that at least one prior panel of this court, in an unpublished opinion, has recently reached the same conclusion. *See United States v. Waldron*, 756 F. App'x 789, 800 (10th Cir. 2018) ("No Tenth Circuit or Supreme Court precedent has held that a district court commits error by allowing jurors to discuss a case before deliberations begin.")

3

Mr. Gomez-Castro also challenges the district court's jury instructions on aiding-and-abetting liability—specifically, the court's failure to instruct the jury concerning the requisite intent for such liability. We decline also to correct this error, however, because we do not believe—under plain error review—that Mr. Gomez-Castro has demonstrated that the error affected his "substantial rights." *McGehee*, 672 F.3d at 876.[3]

[3] When reviewing challenges to jury instructions that were forfeited at trial (that is, not raised at trial through inadvertence or neglect) involving claims that the instructions omit a requisite element, we repeatedly have focused on the third prong of plain error review—that is, the question of whether the error affected the defendant's substantial rights. *See, e.g.*, *United States v. Giannukos*, 908 F.3d 649, 654, 658 (10th Cir. 2018) (holding that by failing to properly instruct the jury on the definition of constructive possession "the district court erred and that error was plain" and "conclud[ing] that the erroneous jury instruction affected [the defendant's] substantial rights"); *United States v. Kalu*, 791 F.3d 1194, 1204 (10th Cir. 2015) (holding that the district court's failure to instruct the jury on the intent element of fraud was "error [that] was plain" but that the defendant "has not shown the error affected his substantial rights"); *see also* *United States v. Campbell*, 763 Fed. App'x 745, 748–49 (10th Cir. 2019) (unpublished); *United States v. Scott*, 747 F. App'x 728, 731 (10th Cir. 2018) (unpublished); *United States v. Martinez*, 749 F. App'x 698, 708 (10th Cir. 2018) (unpublished). For example, in the foregoing cited cases, we found that the omission of an element amounted to clear or obvious error, and our decisions have turned on the third prong of the plain error analysis. And the same is true here with respect to Mr. Gomez-Castro's remaining two instructional challenges.

Lastly, though Mr. Gomez-Castro does not cite to the case—much less argue that it is applicable here—we pause for clarity's sake to distinguish this situation from the one found in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In *Neder*, the Supreme Court held that, though it is a well-established matter of constitutional consequence, "the omission of an element is an error that is subject to harmless-error analysis." *Id.* at 15, 119 S.Ct. 1827. In the instance of such an omission, the question is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* at 15, 119 S.Ct. 1827 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). And there can be no doubt that the burden to establish harmlessness rests with the government. *See* *United States v. Rivera*, 900 F.2d 1462, 1470 n.5 (10th Cir. 1990) ("The prosecution bears the burden of proving that a constitutional error was harmless beyond a reasonable doubt."); *see also* *Chapman*, 386 U.S. at 24, 87 S.Ct. 824 (noting that the presence of "constitutional error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless."). But, importantly, the defendant in *Neder objected at trial* to the jury instructions that omitted the requisite materiality element of his alleged crimes. *See* *Neder*, 527 U.S. at 6, 119 S.Ct. 1827 ("In accordance with

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> then-extant Circuit precedent *and over Neder's objection*, the District Court instructed the jury that, to convict on the tax offenses, it 'need not consider' the materiality of any false statements." (emphasis added)). Here, however, Mr. Gomez-Castro failed to properly object at trial to any of the three purportedly deficient jury instructions. For that reason, we review his challenges to the jury instructions under the plain error standard of review. Consequently, on the question of prejudice, it is Mr. Gomez-Castro's burden to establish under the third prong of the plain error standard that any error affected his substantial rights—rather than the government's burden to establish that any error is harmless.

***248** We have made it clear before that aiding and abetting a drug possession with intent to distribute requires proof that "the defendant: (1) 'willfully associate[d] with the criminal venture,' and (2) 'aid[ed] such venture through affirmative action.' " *United States v. Delgado-Uribe*, 363 F.3d 1077, 1084 (10th Cir. 2004) (quoting *United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995)). That is, "[t]he government must prove, through direct or circumstantial evidence, more than mere presence at the scene of the crime even if coupled with knowledge that the crime is being committed." *Jones*, 44 F.3d at 869. More specifically, "some showing of intent to further the criminal venture must be introduced at trial." *Delgado-Uribe*, 363 F.3d at 1084.

Here, the government appropriately concedes that the jury instructions were clearly or obviously erroneous (i.e., plainly erroneous) for not including an intent requirement. Therefore, we move to the third prong of the plain error standard of review: whether the error affected Mr. Gomez-Castro's substantial rights. Mr. Gomez-Castro must show that this error was "prejudicial," such that it "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). He must demonstrate "a reasonable probability that but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Mr. Gomez-Castro argues that the error as to the aiding-and-abetting instruction "lessen[ed] the government's burden of proof and effectively depriv[ed] him of a defense to which he was entitled and which was supported by his own testimony." Aplt.'s Opening Br. at 22. Thus, he insists that if the court had included the intent requirement in its instructions, there is a reasonable probability he would not have been convicted.

The government counters by pointing to the extensive evidence presented at trial to establish that Mr. Gomez-Castro "participated in the criminal activity to make it succeed, and not to obtain useful information for law enforcement." Aplee.'s Resp. Br. at 36. Among the significant pieces of evidence that the government highlights are the following: twenty-nine phone calls ***249** Mr. Gomez-Castro placed between September 8 and September 12, 2015, arranging drug deals among Mr. Morales, Mr. Lopez, and his suspected supplier; testimony from law enforcement officers that Mr. Gomez-Castro and Mr. Morales, after leaving the supplier's home on September 12, arrived back at Mr. Gomez-Castro's apartment at the same time—undercutting Mr. Gomez-Castro's testimony that Mr. Morales, unbeknownst to him, went to his apartment and dropped off the box of methamphetamine; the fact that Mr. Gomez-Castro initially could not remember any information about his supposed law enforcement informant handler; and the fact that Mr. Gomez-Castro, by his own admission, last assisted local police as an informant in 2014, well before the drug deal at issue in September 2015. In light of all this evidence, the government insists that proper instructions on this issue "would not have made any difference." Aplee.'s Resp. Br. at 36

We likewise conclude that Mr. Gomez-Castro has not established that the instructional error affected his substantial rights. The overwhelming balance of the aforementioned evidence supports the conclusion that Mr. Gomez-Castro "willfully associate[d] with the criminal venture" and "aid[ed] such venture through affirmative action." *Delgado-Uribe*, 363 F.3d at 1084.

Mr. Gomez-Castro insists that all of the conduct in question just as easily confirms his claim that he acted only with the intent of gathering information to pass along to law enforcement authorities. We disagree. His own conduct and testimony belies that claim. His testimony that he had repeatedly tried to call Mr. Morales when he saw the box in his apartment is contradicted by his own phone records from that day. And he flushed the methamphetamine in the box down the toilet when the police first arrived at his residence—suggesting an intent to conceal or destroy evidence of criminal wrongdoing, rather than an intent to make such evidence available to

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law enforcement. *Cf.* *United States v. Williams*, 985 F.2d 749, 753 (5th Cir. 1993) ("Evidence of the defendants' concerted effort to dispose of the cocaine supports a reasonable inference that all three men both associated and participated in possessing the drugs."). Furthermore, at no point during his discussion with the FBI agent on September 12 did he mention his supposed work as local police informant. Even assuming that Mr. Gomez-Castro's exculpatory explanations for such damning evidence are plausible, they do not convince us that there is a reasonable probability—that if the jury had been properly instructed concerning aiding-and-abetting liability—the result of his trial would have been different.

In sum, given the evidence presented by the government at trial, Mr. Gomez-Castro simply cannot adequately establish the third prong of plain error review.

4

Lastly, Mr. Gomez-Castro challenges the district court's jury instruction on constructive possession for its failure to include intent to possess as a required element. But, we again conclude that Mr. Gomez-Castro has not shown that this error affected his substantial rights.

The district court instructed the jury that constructive possession exists when a person "has the ability to exercise substantial control over an object that he does not have in his physical custody." Supp. R., Vol. VI, at 63 (Final Jury Instrs., Instr. No. 30, dated Oct. 17, 2017). Yet, the United States Supreme Court has expressly held that "[c]onstructive possession is established when a person ... has the power *and intent* to exercise control over the object." ***250** *Henderson v. United States*, 575 U.S. 622, 135 S.Ct. 1780, 1784, 191 L.Ed.2d 874 (2015) (emphasis added). We, too, have expressly recognized that after the Supreme Court's holding in *Henderson*, "constructive possession requires *both* power to control an object and intent to exercise that control." *United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016) (emphasis added). The government rightly concedes that the district court's instructions were clearly or obviously erroneous in omitting this necessary component. But, at trial Mr. Gomez-Castro did not object to these instructions on the ground that they omitted the necessary intent element.

As a result, we resolve this challenge under the third prong of the plain error standard. Mr. Gomez-Castro contends that the erroneous instruction "may very well have affected the jury's verdict." Aplt.'s Reply Br. at 10. He argues that if the district court had properly instructed the jury, the jurors might have believed his testimony that he did not know about the methamphetamine in his apartment, and thus did not intend to possess it. *See* Aplt's Opening Br. at 24.

In response, the government directs us to *United States v. Simpson*, 845 F.3d 1039 (10th Cir. 2017). In that case, we faced essentially the same issue as here: whether the omission of the requisite intent element—that *Henderson* prescribes—in jury instructions on constructive possession was reversible plain error. In *Simpson*, we concluded that the omission would not have affected the outcome of the case—and thus, the challenge failed under the third prong of plain error review. As we reasoned in *Simpson*:

> For Count 1, the jury found not only that Mr. Simpson had possessed cocaine, but also that he had intended to distribute the cocaine. Mr. Simpson could intend to distribute the cocaine only if he intended to possess it, for he could not distribute something that he didn't have. *See United States v. Paredes- Rodriguez*, 160 F.3d 49, 55 (1st Cir. 1998) ("[I]t simply makes no sense to assert that the same jury that found that [the defendant] intended to distribute the cocaine could have simultaneously found that he did not intend to possess it."). Thus, we know that the instructional error did not affect the outcome on the charge of possession with intent to distribute.
>
> Because the jury found Mr. Simpson guilty on this count, we know that the jury would have found that Mr. Simpson had intended to possess the cocaine. In these circumstances, the outcome on Count 1 would likely have stayed the same with a legally correct instruction on constructive possession. Thus, we reject the challenge to Count 1 under the third element of the plain-error test.

Simpson, 845 F.3d at 1060.

We agree with the government that the logic of our decision in *Simpson* resolves the present jury instruction challenge. By convicting Mr. Gomez-Castro of possession with intent to distribute, the jury necessarily found that he intended to distribute the methamphetamine. And Mr. Gomez-Castro could only have intended to distribute the methamphetamine, if he also had an intention of possessing it, "for he could not distribute something that he didn't have." *Simpson*, 845 F.3d at 1060. Mr. Gomez-Castro makes no serious attempt to

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distinguish *Simpson*, nor do we see how he could.

In short, because the jurors found Mr. Gomez-Castro guilty of possessing methamphetamine with the intent to distribute, they would have necessarily found that he also intended to possess the methamphetamine under a proper instruction on constructive possession. Therefore, Mr. Gomez-Castro simply cannot ***251** show "a reasonable probability that but for the error claimed, the result of the proceeding would have been different." *Dominguez Benitez*, 542 U.S. at 82, 124 S.Ct. 2333.

B

Mr. Gomez-Castro next argues that the district court abused its discretion in denying his motion for a new trial. Under the Federal Rules of Criminal Procedure, a defendant may file a motion for a new trial on the grounds of "newly discovered evidence." FED. R. CRIM. P. 33(b)(1). A district court may vacate a judgment and grant a new trial "if the interest of justice so requires." FED. R. CRIM. P. 33(a). Here, we conclude that the alleged ground for Mr. Gomez-Castro's motion for a new trial—his recollection of the identity of Mr. Johnson—does not amount to permissible "newly discovered evidence" under Federal Rule of Criminal Procedure 33(b)(1).

We review a district court's denial of a motion for a new trial "for an abuse of discretion." *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999). An abuse of discretion occurs only if a decision is "based on an erroneous conclusion of law, a clearly erroneous finding of fact[,] or a manifest error in judgment." *United States v. Austin*, 231 F.3d 1278, 1282 (10th Cir. 2000) (quoting *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998)).

We have held that five requirements must be met before receiving a new trial on the grounds of newly discovered evidence. A Rule 33 movant in Mr. Gomez-Castro's position must show:

> (1) the evidence was discovered after trial; (2) the failure to discover the evidence was not caused by the defendant's lack of diligence; (3) the new evidence is not merely impeaching; (4) the new evidence is material to the principal issues [ ] involved; and (5) the new evidence would probably produce an acquittal in a new trial.

United States v. Pearson, 203 F.3d 1243, 1274 (10th Cir. 2000). Mr. Gomez-Castro has seemingly met the first, third, and fourth requirements; only the second and fifth requirements are truly at issue. We conclude that Mr. Gomez-Castro can satisfy neither.

Mr. Gomez-Castro argues that his failure to recall Mr. Johnson's name was not caused by his own lack of diligence for two reasons. First, he claims that it had been approximately three years since he had worked as an informant for Mr. Johnson, and, consequently, it was reasonable that he could not remember his name before the trial ended. Second, he contends that "[i]t was the prosecution's rebuttal case that made the newly discovered evidence so necessary," especially the police lieutenant's testimony that drew into question Mr. Gomez-Castro's claim that he had worked as an informant. Aplt.'s Opening Br. at 38.

We find neither reason persuasive. Mr. Gomez-Castro does not contend that he did not have sufficient time to prepare for trial. And, given that his defense turned in substantial part on his alleged cooperation with law enforcement, we are hard pressed to see how Mr. Gomez-Castro exercised due diligence in only recalling of his law enforcement handler after the trial. Moreover, Mr. Gomez-Castro's motion for a new trial makes clear that he had investigative resources at his disposal, so—even though his work for law enforcement may have occurred some three years prior—he was not obliged to rely on the specifics of his memory alone in discovering the identity of his handler.

His second argument fails for a related reason. It was not—as Mr. Gomez-Castro ***252** would have it—the government's rebuttal witness, the Ogden Police lieutenant, that "made the newly discovered evidence so necessary," Aplt.'s Opening Br. at 38, but rather the nature of his defense itself, which relied on his prior cooperation with law enforcement. Contrary to Mr. Gomez-Castro's assertion, this lieutenant did not foreclose the possibility that an informant could have worked for the Ogden police without being formally signed up as such. And, therefore, the lieutenant's testimony did not have the necessary effect of communicating to the jury that Mr. Gomez-Castro was "lying," Aplt.'s Opening Br. at 38, when he testified about his cooperation. Nor did the government's rebuttal

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create some new need on Mr. Gomez-Castro's part to identify his law enforcement handler. Thus, in our view, Mr. Gomez-Castro fails to show that his inability to remember Mr. Johnson's name before trial was not caused by his own "lack of diligence." *Pearson*, 203 F.3d at 1274.

Moving to the fifth requirement, we seriously doubt that the new evidence would probably produce an acquittal in a new trial. Mr. Gomez-Castro insists that the government's case relied heavily on suggesting that he was untruthful about his work as an informant and, thus, also untruthful about his purported motives for engaging in the drug-related activity. As a result, Mr. Gomez-Castro claims Mr. Johnson's testimony "would have so altered at least one juror's assessment of Mr. Gomez-Castro's credibility that the [trial's] outcome would have been different." Aplt.'s Opening Br. at 40.

But this argument simply ignores the abundance of other evidence—previously discussed at length—that casts serious doubt on the credibility of Mr. Gomez-Castro's claim that he was simply gathering information for local police. Therefore, we conclude that the district court did not abuse its discretion in denying Mr. Gomez-Castro's motion for a new trial.

C

Finally, Mr. Gomez-Castro argues that the district court erred in imposing a two-level sentence enhancement for obstruction of justice. For reasons discussed below, we conclude that Mr. Gomez-Castro forfeited this objection by failing to raise it properly before the district court. Thus, we shall review this decision under the plain error standard of review; again, this means that Gomez-Castro must initially show "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *McGehee*, 672 F.3d at 876. Viewed under this standard, we hold that the district court did not commit an error that was "clear or obvious under current law" when it imposed a two-level sentence enhancement for obstruction of justice. *Id.* at 876.

Section 3C1.1 of the Sentencing Guidelines requires a two-level upward adjustment to a defendant's offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. Perjury can be the basis for such an enhancement. *Id.* § 3C1.1 cmt. 4(B); *see also* *United States v. Dunnigan*, 507 U.S. 87, 92, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) ("[T]he phrase 'impede or obstruct the administration of justice' includes perjury, and the commentary to § 3C1.1 is explicit in so providing."); *United States v. Copus*, 110 F.3d 1529, 1536 (10th Cir. 1997) ("Obstruction of justice includes the offering of perjured testimony at trial."). A defendant commits perjury for the purposes of § 3C1.1 of the Guidelines if he "gives false testimony concerning a material matter with the willful intent to provide false testimony." ***253** *Dunnigan*, 507 U.S. at 94, 113 S.Ct. 1111.

Yet, in order to apply the § 3C1.1 enhancement, "a sentencing court must make a specific finding—that is, one which is independent of the jury verdict—that the defendant has perjured herself." *United States v. Massey*, 48 F.3d 1560, 1573 (10th Cir. 1995). This finding must encompass "all of the factual predicates of perjury." *Dunnigan*, 507 U.S. at 95, 113 S.Ct. 1111. That is, the court must find that a witness "(1) when testifying under oath, gives false testimony; (2) concerning a material matter; (3) with willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *Massey*, 48 F.3d at 1573. In determining whether each of these requirements has been satisfied, "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." *Dunnigan*, 507 U.S. at 95, 113 S.Ct. 1111. Additionally, "sentencing judges [must] specifically identify or describe the perjurious testimony before applying the enhancement under § 3C1.1." *Massey*, 48 F.3d at 1573. Here, the parties dispute whether the district court's findings satisfy § 3C1.1's requirements.

In support of its decision to impose the enhancement, the district court set forth the following findings:

> The testimony that I've heard today shows that this defendant had no formal arrangement ever with the Weber/Morgan Task Force, that he had no formal authorization to purchase drugs either with his own money or anyone else's money, that any relationship he had with Don Johnson terminated well

> before the transaction in this case; in fact, before five of the related conduct transactions ...; that there is no agent or officer named Adam associated with the Task Force, and that th[is] was the name that was given by the defendant at trial.

R., Vol. III, at 556 (Sentencing Hr'g., dated May 30, 2018). Mr. Gomez-Castro argues that these findings fail to satisfy the requirements established in *Dunnigan* and *Massey*. With the possible exception of the court's reference to the testimony regarding "Adam," Mr. Gomez-Castro argues that the court "failed to identify any specific testimony by Mr. Gomez-Castro that was both material and willfully false." Aplt.'s Opening Br. at 48. The government disagrees. It argues instead that the district court's findings were wholly sufficient because they encompassed all of the above-mentioned factual predicates of perjury and adequately identified the perjurious testimony.

As previously mentioned, we shall review the district court's decision to impose the sentence enhancement under the plain error standard of review. We do so because we conclude that Mr. Gomez-Castro failed to properly raise his objection to the enhancement in the district court. More precisely, the challenge that he now raises on appeal is not the same challenge that he raised before the district court. In the district court, Mr. Gomez-Castro objected to the sufficiency of the *evidence* to support an enhancement; that is, he argued that none of his testimony was perjurious. *See* Aplt.'s App., Vol. I, at 137 (Def.'s Resp. to PSR, filed May 18, 2018) ("Based on the post-conviction investigation, Defendant asserts that he testified truthfully regarding his undercover work with the narcotic's task force."). However, Mr. Gomez-Castro did not object to the sufficiency of the *court's findings* at the hearing; that is, he did not argue that the district court failed to "specifically identify or describe the perjurious testimony before applying the enhancement under § 3C1.1." *Massey*, 48 F.3d at 1573; *see* Aplt.'s App., Vol. III, at 559 (after announcing its sentence ***254** and its rulings on Mr. Gomez-Castro's PSR objections, including the one concerning the § 3C1.1 enhancement, the district court asked "[d]id I miss anything," and Mr. Gomez-Castro's counsel's answer did not raise the adequacy of the court's perjury findings).

This distinction between an objection to the substantive basis for a § 3C1.1 enhancement—*viz.*, an objection to the sufficiency of the evidence that the defendant committed perjury—and an objection to the sufficiency of the court's factual findings concerning the alleged perjury (per *Dunnigan* and *Massey*) is a real one and a matter of consequence on the question of preservation. *See United States v. Hawthorne*, 316 F.3d 1140, 1146–47 (10th Cir. 2003) (addressing separately the defendant's "attacks" on the § 3C1.1 enhancement, presented on the distinct "grounds" that, as a matter of substance, the defendant "did not commit perjury," and further, that "the district court's findings were inadequate"); *cf. United States v. Mendoza*, 543 F.3d 1186, 1191 (10th Cir. 2008) ("In this case, the government objected to the district court's proposed downward variance ... but did so solely on substantive grounds. A party must specifically object to the district court's procedure in order to preserve that issue for review."); *cf. also United States v. Hernandez-Lopez*, 320 F. App'x 832, 836 n.1 (10th Cir. 2009) (unpublished) ("While defense counsel vigorously disputed substantive dimensions of his client's sentence, after the court explained its reasons for rejecting counsel's variance arguments ..., counsel informed the court that it had no additional objections. It is far from clear whether counsel's substantive objections, coming *before* the court's explanations, put the court on notice that counsel viewed the court's *later* explanation for its sentence to be procedurally inadequate."). We thus conclude that Mr. Gomez-Castro forfeited his challenge to the district court's § 3C1.1 findings, and we review the adequacy of those findings under the plain error standard of review.

As noted, under the second prong of the plain-error analysis, Mr. Gomez-Castro must show that the alleged error was plain, i.e., "clear or obvious under current law," *McGehee*, 672 F.3d at 876. "Generally speaking, we do not deem an error to be obvious and clear unless it is contrary to current 'well-settled law'—that is, to the current law of the Supreme Court or the Tenth Circuit." *United States v. Wardell*, 591 F.3d 1279, 1298 (10th Cir. 2009). Mr. Gomez-Castro has not shown that he can satisfy this standard.

His argument that the district court erred in imposing the sentence enhancement is based on a misreading of *Massey* and *Dunnigan*. The standard set forth in those cases for the required perjury findings is simply not as stringent as Mr. Gomez-Castro suggests. After all, in *Massey* we said that a sentencing court "need not recite the perjured testimony verbatim," but rather need only describe the testimony in a manner such that when this court "review[s] the transcript ... [it need not] speculate on what the district court might have believed

was the perjurious testimony." *Massey*, 48 F.3d at 1574. Weighed against this standard, we cannot say that the district court's findings were clearly or obviously erroneous. The court effectively identified as perjurious Mr. Gomez-Castro's statements regarding his arrangement with the Weber-Morgan Task Force, the timing of his cooperation relationship with Don Johnson, his statements regarding a Task Force officer named Adam, and the purported basis for his drug purchases. These findings—viewed in totality—do not clearly require us to "speculate on what the district court might ***255** have believed was the perjurious testimony." *Massey*, 48 F.3d at 1574. Stated otherwise, it is not clear or obvious that these findings are erroneous under *Dunnigan* and *Massey*; therefore, under plain error review, they pass muster.

We underscore that, under the plain error standard of review, the burden of proof is not on the government to show that the perjury findings fully comply with the requirements set forth in *Dunnigan* and *Massey*. Instead, Mr. Gomez-Castro must show that the findings are clearly or obviously contrary to this precedent. This he cannot do. The district court did not commit an error that was "clear or obvious under current law" when it imposed a two-level sentence enhancement for obstruction of justice. *McGehee*, 672 F.3d at 876.

IV

For the foregoing reasons, we hold that the district court did not commit reversible error in its jury instructions, did not abuse its discretion in denying Mr. Gomez-Castro's motion for a new trial, and did not commit reversible error in applying an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1 to Mr. Gomez-Castro's Guidelines sentence. Thus, we **AFFIRM** the district court's judgment as to Mr. Gomez-Castro's conviction and sentence.

All Citations

839 Fed.Appx. 238

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CASE NO. 18-4090

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee	)
v.	)
	)
LUIS GOMEZ-CASTRO,	)
	)
Defendant-Appellant	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
The Honorable David Nutter, District Judge
D.C. No. Case No. 16-CR-267-DN-1

MR. GOMEZ-CASTRO'S PETITION FOR REHEARING

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APPENDIX B

Pursuant to Fed. R. App. P. 40 and 10th Cir. R. 40, Mr. Gomez-Castro respectfully asks this Court to grant rehearing on the following grounds.

I. The trial court committed reversible plain error when it: (1) told the jurors, including the alternate juror, that they could discuss the case and engage in pre-deliberations; (2) failed to inform the jury of the intent necessary to establish aider and abettor liability; and (3) failed to instruct the jury that constructive possession requires the intent to control the item(s) possessed.

A. Pre-Deliberation Instructions

1. The Court overlooks a significant problem with these instructions.

The district court repeatedly instructed the jurors, including the alternate juror, that they could discuss the case before deliberations so long as all thirteen of them were in the jury room. Opinion at 7. These instructions, though not objected to, were challenged on two grounds. *See* Op. Brief at 16-17. First, the instructions expressly permitted jurors to discuss evidence prematurely, i.e., before all the evidence was admitted, before the arguments of counsel, and before the court instructed the jury on the law. And, second, the instructions permitted the jurors to discuss the evidence with the alternate juror, an individual who ultimately would not be a juror charged with deliberating and deciding guilt or innocence.

This Court's opinion, like the government's brief, overlooks entirely this second, distinct problem with the court's pre-deliberation instructions, which permit the alternate to discuss the case with the twelve actual jurors who would ultimately

decide the case. *See* Opinion at 15-17.

2. Mr. Gomez-Castro established that the pre-deliberation instructions were clear and obvious error.

This Court rejected Mr. Gomez-Castro's plain error challenge to the pre-deliberation instructions because it found he failed to establish that any error was "clear or obvious under current law." *Id.* at 16. In so ruling, this Court appears to have overlooked substantial authority cited by Mr. Gomez-Castro that supports his premise that a jury instruction which affirmatively allows jurors and an alternate to engage in premature deliberations is clear and obvious error.

This Court notes that Mr. Gomez-Castro cites to only one case in his opening brief for his premise that the challenged instructions were "contrary to longstanding and well-established law." *Id.*, citing *Winebrenner v. United States,* 147 F.2d 322, 329 (8th Cir.1945). But Mr. Gomez-Castro's initial brief also cites to this Circuit's pattern instruction, which likewise reflects the well-established rule that jurors should be admonished to refrain from discussing a case until they have all the evidence, arguments and instructions. Opening Brief at 17, n.2.

Mr. Gomez-Castro provided additional support for the proposition that courts should always "admonish juries at the outset of trial not to discuss the case with anyone before the conclusion of trial." *United States v. Resko*, 3 F.3d 684, 689 (3d Cir.1993), citing *United States v. Wiesner*, 789 F.2d 1264, 1269 (7th Cir.1986)

("Admonishing the jury [regarding premature deliberations] is a critical and important duty and cannot be over-emphasized.") (multiple additional citations omitted); *see also United States v. Jadlowe,* 628 F.3d 1, 18-19 (1st Cir.2010); *see also United States v. Hart,* 729 F.2d 662 at n. 10 (10th Cir.1984)(courts should admonish jurors to not discuss the case with themselves or with others during the course of the trial), *citing as an illustrative instruction* 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §10.14, at 273–74 (3d ed.1977).

Given the courts' long-recognized requirement of admonishing jurors to refrain from premature deliberations, the court's affirmative pre-deliberation instructions that jurors may do the opposite, i.e., discuss the case before the close of evidence, qualifies as clear and obvious error.

B. Erroneous Aiding and Abetting Instruction

This Court finds the aiding and abetting instruction was obvious error, since it omitted the requisite intent for aider and abettor liability. Opinion at 19. The Court, however, found that this error did not affect Mr. Gomez-Castro's substantial rights, because the "overwhelming balance of the … evidence supports the conclusion that Mr. Gomez-Castro 'willfully associate[d] with the criminal venture' and 'aid[ed] such venture through affirmative action.'" *Id.* at 20-21.

The Court should reconsider this ruling because it was for a properly

instructed jury to assess the relative weight of the disputed evidence and for it to decide whether the government had proven all the elements of the offense. Since the government charged aider and abettor and requested the jury be instructed on such liability, it was incumbent on the court to properly instruct the jury as to what the government must prove to establish guilt based on aider and abettor liability.

When, as here, a defendant testifies and disputes that he has the requisite intent, instructions that do not require the jury to find the requisite culpable mental state beyond a reasonable doubt, and which allow the jury to convict even if they believe the defendant's testimony that he lacked the required intent, do affect the defendant's substantial rights and, thus, constitute reversible plain error.

C. Erroneous Constructive Possession Jury Instruction

It is undisputed that this instruction, too, was plainly erroneous because it omitted the required intent, in this instance the intent to exercise control over the charged methamphetamine. The Court, however, relies on *United States v. Simpson,* 845 F.3d 1039 (10th Cir.2017) to find Mr. Gomez-Castro did not establish this error affected his substantial rights. In so holding, the court writes that "Mr. Gomez-Castro makes no serious attempt to distinguish *Simpson*, nor do we see how he could." Opinion at 24.

It appears the Court has overlooked just such an attempt by Mr. Gomez-

Castro. *See* Reply Brief at 12-14. In *Simpson,* the jury found the defendant guilty of possession with intent to distribute. In doing so, the jury necessarily found the defendant intended to distribute the cocaine. Since the defendant could only intend to distribute something he intended to possess, i.e., exercise control over, the jury's findings necessarily established the requisite intent for constructive possession. Thus, the *Simpson* Court could be confident that the instructional error did not affect the outcome on the charge of possession with intent to distribute.

In contrast, because of the erroneous aider and abettor instruction in this case, the jury was not required to find that Mr. Gomez-Castro intended to distribute the charged drugs. Thus, the Court errs when it concludes, based on the logic of *Simpson,* that "[b]y convicting Mr. Gomez-Castro of possession with intent to distribute, the jury necessarily found that he intended to distribute the methamphetamine." Opinion at 24. The jury in this case, as instructed on aider and abettor liability, was not required to find an intent to distribute. And without such a finding, this Court cannot logically conclude that the jury necessarily found the required intent for constructive possession.

This case is distinguishable from *Simpson,* because the jury's determination that Mr. Gomez-Castro was guilty of possession with intent to distribute was tainted

by the erroneous aider and abettor instruction, which omitted the required mens rea and did not require the jury to find the intent necessary for possession with intent to distribute. *Compare Simpson, supra* at 1059.

Since both Mr. Gomez-Castro's intent to distribute and intent to possess were disputed issues at trial, the failure to properly instruct the jury on these critical elements may very well have affected the jury's verdict. Unlike the unquestioned jury finding on possession with intent to distribute in *Simpson,* the findings underlying the jury's verdict in Mr. Gomez-Castro do not necessarily support the findings required for constructive possession, i.e., that Mr. Gomez-Castro had the requisite knowledge of what was in the box in his apartment, combined with the intent to exercise control over and distribute the methamphetamine in the box. *See Henderson v. United States,* 135 S.Ct. 1780 (2015); *United States v. Little,* 829 F. 3d 1177 (10th Cir.2019).

Moreover, as Mr. Gomez-Castro also argued in his reply brief, the court's analysis in *Simpson* actually lends support to his claim of reversible plain error. The *Simpson* Court looked at three categories of convictions: one count of possession of drugs with intent to distribute, which is discussed above, two counts of unlawful possession of an unregistered shotgun and ammunition, and ten counts of unlawful possession of handguns and ammunition. *See id.* at 1061-1063.

With respect to the last category, the court found the third element of reversible plain error because others had access to the items and "[a] plainly erroneous jury instruction affects a defendant's substantial rights if the instruction concerns a principal element … of the crime, thus suggesting that the error affected the outcome of the case." *Id.* at 1061, quoting *United States v. Duran,* 133 F.3d 1324, 1330 (10th Cir.1998) (internal quotation marks omitted). In this case, the primary, if not only disputed element was whether Mr. Gomez-Castro had the requisite intent to possess or distribute the methamphetamine found in his apartment.

Although the government in *Simpson* pointed to evidence that would support a finding of the requisite intent for unlawful possession of handguns, the court noted that the pertinent evidence had been impeached and the jury was free to credit whichever testimony it chose to believe. *See id.* at 1062. The same is true here.

The *Simpson* Court also found the fourth element required for plain error--that the "instructional error seriously affected the fairness, integrity or public reputation of the proceedings." *Id.* The failure to instruct on an essential element of the crime satisfies the fourth element of the plain-error test because the government's evidence was neither overwhelming nor uncontroverted. *Id.* at 1063, citing *United States v. Wolfname,* 835 F.3d 1214, 1223 (10th Cir.2016).

In this case, the jury could have chosen to believe the defendant's testimony

that he did not know about the methamphetamine in the box left by informant Reuben Morales and, so, did not intend to exercise dominion over the contraband. However, given the erroneous instruction, this testimony would not provide a defense to possession with intent to distribute because it is not inconsistent with the "ability" to control the drugs, which is all the erroneous constructive possession required. As instructed, the jury was not required to find the necessary intent to control the drugs, the very intent that Mr. Gomez-Castro denied.

Simpson is also instructive in the manner in which the court found no reversible plain error vis-à-vis the two counts of unlawful possession of a shotgun. On these counts, the court ruled the defendant could not show a reasonable likelihood of a different outcome due to the erroneous instruction and the undisputed testimony at trial. *See id.* at 1061. Specifically, police discovered a loaded shotgun in Simpson's garage, and an officer testified that Simpson had admitted holding the shotgun and trying to sell it. "Simpson did not impeach the officer or present any evidence contradicting the officer's testimony." *Id.* In contrast, at Mr. Gomez-Castro's trial, the relevant evidence of possession with the required intent to possess was much disputed. The erroneous instruction denied Mr. Gomez-Castro a defense based on his testimony that he did not intend to possess or intend to distribute the methamphetamine found in his apartment.

D. The Aggregate Prejudicial Effect of Instructional Error Requires Reversal.

This Court did not consider whether, as Mr. Gomez-Castro argued on appeal, the aggregate prejudicial effect of the three challenged instructions required reversal. *See* Opening Brief at 26-27; Reply Brief at 13.

While the government's case was sufficient to prove guilt, it was not bullet proof, as jurors are free to believe parts or all of any witness's testimony, and Mr. Gomez-Castro's testimony contradicted the government's case. Under these circumstances, the district court's failure to instruct the jury on two required and disputed intents was serious error and allowed the jury to convict without requiring the government to prove all elements of the crime beyond a reasonable doubt.

In reviewing the claims of instructional error "individually," Opinion at 12, Section III(A), the Court fails to consider whether the erroneous aider and abettor instruction undermines its conclusion vis-à-vis the constructive possession instruction that the jury necessarily found the defendant possessed the intent to distribute drugs and, thus, necessarily had the requisite intent for constructive possession--the intent to exercise control over the drugs. If the Court were to look at the two clearly erroneous instructions together, it should reach a different result as to whether Mr. Gomez-Castro has shown the error(s) affected his substantial rights

by eliminating two disputed intent elements from the jury's consideration and allowing for conviction, even if the jury believed Mr. Gomez-Castro's testimony.

III. The §3C1.1 two-level enhancement for obstruction of justice is not supported by adequate findings by the court or sufficient proof by the government.

This Court should reconsider its application of plain error review and vacate Mr. Gomez-Castro's sentence, because the prosecution failed to establish the §3C1.1 enhancement, and the court did not (1) find that Mr. Gomez-Castro gave false testimony, concerning material matters with willful intent to provide false testimony or (2) identify any perjured testimony.

When, as here, the defendant objects to the application of §3C1.1, denies any perjury and presents evidence that supports the veracity of his trial testimony, he has preserved his objection to the §3C1.1 enhancement. Many appellate cases review the adequacy of a court's findings vis-à-vis an obstruction of justice enhancement without applying plain error review and without mentioning whether the defendant objected to the court's findings. *See, e.g., United States v. Hawthorne*, 316 F.3d 1140, 1145–47 (10th Cir.2003); *United States v. Yost*, 24 F.3d 99, 106-107 (10th Cir.1999); *United States v. Copus,* 110 F.3d 1529, 1537 (10th Cir.1997); *United States v. Smith*, 81 F.3d 915, 918-919 (1996).

While Mr. Gomez-Castro has argued that the court's findings are inadequate to support the enhancement, his quarrel is with the application of the two-level enhancement to his sentence on the basis of perjury, an issue that was properly before the district court. "By 'informing the court' of the 'action' he 'wishes the court to take,' Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision." *Holguin-Hernandez v. United States,* 140 S. Ct. 762, 777 (2020). Although the Court in *Holguin-Hernandez* did not consider "what is sufficient to preserve a claim that the trial court used improper *procedures* in arriving at its chosen sentence," as the government asked it to do, the Court's guiding, common-sense notion that an issue is preserved when the claim is brought to the court's attention has applicability here.

By denying perjury and objecting to the §3C1.1 enhancement, Mr. Gomez-Castro put the government on notice of what it must prove and put the court on notice of the findings it must make pursuant to controlling precedent. *See* Opinion at 29-30 for the required findings.

A. This Court addressed only a portion of the sentencing issue raised by Mr. Gomez-Castro.

Mr. Gomez-Castro challenged the §3C1.1 enhancement on the ground it was "not supported by adequate findings *or proof*." Opening brief at 41 (emphasis added). His core argument was that when, as happened here, a defendant objects

to the application of an obstruction of justice enhancement based on allegations of perjury, "the court must find, *and the government must prove by a preponderance of the evidence*, that the defendant willfully testified falsely as to material matters" and, in this circuit, the court must also identify the testimony it believes to be perjurious. *Id.* (emphasis added and citations omitted). This Court's decision deals only with the district court's findings and does not address whether the prosecution met its burden of establishing that Mr. Gomez-Castro committed perjury. *See* Opinion at 28.

Here, the government was on notice that it was required to prove specific incidents of perjury and it failed even to identify any such incidents. Moreover, the government's cross-examination of Don Johnson at sentencing did not show that Mr. Gomez-Castro willfully testified falsely as to any material fact, as required for application of the 3C1.1 enhancement. *See* Argument III, Opening and Reply Briefs.

There has been no argument that Mr. Gomez-Castro's challenge to the prosecution's proof is not preserved. It was preserved when he objected to the obstruction of justice enhancement and presented evidence at sentencing to refute the inference of perjury.

B. This Court erroneously applied plain error review.

As indicated above, a defendant's argument that the district court's findings do not support the application of §3C1.1 should not be subject to plain error review when the defendant has objected to the applicability of the enhancement on the basis that he has not perjured himself. On appeal, the question is whether the court's findings support the enhancement. If they do not, or if they are insufficient to permit adequate appellate review, the sentence should be vacated and the cause remanded.

1. The Court sua sponte raised the issues of preservation and plain error review at oral argument.

In its brief, the government never claimed that Mr. Gomez-Castro failed to preserve this issue or that plain error review applied. Answer Brief at 52-57. Rather, it agreed that the district court's legal interpretation of the Guidelines was subject to de novo review and its factual findings for clear error. *Id.* at 52. The government's failure to raise any issue of preservation is understandable since it was clear to the parties that Mr. Gomez-Castro objected to the application of the §3C1.1 enhancement and this issue was litigated at sentencing. *See* Vol.II at 343, PSR (probation officer notes defense objection and defers resolution of the §3C1.1 enhancement to the court). Thus, the parties understood the issue of whether the district court had properly found the enhancement to be preserved.

The question of preservation was raised by this Court sua sponte for the first time during oral argument, one that was set by the court after both parties indicated that Mr. Gomez-Castro's appeal could be decided without argument. *See* https://www.ca10.uscourts.gov/oralarguments/18/18-4090.MP3 at 11:30-29:27; 46:24-47:27.

At argument, the government admitted that its motion requesting the two-point obstruction of justice enhancement was "sparce" and that it had not raised any issue regarding preservation.[1] However, government counsel also indicated that, in preparing for the argument, counsel had found some unpublished cases which agreed with the court's argument that a defendant must object after the court makes its findings to preserve an objection that the court's findings were inadequate.[2] *Id.* circa 14:44. When Judge Holmes directly asked whether the government agreed with him that this issue was not preserved, counsel for the government agreed. *Id*.

[1] The government's pleading asserted only that "Defendant testified at trial regarding material issues in the case; on cross-examination and during its rebuttal case, the government established that defendant's testimony was not truthful." Vol.I at 131.

[2] The unpublished cases referred to by the government were never identified at oral argument or submitted as supplemental authority. In addition, this Court's decision on forfeiture does not cite any case that specifically requires a defendant to object to the court's findings vis-à-vis perjury and the enhancement

In light of this procedural history, there is a real question whether the government waived any argument that Mr. Gomez-Castro forfeited his right to raise this claim.

2. In applying the plain error standard of review, the Court did not consider whether the government waived any argument that Mr. Gomez-Castro forfeited his right to challenge the court's findings.

This Court recognizes that the government's failure to raise forfeiture may waive any right to assert forfeiture or obtain plain error review. *See, e.g., United States v. Rodebaugh,* 789 F.3d 1281, 1306-08, 1314-1318 (10th Cir.2015); *United States v. DeVaughn,* 694 F.3d 1141 (10th Cir. 2012); *see also United States v. Menesses*, 962 F.2d 420, 426 (5th Cir.1992)(refusing to recognize the government's waiver argument when argument not made until oral argument, and deciding "[t]he government cannot, at this late date, alter its proposed standard of review").

Here, the government has suggested no reason why its waiver should not preclude the application of forfeiture and plain error review in this case.

C. The Section 3C1.1 two level enhancement should be reversed even if plain error review is applied.

Since the question of issue preservation, forfeiture and plain error review was never raised by the government, it was not briefed by the parties. Instead, as discussed above, the parties addressed these issues solely in response to the court's questions at oral argument.

This Court's determination that the district court's findings do not constitute clear error overlooks *United States v. Medina-Estrada,* 81 F.3d 981, 987 (10th Cir.1996). To prove this point, Mr. Gomez-Castro will quote at length from *Medina-Estrada.*

> "In order to apply the § 3C1.1 enhancement, it is well-settled that a sentencing court must make a specific finding—that is, one which is independent of the jury verdict—that the defendant has perjured [himself]." *United States v. Massey,* 48 F.3d 1560, 1573 (10th Cir.) …. "A finding of perjury in support of a sentence enhancement for obstruction of justice must contain two components." *United States v. Smith,* 81 F.3d 915, 918 (10th Cir.1996). First, the finding must encompass all of the factual predicates of perjury as required by *United States v. Dunnigan,* 507 U.S. 87, 94 (1993). The factual predicates of perjury are that a defendant (1) while testifying under oath or affirmation, gave false testimony, (2) concerning a material matter, (3) with willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. *Smith,* 81 F.3d at 918; *Massey,* 48 F.3d at 1573. Second, the finding must specifically identify the perjured testimony. *Smith,* 81 F.3d at 918; *United States v. Arias–Santos,* 39 F.3d 1070, 1077 (10th Cir.1994). The district court need not recite the perjured testimony verbatim. Rather, [t]he district court may generally identify the testimony at issue from his or her trial notes or memory and it is sufficient if such testimony is merely described in substance so that when we review the transcript we can evaluate the *Dunnigan* findings of the elements of perjury against an identified line of questions and answers without having simply to speculate on what the district court might have believed was the perjurious testimony. *Massey,* 48 F.3d at 1574. *See also United States v. Owens,* 70 F.3d 1118, 1132 (10th Cir.1995)(citing *Massey*).

> Here the district court's findings adequately identify Medina-Estrada's perjurious trial testimony. However, the findings fail to set forth all of the requisite factual predicates of perjury. Specifically, the district court did not find, even generally, that Medina–Estrada was untruthful about a *material matter* nor that he *willfully intended* to provide false testimony. *See Smith,* 81 F.3d at 919 (findings insufficient because missing findings of materiality and willfulness); *Massey,* 48 F.3d at 1573 ("[m]issing from the district court's findings are the necessary findings on materiality and willfulness").
>
> Here, the district court's finding of perjury did not encompass all of the requisite factual predicates. Accordingly, the district court's finding of perjury was clear error.

The district court's findings in Mr. Gomez-Castro's case were at least as deficient as those in *Medina-Estrada* and, thus, constitute clear error and meet the second prong of plain error review. *See* Opening Brief at 46-48; Reply Brief at 16-17.

In *Medina-Estrada,* the "clear error" did not require remand because the district court had made clear that it would impose the same sentence even if there had been no enhancement for obstruction. The same is not true in Mr. Gomez-Castro's case where the court imposed the minimum possible Guideline Sentence, given the two-point §3C1.1 enhancement. Under these circumstances, Mr. Gomez-Castro has established that his substantial rights have been affected and his sentence must be vacated.

CONCLUSION

Mr. Gomez-Castro asks that this Court grant rehearing for the reasons set forth above and in the briefs.

LORD LAW FIRM, LLC

s/ Kathleen A. Lord
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Section 1. Word count

1.This petition complies with the type-volume limitation of Fed. R. App. P. 32 and 40, as it contains 3858 words. I relied on my word processing program to obtain the count and it is MICROSOFT WORD 2010.

2.This petition complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using MICROSOFT WORD 2010 in Times New Roman 14-point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Date: March 8, 2021

s/ Kathleen A. Lord
KATHLEEN A. LORD

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing petition:

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program McAfee Virus Protection and, according to the program, is free of viruses.

s/ Kathleen A. Lord

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I electronically filed this petition using the CM/ECF system, which will send notification of this filing to the following e-mail addresses:

Jennifer P. Williams, Assistant United States Attorney
Jennifer.Williams2@usdoj.gov

s/ Kathleen A. Lord
KATHLEEN A. LORD

FILED
United States Court of Appeals
Tenth Circuit

March 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS GOMEZ-CASTRO,

Defendant - Appellant.

No. 18-4090
(D.C. No. 2:16-CR-00267-DN-1)
(D. Utah)

ORDER

Before **HOLMES**, **MURPHY**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Utah

UNITED STATES OF AMERICA
v.
LUIS GOMEZ-CASTRO

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX 2:16-CR-00267-001 DN

USM Number: 24768-081

Steven Killpack
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B)	Possession of Methamphetamine With Intent to Distribute		1

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

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

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

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

5/30/2018
Date of Imposition of Judgment

Signature of Judge

David Nuffer, U.S. District Court
Name and Title of Judge

1 June 2018
Date

APPENDIX D

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

IMPRISONMENT

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

151 months. Upon release from custody of the Federal Bureau of Prisons or U.S. Marshals Service, the defendant shall be remanded to the custody of the Federal Bureau of Immigration and Customs Enforcement for deportation proceedings.

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

Defendant be designated and housed at a BOP facility located as close to Utah as possible to facilitate family visitation - either in Colorado or Arizona.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 60 months.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

SPECIAL CONDITIONS OF SUPERVISION

1. If deported, the defendant shall not illegally reenter the United States. If the defendant returns to the United States during the period of supervision, or is not deported, he is instructed to contact the U.S. Probation Office in the District of Utah within 72 hours of arrival in the United States, or release from custody.

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

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

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

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

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

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LUIS GOMEZ-CASTRO
CASE NUMBER: DUTX 2:16-CR-00267-001 DN

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

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

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

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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