

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA \* \*

Plaintiff \* Crim. No. 15-462 (JAG)  
Defendant no. 60

vs. \*

JOSE RESTO \*

Defendant \*

\* \* \* \* \*

**MOTION FOR JUDGEMENT OF ACQUITAL UNDER**  
**RULE 29 OF THE FED. R. CRIM. PROC.**

HON JAY A. GARCIA GREGORY  
UNITED STATES DISTRICT JUDGE  
FOR THE DISTRICT OF PUERTO RICO

COMES NOW Mr. Jose Resto, the defendant herein, represented by the undersigned, and before this Honorable Court respectfully states and prays:

*Introduction*

1. On November 9, 2016 the jury rendered a Guilty verdict as to Counts 1, 2, 3, 8 and 9 of the Indictment. *See* docket no. 2796.
2. Mr. Resto renews the arguments made in his earlier motion for acquittal under Rule 29 of the Fed. R. of Crim. Proc. (Hereafter referred to only as “Rule 29”), because no reasonable jury could have found him guilty beyond a reasonable doubt.
3. As fully expanded below, the evidence did not demonstrate that Mr. Resto Figueroa was not a member of the enterprise known as the Rompe Onu (hereafter referred to as “Rompe”). The evidence did not show Mr. Resto Figueroa involved in any of the core concerns or actions of the

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Rompe as a drug trafficking organization. To the contrary, the evidence showed rather that he was a member of a separate conspiracy to kill Luis Ojeda Andino (AKA Pollo).

4. For the reasons further articulated in the present motion, it is requested that the Court set aside the convictions and grant the request for acquittal under Rule 29.

***Standard Applicable to Rule 29 Review***

5. The standard of review for a Rule 29 motion for acquittal is relatively well known and often re-stated by our Court of Appeals.

6. In many cited cases the Court has stated: “In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government.” *US v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). “[T]he Court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.”

*Id.*

7. If a court “concludes that upon the evidence there must be such a doubt in a reasonable mind, [it] must grant the motion” for judgment of acquittal. *I*, 725 F.2d 862, 865 (2d Cir. 1984) (quoting *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972)). To deny a Rule 29(c) motion, a “reasonable mind must be able to conclude guilt on each and every element of the charged offense.” *Mariani*, 725 F.2d at 865.

8. However, “The rule by its terms gives the trial court ‘broad discretion … to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.’” *US v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). “In exercising the discretion so conferred, the court is entitled to ‘weigh the evidence and in so doing evaluate for itself the credibility of the witnesses’” where exceptional circumstances are demonstrated. *Robinson*, 430 F.3d at 543. “An example of exceptional

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circumstances is where the testimony is ‘patently incredible or defies physical realities.’” *Ferguson*, 246 F.3d at 134.

9. While the First Circuit has recognized that a verdict satisfying this standard “may be supported by circumstantial evidence alone,” *Morgan*, 677 F.3d at 47, it has we also noted the limitations of circumstantial evidence stating:

“[W]e are loath to stack inference upon inference in order to uphold the jury's verdict.” *US v. Valerio*, 48 F.3d 58, 64 (1st Cir.1995). In the end, [i]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt.”

*US v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir.1995)

***Mr. Resto Figueroa was not a Part of the Charged Conspiracy;  
he was Part of an Uncharged Conspiracy***

10. The evidence presented at trial clearly demonstrates that Mr. Resto Figueroa was not a member of the Rompe, but was rather a member of a separate, unrelated conspiracy, that is the conspiracy to kill Luis Ojeda Andino (AKA Pollo).<sup>1</sup>

11. Viewed in the light most favorable to the government, the evidence in this case did not establish that Mr. Resto Figueroa engaged in the core concerns of the Rompe, selling narcotics.

*Testimony Received by the Court*

12. The Rompe was consistently defined in the trial as a drug selling organization.

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<sup>1</sup> Obviously, Mr. Resto Figueroa insists on his actual and factual innocence on all Counts. The statement made in this motion only refers to the evidence as viewed in the most favorable manner to the prosecution.

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13. As to Mr. Resto Figueroa, four witness are relevant: Oscar Calvino Ramos (hereafter Calvino Sr.), Oscar Calvino Acevedo (hereafter Calvino Jr.), Luis Yanyore Pizarro (hereafter Yanyore) and Puerto Rico Police officer Eddie Vidal.

14. Mr. Yanyore's testimony of Mr. Resto Figueroa is easily disposed: there is none. At no time did Mr. Yanyore mention Mr. Figueroa in any manner as belonging to the Rompe, or doing anything for the Rompe or on its behalf. From Mr. Yanyore's perspective, Mr. Resto Figueroa is non-existent.

15. This dearth of testimony is important given that Mr. Yanyore was established to by a high-level member of the Rompe, essentially the designated hitter when the Rompe needed drugs to be moved, people killed or items stolen. Mr. Yanyore participating in meetings to determine who would be killed and carrying out those murders.

16. Mr. Calvino Jr.'s testimony can be disposed equally easy. Calvino Jr. says that Mr. Resto is an enforcer, and that he was trustworthy. (DK2662, pg 69).

17. However, aside from the alleged participation in the deaths of Luis Ojeda Andino (AKA Pollo), Luis Velazquez Aquino (AKA Urraca) and Jose Ayala Garcia, he does not mention Mr. Resto Figueroa as an active or passive member of the Rompe. He does not mention Mr. Resto Figueroa as a seller of drugs, a lookout, a runner or a currier, or any other function of activity. In his testimony, Mr. Resto Figueroa is non-existent, surfaces for the killing of these three individuals, and disappears into oblivion again.<sup>2</sup>

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<sup>2</sup> The death of these three individuals occurred in a single event, the so-called Massacre de Trujillo Alto.

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18. Mr. Calvino Sr. is the only witness that states that Mr. Resto Figueroa was a participant in the drug selling organization in anything related to drugs. However, while his testimony initially appeared to involve Mr. Resto Figueroa, when specifically examined shows to be meager and insufficient.

19. Mr. Calvino Sr. initially attempted to implicate Mr. Resto as a member of the Rompe by saying he was a member and that he had seen him armed.<sup>3</sup>

“Q: And, sir, do you see anyone here today that was a fellow member of La Rompe ONU during that timeframe?

A Yes.

Q Who?

A Tego and Ruben.”

20. However, when the testimony went into more detail, he stated that although he had seen Mr. Resto Figueroa armed, this was observed by him Mr. Resto Figueroa’s own property, and it was not tied to any activity related to the Rompe.<sup>4</sup>

Q; Did you ever see Mr. Resto-Figueroa Tego armed?

“A: Yes.

Q: Where did you see him armed?

A: At the family's land, where they took the SUVs.

Q: And we will talk about that soon.”

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<sup>3</sup> Testimony of Luis Calvino Ramos on October 19, 2016, at page 7, lines 1 to 5.

<sup>4</sup> Testimony of Luis Calvino Ramos on October, at page 63, lines 21 to 25.

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21. When pressed on the issue, he could not place Mr. Resto as a drug seller or as doing anything else.<sup>5</sup>

Q: Do you know if he sold drugs for La Rompe ONU?

A No.

Q From whom --

MR. MATOS-DE-JUAN: From the manner in which the question was asked and answered, I didn't understand the reply. He does not know if the -- if Mr. Resto told drug, or, no, Mr. Resto did not sell drugs?

MR. ACEVEDO-HERNANDEZ: I can rephrase.

MR. MATOS-DE-JUAN: It could be taken either way.

THE COURT: Rephrase the question.

BY MR. ACEVEDO-HERNANDEZ:

Q Sir, did you ever buy drugs from Mr. Resto-Figueroa Tego?

A No.”

22. Again Mr. Calvino Sr. provided testimony as to Mr. Resto Figueroa's participation of the murder of Luis Ojeda Andino (AKA Pollo). However, when crossed on the issue, he admitted that he did not participate or was present during the meeting in which that murder was planned or in the murder itself. All his information was hearsay, and incomplete hearsay at that. Nor did he speak with Mr. Resto Figueroa as to his participation on the events or get confirmation from Mr. Resto Figueroa as to the scuttlebutt of his participation.<sup>6</sup>

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5 Testimony of Luis Calvino Ramos, October 19, 2016, at page 64, lines 8 to 18.

6 Testimony of Luis Calvino Ramos, October 19, 2016, Pg 69, lines 6-7

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Q Did you ever talk to Tego about this event?

A No.

23. This statement, that he had never spoken with Mr. Resto Figueroa after the killing of Luis Ojeda Andino (AKA Pollo) was re-affirmed in re-direct:<sup>7</sup>

Q: Sir, do you remember having a conversation with a state prosecutor, a (speaking in a non-English language), about a conversation that you had with Mr. Tego after the massacre?

A: What was the question?

Q Do you remember if you had a conversation with a state prosecutor regarding --

A: Yes.

Q: -- regarding a conversation that you had with Tego after the massacre?

A: I didn't have any conversation with Tego.

24. Or as repeated when the issue was again raised:<sup>8</sup>

Q: Now, sir, now I'd like to change subjects, and I'd like to talk about what you call the "Massacre de Jardines." Now, sir, first of all, you were not there?

A: That's true.

Q: You were nowhere near there?

A: That's true.

Q: Whatever you know is what somebody else told you?

A: That's true.

Q: And whatever was told to you, you didn't go out and corroborate?

A: That's true.

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<sup>7</sup> Testimony of Luis Calvino Ramos, October 20, 2016, page 53, line 23 to page 54, line 7.

<sup>8</sup> Testimony of Luis Calvino Ramos, October 20, 2016, testimony Page 9, line 8 to 68

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25. The apparent appearance of Mr. Resto out of the blue was analyzed by Government witness Eddie Vidal, a Puerto Rico Police officer, called as an expert witness on gangs and drug trafficking. When questioned by the defense on gang structure and participation, Mr. Vidal explained that an enforcer does not come out of the blue, but rather is “groomed” in the organization by coming up thru the ranks, starting out at the bottom and raising in responsibility within the organization.

26. Mr. Vidal also stated that the only times when a person appears out of nowhere and is only seen participating in one events, in this case the murder of Luis Ojeda Andino (AKA Pollo), is when that person is an “outside contractor” that is a person who is not a member of the conspiracy who is brought in for a specific event.<sup>9</sup>

27. All that testimony leads to the clear result that Mr. Resto was not a member of the Rompe, but if anything at all, was a member of a separate conspiracy, one to kill Luis Ojeda Andino (AKA Pollo).

28. Indeed the testimony leads to believe that Mr. Resto Figueroa was not a member of the Rompe, but essentially an outside contractor, given that he did not participate in the Rompe’s core activities. As the Court stated in *Ferguson*:

“For example, in *Muyet*, a defendant who was not a member of the gang was closely associated with it and criminally liable under Section 1959 because he participated in high-level meetings with gang leaders or at gang headquarters, planned violent crimes to support the gang’s activities, and carried out crimes using his discretion. See *Muyet*, 994 F.Supp. at 516. Ferguson did not participate in Power Rules’ core activities of drug sales, extortion or robbery, and none of those additional circumstances is present with respect to Ferguson. Indeed, other than the facts of

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<sup>9</sup> Although the Court has instructed the parties to provide specific reference to the record when citing testimony of witnesses, at present the transcript of the testimony of Mr. Vidal is not on the docket.

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Ferguson's participation in the Ayala murder conspiracy, the only trial evidence characterizing Ferguson as an associate of Power Rules rather than an outside hit man is the testimony of Luis Soto, who also defined an associate of Power Rules as a 'friend of Miguel's [Guzman].'"

*Ferguson*, 246 F.3d at 136 (emphasis added)

*The Variance and the Caselaw Interpreting Multiple Conspiracies*

29. There is clearly a variance between the allegations (that Mr. Resto Figueroa was a member of the Rompe) and the evidence introduced (that Mr. Resto Figueroa was not a member of the Rompe but a person who participated in a parallel conspiracy to kill Luis Ojeda Andino (AKA Pollo).

30. In *US vs Spezy*, 649 F.3d 109 (1st Cir. 2011) the Court analyzed the concept of a variance in a scenario similar to the present one, that is, where as here the evidence points to the conspiracy that was proven differs from the conspiracy charged as to a specific defendant. The Court stated at page 17 of the opinion:

"When . . . a defendant asserts a claim of variance premised on the notion that multiple conspiracies existed and that his activities were not part of the charged conspiracy, the initial question . . . is one of evidentiary sufficiency." *United States v. Pérez-Ruiz*, 353 F.3d 1, 7 (1st Cir. 2003); see also *United States v. Niemi*, 579 F.3d 123, 127 (1st Cir. 2009) ("Whether evidence shows one or many conspiracies is a question of fact for the jury and is reviewed only for sufficiency of the evidence."), cert. denied, 130 S. Ct. 1912 (2010). In reviewing for sufficiency of the evidence, "'we examine the evidence -- direct and circumstantial -- as well as all plausible inferences drawn therefrom, in the light most favorable to the verdict, and determine whether a rational fact finder could conclude beyond a reasonable doubt that the defendant committed the charged crime.'" *Niemi*, 579 F.3d at 127 (quoting *United States v. Wyatt*, 561 F.3d 49, 54 (1st Cir. 2009)).

In determining if the evidence proves a single (and charged conspiracy, or multiple (charged and non-charged) conspiracies, the Court must "ultimately look at the totality of the evidence." *Mangual-Santiago*, 562 F.3d at 421. There are three factors this court has found particularly helpful in evaluating the evidence: "(1) the existence of a common goal, (2) interdependence among participants, and (3)

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overlap among the participants.'" Id. (quoting *United States v. Sánchez-Badillo*, 540 F.3d 24, 29 (1st Cir. 2008), cert. denied, 129 S. Ct. 953 (2009))."

*Spezy*, 649 F.3d at 126

31. As stated by the *Spezy* Court, the District Court analysis is a three step one:

The first factor, common goal, "is given 'wide breadth.'" Id. (quoting *Sánchez-Badillo*, 540 F.3d at 29). For example, "[a] goal of selling cocaine for profit or furthering the distribution of cocaine" may be sufficient evidence of a common goal. Id. (quoting *United States v. Portela*, 167 F.3d 687, 695 (1st Cir. 1999)) (internal quotation marks omitted). The second factor, interdependence, concerns whether "the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." Id. at 422 (quoting *Portela*, 167 F.3d at 695). More specifically, "Each individual must think the aspects of the venture interdependent, and each defendant's state of mind, and not his mere participation in some branch of the venture, is key." Id. (quoting *Portela*, 167 F.3d at 695). We have explained the significance of this factor: [K]nown interdependence . . . makes it reasonable to speak of a tacit understanding between the distributor and others upon whose unlawful acts the distributor knows his own success likely depends. When such interdependence is missing, when the distributor is indifferent to the purposes of others in the enterprise — say, other distributors — the tacit understanding does not exist. *Glenn*, 828 F.2d at 857-58 (internal citation omitted); see also *Sánchez-Badillo*, 540 F.3d at 29. Finally, the third factor, overlap among the participants, "is satisfied by the pervasive involvement of a single core conspirator, or hub character." *Mangual-Santiago*, 562 F.3d at 422 (internal quotation marks omitted). In considering these three factors, we must remember that the existence of a single conspiracy does not require the participants to know of all the other participants, understand all the details of the conspiracy, or participate in each aspect of the conspiracy. Id.; *Sánchez-Badillo*, 540 F.3d at 29.

32. Having determined that there was a variance on the evidence, and that Mr. Resto

Figueroa was not a member of the Rompe, the question becomes one of prejudice. The Court of Appeals has addressed the issue in the following manner:

We have previously recognized at least three ways in which a variance might "affect the substantial rights" of the accused. Id. at 774 (citing *United States v. Sutherland*, 929 F.2d 765, 772-73 (1st Cir. 1991)). First, a defendant may receive inadequate notice of the charge against him and thus be taken by surprise at trial. Second, a defendant may be twice subject to prosecution for the same offense. Third, a defendant may be prejudiced by "evidentiary spillover": the "transference of guilt"

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to a defendant involved in one conspiracy from evidence incriminating defendants in another conspiracy in which the particular defendant was not involved. *Id.*

33. The prejudice to Mr. Resto Figueroa is absolute. The prejudice of the testimony of the various drug activities of the Rompe, and the parallel use of murder, led the jury to the erroneous conclusion that Mr. Resto was a member of the Rompe.

***Remedy Requested***

34. Under Rule 29, a reasonable mind could not conclude guilt. The government failed to show anything more than Mr. Resto Figueroa was, at best, merely “doing business”, that is participating in a murder with the enterprise. The Government did not prove that he was a member of the Rompe or a participant in its core activities.

35. The government offered insufficient evidence that Mr. Resto Figueroa knowingly and intentionally associated with the Rompe as a participant of that organization.

36. Mr. Resto Figueroa submits that letting the guilty verdicts stand also constitutes a manifest injustice. Aside from the extended sentence to which Mr. Resto Figueroa is potentially subject and the fundamental problems with the claims, *supra*, the only other real evidence as to Mr. Resto Figueroa came from the testimony of uncorroborated witness, Mr. Calvino Sr. an admitted perjurer testifying under a cooperation deal and whom the Government has shielded from extensive criminal liability including this very case, and a person who was not able to back up his allegation with hard facts.

37. Given the arguments above, it is requested that conviction be set aside and judgement of acquittal be entered.

WHEREFORE, it is respectfully requested that this Honorable Court take notice of the above and grant the remedy requested.

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I HEREBY CERTIFY that on March 7, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing all counsels of record.

In San Juan, Puerto Rico, this March 7, 2017.

*S/ Juan F. Matos de Juan*

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