APPENDIX 1

Final appealable judgment of the District Court rendered on March 31st, 2020, denying Castiblanco's §2255 Petition (Dkt. #16 - Habeas procedding).

1995). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonably professional judgment. *Strickland*, 466 U.S. at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981).

A movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Movant must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, a court need not address the question of counsel's performance. *Id.* at 697.

1. MOTION FOR RECONSIDERATION

In his first argument, the Petitioner contends that his trial counsel was ineffective for failing to move the district court to reconsider its denial of his motion for new trial. Although the Petitioner raised more than one issue in his motion for new trial, the Petitioner, at this juncture, focuses his attention on his counsel's alleged failure to move the district court to reconsider its denial of his motion for new trial regarding the court's response to a jury note during deliberations. The district court thoroughly addressed the issue of the jury note in its order denying the Petitioner's motion for new trial. *See United States v. Cabalcante*, 4:09-cr-194 (Dkt. #978). The district court analyzed the issue as follows:

> 1. Response to Jury Question
>
> "Supplemental instructions must be 'reasonably responsive' and 'allow[] the jury to understand the issue presented to it.'" *United States v. Hale*, 685 F.3d 522, 544 (5th Cir.), *cert. denied*, 133 S. Ct. 559 (2012) (quoting *United States v. Cantu*, 185 F.3d 298, 305 (5th Cir. 1999)). "When a deliberating jury expresses confusion and difficulty over an issue submitted to it, the trial court's task is to clear that confusion away with 'concrete accuracy.'" *United States v. Stevens*, 38 F.3d 167,

169-70 (5th Cir. 1994) (quoting *United States v. Carter*, 491 F.2d 625, 634 (5th Cir. 1974)). "If, in response to a jury question, the trial court directs the jury's attention to the original instructions, the response will be deemed sufficient if the original charge is an accurate statement of the law." *United States v. Marshall*, 283 F. App'x 268, 279 (5th Cir.), *cert. denied*, 555 U.S. 1005 (2008) (citing *United States v. Arnold*, 416 F.3d 349, 359 n.13 (5th Cir.), *cert. denied*, 546 U.S. 970 (2005)). Furthermore, "[t]here is nothing wrong in responding in a narrow fashion allowing the jury to decide if the answer is responsive." *United States v. Stowell*, 947 F.2d 1251, 1257 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992).

In this case, the jury sent the following note to the court after starting its deliberations:

> We the jury, request the following: Re: Count One
> If we agree there was a conspiracy, must we believe that each defendant knew or intended importation to the U.S.? Or if we believe there was a conspiracy and only one or two defendants had knowledge of importation to the U.S., can we find all four guilty of Count One?

After reading the note to the parties, the court discussed with counsel in open court the manner in which to respond. The court immediately recognized that the note revealed the jury's misunderstanding concerning which defendants were charged in Count One. As noted previously, Barrera was not prosecuted as to Count One, meaning that only three defendants, not four, were charged with that count. All parties agreed that the misunderstanding should be addressed in the court's response. After further consulting with the parties, the court answered the jury's note as follows:

> No, please note that only 3 of the defendants are charged in Count One of the Indictment. Please read carefully the instructions regarding Count One found on pages 13-15 of the Court's instructions to the Jury as well as the remainder of the instructions.

In his motion, Moya[4] contends that the court should have bifurcated its response to the note by answering "yes" to the first question and "no" to the second one. The court, however, finds the response to be adequate.

First, the record demonstrates that counsel for Moya agreed with the court that the answer to the jury's note should have been "no." Moya's counsel stated:

---

[4]The district court noted that the Petitioner's "arguments concerning the court's response to the jury note are substantively similar to those made by [co-defendant] Moya and likewise fail to demonstrate that a new trial should be granted." *United States v. Cabalcante*, 4:09-cr-194 (Dkt. #978) at p. 13.

> "Your Honor, I agree with the Court that you should answer no." Later, he reiterated his position by saying: "That's why I'm requesting that the answer should be no." At no time did he ask the court to treat the note as two distinct questions or argue that the correct answer was "yes." Counsel objected to the court's response, but only because it did not specifically direct the jury's attention to the part of the jury instructions discussing multiple defendants and multiple counts. While not dispositive, counsel's remarks reflect the parties' agreement that the answer to the note should have been "no."
>
> Moreover, the court's response was proper because it specifically directed the jury to the instructions concerning Count One of the Indictment. In the instructions, the three elements of the offense are described in precise detail. The first element requires the government to prove that a defendant reached an agreement to either distribute, manufacture, or import cocaine "intending or knowing that such substance would be unlawfully imported into the United States" in order to obtain a guilty verdict. This language, which Defendants did not challenge and do not now claim to be incorrect, accurately states the law and provides the answer to the jury's question.
>
> Thus, in answering the jury note, the court consulted with the parties, accurately answered the note, and directed the jury to consider the court's instructions, particularly the section outlining the requirements for a guilty finding under Count One. Accordingly, the record reveals no error requiring a new trial on this basis. Therefore, Moya's motion for new trial on the ground that the court erred in responding to the jury note is denied.

United States v. Cabalcante, 4:09-cr-194 (Dkt. #978) at pp. 4-6 (internal footnote omitted).

While a motion for reconsideration is a "legitimate procedural device" in a criminal proceeding, *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982), it has its limitations. Where, as here, the district court fully analyzed the issue of the jury note, there was no reason for trial counsel to return to the district court seeking a reconsideration. Mere disagreement with a court's order does not require counsel to move for reconsideration of the same. As such, the Petitioner's ineffective assistance of counsel claim fails.

2. STRUCTURAL ERROR

In his second argument, the Petitioner argues that his counsel was ineffective for failing to

argue on appeal that "the district court committed structural error when the judge answered 'no' to a jury's query." The basis for the Petitioner's argument stems from the above-referenced analysis:

> According to the Petitioner, the district court's "no" response to the jury's question during deliberations relieved the jury from considering the knowledge element in counts one and two of the indictment. The Petitioner thus contends that his counsel was ineffective for failing to argue on appeal that the district court incorrectly responded to the jury's question, thereby committing structural error.

> "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 582 U.S. ——, ——, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017). "Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' " *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). In *Weaver*, the Supreme Court laid out three broad categories of structural error: first, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," *id.* at 1908 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (deprivation of the right to self-representation at trial)); second, "if the effects of the error are simply too hard to measure," *id.* (citing *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (unlawful exclusion of grand jurors of defendant's race)); and third, "if the error always results in fundamental unfairness," *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total deprivation of counsel), and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable doubt instruction)). However, "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.*

United States v. Nepal, 894 F.3d 204, 212 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 831, 202 L. Ed. 2d 580 (2019).

Responding to a jury's interrogatory, "though, does not fall into any of these categories, nor

is the error in [the Petitioner's] case on the same level as the errors targeted in the Court's structural error jurisprudence." *Id.* at 212. "Indeed, [a district court's response to a jury's inquiry during deliberations] is a far cry from deprivation of counsel, deprivation of the right to self-representation, or unlawful exclusion of grand jurors of the defendant's race." *Id.* at 212-13.

> Furthermore, and perhaps more importantly, none of the Supreme Court's structural error cases are direct appeals from judgments of conviction within the federal system . . .; they are either appeals from state courts which had considered the error under their own rules or federal habeas challenges to state convictions. *See Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (rejecting federal defendant's argument that the error in her trial was structural: "the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b), "which by its terms governs direct appeals from judgments of conviction in the federal system"; creating an exception to Rule 52(b) to accommodate the error of which defendant complained would be "[e]ven less appropriate than an unwarranted expansion of the Rule").

Id. at 212–13.

Since the Petitioner's claim does not rise to the level of structural error, the Petitioner's argument that counsel was ineffective for failing to raise the same on appeal lacks merit. The Petitioner's claim, therefore, fails.

3. DUE PROCESS

In his third argument, the Petitioner argues that his counsel was ineffective for failing to argue on appeal that "the method by which the jury reached the ultimate conclusion of guilty on Count One offends elementary principles of logic and [the] Due Process Clause of [the] Fifth Amendment." More specifically, the Petitioner contends that "[t]he ultimate conclusion for the jury to draw, that is, that the cocaine will be imported into the United States, is based not upon a fact but upon a circumstance in proof, that is, that the cocaine would reach Guatemala. It offends a due process principle that 'charges of conspiracy are not to be made by piling inference upon

APPENDIX 2

Post-trial motion filed by Castiblanco on November 1st, 2012 (Dkt. #910-Trial proceeding), requesting for a new trial under Fed.R.Crim.P. 33(b)

for answers in the jury instructions when the correct response would be "yes" followed by an instruction for individual consideration.

The Court instructed the jury "No, please note that only 3 of the defendants are charged in Count One of the indictment. Please read carefully the instructions regarding Count One found on pages 13-14 of the Court's instruction to the jury as well as the remainder of the instructions." The Court's response to the jury's question misstates the law of conspiracy as set forth in the jury instructions as to the requirement that each individual defendant must have the intent to import cocaine into the Untied States from abroad. The undersigned respectfully adopts the argument and memorandum of law set forth in codefendant Moya-Buitrago's motion for new trial with respect to the Court's error concerning the its response to the jury's question. (Dkt. No. 909).

As urged in Defendant's oral motion for Rule 29 directed verdict, the government's evidence failed to establish a knowing and intentional conspiracy to import cocaine into the Untied States from Mexico and Colombia. It was error for the trial court to deny Defendant's motion for directed verdict.

WHEREFORE, the undersigned respectfully moves that this Honorable Court grant a new trial.

Respectfully submitted,

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By: /s/ Carlo D'Angelo
Carlo D'Angelo, Esquire
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APPENDIX 3

Final appealable judgment of the District Court rendered on February 28th, 2013 (Dkt. #978-Trial proceeding), denying Castiblanco's post-trial motion for a new trial.

distinct questions or argue that the correct answer was "yes." Counsel objected to the court's response, but only because it did not specifically direct the jury's attention to the part of the jury instructions discussing multiple defendants and multiple counts. While not dispositive, counsel's remarks reflect the parties' agreement that the answer to the note should have been "no."

Moreover, the court's response was proper because it specifically directed the jury to the instructions concerning Count One of the Indictment. In the instructions, the three elements of the offense are described in precise detail. The first element requires the government to prove that a defendant reached an agreement to either distribute, manufacture, or import cocaine "intending or knowing that such substance would be unlawfully imported into the United States" in order to obtain a guilty verdict. This language, which Defendants did not challenge and do not now claim to be incorrect, accurately states the law and provides the answer to the jury's question.

Thus, in answering the jury note, the court consulted with the parties, accurately answered the note, and directed the jury to consider the court's instructions, particularly the section outlining the requirements for a guilty finding under Count One. Accordingly, the record reveals no error requiring a new trial on this basis. Therefore, Moya's motion for new trial on the ground that the court erred in responding to the jury note is denied.

2. Venue

Moya next argues that a new trial should be granted because the court's analysis of the venue question in this case was erroneous. Specifically, Moya contends that the court ruled improperly in denying his proposed venue instruction, refusing to allow counsel for Moya to argue that the government failed to prove the venue allegations in the indictment, and denying his motion to dismiss based on venue.

APPENDIX 4

Trial transcripts corresponding to the "Jury Note Discussion" before the Honorable Marcia C. Crone, United States District Judge, Sherman Division, October 19th, 2012.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

UNITED STATES OF AMERICA)
)
VS.)
)
JAIME GONZALO CASTIBLANCO)
CABALCANTE)
a.k.a "Chalo" "Gonzalo") Criminal No. 4:09CR194
JULIO HERNANDO MOYA BUITRAGO)
a.k.a "Primito")
OSCAR ORLANDO BARRERA PINEDA)
a.k.a "Oscar" "Capi")
ROBERTH WILLIAM VILLEGAS)
ROJAS)
a.k.a "Roberto Villegas")

JURY TRIAL

JURY NOTE DISCUSSION

BEFORE THE HONORABLE MARCIA A. CRONE

UNITED STATES JUDGE

OCTOBER 19, 2012

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Ms. Yovana Gonzalez

COURT REPORTER: Ms. Lori Barnett
P.O. Box 1993
Van Alstyne, Texas 75495
(903)712-2273

Proceedings recorded by mechanical stenography, transcript produced by CAT.

P R O C E E D I N G S

THE COURT: We have a note.

MR. MORRIS: Your Honor, we don't have interpreters here to tell the guys what the notes are.

THE COURT: Okay.

(Pause)

THE COURT: All right. We have a note from the jury.

Okay. The note reads, We the jury request the following, and it goes Re: Count 1: If we agree that there was a conspiracy, must we believe that each -- each is underlined -- defendant knew or intended importation to the U.S., question mark? Or, if we believe there was a conspiracy and only one or two defendants had knowledge of importation to U.S. can we find all four guilty of Count 1.

I mean, obviously there's only three people charged in Count 1, so the answer is no on that.

But, I mean, I can say no, or I can say no, please note that only three defendants are charged in Count 1.

MS. RATTAN: Your Honor, I think the Court's instructions are very clear, very thorough and carefully considered. And I really think the only thing the Court can do here is direct them to the Court's instructions.

MR. BAILEY: Your Honor, I agree with the Court

that you should answer no.

MR. DURDEN: Your Honor, there's -- this goes again to the -- I'm sorry, Sammie, I'll make it as quickly as I can.

This goes to the issue of specific intent required for each defendant.

THE COURT: I understand that.

MR. DURDEN: And again, it's the issue I've been raising since -- you know, the start of trial.

THE COURT: Well, if they would read the charge it's pretty clear.

MR. DURDEN: Each defendant has to have that guilty knowledge, that specific intent to import.

THE COURT: Well, but I'm just -- what I'm going to do -- obviously, they can't find all four because only three are charged. I'm going to say, no, please note that only three defendants are charged. Please -- also, please read carefully the jury instructions regarding Count 1 of the indictment appearing on pages 13 through 15.

MR. BAILEY: And Your Honor, I would also note that if they will read the multiple defendant/multiple count instruction, that might clear it up for them. That each individual is to be considered separately. That's on page --

THE COURT: They seem to sort of be doing that.

MR. D'ANGELO: If you wouldn't mind, would you please re-read that note?

THE COURT: I've got to find that multiple defendant thing.

MR. BAILEY: It's on page eight, Your Honor, third paragraph. It says each defendant should be considered separately and individually. I think if they will refer to that, that probably would answer their question.

THE COURT: I would like to refer them to the charge, but I mean I've got to say there's only -- please note that only three defendants are charged in Count 1. I mean that's just --

MR. D'ANGELO: I'm sorry, Judge, do you mind re-reading the note?

THE COURT: Okay. The note says, "Re: Count 1: If we agree that there was a conspiracy, must we believe that each defendant knew or intended importation to the U.S. Or if we believe there was a conspiracy and only one or two defendants had knowledge of importation to U.S. can we find all four guilty of Count 1."

MR. BAILEY: And that's where I'm saying -- of course you say there's only three, but --

THE COURT: But then I'm going to say, please read carefully -- I can direct them to the multiple defendant

count and the Count 1 of the indictment instruction.

MR. BAILEY: That specifically addresses what their concern is.

MS. RATTAN: There are other things if we're going to start pointing to specific sections. I think answering the first part of the question as the Court has proposed. And then, I direct you to the Court's instructions and you're governed thereby.

THE COURT: Well, why can't I tell them -- certainly, the Count 1 instruction should be looked at.

MR. BAILEY: And Your Honor, it appears that they are trying to -- they are not focusing on the multiple defendant/multiple conspiracy. And I think that will answer their question. That's why I'm requesting that the answer should be no. Note, there are only three defendants, and please refer to the multiple defendant/ multiple conspiracy on page eight.

MS. RATTAN: If you're going to do that, you have to refer to the Pinkerton instruction, too.

THE COURT: That's the problem. I would feel more comfortable just referring to the Count 1 instruction. Because I mean it says -- the instruction on Count 1, you know, it has the elements, that the defendant knew of the unlawful purpose of the agreement.

MR. DURDEN: As stated under paragraph one.

THE COURT: Well, I'm not going to say that. I'm just going to refer them to -- please read carefully the instructions regarding Count 1 of the indictment.

MR. DURDEN: Especially paragraph two.

THE COURT: No, on pages 13 -- I'm not going to be that specific. Pages 13 to 15 of the instructions.

MR. DURDEN: All right. Your Honor, we have a jury note, it's obvious that this is a close case. I renew my motion under Rule 29.1. Again, the government raised nothing about money so we raised nothing about money in our closing. And it was jack-in-the-box. Now if it had only been five or ten minutes, again maybe it would have been rebuttal of silence. But their entire closing was that the -- was -- was based on money, and we never got a chance to make any argument on that as -- as to the -- following their argument.

THE COURT: I already ruled. I ruled, I denied it. It's going to be denied now, it's going to be denied the next time. Do not raise this again. You haven't raised anything else. It's denied.

MR. DURDEN: Thank you, Your Honor.

THE COURT: Okay. It reads, no, please note that only three of the defendants are charged in Count 1 of the indictment. Please read carefully the instructions regarding Count 1 found on pages 13 to 15 of the Court's

instructions to the jury. Signed, my name.

MR. BAILEY: Your Honor, I'm going to object to that. If they went the Pinkerton instruction read, I don't have a problem with that. But I'm going to request the multiple defendant/multiple count instruction. And if they want the Pinkerton instruction read, I -- I would request that you refer them to all three sections, which is multiple defendant/multiple count, and then on page 12, the liability for coconspirators acts. Because I think what clears up their question is what's on page eight. It doesn't help them --

THE COURT: Well, I can say, "as well as the remainder of the instructions." I'm going to say that. Because I don't want to start picking out anything except Count 1. I think it's fair to talk about Count 1. But I'll say, as well as the remainder of the instructions. It answers their question if they would just read it.

MR. BAILEY: Well then, Your Honor -- and I don't want to be argumentative, but it's very important. What they are asking is should they consider each person individually, or can they just group them together. And I think you've got to tell them you can consider them individually. I mean, you don't have to tell them individually, but if you just refer them to a section, it's right there.

THE COURT: It's in the instructions. That's what I'm going to say, as well as the remainder of the instructions. If they would just read them carefully.

MR. BAILEY: Just note my objection, Your Honor.

THE COURT: I mean if the government wants to agree to direct them to all these sections I would do that.

MS. RATTAN: We agree to the way the Court is proposing to do it now.

MR. BAILEY: Well, I didn't expect them to agree with me.

THE COURT: Yeah, I didn't either.

Well, I think that they just need to read it. So I'm directing them to Count 1, and then the remainder of the instructions. But the answer is in there. They need to look at them.

MR. BAILEY: It's like looking for Waldo, Your Honor. If you show them where Waldo is at.

THE COURT: Well, I'm not going to be that direct. I mean, I think it's in Count 1.

MR. BAILEY: Well, there's nothing wrong with being direct, Your Honor.

THE COURT: Well, I think if they would read Count 1 then they would realize there are only three people charged. That's the big impediment. It makes me think

they didn't read Count 1. So -- and then look at the remainder of it. That's what I'm doing. Which the answer is in there.

Okay. So it reads, "No. Please note that only three of the defendants are charged in Count 1 of the indictment. Please read carefully the instructions regarding Count 1 found on pages 13 through 15 of the Court's Instructions to the Jury, as well as the remainder of the instructions."

Okay. This is what's going.

All right. We'll stand by.

(Recess)

(End of requested proceedings)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Lori Barnett
COURT REPORTER

10/9/121
DATE

Sentencing Hearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	DOCKET 4:09CR194-22
	SEPTEMBER 9, 2013
VS.	10:09 A.M.
ROBERTH WILLJAM VILLEGA ROJAS	BEAUMONT, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 17

REPORTER'S TRANSCRIPT OF SENTENCING HEARING
CONDUCTED VIA VIDEO CONFERENCING

BEFORE THE HONORABLE MARCIA A. CRONE,
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

APPENDIX 5

The Georgetown Law Journal, Thirty-Eighth Annual Review of Criminal Procedure, 2009, Proving Elements Beyond a Reasonable Doubt.

THE
GEORGETOWN
LAW JOURNAL

Thirty-Eighth Annual Review of Criminal Procedure

2009

Preface by Jeffrey L. Fisher

Published in cooperation with the
Georgetown University Law Center's
Department of Academic Conferences
and Continuing Legal Education

of perjury,[2023] a prosecutor may
warning the witness of the possib
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pro[illegible]or contacted defense expert
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Hunt, 521 F.3d 636, 641-42 (6th Cir.
y made it more likely that witnesses
f intimidation); U.S. v. Johnson, 437
hen government allegedly threatened
had reasonable basis to believe that
)6 F.3d 1208, 1216 (10th Cir. 2005)
ned witnesses of consequences of
ercive badgering," and witnesses

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) (noting that prosecutor violates
einstate previous charges against
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or withdraw her plea agreement if
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ss). *But see, e.g.*, U.S. v. Fricke,
lated when government warned
y investigation); U.S. v. Wadling-
ted when prosecution improperly
efore defendant's trial because
n witnesses' testimony); U.S. v.
s not violated when prosecutor
or possession of illegal firearm

[illegible]rmative steps to secure the testimony of defense witnesses.[2026] However, in *[illegible]nsylvania v. Ritchie*, the Supreme Court noted that it has never explicitly held that [illegible]Compulsory Process Clause guarantees defendants the right to discover the [illegible]ntity of witnesses or to compel the government to produce exculpatory evi-[illegible]ce.[2027] Rather, such claims are more properly evaluated under the Due Process [illegible]use.[2028]

PROOF ISSUES

[illegible]oving Elements Beyond a Reasonable Doubt. Under the Due Process Clause of [illegible]Fifth Amendment, the prosecutor is required to prove beyond a reasonable doubt [illegible]ery element of the crime with which a defendant is charged.[2029] The reasonable

2026. *See, e.g.*, U.S. v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990) (compulsory process [illegible]lated by government's failure to make foreign national's attendance at trial possible by requesting [illegible]cial interest parole from INS because inaction directly caused loss of defendant's only material [illegible]ness); Maples v. Stegall, 427 F.3d 1020, 1034 (6th Cir. 2005) (compulsory process violated when [illegible]vernment induced codefendant to sign plea agreement because unavailability to testify unfairly [illegible]judiced defendant at trial). *But see, e.g.*, Jacobson v. Henderson, 765 F.2d 12, 16 (2d Cir. 1985) [illegible]mpulsory process not violated when government failed to produce material defense witness not under [illegible]ntrol of government authorities because defendant received full cooperation of government in search [illegible]f witness); U.S. v. Gonzalez, 436 F.3d 560, 579 (5th Cir. 2006) (compulsory process not violated when [illegible]overnment deported defense witnesses because deported in good faith and defendant participated in [illegible]eporting his own witnesses); U.S. v. Chaparro-Alcantara, 226 F.3d 616, 625 (7th Cir. 2000) (compulsory [illegible]rocess not violated when government deported witnesses because defense failed to show government [illegible]cted in bad faith); Williams v. Stewart, 441 F.3d 1030, 1056 (9th Cir. 2006) (compulsory process not [illegible]iolated when court denied defendant's request to fund transportation for witnesses and request continu-[illegible]nce because not clear how requests, if granted, would have aided defendant's mitigation defense); U.S. [illegible]. Gutierrez, 931 F.2d 1482, 1491-92 (11th Cir. 1991) (compulsory process not violated when government [illegible]failed to produce informant under court order because government made reasonable efforts to locate [illegible]informant but unable to find him).

2027. Pa. v. Ritchie, 480 U.S. 39, 56 (1987) (plurality opinion); *see, e.g.*, U.S. v. Connors, 441 F.3d [illegible]527, 531 (7th Cir. 2006) (compulsory process not violated when government failed to disclose confiden-[illegible]tial informant's identity because did not prejudice outcome of trial); U.S. v. Sanchez, 429 F.3d 753, [illegible]755-56 (8th Cir. 2005) (compulsory process not violated because government disclosed last known [illegible]address and number of confidential informant 6 days before trial and prior attempts to locate informant [illegible]unsuccessful). *But see, e.g.*, U.S. v. Lapsley, 263 F.3d 839, 843 (8th Cir. 2001) (compulsory process [illegible]violated when court allowed government to withhold identity of informant without hearing testimony [illegible]because defendant established beyond speculation that testimony would be material).

2028. *See Ritchie*, 480 U.S. at 56. Although the Court in *Ritchie* noted that the Compulsory Process Clause provides no greater safeguards than the Due Process Clause, it declined to decide whether or how the protections guaranteed by each Clause differ. *See id.* For a discussion of a defendant's due process rights to disclosure of exculpatory evidence, see *Government's Statutory Disclosure Duties* in DISCOVERY AND ACCESS TO EVIDENCE in Part II.

2029. *See In re* Winship, 397 U.S. 358, 364 (1970); *see also* Clark v. Ariz., 548 U.S. 735, 766 (2006) (restating presumption that defendant is innocent unless and until government proves, beyond a reasonable doubt, each element of offense). The *Winship* reasonable doubt standard applies in both state and federal proceedings. *See* Sullivan v. La., 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant's liberty interest. *See Winship*, 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. *Id.* Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. *Id.* at 363-64. In his concurring opinion, Justice Harlan noted that the standard is founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

The burden of proof consists of two parts: the burden of production and the burden of persuasion. The party bearing the burden of production must produce enough evidence to allow a factfinder to determine that the fact in question occurred. The party who first pleads the existence of a fact not yet in issue usually has the burden of production, but this burden can shift from one party to another. If a party fails to sustain its burden of production, that party is subject to an adverse ruling by the court. For instance, the prosecution has the burden of production on every element of the offense charged. If the government fails to produce sufficient evidence for any element, thereby not bringing the fact into issue, the judge may direct a verdict in the defendant's favor. *See generally* LAFAVE, CRIMINAL LAW § 1.8 (4th ed. 2003);

doubt requirement applies to elements that distinguish a more serious crime from a less serious one, as well as to those elements that distinguish criminal from noncriminal conduct.[2030] The defendant must be acquitted if the government fails to meet its burden of proof.[2031] The defendant must also be acquitted if the court defines reasonable doubt in a way that impermissibly eases the prosecution's burden of proof.[2032] However, due process does not require the court to use any particular words to advise the jury of the government's burden of proof as long as, "taken as a whole, the instructions . . . correctly convey the concept of reasonable doubt to the jury."[2033] Finally, the omission from the jury instructions of any element that the

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MCCORMICK, EVIDENCE §§ 336-337 (5th ed. 1999).

The party bearing the burden of persuasion must convince the factfinder that a fact in issue should be decided a certain way. *See Winship*, 397 U.S. at 364. The Due Process Clause places on the prosecution the burden of persuasion on every element of the crime charged, and only in rare circumstances does the burden shift to the defendant. Any shifting of the burden of persuasion must withstand constitutional scrutiny. *See* Patterson v. N.Y., 432 U.S. 197, 210 (1977) (requirement that defendant prove affirmative defense by preponderance of evidence did not unconstitutionally shift burden of persuasion).

2030. *See* Apprendi v. N.J., 530 U.S. 466, 488-92 (2000). Thus, a state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts that distinguish the two offenses because the defendant's interest in due process is implicated. *See id.*

2031. *See Winship*, 397 U.S. at 363; *see, e.g.*, U.S. v. Carucci, 364 F.3d 339, 343 (1st Cir. 2004) (prosecution's failure to prove beyond reasonable doubt that defendant purchased property using proceeds from specified unlawful activity required reversal of convictions for engaging in transactions in criminally derived property); U.S. v. Novak, 443 F.3d 150, 159 (2d Cir. 2006) (prosecution's failure to prove beyond reasonable doubt that defendant had intent to harm required reversal of mail fraud conviction); U.S. v. Ozcelik, 527 F.3d 88, 101 (3d Cir. 2008) (prosecution's failure to prove beyond reasonable doubt that defendant concealed illegal alien required reversal of harboring conviction); U.S. v. Ismail, 97 F.3d 50, 59 (4th Cir. 1996) (prosecution's failure to prove beyond reasonable doubt that defendants knew their conduct violated law required reversal of convictions for illegal structuring of financial transactions); U.S. v. Buchanan, 485 F.3d 274, 282 (5th Cir. 2007) (prosecution's failure to prove beyond reasonable doubt that defendant had engaged in more than 1 transaction in violation of applicable statute required reversal of 3 of 4 counts in child pornography charges); McKenzie v. Smith, 326 F.3d 721, 728 (6th Cir. 2003) (prosecution's failure to prove beyond reasonable doubt that defendant was perpetrator of assault required reversal of conviction for assault with intent to murder); U.S. v. Allen, 383 F.3d 644, 649 (7th Cir. 2004) (prosecution's failure to prove beyond reasonable doubt felon status of defendant required reversal of conviction for felon in possession of firearm); U.S. v. Scofield, 433 F.3d 580, 586-87 (8th Cir. 2006) (prosecution's failure to prove beyond reasonable doubt codefendant's constructive possession required reversal of conviction for possession of methamphetamine with intent to distribute); Smith v. Mitchell, 437 F.3d 884, 889-90 (9th Cir. 2006) (prosecution's failure to prove beyond reasonable doubt that defendant caused death of 7-week-old grandson required reversal of conviction for assault on child resulting in death), *vacated and remanded on other grounds*, 550 U.S. 915 (2007); U.S. v. Trung Huu Truong, 425 F.3d 1282, 1291 (10th Cir. 2005) (prosecution's failure to prove beyond reasonable doubt that defendant knew or had reasonable cause to believe that pseudoephedrine and ephedrine he sold would be used to manufacture methamphetamine required reversal of drug conviction); U.S. v. Medina, 485 F.3d 1291, 1300-01 (11th Cir. 2007) (prosecution's failure to prove beyond reasonable doubt that defendants participated in health care fraud required reversal of convictions); U.S. v. Law, 528 F.3d 888, 896-97 (D.C. Cir. 2008) (per curiam) (prosecution's failure to prove beyond reasonable doubt desire to conceal source of funds required reversal of conviction for federal money-laundering).

2032. *See* Cage v. La., 498 U.S. 39, 41 (1990) (per curiam), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62 (1991); *see also* Sullivan v. La., 508 U.S. 275, 279 (1993) (*Cage* error is not amenable to harmless error analysis and "will always invalidate the conviction"). The *Cage* rule has not been made retroactive to cases arising on collateral review. *See* Tyler v. Cain, 533 U.S. 656, 664-69 (2001).

2033. Victor v. Neb., 511 U.S. 1, 5 (1994) (quoting Holland v. U.S., 348 U.S. 121, 140 (1954)); *see also* Estelle v. McGuire, 502 U.S. 62, 72 (1991) ("[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (quoting Boyde v. Cal., 494 U.S. 370, 380 (1990))). The *Victor* Court upheld a California court's instruction that included the phrases "moral certainty" and "moral evidence" because the instruction as a whole adequately conveyed the concept of reasonable doubt. 511 U.S. at 11-16. The Court also upheld a Nebraska court's instruction equating reasonable doubt with "actual and substantial doubt." *Id.* at 18. Nevertheless, the Court noted that, taken

APPENDIX 6

Opinion in United States v. Stephens, 569 F.2d 1372 (5th Cir. 1978).

{569 F.2d 1373} RUBIN, Circuit Judge.

After a first trial that resulted in a mistrial because the jury was unable to reach a verdict, Charles Floyd Stephens was tried again and convicted by a jury of selling a motor vehicle, knowing it to have been stolen, in violation of 18 U.S.C. § 2313. His only defense in both trials was that he did not know that the vehicle had been stolen. After the jury had begun its deliberations in the second trial, one of the jurors asked the judge orally whether suspicion that a vehicle was stolen was equivalent to knowledge. We find that the judge's impromptu answer (based on a reasonable person standard) was incorrect and misleading. We, therefore, reverse the conviction and remand for a new trial.

It was evident throughout the trial that the only defense was the defendant's argument that he did not know that the vehicle was stolen. In its jury charge, the court correctly instructed the jury on the issue of knowledge. However, after deliberating approximately four hours, the jury requested clarification of several terms, including the word "knowingly." The judge called the jury to the courtroom, and the following colloquy occurred:

> Court: . . . An act is knowingly done when it is consciously done. . . an act is knowingly done if done voluntarily and intentionally and not because of some mistake or accident or other innocent reason . . . .
>
> **{569 F.2d 1374}** Juror: . . . if somebody acted with a suspicion that what he's doing could be wrong . . . would that constitute knowing?
>
> Court: I think in that connection you are going to have to view it as a reasonable person, what a reasonable person would know or should know under the circumstances and be governed accordingly.After this instruction was given, the jury deliberated for ten more minutes, and returned a guilty verdict.

Knowledge that the vehicle sold has been stolen is an essential element of guilt under the statute. 18 U.S.C. § 2313. 1 It must be shown that, at the time the vehicle was sold, the defendant had actual knowledge that he was dealing with a stolen car. *Schaffer v. United States*, 5 Cir. 1955, 221 F.2d 17; *cf., United States v. Jewell*, 9 Cir. 1976, 532 F.2d 697, *cert. denied*, 1976, 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188; *United States v. Gallo*, 1976, 177 U.S.App.D.C. 214, 543 F.2d 361; *United States v. Bright*, 2 Cir. 1975, 517 F.2d 584. That state of mind may, of course, be shown by circumstantial evidence. *United States v. Bright, supra; United States v. Jewell, supra; United States v. Jacobs*, 2 Cir. 1973, 475 F.2d 270, *cert. denied sub nom, Lavelle v. United States*, 414 U.S. 821, 94 S. Ct. 116, 38 L. Ed. 2d 53, 94 S. Ct. 131; *Turner v. United States*, 1970, 396 U.S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610; *Leary v. United States*, 1969, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57. It is not necessary for the prosecution to perform the impossible task of obtaining a print-out of the defendant's state of consciousness at the moment of sale. But, however proved, actual knowledge itself must be shown beyond a reasonable doubt. *Schaffer v. United States, supra.*

The court's supplemental definition of knowledge, which used a "reasonable person" standard, was incorrect. Although the court further instructed the jury to consider the supplemental definition in the light of the entire charge, this cautionary statement did not effectively balance the misleading instruction 2 coming as it did at a crucial time in the jury's deliberations. When the jury has zeroed in on a critical issue, accurate instructions take on maximum importance. See *United States v. Bright, supra.*

The defendant also contends that the evidence was insufficient to sustain the conviction. If this were so, then acquittal would be required. *United States v. Barrera*, 5 Cir. 1977, 547 F.2d 1250; *United States v. Salinas-Salinas*, 5 Cir. 1977, 555 F.2d 470. But the sufficiency of the proof of every

element of the offense other than knowledge is conceded. There was, in addition, evidence that might have been considered on the issue of the defendant's awareness that he was dealing with a stolen automobile. The defendant gave an account of his acquisition of the vehicle to an FBI agent, which was related by the agent to the jury; Stephens said he had bought the vehicle for $305 in cash from a stranger whom he had met beside the road. The jury might have considered this not only implausible but incriminatory. In assessing the defendant's state of mind, the jury was also entitled to take into account the fact of the defendant's possession of recently stolen property and his prior conviction on two counts of violating the same **{569 F.2d 1375}** statute, and two counts of violating the statute dealing with transportation of stolen vehicles, 18 U.S.C. § 2312. All of these, taken together, were sufficient to support the jury's verdict. *Barnes v. United States*, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973); *United States v. Casey*, 5 Cir. 1976, 540 F.2d 811; *United States v. Fairchild*, 5 Cir. 1975, 505 F.2d 1378.

The judgment appealed from is reversed, and the case is remanded for a new trial.

REVERSED AND REMANDED.

APPENDIX 7

Supplemental Brief of the §2255 Petition filed on January 16th, 2018 (Dkt #6 - Habeas Proceeding), after the Supreme Court decided Weaver v. Massachusetts, 582 U.S. ___, 198 L. Ed. 2d 420 (2017).

proof as to every fact that ought to be proven); and (2) the Jury Clause of the Sixth Amendment because there is a reasonable probability that the charge deprived Sullivan of a jury verdict, that is a jury's verdict under the Winship standard.

The instructional error in the present case, as well as Sullivan, belongs to these sorts of structural errors that always lead to fundamental unfairness because each of them severly undermine the reliability of the underlying proceeding. A supplemental instruction to the jury that directly, and to the point, negates a correct instruction, which had required the government to prove that each and every defendant had knowledge or intent of importation into the United States, is a blatant deprivation of one of the most, if not the most, fundamental guarantees at trial (which protect a defendant against unjust conviction)[3] and is also a "pervasive undermining of the systemic requirements of a fair and open judicial process." Weaver, supra (citation omitted) (emphasis added). This sort of instructional error is structural in nature and infringes upon the same constitutional rights as the Supreme Court found in Sullivan. Here, as well as in Sullivan, the instructional error lessened what the prosecution ought to prove and what the jury ought to find; all of this, in plain disadvantage for the defendant and obviously in benefit of the prosecution. Errors of this sort are always structural and will always pervasively undermine the systemic requirements of a fair criminal trial.

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[3] The Winship standard protects a defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U. S. at 364.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 4, 2022
Lyle W. Cayce
Clerk

No. 21-40588

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JAIME GONZALO CASTIBL CABALCANTE,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:16-CV-964

ORDER:

Jaime Gonzalo Castibl Cabalcante, federal prisoner # 44925-198, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his convictions of (1) conspiring to knowingly or intentionally import five or more kilograms of cocaine into the United States and (2) aiding and abetting his codefendants while distributing five or more kilograms of cocaine, intending and knowing that it would be unlawfully imported into the United States. He claims that his trial counsel rendered ineffective assistance by failing to file a motion for reconsideration after the district court denied his motion for a new trial and his appellate counsel rendered ineffective assistance by failing to argue that

the trial court committed structural error in how it answered a question posed by the jury.

To obtain a COA, Cabalcante must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He will satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here, the district court denies relief on the merits, the movant must show that reasonable jurists "would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Cabalcante has not made the requisite showing.

Accordingly, his motion for a COA is DENIED.

/s/ Leslie H. Southwick

LESLIE H. SOUTHWICK
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAIME GONZALO CASTIBLANCO CABALCANTE	§	
	§	
	§	
vs.	§	CIVIL NO. 4:16CV964
	§	CRIMINAL NO. 4:09CR194(9)
UNITED STATES OF AMERICA	§	

MEMORANDUM OPINION AND ORDER

The following are pending before the Court:

1. Petitioner's *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Dkt. #1);

2. Petitioner's supplemental brief in support of his 28 U.S.C. § 2255 motion (Dkt. #6);

3. Affidavit of Carlo D'Angelo (Dkt. #8);

4. Government's response to Petitioner's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 (Dkt. #10); and

5. Petitioner's reply to the Government's response to the Petitioner's § 2255 motion (Dkt. #12).

Having considered the Petitioner's motion and the responsive briefing thereto, the Court finds that the motion should be denied.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The United States Court of Appeals for the Fifth Circuit discussed the factual and procedural history of the Petitioner's case as follows:

> In October 2009, a grand jury returned a two-count indictment charging twenty-seven defendants with participation in a vast Colombian conspiracy to import cocaine into the United States. Count One charged a conspiracy offense under 21 U.S.C. § 963, alleging: (1) the defendants conspired to knowingly and intentionally import five or more kilograms of cocaine into the United States, in violation of 21 U.S.C. §§ 952 and 960; and (2) the defendants conspired to knowingly and

intentionally manufacture and distribute five or more kilograms of cocaine, intending and knowing that it would be unlawfully imported into the United States, in violation of 21 U.S.C. §§ 959 and 960. Count Two alleged that the defendants aided and abetted each other while intentionally and knowingly manufacturing and distributing five or more kilograms of cocaine, intending and knowing that it would be unlawfully imported into the United States, in violation of 21 U.S.C. § 959 and 18 U.S.C. § 2.

Nineteen of the twenty-seven defendants pled guilty, two died before they could be extradited to the United States, and two fled and remain fugitives. The four remaining defendants—appellants here—went to trial: Jaime Gonzalo Castibl Cabalcante ("Cabalcante"), Oscar Orlando Barrera Piñeda ("Piñeda"), Julio Hernando Moya Buitrago ("Moya"), and Roberth William Villegas Rojas ("Rojas").

The trial focused primarily on two drug transactions. The first transaction was a thwarted attempt in December 2007 to move at least 1,000 kilograms of cocaine from Colombia to Guatemala and, from there, to the United States–Mexico border and then into the United States. This particular plan involved a plane with tail number HP1607, and thus was often referred to by the parties as the HP1607 flight or the HP1607 deal. Cabalcante brokered the HP1607 deal by introducing the Colombian suppliers to the Mexican buyers, members of the Los Zetas drug cartel. The Zetas paid about $7.9 million for this deal—an amount that would have purchased several thousand kilograms of cocaine in 2007.

In Colombia, Carlos Eduardo Gaitan–Uribe ("Gaitan"), who was indicted in this conspiracy but died before trial, coordinated logistics by recruiting pilots, maintaining airplanes, securing clandestine airstrips, and contacting corrupt air traffic controllers. Defendant Moya, an air traffic controller who worked as a supervisor at the El Dorado International Airport in Bogota, agreed to help Gaitan get HP1607 through Colombian airspace. Defendant Piñeda was the pilot who flew HP1607 from Bogota to Panama for staging. Piñeda also coordinated the pilots who then flew the plane from Panama back into Colombia to pick up the cocaine.

HP1607's return trip to Colombia on December 20, 2007, did not go as planned. The Colombian Air Force detected the plane heading back to Colombia and sent a plane to follow HP1607 until it landed at a clandestine air strip. Because the Air Force failed to make contact with HP1607 before it landed, the Air Force dispatched a combat aircraft to the landing strip. After firing warning shots with no response, the Air Force fired at HP1607 and destroyed it. In a wiretapped call after the thwarted HP1607 flight, Piñeda commented that they "were left without Christmas" and could instead "get together and cry together" about the failed flight. The Zetas held Cabalcante responsible for the failed transaction, holding him hostage for three months.

> Although he was not involved in the HP1607 transaction, Defendant Rojas was involved in other cocaine transactions. Rojas was connected to the conspiracy through a drug trafficker named German Giraldo Garcia (alias "El Tio"), who was indicted in this case but remains a fugitive. El Tio worked with David Quinones ("Quinones"), Gaitan's logistics partner, to build an organization to import drugs into the United States. The main transaction concerning El Tio that the parties focused on at trial involved a deal he made in 2008 with a cocaine supplier named Jamed Colmenares (alias "El Turco"). Rojas was El Turco's right-hand man. The buyer for this $1.1 million deal was a Mexican man called "Chepa." This transaction also failed when, on October 22, 2008, the Colombian National Police intercepted a truck carrying about 1,000 kilograms of cocaine.
>
> After Chepa held El Tio hostage for failing to deliver the cocaine, Chepa and El Tio agreed that El Tio would have to make up for the lost truck load. On November 26, 2008, El Tio had a meeting with Quinones, El Turco, and Rojas to plan their second attempt. Five days after the meeting, Rojas said over the phone that he had half the "luggage" at his house and was waiting for El Tio to tell him when to transport the load to an airplane so that it could be flown to Central America.
>
> The Colombian National Police again thwarted this plan the very next day when the police seized 286 kilograms of cocaine found in a parked truck. Rojas paced the street in front of the parking lot while the police searched the truck. On a wiretapped call, Rojas told his boss, El Turco, that the cocaine had been seized again.

United States v. Rojas, 812 F.3d 382, 388–90 (5th Cir. 2016).

At the conclusion of "a three-week trial, a jury found four defendants," one being the Petitioner herein, "guilty of conspiring to knowingly or intentionally import five or more kilograms of cocaine into the United States in violation of 21 U.S.C. §§ 959 and 960, and all in violation of 21 U.S.C. § 963." *Id.* at 388. "The jury also found three of the four defendants" (one being the Petitioner herein) "guilty of aiding and abetting each other while distributing five or more kilograms of cocaine, intending and knowing that it would be unlawfully imported into the United States, in violation of 21 U.S.C. § 959 and 18 U.S.C. § 2." *Id.*[1]

[1]The Honorable Marcia Crone presided over the trial of this case. On January 13, 2015, Judge Crone signed an order transferring this case to the undersigned, the Honorable Amos L. Mazzant, III. The order was entered on January 14, 2015. *United States v. Cabalcante*, 4:09-cr-194 (Dkt. #1272).

The Petitioner filed a direct appeal to the United States Court of Appeals for the Fifth Circuit. On appeal, the Petitioner raised the following issues:

1. The validity and extraterritoriality of 21 U.S.C. §§ 959 and 963;

2. Venue was not proper in the Eastern District of Texas;

3. The district court erred by failing to give two proposed jury instructions on venue;

4. The district court erred because it denied the Petitioner's motion to suppress wiretap conversations that were recorded in Columbia;

5. The district court erred because it denied the Petitioner's motion for new trial based on prosecutorial misconduct;

6. The district court erred because it declined to give the Petitioner's requested jury instruction on specific intent;

7. The evidence was insufficient to support the Petitioner's conviction;

8. The district court erred by admitting into evidence cocaine that was seized from the boat *Avante*;

9. The district court erred because it declined to instruct the jury on withdrawing from a conspiracy;

10. A material variance existed between the conspiracy charged and the evidence offered at trial, thus warranting a reversal of the Petitioner's conviction; and

11. The district court erred by permitting the Government to refer to the American dollar in its rebuttal argument.

The Fifth Circuit affirmed the Petitioner's conviction and sentence on January 28, 2016. The Supreme Court of the United States denied the Petitioner's petition for a writ of certiorari on June 6, 2016. On December 16, 2016, the Petitioner filed this motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, alleging the following grounds for relief:

1. The Petitioner received the ineffective assistance of trial counsel[2] because counsel failed to move the trial court to reconsider his motion for new trial; and

2. The Petitioner received the ineffective assistance of appellate counsel because:

   A. Counsel failed to argue on appeal that "the district court committed structural error when the judge answered 'no' to a jury's query";

   B. Counsel failed to argue on appeal that "the method by which the jury reached the ultimate conclusion of guilty on Count One offends elementary principles of logic and [the] Due Process Clause of [the] Fifth Amendment";

   C. Counsel failed to argue on appeal "on Count Two, [that] the government failed to prove the manufacture or distribution element and failed also in establishing a guilty principal"; and

   D. Counsel failed to argue on appeal that "the trial Court erred in admitting the Petitioner's prior money laundering convictions."[3]

DISCUSSION AND ANALYSIS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (*citations omitted*). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). Conclusory allegations, which are unsupported and unsupportable by anything else contained in the record, do not raise a constitutional issue in a

[2]Mr. Carlo D'Angelo represented the Petitioner at trial and on appeal.

[3]The Petitioner also asserts that he is actually innocent of the crimes charged. However, since the Petitioner presented no argument in support of his actual innocence claim, the court need not address it.

habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

PROCEDURAL BAR

It is well-settled that, absent countervailing equitable considerations, a § 2255 movant cannot relitigate issues raised and decided on direct appeal. *United States v. Rocha,* 109 F.3d 225, 299 (5th Cir. 1997); *Withrow v. Williams*, 507 U.S. 680 (1993). "[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are [generally] not considered in § 2255 motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (citing *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980)). It is also well settled that a collateral challenge may not take the place of a direct appeal. *Shaid*, 937 F.2d at 231. Accordingly, if the Petitioner raised, or could have raised, constitutional or jurisdictional issues on direct appeal, he may not raise them on collateral review unless he shows either cause for his procedural default and actual prejudice resulting from the error, or demonstrates that the alleged constitutional violation probably resulted in the conviction of one who is actually innocent. *Id.* at 232.

LAW APPLICABLE TO THE PETITIONER'S CLAIMS

The Petitioner couches all of his claims in terms of receiving the ineffective assistance of counsel. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir.

1995). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonably professional judgment. *Strickland*, 466 U.S. at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981).

A movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Movant must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, a court need not address the question of counsel's performance. *Id.* at 697.

1. MOTION FOR RECONSIDERATION

In his first argument, the Petitioner contends that his trial counsel was ineffective for failing to move the district court to reconsider its denial of his motion for new trial. Although the Petitioner raised more than one issue in his motion for new trial, the Petitioner, at this juncture, focuses his attention on his counsel's alleged failure to move the district court to reconsider its denial of his motion for new trial regarding the court's response to a jury note during deliberations. The district court thoroughly addressed the issue of the jury note in its order denying the Petitioner's motion for new trial. *See United States v. Cabalcante*, 4:09-cr-194 (Dkt. #978). The district court analyzed the issue as follows:

> 1. Response to Jury Question
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> "Supplemental instructions must be 'reasonably responsive' and 'allow[] the jury to understand the issue presented to it.'" *United States v. Hale*, 685 F.3d 522, 544 (5th Cir.), *cert. denied*, 133 S. Ct. 559 (2012) (quoting *United States v. Cantu*, 185 F.3d 298, 305 (5th Cir. 1999)). "When a deliberating jury expresses confusion and difficulty over an issue submitted to it, the trial court's task is to clear that confusion away with 'concrete accuracy.'" *United States v. Stevens*, 38 F.3d 167,

169-70 (5th Cir. 1994) (quoting *United States v. Carter*, 491 F.2d 625, 634 (5th Cir. 1974)). "If, in response to a jury question, the trial court directs the jury's attention to the original instructions, the response will be deemed sufficient if the original charge is an accurate statement of the law." *United States v. Marshall*, 283 F. App'x 268, 279 (5th Cir.), *cert. denied*, 555 U.S. 1005 (2008) (citing *United States v. Arnold*, 416 F.3d 349, 359 n.13 (5th Cir.), *cert. denied*, 546 U.S. 970 (2005)). Furthermore, "[t]here is nothing wrong in responding in a narrow fashion allowing the jury to decide if the answer is responsive." *United States v. Stowell*, 947 F.2d 1251, 1257 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992).

In this case, the jury sent the following note to the court after starting its deliberations:

> We the jury, request the following: Re: Count One
> If we agree there was a conspiracy, must we believe that each defendant knew or intended importation to the U.S.? Or if we believe there was a conspiracy and only one or two defendants had knowledge of importation to the U.S., can we find all four guilty of Count One?

After reading the note to the parties, the court discussed with counsel in open court the manner in which to respond. The court immediately recognized that the note revealed the jury's misunderstanding concerning which defendants were charged in Count One. As noted previously, Barrera was not prosecuted as to Count One, meaning that only three defendants, not four, were charged with that count. All parties agreed that the misunderstanding should be addressed in the court's response. After further consulting with the parties, the court answered the jury's note as follows:

> No, please note that only 3 of the defendants are charged in Count One of the Indictment. Please read carefully the instructions regarding Count One found on pages 13-15 of the Court's instructions to the Jury as well as the remainder of the instructions.

In his motion, Moya[4] contends that the court should have bifurcated its response to the note by answering "yes" to the first question and "no" to the second one. The court, however, finds the response to be adequate.

First, the record demonstrates that counsel for Moya agreed with the court that the answer to the jury's note should have been "no." Moya's counsel stated:

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[4]The district court noted that the Petitioner's "arguments concerning the court's response to the jury note are substantively similar to those made by [co-defendant] Moya and likewise fail to demonstrate that a new trial should be granted." *United States v. Cabalcante*, 4:09-cr-194 (Dkt. #978) at p. 13.

> "Your Honor, I agree with the Court that you should answer no." Later, he reiterated his position by saying: "That's why I'm requesting that the answer should be no." At no time did he ask the court to treat the note as two distinct questions or argue that the correct answer was "yes." Counsel objected to the court's response, but only because it did not specifically direct the jury's attention to the part of the jury instructions discussing multiple defendants and multiple counts. While not dispositive, counsel's remarks reflect the parties' agreement that the answer to the note should have been "no."
>
> Moreover, the court's response was proper because it specifically directed the jury to the instructions concerning Count One of the Indictment. In the instructions, the three elements of the offense are described in precise detail. The first element requires the government to prove that a defendant reached an agreement to either distribute, manufacture, or import cocaine "intending or knowing that such substance would be unlawfully imported into the United States" in order to obtain a guilty verdict. This language, which Defendants did not challenge and do not now claim to be incorrect, accurately states the law and provides the answer to the jury's question.
>
> Thus, in answering the jury note, the court consulted with the parties, accurately answered the note, and directed the jury to consider the court's instructions, particularly the section outlining the requirements for a guilty finding under Count One. Accordingly, the record reveals no error requiring a new trial on this basis. Therefore, Moya's motion for new trial on the ground that the court erred in responding to the jury note is denied.

United States v. Cabalcante, 4:09-cr-194 (Dkt. #978) at pp. 4-6 (internal footnote omitted).

While a motion for reconsideration is a "legitimate procedural device" in a criminal proceeding, *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982), it has its limitations. Where, as here, the district court fully analyzed the issue of the jury note, there was no reason for trial counsel to return to the district court seeking a reconsideration. Mere disagreement with a court's order does not require counsel to move for reconsideration of the same. As such, the Petitioner's ineffective assistance of counsel claim fails.

2. STRUCTURAL ERROR

In his second argument, the Petitioner argues that his counsel was ineffective for failing to

argue on appeal that "the district court committed structural error when the judge answered 'no' to a jury's query." The basis for the Petitioner's argument stems from the above-referenced analysis.

According to the Petitioner, the district court's "no" response to the jury's question during deliberations relieved the jury from considering the knowledge element in counts one and two of the indictment. The Petitioner thus contends that his counsel was ineffective for failing to argue on appeal that the district court incorrectly responded to the jury's question, thereby committing structural error.

> "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 582 U.S. ——, ——, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017). "Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' " *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). In *Weaver*, the Supreme Court laid out three broad categories of structural error: first, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," *id.* at 1908 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (deprivation of the right to self-representation at trial)); second, "if the effects of the error are simply too hard to measure," *id.* (citing *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (unlawful exclusion of grand jurors of defendant's race)); and third, "if the error always results in fundamental unfairness," *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total deprivation of counsel), and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable doubt instruction)). However, "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.*

United States v. Nepal, 894 F.3d 204, 212 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 831, 202 L. Ed. 2d 580 (2019).

Responding to a jury's interrogatory, "though, does not fall into any of these categories, nor

is the error in [the Petitioner's] case on the same level as the errors targeted in the Court's structural error jurisprudence." *Id.* at 212. "Indeed, [a district court's response to a jury's inquiry during deliberations] is a far cry from deprivation of counsel, deprivation of the right to self-representation, or unlawful exclusion of grand jurors of the defendant's race." *Id.* at 212-13.

> Furthermore, and perhaps more importantly, none of the Supreme Court's structural error cases are direct appeals from judgments of conviction within the federal system . . .; they are either appeals from state courts which had considered the error under their own rules or federal habeas challenges to state convictions. *See Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (rejecting federal defendant's argument that the error in her trial was structural: "the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b), "which by its terms governs direct appeals from judgments of conviction in the federal system"; creating an exception to Rule 52(b) to accommodate the error of which defendant complained would be "[e]ven less appropriate than an unwarranted expansion of the Rule").

Id. at 212–13.

Since the Petitioner's claim does not rise to the level of structural error, the Petitioner's argument that counsel was ineffective for failing to raise the same on appeal lacks merit. The Petitioner's claim, therefore, fails.

3. DUE PROCESS

In his third argument, the Petitioner argues that his counsel was ineffective for failing to argue on appeal that "the method by which the jury reached the ultimate conclusion of guilty on Count One offends elementary principles of logic and [the] Due Process Clause of [the] Fifth Amendment." More specifically, the Petitioner contends that "[t]he ultimate conclusion for the jury to draw, that is, that the cocaine will be imported into the United States, is based not upon a fact but upon a circumstance in proof, that is, that the cocaine would reach Guatemala. It offends a due process principle that 'charges of conspiracy are not to be made by piling inference upon

inference.'" (Dkt. #1, p. 6).

The Petitioner's argument ignores the fact that his counsel did, in fact, raise on appeal the sufficiency of the evidence regarding the Petitioner's intent to import cocaine into the United States. In evaluating the sufficiency of the evidence, the Fifth Circuit found as follows:

> Three of the defendants—Cabalcante, Piñeda, and Rojas—challenge the sufficiency of trial evidence proving that they committed the Count One conspiracy offense and the Count Two distribution offense with the necessary intent or knowledge that the cocaine would be unlawfully imported into the United States. To establish the mens rea element of either offense, the government needed to prove that the defendants either intended or knew that the drugs would be unlawfully imported into the United States. *See* 21 U.S.C. § 959(a); *Conroy*, 589 F.2d at 1270. The government could prove the defendants' intent or knowledge by "circumstantial evidence alone." *Medina*, 161 F.3d at 872; *see United States v. Conlan*, 786 F.3d 380, 385 (5th Cir.2015).
>
> Cabalcante and Piñeda argue that the government's evidence showed "no intent to import or distribute cocaine outside of Latin America," and Rojas suggests that the end point for the cocaine could have been Guatemala or Mexico. They point out on appeal, as they argued strenuously to the jury, that the cocaine in this case was destroyed or confiscated while still in South America and thus never actually reached the United States.
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> ---
>
> The government also introduced circumstantial evidence of intent or knowledge specific to each defendant. Cabalcante confessed to participating in the conspiracy. After his arrest, he told the DEA that he had referred his Colombian counterparts to the Zetas for the HP1607 deal. He informed the DEA that the deal was worth $7.9 million. Cabalcante also admitted that when the deal fell through, the Zetas held him responsible. To smooth over the failed deal, he went to Matamoros, Mexico—on the Mexican side of the United States—Mexico border near Brownsville, Texas—to meet with the Zetas. This evidence showed that Cabalcante was aware that the cocaine was headed to the Zetas at the United States—Mexico border and that the multi-million dollar deal was paid for in American dollars. Combined with the evidence that his co-conspirators knew that drugs heading to Mexico almost always ended up in the United States, the evidence from Cabalcante's own confession supports the jury's verdict.

Rojas, 812 F.3d at 400-401 (footnote omitted).

The issue concerning the sufficiency of the evidence with respect to the Petitioner's intent to import cocaine into the United States was raised on direct appeal and rejected by the United States Court of Appeals for the Fifth Circuit. "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986)(internal citations omitted). *See also United States v. Johnson*, 615 F.2d 1125, 1128 (5th Cir. 1980) ("[w]hen an issue has already been determined on direct appeal, a Court need not reconsider it on a Section 2255 motion."); *Ugarte-Veizaga v. United States*, 452 F.2d 1194, 1195 (5th Cir. 1972) ("[a] Section 2255 motion cannot be used in lieu of an appeal on the merits nor will issues disposed of on a previous appeal be reviewed again on such a motion."). Since the Petitioner's counsel clearly raised the sufficiency of the evidence regarding the Petitioner's intent to import cocaine into the United States on direct appeal, and the Fifth Circuit rejected the same, this Court will not revisit the same issue even though it is couched in terms of counsel providing ineffective assistance. Since counsel raised the issue on direct appeal, it cannot be said that counsel was ineffective on this basis. The Petitioner's claim therefore fails.

4. MANUFACTURE OR DISTRIBUTION ELEMENT

In his fourth argument, the Petitioner argues that his counsel was ineffective for failing to argue on appeal that "on Count Two, [that] the government failed to prove the manufacture or distribution element and failed also in establishing a guilty principal." However, counsel for the Petitioner did, in fact, argue on appeal the sufficiency of the Government's evidence with respect to Count Two. Since counsel raised the sufficiency of the evidence with respect to Count Two on direct appeal and the Fifth Circuit rejected the same, this Court will not revisit this issue at this time

even though it is couched in terms of counsel providing ineffective assistance. Since counsel raised the issue on direct appeal, it cannot be said that counsel was ineffective on this basis. The Petitioner's claim therefore fails.

5. PRIOR CONVICTIONS

In his fifth and final argument, the Petitioner argues that his counsel was ineffective for failing to argue on appeal that "the trial Court erred in admitting the Petitioner's prior money laundering convictions." At trial, the district court admitted into evidence pursuant to Rule 404(b) of the Federal Rules of Evidence, evidence concerning (1) the Petitioner's 1997 conviction for conspiracy to violate currency transaction requirements and to conduct financial transactions involving proceeds from narcotics activity, and (2) his 2003 conviction for money laundering. The district court issued a detailed order explaining the admissibility of the prior convictions. *United States v. Cabalcante*, 4:09-cr-194 (Dkt. #827). Additionally, the district court stated that although the prior convictions were admissible, a limiting instruction at the time of trial would be required. *Id.* at p. 4. Indeed, the jury was instructed not to "consider any of this evidence in deciding if the defendant committed the acts charged in the Indictment." *United States v. Cabalcante*, 4:09-cr-194 (Dkt. #896, p. 9). Given that the Fifth Circuit found that the evidence at trial was sufficient to support the Petitioner's convictions, and since the jury was instructed not to consider the Petitioner's prior convictions in reaching its guilty verdict, the Court is not convinced that the Petitioner could have been harmed because his counsel did not raise this issue on appeal. The Petitioner's claim fails.

CONCLUSION

Based on the foregoing, the motion for relief pursuant to 28 U.S.C. § 2255 is denied and the

case is dismissed with prejudice.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although the Petitioner has not yet filed a notice of appeal, the Court, nonetheless, addresses whether the Petitioner would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the movant must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a [certificate of appealability] should issue when the movant shows, at least, that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, reasonable jurists could not debate the denial of the Petitioner's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Petitioner is not entitled to a certificate of appealability.

It is therefore **ORDERED** that the motion to vacate, set aside, or correct sentence is **DENIED**, and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions not previously ruled on are **DENIED.**

IT IS SO ORDERED.

SIGNED this 31st day of March, 2020.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE