

APPENDIX A

Opinion of the United States Court of Appeals
for the Third Circuit affirming denial of relief under
28 U.S.C. § 2255.

(November 30, 2022)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3310

UNITED STATES OF AMERICA

v.

DAVID CALHOUN,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-05-cr-00363-006)
District Judge: Honorable Cynthia M. Rufe

Submitted Under Third Circuit L.A.R. 34.1(a)
on November 14, 2022

Before: AMBRO, KRAUSE, and BIBAS, Circuit Judges

(Filed: November 30, 2022)

OPINION*

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

APPENDIX A

AMBRO, Circuit Judge

David Calhoun appeals the District Court's denial of his habeas petition, in which he alleged a Sixth Amendment choice-of-counsel violation that he never raised at trial or on direct review. Because we agree with the District Court that Calhoun procedurally defaulted his claim, we affirm.

I.

In June 2005, Calhoun and seven other co-defendants were indicted for their participation in a narcotics conspiracy. Calhoun retained attorney Nino Tinari, who entered his appearance before the District Court on July 28, 2005.

In January 2006, after two failed plea deals, Tinari mailed a letter to Calhoun asking if he could pay his legal fees for the upcoming trial. In the letter, Tinari asked that, if Calhoun could not pay, he allow Tinari to withdraw so the Court could appoint new counsel. But Calhoun never received this letter because Tinari mistakenly sent it to a state correctional institution even though Calhoun had been transferred to the Federal Detention Center in Philadelphia for his change-of-plea hearing. When Tinari did not hear back, he faxed a motion to withdraw as counsel to the District Court's chambers. The same day, without holding a hearing or permitting Calhoun to object, the Court granted the motion to withdraw and gave Calhoun thirty days to find a new attorney. But only two days later, without waiting for Calhoun to find new counsel, it ruled that Calhoun was indigent and appointed William Cannon to represent him. There is no evidence in the record that Calhoun objected to Tinari's dismissal or Cannon's appointment at that time.

Two weeks before trial, Calhoun submitted a hand-written *pro se* motion for a continuance claiming he did not have enough time to prepare for trial with his new counsel, Cannon. In this motion, Calhoun confirmed he was “indigent with absolutely no funds available in his inmate account” and needed both appointed counsel and more time to prepare. App. 373. The District Court denied the motion for a continuance, and Calhoun’s trial began four days later. Before, during, and after trial, Calhoun filed multiple motions, both *pro se* and through appointed counsel, but he never made a Sixth Amendment choice-of-counsel objection. He was convicted on all counts, and the Court sentenced him to twenty years in prison and ten years supervised release.

Calhoun appealed, and the Third Circuit appointed Cannon to represent him again, this time on direct appeal. A few months later, Calhoun filed a motion for appointment of new counsel for his direct appeal claiming Cannon “was ineffective at trial” and had “avoided contact with appellant since sentencing.” *Id.* at 343. Calhoun’s motion did not include a choice-of-counsel objection. We rejected the motion because it is typical within our Circuit that criminal trial counsel remain on appeal. 3d. Cir. L.A.R. 109.1. Calhoun raised many constitutional claims in his appeal, but choice of counsel was not one of them. *See United States v. Calhoun*, 276 F. App’x 114 (3d Cir. 2008), *cert. denied*, 556 U.S. 1113 (2009).

Calhoun first raised the choice-of-counsel violation in his habeas petition that he filed in March 2010. In this petition, Calhoun raised nineteen total constitutional violations. Over the next ten years, the habeas proceedings resolved eighteen of the claims, leaving only the claim for choice of counsel. The District Court had “grave

concerns regarding the process by which Tinari was permitted to withdraw,” but it concluded that “this claim is procedurally defaulted . . . [and Calhoun] has failed to establish cause to excuse the default.” App. 8. The Court nonetheless issued a certificate of appealability on the claim.

The District Court had jurisdiction under 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253. Our review of the habeas petition is plenary. *United States v. Arrington*, 13 F.4th 331, 334 (3d Cir. 2021).

II.

The Sixth Amendment’s right to counsel encompasses “the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). But because Calhoun did not raise his choice-of-counsel claim at trial or on direct appeal, his habeas claim is procedurally defaulted unless he can show (i) cause for his failure to raise the issue before collateral review, and (ii) actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *United States v. Frady*, 456 U.S. 152, 167 (1982); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1912 (2017).

Assuming the Sixth Amendment claim has merit, we presume prejudice because Calhoun was “erroneous[ly] depriv[ed] of the right to counsel of choice.” *Gonzalez-Lopez*, 548 U.S. at 150. Such a deprivation is a “structural defect” that defies harmless error review because it “would be a speculative inquiry into what might have occurred in an alternate universe.” *Id.* Instead, we presume prejudice when a choice-of-counsel violation occurs.

Calhoun still must show cause for his failure to raise the issue before collateral review. *See Weaver*, 137 S. Ct. at 1910 (explaining that the “term ‘structural error’ means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was ‘harmless beyond a reasonable doubt.’”). To do so, he must show “some external impediment preventing counsel from constructing or raising the claim,” such as where the legal or factual basis for the claim was “not reasonably available to counsel” or where interference by officials made compliance “impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986).

Calhoun argues that the trial court record was incomplete and too limited for him to raise his claim. For example, the docket did not include Tinari’s request for withdrawal because he faxed the request to, rather than filing it with, the Court. Though Calhoun had no notice of the motion to withdraw before the Court decided it, he eventually became aware when new counsel started representing him. At that time or even later on direct review, Calhoun could have questioned why Tinari was no longer representing him and asked the Court to reconsider its order. But he did not. He filed multiple motions and a direct appeal raising myriad other complaints without raising his Sixth Amendment objection. Instead, Calhoun confirmed to the Court that he needed appointed counsel because he was “indigent with absolutely no funds available in his inmate account.” App. 373.

The District Court correctly held that Calhoun “knew of the basis for this claim” at least by the time of direct appeal, so his “lack of establishing cause for his procedural default forecloses a grant of relief.” *Id.* at 13.

* * *

We thus affirm the judgment of the District Court.

APPENDIX B

Order of the United States Court of Appeals
for the Third Circuit denying Appellant's
Application to Expand the Scope of Certificate
of Appealability.

NOTE: This copy is a replica reproduced by
Petitioner from the docket of the Court of
Appeals which contains the entire text of
the order. Petitioner has never received
a copy of the original order from said
court.

(December 9, 2020)

BLD-041

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 19-3310

UNITED STATES OF AMERICA

v.

DAVID CALHOUN,
Appellant

(E.D. Pa. No. 2-05-cr-00363-006)

Present: AMBRO, SHWARTZ, and PORTER Circuit Judges

Submitted are:

- (1) Appellant's motion to file oversized application to expand scope of certificate of appealability; and
- (2) Appellant's motion to expand scope of certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Calhoun's motion to file an overlong application to expand the certificate of appealability is granted, but his application to expand the certificate of appealability is denied. For substantially the reasons that the District Court provided in its thorough and well-reasoned opinion, jurists of reason would

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agree without debate that his challenging his enhanced sentence and the violation of a [legally-binding document] lack merit. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

The Clerk shall issue a briefing schedule.

By the Court,

/s/Thomas Ambro
Circuit Judge

Dated: December 9, 2020

CLW/cc: Mr. David Calhoun

APPENDIX F

Indictment issued in the Eastern District of Pennsylvania.

(June 29, 2005)

WIK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL NO. 05-363

v.

DATE FILED: June 29, 2005

RAUL ESTEVE,
a/k/a "Raul Estevez," : VIOLATIONS:
IBEL BLANCH : 21 U.S.C. § 846 (conspiracy to distribute
RICARDO CRUZ : more than 5 kilograms of cocaine - 1
PEDRO RISQUET, : count)
a/k/a "Mota," : 21 U.S.C. § 841(a)(1) (distribution of
LEOPOLDO MORELL-ESTEVEZ : cocaine - 13 counts)
DAVID CALHOUN : 21 U.S.C. § 841(a)(1) (possession with
DAVID GUTIERREZ, : intent to distribute cocaine - 3 counts)
a/k/a "Spider," : 18 U.S.C. § 924(c) (possession of firearm
ROBERT GARCIA, : in furtherance of drug trafficking crime -
a/k/a "Robertico" : 1 count)
18 U.S.C. § 922(g)(1) (possession of
firearm by a convicted felon - 1 count)
18 U.S.C. § 2 (aiding and abetting)
Notice of forfeiture

FILED

JUN 29 2005

MICHAEL E. KUNZ, Clerk
By *EMC* Dep. Clerk

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. From at least in or about July 2004 through on or about February 3, 2005, in Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendants

RAUL ESTEVE,
a/k/a "Raul Estevez,"
IBEL BLANCH,
RICARDO CRUZ,
PEDRO RISQUET,
a/k/a "Mota,"
LEOPOLDO MORELL-ESTEVEZ,
DAVID CALHOUN,
DAVID GUTIERREZ,
a/k/a "Spider," and

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**ROBERT GARCIA,
a/k/a "Robertico"**

conspired and agreed, together and with others known and unknown to the grand jury, to knowingly and intentionally distribute, and possess with intent to distribute, more than 5 kilograms of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(A).

MANNER AND MEANS

It was a part of the conspiracy that:

2. The defendants were members of a cocaine distribution organization that was operated and managed by defendants RAUL ESTEVE and IBEL BLANCH, who were partners in both the drug organization and the Tire Doctor, an automotive repair shop, located at 2353 N. 2nd Street in Philadelphia.

3. The organization used the Tire Doctor as its hub for the sale of cocaine. The organization also stored cocaine at a house owned by defendant RAUL ESTEVE at 760 E. Ruscomb Street in Philadelphia.

4. Defendants RICARDO CRUZ and PEDRO RISQUET each supplied bulk quantities of cocaine to defendants RAUL ESTEVE and IBEL BLANCH.

5. After receiving bulk quantities of cocaine from their suppliers, defendants RAUL ESTEVE and ROBERT GARCIA re-packaged the cocaine in smaller quantities at 760 E. Ruscomb Street, sold wholesale quantities of cocaine to defendants DAVID GUTIERREZ and DAVID CALHOUN, and others unknown to the grand jury, sold retail amounts of cocaine to

customers of the organization, and provided cocaine to other members of the organization for sale to the organization's customers.

6. Defendant IBEL BLANCH sold cocaine to retail customers of the organization.

7. Defendant LEOPOLDO MORELL-ESTEVEZ, who is defendant RAUL ESTEVE's brother, transported cocaine to the Tire Doctor for distribution to customers and distributed cocaine directly to customers among other duties.

8. Defendant DAVID CALHOUN sold the cocaine supplied by defendant RAUL ESTEVE from two properties in Southwest Philadelphia: (a) 2658 S. 66th Street; and (b) his residence at 6426 Dicks Avenue.

9. Defendant ROBERT GARCIA transported cocaine to customers and collected money from customers of the organization.

10. The organization's customers placed orders for cocaine by calling defendant RAUL ESTEVE on his cellular telephone.

OVERT ACTS

In furtherance of the conspiracy and to accomplish its objects, the following overt acts, among others, were committed in the Eastern District of Pennsylvania and elsewhere:

The July 22, 2004 Sale of Cocaine

1. On or about July 19, 2004, defendant RAUL ESTEVE met with a Person known to the grand jury (Person # 1) inside the Tire Doctor and arranged to sell two ounces of cocaine to person # 1 on July 22, 2004.
2. On or about July 22, 2004:
 - a. Defendants RAUL ESTEVE and IBEL BLANCH met with person #1 inside the Tire Doctor, where ESTEVE gave person # 1 a business card with his cell phone number - (267) 226-0759.
 - b. Defendant IBEL BLANCH sold approximately two ounces (55.6 grams) of cocaine to person # 1 inside the Tire Doctor and was paid \$1,600 in cash.

The August 10, 2004 Sale of Cocaine

3. On or about August 10, 2004:
 - a. Person # 1 called defendant RAUL ESTEVE on his cell phone and agreed to meet defendant ESTEVE to purchase cocaine at the Sunoco Station at F Street and Roosevelt Boulevard in Philadelphia.
 - b. Defendant RAUL ESTEVE met person # 1 at the Sunoco gas station, where defendant ESTEVE sold approximately two ounces (55.4 grams) of cocaine to person # 1 and was paid \$1,600 in cash.

The August 19, 2004 Sale of Cocaine

4. On or about August 19, 2004:

a. Defendant IBEL BLANCH met person # 1 inside the Tire Doctor to arrange for the sale of two ounces of cocaine, then called defendant RAUL ESTEVE on his cell phone, and told person # 1 that defendant ESTEVE had called his brother, defendant LEOPOLDO MORELL-ESTEVEZ, who would be at the Tire Doctor shortly.

b. After defendant LEOPOLDO MORELL-ESTEVEZ arrived at the Tire Doctor, he sold approximately two ounces (55.9 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash.

The August 24, 2004 Sale of Cocaine

5. On or about August 24, 2004:

a. Defendant IBEL BLANCH met with person # 1 inside the Tire Doctor and made a telephone call to arrange for person # 1 to purchase two ounces of cocaine.

b. Person # 1 then went to the Sunoco Station at F Street and Roosevelt Boulevard in Philadelphia, where he called defendant RAUL ESTEVE's cell phone.

c. Defendant RAUL ESTEVE subsequently drove to the Sunoco Station, met with person # 1, sold person # 1 approximately two ounces (56 grams) of cocaine, and was paid approximately \$1,600 in cash.

The September 1, 2004 Sale of Cocaine

6. On or about September 1, 2004, defendant RAUL ESTEVE sold approximately two ounces (55.9 grams) of cocaine to person # 1 inside an automobile at Whitaker Avenue and Loudon Street in Philadelphia and was paid approximately \$1,600 in cash.

The September 14, 2004 Sale of Cocaine

7. On or about September 14, 2004:

a. Defendant RAUL ESTEVE met with person # 1 inside the Tire Doctor and told person # 1 that he had to call defendant ESTEVE's brother, defendant LEOPOLDO MORELL-ESTEVEZ, after which defendant ESTEVE and person # 1 left the Tire Doctor.

b. When defendant RAUL ESTEVE called person # 1 and told him that defendant LEOPOLDO MORELL-ESTEVEZ would be at the Tire Doctor in about 20 minutes, both defendant ESTEVE and person # 1 returned to the Tire Doctor.

c. Defendant LEOPOLDO MORELL-ESTEVEZ subsequently drove to the Tire Doctor, met with person # 1, and in the presence of defendant ESTEVE, defendant MORELL-ESTEVEZ sold approximately two ounces (55.7 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash.

The September 22, 2004 Sale of Cocaine

8. On or about September 22, 2004:

a. At a meeting inside the Tire Doctor, defendant RAUL ESTEVE told person # 1 that he had another customer who wanted a kilogram of cocaine today and that defendant ESTEVE could get that for him and defendant ESTEVE and person # 1 negotiated the price for a kilogram of cocaine ranging from \$24,000 per kilogram of cocaine to \$26,000 for one kilogram of "china white" cocaine.

b. Defendant RAUL ESTEVE subsequently sold approximately two ounces (55.5 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash inside the Tire Doctor.

The September 29, 2004 Sale of Cocaine

9. On or about September 29, 2004:

a. Defendant RAUL ESTEVE told person # 1 that ESTEVE's brother would be waiting for person # 1 at the Tire Doctor to sell two ounces of cocaine in approximately 20 minutes.

b. Defendant LEOPOLDO MORELL-ESTEVEZ arrived at the Tire Doctor and sold approximately two ounces (55.1 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash..

The October 28, 2004 Sale of Cocaine

10. On or about October 27, 2004, defendant RAUL ESTEVE and person # 1 arranged to meet the next day at the Tire Doctor in order to purchase two ounces of cocaine.

11. On or about October 28, 2004, defendant RAUL ESTEVE sold approximately two ounces (54.4 grams) of cocaine that ESTEVE obtained from defendant LEOPOLDO MORELL-ESTEVEZ to person # 1 and was paid approximately \$1,600 in cash. inside the Tire Doctor.

The November 19, 2004 Sale of Cocaine

12. On or about November 19, 2004:

a. During a telephone conversation with person # 1 known to the grand jury, defendant RAUL ESTEVE arranged to sell two ounces of cocaine to person # 1.

b. After defendant ROBERT GARCIA drove to the Tire Doctor, he left approximately two ounces (55.1 grams) of cocaine for person # 1 to pick up, person # 1 subsequently picked up the cocaine and left approximately \$1,600 in cash as payment for the cocaine.

The December 10, 2004 Sale of Cocaine

13. On or about December 10, 2004:

a. When person # 1 called defendant RAUL ESTEVE on his cell phone and stated that person # 1 would be at the Tire Doctor in about an hour or two, defendant ESTEVE told person # 1 that defendant ESTEVE would call his brother, defendant LEOPOLDO MORELL-ESTEVEZ.

b. Defendant RAUL ESTEVE called defendant LEOPOLDO MORELL-ESTEVEZ and asked if defendant MORELL-ESTEVEZ had two ounces of cocaine to sell to person # 1.

c. Defendant LEOPOLDO MORELL-ESTEVEZ subsequently sold approximately two ounces (54.6 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash inside the Tire Doctor.

The December 13, 2004 Sale of Cocaine

14. On or about December 13, 2004, defendant RAUL ESTEVE was supplied by defendant RICARDO CRUZ with approximately one kilogram of cocaine, which defendant ESTEVE sold to defendant DAVID CALHOUN for approximately \$24,000.

The December 28, 2004 Sale of Cocaine

15. On or about December 28, 2004:

- a. Defendant RICARDO CRUZ delivered approximately 125 grams of cocaine to defendant IBEL BLANCH inside the Tire Doctor.
- b. Defendant RICARDO CRUZ called RAUL ESTEVE and stated that he had left "125" referring to the 125 grams of cocaine he had left for defendant BLANCH at the Tire Doctor.

The January 2, 2005 Sale of Cocaine

16. On or about January 2, 2005:

- a. After defendant PEDRO RISQUET supplied defendant RAUL ESTEVE with approximately one kilogram of cocaine, defendant ESTEVE sold the same kilogram of cocaine to defendant DAVID CALHOUN inside 760 Ruscomb Street in Philadelphia.
- b. Defendant DAVID CALHOUN possessed approximately 1,015 grams of cocaine on his person in the area of 6500 Grays Avenue in Philadelphia and approximately 224 grams of cocaine inside his residence at 6426 Dicks Avenue in Philadelphia..

17. On or about January 12, 2005, defendant DAVID CALHOUN paid defendant RAUL ESTEVE approximately \$1,300 in cash as the final payment for the one kilogram of cocaine defendant CALHOUN had purchased from defendant ESTEVE on or about January 2, 2005.

The January 6, 2005 Sale of Cocaine

18. On or about January 6, 2005, defendant ROBERT GARCIA sold approximately two ounces (51.7 grams) of cocaine to person # 1 for approximately \$1,600 in cash inside the Tire Doctor.

The January 7, 2005 Delivery of Cocaine

19. On or about January 7, 2005:

a. Defendant DAVID GUTIERREZ paid defendant RAUL ESTEVE in advance for the delivery of approximately one pound of cocaine.

b. Later the same day, defendant RAUL ESTEVE sent defendant ROBERT GARCIA to defendant DAVID GUTIERREZ's residence at 2343 N. 5th Street in Philadelphia to deliver approximately one pound of cocaine.

The January 14, 2005 Possession of Two Kilograms of Cocaine

20. On or about January 14, 2005:

a. Defendant RICARDO CRUZ possessed approximately two kilograms (2,000 grams) of cocaine inside the automobile he was driving from New Jersey into Pennsylvania.

b. Defendant RICARDO CRUZ also stored drug paraphernalia including cutting materials for cocaine and packaging materials inside his residence located at 3504 Churchill Lane in Philadelphia.

The January 25, 2005 Sale of Cocaine

21. On or about January 25, 2005, defendant RAUL ESTEVE and person # 1 agreed to meet the next day at the Tire Doctor.

22. On or about January 26, 2005:

a. When defendant LEOPOLDO MORELL-ESTEVEZ called defendant RAUL ESTEVE, defendant ESTEVE stated that person # 1 wanted to purchase two ounces of cocaine and asked defendant MORELL-ESTEVEZ if he had an ounce of cocaine because defendant ESTEVE only had one ounce. Defendant MORELL-ESTEVEZ said he needed to get it.

b. After defendant RAUL ESTEVE subsequently obtained the additional ounce of cocaine, he sold approximately two ounces (55.1 grams) of cocaine to person # 1 and was paid approximately \$1,600 in cash inside the Tire Doctor.

The February 3, 2005 Delivery of Two Kilograms of Cocaine

23. On or about February 3, 2005:

a. Defendant PEDRO RISQUET delivered approximately two kilograms of cocaine to defendant RAUL ESTEVE at 760 E. Ruscomb Street in Philadelphia.

b. Defendant RAUL ESTEVE possessed approximately two kilograms (1,996 grams) of cocaine, approximately 24 pounds of marijuana, an electronic scale, cutting agents and \$1,843 in cash inside of 760 E. Ruscomb Street in Philadelphia.

24. On or about February 3, 2005, defendant DAVID GUTIERREZ possessed a .25 caliber Beretta handgun, model 950 BS with serial number BU 23924V, loaded with seven .25 caliber bullets inside 2343 N. 5th Street in Philadelphia.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 22, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
IBEL BLANCH**

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 55.6 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 10, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**RAUL ESTEVE,
a/k/a "Raul Estevez"**

knowingly and intentionally distributed approximately 55.4 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 19, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez,"
IBEL BLANCH, and
LEOPOLDO MORELL-ESTEVEZ**

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 55.9 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 24, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
IBEL BLANCH**

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 56 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 1, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendant

RAUL ESTEVE,
a/k/a "Raul Estevez"

knowingly and intentionally distributed approximately 55.9 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C).

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 14, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
LEOPOLDO MORELL-ESTEVEZ**

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 55.7 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

APPENDIX | H

Opening Brief for Appellant filed in Court of Appeals
Case No. 19-3310 and filed herein for the sole purpose
of verifying the full extent of arguments raised some of
which are not addressed in the opinion of the Court of Appeals.

(filed on March 31, 2022)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 22, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**RAUL ESTEVE,
a/k/a "Raul Estevez"**

knowingly and intentionally distributed approximately 55.5 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C).

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 29, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
LEOPOLDO MORELL-ESTEVEZ**

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 55.1 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 28, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez"**

knowingly and intentionally distributed, approximately 54.4 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C).

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 19, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

RAUL ESTEVE,
a/k/a "Raul Estevez," and
ROBERT GARCIA,
a/k/a "Robertico"

knowingly and intentionally distributed, and aided and abetted the distribution of, approximately 55.1 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 10, 2004, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
LEOPOLDO MORELL-ESTEVEZ**

knowingly and intentionally distributed, and aided and abetted in the distribution of, approximately 54.6 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C), and Title 18, United States Code, Section 2.

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 2, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez,"
PEDRO RISQUET, and
DAVID CALHOUN**

knowingly and intentionally possessed with intent to distribute more than 500 grams, that is, approximately 1,240 grams, of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(B).

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 6, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**ROBERT GARCIA,
a/k/a "Robertico"**

knowingly and intentionally distributed approximately 51.7 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C).

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 14, 2005, in Bensalem, in the Eastern District of Pennsylvania, and elsewhere, defendant

RICARDO CRUZ

knowingly and intentionally possessed with intent to distribute more than 500 grams, that is, approximately 2,000 grams, of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(B).

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 26, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
LEOPOLDO MORELL-ESTEVEZ**

knowingly and intentionally distributed, and aided and abetted in the distribution of, approximately 55.1 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(C) and Title 18, United States Code, Section 2.

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 3, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**RAUL ESTEVE,
a/k/a "Raul Estevez," and
PEDRO RISQUET,
a/k/a "Mota"**

knowingly and intentionally possessed with intent to distribute more than 500 grams, that is, approximately 1,996 grams, of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(B).

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 3, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**DAVID GUTIERREZ,
a/k/a "Spider"**

knowingly possessed a firearm and ammunition, that is, one .25 caliber semi-automatic pistol, Model #950BS, serial #BU23924V, and seven .25 caliber bullets, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, conspiracy to distribute, and possession with intent to distribute, a controlled substance, in violation of Title 21, United States Code, Section 846.

In violation of Title 18, United States Code, Section 924(c)(1).

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 3, 2005, in Philadelphia, in the Eastern District of Pennsylvania, defendant

**DAVID GUTIERREZ,
a/k/a "Spider",**

having been convicted in the United States District Court for the Eastern District of Pennsylvania of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed in and affecting interstate and foreign commerce a firearm and ammunition, that is, one .25 caliber Beretta semi-automatic pistol, Model #950BS, serial #BU23924V, and seven .25 caliber bullets.

In violation of Title 18, United States Code, Section 922(g)(1).

NOTICE OF FORFEITURE

THE GRAND JURY FURTHER CHARGES THAT:

1. As a result of the violations of Title 21, United States Code, Sections 846 and 841(a)(1), set forth in this indictment, defendants

**RAUL ESTEVE,
a/k/a "Raul Estevez,"
IBEL BLANCH,
RICARDO CRUZ,
PEDRO RISQUET,
a/k/a "Mota,"
LEOPOLDO MORELL-ESTEVEZ
DAVID CALHOUN,
-DAVID GUTIERREZ,
a/k/a "Spider," and
ROBERT GARCIA,
a/k/a "Robertico"**

shall forfeit to the United States of America:

- (a) any property used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such offenses, including, but not limited to:
- \$15,255 located at 612 Kinglsey Street, Philadelphia, Pennsylvania
 - .25 caliber Beretta semi-automatic pistol, Model #950BS, serial #BU23924V
 - 760 E. Ruscomb Street, Philadelphia, Pennsylvania;
 - 1995 Chevrolet van, VIN 1GCGG35K0SF223953, Pennsylvania license plate FJW-2023, registered to RAUL ESTEVE, 760 E. Ruscomb Street, Philadelphia, Pennsylvania;

- 1995 Chevrolet Suburban, VIN 1GNGK26F9SJ430419, Pennsylvania license plate EXM-2184, registered to DAVID CALHOUN, 2604 S. 66th Street, Philadelphia, Pennsylvania;
- 1999 Suzuki, VIN JS2GB41WSX5161112, Pennsylvania license plate DFA-5671, registered to LEOPOLDO MORELL, 760 E. Ruscomb Street, Philadelphia, Pennsylvania; and
- 1992 Dodge, VIN 2B4GH4533NR710327, Pennsylvania license plate FTR-8654, registered to RICARDO CRUZ, 3504 Churchill Lane, Philadelphia, Pennsylvania.

(b) any property constituting, or derived from, proceeds obtained directly or indirectly from the commission of such offenses, including, but not limited to, the sum of \$250,000, and:

- .25 caliber Beretta semi-automatic pistol, Model #950BS, serial #BU23924V
- 760 E. Ruscomb Street, Philadelphia, Pennsylvania;
- 1995 Chevrolet van, VIN 1GCGG35K0SF223953, Pennsylvania license plate FJW-2023, registered to RAUL ESTEVE, 760 E. Ruscomb Street, Philadelphia, Pennsylvania;
- 1995 Chevrolet Suburban, VIN 1GNGK26F9SJ430419, Pennsylvania license plate EXM-2184, registered to DAVID CALHOUN, 2604 S. 66th Street, Philadelphia, Pennsylvania;

-- 1999 Suzuki, VIN JS2GB41W5X5161112, Pennsylvania license plate DFA-5671, registered to LEOPOLDO MORELL, 760 E. Ruscomb Street, Philadelphia, Pennsylvania; and

-- 1992 Dodge, VIN 2B4GH4533NR710327, Pennsylvania license plate FTR-8654, registered to RICARDO CRUZ, 3504 Churchill Lane, Philadelphia, Pennsylvania.

2. If any of the property subject to forfeiture, as a result of any act or

omission of the defendants:

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third party;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the property subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853.

A TRUE BILL:

Elanor Jane Castellino
GRAND JURY FOREPERSON

First Assistant U.S. Attorney

for *Pat L. Meehan Jr.*
PATRICK L. MEEHAN
UNITED STATES ATTORNEY

APPENDIX / G

Pertinent text of statute and rules involved.

(See Rules of the Supreme Court of the
United States 14.1(f))

PERTINENT TEXT FROM STATUTES AND RULES INVOLVED

The pertinent text from 28 U.S.C. § 2253 states:

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

[* * *]

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process by a State court; or
(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

The pertinent text from 28 U.S.C. § 2255 states:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

The pertinent text from Rule 16 of the Federal Rules of Criminal Procedure states:

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

[* * *]

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

Federal Rules of Criminal Procedure 16.

**Additional material
from this filing is
available in the
Clerk's Office.**