

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

JOSE PADILLA-GALARZA, a/k/a Joey

Petitioner

Vs.

UNITED STATES OF AMERICA

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

APPENDIX

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Indictment

United States v. Jose Padilla-Galarza,

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

UNITED STATES OF AMERICA,

Plaintiff

v.

JOSE PADILLA-GALARZA,

Defendant.

INDICTMENT

CRIMINAL NO. 15-078(JAF)

VIOLATIONS:

18 U.S.C. § 922(g)(1)

21 U.S.C. § 841(a)(1)

FORFEITURE

18 U.S.C. § 924(d)(1)

28 U.S.C. § 2461(c)

TWO COUNTS

RECEIVED AND FILED
CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, PR
JAN 29 AM 11 J.

THE GRAND JURY CHARGES:

COUNT ONE

**Prohibited Person in Possession of Ammunition
(Title 18, United States Code, Section 922(g)(1))**

On or about January 9, 2015, in the District of Puerto Rico, and within the jurisdiction of this
Court, the defendant,

JOSE PADILLA-GALARZA,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did
knowingly possess in and affecting interstate and foreign commerce ammunition, to wit: fifty-four (54)
rounds of 9mm caliber ammunition; eight (8) rounds of 7.62x39.8 caliber ammunition; and two (2) rounds

Indictment

United States v. Jose Padilla-Galarza, et al.

of 38 special ammunition, said ammunition having been shipped in interstate and foreign commerce. All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT TWO

**Possession of a Controlled Substance with Intent to Distribute
(Title 21, United States Code, Section 841(a)(1))**

On or about January 9, 2015, in the District of Puerto Rico, and within the jurisdiction of this Court, the defendant,

JOSE PADILLA-GALARZA,

did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectable amount of marihuana, a Schedule I Controlled Substance. All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

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AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA

v.

JOSE PADILLA-GALARZA

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-00078-001 (JAF)

USM Number: 19158-069

AFPD Carlos A. Vazquez-Alvarez

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) One and Two of the Indictment on August 27, 2015.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:922(b)(1)	Prohibited person in possession of ammunition	January 9, 2015	ONE
21:841(a)(1)	Possession of 1,293.1 grams of marijuana with intent to distribute	January 9, 2015	TWO

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

December 3, 2015

Date of Imposition of Judgment

S/JOSE A. FUSTE

Signature of Judge

José A. Fusté

Name of Judge

US District Judge

Title of Judge

December 3, 2015

Date

Indictment

United States v. Jose Padilla-Galarza, et al.

FIREARMS AND AMMUNITION FORFEITURE ALLEGATION
 (18 U.S.C. §§ 924(d)(1) and 28 U.S.C. § 2461(c))

The allegations set forth in Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).

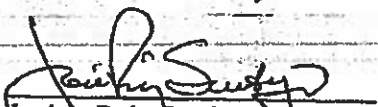
Upon conviction of the offense charged in Count One of this Indictment, JOSE PADILLA-GALARZA, the defendant, shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c), any ammunition involved or used in the commission of the offense, including, but not limited to: fifty-four (54) rounds of 9mm caliber ammunition; eight (8) rounds of 7.62x39.8 caliber ammunition; two (2) rounds of 38 special ammunition; and two magazines. All pursuant to 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c).

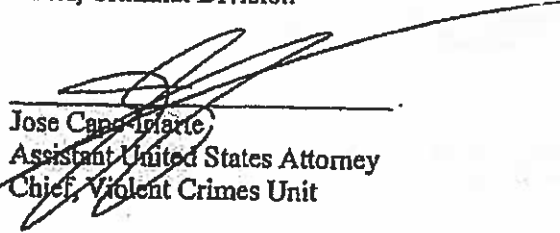
TRUE BILL


FOREPERSON

Date: January 29, 2015

ROSA EMILIA RODRÍGUEZ-VÉLEZ
 United States Attorney


 José A. Ruiz-Santiago
 Assistant United States Attorney
 Chief, Criminal Division


 Jose Canales
 Assistant United States Attorney
 Chief, Violent Crimes Unit


 Alexander L. Alum
 Assistant United States Attorney
 Violent Crimes Unit

DEFENDANT: JOSE PADILLA-GALARZA
CASE NUMBER: 3:15-CR-00078-001 (JAF)

Judgment — Page 4 of 5

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 0.00

- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	\$	0.00	\$	0.00
--------	----	------	----	------

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
 - ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release and thereafter, submit to random drug test, no less than 3 samples during the supervision period and not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If any such samples detect substance abuse, the defendant shall participate in a in-patient or out-patient substance abuse program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the U.S. Probation Officer based on the ability to pay or availability of third party payment.
- 3 The defendant shall provide the U.S. Probation Officer access to any financial information upon request.
4. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and the Title 18, U.S. Code § 3563(a)(9).
6. The defendant shall participate in transitional and reentry support services, including cognitive behavioral treatment program under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.
7. The defendant shall participate in an approved mental health treatment program for evaluation and/or treatment services determination. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider; the modality, duration and intensity o treatment will be based on the risks and needs identified. The defendant will contribute to the costs of services rendered by means of co-payment, based on his ability to pay or the availability of third party payment.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
 Sheet 3 — Supervised Release

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

Judgment—Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
THREE (3) YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

IMPRISONMENT

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

FORTY-SIX (46) MONTHS.

IT IS THE COURT'S INTENTION THAT, IF CONVICTED, THIS SENTENCE BE SERVED CONSECUTIVELY TO THE SENTENCES TO BE IMPOSED IN CRIMINAL CASES 15-079 (DRD) AND 15-633 (GAG).

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

- That the defendant be designated to FCI Loretto, PA

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

AO 243 (Rev. 09-17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District Puerto Rico
Name (under which you were convicted) Jose Padilla-Galarza		Docket or Case No.: Cr:15-078
Place of Confinement: MDC Guaynabo, P.R.	Prisoner No.: 19158-069	
<div style="display: flex; justify-content: space-between;"> UNITED STATES OF AMERICA Movant (include name under which convicted) </div> <div style="display: flex; justify-content: center; align-items: center; margin-top: 5px;"> V. Jose Padilla-Galarza </div>		

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

U.S. District Court of Puerto Rico
Federal Court Building
Calle Chardon, Halo Rey, P.R.
- (b) Criminal docket or case number (if you know): **CR 15-078 (JAF)**
2. (a) Date of the judgment of conviction (if you know): **8/27/2015**
 (b) Date of sentencing: **12/3/2015**
3. Length of sentence: **46 months consecutive + Sentence imposed in CR 15-079 (DRD) and CR: 15-633 (G+)**
4. Nature of crime (all counts):

1- 18 USC 922 (g)(1) Prohibited person in possession of ammunition
2- 21 USC 841 (a)(1) Possession of 1,293.1 grams of marijuana with intent to distribute
5. (a) What was your plea? (Check one)

(1) Not guilty ☒

 (2) Guilty ☐

 (3) Nolo contendere (no contest) ☐
6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

AO 243 (Rev 09/17)

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. First Circuit Court of Appeals

(b) Docket or case number (if you know): 16-1035

(c) Result: Conviction affirmed

(d) Date of result (if you know): 3/23/2018

(e) Citation to the case (if you know): 886 7.3d 1

(f) Grounds raised:

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

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(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐No ☐

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition:

Yes ☐No ☐

(2) Second petition:

Yes ☐No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: PETITIONER'S APPELLATE COUNSEL DEPRIVED PADILLA-GALARZA OF HIS CONSTITUTIONAL 6TH AMMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

SEE MEMORANDUM IN SUPPORT OF 2255 ATTACHED HERETO.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

INSUFFICIENT RECORD TO DEVELOP ISSUE OF INEFFECTIVENESS

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL WERE VIOLATED THAT JUSTIFIES GRANTING HIM 2255 RELIEF

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

SEE MEMORANDUM IN SUPPORT OF 2255 ATTACHED HERETO.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

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(2) If you did not raise this issue in your direct appeal, explain why:

TARDY PRODUCTION OF IMPEACHMENT EVIDENCE PREVENTED ISSUE FROM BEING DEVELOPED DURING TRIAL AND PRESENTED ON APPEAL.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

AO 243 (Rev 09/17)

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

AO 243 (Rev 09/17)

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

AO 243 (Rev 09/17)

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

N/A

(b) At the arraignment and plea:

JOHN J. CONNORS

(c) At the trial:

SELF REPRESENTATION CARLOS VAZQUEZ STAND BY COUNSEL

(d) At sentencing:

CARLOS VAZQUEZ

(e) On appeal:

LENORE GLASER

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☒ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

DISTRICT COURT P.R. CR: 15-079

(b) Give the date the other sentence was imposed: 10/15/2018

(c) Give the length of the other sentence: 228 MONTHS

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☒ No ☐

AO 243 (Rev 09 17)

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

AO 243 (Rev 09/17)

Therefore, movant asks that the Court grant the following relief:

or any other relief to which movant may be entitled.



Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on

(month, date, year)

Executed (signed) on 4/22/2019 (date)



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

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

JOSE PADILLA-GALARZA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

CIVIL NO. 19-cv-01415-DRD

CRIM. NO. 15-078 (DRD)

MEMORANDUM IN SUPPORT OF 2255 PETITION

FIRST GROUND FOR 2255 RELIEF

I- PETITIONER'S APPELLATE COUNSEL DEPRIVED PADILLA-GALARZA OF HIS CONSTITUTIONAL 6TH AMMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY MISTATING THE RECORD AS TO WHERE THE MARIJUANA AND AMMUNITION WAS FOUND IN A MANNER THAT MATERIALLY AFFECTED HIS INSUFFICIENCY OF EVIDENCE, ARGUMENT THAT WAS RELIED UPON BY THE COURT OF APPEALS IN REJECTING SAID CLAIM.

IN ADDITION, APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CONDUCT RESEARCH THAT WOULD HAVE DEMONSTRATED THAT DURING THE PERIOD PADILLA'S FATHER WAS ALIVE THE LAW ALLOWED OWNERS OF FIREARMS TO PURCHASE ANY KINDS OF BULLETS THAT DID NOT HAVE TO MATCH THOSE THEY POSSESSED. THIS RESEARCH WAS CRUCIAL IN

ESTABLISHING ADDITIONAL REASONS THAT SUPPORTED HIS SUFFICIENCY ARGUMENT THAT ALSO REBUTTED THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY.

APPELLATE COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO DEVELOP THE REFUSAL OF THE COURT TO GRANT A CONTINUANCE ISSUE SINCE AT THE TIME OF TRIAL PADILLA-GALARZA HAD REQUESTED AND BEEN GRANTED PERMISSION TO RETAIN AN EXPERT CHEMIST THAT WAS NECESSARY TO REBUT THE GOVERNMENT'S MISLEADING PRESENTATION OF EVIDENCE CONCERNING THE MARIJUANA SEIZED. SAID EXPERT WAS CRUCIAL SINCE THE GOVERNMENT'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH DRUG QUANTITY WHICH WAS SUBMITTED TO THE JURY FOR A DETERMINATION AND THE QUALITY FOR A DETERMINATION OF INTENT TO DISTRIBUTE.

APPELLATE COUNSEL FAILED TO INCLUDE IN HER ARGUMENT RELATED TO THE FAILURE TO GRANT A CONTINUANCE ERROR PADILLA'S TWO PRO SE MOTIONS DATED 08/20/15 AND 08/24/15, AND STAND BY COUNSEL VAZQUEZ' MOTION FOR RECONSIDERATION OF DENIAL OF CONTINUANCE DATED 08/24/15 THAT INCLUDED MULTIPLE FACTS THAT SUPPORTED THE GRANTING OF A CONTINUANCE. AS A RESULT, APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY DEVELOP THIS ISSUE ON APPEAL WHICH WAS ARGUED BY PADILLA-GALARZA AT TRIAL AND DENIED BY THE DISTRICT COURT. HAD SHE DONE SO THE RESULT WOULD HAVE BEEN DIFFERENT.

to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies.

In the face of the evidence, Padilla nevertheless contends that the evidence was insufficient to prove that he knowingly possessed the contraband". U.S. v. Padilla-Galarza, 886 F.3d Pg. 1, 5-6 (1st Cir. 2018). (Exh. 2).

It is clear from the above that the insufficiency of evidence issue was denied by the Court of Appeals based on Padilla-Galarza's counsel's representation that the marijuana and ammunition were found in the bedroom that was more organized where he slept on occasions from where the jury could infer that he knowingly possessed them.

The problem with that analysis based on appellate counsel's factual representations is that they are false. Had appellate counsel studied the record she would have made a totally contrary argument since no marijuana, ammunitions nor mannequins were found in the more organized bedroom. In fact no contraband for which Padilla-Galarza was indicted was found in that bedroom. Had the correct facts been informed in the brief the insufficiency of evidence argument could have prospered.

Photos were taken of that bedroom, which was identified as Room I, that showed that no marijuana or ammunition was found there. (Exh. 3a-d). The marijuana, ammunition and mannequins that she made reference to were found in Room K, which is a totally different room in the house from where no evidence was presented that he frequented that room much less slept there. (Exh. 4a-e).

One bullet was claimed to have been found in Room M on the floor of a safe that did not contain any real firearms and was totally disorganized. (Exh. 5a-d). In the kitchen which was identified as Room H, in the bottom of a hamper that was full at the time of entry (Exh. 6a), a

STATEMENT OF FACTS AS TO FIRST GROUND OF RELIEF

In her Brief to the Court of Appeals in the Statement of Facts section Court appointed counsel Lenore Glaser made the following representation: *"FBI agent Tews, the case agent who executed the search warrant, testified at trial. He described the house as generally messy and disorganized with the exception of one-bedroom area, which he described as relatively more organized. The marijuana was found in a bundle of clothes in the closet and some ammunition was found in this room. Items belonging to Padilla-Galarza were also found in this bedroom, including mannequins, toy or replica guns, and law enforcement materials."* (Appellant's brief at pages 4-5, Exh. 1).

One of the issues raised in her Brief was that *"The evidence was Insufficient to Demonstrate that Defendant had Knowledge of the Drugs or Ammunition"*. In her argument of said issue she reiterated; *"The house was unkempt, disorganized and full of items in every room, even the bedroom which was more organized and where the contraband items were found."* (Appellant's brief at page 23, Exh. 1).

The Court of Appeals relying on said factual representations denied Padilla-Galarza's sufficiency of evidence argument:

"The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight. In addition, the Government's evidence sufficed to show that the bedroom in which the ammunition and the marijuana were found in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is "entitled to rely on plausible inferences" from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla, including: photo identification cards; receipts in his name from the previous year; old correspondence addresses

box was found of a Smith & Wesson but no firearm within¹ (Exh. 6b), and very high on top of a kitchen shelf 2 magazines with 2 old rusty .38 cal. bullets (Exh. 6a, c).

Padilla-Galarza had powerful arguments to sustain the he did not have knowledge of the ammunition and marijuana found in other rooms of the house. Other than the one bedroom that was organized where nothing illegal was found; *"The residence was messy, the majority of it was unorganized, there was a lot of clutter, with the exception of one bedroom which was, I'd say, organized and clean compared to the rest of the house."* (Test. case agent Tews, Tr. Pg.10 - Exh. 7). Even FBI agent Grettel Pieloch testified that she told Padilla-Galarza; *"But how are you going to know what is in your house also, there was a free for all there."* (Tr. August 26, pg.166- Exh. 8).

Padilla's deceased father had lived in the residence and he possessed a firearms license since 1994 (Exh. 9c). The fact that some of the bullets did not match the firearms of the father was of no consequence since prior to the year 2000 you could purchase in P.R. all types of ammunition even if they weren't of the type for which you had a licence. (Exh. 10). Padilla-Galarza through attorney Armenteros provided appellate counsel Glaser a Spanish copy of this law yet she failed to cite it in her brief. (Exh. 11). Appellate counsel was ineffective in failing to cite said law particularly since during closing argument the prosecutor highlighted this to the jury:

"But what's more telling? Where do you see here that the father had a firearm of 7.62 caliber ammunition? Where do you see here that father had a gun that accepted .38 caliber rounds ammunition? It just doesn't. Dad did not have registered, at least legally, a .38 caliber handgun, or a firearm for a 7.62 caliber ammunition." (Tr. April 27, Pg. 68- Exh.12).

¹ Agent Tews testified that inside the box 8 7.62 x 39.8 and 9mm bullets were found there (Exh. 5d), but the same were never photographed within the hamper.

The bullets found were old and rusty (Exh. 13), consistent with having been there a long time. Other people had broken into the house twice (Exh. 14), and there were three licenses of other persons in the house. (Exh. 15a-c).

The record reflects Padilla-Galarza filed two pro se motions justifying the granting of a continuance. (Dockets 85 and 97- Exh. 16a-b). In his motion of 08/20/15 (Exh. 16a), he detailed the following facts that justified the granting of a continuance; 1- That since August 7, 2015 his unit had been placed in lockdown due to an unrelated incident where someone was stabbed. This caused his being denied access to obtain legal matters to prepare for his **pro se defense**; 2- That he lost precious trial preparation time since he was sent on travel for a psychological examination; 3- That counsel Vazquez was assigned as stand by counsel on 08/07/15 and when he visited him on 08/11/15 at MDC he concurred with Padilla-Galarza that the 15 day continuance that the Court had granted was insufficient for him to adequately assist him and prepare for trial.

In his 08/24/15 pro se Renewal for Continuance Motion Padilla-Galarza informed additional grounds for the granting of a continuance; 1- That he had been unable to secure an expert chemist which was essential to defend the drug charge and needed additional time to retain one. (Docket 97- Exh. 16b). On that same date he filed a pro se motion notifying his intent to use an expert witness at trial (Docket 95- Exh. 17a) which the Court granted on the day the trial was supposed to begin. (Docket 99- Exh. 17b). Obviously, Padilla-Galarza was prevented from retaining the chemist due to the Court's refusal to grant a continuance. Said failure to obtain an expert prejudiced him as can be gleaned from this Petition; 2- That he had been unable to inspect the tangible evidence in his case and had just recently received voluminous discovery which he had not been able to adequately study; 3- That he still had not received any Brady.

Kyles, nor Jencks materials; 4- That he still had not received his deceased father's weapons permits that were necessary for his defense.

His stand by counsel Vazquez also filed on 08/24/15 a Motion for Reconsideration (Docket 90- Exh. 18) where he detailed all of the reasons why a continuance was justified that had been mentioned by Padilla-Galarza in his pro-se motions. Stand by counsel admitted he had only been able to meet with Padilla-Galarza only on 3 occasions for an average of one and a half to two hours and that he needed additional time due to the extensive hundreds of pages of discovery that had just been produced by the Government. He, as stand by counsel also understood that they needed a continuance of only an additional **three weeks** in order to properly prepare for trial.

His appellate counsel completely failed to include said motions and multiple factual basis that justified granting the continuance requested. This failure materially prejudiced Padilla-Galarza since the appellate Court was never made aware of the multiple valid additional reasons that existed that justified finding error in the failure to grant the continuance. Had they been presented and argued the Appeals Court would have probably found reversible error.

All of the above serious deficiencies of appellate counsel justify a finding of ineffective assistance of counsel on appeal that warrants granting 2255 relief.

MEMORANDUM OF LAW

Padilla-Galarza's appellate counsel's incorrect narration of the record in a highly prejudicial manner by representing to the Court that the marijuana, bullets, and mannequins were found in the organized bedroom where it could be inferred that he slept there, led the Court to incorrectly dismiss his sufficiency of evidence argument.

Even though provided (Exh. 11), she failed to cite important P.R. law that did not limit the type of ammunition a person could purchase/possess that existed while Padilla's father was alive. The trial evidence showed his father possessed a firearms license since 1994 (Exh. 9c) well within the time period a person could purchase any type of bullets in P.R. (Exh. 10).

She completely failed to argue that the evidence was insufficient for a determination of drug quantity and that it failed to establish a sufficient basis from which to infer intent to distribute. This constitutes ineffective assistance of counsel that justifies granting 2255 relief. See Evitts v. Lucey, 469 U.S. 387 (1985) (The Due Process clause of the Fourteenth Amendment guarantees a criminal defendant the right to effective assistance on appeal); U.S. v. Cirilo-Munoz, 404 F.3d 527, 530 (1st Cir. 2005); U.S. v. Bonneau, 961 F.2d 17 (1st Cir. 1992) (2255 relief granted for ineffective assistance of counsel on appeal):

"An ineffective assistance claim requires the defendant – who bears the burden of proof, Scarpa v. Dubois, 38 F.3d 1, 8-9 (1st Cir. 1994) – to show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's failures, the outcome would likely have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cofsky v. U.S., 290 F.3d 437, 441 (1st Cir. 2002); Cirilo-Munoz, supra at 530.

Had the record and law concerning ammunition that could be purchased been correctly-cited it is clear that the Court of Appeals could have concluded that the evidence sustained two equally plausible conclusions, one of innocence and one of guilt which would have led it to apply First Circuit precedents that establish:

"The standard of review governing a challenge to the sufficiency of the evidence is well established. An appellate Court must determine whether a rational jury could find guilt beyond a reasonable doubt. Echeverri, 982 F.2nd at 677; U.S. v. Garcia, 983 F.2nd 1160, 1163-64 (1st Cir. 1993). In making this determination, the reviewing Court must examine the evidence together with all inferences that may be reasonably drawn from it, in the light most favorable to the prosecution. Echeverri, 982 F.2nd at 677. Furthermore, the reviewing Court does not evaluate witness credibility, but resolves all credibility issues in favour of the verdict. Garcia, 983 F.2nd at 1164 [quoting U.S. v. Batista-Polanco, 927 F.2nd 14, 17 (1st Cir. 1991)]. The evidence may be entirely circumstantial, and need not exclude every reasonable hypothesis of

innocence; that is, the fact finder may decide among reasonable interpretations of the evidence' Batista-Polanco, 927 F.2nd at 17. Nevertheless, 'If the "evidence viewed in the light most favourable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged," this Court must reverse the conviction. This is so because... where an equal or nearly equal theory of guilt and theory of innocence is supported by the evidence viewed in the light most favourable to the prosecution, 'a reasonably jury must necessarily entertain a reasonable doubt.' U.S.A v. Sanchez, 961 F.2 1169, 1173 (5th Cir.) (citations omitted), cert. denied, 506 US 918, 113 S. Ct. 330, 121 L. Ed.2nd 248 (1992)" U.S.A. v. Flores-Rivera, 56 F.3rd 319, 323 (1st Cir. 1995); U.S.A. v. Andujar, 49 F.3rd 16, 20 (1st Cir. 1995); U.S.A. v. Fulmer, 108 F.3rd 1486, 1492 (1st Cir. 1997).

A basic function of every appellate lawyer is to study the record and to cite it correctly since the Appeals Court will rely as correct admissions made in the Brief that are unfavourable to appellant. The appellate opinion reflects that it incorrectly relied on Padilla-Galarza's appellate counsel's representations that the marijuana, ammunition and mannequins were in the organized room from where the jury could infer that he knowingly possessed them. Said gross error in her citation of the record led the Court to reject his sufficiency of evidence argument. The truth is no drugs, ammunition or mannequins were in that room. Counsel's performance was clearly below an objective standard of reasonableness and the outcome could have been different has she cited the record properly.

The record reflects that Padilla-Galarza had requested and been granted permission to retain a chemist (Docket 99- Exh--17b) that was necessary to investigate the adequacy of the Government's chemist's analysis that was limited to having cut a small part of the foil packaging and testing for a positive THC content. As appears from the trial record:

"THE COURT: Okay. Motion denied.

The question now is, is defendant going to present any evidence, before I bring the jury back? Aside the stipulation?

MR. PADILLA-GALARZA: We had asked previously for an expert witness. We never had a chance to get one. We never even had a chance at all in this case.

THE COURT: Expert on What?

MR. PADILLA-GALARZA: Expert witness, that the motion was granted, but never gave us.

THE COURT: Expert on what?

MR. PADILLA-GALARZA: Expert witness in order to refute. An expert chemist would know what he's doing, not based on personal opinions, instead of a scientific method as it should be." (Tr. August 27, Pg. 41- Exh. 19).

This pending discovery was an important consideration to include within the argument of the issue of the District's Court's failure to grant a continuance that could have led the appellate Court to find error. As was argued by Padilla-Galarza the chemist was necessary to determine net weight and the quality which were all necessary in order for the jury to be in a position to determine the drug quantity he was being held liable for, the quality which was necessary to establish intent to distribute and its age. The District Court during said argument erroneously stated that; *"Even the purity is not even relevant."* (Tr. August 27, Pg. 43- Exh. 20). Said error can be gleaned by the District Court's instructions to the jury where he stated;

"Intent to distribute may be inferred from the quality and quantity of the drugs, for example. Quantity more than anything else. A larger amount of narcotics indicates that it may not be for personal use and that it's for distribution. In other words, if you find that the defendant possessed a quantity of marijuana, more than which would be needed for personal use, then you may make the inference that the defendant intended to distribute that controlled substance." (Tr. April 27, Pg. 77 – Exh. 21).

The error was augmented when the judge submitted to the jury a drug quantity determination as part of its verdict;

"Then I ask you a question. Question, to be answered only if you find the defendant guilty on the issue of the marijuana. How much marijuana did the defendant possess? I gave you three options. More than one kilo of marijuana. One kilo is 2.2 pounds. Less than one kilo of marijuana. Less than 2.2 pounds. Or the amount certified by the chemist." (Tr. August 27, Pg. 84 – Exh. 22).

Incredibly the jury in its verdict form made a finding of the third choice provided by the judge; *"The amount certified by the chemist."* (Tr. August 27, Pg. 89 - Exh. 23a-b). The problem with this is that the chemist's testimony never provided a basis for the jury nor the Court to make

a drug quantity finding since all that was certified was a finding of the presence of THC. The weight used was gross weight which included the packaging which was totally insufficient for a drug quantity finding or that it was intended for distribution.

All of these important matters that were necessary for Padilla-Galarza's defense justified the granting of a continuance so that an independent chemist could certify net drug weight and its purity. Appellate counsel's failure to raise any of these matters when discussing the error of failing to grant a continuance constitutes ineffective assistance of counsel on appeal. There is no doubt this important litigation matter that left Padilla-Galarza bereft of a possible defense could have swayed the appellate Court to find error.

This is particularly true when the prosecutor argued to the jury weight, dollar value and an inference of intent to distribute;

"Ladies and gentlemen, let's talk about the issue of possession with intent to distribute marijuana, which was in that room with the mannequins. You heard from Task Force Agent Eddie Vidal. Look at how this marijuana was packaged. We have over one thousand grams of marijuana here.

Agent Vidal told you, based on his training and experience, that this marijuana is approximately a year old. With this marijuana, you can make approximately 2,000 baggies. That was Agent Vidal's testimony. And with those 2,000 baggies, the street value would be 9,000 dollars." (Tr. April 27, Pg. 53 – Exh. 24).

The truth is we don't know if there was over 1,000 grams of marijuana there, nor could its age be determined without a chemist's test, and since we don't know its net weight nor purity it is impossible to determine if it was intended for distribution nor if it was worth \$9,000 on the street.

The same can be concluded from her failure to detail in her brief all of the facts that justified granting a continuance as appeared from the 2 pro se motions filed by Padilla-Galarza and that of his standby counsel Vazquez that were part of the record. Had she done so the

assignment of error for failure to grant a continuance would have prospered. An examination of the appellate opinion (Exh. 2) reflects that the Court did not take into account said additional robust reasons that justified finding error in not granting the continuance. Said failure materially prejudiced Padilla-Galarza since their inclusion would have provoked the granting of a new trial.

2255 relief is clearly warranted in this case.

II- Petitioner's constitutional right to a fair trial were violated that justifies granting him 2255 relief.

The Government's trial evidence was plagued with perjured testimony of its agents; the crime scene was altered by the agents conducting a search of the residence and presented at trial; circumstantial evidence that justified the inference that the one bullet found in the safe was placed there by the agents after they found the pack of rusty bullets in another room and misleading evidence concerning the marijuana was presented at trial that justifies granting Padilla-Galarza 2255 relief.

The delayed provision of hundreds of pages of discovery shortly before the trial began that included important impeachment evidence prevented Padilla-Galarza from being able to use it at trial particularly since he had requested a continuance that was denied by the judge. The tardy provision of Brady material and no provision of Jencks deprived Padilla-Galarza of his constitutional due process rights to a fair trial.

FACTS IN SUPPORT OF SECOND GROUND FOR RELIEF

1- As appears from the trial testimony of FBI agent Tews, he stated under oath when asked; Q. *"Agent Tews, who found the marijuana?"* A. *"I did."* (Tr. 08/26/15, Pg. 17- Exh. 25). He went on to state: A. *"As I was searching the closet going through the clothes, I was moving the clothes that were in the pile and when I got to the pair of pants, I felt*

the hard object and it was heavy. And after unfolding the pants and looking inside the pant leg, I discovered the bag which contained the two packages of marijuana." (Tr. 08/26/15, Pg. 18 - Exh. 25).

This constituted blatant perjured testimony. As appears from the Evidence Log the 2 packages of suspected marijuana were; "Located By: Cintron Negron, Hector", in; "Room K inside plastic bags in pants in closet." (Exh. 26). See also Evidence Chain of Custody form for the marijuana from where it appears that Tews was not even involved in the receipt of the drugs on the day of the seizure. (Exh. 27). The Evidence Recovery Log reiterates that the marijuana was found by Hector Cintron and observed by Jeremy Asencio (Exh. 28), not Tews. It should be noted that agent Hector Cintron Negron never testified at trial nor did the prosecutor ever correct the false material testimony provided by agent Tews concerning something as important as to who found the marijuana in the house. This creates many adverse inferences against the validity of the Government's evidence related to the marijuana that warrants granting 2255 relief.

2- The crime scene logs establish that the bullet allegedly found on the floor of the safe in room M was placed there after multiple rounds of 9mm. bullets were found in room K creating the sequence that one of the bullets found in room K was removed and placed there.

As appears from the testimony of agent Tews in the same room K where the marijuana and mannequins were found, inside a drawer thirty 9mm. bullets were recovered. (Tr. August 26, Pg. 19 - Exh. 4d; Exh. 4a-e). He later testified that in another room inside a safe a 9mm. bullet was found on the floor of a safe. (Tr. August 26, Pg. 24-25- Exh. 5d). As appears from the Evidence Log and the Evidence Recovery Log both the one 9mm. bullet found in Room M and

the bag of 30 9mm. bullets found in Room K were discovered by agent Hector Cintron Negron, the same agent that located the marijuana. (Exh. 29a-b). The Evidence Log reflects that the items found in Room M including the fake firearms found inside the safe were numbered sequentially prior to those items found in Room K with the sole exception of the one bullet allegedly found at the bottom of the safe. (Exh. 30). Interestingly it is only after the 30 9mm. bullets found in room K are identified with receipt number 70 that they jump back to room M, a room that had already been searched, and mark as receipt number 71 the single 9mm. bullet allegedly found on the bottom of the safe and then continue with the sequence of items found in Room K. (Exh. 30). What is even more incredible is that the Evidence Chain of Custody Form has agent Hector Cintron finding both the 30 rounds of 9mm. bullets in Room K and the one bullet on the bottom of the safe in Room M at the same time, 3:30 p.m. (Exh. 31a, b). How is it possible that agent Cintron was in two different rooms at the same time? (See Exh. 4a). The Evidence Recovery Log also corroborates that after the items found in Room M were labelled by number and the labelling began of the items found in Room K, that after item 70, the 30 rounds of 9mm. bullets are identified, the agent identifies as Item 71 the sole 9mm. bullet taken out of sequence as found in room M. (Exh. 29b). This sequence of itemization clearly establishes that the single 9mm. bullet allegedly found in room M was transferred there after the bag of 9mm. bullets were discovered in Room K. The inference of fabrication can clearly be drawn. One has to wonder why the two most important witnesses of the search who discovered the most damaging evidence, agent Hector Cintron and agent Asencio as observer didn't testify at trial?

During closing argument, the prosecutor emphasized the sole 9mm. bullet allegedly found in the bottom of the safe as evidence of Padilla-Galarza's knowing possession of ammunition:

"If he is claiming that the ammunition was his father's, he knew that that ammunition was in that residence. And if he knew that that ammunition was in that residence, he knew that it was there. And if he knew that was there, he was in possession of the ammunition.

Let's talk about this one round of ammunition that was found inside a safe. Exhibit Number 20. This was the same safe where the defendant kept another one of his toy guns.

Now, I want to be very clear, ladies and gentlemen. You heard evidence that this is not a real firearm. Nobody's claiming it was a real firearm. It was not a real firearm. He used it to make movies. But what's clear is that this fake firearm was his, and kept it there.

Look what else was there, a round of ammunition." (Tr. April 27, Pg. 52- Exh. 32).

It is clear that the single bullet allegedly found in the bottom of the safe where a fake gun was found could have led the jury to convict Padilla-Galarza. The marijuana was well hidden, wrapped within some clothes in a highly disorganized room (Exh. 4b, c); the two magazines and bullets found on the top of a cabinet in the kitchen were so high (Exh. 6a, c) that it is highly improbable that the jury would conclude Padilla-Galarza knew they were there; the empty Smith & Wesson box found in the bottom of a large hamper full of items in Room H, the kitchen, (Exh. 6a) with eight 7.62 x 39.8 bullets and seven 9mm. bullets allegedly in there that were not photographed (Exh. 6b) did not justify a conviction since the box and bullets were in the bottom of the large hamper that was full of other items not associated with Padilla-Galarza as can be seen in the entry photo (Exh. 6a - log photo 28), and the kitchen a mess (Exh. 33 - log photo #218), which established he did not frequent it; the bag of old, rusty 30 9mm. bullets found within a drawer in room K, the deceased father's bedroom which was also a mess (Exh. 34 - log photo 212) could have easily been discarded as knowingly possessed by Padilla-Galarza which means the planted bullet in the safe is what could have led to Padilla-Galarza's conviction. As can be seen from Exh. 5a log photo #46, the safe where the sole 9mm. was allegedly found was located in an extremely disorganized, messy room. Why would Padilla-Galarza drop an old 9mm. bullet there when the 30 9mm. bullets were in a bag within a drawer in the deceased father's bedroom?

3- The discovery further shows that the crime scene was altered by the agents. The entry photo of Room I, the 'organized room' reflects that no identifications of Padilla-Galarza were on top of the nightstand. (Exh. 3a). Agent Tews testified that the photos ID's of Padilla-Galarza were found "*on the nightstand next to the bed in the prior picture, the bedroom.*" (Tr. August 26, Pg. 76 - Exh. 3b). Aside from the fact that the ID's were placed on the nightstand by the agents (Receipt 15, Exh. 3c-d), the same were removed from the drawer and later placed on the nightstand. (See Padilla-Galarza's statement under penalty of perjury- Exh. 44).

Receipt 16 (Exh. 3e) which was found in Room I (the cleaner room) was also removed from the accordion case and placed on top of the drafting table. (Exh. 35a). That was also the product of crime scene alteration. As can be seen from the entry photo of said room neither the accordion nor the two papers identified as Receipt 16 were on top of the dresser. The accordion case can be seen inside of the closet of Room I. (Exh. 35b).

Crime scene alteration also occurred as to Receipt 45 (Exh. 35c) located by agent Cintron and witnessed by Asencio as appears from the Evidence Recovery Log, allegedly on top of DVD's (Exh. 35d) when the entry photo of the place where the DVD's were photographed shows there were no envelopes on top of them. (Exh. 35b).

The same occurred with Padilla's Social Security and Business card (Exh. 36a, b), which agent Tews claimed were found inside two billings photographed in Receipt 73. (Exh. 37). However, an examination of the photo does not reflect that the social security nor the business card were there. (Exh. 38). If they had been, they would have been photographed alongside the PRTC and "Autoridad de Acueductos" bills that were partially removed so they could be seen. The fabrication can be seen from an examination of the Evidence Log from where it appears that the agent that found Receipt 73 was again Hector Negron Cintron, not Tews. (Exh. 39). The

Evidence Recovery Log identifies agent Asencio as allegedly having observed agent Hector Cintron discover the social security card, not Tews. (Exh. 40). Notwithstanding the prosecutor during closing argument falsely stated to the jury that the social Security Card was found by agent Tews. (Tr. August 27, Pg. 68-69- Exh. 40a). Significantly, neither the Social Security Card nor the business card were ever photographed as being inside the drawer or bills photographed in receipt 73. The only photographs taken were individual photographs that do not reflect the place from where they were taken. (Exh. 36a, b). No crime scene location photograph of either of them was taken. All of this with the purpose of creating more evidence from where they could tie Padilla-Galarza to Room K where the 30 9mm. bullets were found.

For some unexplained reason no photographic logs appear for receipts 69-74.

4- The Government continued presenting misleading evidence concerning the marijuana allegedly found hidden in some clothes in a closet. The only lab examination conducted was for the presence of THC that included the weight of the packaging (Tr. August 26, Pg. 200-203- Exh. 41), without ever establishing the net weight of the actual drug. The purity of the marijuana was never established (Tr. August 26, Pg. 204- Exh. 42) yet they had P.R. police DEA task force agent Eddie Vidal provide lay testimony that said marijuana, including the wrapping, was worth in the street an outstanding \$9,000 and that definitely it was for 'distribution'. (Tr. August 27, Pg. 20-21, 32 - Exh. 43). When Padilla-Galarza attempted to question the chemist about the purity of the marijuana the prosecutor incredibly objected to the same on relevancy grounds. (Tr. August 26, Pg. 204 - Exh. 42). Without knowing the purity of the marijuana, how could anyone testify about its value on the street or for that matter that it was definitely intended for distribution. It is incredible that the purported marijuana was never taken out of the foil where it

was packaged and its net weight never measured. The presentation of misleading testimony in order to obtain a conviction constitutes governmental misconduct.

When one adds all of the false evidence presented, the alteration of the crime scene and the presentation of misleading testimony, Padilla-Galarza was deprived of his Constitutional 5th and 14th Amendment due process rights to a fair trial that warrants granting him 2255 relief. This issue could not have been presented on direct appeal since the record did not contain all of the documentation necessary for its development that is being included in this Petition nor were they used at trial. As appears from Padilla's statement under penalty of perjury (Exh. 44), since he was delivered over 800 pages of discovery provided to him at MDC by the legal division just 6 days prior to trial (Exh. 45), that prevented him from becoming aware of all the perjury, false and misleading evidence until after the trial had ended. The denial of his motion for continuance prevented him from discovering the impeachment evidence in time for use at trial

MEMORANDUM OF LAW AS TO SECOND GROUND OF RELIEF

The seminal case concerning the presentation of false, perjured testimony at trial by the prosecution is Napue v. Illinois, 360 U.S. 264, 269-270 (1959) where the Court held; "*First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103 (citations omitted). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears....A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows is false and elicit the truth.*" In U.S. v. Agurs, 427 U.S. 97, 103 (1976) the Court reiterated; "*a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable*

likelihood that the false testimony could have affected the judgment of the jury." See also ABF Freight Sys. v. NLRB, 510 U.S. 317, 323 (1994) where the Court recognized; "*False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings. (citations omitted). If knowingly exploited by a criminal prosecutor, such wrongdoing is so "inconsistent with the rudimentary demands of justice" that it can vitiate a judgment even after it has become final. Mooney v. Holohan, 294 U.S. 103, 112 (1935). The First Circuit has repeatedly recognised these settled principles. See U.S. v. Tavares, 93 F.3d 10, 14 (1st Cir.1996), and U.S. v. Carrasquillo-Plaza, 873 F.2d 10, 15 (1st Cir. 1989); "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." In U.S. v. Babb, 807 F.2d 272, 277 (1st Cir. 1986) the Court emphasized; "In the constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative."*

Upon examining the Evidence Log (Exh. 26), the Evidence Recovery Log (Exh. 28) and Chain of Custody Form (Exh. 27), there is no doubt that agent Tews committed blatant perjury when he testified at trial that he was the person that found the marijuana in the house, describing in detail how he uncovered it. Said Logs were in possession of the prosecutor who should have known said testimony was false yet he failed to correct it when it was testified during his direct examination of the witness. In fact, it was the prosecutor who elicited said false testimony when he asked the question; Q- "*Agent Tews, who found the marijuana?*" A- "*I*

did." (Tr. August 26, Pg. 17). Said false testimony was clearly material to the case and could have affected the verdict. A Napue violation clearly occurred.

It is no defense for the Government to argue that what Tews testified is what agent Hector Cintron-Negron would have testified at trial. It is Cintron-Negron who should have testified at trial about said finding, not Tews. Interestingly, Cintron-Negron was also the agent that found the thirty bullets in Room K who after identifying them in Receipt 70, a single bullet of the exact type found in Room K is found in Room M inside a safe on the floor that is identified as Receipt 71, after the search of room M had finalized and his social security card and business card allegedly located inside some bill envelopes never photographed as being there that the prosecutor falsely claimed during closing argument had been located by Tews. It is obvious the Government went to great lengths in not having the agent that allegedly found the most incriminating evidence testify at trial. What are they hiding about said agent?²

Deliberate deception of a Court and jurors by the presentation of false evidence is reprehensible and incompatible with "*rudimentary demands of justice.*" Giglio v. U.S., 405 U.S. 150 (1972). The "*touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.*" Smith v. Phillips, 455 U.S. 209, 220 (1982). What the agents did in altering the crime scene during the search so as to create a more viable case against Padilla-Galarza is reprehensible regardless as to whether the prosecutor knew of this or not. The Government agents are part of the prosecutorial team and put together the cases for the prosecutor. When the agents incur in misconduct and the altered crime scene and use of misleading evidence presented at trial, the prosecutor is also held

² The Court should compel the Government to disclose in discovery in these 2255 proceedings if agents Cintron and Asencio have been subject to disciplinary measures and what their status was at the time the trial was held.

accountable, particularly when an analysis of the entry photos, logs and sequence of identifications should have raised a red flag to the prosecutor that something was astray when the agents prepared the crime scene.

It is highly suspicious that the Government never made any attempt to test the net weight of the drug when part of their argument to the jury was that the marijuana was worth \$9,000 on the street and go before the jury with the gross weight of the drugs that included the packaging armed only with a positive THC lab result. What if only 10% of the material was real marijuana? Could their argument survive any scrutiny? Why was agent Tews presented as the person that found the marijuana when it was agent Cintron who found it? All of this should be disconcerting to the Court.

Padilla-Galarza on August 19, 2015, just 6 days before trial began, was provided over 800 pages of discovery by the Legal Dept. of MDC (Exh. 45) that he was never able to adequately review. (Exh. 44). Both, he and his stand by counsel Vazquez informed Judge Fuste that they needed additional time to prepare for trial but the request for continuance was denied. This prevented him from discovering all of the impeachment material that existed to use it effectively at trial. The Government under Brady v. Maryland, 373 U.S. 83, 86 (1963) has an affirmative duty to disclose impeachment material in a timely manner. U.S. v. Chaudhry, 850 F.2d 851, 858 (1st Cir. 1988). Failure to do so can entitle a defendant to 2255 relief. Conley v. U.S., 415 F.3d 183, 188 (1st Cir. 2005). In U.S. v. Kifwa, 868 F.3d 55, 60-61, 63 (1st Cir. 2017) the Court recognized that where a defendant requests a continuance delayed disclosure of discovery without bad faith a new trial will be granted if defendant can demonstrate that there is a "*reasonable probability*" that if he had received the discovery in a timely manner the result of the proceeding would have been different. The conviction will be overturned if the defendant

demonstrates prejudice. See also U.S. v. Montoya, 844 F.3d 63, 71 (1st Cir. 2016). As appears from an examination of all the material, substantial impeachment evidence that has been detailed in this Petition had Padilla-Galarza been able to utilize it at trial there is more than a “*reasonable probability*” that the outcome would have been different. He was definitely prejudiced by the delayed provision of discovery and no production of Jencks material. The evidence presented in this petition undermines confidence in the verdict. What is particularly troublesome is that there are grounds to believe that bad faith exists in this case since it is clear that the prosecution presented perjured, false evidence that they should have been aware of that justifies granting 2255 relief. There is a sufficient basis for this Court to conclude that the Government engaged in “outrageous misconduct” that justifies dismissal of the indictment. “*The Government commits outrageous misconduct when it behaves in a manner that violates “fundamental fairness” and “shocks.... the universal sense of justice.”* U.S. v. Nunez, 146 F.3d 36, 38 (1st Cir. 1998). “*Dismissal may be proper, however, where the Government’s misconduct is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction.*” U.S. v. Djokich, 693 F.3d 37, 43-44 (1st Cir. 2012).

When one adds all of the different events of Government misconduct in not only providing perjured testimony, altering the crime scene, presenting misleading evidence to the jury, and providing late Brady materials shortly before trial, failing to provide Jenks, there is no doubt that Padilla-Galarza’s Due Process Constitutional Rights to a fair trial were violated, the Government engaged in “outrageous misconduct” that warrants granting him 2255 relief either by dismissing the indictment or granting him a new trial.

WHEREFORE it is respectfully requested from this Hon. Court for all of the reasons stated in this Petition grant him 2255 relief and set aside Padilla-Galarza's conviction and either dismiss the indictment due to "outrageous misconduct" or granting him a new trial.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties involved.

In San Juan, Puerto Rico, this 30th day of April, 2019.

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

EXHIBITS LIST

Case No: Cv-19-01415-DRD

Cr-15-078 (DRD)

Petitioner: Jose Padilla-Galarza

Attorney: Rafael F. Castro-Lang

EXHIBIT	DESCRIPTION
EXH 1	Appellant's brief
EXH 2	U.S. v. Padilla-Galarza, 886 F.3d
EXH 3a	Photos Room I
EXH 3b	Reference of Room I
EXH 3c	Photos Room I
EXH 3d	Photos Room I
EXH 3e	Photo of Receipt 16, Room I0.
EXH 4a	Photos Room K
EXH 4b	Photos Room K
EXH 4c	Photos Room K
EXH 4d	Photos Room K
EXH 4e	Reference of Room K
EXH 5a	Photos Room M
EXH 5b	Photos Room M
EXH 5c	Photos Room M
EXH 5d	Reference of Room M
EXH 6a	Photos Room H
EXH 6b	Photos Room H
EXH 6c	Photos Room H
EXH 7	Test. case agent Tews
EXH 8	Testimony of FBI agent Grettel Pieloch
EXH 9a	Padilla's deceased father firearms license inf.
EXH 9b	Padilla's deceased father firearms license inf.
EXH 9c	Padilla's deceased father firearms license inf.
EXH 9d	Padilla's deceased father firearms license inf.
EXH 9e	Padilla's deceased father firearms license inf.
EXH 9f	Padilla's deceased father firearms license inf.
EXH 10	Ley Num 404 del año 2000
EXH 11	Alert to appellate counsel Glaser of this law
EXH 12	Reference to Trial transcript
EXH 13	Reference to Trial transcript
EXH 14	Reference to Trial transcript
EXH 15a	Photos other licenses found

EXH 15b	Photos other licenses found
EXH 15c	Photos other licenses found
EXH 15d	Photos other licenses found
EXH 16a	Pro Se Motion – Docket 85
EXH 16b	Pro Se Motion – Docket 97
EXH 17a	Pro Se Motion – Docket 95
EXH 17b	Court Order Re: Docket 95
EXH 18	Motion for Reconsideration - Docket 90
EXH 19	Reference to Trial transcript
EXH 20	Reference to Trial transcript
EXH 21	Reference to Trial transcript
EXH 22	Reference to Trial transcript
EXH 23a	Reference to Trial transcript
EXH 23b	Reference to Verdict
EXH 24	Reference to Trial transcript
EXH 25	Reference to Trial transcript
EXH 26	Evidence Log
EXH 27	Evidence Chain-of-Custody
EXH 28	Evidence Recovery Log
EXH 29a	Evidence Log
EXH 29b	Evidence Recovery Log
EXH 30	Evidence Log
EXH 31a	Evidence Chain-of-Custody
EXH 31b	Evidence Chain-of-Custody
EXH 32	Reference to Trial transcript
EXH 33	Photos Room H
EXH 34	Photos Room K
EXH 35a	Photos of Receipt 16
EXH 35b	Photos Room I
EXH 35c	Photo of Receipt 45
EXH 35d	Evidence Recovery Log
EXH 36a	Padilla's Social Security
EXH 36b	Padilla's Social Business card
EXH 37	Reference to Trial transcript
EXH 38	Photo of Receipt 73
EXH 39	Evidence Log
EXH 40	Evidence Recovery Log
EXH 40a	Reference to Trial transcript
EXH 41	Reference to Trial transcript
EXH 42	Reference to Trial transcript
EXH 43	Reference to Trial transcript
EXH 44	Padilla-Galarza's statement under penalty of perjury
EXH 45	Receipt of delivery of Discovery

Total # 76

Exh. 1**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT****NO : 16-1035****UNITED STATES OF AMERICA
APPELLEE****v.****JOSE PADILLA-GALARZA
DEFENDANT-APPELLANT****ON APPEAL FROM A FINAL JUDGEMENT OF
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
PUERTO RICO.****BRIEF AND RECORD ADDENDUM OF THE APPELLANT.****Lenore Glaser, Esq. /First Circuit No. 55348
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I. STATEMENT OF JURISDICTION.

Jose Padilla-Galarza, defendant-appellant, seeks relief from a final judgment in a criminal case of the United States District Court for the District of Puerto Rico.¹ The district court had subject matter jurisdiction pursuant to 18 U.S.C. §3231. Padilla-Galarza was sentenced on December 03, 2015. A final judgment, entered that day, disposed of the claims of both parties. Padilla-Galarza filed a timely Notice of Appeal on December 17, 2015, in accordance with Fed. R. Crim. P. 11(A) (2).² This Court has appellate jurisdiction pursuant to 18 U.S.C. §3742 and 28 U.S.C. §12.

II. STATEMENT OF THE ISSUES.

A. Did the trial court violate the Defendant's Sixth Amendment right to counsel when it denied his request for a continuance and forced him to choose between representation by attorneys whom he didn't trust or representing himself?

B. Did the Trial Court violate the *pro se* defendant's right to testify when he was repeatedly admonished for "testifying" during his cross-examination and never advised that he could testify in narrative form as part of his defense?

¹ The case is *United States v. Padilla-Galarza*, (D.P.R. No 15-00078).

² The judgment appears in the district court docket as #130. It is reproduced in the Addendum at AD 4The Notice of Appeal is docket #137.

C. Did the prosecutor's comments prejudice the jury when he repeatedly described the site of the search as the defendant's residence, when this was a disputed issue to be proved, argued facts not in evidence by suggesting that the defendant had previously been involved with narcotics and was familiar with firearms and highlighted the fact that the defendant was a convicted felon?

D. Did the trial court err when it denied the defendant's motion for acquittal when the evidence at trial did not demonstrate that defendant had knowledge that the contraband was in the house?

E. Was there justification to impose a condition of mental health counseling as part of supervised release, when medical records unambiguously showed that the defendant had no mental illness? Was a condition of forfeiture of all materials and property intended for use in pornography justified when the condition was vague and overbroad, had nothing to do with the case or the personal history of the defendant and was not mentioned by the court at sentencing?

III. STATEMENT OF THE CASE

A. Procedural History

On January 9, 2015, agents from the Federal Bureau of Investigation (FBI) executed a search warrant pertaining to another case, at a property relating to the defendant. Some ammunition and slightly more than a kilogram of marijuana were found during the search. On January 29, 2015, Padilla-Galarza was charged in a two-count indictment with possession of ammunition as a prohibited person, in violation of 18 U.S.C. § 922 (g) (1) and possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. § 841(a) (1) and (b) (1) (D).

Padilla-Galarza represented himself in a two-day jury trial in the United States District Court for the District of Puerto Rico at which the Honorable Judge Fuste presided. On August 27, 2015, the second day of trial, the jury found the defendant guilty of both charges. On December 3, 2015 he was sentenced to forty-six months in prison followed by two years of supervised release. [AD-4]. The trial judge designated the term of imprisonment to be served consecutively after any sentence he might receive in two pending federal cases. [D.P.R. Nos. 15-079 and 15-633] [AD-5].

B. Statement of Facts

The facts related here are primarily taken from the transcripts in this case, including the transcripts of the hearings for a continuance and to replace counsel [Tr 8-5 and Tr 8-7] [Docket Nos. 144,145]; the trial [Tr 8-26 and 8-27] [Docket

Nos. 147,148] and the sentencing. [Tr 12-03][Docket No.149].³ Additional facts are discussed in the argument section below.

On January 9, 2015, FBI agents executed a search warrant on the former home of the defendant's father. There, they seized slightly more than one kilogram of marijuana (1,293.1 grams) and various ammunitions.⁴ As his defense, Padilla-Galarza focused on the facts that he did not live at this site, did not know the contents of the house and did not have exclusive control over it.

The disputed property originally belonged to the defendant's father who was deceased. [Tr 8-26/142]. His estate left the house in equal shares to his three children. [Tr 8-26/142]. Padilla-Galarza's siblings lived outside of Puerto Rico so he was responsible for maintenance and payment of the mortgage. [Tr 8-26/143]. He occasionally stayed at the house and repaired cars there. [Tr 8-26/98]. An FBI agent testified that she had seen him in the yard of the house approximately one week before the execution of the search warrant. [Tr 8-26/115]. Padilla-Galarza was not at the property when the search took place. [Tr 8-26/72].

FBI Agent Tews, the case agent who executed the search warrant, testified at trial. He described the house as generally messy and disorganized with the exception of one bedroom area, which he described as relatively more organized. [Tr 8-26/117]. The marijuana was found in a bundle of clothes in the closet and

³ Transcripts are referenced by the month and day of the proceeding and the page number, e.g., "(Tr 8-26/pg.)."

⁴ The ammunition consisted of 54 rounds of 9mm caliber, 8 rounds of 7, and 62 rounds of 39.8 and 2 rounds of 38 special ammunition. [Tr 8-26/117].

some of the ammunition was found on a night stand in this room.⁵ Items belonging to Padilla-Galarza were also found in this bedroom, including mannequins, toy or replica guns and law enforcement materials. [Tr 8-26/117]. The mannequins and toy replica guns were props that the defendant used to make movies. [Tr 8-26/115]. There were also various personal papers of the defendant's including receipts, a social security card and various correspondence. [Tr 8-26/107]. The receipts were dated between March and June of 2014 and one of the letters was from 2003.[Tr 8-26/77-78]. The correspondence had been addressed and delivered to a post office box, not this house, in a different community. [Tr 8-26/107]. Padilla-Galarza also repaired and stored automobiles in the yard and there were various registration forms in the bedroom, although none were in the defendant's name. [Tr 8-26/ 105].

Padilla-Galarza questioned the agent as to whether there was food in the refrigerator but the agent had no recollection. [Tr 8-26/99]. The agent also did not recall that there was no toilet paper in the bathroom, although Padilla-Galarza demonstrated this fact with a photograph. [Tr 8-26/100]. He attempted unsuccessfully to have the agent acknowledge that the toilet was broken. [Tr 8-26/101]. The agent agreed that Padilla-Galarza told him that the house had been broken in on two occasions and as a result, he had installed four security cameras. [Tr 8-26/103].

⁵ Other ammunition was found in other places in the house, including the top of the kitchen cabinet. [Tr 8-26/].

Agent Pieloch also testified that the house was a mess, appearing as though someone had been hoarding items. [Tr 8-26/112]. She agreed that the grass in the yard was high and had not been cut. [Tr. 8-26/113].

Padilla-Galarza argued that the ammunition belonged to his deceased father, who had several licenses for firearms. The licenses were admitted into evidence as a joint exhibit. [Tr 8-26/152]. An agent testified, without controversy, that the ammunition was manufactured outside of Puerto Rico. [Tr 8-26/180]. In response to a question from the defendant, he agreed that some of the ammunition appeared to be rusty and possibly "old," but could still be active. [Tr 8-26/192].

A forensic chemist established without dispute that the drug seized was marijuana. [Tr8-26/202] She testified that the weight on the certification was one thousand two hundred and ninety three and three tenths grams although there was no testimony that she weighed it. [Tr 8-26/203]. A DEA agent testified that the amount and its packaging indicated that it was held for distribution not personal use. [Tr8-27/].

IV. SUMMARY OF THE ARGUMENT.

Approximately seven months after the indictment, in violation of his Sixth Amendment right to counsel, the defendant represented himself in a jury trial. The trial court had denied his first request for a continuance so that he could be represented by an attorney whom he trusted. He did not testify in his own defense

because the court admonished him during his cross examination and did not advise him that he could testify in narrative form.

The prosecutor made improper and harmful comments when he told the jury that the case was about a convicted felon and when he argued points that were not in evidence. At sentencing the judge ordered two special conditions which were not justified by the case or personal information about the defendant.

V. ARGUMENT.

A. The Failure to Grant a Brief Continuance so that the Defendant Could Be Represented by Counsel violated his Sixth Amendment rights.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel for defendants in criminal cases. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). On January 29, 2015, the day of his arrest, the court appointed an assistant public defender to represent Padilla-Galarza in this case, as it already represented him in an unrelated case. Ten days later, that attorney withdrew, citing among other reasons a potential conflict of interest as the office had previously represented some witnesses. [Docket No. 5]. Attorney Anita Hill was appointed the following day. [Docket No.6]. Trial was scheduled to begin on August 11, 2015.

On July 7, 2015, Padilla-Galarza asked for new counsel because Attorney Hill didn't agree with his case strategy and he felt that she would not represent him

effectively. [Tr 7-7/4] Judge Fuste denied the motion but added a second attorney to the defense team, the same assistant public defender who had previously withdrawn. [Tr 7-7/7][Ap 2]. In no uncertain terms, the Court told him that he was going to trial on August 11 with the two attorneys. [Tr 7-7/7][Ad2]⁶.

On August 4, 2015, Padilla-Galarza filed a second motion to obtain replacement counsel. [Docket No.72]. The request also required a continuance of the trial date which was then one week away. At a hearing on August 5, 2015, Padilla-Galarza renewed his discontent with his appointed counsel who had done little work on his case, specifically noting that the attorney had not ordered his father's firearms licenses that were critical to his defense. [Tr8-5/7, 30]⁷. [Ad 2, 9] The first attorney was likewise unacceptable as he had never seen or visited with him and did not know his case. [Tr8-5/7][Ap 2]. The Court would not release the other two attorneys but offered to add a third attorney, Carlos Vasquez, also from the Federal Defenders, to represent the defendant [Tr 8-5/15]. Padilla Galarza repeated four times that he would be satisfied to be represented only by attorney Vasquez but did not want the previous two attorneys to be involved in his case. [Tr 8-5/15, 17, 21, 24]. [Ap 4, 5, 7, 8] He told the Court "I do not wish to represent myself, but if I am put between a rock and a hard place, then I have no option but

⁶ The appendix is referenced as Ap followed by the page number.

⁷ In his motion and a subsequent motion for recusal of the judge, he asserted that the court nor the attorney were protecting his interests as they were close neighbors and intimate friends...

to do so.”[Tr 8-5/24]. [Ap 8] The Court denied his request for new counsel and denied him the right to represent himself. [Tr8-5/30]. [Ap 9]

Two days later, the Court held another hearing at which it acknowledged that Padilla-Galarza had the right to represent himself, but asked him whether he would accept Vasquez as his lawyer. [Tr 8-7/3]. [Ap 10-11] Padilla-Galarza repeated his preference to have Vasquez as his attorney, but only if the other two attorneys did not participate in his trial. [Tr 8-7/3-4]. [Ap10-11] He asked the Court whether the trial can be continued for a little time so that Vasquez can prepare. [Tr8-7/4][Ap11]. Judge Fuste asked Attorney Vasquez whether an additional two days [Tr8-7/5] [Ap 12-13] or even a week would be sufficient to handle the trial as the attorney. [Tr8-7/5][Ap12] Vasquez informed the Court that he would need one to two months to properly prepare for trial. [Tr8-7/6]. [Ap13]

The Court would not continue the trial for this length of time and so asked Padilla-Galarza whether he would be ready for trial if he appointed Vasquez as standby counsel. [Tr 8-7/7][Ap15] He answered affirmatively but renewed his request for twenty days or a month so that Vasquez could prepare. [Tr8-7/20]. The court told Padilla-Galarza that it would not continue the trial for such a long time [Tr.8-7/16] [Ap20] Before formally appointing Vasquez as stand by attorney, he emphasized that had the authority to appoint the two objectionable attorneys instead. [Tr 8-7/16][Ap 20-21]

Judge Fuste denied the continuance required and requested by Attorney Vasquez and continued the trial for only ten days because of concerns about speedy trial calculations. [Tr.8-7/22].[Ap 22] *See* 18 U.S.C. § 3161. This was error, as a continuance for the stated reasons would have been excluded from any speedy trial calculations. *See e.g. United States v. Apicelli*, 839 F.3d 75 (1st Cir.2016).

The denial of a request for a continuance will not be reversed unless the trial court abused its discretion. *United States v. Torres*, 793 F.2d 436 (1st Cir.1986). This is one of those rare cases where it did. Padilla-Galarza was left with a Hobbesian choice – either go to trial with the attorneys he did not trust or represent himself with all the attendant problems of *pro se* representation.

There is no bright line rule to determine when a continuance should be granted, and this Court will review the facts of each case and the reasons presented to the trial judge. *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir. 1976). The defendant repeatedly expressed his preference to be represented by counsel at trial and his unequivocal belief that the attorneys selected by the judge were not working in his interests.

There is nothing in the record suggesting that the defendant was simply contriving to postpone trial. *Contrast United States v. Rodriguez Vallejo*, 496 F.2d 960,965(1st Cir.1974). Rather, he expressed his dissatisfaction with his attorney's performance thus far, and his skepticism that he could receive "effective"

representation. He repeatedly expressed a preference to be represented by counsel, but made clear his unequivocal belief that the two attorneys selected by the judge were not working in his interests. He was agreeable to the appointment of attorney Vasquez, to represent him as his attorney, but the Court would not continue the case so that he could adequately prepare. Although a defendant does not have the right to always have his counsel of preference, and the trial court must also consider the sound administration of the Court. *Torres*, 793 F.2d at 441, this was not a point at which the Court had to force the defendant to go to trial with lawyers he did not trust or with no lawyer at all. His trial date had been calendared within seven months of his indictment, and it was his first request for a continuance.

The district court's blind insistence that the trial proceed as scheduled, mirrored precisely the type of "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" that the Sixth Amendment will not tolerate. *Torres* at 440 citing *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) citing *Ungar v. Sarafite*, 376 U.S. 575,589 (1964).

B. Did the Court Violate the Pro Se Defendant's Constitutional Right to Testify When It Failed to Inform Him that He Could Testify in Narrative Form, After Repeatedly Admonished him for "Testifying" During His Cross Examination of Government Witnesses?

The right to testify in one's own defense is a fundamental constitutional right guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United

States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 51-4 (1987). This Court will review *de novo* claims of constitutional error. *United States v. Gordon*, 290 F.3d 539 (3d Cir. 2002). The Fifth Amendment protection against self-incriminating testimony can only be meaningfully fulfilled when a defendant has the option to decide whether to testify in his own defense. *Rock* 483 US 44 at 53. It is “the necessary ingredient of the Fourteenth amendment’s guarantee that no one shall be deprived of liberty without due process [which] includes a right to be heard and offer testimony”. *Id.* At 51. This Court has described it as “even more fundamental than the right to represent oneself.” *Id.* at 52. See *Casiano-Jimenez v. United States*, 817 F.3d 816,820 (1st 2016).

A defendant’s right to testify is constitutional and a waiver must be “knowing, voluntary and intelligent.” *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir.1987). Every Circuit has characterized this as a “personal right” meaning only the defendant can waive it: *Owens v. United States*, 483 F.3d 48 (1st Cir.2007), *United States v. Legett*, 162 F.3d 237, 246 (3d Cir.1985) [citations omitted]. When a defendant is represented by an attorney, it is the obligation of the attorney to inform the defendant that s/he has the right to testify. *United States v. Casiano-Jimenez*, 817 F.3d 816 (1st Cir. 2016). In ordinary circumstances, a court is not obliged or even encouraged to inquire whether a represented defendant has adequately waived this right but relies on the attorney to have the conversation

with the client. *United States v. Bernloew*, 833 F.3d 749 (8th Cir.1987). The trial attorney has the primary but not exclusive responsibility to inform the defendant of his/her choice to testify. *Owens v. United States*, 483 F.3d 48, 58 (1st Cir. 2007).

When a defendant is *pro se*, it is incumbent upon the Court to fulfill this duty. Although the Court advised Padilla-Galarza that he had the right to testify in his colloquy to determine whether the defendant's waiver of counsel was knowing and voluntary, he informed Padilla-Galarza that his testimony would subject him to cross-examination on prior bad acts. [Tr 8-7/14][Ap18] The topic was discussed again at the initiative of the prosecutor to limit the defendant's opening statement. [Tr 8-26/64][Ap25]

In *United States v. Hung Their Ly*, 646 F.3d 1307 (11th Cir. 2011) a *pro se* defendant did not testify at his own trial, because he mistakenly believed that he had to have an attorney or someone to pose questions to him. The trial court asked him whether he wished to take the stand and his answers demonstrated his confusion. The Eleventh Circuit held that the court should have directly inquired of the defendant whether he planned to testify and to be certain that he knew that he could testify in narrative form. The Court reversed the conviction because the defendant's right to testify had been violated. ("Where an apparent waiver of defendant's fundamental and personal right seems detrimental to his interests, the

Court may have a duty to inquire directly of the defendant.” *United States v. Ortiz*, 82 F.3d 1066 (D.C. Cir.1996).

After the prosecution finished its case in chief, (and after a contentious exchange between the judge and the defendant regarding the denial of his Rule 29 motion), the Court asked Padilla-Galarza whether he had any evidence. [Tr 8-27/43][Ap42] He responded “No. It would also be denied.” [Tr 8-27/43]. [Ap42] The Court repeated its question of whether he wanted to present evidence. [Tr8-27/43].[Ap42] Padilla-Galarza told the court that “I am not going to waste the time with that, so - I know that it’s going to be denied.” [Tr8-27/43]. [Ad42] The defendant’s repeated answers which stressed that his requests would be denied demonstrate that he did not understand the right he was forfeiting. He was never directly asked whether he wished to testify nor advised that he could do so in narrative form. When a defendant is ignorant of his right to testify, it nullifies the possibility of an informed constitutional waiver. *Casiano Jimenez*, 817 F.3d at 820.

To compound the problem, on four occasions, the court admonished him that he was improperly “testifying” during his cross-examination of the government witnesses. When Padilla-Galarza attempted to elicit testimony that there was no food in the refrigerator, toilet paper in the bathroom or a functioning toilet, he was admonished that he was “actually testifying.” [Tr 8-26/101][Ap36]. The judge did not permit him to ask the agent about statements he made during his interview with

her as inadmissible hearsay. [Tr 8-26/168]. Twice during his closing argument, the prosecutor interrupted him to complain that he “was testifying.”[Tr8-27/]. When paired with the fact that the court never advised him that he could testify in narrative form, these repeated admonitions likely reinforced his belief that by giving up representation by an attorney, he had waived his right to testify.

This Court has noted that the testimony of a defendant regarding his non-involvement in the criminal activity should never “be taken lightly.” *Owens v. United States*, 483 F.3d 48, 59 (1st Cir. 2007). Padilla- Galarza’s defense was that he was not the only person with access to the house and that he had not systematically gone through the belongings left there by his father when he died. [Tr 8-27/]. His testimony would have filled in some of the areas that were left out by the government’s witnesses. Where it cannot be said with fair assurance that Padilla-Galarza understood and validly waived his right to testify, justice demands a new trial.

C. Did the Prosecutor Prejudice the Jury By His Repeated Description During the Trial, of The Search Site as The Residence of the defendant When That Was A disputed issue? Did the Government’s *ad hominem* Comment on the Defendant’s Status as a Felon Improperly focus the jury on the defendant’s character?

This Court will determine *de novo* whether prosecutorial comments were improper. *United States v. Glover*, 558 F.3d 71 (1st Cir. 2009). Padilla-Galarza did

not contemporaneously object to the prosecutor's statements so the review is for plain error. *Id.* at 76.

Padilla-Galarza was charged with two possession crimes that were found in a house to which he had access. He argued that he did not live in the house, did not have exclusive dominion and control of the area or know what was in the house. But, from the opening statement through and including the closing arguments, the prosecutor referred to the house as "the residence of Padilla-Galarza" or words to that effect. Excluding the closing statement, the prosecutor repeated this factual conclusion nineteen times as though it was a proven fact.⁸ [AP 1] Throughout the trial, the repeated characterization by the prosecutor was misconduct in that: (1) the statements tended to mislead the jury or prejudice the defendant; (2) the statements were not isolated but multiple and repetitive and (3) the proof of guilt was not overwhelming. *United States v. Stover*, 474 F.3d 904 (6th Cir.2007).

In his closing, the prosecutor asserted that the ammunition which was found in the house did not match the firearms that were listed in the licenses of Padilla-Galarza's father. Although there was a firearm forensic expert who testified about

⁸ A summary of the statements is included at Ap 44.

the ammunition and the types of permits available in Puerto Rico, there is no testimony that links the ammunition with particular firearms or with the firearms on the permits.⁹ He opined, without factual support that if the ammunition had been the father's, the firearms would have been in the house as well, unless Padilla-Galarza removed them.

In his rebuttal, the prosecutor told the jury that:

"This case is about an ex PRPD ¹⁰ officer, convicted felon, person that has law enforcement background. This is not a case about a grandmother, naïve, that has never seen any type of narcotics, or was never confronted and had no participation with narcotics. This is not a case about an old greandfather, 85 years old, who has no law enforcement background, had never seen a gun before, and had never seen a bullet before and would not be able to identify them. This is not the case. This case is about an ex PRPD officer. This case is about a convicted felon. This case is about Jose Padilla Galarza." [Tr 8-27/69].[Ad43]

Although it was established that Padilla-Galarza had been a police officer, there is no evidence in the record that, as a police officer, or in any other capacity, he had personal knowledge about narcotics. The use of the word "participation" insinuated illegal usage or activity. Likewise, there is nothing in the record that indicates that Padilla-Galarza had knowledge or familiarity with bullets. As troubling is the statement to the jury that, "This case is about a convicted felon."

⁹ After the government rested, it requested the opportunity to recall this expert to ask him whether the bullets matched any of the firearms. The judge denied the motion but told him that he could argue it. [Tr.8-27/

¹⁰ Puerto Rican Police Department.

The final comments about Padilla-Galarza as a convicted felon, were improper, greatly undermined the defense theory and invited the jury to focus on his bad character rather than on the evidence at hand. The prosecutor may only comment on the evidence and its reasonable inferences, but not on the defendant.

United States v. Wilkerson, 411 F.3d 1, 9 (1st Cir.2005). The Court will look at the totality of the circumstances, including: whether the comments were willful or inadvertent, the weight of the evidence supporting the verdict and whether the jury instructions cured the problem. *United States v. Balsam*, 203 F.3d 87 (1st Cir. 2000). This Court will reverse a conviction when prosecutorial comments are inappropriate and harmful. *Wilkerson* at 18.

The Court told the jury several times that the statements of the lawyers or "defendant acting as his lawyer" were not evidence. [Tr 8-27/70, 73]. He also reminded the jury that they may not infer that Padilla-Galarza committed the offenses here, because he has a prior record. [Tr. 8/27-79, 80]. This standard instruction was not curative and failed to offset the prejudice that the prosecutor's statement created.

D. The Evidence was Insufficient to Demonstrate that Defendant Had Knowledge of the Drugs or Ammunition.

The defendant and his attorney argued a motion for acquittal pursuant to F. R. Crim. P.29 at the close of the government's case.[Tr8-27/]A post-judgment motion for acquittal was timely filed on September 1, 2015 but denied. (Docket No. 107). This Court will review *de novo* the denial of a motion for acquittal. *United States v. Azukbene*, 504 F.3d (1st Cir.2007). This Court will review the evidence at trial in the light most favorable to the verdict, to determine whether the government proved each essential element of the crime beyond a reasonable doubt." *United States v. Soto*, 720 F.3d 51, 55 (1st Cir. 2013).

The government failed to prove beyond a reasonable doubt that the defendant had knowledge that the marijuana and ammunition were in the house, an element of both charges. Padilla-Galarza and his two siblings inherited the house from their father when he died. The house was unkempt, disorganized and full of items in every room, even the bedroom which was more organized and where the contraband items were found. There is no evidence of the date of the father's death or when Padilla-Galarza began frequenting the house. Although the contraband was found with items belonging to the defendant, there was no evidence of when those items were stored in the house. The letters addressed to Padilla-Galarza, found in the bedroom were not close in time to the search (one even went back to 2003) and did not provide evidence that Padilla-Galarza knew what was in the

house. Neither the marijuana nor the ammunition had his fingerprints and the clothing which was wrapped around the marijuana was not connected to the defendant.

E. The Court Erred in its Application of Two Special Release Conditions Which Were Not Justified in the Record.

The judge imposed two special conditions of supervised release. First, he required the defendant to participate in a mental health treatment program. [AD-7]. Padilla-Galarza objected to this condition at his sentencing, and pointed out that his court-ordered psychiatric evaluation concluded that he had no mental illness. [Tr 12-03/7]. The judge included a second condition in his written judgment, which was not mentioned at sentencing nor disclosed in the pre-sentence report. The extra condition requires forfeiture of “all materials and property used or intended to be used in the possession, receipt, distribution or transportation of child pornography”. This condition has no relationship to the charges in this case nor to any personal history related in the pre-sentence report. It is also vague and overbroad and does not provide actual notice of what may potentially be seized.

The challenge to the conditions is ripe as it is a challenge to the conditions and not their implementation. *United States v. Medina*, 779 F.3d 55-66-7 (1st Cir. 2015). A special condition is ripe and not hypothetical where the

judgment spells out the condition and the defendant “challenges the condition itself, not its application or enforcement”] *United States v. Davis*, 242 F.3d 49, 51 (1st Cir. 2001).

Special conditions of supervised release must be justified in the record and entail the least possible deprivation of liberty that is reasonably necessary. *United States v. Medina*, 779 F.3d 55 (1st Cir. 2015).

Although this Court may infer the rationale for the condition in the context of the record, it cannot determine a court’s reasoning from its silence. *United States v. Medina*, 779 F.3d 55 (1st Cir. 2015). When as here, the district court adopts without apparent justification the special conditions for supervised release, and, as to the second condition, with no notice to the defendant, it fails in the obligation to independently determine the reasonableness of every aspect of the sentence. *United States v. Siegel*, 753 F.3d 705 (7th Cir.2014).

VI. CONCLUSION

For these reasons, Padilla - Galarza asks this Court to vacate the judgment and sentence and remand the case to a different judge for a new trial.

Respectfully submitted,
Jose Padilla-Galarza,
By his Attorney,

April 1, 2017

/s/ Lenore Glaser
Lenore Glaser, Esq. BBO # 194220, 1st Cir. 55348
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(617) 753-9988

Certificate of Compliance with Rule 32 (A).

This brief complies with the type-volume limitation of F.R. App 32(a) (7) (B) because it contains 5,001 words, excluding the parts of the brief exempted by F.R.App. 32 (a) (7) (B) (iii).

This brief complies with the typeface requirements of F.R. App. 32 (a)(5) and the type style requirements of F.R. App. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in Times New Roman, Font Size 14.

/s/ Lenore Glaser

April 1, 2017

Certificate of Service

I hereby certify that this document, filed through the ECF system will be sent electronically to the United States Attorney Office as identified in the Notice of Electronic Filing. I further certify that a copy of this document was mailed by first -class mail to the defendant-appellant, Jose Padilla-Galarza at FCI Guaynabo, Puerto Rico on this date.

/s/ Lenore Glaser

April 1, 2017

ADDENDUM

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Indictment

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Judgement

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Indictment**United States v. Jose Padilla-Galarza,****IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO****UNITED STATES OF AMERICA,**

Plaintiff

v.

JOSE PADILLA-GALARZA,

Defendant.

INDICTMENT

CRIMINAL NO. 15-078(JAF)

VIOLATIONS:

18 U.S.C. § 922(g)(1)

21 U.S.C. § 841(a)(1)

FORFEITURE

18 U.S.C. § 924(d)(1)

28 U.S.C. § 2461(c)

TWO COUNTSRECEIVED AND FILED
CLERK'S OFFICE
U.S. DISTRICT COURT
SAN JUAN, PR

JAN 29 AM 11 J.

THE GRAND JURY CHARGES:**COUNT ONE****Prohibited Person in Possession of Ammunition
(Title 18, United States Code, Section 922(g)(1))**

On or about January 9, 2015, in the District of Puerto Rico, and within the jurisdiction of this

Court, the defendant,

JOSE PADILLA-GALARZA,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate and foreign commerce ammunition, to wit: fifty-four (54) rounds of 9mm caliber ammunition; eight (8) rounds of 7.62x39.8 caliber ammunition; and two (2) rounds

Indictment**United States v. Jose Padilla-Galarza, et al.**

of 38 special ammunition, said ammunition having been shipped in interstate and foreign commerce. All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT TWO

Possession of a Controlled Substance with Intent to Distribute
(Title 21, United States Code, Section 841(a)(1))

On or about January 9, 2015, in the District of Puerto Rico, and within the jurisdiction of this Court, the defendant,

JOSE PADILLA-GALARZA,

did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectable amount of marihuana, a Schedule I Controlled Substance. All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

INTENTIONALLY LEFT BLANK

Indictment**United States v. Jose Padilla-Galarza, et al.****FIREARMS AND AMMUNITION FORFEITURE ALLEGATION**
(18 U.S.C. §§ 924(d)(1) and 28 U.S.C. § 2461(c))

The allegations set forth in Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).


Upon conviction of the offense charged in Count One of this Indictment, JOSE PADILLA-GALARZA, the defendant, shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c), any ammunition involved or used in the commission of the offense, including, but not limited to: fifty-four (54) rounds of 9mm caliber ammunition; eight (8) rounds of 7.62x39.8 caliber ammunition; two (2) rounds of 38 special ammunition; and two magazines. All pursuant to 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c).

TRUE BILL


FOREPERSON

Date: January 29, 2015

ROSA EMILIA RODRÍGUEZ-VÉLEZ
United States Attorney


José A. Ruiz-Santiago
Assistant United States Attorney
Chief, Criminal Division


Jose Canales
Assistant United States Attorney
Chief, Violent Crimes Unit


Alexander L. Alum
Assistant United States Attorney
Violent Crimes Unit

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA

v.

JOSE PADILLA-GALARZA

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-00078-001 (JAF)

USM Number: 19158-069

AFPD Carlos A. Vazquez-Alvarez
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)☐ pleaded nolo contendere to count(s)
which was accepted by the court.☒ was found guilty on count(s) One and Two of the Indictment on August 27, 2015.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:922(g)(1)	Prohibited person in possession of ammunition	January 9, 2015	ONE
21:841(a)(1)	Possession of 1,293.1 grams of marijuana with intent to distribute	January 9, 2015	TWO

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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

December 3, 2015

Date of Imposition of Judgment

S/JOSE A. FUSTE

Signature of Judge

José A. Fusté
Name of JudgeUS District Judge
Title of Judge

December 3, 2015

Date

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

IMPRISONMENT

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

FORTY-SIX (46) MONTHS.

IT IS THE COURT'S INTENTION THAT, IF CONVICTED, THIS SENTENCE BE SERVED CONSECUTIVELY TO THE SENTENCES TO BE IMPOSED IN CRIMINAL CASES 15-079 (DRD) AND 15-633 (GAG).

☒ The court makes the following recommendations to the Bureau of Prisons

- That the defendant be designated to FCI Loretto, PA

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

to

, with a certified copy of this judgment

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSE PADILLA-GALARZA
CASE NUMBER: 3:15-CR-00078-001 (JAF)

Judgment—Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
THREE (3) YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release and thereafter, submit to random drug test, no less than 3 samples during the supervision period and not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If any such samples detect substance abuse, the defendant shall participate in a in-patient or out-patient substance abuse program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the U.S. Probation Officer based on the ability to pay or availability of third party payment.
3. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.
4. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and the Title 18, U.S. Code § 3563(a)(9).
6. The defendant shall participate in transitional and reentry support services, including cognitive behavioral treatment program under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.
7. The defendant shall participate in an approved mental health treatment program for evaluation and/or treatment services determination. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider; the modality, duration and intensity of treatment will be based on the risks and needs identified. The defendant will contribute to the costs of services rendered by means of co-payment, based on his ability to pay or the availability of third party payment.

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

Judgment — Page 4 of 5

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 0.00

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

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$	0.00	\$	0.00
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☐ Restitution amount ordered pursuant to plea agreement \$

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

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

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

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

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSE PADILLA-GALARZA
 CASE NUMBER: 3:15-CR-00078-001 (JAF)

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ over a period of (e.g., months or years) to commence (e.g., 30 or 60 days) after the date of this judgment, or
- D ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ over a period of (e.g., months or years) to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution
- ☐ The defendant shall pay the following court cost(s).
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Any and all materials or property used or intended to be used in the possession, receipt, distribution or transportation of child pornography, pursuant to Title 18, USC Section 2253.

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

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOCKET NO: 16-1035

UNITED STATES OF AMERICA,

v.

JOSE PADILLA-GALARZA, Defendant-Appellant

DEFENDANT-APPELLANT'S PETITION FOR A PANEL REHEARING.

Jose Padilla-Galarza, the defendant-appellant, petitions this Honorable Court, pursuant to F.R.Crim. P. 40 for a rehearing by the panel. As detailed below, the Court misapprehended significant facts in its determination that Mr. Padilla-Galarza knowingly, intelligently and voluntarily waived his right to be represented by counsel at his trial.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel for defendants in criminal cases. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). In its opinion, the Court concluded that "...the District Court offered to appoint [an attorney] as either full counsel or standby counsel and... ordered a fifteen day continuance to enable the attorney to prepare. Apparently because he thought a continuance of that length would not give the trial attorney sufficient time to prepare for trial as full counsel, Padilla opted to proceed pro se with the assistance of standby counsel." [Slip. Op., p 4].

The Court incorrectly stated that attorney Vasquez agreed that he could adequately prepare to represent Padilla-Galarza in full, with only twenty days to prepare. [Slip.Op.p.12].

The Court and Attorney Vasquez had the following discussion regarding the capacity of Attorney Vasquez to adequately prepare to try this case :

The Court (To Attorney Vasquez): Could you be ready for Wednesday rather than Monday." [AP 12/¹ transcript p.5]²

Vasquez: "No..." [Ap12/TR. 5]

The Court: "What about one week? It doesn't seem like a complicated case." [AP13/TR.6]

Vasquez: "I cannot answer ---"[AP13/TR.6]

Vazquez: "I cannot answer that a week is enough. I tend to think that it is not enough. I was thinking in terms of a month to two months. [AP13/TR.6]

The Court. "That is not a possibility." [AP13/Tr.6]

Vasquez: "Okay. But then I want you to kind of temper your the reality of this Court's schedule with what is going to happen here when I stand to represent this defendant." [AP13/TR6].

Here, Vasquez told the Court and Padilla-Galarza that he would prepare if the Court ordered him to do so, but would not perform satisfactorily. The Court then

¹ Excerpts of the transcript are contained in the Appendix, referenced here as AP and the page number.

² The transcript is docket number 145 in the district court record. References here are TR. and page number.

asked Padilla-Galarza if he wished to represent himself or have Vasquez handle the trial, even when he expressed ambivalence about his capacity to do an adequate job in such short time,

The Court: "Let me ask the defendant something. Sir, do you still want to represent yourself? [AP13/TR6]

The Court "Now I have to recognize that you have the right to represent yourself if you want." [AP14/TR7]

Padilla -Galarza "May I make a suggestion sir?"... I could do it with stand-by counsel." [AP14/TR7].

The request for standby counsel was not the preference of Padilla-Galarza, but was his effort to make a more favorable resolution than the choice of the two previous attorneys, one of whom had previously been conflicted out and one with whom there was an irreconcilable difference.

A few minutes later in the proceeding, Padilla =Galarza renewed his request that Vasquez have adequate time to prepare to represent him as counsel:

Padilla-Galarza: "Isn't there any way that we can compromise a little bit? Attorney Vasquez solicited at least a month, 20 days something like that. "[AP15/TR8].

Vasquez: "I can be ready in twenty days if I'm ... standby counsel." [AP15/AP8]

The Court: "If I give you 20 days, he has the option of either using you as his lawyer... or representing himself." [AP16/TR9]

Vasquez: "Okay." [AP16/TR9]

When Vasquez said "OK", he was not switching his previous assertion that he while he would will handle the trial if ordered to do so, but he would not be prepared and would not do an adequate job. Later in the proceedings, he reasserts that he can be ready in twenty days as stand-by counsel only.³ In these circumstances, Padilla-Galarza was not offered the choice of self-representation or effective representation by an attorney. Indeed, as the Court inquired of Padilla-Galarza if he understood the risks of self-representation, Padilla-Galarza repeated his request that the Court continue the case so that Vasquez could actually prepare as the attorney.

Padilla-Galarza: "I am aware that I cannot invoke ineffective legal assistance when I was the legal assistance." [AP17/TR13]

Padilla-Galarza: "That is why I asked for the additional time to prepare." [AP17/TR13]

Finally, at the end of the colloquy, the Court asked Padilla-Galarza,

"You also understand that you have the right to have a lawyer, but you don't want one?" [AP24/TR28].

Padilla -Galarza answers in the affirmative: "Oh yes. Yes. An effective lawyer, free of conflict." [AP28/TR 24]⁴

³ AP22/TR22]

⁴ The Court initially appointed attorney Connors of the Federal Defenders who withdrew because of a conflict with another case. Attorney Hill was appointed as substitute counsel. Padilla-Galarza asked the Court for replacement counsel. The Court denied the request but reappointed Connors to work with Hill. During the colloquy regarding self-representation the Court advised Padilla-Galarza that he could actually appoint Connors and Hill as stand-by counsel despite that Connors had indicated that he was conflicted out and Hill and the defendant had irreconcilable differences.

Padilla-Galarza repeatedly asserted his preference for an effective attorney but had the Hobson's choice of two attorneys whom he did not trust (one who had previously withdrawn because of conflicts) or attorney Vasquez who told the Court that he would not be prepared to adequately try the case.

The rush to trial – seven months after it was initially calendared, which forced Padilla-Galarza to represent himself was an abuse of discretion. *United States v. Torres*, 793 F.2d 436 (1st Cir.1986). The district court's blind insistence that the trial proceed as scheduled, mirrored precisely the type of "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" that the Sixth Amendment will not tolerate. *Torres* at 440 citing *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) citing *Ungar v. Sarafite*, 376 U.S. 575,589 (1964).

Conclusion

For the foregoing reasons, this Court should grant panel rehearing.

Respectfully submitted,

Jose Padilla-Galarza, By his Attorney,

April 5, 2017

/s/ Lenore Glaser

Lenore Glaser, Esq. BBO # 194220, 1st Cir. 55348
45 Bromfield St., Suite 500, Boston, MA 02108
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first-class mail to the defendant-appellant, Jose Padilla-Galarza at FCI Guaynabo,
Puerto Rico on this date. /s/Lenore Glaser April 5, 2017

Ex. 2



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United States Court of Appeals for the First Circuit

March 23, 2018, Decided

No. 16-1035

Reporter886 F.3d 1 * | 2018 U.S. App. LEXIS 7429 ** | 2018 WL 1444325

UNITED STATES OF AMERICA, Appellee, v. JOSE PADILLA-GALARZA, Defendant,
Appellant.

Prior History: [1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO. [Hon. José Antonio Fusté, U.S. District Judge].

Core Terms

district court, contraband, continuance, contends, ammunition, convictions,
standby counsel, pro se, bedroom, infer, attorneys, prepare, references,
supervised release, narrative form, forfeiture, sentence, days, right to counsel,
proceedings, challenges, possessed, firearms, child pornography, plain error,

knowingly, marijuana, constructive possession, closing argument, opening argument

Case Summary

Overview

HOLDINGS: [1]-Evidence sufficient to sustain conviction of possession of a controlled substance with intent to distribute under 18 U.S.C.S. § 841 and being a prohibited person in possession of ammunition under 18 U.S.C.S. § 922 because defendant admitted that he was an owner of the house in which the ammunition and marijuana were found, that he had made payments on the mortgage for the house, and that he had installed surveillance cameras at the house; additionally, contraband was found in a bedroom together with personal items that indisputably belonged to defendant, including photo identification cards, and receipts in his name from the previous year, old correspondence addressed to him; [2]-The district court did not err by failing to advise defendant of his right to testify in narrative form because counsel could have explained to defendant that he could testify in narrative form.

Outcome

The judgment was affirmed and remanded.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Definitions

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HN1 Controlled Substances, Definitions

To sustain a conviction under 18 U.S.C.S. § 841(a)(1) or 18 U.S.C.S. § 922 (a)(1), the government must prove, among other things, that the defendant knowingly possessed the contraband. Knowing possession of the contraband may be inferred from evidence of actual possession or constructive possession. In order to show constructive possession, the government must prove that the defendant had dominion and control over the area where the contraband was found. [More like this Headnote](#)

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > [Counsel](#) ▼ > [Waiver](#) ▼ > [Standards](#) ▼

HN2 [Waiver, Standards](#)

A defendant's decision to waive his constitutional right to counsel must have been made knowingly, voluntarily and intelligently. [More like this Headnote](#)

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Criminal Law & Procedure > [Trials](#) ▼ > [Defendant's Rights](#) ▼
> [Right to Testify](#) ▼

HN3 [Defendant's Rights, Right to Testify](#)

A district court generally has no duty to apprise a criminal defendant of the right to testify or to secure an explicit waiver of that right, as the responsibility to advise a defendant of the right to testify rests with his lawyer. [More like this Headnote](#)

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Criminal Law & Procedure > [Appeals](#) ▼ > [Standards of Review](#) ▼
> [Plain Error](#) ▼

HN4 [Standards of Review, Plain Error](#)

To show plain error, a defendant must show: (1) that an error occurred; (2) which was clear or obvious and which not only; (3) affected the defendant's substantial rights, but also; (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings. [More like this Headnote](#)

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Criminal Law & Procedure > [Appeals](#) ▼ > [Prosecutorial Misconduct](#) ▼
> [Prohibition Against Improper Statements](#) ▼

HN5 [Prosecutorial Misconduct, Prohibition Against Improper Statements](#)

A prosecutor has a right to comment on the plausibility of the defense theory. [More like this Headnote](#)

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Criminal Law & Procedure > ... > [Appeals](#) ▼ > [Standards of Review](#) ▼
> [Abuse of Discretion](#) ▼

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HN6 Standards of Review, Abuse of Discretion

An appellate court reviews conditions of supervised release for abuse of discretion. The district court has broad discretion to impose conditions of release provided they are reasonably related to the provision of rehabilitative treatment for the defendant. [More like this Headnote](#)

Shepard's - Narrow by this Headnote (0)

Criminal Law & Procedure > [Sentencing](#) > [Forfeitures](#) > [Proceedings](#)

HN7 Forfeitures, Proceedings

Forfeiture under criminal statutes like 18 U.S.C. § 922(g)(1) is an element of the sentence imposed following conviction. Accordingly, an order of criminal forfeiture must be supported by a factual foundation in the record. [More like this Headnote](#)

Shepard's - Narrow by this Headnote (0)

Counsel: [Lenore Glaser](#), with whom Law Office of Lenore Glaser was on brief, for appellant.

Julia M. Meconiates, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

Judges: Before [Kavaller](#), [Stall](#), and [Barron](#), Circuit Judges.

Opinion by: [BARRON](#)

Opinion

[*3] [BARRON](#), Circuit Judge. Jose Padilla-Galarza appeals his convictions for possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and for being a prohibited person in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). He contends that both convictions must be reversed on the ground that the evidence of his knowing possession of the contraband was insufficient. He argues in the alternative that the convictions must at least be vacated due to various alleged errors in the proceedings below -- principally that he was "forced" to represent himself pro se because, in his view, the District Court did not grant a sufficiently long continuance to enable his preferred court-appointed attorney **[*2]** to prepare for trial as full counsel. He also challenges two aspects of his sentence: a condition of his **[*4]** supervised release that he be evaluated for participation in

a mental health treatment program and a child pornography forfeiture order. We affirm his convictions and sentence, subject to a remand for the limited purpose of striking the child pornography forfeiture order.

I.

On January 9, 2015, federal law enforcement agents executed a search warrant at a house in Toa Baja, Puerto Rico, which the government alleges was Padilla's residence. Padilla, together with two siblings who lived in the continental United States, had inherited the house from their deceased parents. During the search, the agents found ammunition and 1,293.10 grams of marijuana. A grand jury thereafter indicted Padilla, who has a prior felony conviction, with one count of being a prohibited person in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1), and one count of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

In pre-trial proceedings, two court-appointed attorneys represented Padilla. However, on August 4, 2015 -- one week before trial was scheduled to begin on August 11 -- Padilla [**3] moved to dismiss both attorneys. 13 After a hearing on that motion on August 5, the District Court denied it. But, because Padilla indicated in his motion and at the hearing that he would be forced to represent himself pro se if his two attorneys were not dismissed, the District Court held another hearing on August 7 to ensure that any waiver of Padilla's constitutional right to counsel would be knowing, intelligent, and voluntary. At this second hearing, the District Court offered to appoint a different attorney, whom Padilla preferred, as either full counsel or standby counsel, and the District Court ordered a fifteen-day continuance to enable the attorney to prepare. Apparently because he thought a continuance of that length would not give that attorney sufficient time to prepare for trial as full counsel, Padilla decided to proceed pro se with the assistance of that attorney as standby counsel.

Padilla was tried on August 26 and 27 of 2015. At the close of the government's evidence, Padilla moved for acquittal on both counts based on the insufficiency of the evidence against him. Padilla's standby counsel presented oral argument for the motion, which the District Court denied. Thereafter, [**4] Padilla did not testify or otherwise present evidence on his behalf. The jury then returned a guilty verdict on both counts. Afterwards, Padilla renewed his motion for acquittal, but the District Court denied it.

The District Court then sentenced Padilla to forty-six months of imprisonment and three years of supervised release. The District Court specified that, among the conditions of his supervised release, Padilla must "participate in an approved mental health treatment program for evaluation and/or treatment services determination." The District Court's written judgment also stated that Padilla must forfeit "[a]ny and all materials or property used or intended to be used in

the possession, receipt, distribution or transportation of child pornography, pursuant to Title 18, USC Section 2253."

Padilla then filed this appeal. This Court appointed counsel to represent him in these proceedings.

[*5] II.

Padilla first contends that his convictions must be reversed because the government's evidence was insufficient to convict him of either possession of a controlled substance with intent to distribute under § 841(a)(1) or being a prohibited person in possession of ammunition under § 922(q)(1). Because Padilla preserved this argument in 2011, his motion for acquittal, we review his challenge de novo, "viewing the evidence in the light most favorable to the government and taking all inferences in its favor." United States v. Padilla-Galarza, 886 F.3d 41, 44 (1st Cir. 2008).

Padilla's challenge pertains solely to the knowledge requirement for both crimes. HN1 To sustain a conviction under either statute, the government must prove, among other things, that the defendant knowingly possessed the contraband. United States v. Guzmán-Montañez, 756 F.3d 1, 8 (1st Cir. 2014) (§ 922(q)(1)); United States v. García-Carrasquillo, 483 F.3d 124, 130 (1st Cir. 2007) (§ 841(a)(1)). Padilla acknowledges that marijuana and ammunition were found inside a bedroom in the house, but he contends that, notwithstanding this fact, the government failed to prove beyond a reasonable doubt that he knowingly possessed the ammunition and the marijuana. 2

Significantly, for the purposes of both statutes under which Padilla was convicted, knowing possession of the contraband may be inferred from evidence of actual possession (meaning "immediate, hands-on physical possession") or constructive possession. Guzmán-Montañez, 756 F.3d at 8 (§ 922(q)(1)); accord García-Carrasquillo, 483 F.3d at 130 (§ 841(a)(1)). And, as pertinent here, "[i]n order to show constructive possession, the government must prove that the defendant 'had dominion and control over the area where the contraband was found.'" United States v. Wight, 968 F.2d 1393, 1397 (1st Cir. 1992) (quoting United States v. Barnes, 890 F.2d 545, 549 (1st Cir. 1989)) (discussing constructive possession in the context of both drug [*6] offenses and § 922(q)(1)). Thus, the record need show only that the evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Padilla exercised dominion and control "over the area" in which the contraband was found, as a jury may infer from such a finding of constructive possession that he knowingly possessed the contraband if circumstances would make it reasonable for a jury to do so. Id.

The evidence in this case more than sufficed to permit a jury to reasonably find as much. To begin with, the jury learned that Padilla had admitted in an

interview with federal agents that he was an owner of the house in which the ammunition and marijuana were found, that he had made payments on the mortgage for the house, and that he had installed four surveillance cameras at the house in order to deter break-ins and vandalism. Moreover, a federal agent testified that she conducted drive-by surveillance of the house ten days before the search of the house, and that Padilla was standing outside the house as she drove by it.

The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept [**7] at the house overnight. In addition, the government's evidence sufficed to show [*6] that the bedroom in which the ammunition and the marijuana were found was in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is "entitled to rely on plausible inferences" from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla, including: photo identification cards; receipts in his name from the previous year; old correspondence addressed to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies.

In the face of this evidence, Padilla nevertheless contends that the evidence was insufficient to prove that he knowingly possessed the contraband. He points out that there was no evidence of his fingerprints on the contraband and that the house was "unkempt, disorganized and full of items." But neither of those facts suffices to show that the jury was compelled to find in his favor regarding [**8] whether he knew the contraband was in the bedroom, given the government's ample evidence of his dominion and control over that area. In particular, Padilla acknowledges that the evidence showed that the bedroom was relatively "more organized" than the rest of the house, and that the contraband was found in that bedroom "with items belonging to [Padilla]." A jury could reasonably infer from those facts that Padilla exercised dominion and control over the area where the contraband was found. See United States v. Smith, 680 F.2d 255, 259 (1st Cir. 1982) ("[I]f the evidence can be construed in various reasonable alternatives, the jury is entitled to freely choose from among them."). And the jury was then entitled to infer knowledge of the contraband from that evidence of constructive possession, given that such an inference was reasonable under the circumstances, even if there was no evidence of actual possession, such as the type of fingerprint evidence that Padilla demands.

Padilla also contends that the evidence at trial was too slight because it did not indicate when he inherited his ownership share in the house, when he began "frequented" the house, or when he stored his personal items in the bedroom inside the house. But, there is no dispute [**9] that those events occurred prior

to when the contraband was found. And given, for example, the relatively recent dates of the receipts, the comparatively organized and clean condition of the bedroom, and the testimony that Padilla was seen outside the house ten days before the search, a jury could have reasonably found that his dominion and control over the area where the contraband was found continued up to the time of the search.

We therefore conclude that the government's evidence sufficed to prove that Padilla constructively possessed the ammunition and the marijuana found in the bedroom of the house, from which the jury was entitled to infer that Padilla knowingly possessed the contraband, as that inference was reasonable in these circumstances. We thus affirm the denial of his motion for acquittal.

III.

Padilla next contends in the alternative that, even if the evidence against him was sufficient, both his convictions must be vacated due to various alleged errors in the proceedings below. We disagree.

A.

Padilla's first argument on this score is that he was "forced" into representing [*7] himself pro se in violation of his Sixth Amendment right to counsel because, in his view, he was not given a viable [*10] alternative to proceed with effective counsel. Before addressing the merits of this argument, some additional background is needed for context.

As explained above, the trial was originally set to begin on August 11, 2015. One week before then, Padilla moved for new counsel on the ground that he did not trust his two court-appointed attorneys or agree with their case strategy. At a subsequent hearing on August 7, 2015, the District Court offered Padilla a choice to proceed with a different court-appointed attorney whom Padilla preferred, Carlos Vázquez, or, on Padilla's own suggestion, to represent himself pro se with Vázquez's assistance as standby counsel. In either case, the District Court said it would grant Vázquez only twenty days to prepare, which ultimately amounted to a fifteen-day continuance. 32 The District Court asked Padilla which option he preferred, and Padilla responded that he preferred to represent himself with Vázquez as standby counsel. The District Court then proceeded with a lengthy colloquy to ensure both that Padilla understood his constitutional right to representation and that he was voluntarily waiving it.

HN2 Padilla's decision to waive his constitutional right to [*11] counsel must have been made "knowingly, voluntarily and intelligently." United States v. Benefield, 942 F.2d 60, 65 (1st Cir. 1991) (citing United States v. Campbell, 874

F.2d 838, 845-46 (1st Cir. 1989)). Padilla contends, however, that he was not actually given an option to be represented by effective counsel because a longer continuance than the one the District Court granted was needed in order for Vázquez to have represented him effectively as full -- rather than merely standby -- counsel. Padilla thus contends that, absent a longer continuance, he was forced to make a Hobson's choice, by which his only real option was to proceed pro se, as the only other counsel available to him, besides Vázquez, were the two attorneys who he contends could not represent him effectively. Thus, in Padilla's view, his waiver of his constitutional right to representation was not voluntary.

However, a premise of Padilla's challenge to the effectiveness of his waiver -- namely, that the continuance was too brief to permit Vázquez to provide constitutionally adequate representation as full counsel and thus that Padilla was not actually offered an option of choosing an effective counsel -- is not supported by the record. 4. In determining how long to continue the trial, the District Court reasoned that it was not a "very complicated" [1-12] case and that Vázquez would have the benefit of the preparation done by Padilla's previous two attorneys and their two investigators. At the hearing, Vázquez did initially tell the District Court, with respect to the time that he needed to prepare as full counsel, that he was "thinking in terms of a month to two months." However, when the District Court told Vázquez that one to two months was not an option and that he would have only twenty days if Padilla [*8] elected to use him as full counsel, Vázquez said "okay."

On appeal, Padilla does not dispute that the District Court had discretion to determine how long of a continuance to grant, even if that decision potentially implicated the constitutional right to counsel. See United States v. Zimny, 873 F.3d 38, 52 & n.17 (1st Cir. 2017). Moreover, it is clear that, in order to establish that not granting Padilla a longer continuance erroneously deprived him of his right to counsel, Padilla must show "that the denial amounts to 'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'" Id. at 53 (quoting United States v. Maldonado, 708 F.3d 38, 42 (1st Cir. 2013)). 5 Padilla offers no persuasive argument, however, as to why, on this record, the District Court was not entitled to determine that no more than twenty days [**13] was needed for Vázquez to prepare as full counsel.

In this regard, we see no error in the District Court's determination that this was not a "very complicated" case. After all, the only genuinely disputed issue at the trial was whether Padilla actually or constructively possessed the contraband found in the house, and there were relatively few witnesses and exhibits. See United States v. Rodriguez-Duran, 507 F.3d 749, 767 (1st Cir. 2007) (finding no abuse of discretion in denying continuance in part because "the factual circumstances were not particularly complicated" where charges for drug possession with intent to distribute "stemmed from a single episode with a fixed cast of participants"). 6

Consistent with this conclusion, we observe that Vázquez himself responded by saying "okay" when informed of the continuance that would be allowed, without indicating he would need more time in order to provide effective representation on that schedule. Cf. Zimny, 873 F.3d at 55 (noting that a request for a continuance should be made "in clear, unmistakable terms"). 7 And we observe as well that Padilla does not point to any particular reason why longer than twenty days was in fact needed, such as by identifying further investigation that the defense would have needed more time [**14] to complete. 8 See United States v. Williams, 630 F.3d 44, 48 (1st Cir. 2010) (finding no abuse of discretion in denying continuance, which had been requested on the basis of an assertion that the record was voluminous, given in part that "no specific explanation ha[d] been [*9] provided as to why those particular materials justified additional time").

For these reasons, we conclude that it was within the District Court's discretion to decide not to grant a longer continuance. We thus disagree with Padilla that his decision to instead proceed pro se with standby counsel was a Hobson's choice. In consequence, a premise for Padilla's challenge to the effectiveness of his waiver of his right to counsel -- that he had no option of choosing an effective counsel because the continuance was too brief -- is mistaken. We thus see no basis for finding merit in Padilla's contention that his waiver of his right to counsel was ineffective.

B.

Padilla next contends that his convictions must be vacated on the ground that the District Court erred by not advising him that he could testify at his trial in narrative form and thus without anyone asking him questions. And he contends that he was thereby prejudiced, because he was not aware that he could have testified [**15] notwithstanding that he was proceeding pro se.

Padilla asserts that the standard of review is de novo, but the government suggests that our review is for only plain error because Padilla did not raise below his claim that the District Court should have advised him that he could testify in narrative form. However, because this type of claim "lies in . . . ignorance of the law," at least one other circuit has held that whether it was error not to advise a defendant of the option to testify in narrative form is reviewed de novo notwithstanding that the defendant did not raise a specific objection below. See United States v. Lv, 646 F.3d 1307, 1312 & n.5 (11th Cir. 2011). For present purposes, we may assume that our review is de novo, because even under that more favorable standard of review, Padilla's challenge fails.

Padilla asserts in his appellate brief that, had he been advised by the District Court that he could testify in narrative form, "[h]is testimony would have filled in some of the areas that were left out by the government's witnesses." However,

Padilla does not actually tell us what his testimony would have been, so we have no basis to conclude that his testimony would have had any effect on the verdict. But we need not decide whether [**16] the alleged constitutional error here was harmless or whether this type of error is even subject to harmless error review (a question neither party briefed), see Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-08, 198 L. Ed. 2d 420 (2017), because we see no error.

HN3 A district court generally has no duty to apprise a criminal defendant of the right to testify or to secure an explicit waiver of that right, as the responsibility to advise a defendant of the right to testify "rests with his lawyer." Rosenthal v. O'Brien, 713 F.3d 676, 687 (1st Cir. 2013) (citing Siciliano v. Vose, 834 F.2d 29, 30 (1st Cir. 1987)). Padilla proposes, however, that when a defendant proceeds without a lawyer, it is "incumbent upon the Court to fulfill this duty," at least where it becomes manifest that the pro se defendant does not understand that he can testify without anyone asking him questions.

But this argument fails because Padilla did proceed with standby counsel -- whom the District Court described to Padilla as his resource on federal law and procedure -- who could have explained to Padilla that he could testify in narrative form. Indeed, "the wisdom of the trial judge" in appointing standby counsel lies in the fact that the pro se defendant will therefore have counsel available "to perform all the services a trained advocate would perform [*10] ordinarily," including "examination . . . [**17] . of witnesses." Mayberry v. Pennsylvania, 400 U.S. 455, 467-68, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Burger, C.J., concurring). Thus, we fail to see how it was manifest that Padilla would have needed the District Court to apprise him of his right to testify in narrative form.

Padilla does point to an Eleventh Circuit decision, Ly, 646 F.3d 1307, which held that the district court erred by not correcting a pro se defendant's "obvious" misunderstanding of his option to testify in narrative form. Id. at 1317. But that case is quite different from this one.

In Ly, during a colloquy that the district court had initiated regarding the pro se defendant's decision not to testify, the defendant repeatedly told the district court that the reason he was not testifying was that "I don't have counsel to ask me questions." Id. at 1311-12. Padilla has not persuasively identified any statement, let alone one from a colloquy over his right to testify, that would have put the District Court on similar notice that he was not aware that he could testify in narrative form. Padilla certainly never told the District Court that the reason he was not testifying was that he did not have counsel to ask him questions. And, of course, he did have standby counsel who could have asked him questions. We thus conclude that the District Court [**18] did not err on this score.

C.

Padilla also contends that his convictions should be vacated in light of several statements made by the prosecutor at trial that Padilla alleges were improper. Padilla did not object to any of the statements that he now challenges on appeal. Nor did Padilla's standby counsel object to the statements on Padilla's behalf, even though the standby counsel did make other objections during the trial. Accordingly, as Padilla concedes, our review is only for plain error.

HN4 To show plain error, Padilla must show: "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Madsen*, 809 F.3d 712, 717 (1st Cir. 2016) (quoting *United States v. Duarte*, 246 F.3d 56, 60 (1st Cir. 2001)). Padilla has not made such a showing.

1.

To begin with, Padilla points to the prosecutor's references during opening arguments to the house where the contraband was found as Padilla's "residence." **9** Padilla contends that these references improperly prejudiced the jury because whether the house was in fact his residence was a disputed issue. "Ideally, to preclude any argument of error, the prosecutor might have used the locution [119] that 'the evidence will show' that" the house was Padilla's residence. *United States v. Capalton*, 350 F.3d 231, 237-38 (1st Cir. 2003). But, even assuming a clear or obvious error, Padilla fails to show how the references affected his substantial rights by prejudicing the jury and resulted in a miscarriage of justice.

[*11] In fact, we have previously held that it was not a manifest abuse of discretion to deny a new trial -- a lower standard than plain error -- in a case in which the prosecutor repeatedly referred to each defendant who was charged with drug offenses as a "drug dealer" in the opening arguments. *Id.* at 238. We reasoned that the references did not prejudice the jury because (1) the district court had cautioned the jury before the opening arguments that the counsel's words were not evidence and (2) the government later introduced "substantial" evidence that the defendants were drug dealers. *Id.*

Likewise, here, the District Court instructed the jury prior to the government's opening argument that what the prosecutor was going to say was not evidence. And the government then introduced substantial evidence from which a jury could reasonably infer that the house was Padilla's residence, including his admissions during an interview with federal agents [*20] that he owned and frequented the house, the testimony that he was surveilled outside the house, and the evidence that his personal items were found inside the house. Nor does Padilla develop any argument otherwise.

2.

Moving on to the closing arguments, Padilla points to certain statements that the prosecutor made during the rebuttal portion with respect to Padilla's defense theory, presented during his own closing argument, that the ammunition found in the house had belonged to his father and had remained in the house without Padilla's knowledge since his father's death. In this regard, Padilla contends that it was improper for the prosecutor to point out that some of the caliber sizes of the firearms listed in his father's firearm licenses "did not match" the caliber sizes of the ammunition found in the house, given that the government did not introduce expert testimony on this point.

The problem with this contention is that evidence of the caliber sizes of the father's licensed firearms and the caliber sizes of the ammunition in the house were in the record. Thus, we do not see how it was improper -- let alone clearly improper -- for the prosecutor to comment on an inference that the [**21] jury might draw from the fact that the caliber sizes were different. See United States v. Smith, 982 F.2d 681, 683 (1st Cir. 1993) (explaining that "Inferences the jury might draw from the evidence" are "a proper subject of comment by the prosecutor" in closing arguments).

Padilla also challenges the prosecutor's reference during the rebuttal to the fact that no firearms were found inside the house, from which the prosecutor inferred that any firearms belonging to the father had been removed. The prosecutor then suggested to the jury that it would be implausible that any ammunition belonging to Padilla's father would have remained in the house after the father's firearms were removed.

Padilla asserts that this suggestion was improper. However, HNS "a prosecutor has a right to comment on the plausibility of the defense theory." United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003) (citing United States v. Garcia, 818 F.2d 136, 143 (1st Cir. 1987)). And Padilla makes no argument as to why the prosecutor's remark clearly exceeded the scope of that right.

3.

Finally, Padilla challenges the following statement made by the prosecutor during the rebuttal portion of closing arguments:

[*12] This case is about an ex PRPD officer, convicted felon, person that has law enforcement background. This is not a case about a grandmother, naive, that had never seen any type of narcotics, [**22] or was never confronted and had no participation in narcotics. This is not a case about an old grandfather, 85 years

old, who had no law enforcement background, had never seen a gun before, had never seen a bullet before, and would not be able to identify them.

Padilla contends that the fact that he was a former police officer did not bear on his knowledge about narcotics and that the implied reference to his "participation in narcotics" improperly "insinuated illegal usage or activity." He also contends that the reference to him as "a convicted felon" "invited the jury to focus on his bad character rather than on the evidence."

The government responds that the prosecutor properly invoked Padilla's former profession in order to rebut Padilla's theory that he was ignorant of the nature of the contraband found in the house. The government also counters that the reference to Padilla's status as a convicted felon -- which is an element of the charge -- was proper because it rebutted Padilla's claim to the jury in his closing argument that the charge against him "could happen to anybody" who inherits a house from someone with a weapons permit.

Even if Padilla is right that these comments were improper, he has failed to make any developed argument as to how the prosecutor's references to him as a former police officer and convicted felon affected his substantial rights and resulted in a miscarriage of justice. And, in any event, as we explained in Part II, while Padilla challenges only the sufficiency of the government's evidence with respect to his knowledge that the contraband was in the bedroom, the government offered a wealth of evidence on that score. Padilla has thus failed to show how these references made it reasonably probable that, had they not been made, the outcome at trial would have been different. See United States v. Latorre-Cacho, 874 F.3d 299, 303 (1st Cir. 2017) ("[T]he third prong of the plain error standard . . . requires the defendant to show . . . that it is reasonably probable that the clear and obvious error affected the result of the proceedings."). Accordingly he has failed to satisfy the plain error standard that applies here.

IV.

Finally, Padilla challenges two aspects of his sentence. We reject his first challenge but, in accord with the government's own view, grant relief with respect to his second challenge.

A.

To begin with, Padilla objects to a special condition of his supervised release that he "shall [424] participate in an approved mental health treatment program for evaluation and/or treatment services determination." The condition specifies

that, "[i]f deemed necessary, the treatment will be arranged by the [probation] officer in consultation with the treatment provider; the modality, duration and intensity o[f] treatment will be based on the risks and needs identified." The presentence report recommended this condition. Padilla objected to the condition at the sentencing hearing, but the District Court concluded, in light of his experiences interacting with Padilla over the course of the case, that "this is a good condition for him."

HN6 "We review conditions of supervised release for abuse of discretion." United States v. DaSilva, 844 F.3d 8, 11 (1st Cir. 2016) (quoting United States v. Del Valle-Cruz, 785 F.3d 48, 58 (1st Cir. 2015)). The District Court has "broad discretion" to impose conditions of release provided they are "reasonably related," as pertinent here, to the provision of rehabilitative treatment for the defendant. United States v. Rivera-Lopez, 736 F.3d 633, 635 (1st Cir. 2013); see also U.S. Sentencing Guidelines Manual § 5D1.3(d)(5) (U.S. Sentencing Comm'n 2015) (release may be conditioned on participation in a mental health program "[i]f the court has reason to believe that the defendant is in need of psychological or psychiatric treatment").

Padilla contends that the District Court abused its [**25] discretion in imposing the mental health counseling condition because his court-ordered psychiatric evaluation did not diagnose him with a mental illness. However, the government points out that the psychiatric evaluation concluded that Padilla did exhibit "features" of a particular mental illness -- a point Padilla does not dispute. See United States v. Perazza-Mercado 553 F.3d 65, 75 (1st Cir. 2009) (noting, with respect to a court's imposition of a condition of supervised release, that "a court's reasoning can often be inferred after an examination of the record" (internal quotation marks omitted)). The condition of supervised release at issue requires only that Padilla be evaluated for treatment services. Thus, if treatment services are not "deemed necessary," then under the plain terms of the condition, no treatment will be arranged. Padilla identifies no case law indicating that a mental health counseling condition like this one can be imposed only if the defendant is diagnosed with a mental illness. Nor are we aware of any such authority. Accordingly, we conclude that the District Court did not abuse its discretion by including this condition of supervised release.

B.

Padilla also challenges the District Court's order of forfeiture of "[a]ny [**26] and all materials or property used or intended to be used in the possession, receipt, distribution or transportation of child pornography, pursuant to Title 18, USC Section 2253." The government agrees with Padilla that this order of forfeiture was an error and should be excised from the written judgment.

HN74 Forfeiture under criminal statutes like 18 U.S.C. § 2253 is "an element of the sentence imposed following conviction." Libretti v. United States, 516 U.S. 29, 38-39, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995) (emphasis omitted). Accordingly, an order of criminal forfeiture must be supported by a factual foundation in the record. See id. at 48. Nothing in the record here, however, has any discernible connection to child pornography. Accordingly, we agree with the parties that this order of forfeiture should be struck from the written judgment.

v.

We therefore remand for the limited purpose of striking the child pornography forfeiture order, but we affirm the rest of the District Court's judgment.

Footnotes

1 ¶

At an earlier pre-trial hearing in July, Padilla had indicated his dissatisfaction with one of his attorneys because she did not "see eye to eye in case strategy" with him. But the District Court found no grounds for dismissing her.

2 ¶

It is also undisputed that additional ammunition was found elsewhere in the house. But, because we conclude that the evidence of Padilla's knowing possession of the ammunition in the bedroom was sufficient to convict him under § 922(g)(1), we need not address the evidence of the additional ammunition.

3 ¶

The fifteen-day continuance of the trial actually meant that Vázquez was ultimately given nineteen, rather than twenty, days to prepare. Because neither party raises this point, it has no bearing on our analysis.

4 ¶

Because we conclude that Padilla had a real option to be represented effectively by Vázquez as full counsel, we need not address his other implicit premise that his original two attorneys could not have represented him effectively. We note, too, that Padilla has not identified any other ground for concluding that his waiver of his right to counsel was ineffective.

5 ¶

Because Padilla has not made this showing, we need not decide whether Padilla would also have to show prejudice in this context, a question we recently reserved in Zimny, 873 F.3d at 52-53.

67

The District Court also pointed out that Vázquez would benefit from the preparation already done by Padilla's two previous attorneys and their two investigators. See United States v. Hurley, 63 F.3d 1, 16 (1st Cir. 1995) (reasoning that a denial of a continuance was not an abuse of discretion in part because counsel benefitted from the work of co-defendants' counsel who had longer time to prepare). And, although Padilla states that he distrusted those attorneys and disagreed with their case strategy, he does not contend that the work they and their investigators performed on his case could not permissibly be considered by the District Court in determining the duration of the continuance.

77

We note that, by way of contrast, Vázquez felt comfortable telling the District Court "no" when the District Court asked him if he could be ready as full counsel within two days or one week from when trial was originally scheduled to begin.

87

The only investigative work that Padilla references on appeal was tracking down his father's firearms licenses "that were critical to his defense." But, as Padilla acknowledges, those licenses were ultimately admitted into evidence despite the brief continuance.

97

Padilla directs our attention to nineteen references during the trial to the house as Padilla's "residence." However, the majority of the statements that he identifies were in fact made by government witnesses, not the prosecutor. The only references by the prosecutor to the house as Padilla's "residence" that Padilla identifies were made during the opening arguments.



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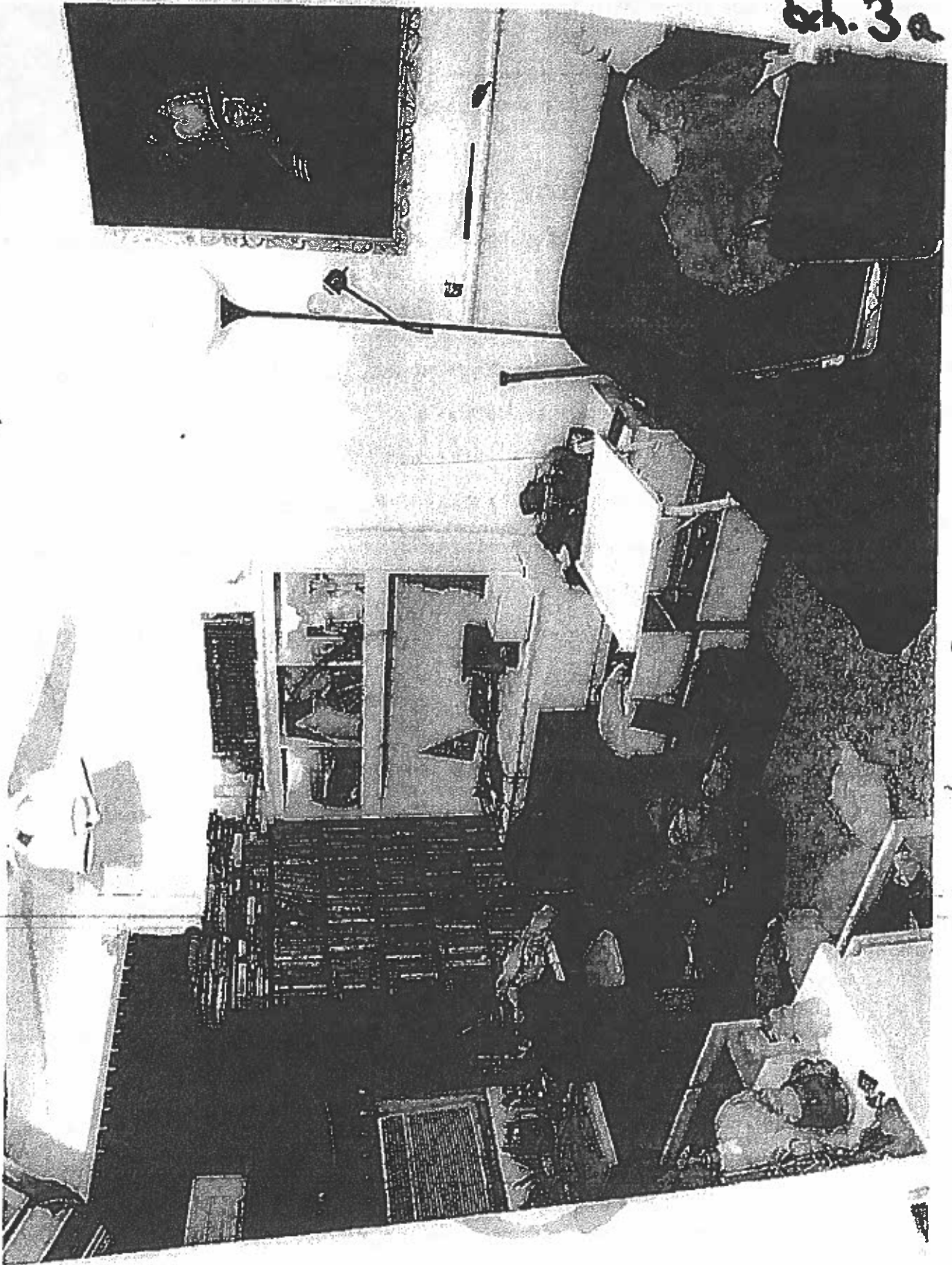
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exh. 3a



Room 1

Entry photo

D

36

1 A. They are all photographs of inside the residence of
2 Mr. Padilla.

3 Q. Do they fairly and accurately depict what these
4 photographs portray on the date that you executed the search?

5 A. They do.

6 Q. All right. So showing you --

7 MR. ALUM: Your Honor, at this time we move these
8 photographs into evidence.

9 THE COURT: Received.

10 DEFENDANT PADILLA: No objection.

11 (Government's Exhibits 2, 4, 5, 6, 7, 8 and 9 received.)

12 BY MR. ALUM:

13 Q. Showing you what's been marked as Government's Exhibit 9,
14 do you recognize that?

15 A. I do.

16 Q. What is that?

17 A. That is what I referred to as the organized bedroom in
18 the residence.

19 Q. Showing you what has been admitted as Government's
20 Exhibit No. 2, do you recognize that, sir?

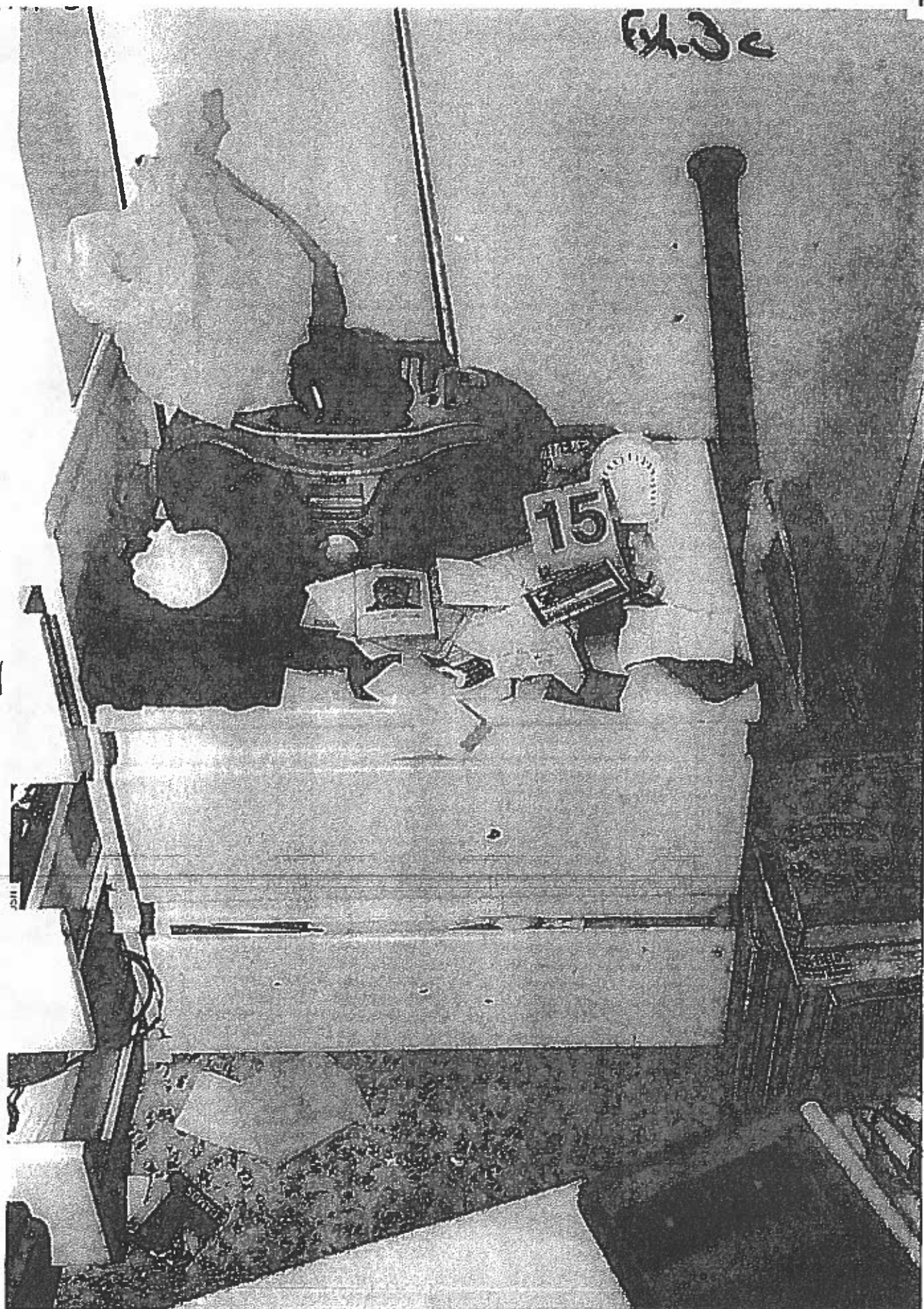
21 A. I do. That is pictures of photo IDs for Mr. Padilla.
22 That was found on the nightstand next to the bed in the prior
23 picture, the bedroom.

24 Q. Is the picture of the gentleman shown in that -- do you
25 see the gentleman shown in that photograph in court today?

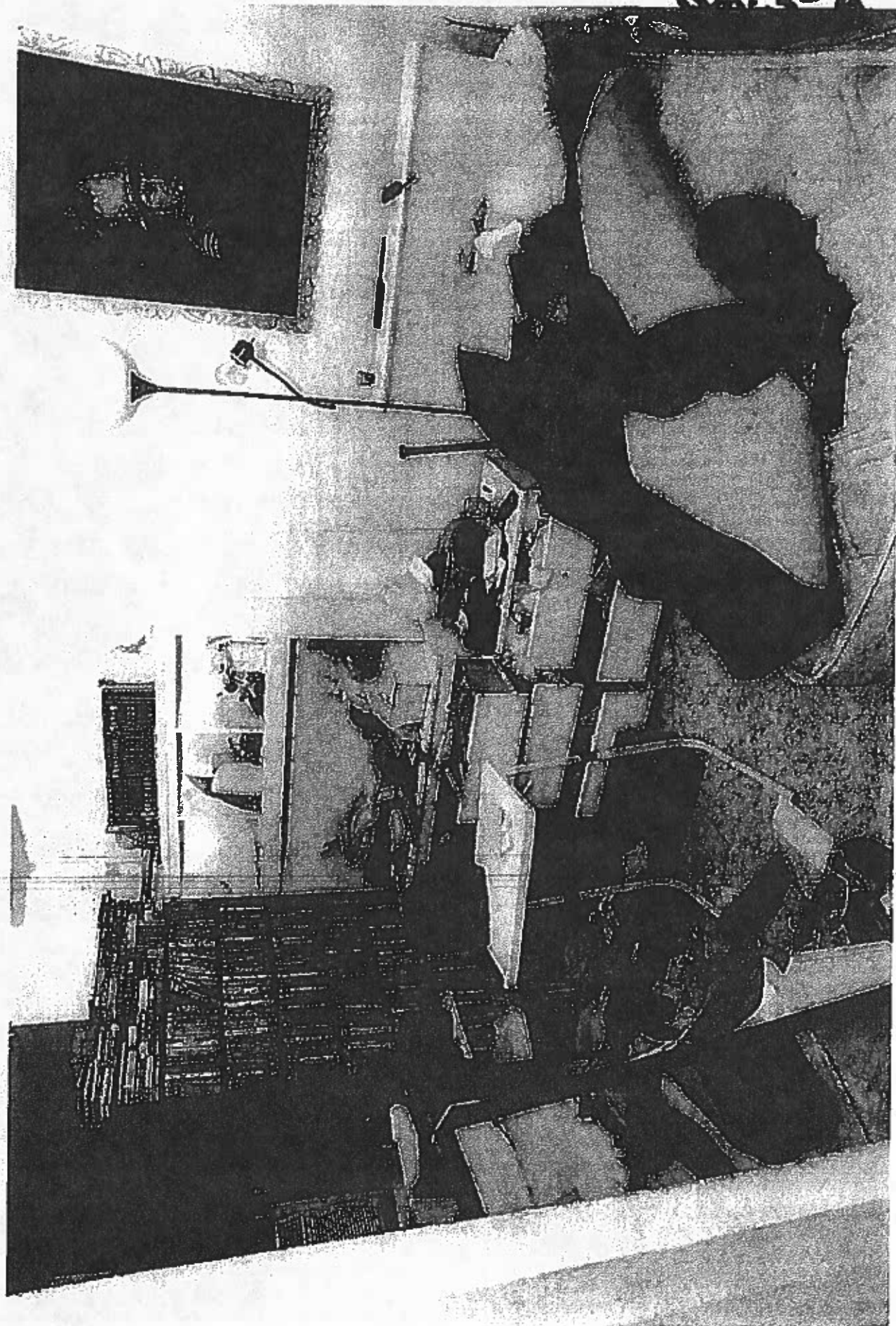
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C

Room I



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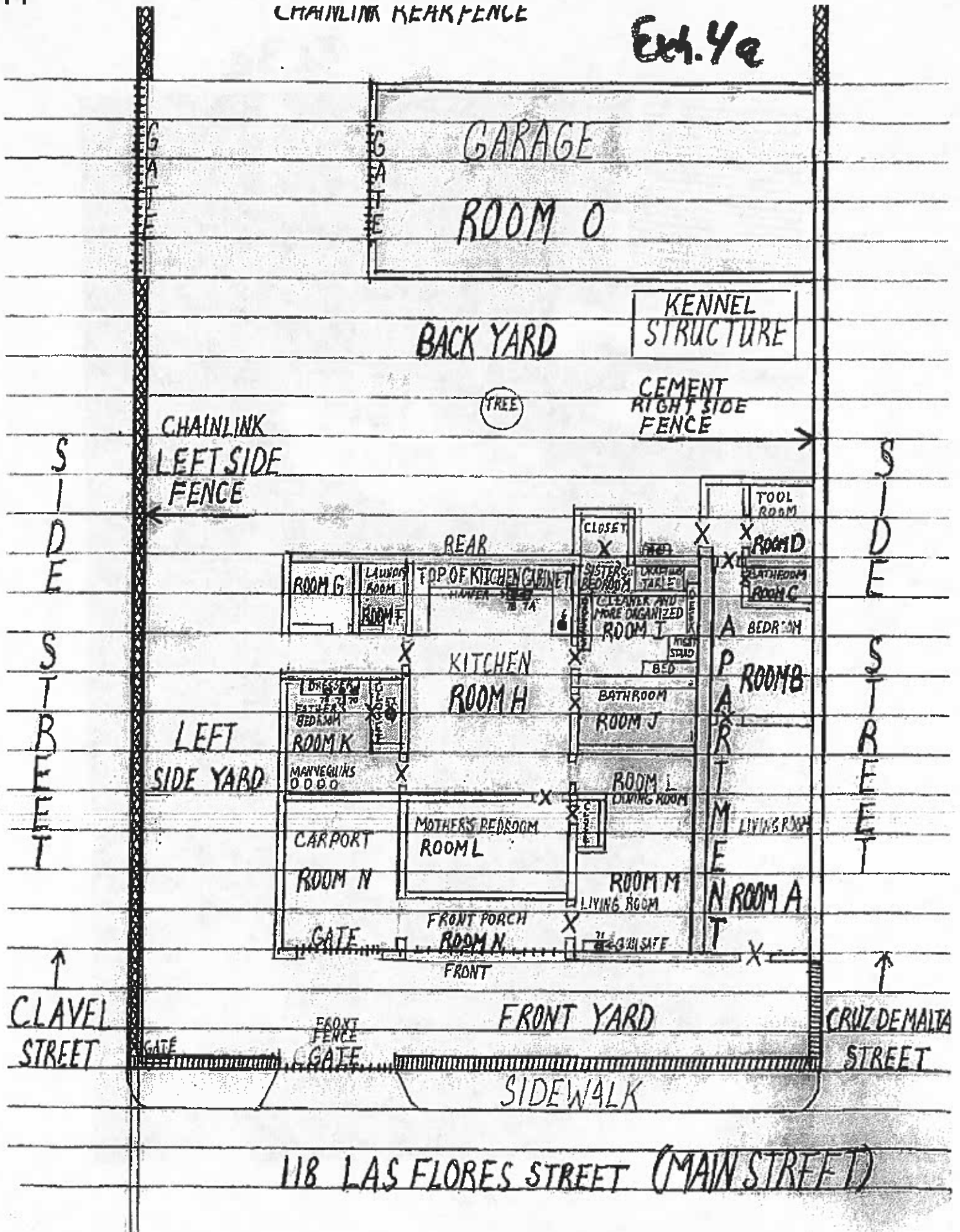
Ex. 3e



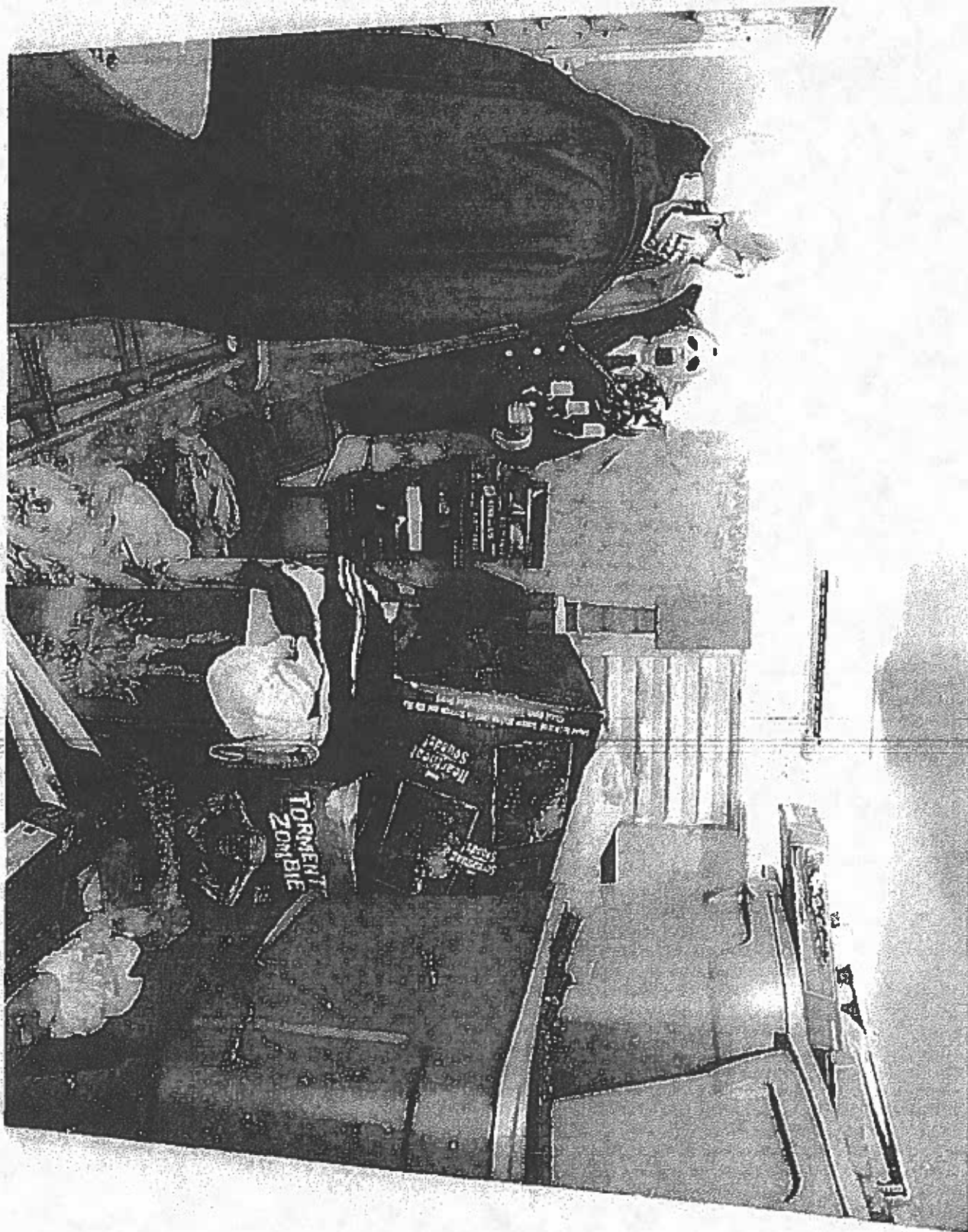
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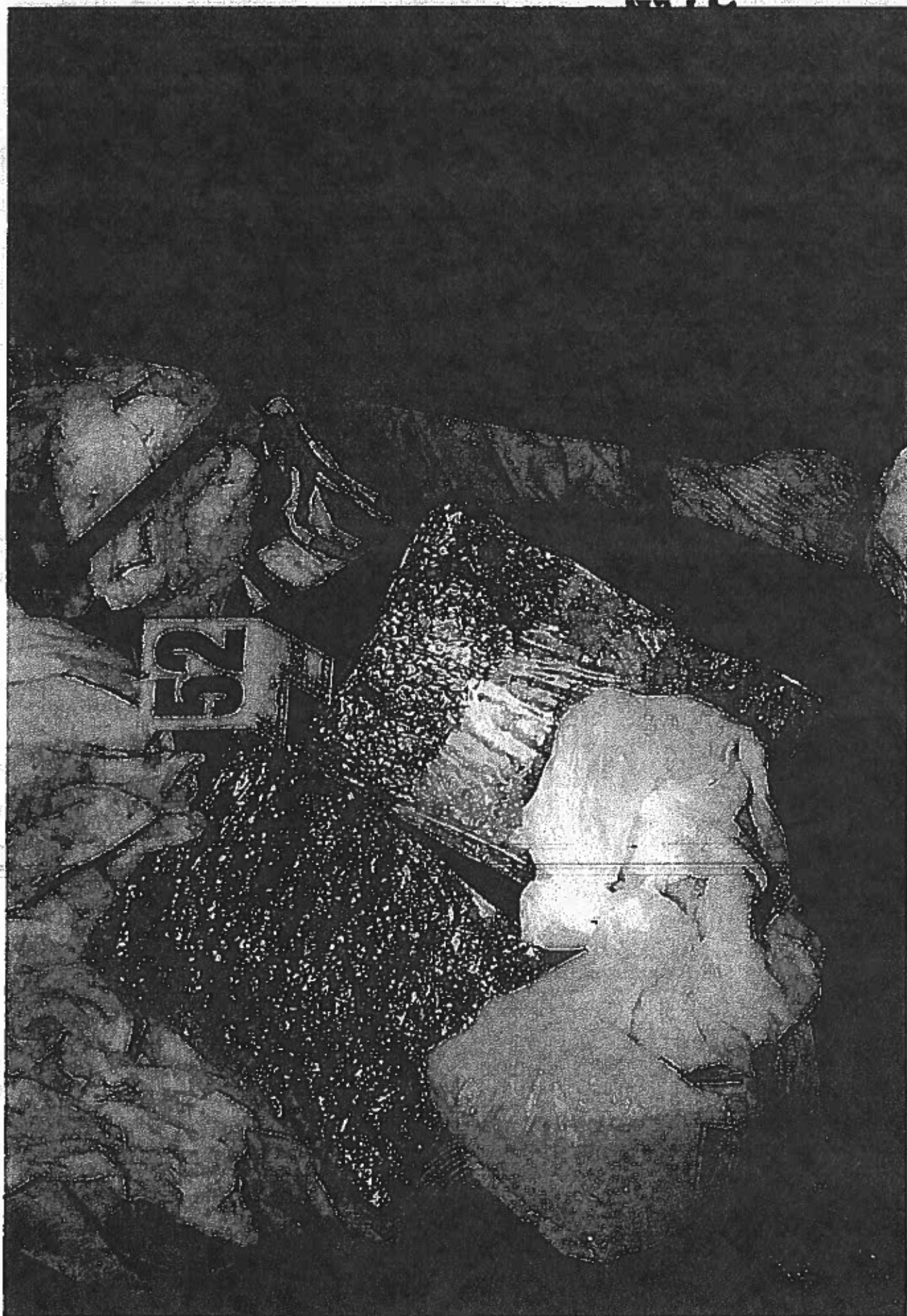


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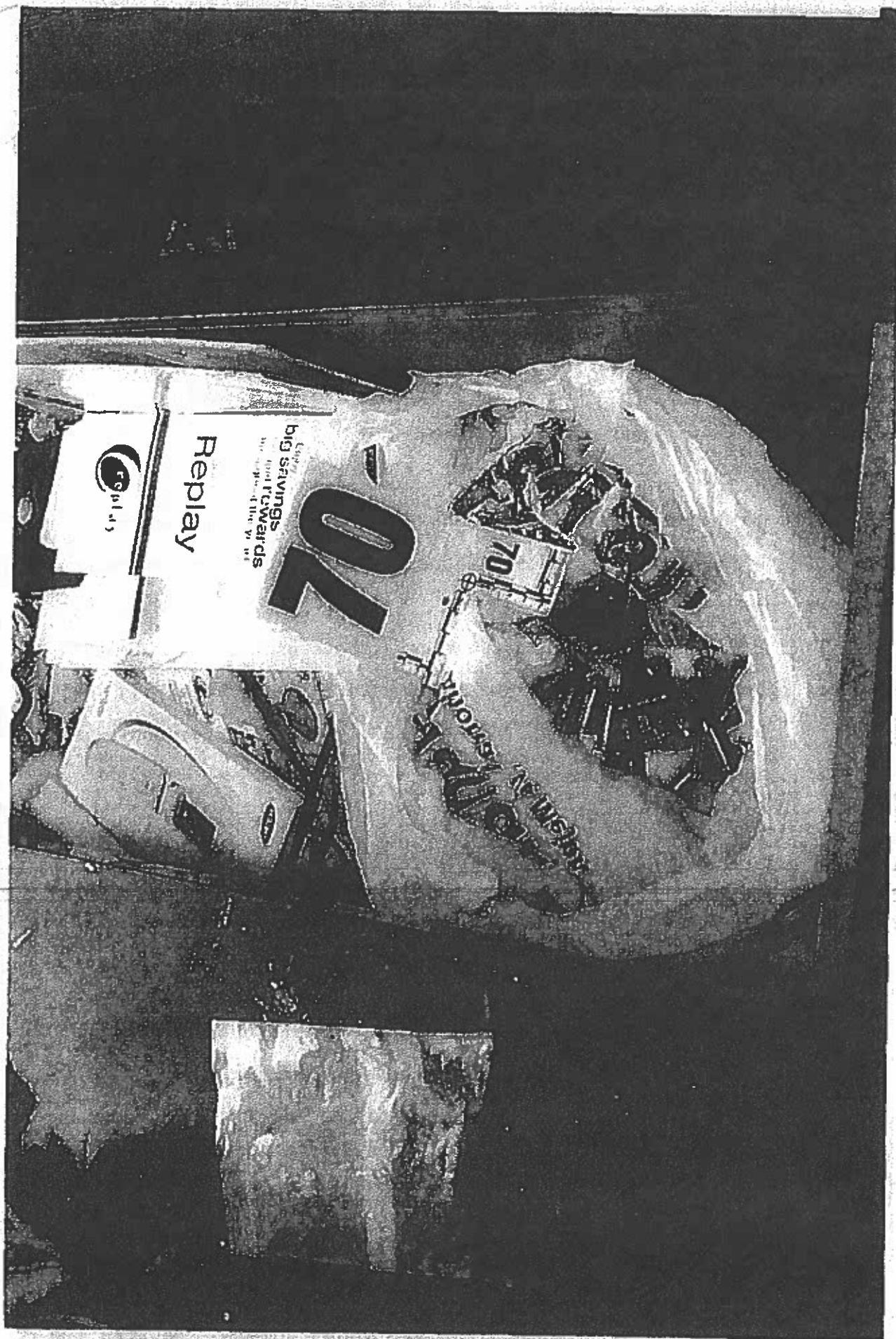


ROOM K ENTRY PHOTO

112 PHOTO # 36



Room 1



Room 1

En Ye

1 A. I do.

2 Q. What is it?

3 A. That is a drawer in the room, the same room with the
4 Halloween decorations, the mannequins, the marijuana that was
5 discovered. Those are 30 .9 mm round bullets, caliber bullets
6 that were recovered out of that room.

7 MR. ALUM: May I approach, Your Honor?

8 THE COURT: Please.

9 BY MR. ALUM:

10 Q. Agent Tews, I'm showing you what's been marked for
11 identification purposes as Government ID 10. Do you recognize
12 what that is, sir?

13 A. I do. These are the two packages of marijuana that I
14 recovered out of Mr. Padilla's closet inside his residence.

15 Q. And what did you do -- what did you do after you
16 recovered that marijuana?

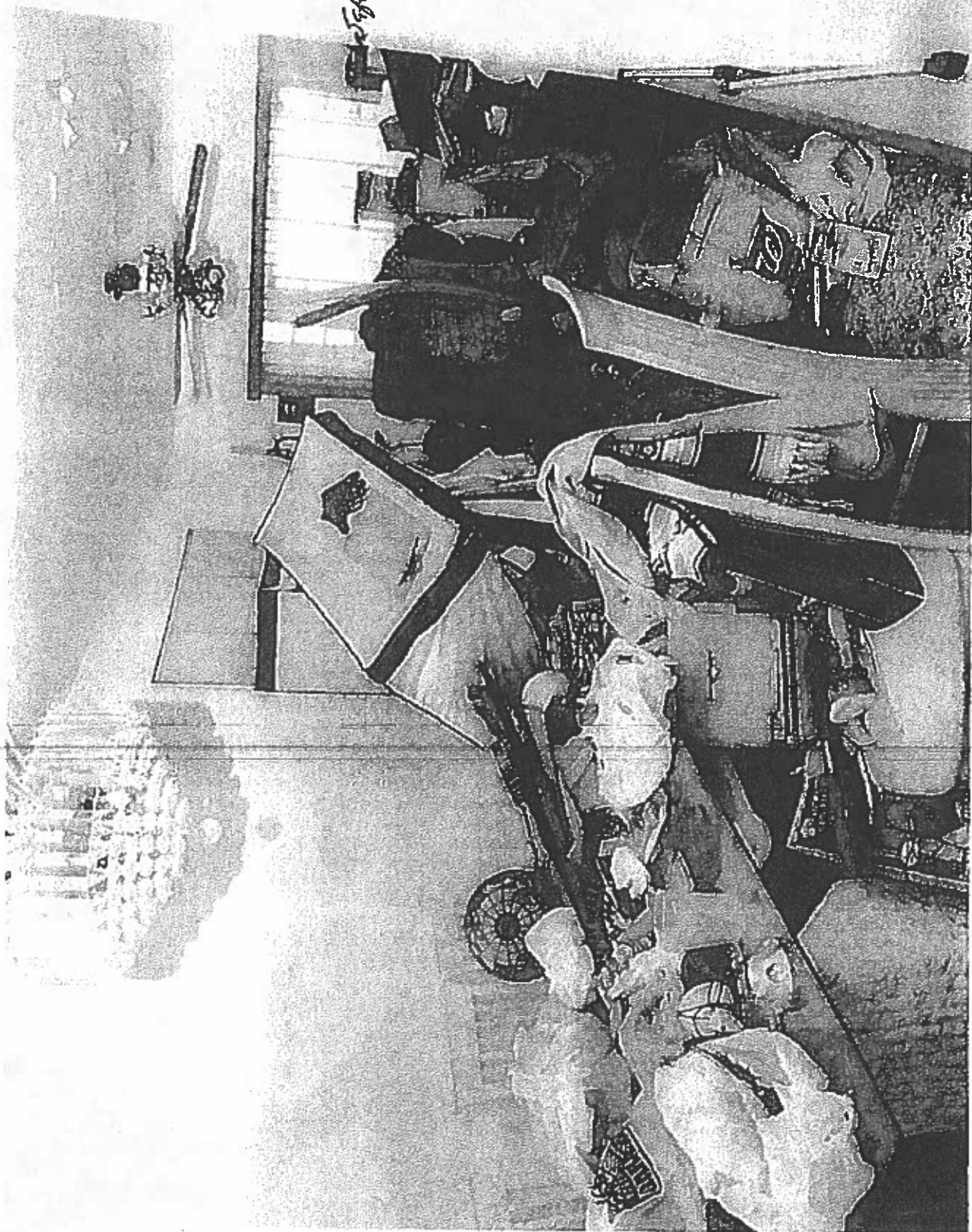
17 A. The number was placed on it that was shown in the prior
18 photograph and the photographer came and took a picture of
19 where it was located. Once that was completed, I picked up
20 the marijuana and brought it outside to the evidence
21 collection table where Task Force Officer Hector Cintron took
22 possession of it as the collector and signed the chain of
23 custody accepting the two packages of marijuana.

24 MR. ALUM: Your Honor, at this time we move the
25 marijuana into evidence.

DINING ROOM AND LIVING ROOM

(38.)

Ref. 5a



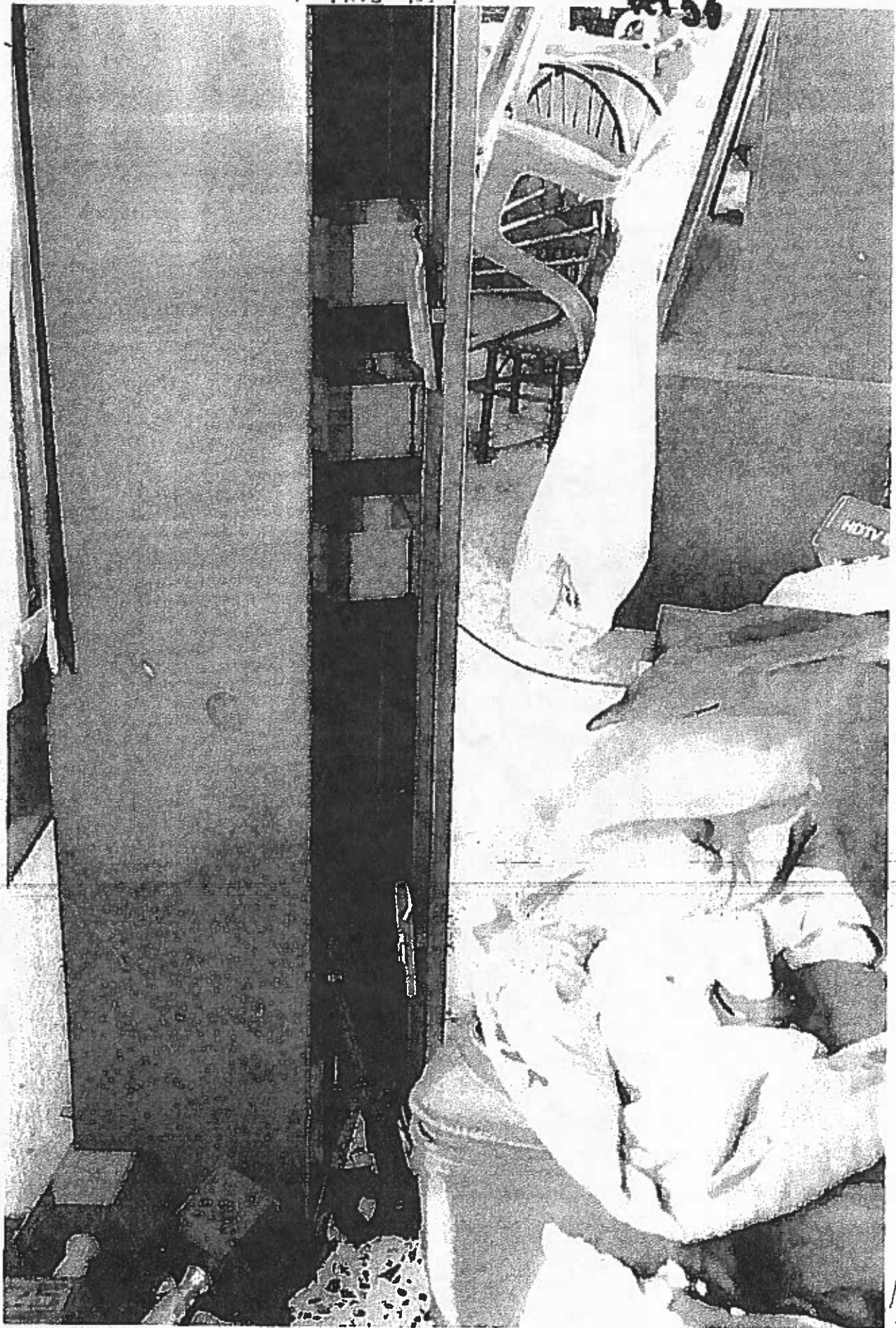
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ROOM M ENTRY PHOTO

106 PHOTO #49

117

5/11



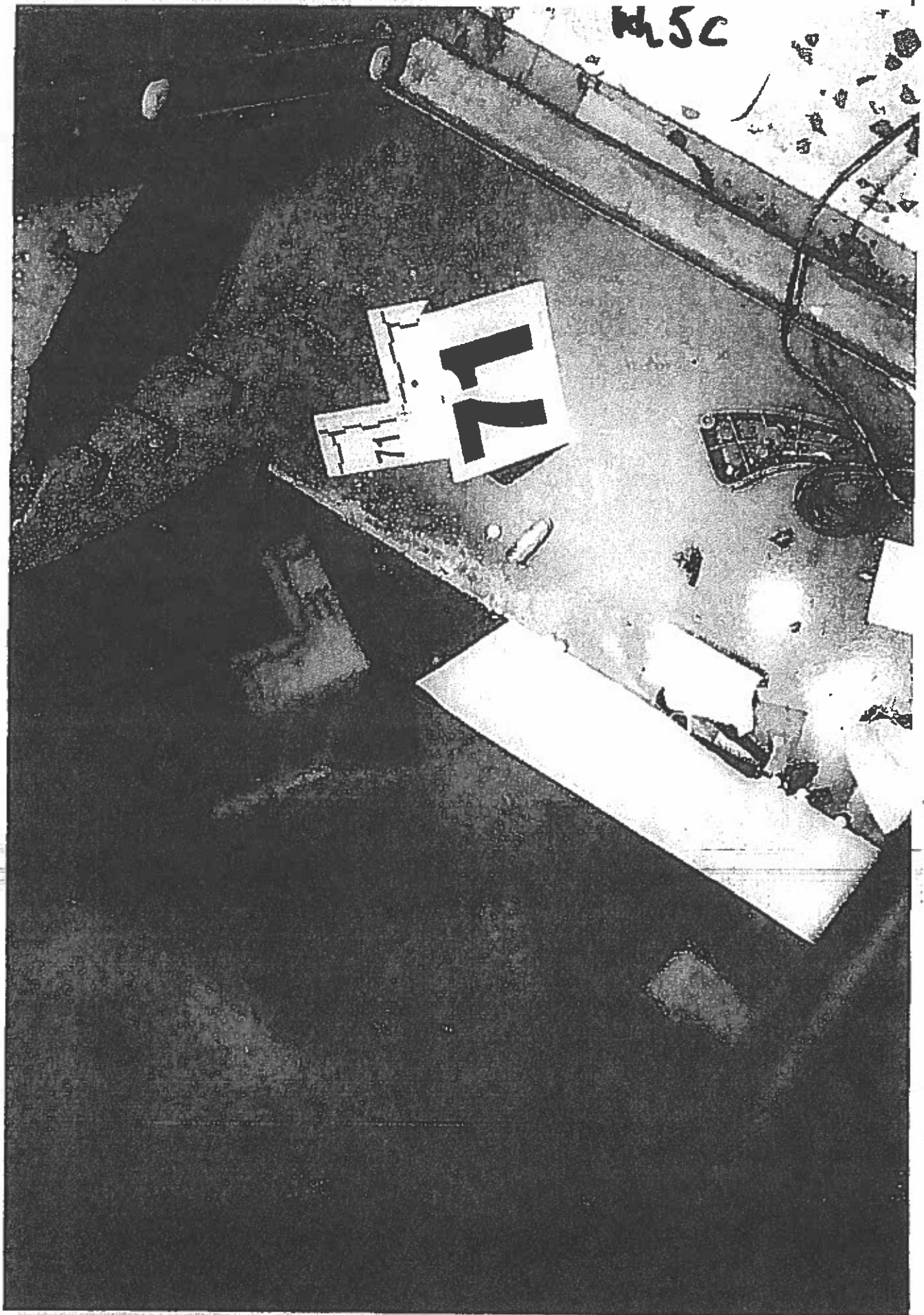
39

5b

ROOM M

LOG
PHOTO
#

W5C



Ch 5d

1 the bullets, but were you able to verify that bullets were
2 actually inside that hamper?

3 A. I was. The evidence -- the picture of the evidence is
4 taken to try to preserve the most -- how it appeared when it
5 was recovered. It wasn't set up to take the photo. So that's
6 how it was recovered. And I personally saw the eight 7.62 x
7 39.8 mm bullets and the .9 mm bullets that were recovered out
8 of there.

9 Q. Now, Agent Tews, I am showing you Government's
10 Exhibit 21. What are we looking at there, Agent Tews?

11 A. That is a picture of a gun safe located in Mr. Padilla's
12 residence.

13 Q. Okay. And now showing you Government's Exhibit 26.

14 A. That is a picture of the same gun safe with the door open
15 showing what appears to be two toy replica firearms.

16 Q. And, Agent Tews, again, throughout the course of your
17 investigation did you learn what the purpose of those toy
18 firearms were?

19 A. For movie props for Mr. Padilla.

20 Q. And how did you learn that?

21 A. During the interview I had with him on January 10th.

22 Q. Now I'm showing you what's been marked as Government's
23 Exhibit -- what has been admitted as Government's Exhibit 20.
24 What is that, sir?

25 A. That is a picture of inside the safe, the .9 mm bullet on

1 the floor of the safe.

2 Q. And why is it that those fake firearms that we saw -- is
3 this the same safe as the safe I had shown you in Government
4 Exhibit 26?

5 A. Yes, except for the firearms were moved out of the
6 picture after they were collected to take a clear photo of the
7 .9 mm bullet.

8 Q. Now I'm showing you what has been admitted as
9 Government's Exhibit 22. What are we looking at there?

10 A. This is the same room that the safe was in.

11 Q. Can you diagram the trajectory that you would have taken
12 to get to that safe?

13 A. You had to walk through like this (indicating) and
14 around. And the safe was located here (indicating).

15 DEFENDANT PADILLA: Can we approach, Your Honor?
16 Excuse me.

17 THE COURT: Sure.

18 (Bench conference held.)

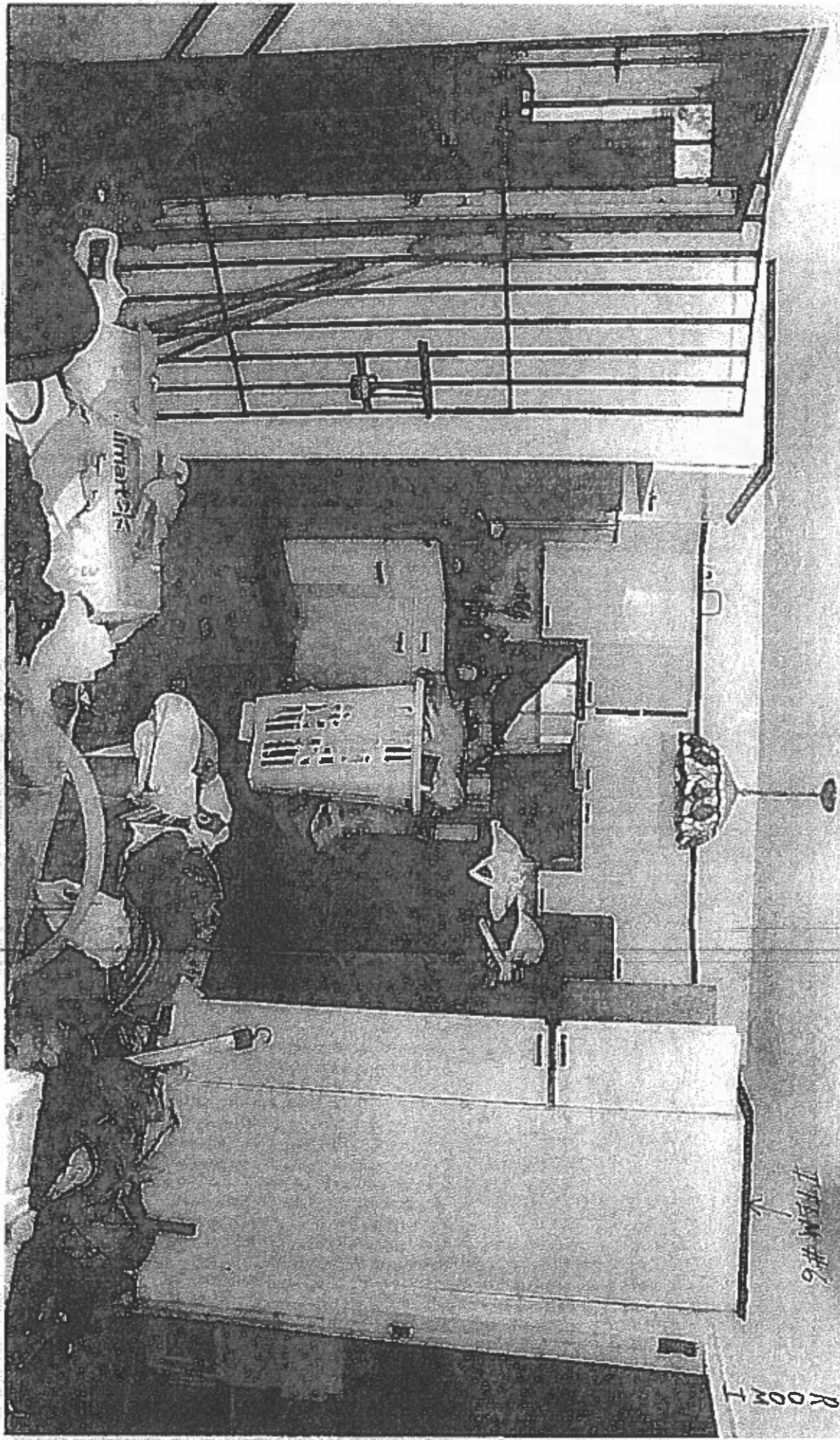
19 DEFENDANT PADILLA: Since we're still on the subject
20 of the safe, the agent is mentioning that once the firearms
21 were out -- there are no firearms there. No firearms
22 whatsoever were occupied there. They're toy weapons.

23 MR. ALUM: That's what he said.

24 DEFENDANT PADILLA: No, once he said when the
25 firearms are removed.

Ed. 6a

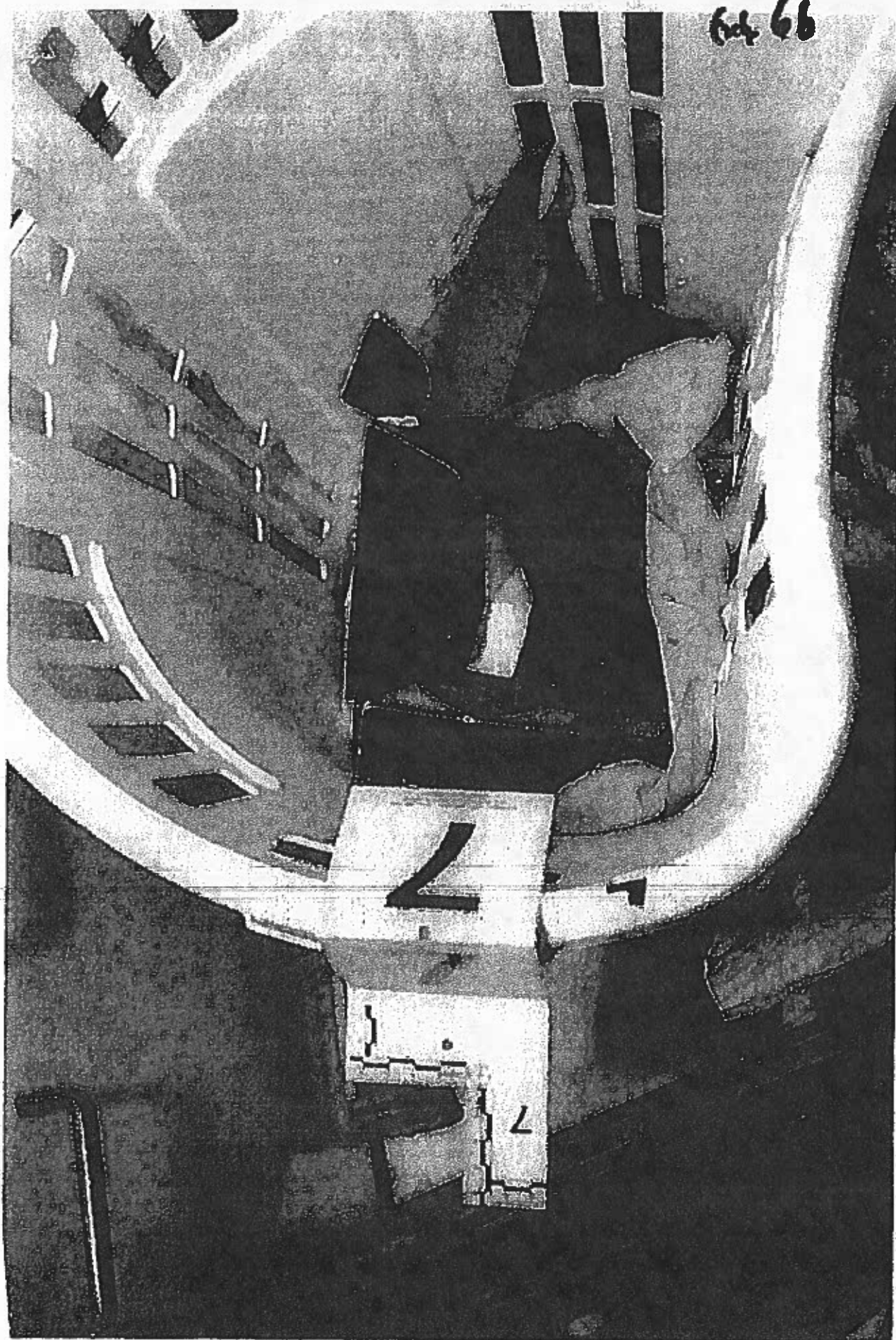
PART OF KITCHEN ROOM H



ENTRY PHOTO

106 PHOTO #20

(20)

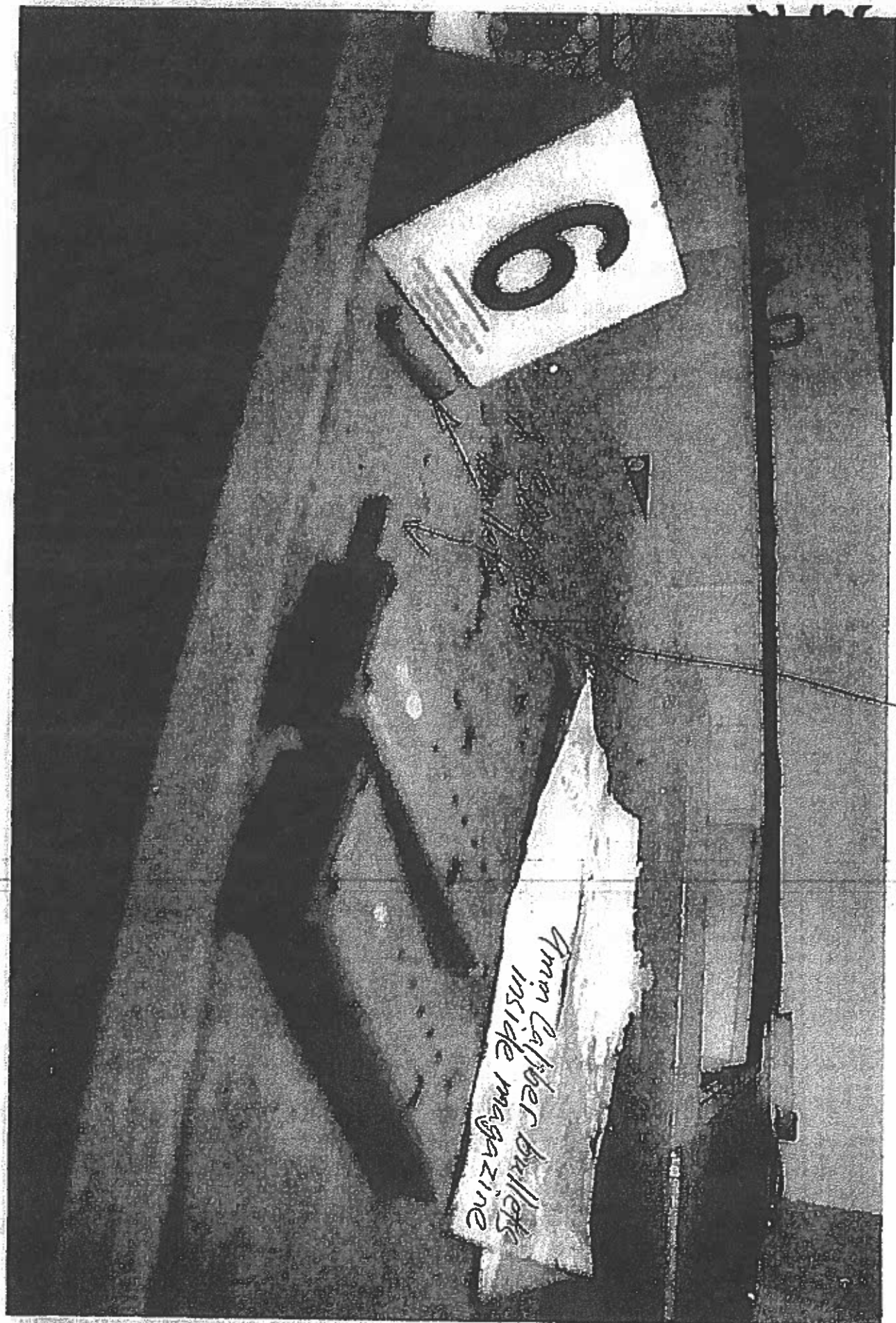


64 66

6b

Room 7

On top of Kitchen Cabinet



Ammen Caliber bullets
inside magazine

known

Ex. 7

1 include mannequins, disguises, general decorations. There
2 were a lot of toy and replica firearms. There were personal
3 documents to Mr. Padilla to include ID cards, correspondence,
4 bills, and just a variety of other replica toys and law
5 enforcement material.

6 Q. Now how would you generally describe the condition of the
7 residence when you executed the search?

8 A. The residence was messy. The majority of it was
9 unorganized. There was a lot of clutter, with the exception
10 of one bedroom which was, I'd say, organized and clean
11 compared to the rest of the house.

12 Q. Agent Tews --

13 MR. ALUM: May I approach, Your Honor?

14 BY MR. ALUM:

15 Q. Agent Tews, I'm going to show you what's been marked
16 Government IDs 2, 4, 5, 6, 7, 8 and 9.

17 MR. VAZQUEZ: We need to see them first.

18 BY MR. ALUM: --

19 Q. Agent Tews, would you please take a moment and review
20 those photographs.

21 Do you recognize those photographs?

22 A. I do.

23 Q. What are they?

24 A. They are all photographs of inside the residence of
25 Mr. Padilla.

Ex. 8

1 look at?

2 BY DEFENDANT PADILLA:

3 Q. Your name, ma'am.

4 A. Right in the middle. Okay.

5 Q. That contains your name.

6 A. Would you like me to --

7 Q. Please.

8 THE COURT: Tell us exactly what --

9 THE WITNESS: You want me to say exactly what it
10 says?

11 THE COURT: Yes.

12 THE WITNESS: Okay. In Spanish or English? Because
13 it was translated.

14 THE COURT: Say it in English.

15 THE WITNESS: "But how are you going to know what is
16 in your house also, there was a free for all there."

17 BY DEFENDANT PADILLA:

18 Q. Okay.

19 THE COURT: Pick up the document, please.

20 DEFENDANT PADILLA: One more thing.

21 THE COURT: Yes.

22 MR. PEREZ: Your Honor, once again, lack of
23 information. There has to be a question.

24 BY DEFENDANT PADILLA:

25 Q. What is my answer there, ma'am?

649a



ESTADO LIBRE ASOCIADO DE PUERTO RICO

POLICIA

PERFIL DE CIUDADANO

INFORMACIÓN GENERAL

Nombre PEDRO PADILLA MENENDEZ
Dirección Física BO. MACUN # 118 TOA BAJA P R 0
Dirección Postal ADJUNTAS PR 00601
 P O BOX 51627
 LEVITOWN PR 009500000
Teléfono 7873138550
Lic. de Conducir 256407
Seguro Social ***-**-1727
Fecha Nacimiento 4/14/1939
Lugar Nacimiento 052
Nacionalidad AMERICANA
Sexo MASCULINO
Estado Civil CASADO



Peso

220

Estatura

5.8

Color de Ojos

MARRONES

INFORMACIÓN DE LICENCIA

Número Licencia	Tipo Licencia	Estatus	Expedición	Expiración
50949	LICENCIA DE ARMAS	VENCIDA	12/10/2008	12/9/2013

INFORMACIÓN DE PERMISOS

Número Permiso	Tipo Permiso	Estatus	Expedición	Expiración
----------------	--------------	---------	------------	------------

INFORMACIÓN SOBRE ARMAS

#	Número Serie	Marca	Tipo Arma	Núm. Registro	Calibre	Estatus
1	L046516	BUSHNELL	CARABINA	737663	.223	LEGALMENTE EN PODER

2=Cambio 4=Elimina 5=Visualiza 7=Comentarios 8=Historico_(DPA) **96**

Mantenimiento a la Relacion de Licencias - Armas

Tipo Lic. . : 200 TIRO AL BLANCO

Num. Lic. . : 20085172 PEDRO

PADILLA

MENENDEZ

Opc	Serie del Arma	Marca	Cla.	Cal.	Modelo	Num. Folio	Sit.
	L046516	BUS	RI	223			1A
	L046516E	BHT	R	223	XM15		1A
	TVR7523	SW	P	9MM	5906		1A
	UP10702	UZI	P	9MM	SM AUTO		1A
	UP107020	UZI	P	9MM	MINI UZI		1A
	95200930	MGN	P	50	DESERT EAGLE	1	7G

Enter Help F3=Fin F6=Añadir F12=Regresa F14=Imp_Lista

Visualizacion al Registro de Licencias

649c

Tipo de Licencia : 200 TIRO AL BLANCO

Numero de Licencia/TP. . : 20085172

Numero de Control :

Fecha de Expedicion . . : 28/07/1994 (DD/MM/AAAA)

Fecha de Vencimiento . . : 27/07/1997 (DD/MM/AAAA)

Situacion de Licencia . . : 11A

Tipo de Solicitud : WAN PROVIENE DEL SISTEMA WANG(NO MODIFICADA)

Area de Registro : 071

Pueblo de Registro :

Armeria o Traficante . . : 98998 N/A

Fecha de Radicacion . . : 28/07/1994 (DD/MM/AAAA)

Persona : 580581727

PEDRO

PADILLA

MENENDEZ

1939/04/14 MOROVIS

Intro Ayuda F3=Fin F4=Lista F12=Regresa

01/001

Ex. 9d

Visualizacion del Registro de Personas

Seg.Soc.	Nombre	Ini	Ape.Paterno	Ape.Materno	Sexo
580581727	PEDRO		PADILLA	MENENDEZ	M (F,M)

Fecha de Nacimiento . : 14/04/1939 (DD/MM/AAAA)

Lugar de Nacimiento . : MOROVIS

Nacionalidad : PR PUERTORRIQUENO

Num. de Residencia . : NO APLICA

Es Veterano : N (S/N)

Pertenece Reserva . . : N (S/N)

Raza	Tez	Ojos	Pelo	Estatura	Peso	Tipo_Persona	Menor_Edad
L	T	N	G	510	190	999	N (S,N)

Direccion Residencial .

BO. MACUN 118

Pueblo

171

Codigo Postal

949 -

Intro Ayuda F3=Fin F12=Regresa

01/001



ESTADO LIBRE ASOCIADO DE PUERTO RICO

POLICIA



Superintendencia Auxiliar de Investigaciones Criminales
Negociado de Investigación de Licencias e Inspección
De Armas de Fuego
División de Registro de Armas
TELEFONO 787-793-1234 EXT. 3110-2331

SAIC-NILIAF-DRAEL-7-36

CERTIFICACION

Certifico que al señor Pedro Padilla Menéndez se le expidió la Licencia de armas 50949 con fecha de Expedición, 10 de Diciembre de 2003 a 9 de Diciembre de 2008 y renovada el 10 de diciembre de 2008 con fecha de vencimiento 9 de diciembre de 2013. según el Sistema REAL (Registro Electrónico de Armas y Licencias) de la Ley 404. La misma se encuentra vencida.

Tiene inscrita la siguiente arma

- 1- Carabina, Marca: Bushnell, Calibre: .223, Serie: L046516

El Sr. Pedro Padilla Menéndez tenía una licencia bajo la ley 17 con el núm. 20085172 en la cual poseía las siguientes armas de fuego. Según sistema AS400

- 1- Rifle, Bushnell, Calibre: .223, Serie: L046516
- 2- Rifle, Bushmaster, Calibre: .223, Serie: L046516E
- 3- Pistola, S&W, Calibre: 9mm, Serie: TVR7523
- 4- Pistola, UZI, Calibre: 9mm, Serie: UP10702
- 5- Pistola, UZI, Calibre: 9mm, Serie: UP107020
- 6- Pistola, Magnum Research, Calibre: 50, Serie: 95200980



EX. 9F

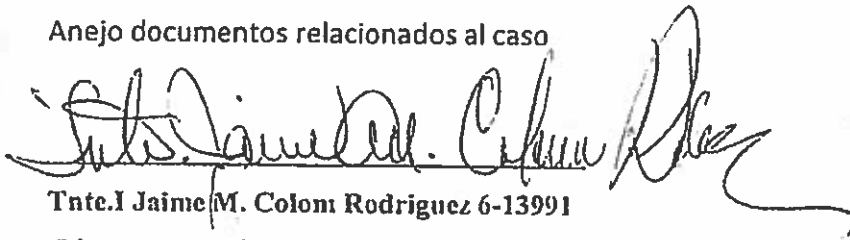
----Página 2----

Continuación SAIC-NILIAF-DRAEL-7-36

Esta información fue solicitada por el Hon. Juez José A. Fuste, U.S. District Judge. Dicha búsqueda fue realizada por el Agte. William Lugo Rodríguez 31843 de la Sección de Folio, División de Registro de Armas.

Se expide esta certificación hoy miércoles 26 de agosto de 2015 en Hato Rey, Puerto Rico y para que así conste se estampa el sello oficial de la Policía de Puerto Rico.

Anejo documentos relacionados al caso



Tnte. I Jaime M. Colom Rodriguez 6-13991

Director

División Reglamento de Armas y Expedición de Licencias



LexJuris
Puerto Rico

Ley Núm. 404 del año 2000

(P. de la C. 3447), Ley 404, 2000
(Conferencia)

Nueva Ley de Armas de Puerto Rico 2000,
Incluye enmiendas de las Leyes Núm. 27 y Núm. 274 de 2002
(Para ordenar el libro con (CD ROM incluido gratis) para hacer búsquedas fáciles,
Incluye otras 5 Leyes Especiales Penales y las enmiendas)
(Para más información presione aquí)

Ley Núm. 404 del 11 de septiembre de 2000, efectiva el 1 de marzo de 2001

Para crear la "Ley de Armas de Puerto Rico y derogar las Leyes Núm. 17 de 19 de enero de 1951, según enmendada, y la Núm. 75 de 13 de junio de 1953, según enmendada; a fin de unificar los requisitos para la concesión de las licencias de tener, poseer y portar armas, y las de tiro al blanco y de caza; establecer las sanciones y multas a imponerse; disponer que las sentencias que se impongan por incurrir en violaciones a esta Ley se cumplirán de manera consecutiva; establecer un registro de la venta de municiones; establecer un límite máximo a la cantidad de municiones que podrá obtener un tenedor de armas que no posea un permiso de tiro al blanco o de caza; Limitar la cantidad de armas que podrán ser autorizadas a una persona que tenga licencia de armas; crear el Sistema de Registro Electrónico en la Policía de Puerto Rico; y para otros fines.

EXPOSICION DE MOTIVOS

Durante los pasados seis años, nuestro Gobierno se ha dedicado a establecer una política pública de cero tolerancia contra el crimen, mediante la cual los agentes del orden público velan por el cumplimiento estricto de las leyes que rigen la Isla. Previo al comienzo de nuestra gestión pública, todos los índices de criminalidad estaban en una espiral ascendente sin precedente. Se tomaron las medidas correctivas, lo que tuvo como resultado, por ejemplo, que para el 1998, ocurriera una reducción del 32.5% en los delitos Tipo I y una reducción del 8.3 % en todos los delitos, en relación con el año anterior, estadísticas que se mantienen en descenso durante este año. Estos números reafirman el compromiso de nuestra administración de lograr un ambiente de paz, tranquilidad y mayor seguridad pública para nuestros ciudadanos. Sin embargo, estamos conscientes que debemos realizar esfuerzos específicos, dentro del marco conceptual de las leyes federales sobre esta materia y en particular las [disposiciones] de ésta en el "Firearms Owners Protection Act of 1986", para lograr una solución efectiva al problema del control de armas de fuego en manos de delincuentes en Puerto Rico, el cual es una vertiente directa de la actividad criminal.

La Ley Núm. 17 de 19 de enero de 1951, según enmendada, reconocida como "Ley de Armas de Puerto Rico", fue aprobada a raíz de un acontecimiento histórico. El Gobierno de la Isla entendió prudente crear una legislación como medida de control de armas para evitar que este tipo de acción resurgiera dentro de un

pueblo que hasta ese suceso mantuvo una tradición pacífica. Con el transcurrir de los años, la Ley Núm. 17 antes citada, ha sido enmendada con la intención de atemperar la misma a la realidad social de Puerto Rico, y utilizar la medida como una herramienta para controlar el crimen. Hoy, transcurridas cuatro décadas desde su aprobación y a pesar de haber sido extensamente enmendada, resulta evidente que la Ley de Armas de Puerto Rico, no es el instrumento jurídico más eficaz para atender las distintas situaciones relacionadas con manejo de armas en la Isla.

La actividad criminal de las últimas dos décadas ha sido mayormente producto del

aumento en el tráfico ilegal de sustancias controladas, que a su vez, ha causado un aumento vertiginoso en el uso de las armas de fuego ilegales. Datos estadísticos recopilados por la Policía durante este periodo evidencian la seriedad del problema. Las armas de fuego cuya tenencia es ilegal han sido traídas de forma clandestina desde otras jurisdicciones, y algunas han sido adquiridas durante escalamientos o robos al Gobierno y a los hogares o negocios de dueños debidamente autorizados para la tenencia de las mismas en Puerto Rico. Estas armas son utilizadas durante la comisión de todo tipo, de actos criminales, situación que hace necesario adoptar medidas legislativas cuya naturaleza sancionadora constituya un eficaz disuasivo al delincuente.

Esta medida presenta disposiciones innovadoras que responden al interés apremiante del Gobierno de Puerto Rico en lograr una ley cuya implantación permita a las agencias del orden público ser más efectivas en la lucha contra el crimen. A tales efectos, la Ley orienta a las personas autorizadas en Puerto Rico a manejar armas de fuego para que lo hagan responsablemente, y a su vez, apercibe al delincuente de las serias consecuencias de incurrir en actos criminales utilizando armas de fuego.

Por primera vez en nuestro ordenamiento jurídico se regula lo relacionado a la tenencia y uso de municiones para armas de fuego. La Ley limita la venta de municiones al tipo de munición utilizada por las armas que el comprador tenga inscritas a su nombre. *Refer to you. Can buy any type of bullet.*

Consistente con la política pública de Nuestros Niños Primero, esta Ley tipifica como delito menos grave el que una persona deje al alcance de un menor un arma, en aquellos casos en los cuales el menor se apodere de la misma, causándose daño a sí mismo o a otra persona.

Además, con el fin de erradicar el uso ilegal de armas con inmenso potencial de destrucción, esta Ley regula en forma particular, igual que la Ley Federal de Armas, la posesión o uso de cualquier arma de asalto semiautomática sus copias o duplicados, en cualquier calibre.

Por último, se crea en la Policía de Puerto Rico un Registro, Electrónico, el cual mediante el uso de una tarjeta electrónica, centralizará en dicha agencia todas las Transacciones de armas y Municiones que se realizan entre armeros autorizados de armas y personas con licencia en Puerto Rico.

Mediante la aprobación de esta Ley, el Estado ejercita su poder inherente de reglamentación, con el fin de promover una mayor seguridad y bienestar público para el Pueblo de Puerto Rico.

DECRETASE POR LA ASAMBLEA LEGISLATIVA DE PUERTO RICO:

CAPITULO I

DISPOSICIONES PRELIMINARES



Ex. 11

Jorge Armenteros-Chervoni <armenteroslaw@gmail.com>

Jose Padilla

2 messages

Jorge Armenteros-Chervoni <armenteroslaw@gmail.com>

Mon, May 15, 2017 at 8:28 AM

To: lgaser@glaser-law.com

Dear Ms. Glaser:

Mr. Padilla, an inmate at MDC, for which I am doing other legal matters asked me to send you this information. This is the actual weapons law of Puerto Rico and its legislative intent it is clear that the law was ammended among other things because of the lack of regulation with the bullets. A google translator should help you out.
 Jorge Luis Armenteros-Chervoni
<http://www.lexjuris.com/lexlex/lexarmas.htm>

Abogado-Notario / Federal-Estatal
 Cond. Galeria, Ste. 202
 201 Arterial Hostos
 San Juan, PR 00918
www.armenteros.lawyer
 (787) 751-7634 tel.
 (787) 764-1086 fax.

If you have received this e-mail by mistake, or you are not the intended recipient, any disclosure, dissemination, distribution, copying or other use or retention of this communication or its substance is prohibited unless with previous written permission by Jorge Luis Armenteros Chervoni.

Lenore Glaser <Lglaser@glaser-law.com>

Tue, May 16, 2017 at 5:09 PM

To: Jorge Armenteros-Chervoni <armenteroslaw@gmail.com>

Thanks for sending this to me. I represent Mr. Padilla Galarza in the First Circuit so, as you know, the opportunity to expand the record is very limited (and I have already written his brief !) Nonetheless, it is interesting. (I am fluent in Spanish).

Regards,

Lenore Glaser, Esq. (Abogada Bilingue)

45 Bromfield Street , Suite 500 , Boston, MA. 02108

Tel : 617-753-9988. 617 830-0167 FAX

Exh. 12

1 And it's been mentioned that basically pointing at
2 his dad regarding that he had a shooting range license, that
3 he had guns, where there was no guns found there? Right?
4 There were no guns found inside the house, so somebody had to
5 actually look for the firearms when the father passed away and
6 turn them in. That person what, missed the ammunition? I
7 suggest to you that those ammos were there after his father
8 passed away.

9 Further analysis to defendant's story just doesn't
10 fit. If you review Joint Exhibit II, and it was read -- it
11 was read to you here, it shows a list of firearms, right?

12 Along side to it, what do we have? Calibers. The
13 Bushnell, .223; Bushmaster .223. Ask yourselves how many ammo
14 of .223 caliber were seized from the house? None.

15 Pistol, Magnum Research, caliber .50. Ask yourselves
16 how many rounds of ammo, of .50 caliber were found inside the
17 house? Zero. Nada.

18 But what's more telling? Where do you see here that
19 the father had a firearm of 7.62 caliber ammunition? Where do
20 you see here that father had a gun that accepted .38 caliber
21 rounds ammunition? It just doesn't. Dad did not have
22 registered, at least legally, a .38 caliber handgun, or a
23 firearm for a 7.62 caliber ammunition.

24 But you know what also doesn't fit? Defendant is
25 stating that the Social Security found inside the residence is

64. 13

1 MR. PEREZ: Objection, Your Honor. Irrelevant and
2 outside the scope of the --

3 THE COURT: I would allow that.

4 BY MR. PADILLA:

5 Q. Are they new, Agent Burgos?

6 A. They seem to be kind of rusty.

7 Q. Rusty. Means they have age?

8 A. They have what?

9 Q. Age. They're old. Do you concur?

10 A. (Nods head.)

11 Q. Thank you.

12 Agent Burgos, being that you were prior a state
13 agent, investigator for the Department of Justice, special
14 investigations unit, are you familiar with the type of
15 licenses that we have here in Puerto Rico to --

16 MR. PEREZ: Your Honor, it's outside the scope. We
17 spoke about this in sidebar. We understand that this is
18 irrelevant to this case.

19 THE COURT: I will allow a simple explanation. Tell
20 us the type of licenses that the Puerto Rico Police issues
21 regarding firearms, if you know.

22 THE WITNESS: I believe they provide shooting
23 permit. The Puerto Rico Police, you mean?

24 THE COURT: Yes, the Puerto Rico Police.

25 THE WITNESS: The shooting permit. And in order to

6h.14

1 MR. ALUM: Objection.

2 THE COURT: Sustained. Outside the scope.

3 MR. PADILLA: Your Honor, it's related.

4 THE COURT: Sustained.

5 MR. PADILLA: It's a different question.

6 THE COURT: Go ahead. Try again.

7 BY MR. PADILLA:

8 Q. The question is did I tell Agent --

9 MR. ALUM: Objection. Hearsay.

10 THE COURT: Wait a minute. Let him finish the
11 question.

12 What is the question, Mr. Padilla?

13 BY MR. PADILLA:

14 Q. Did I tell you that house was broken into twice, Sir,
15 that's the question, because nobody was inhabiting it?

16 THE COURT: I will allow that.

17 THE WITNESS: You did tell me that.

18 BY MR. PADILLA:

19 Q. I did tell you that.

20 Why did you leave that out?

21 A. I wasn't asked about that.

22 Q. So I did tell you about that?

23 A. You did.

24 Q. Mmm.

25 Sir, those receipts, were they found in a portable

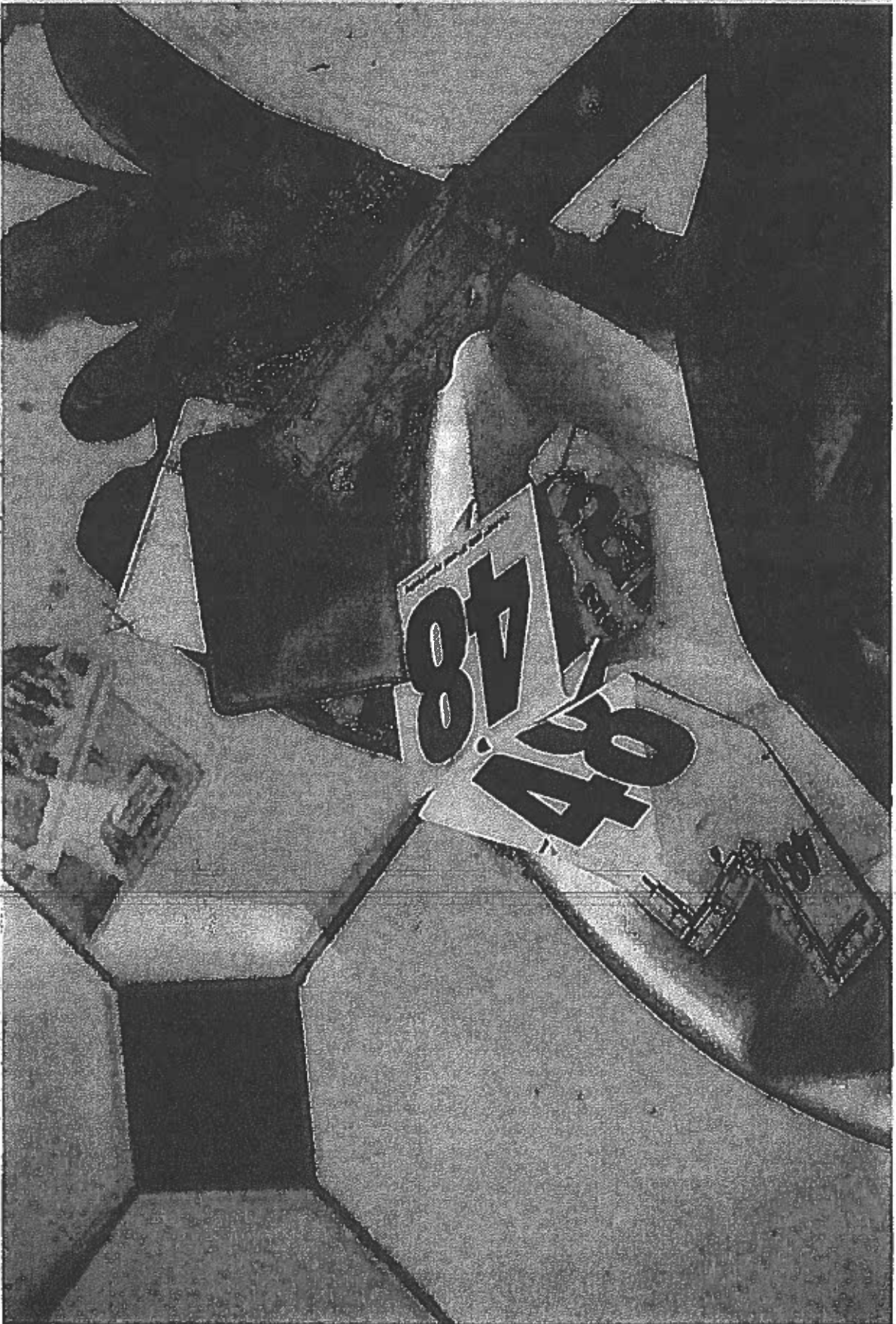
A black and white photograph of a collage on a textured surface. The collage includes a 'Housewarming Greetings!' card, a map of California, a large '55' speed limit sign, and a '55' speed limit sign. A small white object, possibly a pen or pencil, lies horizontally below the signs.

15a

138

5125

Ex. 15b



THIS AREA IS DESIGNATED AS A

DO NOT PHOTOGRAPH

B. R. 1000



E.M. 15c

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B Firearm

(U) Black plastic gun
 Collected On: 01/09/2015
 Receipt Number: 19
 Located By: CINTRON NEGROM HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room H top of chair
 Firearm Type: Other

1B General

(U) Costume mask and two black gloves
 Collected On: 01/09/2015
 Receipt Number: 20
 Located By: CINTRON NEGROM HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room M on the floor

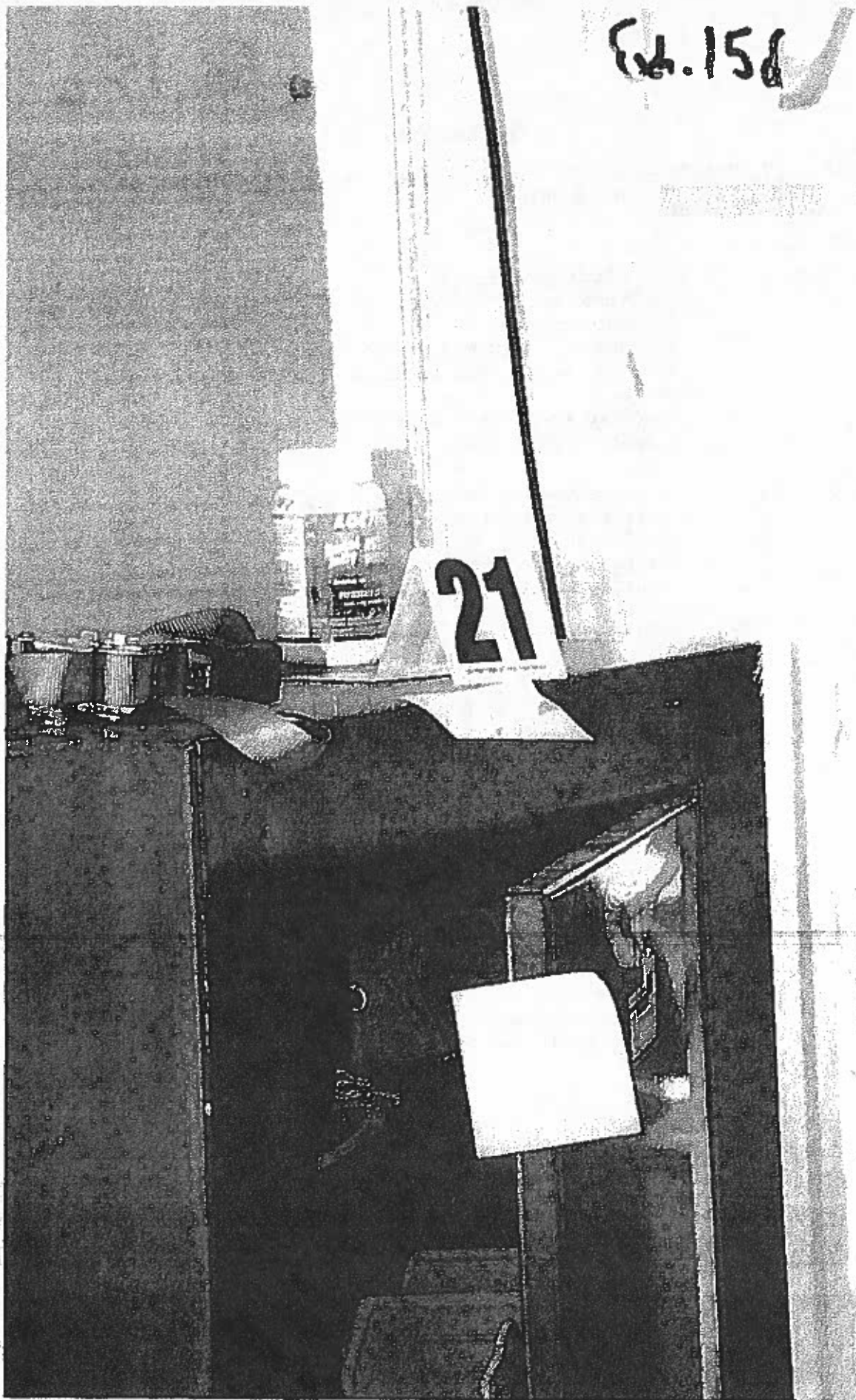
1B General

* (U) Juan Ortiz Gonzalez driver license
 Collected On: 01/09/2015
 Receipt Number: 21
 Located By: CINTRON NEGROM HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room M on top of storage cabinet

1B Firearm

(U) silver and black air pistol with mag
 Collected On: 01/09/2015
 Receipt Number: 22A
 Located By: CINTRON NEGROM HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room L inside drawer
 Firearm Type: Other

UNCLASSIFIED



Ex. 156

JUAN ORTIZ GONZALEZ MASCARICO SANCHEZ LEON

LOG 8470707

Ex 16a

JOSE PADILLA GALARZA

#19158-069

MDC GUAYNABO

P.O. BOX 2005

CATANO, P.R. 00963-2005

RECEIVED

2015 AUG 20 11 8 49

U.S. DISTRICT COURT
SAN JUANIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

PLAINTIFF

JOSE PADILLA GALARZA

DEFENDANT

CASE NO. 15-78 (JAF)

MOTION REQUESTING A

CONTINUANCE/ENLARGEMENT OF TIME
RULE 45(b) 18 USC 3161(b)(1); (b)(3); (b)(8)

COMES NOW THE DEFENDANT JOSE PADILLA GALARZA PRO SE, AND RESPECTFULLY REQUESTS THE HONORABLE COURT FOR A CONTINUANCE, DUE TO THE FACT THAT THE DEFENDANT HAS BEEN PUT IN LOCKDOWN STATUS SINCE AUGUST 7th, 2015 REGARDING AN UNRELATED INCIDENT WHERE SOMEONE WAS STABBED. SINCE THEN THE DEFENDANT HAS BEEN DENIED ACCESS TO OBTAIN THE LEGAL MATERIALS NECESSARY TO ADEQUATELY PREPARE FOR HIS PRO SE DEFENSE. THE DEFENDANT IS FULLY AWARE AND RESPECTS THAT YOUR HONOR REGULARLY OPPOSES GRANTING CONTINUANCES, BUT THE DEFENDANT ALSO WISHES TO RESPECTFULLY REMIND YOUR HONOR THAT THIS IS NOT A REGULAR CASE, NOR REGULAR CIRCUMSTANCES, AND THAT THE RECORD REFLECTS THAT MUCH PRECIOUS TIME HAS BEEN WASTED ON THE COUNT OF THAT THE DEFENDANT HAD TO GREATLY CONTEND WITH YOUR HONOR REGARDING HIS CONSTITUTIONAL RIGHTS, AND THE DISMISSAL OF ATTORNEY ANITA HILL, AND ATTORNEY JOHN CONNORS WHOM YOUR HONOR REASSIGNED TO THE DEFENDANT AFTER HE HAD BEEN PREVIOUSLY DISMISSED.

THE DEFENDANT ALSO LOST MORE PRECIOUS TIME BY HAVING TO UNNECESSARILY AND UNWILLINGLY TRAVEL TO A PSYCHOLOGICAL EVALUATION TO CONFIRM SOMETHING HE ALREADY KNOWS. ON AUGUST 7th, 2015 ATTORNEY CARLOS VAZQUEZ WAS ASSIGNED TO ASSIST THE DEFENDANT, AND ON AUGUST 11th, 2015 ATTORNEY VAZQUEZ VISITED THE DEFENDANT AT MDC GUAYNABO, AND AFTER DISCUSSING SAID SET BACKS, ATTORNEY VAZQUEZ CONCURRED WITH THE DEFENDANT THAT THE FIFTEEN DAY CONTINUANCE ALLOTMENT BY THE HONORABLE COURT WAS REALISTICLY NOT ENOUGH TO SATISFY FAIRNESS. IN THE LIGHT OF THESE NEW CIRCUMSTANCES, THE DEFENDANT'S HANDS ARE BOUND, AND THEREFORE HAS NO OTHER OPTION THAN TO RESPECTFULLY REQUEST FOR ANOTHER REASONABLY AMPLE CONTINUANCE.

RESPECTFULLY SUBMITTED ON
AUGUST 12th, 2015

Jose Padilla Galarza
JOSE PADILLA GALARZA

JOSE PADILLA GALARZA

#19/58-069

METROPOLITAN DETENTION CENTER GUAYNABO

P.O. BOX 2005

CATANO, P.R. 00963/2005



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Ed. 166

JOSE PADILLA GALARZA
#19158-069
MDC GUAYNABO
P.O. BOX 2005
CATANO, P.R. 00963-2005

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

UNITED STATES OF AMERICA
PLAINTIFF

JOSE PADILLA GALARZA
DEFENDANT

CASE NO. 15-78 (JAF)
RENEWAL FOR MOTION
REQUESTING A CONTINUANCE

COMES NOW THE DEFENDANT JOSE PADILLA GALARZA PRO SE, AND RESPECTFULLY RENEWS HIS MOTION REQUESTING THE HONORABLE COURT FOR A CONTINUANCE IN RESPONSE TO THE COURT'S DENIAL OF THE DEFENDANT'S PREVIOUS MOTION REQUESTING SAID CONTINUANCE DUE TO THE ARGUMENTS PREVIOUSLY PRESENTED, AND DUE TO THE FOLLOWING NEW ONES. FIRST, THE DEFENDANT WITH THE HELP OF ATTORNEY CARLOS VAZQUEZ HAS NOT BEEN ABLE TO SECURE A CHEMIST EXPERT WITNESS WHICH IS ESSENTIAL FOR THE DEFENSE AGAINST THE DRUG CHARGE, DUE TO THE FACT THAT THERE HAS NOT BEEN ENOUGH TIME. SECOND, THE DEFENDANT WHOM IS REPRESENTING HIMSELF PRO SE, HAS NOT BEEN ALLOWED TO INSPECT THE TANGIBLE EVIDENCE INTENDED FOR USE BY THE GOVERNMENT IN ITS CASE PURSUANT TO FED. R. CRIM. P. 16(a)(1)(e). THIRD, THE RECORD CLEARLY DEMONSTRATES THAT THE DEFENDANT JUST RECENTLY RECEIVED THE DISCOVERY WHICH IS COMPOSED OF VARIOUS VOLUMES AND WHICH NEEDS REASONABLE TO BE STUDIED IN A TIMELY MANNER. FOURTH, THE DEFENDANT IS STILL IN LOCKDOWN STATUS AND HAS NO ACCESS TO LEGAL RESOURCES. DUE PROCESS DOES REQUIRE THAT A PRO SE DEFENDANT HAVE ACCESS TO LEGAL RESOURCES. SEE BOUNDS V. SMITH, 430 U.S. 817, 828 (1977).

FIFTH, RULE 16 REQUIRES THE GOVERNMENT TO DISCLOSE ITS INTENT TO RELY ON EXPERT TESTIMONY AND TO PROVIDE A WRITTEN SUMMARY OF THE CONTENT AND BASES OF SUCH TESTIMONY. SEE FED. R. CRIM. 16 (a)(1)(B).

SIXTH, THE DEFENDANT HAS NOT RECEIVED ANY BRADY, KYLES, NOR JENCKS ACT MATERIAL.

SEVENTH, THE SUBPOENA OF THE DEFENDANT'S LATE FATHER'S WEAPONS PERMIT WHICH WAS SO CONSTANTLY AND REPEATEDLY REQUESTED THAT ATTORNEY ANITA HILL FILE FOR, WAS FINALLY AND NEGLIGENTLY FILED BY SAID ATTORNEY UNDER THE WRONG NAME, THEREFORE SAID WEAPONS PERMITS DO NOT EXIST UNDER THE NAME OF PEDRO PADILLA MENDEZ, WHEN THE DEFENDANT'S LATE FATHER'S NAME IS PEDRO PADILLA MENENDEZ. THE DEFENDANT HAS ALWAYS CLEARLY AND IMPLICITLY EMPHASIZED ON HIS LATE FATHER'S MATERNAL LAST NAME AS MENENDEZ AND NOT MELENDEZ IN ORDER TO AVOID CONFUSION. AS TO HOW IT WAS WRITTEN AS MENDEZ, IS WAY BEYOND THE DEFENDANT'S COMPREHENSION. THE DEFENDANT CLEARLY MADE EMPHASIS ON SAID MATERNAL LAST NAME TO ATTORNEY ANITA HILL, HER ASISTANT, AND TO PRIVATE INVESTIGATOR VIZCARRONDO WHOM LOST THAT INFORMATION THAT WAS GIVEN TO HIM THE FIRST TIME, AND HAD TO BE GIVEN TO HIM A SECOND TIME, AND STILL ATTORNEY HILL AND MR. VIZCARRONDO WERE BOTH SO NEGLIGENT, INEPT, AND INCOMPETENT, THAT SAID SUBPOENA WAS FILED FOR UNDER THE WRONG NAME. THE DEFENDANT HAS SUFFERED ENOUGH THROUGHOUT THIS WHOLE ORDEAL THAN TO NOW BE MADE TO PAY FOR SOMEONE'S NEGLIGENCE. SAID WEAPONS PERMIT IS CRUCIAL AND ESSENTIAL FOR THE DEFENDANT'S CASE. IN THE LIGHT OF THESE EXTRAORDINARY CIRCUMSTANCES, THE DEFENDANT REQUESTS YOUR HONOR TO PLEASE RECONSIDER AND GRANT A REASONABLY AMPLE CONTINUANCE IN ORDER TO PROMOTE A FAIR TRIAL.

RESPECTFULLY SUBMITTED

ON AUGUST 24th, 2015

Jose Padilla Galarza
JOSE PADILLA GALARZA

Ex 17a

JOSE PADILLA GALARZA

#19158-069

MDC. GAYNADO

CATANÓ, P.R. 00963-2005

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

UNITED STATES OF AMERICA
PLAINTIFF

v

JOSE PADILLA GALARZA
DEFENDANT

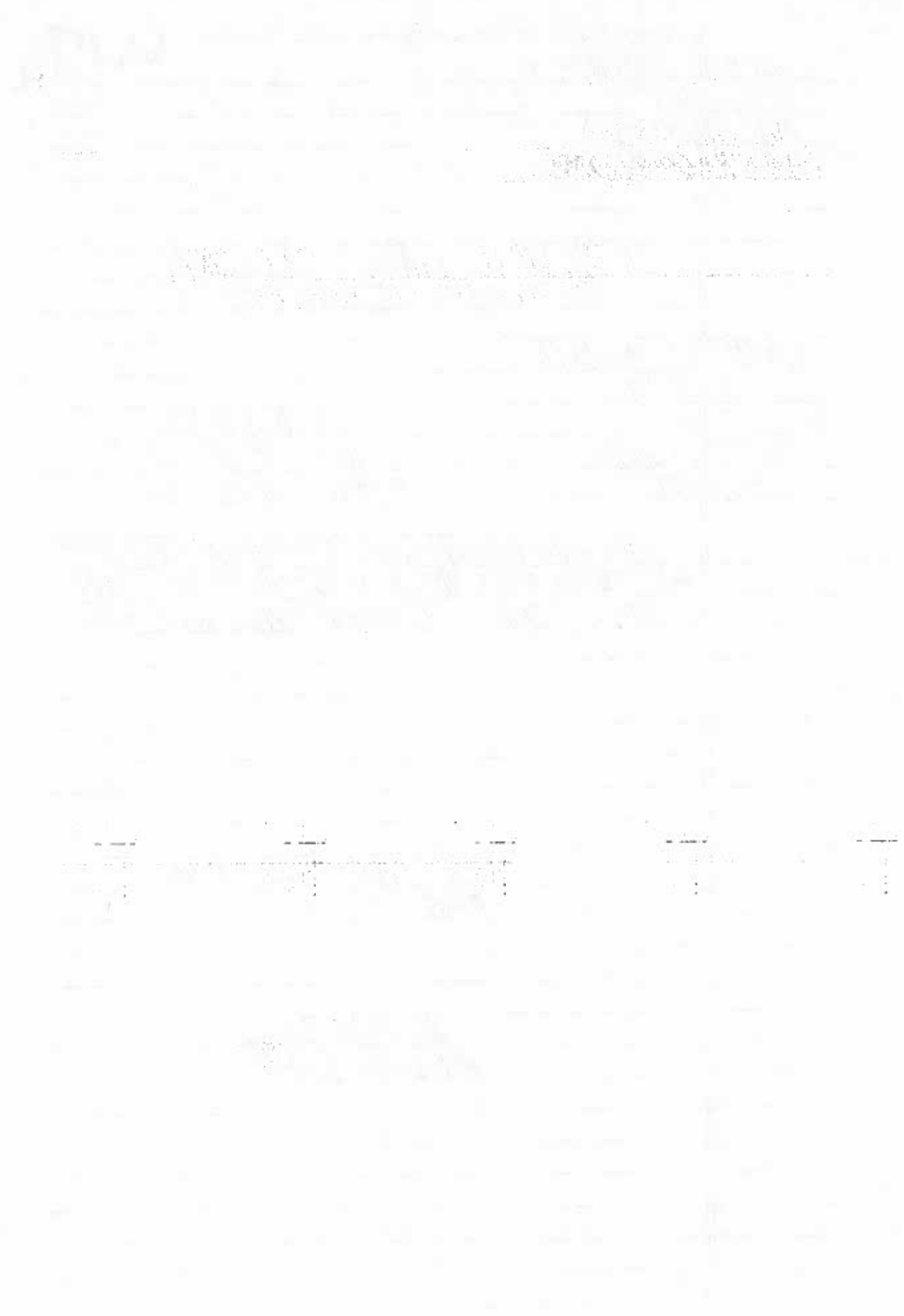
CASE NO. 15-78 (JAF)

NOTICE OF INTENT TO USE
EXPERT WITNESS AT TRIAL

COMES NOW THE DEFENDANT JOSE PADILLA GALARZA PRO SE,
AND HEREBY GIVES NOTICE OF INTENT TO USE EXPERT
WITNESS AT TRIAL, AT GOVERNMENT EXPENSE 18 USC 3006A(e).

RESPECTFULLY SUBMITTED ON
AUGUST 24th, 2015

Jose Padilla Galarza
JOSE PADILLA GALARZA



This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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United States District Court

District of Puerto Rico

Notice of Electronic Filing

The following transaction was entered on 8/26/2015 at 7:54 AM AST and filed on 8/26/2015

Case Name: USA v. Padilla-Galarza

Case Number: 3:15-cr-00078-JAF

Filer:

Document Number: 99(No document attached)

Docket Text:

ORDER as to Jose Padilla-Galarza (1) re [95] Notice (Other) filed by Jose Padilla-Galarza. We consider Defendant's notice a motion to use an expert witness at trial at the Government's expense. Defendant's motion is GRANTED conditioned on compliance with the rule that governs the use of experts in criminal cases. We note that the request is made 48 hours before trial. Signed by Judge Jose A. Fuste on 8/26/2015.(CP)

3:15-cr-00078-JAF-1 Notice has been electronically mailed to:

6th-18

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CRIMINAL NO. 15-78 (JAF)

JOSE PADILLA-GALARZA,
Defendant.

MOTION FOR RECONSIDERATION

(Re: Defendant's Motion to Continue Trial at Docket No. 85)

TO THE HONORABLE
JOSE A. FUSTE
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW the Federal Public Defender on behalf of defendant Jose Padilla-Galarza

("defendant Padilla") and before this Honorable Court respectfully alleges and prays:

I. Introduction.

This case is set for trial on August 26, 2015. Docket No. 76.

II. Relief Requested.

We are respectfully requesting from Your Honor to reconsider your denial of defendant Padilla's Motion to Continue Trial.

III. Basis of Relief.

On January 29, 2015, defendant Padilla was indicted with being a prohibited person in possession of ammunition, and possession with intent to distribute a controlled substance, 18, U.S.C., §922(g)(1), and 21, U. S. C., §841(a)(1). Docket No. 1. By then, defendant Padilla had already been charged, through a criminal complaint that was filed under seal, in what is now criminal

Criminal No. 15-78 (JAF)

Page 2

number 15-79 (DRD).¹ There, the Federal Public Defender was appointed to represent defendant Padilla on January 12, 2015. See, docket number 11. On January 15, 2015, Assistant Federal Public Defender John Connors filed a Notice of Appearance on behalf of the defendant. See, docket number 14 in criminal number 15-79 (DRD).

Although in the instant case we could not find a formal appointment of the Federal Public Defender in the case docket, there is a motion filed on February 9, 2015, by Assistant Federal Public Defender John Connors to withdraw as attorney of defendant Padilla. Docket No. 5. Your Honor granted this request on February 10, 2015, and thereat appointed counsel Anita Hill. Docket No. 6. On that date, as per counsel request, District Judge Daniel R. Dominguez followed suit in criminal number 15-79 (DRD), allowed the Federal Public Defender to withdraw, and also appointed counsel Anita Hill.

For reasons that need not be stated here, on July 7, 2015, defendant Padilla requested the withdrawal of Counsel Anita Hill. Docket No. 30. Your Honor denied defendant Padilla's request, but re-appointed Assistant Federal Public Defender John Connors to join his defense. *Id.*

On July 29, 2015, the Government filed a motion for a hearing on defendant's request for withdrawal of court-appointed counsel. Docket No. 46. The Government's motion was granted as requested. Docket No. 49.

Consonantly, a hearing was held on August 5, 2015, where defendant Padilla not only restated his request for the withdrawal of court-appointed counsel, but moved the Court for leave to represent himself. Docket No. 73. After due hearing the Court not only denied defendant's request

¹Defendant Padilla was indicted for conspiracy to commit a bank robbery, and the commission of bank robbery. Indictment at Docket No. 22.

Criminal No. 15-78 (JAF)

Page 3

to act as his own counsel, but appointed the undersigned to join counsel Hill and Connors in his representation.

Notwithstanding the above, a second hearing on the matter was held on August 7, 2015. Docket No. 76. The end result this time was different. Defendant Padilla's request to represent himself was granted, counsel Hill and Connors would no longer represent the defendant, and the undersigned attorney was directly appointed to act as defendant's stand by counsel at trial. *Id.* Trial was re-set for August 26, 2015. Docket No. 76.

On August 20, 2015, defendant Padilla filed a motion to continue trial. The basis for defendant's request can be summarized as follows: 1) that his housing unit at MDC Guaynabo remains under lock-down, resulting in a considerable restriction to his trial preparation; 2) that there are special circumstances here in that he had to spend an inordinate amount of time, before the Court relieved his previous counsel, and allowed him to represent himself; 3) that time was lost when he was transferred outside the jurisdiction to conduct an involuntary mental evaluation; 4) that under the totality of circumstances the fifteen day continuance granted by Your Honor was "realistically not enough to satisfy fairness"; and 5) that his stand by counsel agrees with the latter.

On August 21, 2015, Your Honor denied defendant's request, and reminded that he had "accommodated defendant and his requests including the selection of a trial date in his presence and with his participation and that of stand by counsel." Docket No. 89. It is true that the selection of a trial date here was agreed. This agreement, however, was reached only after Your Honor would not entertain a two month, or one month continuance, as suggested by the undersigned counsel at the hearing of August 7, 2015.

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Page 4

Having said that, the issue that should concern us is not whether defendant's trial date was one agreed upon or not. The real issue is whether under the totality of the circumstances, the time allotted here for trial preparation is sufficient when you consider that defendant Padilla, an inmate under custody, will be representing himself.

Padilla's first ground for continuance is that "he has been put on lockdown (sic) status since August 7, 2015" regarding an unrelated matter. When Mr. Padilla states that "he has been put on lock-down", he is actually referring to his housing unit within the metropolitan detention center in Guaynabo ("MDC"). We can represent to the Court that in our previous visits with defendant we have been advised by MDC personnel that his housing unit is on lock-down. Thus, after August 7, 2015, defendant has had no access to the institution's law resources.

That an inordinate amount of time was spent, before the Court relieved defendant Padilla's previous counsel, and allowed him to represent himself may, at first glance, find support in the record. The fact that three hearings were held, we think, was more a testimony of the Court's genuine effort to reason with defendant, and salvage the attorney-client relationship. We now know, however, that by the first hearing on this matter, said relationship was already severed, and the Court's good faith attempts to fashion a solution, made matters worse. In the end, a month had elapsed between defendant's first attempt to get counsel removed, and the Court's final approval.

Defendant's next claim is that time was also lost when he was transferred outside the jurisdiction for an involuntary mental evaluation. The only thing we can say about this is that it appears that defendant made clear to previous counsel that he strongly opposed a mental evaluation in this case.

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As a final claim, defendant avers that a fifteen day continuance was not enough to satisfy fairness. Within the context of what has happened in this case, I would ask Your Honor to consider what has transpired after August 7, 2015. After our appointment as stand by counsel, we have met with defendant Padilla three times, and average of one and a half to two hours each time. At these meetings, we have discussed in general terms the trial procedure, and organized discovery. We have drafted motions for defendant Padilla's review, and filed all but one, on his behalf.

Personally, I have been reviewing the discovery, but I still have to finish listening to defendant's recorded post-arrest interview - the transcript of this recording only is 427 pages long, and I am at page 161 - seven recordings of MDC calls, totaling approximately 127 pages, and video clips that appear to be from the same post arrest interview. I also have not read all the Reports of Investigation, provided in discovery.

At the last hearing held on August 7, 2015, defendant Padilla advised he needed an expert. Defendant is requesting an expert in chemistry to conduct his own analysis of the marijuana seized in this case. In this regard we took to the task of finding such an expert, albeit unsuccessfully. Of the two experts we found, only one responded to advise he was not available to conduct such examination.

Last Friday, we conducted a physical inspection of the evidence to be presented at trial by the Government, and we so advised the defendant. As he is acting as his own counsel, defendant Padilla is requesting to conduct the inspection himself, prior to trial.

Finally, and more strikingly, last week we received some records from the Police of Puerto Rico, as a result of the subpoena, submitted by defendant Padilla's previous counsel, and this Court's Order. Both the subpoena and order, were filed and entered under seal. Docket No. 48, and 63.

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After the hearing of August 7, 2015, it is no secret that the house where the search was conducted was previously owned by defendant's father, now deceased, and that the ammunition found therein, may have been left there by someone, other than defendant, and including his father. In pertinent part, defendant's request under seal, and the Court's ensuing order, compelled the disclosure of the record of firearms and ammunition lawfully owned by one Pedro Padilla-MENDEZ.

At our meeting with defendant Padilla last Saturday, we reviewed the aforementioned documents. He was surprised, and understandably upset, when he found that the subpoena filed, and the Order issued was for the disclosure of the record of someone, other than his father. Defendant Padilla's father true and correct name is Pedro Padilla-MENENDEZ. We cannot emphasize enough the importance of this evidence to defendant's theory of defense.

Notwithstanding, on Friday, August 21, 2015, we received an electronic correspondence from Government's counsel, disclosing what appears to be the Police of Puerto Rico record of firearms and ammunition lawfully owned by Pedro Padilla-Menendez. Defendant Padilla is not privy to this information as we did not review this evidence until Sunday, August 23, 2015. Defendant Padilla we are sure will want to serve his own subpoena, and not rely on the Government's investigation for the presentation of his defense.

Under the totality of the circumstances, including defendant Padilla's due diligence, it is respectfully submitted that at this time he is not prepared to try his case, and that his request for continuance is not with bad purpose, nor to unnecessarily delay the proceedings in this case. Furthermore, additional time is needed for the undersigned to complete his review of discovery and

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for adequate trial preparation, in order to competently address the task that this Honorable Court bestowed on us on August 7, 2015.

III. Conclusion.

FOR THESE REASONS, defendant Padilla prays this Honorable Court to reconsider its Order of August 21, 2015, and continue his trial until September 16, 2015.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of August, 2015.

ERIC A. VOS
CHIEF FEDERAL DEFENDER

S/CARLOS A. VAZQUEZ-ALVAREZ
ASSISTANT FEDERAL DEFENDER
USDC No. 206903
241 FD Roosevelt Ave.
San Juan, PR 00918-2441
Tel. 787.281.4922
Fax. 787.281.4899
E-mail: carlos_vazquez@fd.org

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was served on counsel for the government, Acting U.S. Attorney Rosa Emilia Rodriguez (Attn.: Assistant U.S. Attorney Alexander L. Alum) by delivering it through CM/ECF.

In San Juan, Puerto Rico, this 24th day of August, 2015.

ERIC A. VOS
CHIEF FEDERAL DEFENDER

S/CARLOS A. VAZQUEZ-ALVAREZ
ASSISTANT FEDERAL DEFENDER
USDC NO. 206903
241 FD Roosevelt Ave.
San Juan, PR 00918-2441
Tel. 787.281.4922
Fax. 787.281.4899
E-mail: carlos_vazquez@fd.org

not the logical

Exh. 19

1 | governed
2 | standard. It's a legal standard.

3 | If the evidence seen in the light most favorable to
4 | the government, without making any credibility assessments,
5 | tells us that this is a case for jury disposition, I have to
6 | let it go to the jury.

7 | MR. PADILLA GALARZA: No problem. Thank you.

8 | THE COURT: Okay. Motion denied.

9 | The question now is, is defendant going to present
10 | any evidence, before I bring the jury back? Aside from the
11 | stipulation?

12 | MR. PADILLA GALARZA: We had asked previously for an
13 | expert witness. We never had a chance to get one. We never
14 | even had a chance at all in this case.

15 | THE COURT: Expert on what?

16 | MR. PADILLA GALARZA: Expert witness, that the motion
17 | was granted, but never gave us.

18 | THE COURT: Expert on what?

19 | MR. PADILLA GALARZA: Expert witness in order to
20 | refute. An expert chemist would know what he's doing, not
21 | based on personal opinions, instead of a scientific method as
22 | it should be.

23 | THE COURT: You wanted to bring a witness to dis --
24 | prove that this is not marijuana?

25 | MR. PADILLA GALARZA: No, not at all.

Exh-20

case.

1 of Forensic Sciences dc

2 And I'll tell you more.

3 this bench, and I have never seen a chemist from the Drug

4 Enforcement Administration or FBI, whatever, analyzing age of

5 marijuana or of cocaine or of heroin. Never.

6 The only issue is whether it's the drug or not.

7 MR. PADILLA GALARZA: I am not going to continue --

8 THE COURT: Even the purity is not even relevant.

9 MR. PADILLA GALARZA: I'm not going to continue

10 saying I would like this, like that. Everything here has been

11 denied, so --

12 THE COURT: The question is, sir, do you have any

13 evidence?

14 MR. PADILLA GALARZA: No. It would also be denied I

15 imagine, sir, so with all due respect --

16 THE COURT: Do you want to present any evidence?

17 MR. PADILLA GALARZA: I'm not going to waste the time

18 with that, so -- I know it's going to be denied.

19 THE COURT: Fine. The stipulation. Yes. Very well.

20 I am going to bring the jury in, and we are going

21 to -- yes.

22 MR. ALUM: Your Honor, just before we proceed with

23 closing, I had filed a motion.

24 THE COURT: I looked at the motion, and the motion

25 correctly states what is the status of the law. And I will

Ex. 21

77

1 | example, doesn't belong to me, but it's in my possession. So
2 | they have to prove possession of a controlled substance, in
3 | any of its modalities, actual or constructive, sole or joint.
4 | We'll discuss that.

5 | Second, that he did so with the specific intent to
6 | distribute the controlled substance over which he had
7 | possession of whichever kind. And, third, that he did so
8 | knowingly and intentionally.

9 | It is not necessary for you to be convinced that the
10 | defendant actually delivered the controlled substance to
11 | somebody else, or that he made any money out of the
12 | transaction. It is enough for the government to prove beyond
13 | a reasonable doubt that he had in his possession what he knew
14 | was controlled substances, and that he intended to transfer it
15 | to somebody else.

16 | The intention can be inferred from the surrounding
17 | circumstances. Intent to distribute may be inferred from the
18 | quality and quantity of the drugs, for example. Quantity more
19 | than anything else. A larger amount of narcotics indicates
20 | that it may not be for personal use and that it's for
21 | distribution. In other words, if you find that the defendant
22 | possessed a quantity of marijuana, more than which would be
23 | needed for personal use, then you may make the inference that
24 | the defendant intended to distribute that controlled
25 | substance. You can draw the inference, but you don't have to

Q4 22

1 hesitate to reconsider . it is
2 the appropriate thing to do.

3 It is important that you attempt to return a verdict,
4 but of course only if you can do so after making your own
5 conscientious determination.

6 You will be given a verdict form. I have it here.
7 The verdict form is simple. On the top part, it has the
8 caption of the case, which is what identifies the case in the
9 clerk's office. And then it has the word verdict.

10 And it says Count I, prohibited person in possession
11 of ammunition. We the jury find the defendant guilty or not
12 guilty. You mark the correct answer according to your
13 deliberations.

14 Count II, possession of a controlled substance,
15 marijuana, with intent to distribute. We find the defendant
16 guilty or not guilty, as the case may be, according to your
17 deliberations.

18 Then I ask you a question. Question, to be answered
19 only if you find the defendant guilty on the issue of the
20 marijuana. How much marijuana did the defendant possess? I
21 gave you three options. More than one kilo of marijuana. One
22 kilo is 2.2 pounds. Less than one kilo of marijuana. Less
23 than 2.2 pounds. Or the amount certified by the chemist.

24 The foreperson signs it, dates it, and then you will
25 send me a note telling me that you are finished with your

(At 2:20 PM, proceedings recon.)

1 THE COURT: Be seated. We have a note from the jury
2 which the lawyers can examine saying that they have reached a
3 verdict.
4

Exh. 23a

5 Members of the jury, would you be so
6 deliver the verdict to the court security office
7 Would you please publish the verdict?

8 COURTROOM DEPUTY: Will the defendant please
9 up?

10 Count I, prohibited person in possession of
11 ammunition. We the jury find the defendant guilty.

12 Count II, possession of a controlled substance
13 marijuana, with intent to distribute. We the jury find the
14 defendant guilty.

15 How much marijuana did the defendant possess? The
16 amount certified by the chemist.

17 Dated today, and signed by the foreperson.

18 THE COURT: Please file it.

19 We're going to ask each one of you now whether this

20 is your verdict.

Juror number one, is this your verdict?

21 THE JUROR: Yes, sir.

22 THE COURT: Juror number two, is this your verdict?

23 THE JUROR: Yes, sir.

24 THE COURT: Juror number three?
25

54.236

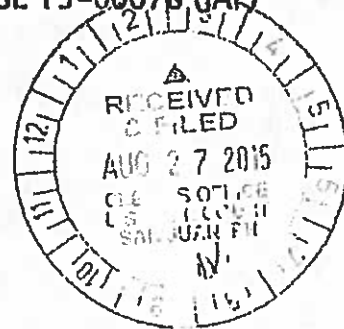
**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA
Plaintiff

vs.

JOSE PADILLA-GALARZA (1)
Defendant

CR. CASE 15-00078 (JAF)



VERDICT

COUNT 1: Prohibited Person in Possession of Ammunition

We the Jury find the Defendant,

 X GUILTY NOT GUILTY

COUNT 2: Possession of a Controlled Substances (Marihuana) with Intent to Distribute

We the Jury find the Defendant,

 X GUILTY NOT GUILTY

Question: (to be answered ONLY if you find Defendant guilty as to Count 2)

How much marihuana did the Defendant possess?

 more than one kilo of marihuana (2.2 pounds)

 less than one kilo of marihuana (2.2 pounds)

 X the amount certified by the chemist

Dated 8-27-15



Foreperson

Exh. 24

53

1 fact that my father left it in the car; but at that moment in
2 time, I have possession of that wallet.

3 Ladies and gentlemen, let's talk about the issue of
4 possession with intent to distribute marijuana, which was in
5 that room with the mannequins. You heard from Task Force
6 Agent Eddie Vidal. Look at how this marijuana was packaged.
7 We have over one thousand grams of marijuana here.

8 Agent Vidal told you, based on his training and
9 experience, that this marijuana is approximately a year old.
10 With this marijuana, you can make approximately 2,000 baggies.
11 That was Agent Vidal's testimony. And with those 2,000
12 baggies, the street value would be 9,000 dollars.

13 It's clear that this marijuana was not for personal
14 use. And as Agent Vidal testified, I submit to you that based
15 on the way this was packaged, based on where this was stored,
16 inside of a closet, it was packaged and it was stored this way
17 to preserve it. And to preserve it for distribution.

18 I have to make one thing very clear, ladies and
19 gentlemen, and the Judge will instruct you on this. The
20 Indictment charges the defendant with possession of
21 ammunition. And in that -- and we have presented evidence of
22 various types of rounds, and various calibers of ammunition
23 that the defendant had throughout his residence.

24 Under the law, it is sufficient if you find that the
25 defendant knowingly possessed one single round, just one

84.25

17

1 A. We found 30 rounds of .9 mm ammunition, and we also found
2 the two packages of marijuana.

3 Q. I'm showing you what has been admitted as Government's
4 Exhibit No. 12. Do you recognize that?

5 A. I do.

6 Q. What is it?

7 A. That's the same room as the Halloween decorations and
8 mannequins, except for taken from the opposite end. That
9 shows the picture of the closet which the marijuana was found
10 in and the bottom portion of it.

11 Q. Can you mark what closet we're talking about?

12 A. (Indicating.)

13 Q. Okay.

14 I'm showing you Government's Exhibit No. 10. Do you
15 recognize that?

16 A. I do.

17 Q. What is that?

18 A. ~~Those are the two packages of marijuana that were~~
19 ~~discovered in the closet. They were in that plastic bag and~~
20 ~~they were concealed in a pair of pants inside the pant legs~~
21 ~~wrapped up in a pile of clothes inside the closet.~~

22 Q. Agent Tews, who found that marijuana?

23 A. I did.

24 Q. And can you describe how you went about finding it?

25 A. As I was searching the closet going through the clothes,

1 I was moving the clothes that were in the pile and when I got
2 to the pair of pants, I felt the hard object and it was heavy.
3 And after unfolding the pants and looking inside the pant leg,
4 I discovered the bag which contained those two packages of
5 marijuana.

6 Q. Showing you what's been admitted as Government's
7 Exhibit 13. Do you recognize that, sir?

8 A. I do.

9 Q. What is it?

10 A. That's a photograph of the same room where the mannequins
11 and Halloween decorations were. This is the left side of the
12 closet. The left side of the room. What you're seeing is
13 this is the left part of the closet and these boxes right here
14 (indicating) are all toy replica guns.

15 Q. And throughout the course of your investigation, did you
16 have an opportunity to learn what the purposes of those toy
17 guns were?

18 A. During the same conversation with Mr. Padilla, he stated
19 those guns were props for the movies he made.

20 Q. Now, Agent Tews, you mentioned a couple times now that
21 you had a conversation with Mr. Padilla. When did you have
22 this conversation with him?

23 A. I had that conversation on January 10, 2015.

24 Q. Agent Tews, I am now showing you what has been marked as
25 Government's Exhibit 15. Do you recognize that?

Ex 26

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General (U) Black face mask
 Collected On: 01/09/2015
 Receipt Number: 51
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room H

✓ 1B Drug (U) two packages of unknown substance wrapped in
 plastic (suspected marijuana)
 Collected On: 01/09/2015
 Receipt Number: 52
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room K inside plastic bags in
 pants legs in closet
 Drug Type: Marijuana
 Total Package Weight: 1336 Grams

1B General (U) Black gloves
 Collected On: 01/09/2015
 Receipt Number: 53
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room H

1B General (U) Misc. paperwork
 Collected On: 01/09/2015
 Receipt Number: 54
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room L top of dresser

UNCLASSIFIED

See 11/1/11- page 1
 See 11/1/11- page 2

64.27

10-1014

10-1014

10-1014

See 5/1/12
 1/1/12
 Page 1

FEDERAL BUREAU OF INVESTIGATION
 EVIDENCE CHAIN-OF-CUSTODY

Evidence Type: <input type="checkbox"/> General <input checked="" type="checkbox"/> Drug <input type="checkbox"/> Firearm/Weapon		<input type="checkbox"/> CART <input checked="" type="checkbox"/> Valuable <input type="checkbox"/> Firearm/Other	
Special Handling Instructions		Initial Receipts	
<input type="checkbox"/> Batteries <input type="checkbox"/> Fragile <input type="checkbox"/> FGI <input type="checkbox"/> HAZMAT <input type="checkbox"/> Parents <input type="checkbox"/> Refrigerate <input type="checkbox"/> Req. Charging <input type="checkbox"/> None <input type="checkbox"/> Other		Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: <i>[Signature]</i>	
Relinquished Custody		Date and Time	
Signature: <i>[Signature]</i>		1/9/15	
Printed Name: <i>[Signature]</i>		3:30pm	
Reason: <i>[Signature]</i>		Accepted Custody	
Signature: <i>[Signature]</i>		1/9/15	
Printed Name: <i>[Signature]</i>		3:30pm	
Reason: <i>[Signature]</i>		Accepted Custody	
Signature: <i>[Signature]</i>		1/9/15	
Printed Name: <i>[Signature]</i>		5:06pm	
Reason: <i>[Signature]</i>		Accepted Custody	
Signature: <i>[Signature]</i>		1/9/15	
Printed Name: <i>[Signature]</i>		11:00am	
Reason: <i>[Signature]</i>		Accepted Custody	
Signature: <i>[Signature]</i>		1/9/15	
Printed Name: <i>[Signature]</i>		11:00am	
Reason: <i>[Signature]</i>		Accepted Custody	
Signature: <i>[Signature]</i>		2/13/15	
Printed Name: <i>[Signature]</i>		11:00am	
Reason: <i>[Signature]</i>		Accepted Custody	

Firearms Certification:

Printed Name: _____ Signature: _____ Date: _____

Case ID: 91A-SJ-5808029 IB: 114 Barcode: 6561246

Item #32 Marijuana a/c found in room
 Miguel Reyes
 11/1/11-1/1/12

Ex. 28



BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
JAN 09, 2015 06:28 AM
91A-SJ-5808029

Evidence Recovery Log

50	Camera with Cyrillic brand name and No. 74202312 in case	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of chair	Paper (Indirect)		Room H	

Item #	Description	Recovered By	Observed By	Date Found	
51	Black face mask	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
		Paper (Indirect)		Room H	

Item #	Description	Recovered By	Observed By	Date Found	
52	Unknown substance	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside pants in the closet	Kpac (Indirect)		Room K	

Item #	Description	Recovered By	Observed By	Date Found	
53	Black gloves	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
		Paper (Indirect)		Room H	

Item #	Description	Recovered By	Observed By	Date Found	
54	Miscellaneous paper work	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of dresser	Paper (Indirect)		Room L	

Item #	Description	Recovered By	Observed By	Date Found	
55	Black plastic	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside a drawer	Paper (Indirect)		Room I	

Item #	Description	Recovered By	Observed By	Date Found	
56	LG model UX3300 Verizon flip phone	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
		Kpac (Indirect)		Room H	

Item #	Description	Recovered By	Observed By	Date Found	
57	Miscellaneous paper work	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of bed	Paper (Indirect)		Room L	

UNCLASSIFIED

64.29a

Subject: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General

(U) Kid walkie-talkie, four transmitters with morse code (toy)
 Collected On: 01/09/2015
 Receipt Number: 69
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K on top of container

1B Firearm

* (30)
 9mm bullets
 Room K?

(U) 9mm bullets
 Collected On: 01/09/2015
 Receipt Number: 70
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K inside drawer
 Firearm Type: Other

1B Firearm

* Room M
 inside safe

(U) 9mm bullet
 Collected On: 01/09/2015
 Receipt Number: 71
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe
 Firearm Type: Other

1B General

(U) Documents about airsoft guns
 Collected On: 01/09/2015
 Receipt Number: 72
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K top of dresser

UNCLASSIFIED

Ex. 296

BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
 JAN 09, 2015 06:28 AM
 91A-SJ-5808029

Evidence Recovery Log

65	One pair black cargo pants; one pair cakey cargo pants	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On bed	Paper (Indirect)		Room L	

Item #	Description	Recovered By	Observed By	Date Found	
66	Starter revolver	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside safe	Paper (Indirect)		Room M	

Item #	Description	Recovered By	Observed By	Date Found	
67	Six plastic magazines and two black plastic gun parts	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside safe	Paper (Indirect)		Room M	

Item #	Description	Recovered By	Observed By	Date Found	
68	(2) 16-Well air pistol series plastic (2) CALIBER 6mm BB plastic (1) Cal. 6mm BB plastic with scope	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside safe	Paper (Indirect)		Room M	

Item #	Description	Recovered By	Observed By	Date Found	
69	Kid walkie-talkie, four transmitters with Morse code	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of container	Paper (Indirect)		Room K	

Item #	Description	Recovered By	Observed By	Date Found	
70	30 bullets 9mm	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside drawer	Plastic (Indirect)		Room K	

Item #	Description	Recovered By	Observed By	Date Found	
71	9mm bullet	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments



BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
JAN 09, 2015 06:28 AM
91A-SJ-5808029

Evidence Recovery Log

Item #	Description	Recovered By	Observed By	Date Found
72	Documents on airsoft gun	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	On top of dresser	Paper (Indirect)		Room K
				Comments
73	Letter (PRTC), social security card (Jose Padilla), and more documents	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	Inside dresser	Paper (Indirect)		Room K
				Comments
74	Empty box of a S&W 9mm model 5906 (not included)	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	On top of dresser	Paper (Indirect)		Room K
				Comments

UNCLASSIFIED

Exh. 30

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General (U) One pair of black cargo pants; one pair khaki cargo pants
 Collected On: 01/09/2015
 Receipt Number: 65
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room L top of bed

1B Firearm (U) Starter revolver
 Collected On: 01/09/2015
 Receipt Number: 66
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe
 Firearm Type: Other

1B General (U) Six plastic magazines and two plastic gun parts
 Collected On: 01/09/2015
 Receipt Number: 67
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe

1B Firearm (U) Two 16-well air pistol series plastic, Two 6mm caliber BB plastic, one 6mm caliber BB plastic with scope
 Collected On: 01/09/2015
 Receipt Number: 68
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe
 Firearm Type: Other

UNCLASSIFIED

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General (U) Kid walkie-talkie, four transmitters with morse code (toy)
 Collected On: 01/09/2015
 Receipt Number: 69
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K on top of container

✓ * (30) 9mm bullets
 Room K?
 1B Firearm (U) Thirty 9mm bullets
 Collected On: 01/09/2015
 Receipt Number: 70
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K inside drawer
 Firearm Type: Other

✓ * Room M inside safe
 1B Firearm (U) 9mm bullet
 Collected On: 01/09/2015
 Receipt Number: 71
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe
 Firearm Type: Other

1B General (U) Documents about airsoft guns
 Collected On: 01/09/2015
 Receipt Number: 72
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K top of dresser

UNCLASSIFIED

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General

(U) Letter (PRTC), social security card Jose Padilla,
 and ~~more~~ documents
 Collected On: 01/09/2015
 Receipt Number: 73
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room K inside dresser

1B General

Room K?

(U) Empty box of a S&W 9mm model 5906 (not included)
 Collected On: 01/09/2015
 Receipt Number: 74
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room K top of dresser

♦♦

UNCLASSIFIED

22 A-11
 26 A-11
 27 A-1
 60 A-B

20 04



See Trial Transcript page 58

E4.31a

FD-1004
Revised
9-16-2009FEDERAL BUREAU OF INVESTIGATION
EVIDENCE CHAIN-OF-CUSTODY

Evidence Type: <input type="checkbox"/> General <input type="checkbox"/> CART		<input type="checkbox"/> Drug <input type="checkbox"/> Valuable	<input type="checkbox"/> Firearm/Weapon <input checked="" type="checkbox"/> Firearm/Other
Special Handling Instructions:		Date and Time:	
<input type="checkbox"/> Batteries <input type="checkbox"/> Biohazard <input type="checkbox"/> FGJ <input type="checkbox"/> HAZMAT <input type="checkbox"/> Latents <input type="checkbox"/> Refrigerate <input type="checkbox"/> Req. Charging <input type="checkbox"/> None <input type="checkbox"/> Other		Signature: <i>[Signature]</i> Printed Name: Hector Cintron Reason: Collected	
Signature: <i>[Signature]</i> Printed Name: Hector Cintron Reason: Transfer to TPA Sq 4440		Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: <i>[Signature]</i>	
Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: Release to <i>[Signature]</i>		Signature: <i>[Signature]</i> Printed Name: Andrew Lewis Reason: accepted	
Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: released to ECU		Signature: <i>[Signature]</i> Printed Name: Iris Elaine Sanchez Reason: Storage	
Signature: <i>[Signature]</i> Printed Name: Sandra L Roman Reason: Release to SA Parker		Signature: <i>[Signature]</i> Printed Name: David P. Rinaldi Reason: Review	
Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: Release to ECR		Signature: <i>[Signature]</i> Printed Name: Sandra L Roman Reason: Storage	

Firearms Certification:

Printed Name: _____ Signature: _____ Date: _____

Case ID: 91A-SJ-50808029

IB: 132

Barcode: E5672876

Item # 70 (30 rounds 9mm) found in dresser drawer of Room K.

See Trial Transcript / pages 21-22

64.316

FD-1004
Revised
9-16-2009FEDERAL BUREAU OF INVESTIGATION
EVIDENCE CHAIN-OF-CUSTODY

Evidence Type: <input type="checkbox"/> General <input type="checkbox"/> CART		<input type="checkbox"/> Drug <input type="checkbox"/> Valuable	<input type="checkbox"/> Firearm/Weapon <input checked="" type="checkbox"/> Firearm/Other
<input type="checkbox"/> Batteries <input type="checkbox"/> Biohazard <input type="checkbox"/> FGJ <input type="checkbox"/> HAZMAT <input type="checkbox"/> Latents <input type="checkbox"/> -Refrigerate <input type="checkbox"/> Req. Charging <input type="checkbox"/> None <input type="checkbox"/> Other		Signature: <i>[Signature]</i> Printed Name: Hector Cintron Reason: Collected	3:30 p 1/9/15
Signature: <i>[Signature]</i> Printed Name: Hector Cintron Reason: Release to TEO Juan Santiago		1/9/15 4:10 p	Signature: <i>[Signature]</i> Printed Name: Juan Santiago Reason: SECURE STORAGE
Signature: <i>[Signature]</i> Printed Name: Juan Santiago Reason: Release to Andrew Tewls		1/14/15 10:40am	Signature: <i>[Signature]</i> Printed Name: Andrew Tewls Reason: accepted
Signature: <i>[Signature]</i> Printed Name: Andrew Tewls Reason: Released to ECU		1-15-15 9:50am	Signature: <i>[Signature]</i> Printed Name: Tru Elaine Sanchez Reason: Storage
Signature: <i>[Signature]</i> Printed Name: Sandra L. Pomeroy Reason: Release to SA Partee		1/20/15 10:15am	Signature: <i>[Signature]</i> Printed Name: David Partee Reason: Review
Signature: <i>[Signature]</i> Printed Name: David Partee Reason: Release to ECU		1/20/15 10:40am	Signature: <i>[Signature]</i> Printed Name: Sandra L. Pomeroy Reason: Same

Firearms Certification:

Printed Name: _____ Signature: _____ Date: _____

Case ID: 91A-SJ-50808029

IB: 133

Barcode: E5672877

Item # 71 (1 round 9mm) Impossibly found on inside floor of gun safe of Room M
 Compare page 25 of FBI Agent Andrew Tewls trial testimony with the number sequence of the
 FBI Photographic Log

84.32

1 If he is claiming that the ammunition was his
2 father's, he knew that that ammunition was in that residence.
3 And if he knew that that ammunition was in that residence, he
4 knew that it was there. And if he knew that was there, he was
5 in possession of that ammunition.

6 Let's talk about this one round of ammunition that
7 was found inside a safe. Exhibit Number 20. This was the
8 same safe where the defendant kept another one of his toy
9 guns.

10 Now, I want to be very clear, ladies and gentlemen.
11 You heard evidence that this is not a real firearm. Nobody's
12 claiming it was a real firearm. It was not a real firearm.
13 He used it to make movies. But what's clear is that this fake
14 firearm was his, and he kept it there.

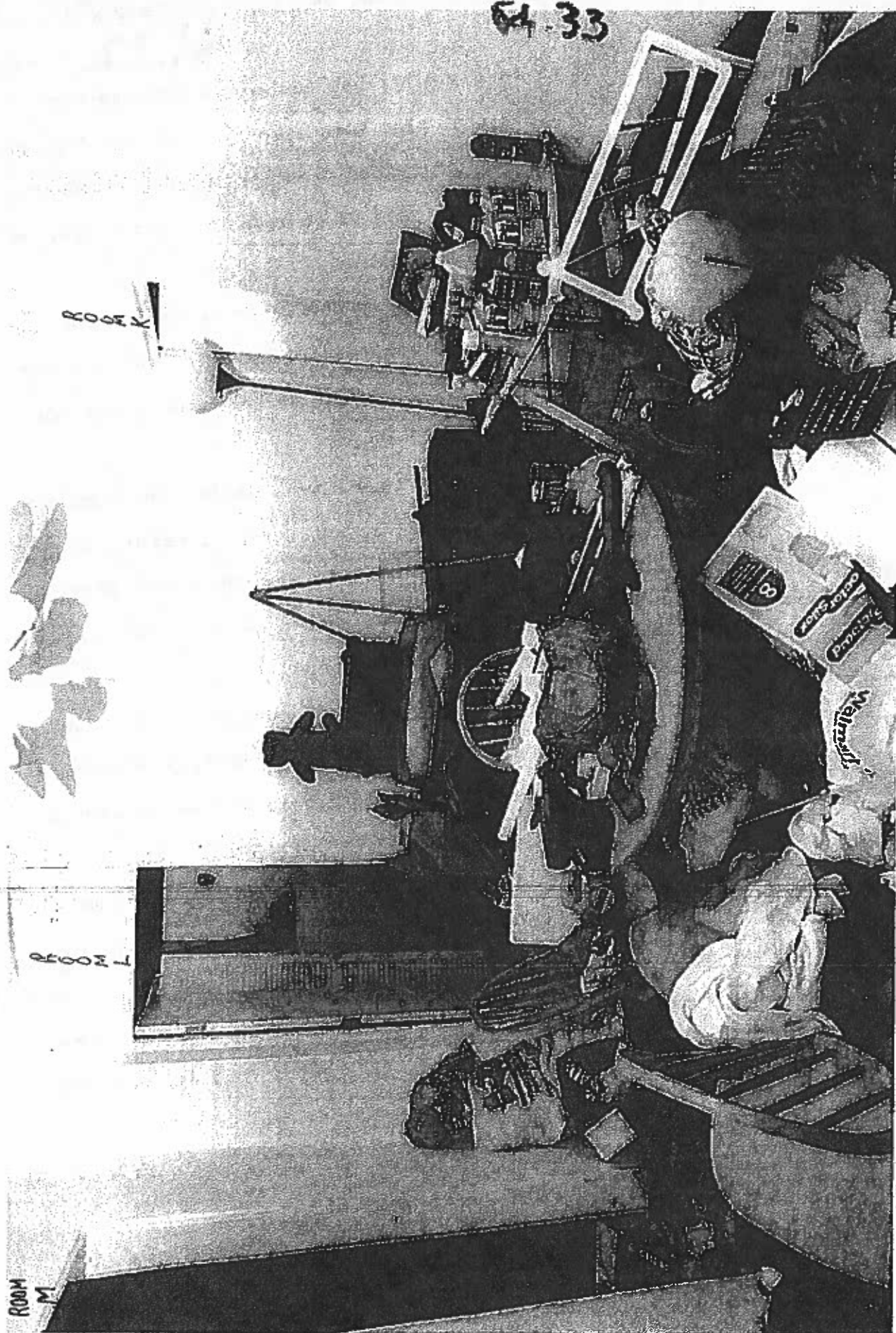
15 Look what else was there, a round of ammunition. By
16 way of an example, I want to give you an analogy, because I
17 know it's confusing, what the difference between ownership and
18 possession is.

19 And this is a hypothetical example. I drive my
20 father to work, and when I drive my father to work, he gets
21 out of the car and he drops his wallet in the passenger seat.
22 All right? And then I drive two blocks down. I hit a red
23 light. My father's out of the car, and I realize, wow, that's
24 my dad's wallet.

25 Now, that wallet did not become mine by virtue of the

(21)

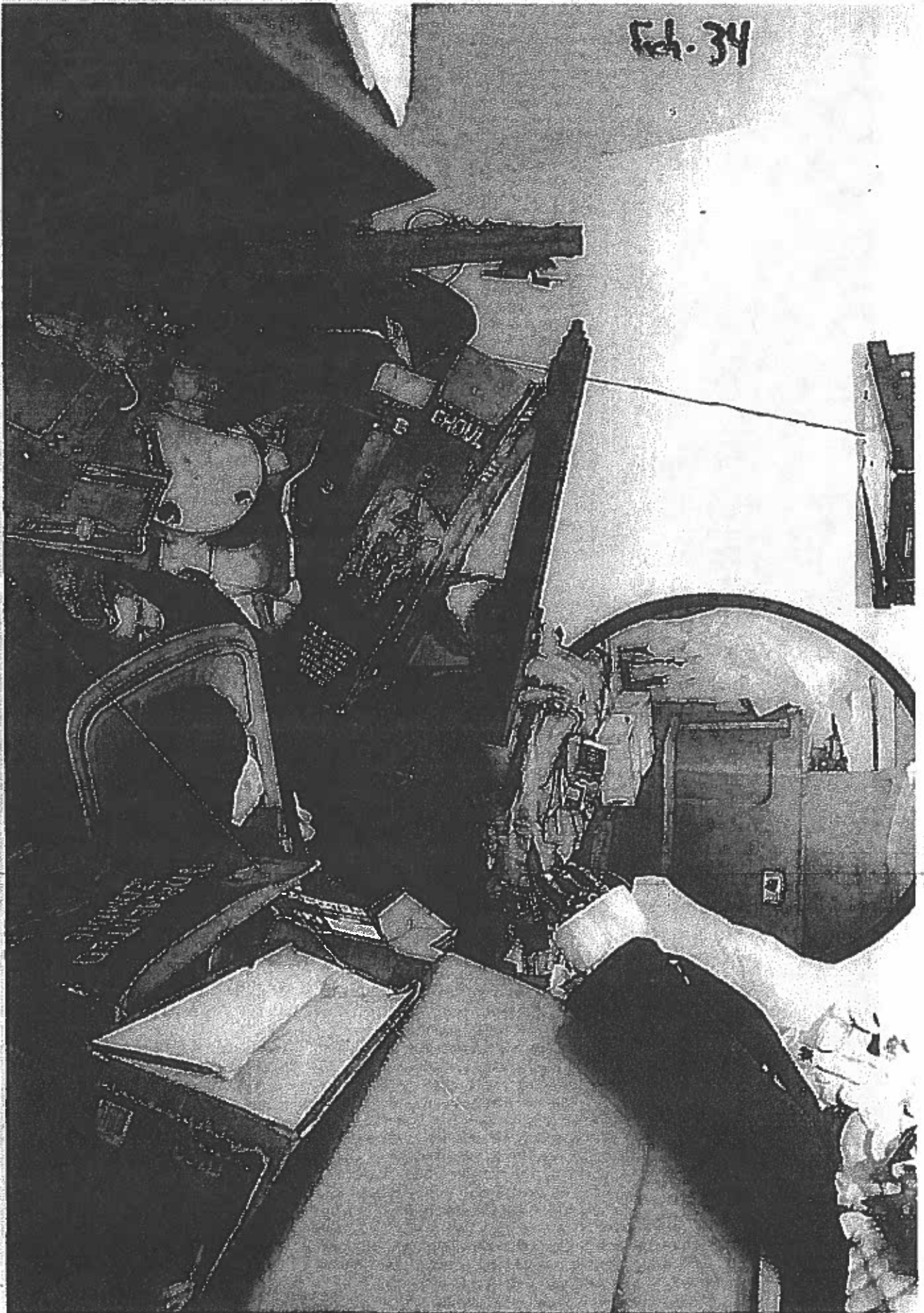
Part of Kitchen ROOM H



LOG PHOTO #218

EXIT PHOTO

Feb. 34



Linn's

EXIT PHOTO

INC. QUART #919

FATHERS & SONS

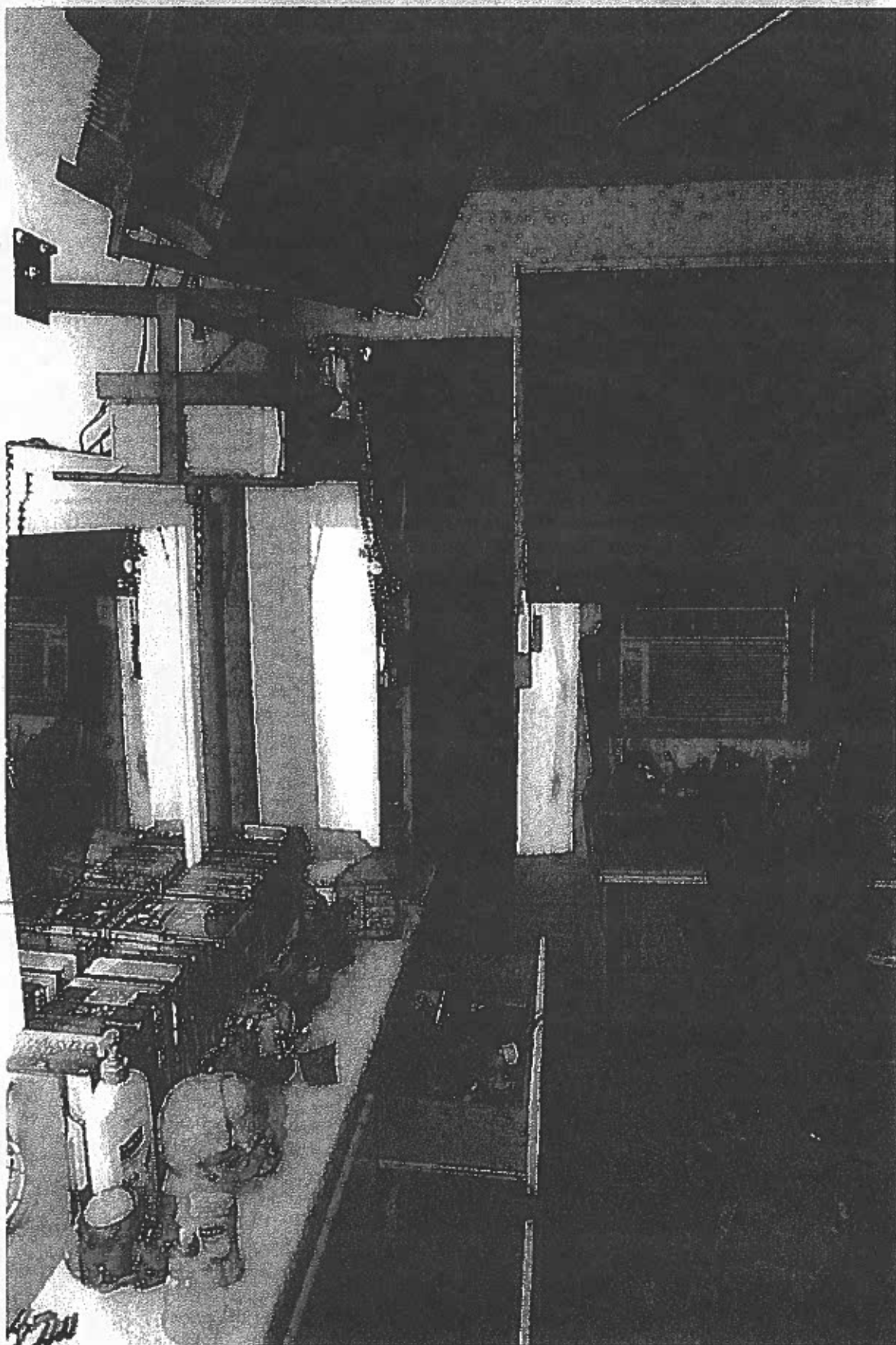
(36)



31359

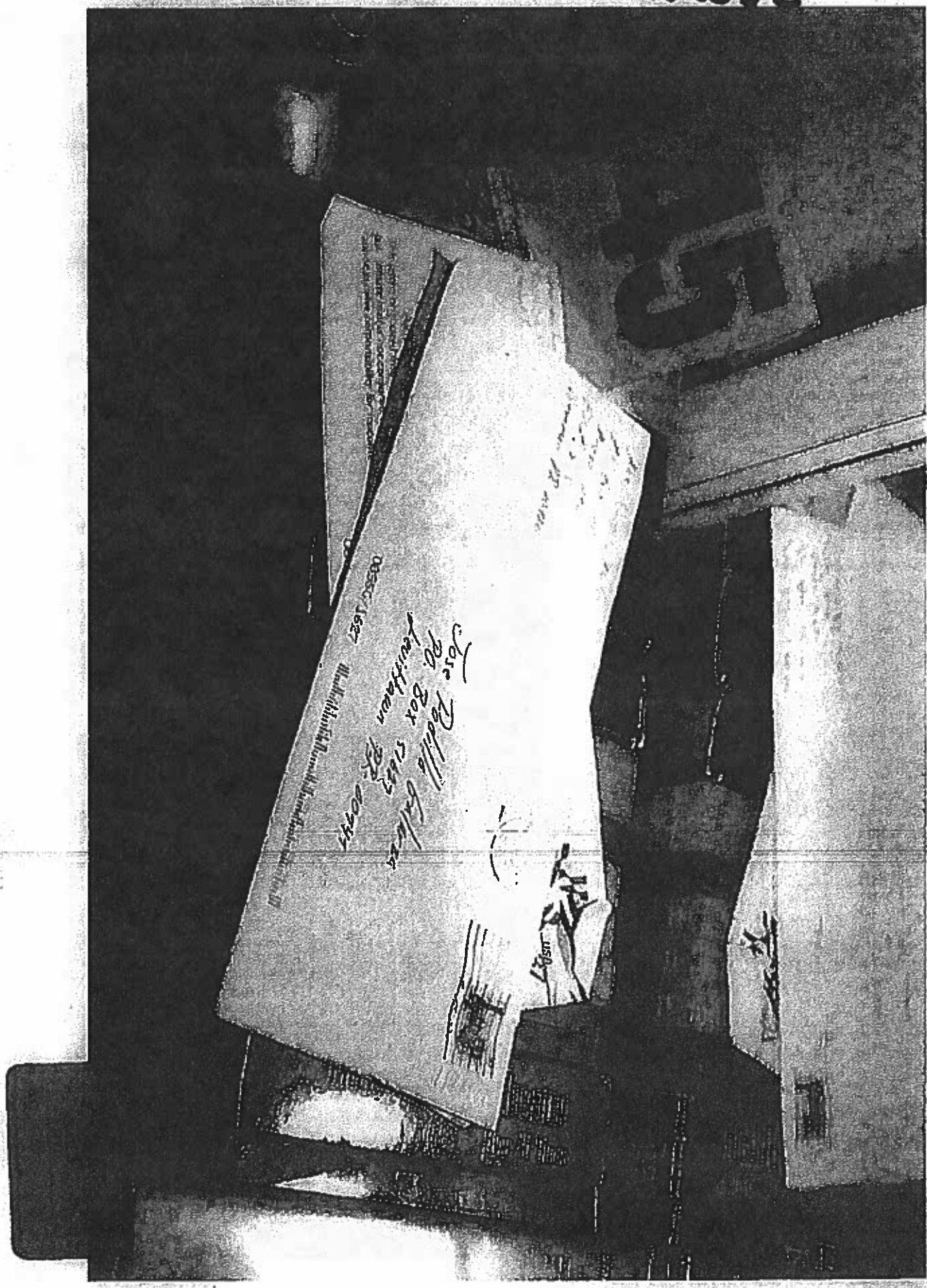
16

EX. 356



ROAST

Wh. 35 c



84.358

35d



BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
JAN 09, 2015 06:28 AM
91A-SJ-5808029

Evidence Recovery Log

43	Black and grey Alcatel cellular phone from AT&T company serial number HQJES1APSMV3GU4 Model QT510A	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside a drawer	Kpac (Indirect)		Room I	

Item #	Description	Recovered By	Observed By	Date Found	
44	Motorola radio, holsters and POPR ID	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On chest drawer	Paper (Indirect)		Room I	

Item #	Description	Recovered By	Observed By	Date Found	
45	Two (2) letters envelopes	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of DVDs	Paper (Indirect)		Room I	

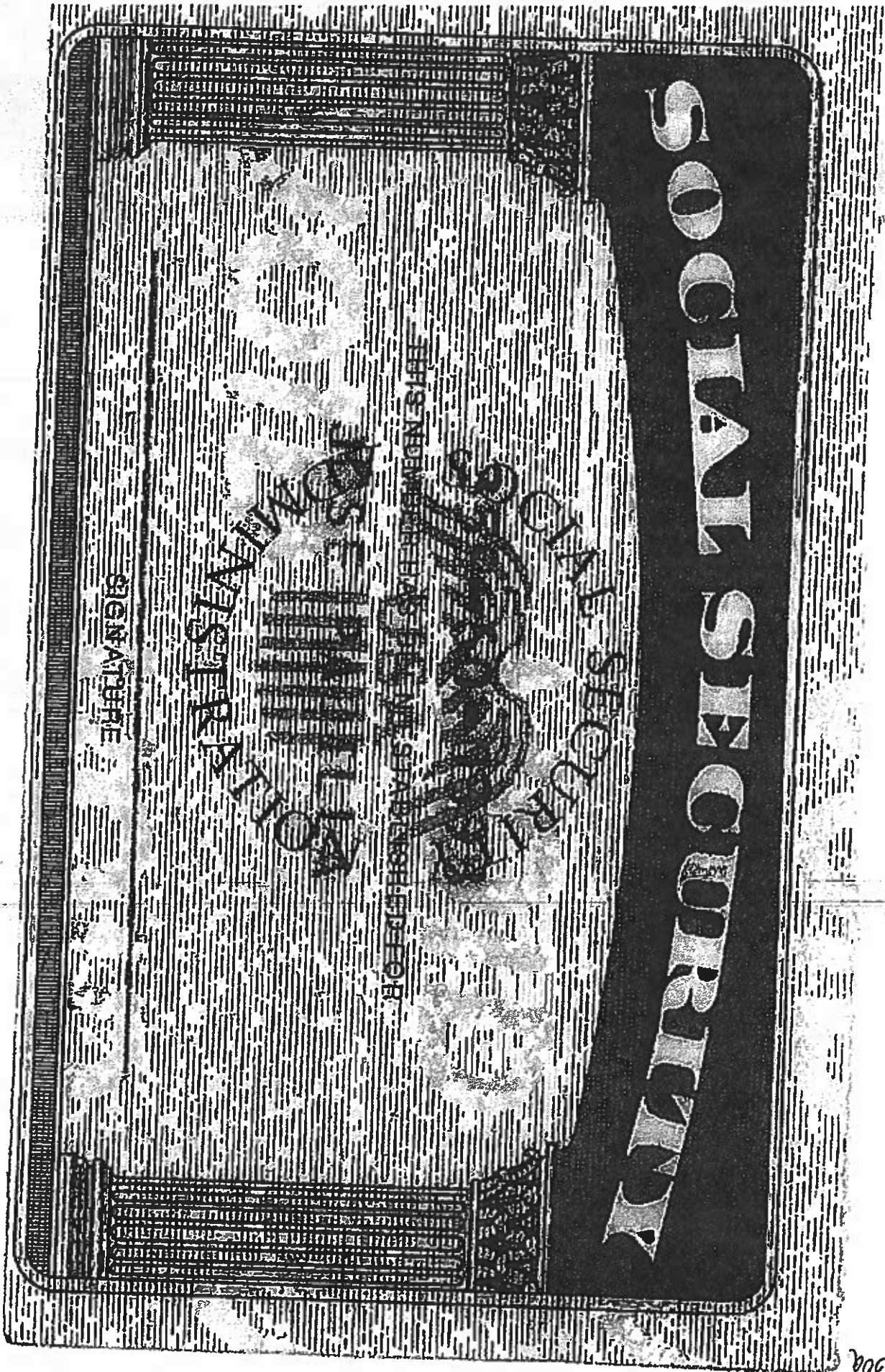
Item #	Description	Recovered By	Observed By	Date Found	
46	Applied Laser on a box	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	On top of table	Paper (Indirect)		Room I	

Item #	Description	Recovered By	Observed By	Date Found	
47	Binoculars	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
	Inside drawer	Paper (Indirect)		Room I	

Item #	Description	Recovered By	Observed By	Date Found	
48	Identification cards/ID : driver license	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
		Paper (Indirect)		Room J	

Item #	Description	Recovered By	Observed By	Date Found	
49	Green face mask	Hector Cintron	Jeremy Asencio	1/9/2015	
	Where Found	Packaging/Marking	Grid	Room/Area	Comments
		Paper (Indirect)		Room H	

Item #	Description	Recovered By	Observed By	Date Found	
--------	-------------	--------------	-------------	------------	--

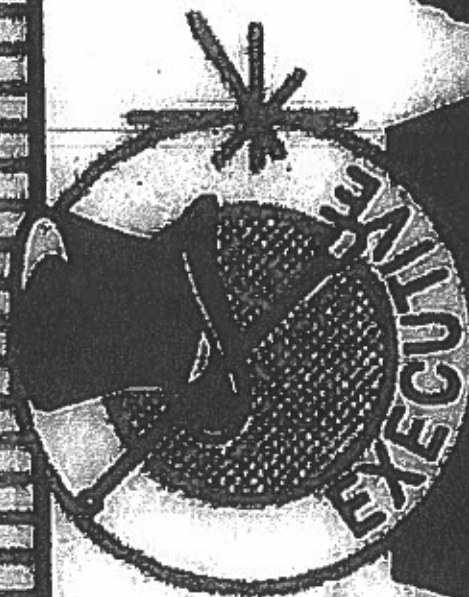
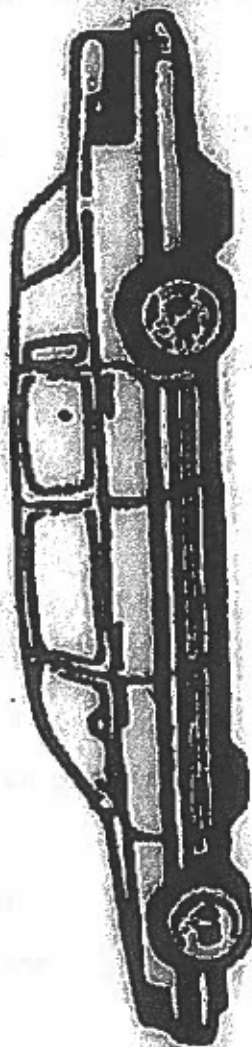


SL 36a

500 50a

SA-366

*A New Concept In
Luxury Service*



LIMOUSINE SERVICE

José Padilla - Propietario

Tel. (787) 253-0637

Recept: 250-0140 T. 28643

1 A. It was in the same bedroom as the prior photo in a drawer
2 in that room.

3 Q. When you say "the prior photo," in the photo with the
4 mannequins?

5 A. Yes, the one showing the Halloween mannequins and
6 decorations.

7 Q. I'm going to show you what's been marked as Government's
8 Exhibit 30-A. Do you recognize that?

9 A. I do.

10 Q. What is that?

11 A. That is the social security card of Mr. Jose Padilla.
12 That was found in that room inside that envelope.

13 Q. Inside the envelope located where?

14 A. Inside the bedroom with the Halloween decorations and
15 mannequins.

16 Q. Now I'm showing you what's been marked as Government's
17 Exhibit 30-B. Do you recognize that?

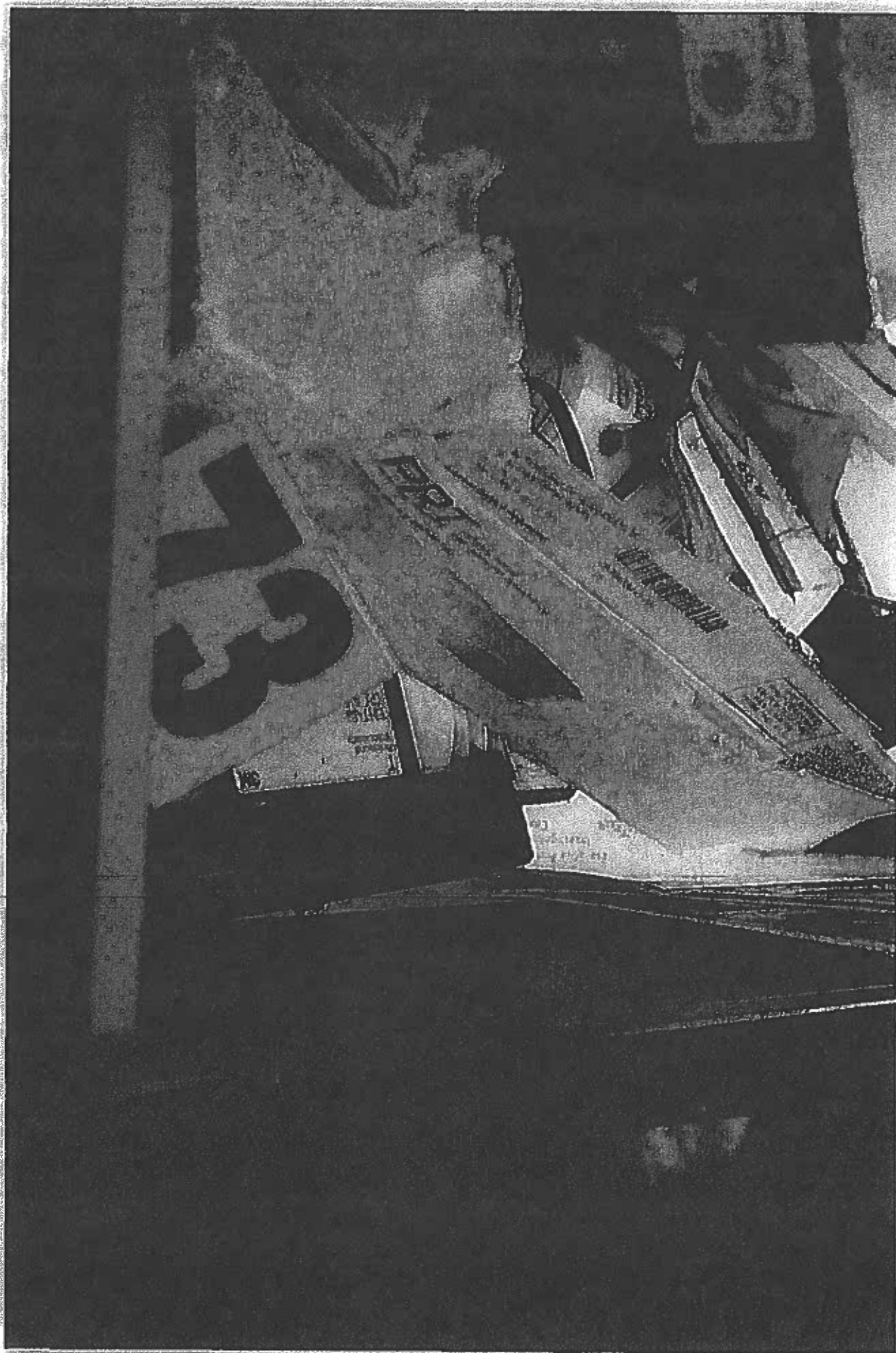
18 A. I do.

19 Q. What is that?

20 A. That is the business card that was found in the same
21 envelope as the social security card in Jose Padilla's name
22 inside the bedroom with the Halloween decorations and
23 mannequins.

24 Q. Agent Tews, what else did you find in the bedroom with
25 the mannequins and the social security card and Mr. Jose

E.H. 34



Exh. 39

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General (U) Letter (PRIC), social security card Jose Padilla,
 and more documents
 Collected On: 01/09/2015
 Receipt Number: 73
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room K inside dresser

1B General (U) Empty box of a S&W 9mm model 5906 (not included)
 Collected On: 01/09/2015
 Receipt Number: 74
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores,
 Toa Baja
 Specific Location: Room K top of dresser

Room K?

UNCLASSIFIED

Do my 64

54.40



BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
JAN 09, 2015 06:28 AM
91A-SJ-5800029

Evidence Recovery Log

pt 17.

Inside safe	Plastic (Indirect)	Room M		
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Item #	Description	Recovered By	Observed By	Date Found
72	Documents on airsoft gun	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	On top of dresser	Paper (Indirect)		Room K

Item #	Description	Recovered By	Observed By	Date Found
73	Letter (PRTC), social security card (Jose Padilla), and more documents	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	Inside dresser	Paper (Indirect)		Room K

Item #	Description	Recovered By	Observed By	Date Found
74	Empty box of a S&W 9mm model 5906 (not included)	Hector Cintron	Jeremy Asencio	1/9/2015
	Where Found	Packaging/Marking	Grid	Room/Area
	On top of dresser	Paper (Indirect)		Room K

Ed 40a

1

And it's been mentioned that basically pointing at his dad regarding that he had a shooting range license, that he had guns, where there was no guns found there? Right? There were no guns found inside the house, so somebody had to actually look for the firearms when the father passed away and turn them in. That person what, missed the ammunition? I suggest to you that those ammos were there after his father passed away.

Further analysis to defendant's story just doesn't fit. If you review Joint Exhibit II, and it was read -- it was read to you here, it shows a list of firearms, right?

Along side to it, what do we have? Calibers. The Bushnell, .223; Bushmaster .223. Ask yourselves how many ammo of .223 caliber were seized from the house? None.

Pistol, Magnum Research, caliber .50. Ask yourselves how many rounds of ammo, of .50 caliber were found inside the house? Zero. Nada.

But what's more telling? Where do you see here that the father had a firearm of 7.62 caliber ammunition? Where do you see here that father had a gun that accepted .38 caliber rounds ammunition? It just doesn't. Dad did not have registered, at least legally, a .38 caliber handgun, or a firearm for a 7.62 caliber ammunition.

But you know what also doesn't fit? Defendant is stating that the Social Security found inside the residence is

1 a duplicate. Well, yes, the exhibit that was presented here
2 is a copy. That is correct. But this is a copy of
3 Government's Exhibit 38. This is a copy --

4 One second, Your Honor. Oh, pardon, Your Honor.

5 This Government Exhibit 38 is basically a copy of the
6 actual card (that Agent Tews seized from the house.) And as I
7 started -- but that's not what this case is about. This case
8 is about an ex PRPD officer, convicted felon, person that has
9 law enforcement background. This is not a case about a
10 grandmother, naive, that had never seen any type of narcotics,
11 or was never confronted and had no participation with
12 narcotics. This is not a case about an old grandfather, 85
13 year old, who had no law enforcement background, had never
14 seen a gun before, had never seen a bullet before, and would
15 not be able to identify them. This is not the case.

16 This case is about an ex PRPD officer. This case is
17 about a convicted felon. This case is about Jose Padilla
18 Galarza.

19 And all the evidence here points to only one person.
20 It doesn't matter if you mention my parents, my brothers. The
21 evidence here points to only one person who exercised dominion
22 and control over that house.

23 Ladies and gentlemen, the evidence here is beyond a
24 reasonable doubt. All the evidence points towards Jose
25 Padilla Galarza. And we expect you to render a guilty verdict

1 as to both counts.

2 Thank you very much.

3 (Excerpt concluded.)

4 * * *

5

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1 THE INTERPRETER: *Picadura*.

2 THE COURT: And what is *picadura*?

3 THE INTERPRETER: Marijuana shreds. Shreds. The
4 interpreter would say that where you can see that it contains
5 shreds.

6 BY MR. PEREZ:

7 Q. Any markings you can identify from Government's
8 Exhibit 10-A?

9 A. Yes. My initials.

10 MR. PEREZ: Permission to approach, Your Honor.

11 BY MR. PEREZ:

12 Q. Showing you Government's -- the back of Government's
13 Exhibit 10-A, can you please describe what this is?

14 A. That is the opening I make in order to conduct the
15 analysis.

16 Q. And why did this substance get to your possession?

17 A. This came to my hands because in order for me to conduct
18 the necessary tests to verify whether there was the presence
19 of controlled substances in it.

20 Q. Okay. And what did you do specifically with this
21 substance once you got it?

22 A. A presumptive test was initially done. This presumptive
23 test consists of verifying the shreds, to verify whether there
24 are any *cistolitos*.

25 Q. In lay terms, what is *cistolitos*?

1 A. *Cistolitos* is microscopic formation that resembles the
2 shape of a bear's claw, a hook.

3 Q. Okay. And what was the result of that test?

4 A. That test came out positive for *cistolitos*.

5 Q. What does that mean?

6 A. That preliminarily it gives us a guideline that what we
7 have might be marijuana.

8 Q. Okay. After that test, what did you do?

9 A. A confirmatory test was performed with a gas
10 chromatograph, coupled with a mass spectrometer.

11 Q. Okay. That item that you just mentioned, what does that
12 do?

13 A. It's a tool that has -- that does two things: One is it
14 separates; and the second is that it identifies.

15 For example, after you had coffee, for example, and
16 it goes through the process of separation, three components
17 come out. Then the second part, what are those components
18 that are identified? In the case of coffee; sugar, milk and
19 coffee came out.

20 Q. Okay. And in the case of Government's Exhibit 35, what
21 came out after that test was done?

22 A. After the test was performed -- the confirmatory test was
23 performed, the --

24 THE INTERPRETER: The interpreter is going to ask
25 the witness to repeat.

1 THE COURT: Write it down. Write it down on a piece
2 of paper.

3 BY MR. PEREZ:

4 Q. Is there any generic term for Delta 9 --

5 A. A division of it is called --

6 THE COURT: THC?

7 THE WITNESS: THC.

8 BY MR. PEREZ:

9 Q. And what is THC?

10 A. I'm writing.

11 THC.

12 THE COURT: We have to give it to the court
13 reporter, that piece of paper, too.

14 BY MR. PEREZ:

15 Q. Could we attempt a translation?

16 A. Delta 9 tetrahydrocannabinol.

17 Q. Okay. What is THC?

18 A. One of the active ingredients in marijuana. It's
19 considered the psychoactive ingredient, or the one you get a
20 high from in marijuana.

21 Q. Okay. And basically, from the test results that you've
22 done, your experience and your training, in lay terms, what is
23 Government's Exhibit 35?

24 A. Marijuana.

25 Q. And according to your tests, how much does it weigh?

1 A. According to the certification, it weighs 1293.1 grams,
2 and the weight is included with the wrapping.

3 Q. Which is basically what's covering this, right?

4 A. Yes. Correct.

5 Q. And out of the 1,293 grams, is that a substantial amount
6 of the weight?

7 MR. PEREZ: I'm sorry. I'll rephrase.

8 THE COURT: What he's asking is whether the wrapping
9 is a substantial part of the 1293.1 grams of marijuana.

10 THE WITNESS: The wrapping -- the weight of the
11 wrapping as such, I don't have it. I mean, it's unknown. But
12 it's not a substantial finding as in terms of the content of
13 what's therein.

14 THE COURT: It's like cellophane; correct?

15 THE WITNESS: Yes.

16 MR. PEREZ: Thank you very much. No further
17 questions, ma'am.

18 THE COURT: Any cross?

19 DEFENDANT PADILLA: Yes, Your Honor.

20 THE COURT: Please.

21 CROSS-EXAMINATION

22 BY DEFENDANT PADILLA:

23 Q. Good afternoon, Miss.

24 A. Good afternoon.

25 Q. In your capacity as a chemist, I ask you, is there a type

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1 of test that measures the strength -- let's say this type of
2 marijuana --

3 MR. PEREZ: Your Honor -- we have an objection,
4 Your Honor. That's totally irrelevant. It's beyond the
5 scope.

6 THE COURT: She can answer that. Because -- she can
7 answer that.

8 THE WITNESS: At the Forensic Sciences Institute we
9 conduct a qualitative analysis. That means that what we
10 ascertain is the presence or absence of a controlled
11 substance. We do not measure the purity of the substance.

12 BY DEFENDANT PADILLA:

13 Q. Okay. And in your capacity, again, as a chemist, is
14 there a type of test to determine the age of the marijuana,
15 like this in this case?

16 MR. PEREZ: Again, Your Honor.

17 THE COURT: I will allow that question.

18 THE WITNESS: At the present time, at the institute
19 that type of test is not done because in order to know that
20 you need to find out the purity of it and that's not being
21 done now.

22 DEFENDANT PADILLA: Miss, thank you very much. Have
23 a good afternoon. No more questions.

24 THE COURT: Thank you very much. You're now
25 excused.

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1 BY MR. PEREZ:

2 Q. And why would you say a little bit more than one pound?

3 A. Well, based on my experience, because as I said earlier,
4 I have worked as an undercover agent occupying marijuana. I
5 have had the occasion to seize hundreds and hundreds of pounds
6 of marijuana.

7 And in addition to that, the job of an undercover
8 agent, when the undercover agent is going to buy that type of
9 product or merchandise, we must make sure that we are paying
10 for -- the product that we're buying is correct.

11 Q. And in your training and experience, what is the
12 wholesale value of one brick of marijuana? Saying I would
13 sell this as it is right now in one brick, what's the
14 wholesale value?

15 A. Each one of those bricks that you have there, in value of
16 no less -- of approximately 1200 dollars.

17 Q. And in your training and experience, how is marijuana
18 sold at the street level? In detail, how is it sold?

19 A. ~~That type of marijuana is retail sold~~ -- retailed in
20 plastic bags of half a gram of marijuana, an approximate
21 weight of half a gram each baggy.

22 Q. And how many half grams of marijuana would I have if I
23 have two pounds of marijuana?

24 THE COURT: Rather than pounds, why don't we use the
25 figure the chemist gave us, 1,293.1 grams, including the

1 wrapping.

2 MR. PEREZ: Okay.

3 THE COURT: Which is a little bit more than two
4 pounds, but --

5 BY MR. PEREZ:

6 Q. Okay. How many -- but in general terms, or approximates,
7 how many baggies of half a gram would I have with two pounds
8 of marijuana? How many small baggies would I have?

9 A. We would obtain approximately 2,000 marijuana baggies.

10 Q. And according to your training and experience, why are
11 they sold by half a gram?

12 A. Because that's the exact amount used to smoke a cigarette
13 or a marijuana joint.

14 Q. So at street level, how much are these two bricks of
15 marijuana worth?

16 A. In the street level, it would have a value of no less
17 than nine thousand dollars.

18 Q. And I ask you, after analyzing these two bricks of
19 marijuana, according to your training and experience, what

20 conclusion do you arrive at and can you tell this jury?

21 THE INTERPRETER: Repeat --

22 BY MR. PEREZ:

23 Q. According to your training and experience, in analyzing
24 the two bricks of marijuana, what is your conclusion and what
25 can you tell the jury pertaining to these two bricks of

1 Q. So in your opinion, sir, that would be for distribution?

2 A. Definitely, it is for distribution.

3 Q. Sir, then why didn't the owner distribute it and wait
4 over a year? Can you answer that?

5 MR. PEREZ: Your Honor, calls for speculation.

6 THE COURT: I think he answered.

7 MR. PADILLA GALARZA: It's a question.

8 THE COURT: He can answer that question.

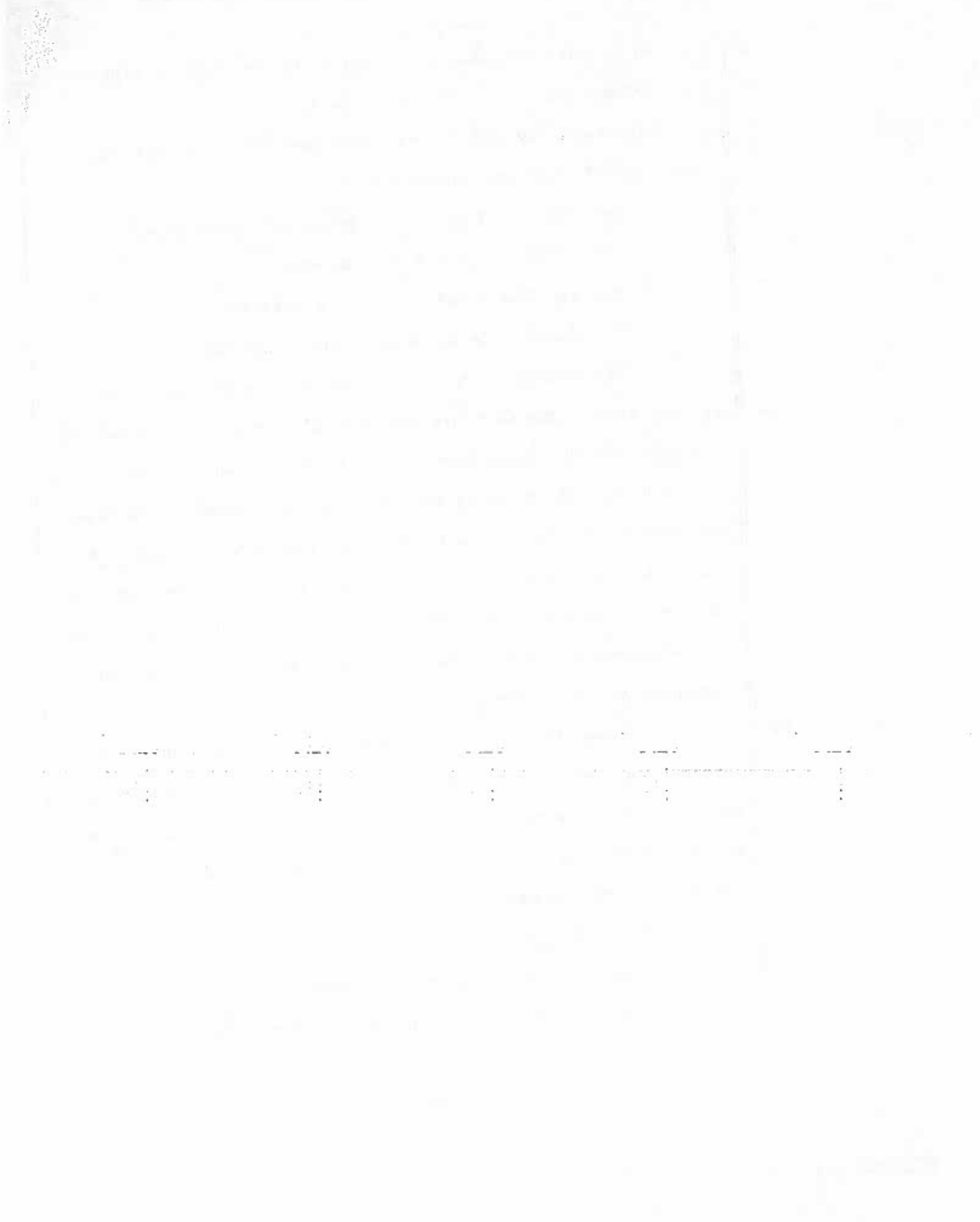
9 THE WITNESS: We could talk responsibly about this
10 all day long, because there are multiple factors. The person
11 obtained a much larger amount than that one, and it was
12 distributed. The persons that were going to acquire it were
13 not able to obtain it due to economic reasons, or simply made
14 a decision not to acquire it, not to buy it from the owner who
15 had control of the same, because the prior -- they'd finally
16 been apprised somewhere else. The police arrested them, and
17 they didn't get to buy it.

18 We continue to talk, and there would be a number of
19 factors for the reason -- for which the person who had control
20 of that marijuana did not get rid of it; but definitely, that
21 amount of drug is for distribution, and not for the
22 consumption by one person.

23 BY MR. PADILLA GALARZA:

24 Q. Sir, we are very clear on that fact.

25 Isn't it your professional opinion that if that



Ex. 44

I, Jose Padilla-Galarza under penalty of perjury declare;

1- Just 6 days prior to trial I was provided by the legal division of MDC several packages of discovery that exceeded 800 pages which I was never able to study completely nor analyze with sufficient time to use them at trial.

2-The Evidence logs were in that late discovery package and it was only after the trial ended that I had the time to study and analyze them. It was then that I discovered that the logs reflected the perjured testimony of agent Tews, the fabrication and alteration of the crime scene by the agents so as to obtain my conviction.

3- As I informed the Court I felt I needed additional time to prepare for trial but was denied that request. As a result of the late provision of Brady materials they were not able to be used at trial.

4- The crime scene was also altered by the agents since the identification papers and documents belonging to me in Room I were not on top of the drawer as photographed by the agents but within the drawer and taken out by them and then photographed.

The above is the truth and I make this declaration under penalty of perjury.

Jose Padilla Galarza 4/29/2019
Jose Padilla-Galarza



Rosa Emilia Rodríguez-Vélez
United States Attorney
District of Puerto Rico

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Re: United States v. Jose Padilla-Galarza
Criminal No. 15-78 (JAF)
Pre-Trial Discovery Package

1-B
#19158-069
Padilla-Galarza, J.

FPD-PRCJD07/28/15M0344

Legal Material
9 folders
"Binders"

Dear Counsel:

As we discussed, the government is reproducing all the discovery that has been already been tendered in connection with this case Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and by order of the Court.

As you are aware, Rule 16 generally entitles you to pretrial disclosures of certain categories of information in possession of the United States. They are as follows:

- a. Recorded and written statements made by a defendant before or after the arrest and the substance of any oral statements made by the defendant to any person known to

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

JOSE PADILLA-GALARZA,
Petitioner

CIVIL NO. 19-1415 (DRD)
(Related to Cr. No. 15-078 (DRD))

v.

UNITED STATES OF AMERICA,
Respondent

**UNITED STATES' OPPOSITION TO MOTION TO VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER 28 U.S.C. § 2255**

TO THE HONORABLE COURT:

COMES NOW, the United States, by and through the undersigned attorney, and hereby opposes José Padilla-Galarza's ("Padilla") petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (the "petition").

INTRODUCTION

Padilla filed a timely¹ petition pursuant to 28 U.S.C. § 2255 claiming that: (1) his appellate counsel was ineffective for misstating the record to Padilla's detriment and not including additional legal arguments in the brief (Cv. ECF No. 1-at 2-12)²; and (2) alleged government misconduct violated Padilla's due process rights. The government submits that Padilla's claims lack merit and should be denied without an evidentiary hearing.

BACKGROUND

¹ Padilla's petition is timely because he filed it within one year of the judgment of conviction becoming final. *See* 28 U.S.C. § 2255(f)(1). The Court entered Padilla's amended judgment on remand on May 4, 2018, (Cr. ECF No. 154), and he filed his petition on April 30, 2019, (Cv. ECF No. 1).

² References to the docket will be as follows: Civil No. 19-1415 (Cv.); Criminal No. 15-078 (Cr.).

In January 2015, federal agents executed a search warrant at Padilla's residence in Toa Baja, Puerto Rico. *United States v. Padilla-Galarza*, 886 F.3d 1, 4 (1st Cir. 2018). During the search, the agents found over a kilogram of marijuana and ammunition. *Id.* As a result, Padilla was indicted by a grand jury and was charged in a two-count indictment with being a prohibited person in possession of ammunition (Count One) and possessing a detectable amount of marijuana with intent to distribute (Count Two). (Cr. ECF No. 1).

Padilla was initially represented by two court-appointed attorneys. However, on August 4, 2015 – one week before trial was scheduled to begin – he moved to dismiss both counsel. *Padilla-Galarza*, 886 F.3d at 4. After conducting two hearings on the matter, the Court granted his request, appointed new counsel preferred by Padilla, as either full counsel or standby counsel, and granted a 15-day continuance until August 26. *Id.* Padilla decided to represent himself with the assistance of that attorney as standby counsel. *Id.* The Court also ensured Padilla was knowingly and voluntarily choosing to represent himself. *Id.* (Cr. ECF No. 76). The Court refused to grant further continuances. (Cr. ECF Nos. 89, 92).

Padilla faced a jury trial lasting two days. (Cr. ECF Nos. 103, 105). At trial, the government introduced evidence that proved contraband was found in Padilla's residence and that Padilla was in constructive possession of the items. *Id.* at 5. As observed by the Court of Appeals:

The evidence in this case more than sufficed to permit a jury to reasonably find as much. To begin with, the jury learned that Padilla had admitted in an interview with federal agents that he was an owner of the house in which the ammunition and marijuana were found, that he had made payments on the mortgage for the house, and that he had installed four surveillance cameras at the house in order to deter break-ins and vandalism. Moreover, a federal a federal agent testified that she conducted drive-by surveillance of the house ten days before the search of the house, and that Padilla was standing outside the house as she drove by it.

The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight.

Id. While the contraband might not have been in the “cleaner room,” as shown at trial, the room where the contraband was found was full of items owned by Padilla, such as mannequins and prop guns he admitted he owned and used for making films. (Cr. ECF No. 147 at 82-84).

The jury convicted Padilla on both counts. (Cr. ECF No. 107). He was sentenced to 46 months of imprisonment and three years of supervised release. (Cr. ECF No. 136). Padilla appealed his conviction and sentence, and his sentence was remanded for the limited purpose of striking a child pornography forfeiture. *Padilla-Galarza*, 886 F.3d at 13. The rest of the judgment was affirmed on appeal. *Id.* The Court entered an amended judgment in May 2018. (Cr. ECF No. 154).

DISCUSSION

I. Padilla received effective assistance of counsel on appeal.

Padilla cannot establish that his appellate counsel’s failure to raise additional issues on appeal constituted deficient performance or that he suffered prejudice as a result of counsel’s mistakes. To prevail on an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant bears the burden of proving both (1) “that counsel’s performance was constitutionally deficient, meaning that counsel made errors so serious that ‘counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,’” and (2) “that the— deficient performance prejudiced the defense.” *United States v. LaPlante*, 714 F.3d 641, 648 (1st Cir. 2013) (quoting *Strickland*, 466 U.S. at 687). Counsel is “strongly presumed” to have rendered adequate assistance and to have exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. In conducting this analysis, courts must scrutinize an attorney’s performance with a “highly deferential” lens and “must not lean too heavily on hindsight.” *Ouber v. Guarino*, 293 F.3d 19, 25 (1st Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685 (2002)). Padilla is relying on hindsight in an attempt to relitigate his case by claiming ineffective assistance of counsel on appeal. However, he

cannot defeat the presumption of adequate assistance by showing that his appellate counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 669 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.").

A. Padilla was not prejudiced by appellate counsel's misstatement of the record.

Padilla greatly overstates the impact of appellate counsel's misstatement of the record. While appellate counsel did make a mistake when she stated in the brief that ammunition and marijuana was found in the more organized bedroom, Padilla cannot show this mistake prejudiced him or prove a different outcome on appeal. (Brief for Appellant at 8-9, *United States v. Padilla-Galarza*, 886 F.3d 1 (1st Cir. 2018) (No. 16-1035)).³ Even if appellate counsel had correctly cited the record and stated that the contraband was found in a room that was not Padilla's bedroom, this would not have changed the outcome of the case. Therefore, Padilla cannot prove he was prejudiced by appellate counsel's mistake.

When evaluating the denial of a motion for acquittal, the Court of Appeals must review the evidence in the light most favorable to the verdict and must uphold the denial if a rational factfinder could find that the government proved each essential element of the crime beyond a reasonable doubt. *United States v. Soto*, 720 F.3d 51, 55 (1st Cir. 2013). Padilla claims that appellate counsel misled the Court of Appeals into inferring that Padilla slept in the same room where the contraband was found. (Cv. ECF No. 1-1 at 7). Padilla's challenge to the denial of his motion for acquittal was limited to contesting the sufficiency of the evidence regarding his knowledge of the marijuana and ammunition found in the residence. (Brief for Appellant at 23, *United States v. Padilla-Galarza*,

³ The Government's Brief did not contain the same mistake and maintained the sufficiency of the evidence.

886 F.3d 1 (1st Cir. 2018) (No. 16-1035)). However, it is irrelevant whether or not Padilla slept in the room because the evidence showed the contraband was found in the same room containing items belonging to Padilla and in the same house he owned, visited, slept in, and made mortgage payments on. (*See* Cr. ECF No. 147 at 80-82). The jury was entitled to infer that because Padilla used a room of the house to store items he acknowledged were his, Padilla knew of the contraband found in that very same room. *United States v. Matthews*, 498 F.3d 25, 31 (1st Cir. 2007) (stating that the jury is “entitled to rely on plausible inferences.”).

The record is clear that the ammunition was found in a room that while not Padilla’s bedroom, he had control over. Padilla used the room as storage for mannequins and toy guns that he used as props to film movies. (Cr. ECF No. 147 at 80). Furthermore, identification documents belonging to Padilla were found in that same room with the movie props and contraband. (*Id.* at 81). The jury could have reasonably inferred that Padilla knew of the marijuana and ammunition found in the storage room filled with his movie props. (*Id.* at 82). While a factfinder could have plausibly inferred that the contraband did not belong to Padilla because of the messy condition of the house and the fact that the house was inherited from Padilla’s father, the jury inferred otherwise. Among competing plausible inferences, the Court “must choose the inference that best fits the prosecution’s theory of guilt.” *United States v. Ruiz*, 105 F.3d 1492, 1495 (1st Cir. 1997). Following this rule, the Court of Appeals would have chosen the inference that supported Padilla’s guilt as it could be reasonably gleaned that he had knowledge of the contraband. Whether or not Padilla slept in the bedroom with the mannequins and contraband makes little difference in the plausibility of the inference because he clearly used the room for storage, indicating control and constructive possession over the items found in that room. Therefore, Padilla has failed to show that but for appellate counsel’s error, the result of his appeal would have been different. *See*

Williams v. Taylor, 529 U.S. 362, 391 (2000) (“To establish prejudice [petitioner] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

B. Appellate counsel exercised reasonable judgment in choosing which issues to include in her brief.

Appellate counsel has great latitude in determining appellate issues. Padilla faults his appellate counsel for not raising particular arguments on appeal or not sufficiently developing them. (Cv. ECF No. 1 at 1-2). However, the fact that appellate counsel did not raise every possible issue on appeal does not render her ineffective. The right to effective counsel “does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” *Engle v. Isaac*, 456 U.S. 107, 134 (1982). Moreover, the Supreme Court has unequivocally rejected the assertion that effective assistance requires litigation of every conceivable issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 52 (1983) (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”). Furthermore, Padilla has not shown that he would have prevailed on the merits had appellate counsel presented his underlying claims.

As to Padilla’s claim that counsel should have developed a theory of innocence based on a change in the Puerto Rico weapons law (Cv. ECF No. 1-1 at 5), it is unlikely he would have prevailed on appeal. Appeals courts cannot weigh evidence or make credibility judgments and must view the evidence in the light most favorable to the government. *See United States v. Ofray-Campos*, 534 F.3d 1, 31–32 (1st Cir. 2008). As explained above, the jury could infer that Padilla knowingly possessed the ammunition, given Padilla’s admitted control of other items in the house, and including items in the particular room where the rounds of ammunition were found. Regardless of whether his father could have lawfully purchased the ammunition, it still did not match the

firearms within the house. Even if submitted to the appellate court, this fact would have changed nothing. The appeals court must reject only the evidentiary interpretations that are “unreasonable, insupportable, or overly speculative, and must uphold any verdict that is supported by a plausible rendition of the record.” *Id.* at 32 (quoting *United States v. Hernandez*, 218 F.3d 58, 64 (1st Cir. 2000)). Given the evidence on record, the jury’s inference that Padilla knowingly possessed the ammunition found in the room filled with his movie props is perfectly reasonable. As such, there would be no reason to overturn this finding on appeal even if the Court of Appeals had been presented with a plausible alternative theory.

Furthermore, Padilla’s appellate counsel was not ineffective for failing to raise additional arguments to contest the district court’s denial of a longer trial continuance. Appellate counsel developed an argument around how the district court’s denial of a longer continuance violated Padilla’s Sixth Amendment rights. (Brief for Appellant at 11-15, *United States v. Padilla-Galarza*, 886 F.3d 1 (1st Cir. 2018) (No. 16-1035)). When evaluating this claim, the Court of Appeals found that the district court did not abuse its discretion in denying the requested continuance and agreed with the district court’s assessment that the case was not very complicated and that additional continuances were unnecessary. *Padilla-Galarza*, 886 F.3d at 8. The fact that the Court of Appeals rejected Padilla’s arguments regarding the denial of continuance does not mean that appellate counsel was ineffective. “That the defense failed to prevail does not mean that counsel rendered ineffective assistance.” *Campuzano v. United States*, 976 F. Supp. 2d 89, 119 (D.P.R. 2013). Under *Strickland*, “counsel is not incompetent merely because [s]he may not be perfect.” *Id.* at 120 (quoting *Arroyo v. United States*, 195 F.3d 54, 55 (1st Cir.1999)).

In addition, Padilla cannot show that he would have prevailed on appeal if he argued that the district court’s denial of the continuance resulted in his inability to procure an expert and in

turn prejudiced him. In order to prove that the district court unfairly denied him a continuance, Padilla needed to show that the denial amounted to “an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.” *United States v. Zimny*, 873 F.3d 38, 53 (1st Cir. 2017). The relevant issue is not whether securing an expert could have helped Padilla’s case⁴ but whether the district court arbitrarily denied him a continuance.

The record shows that Padilla went to great lengths to delay the trial, using his own decision to proceed *pro se* as an excuse, rather than attempting to secure an expert in time. Between the pretrial conference held on August 7, 2015 and trial which started on August 26, Padilla made several *pro se* filings including a motion for recusal alleging the district court was biased against him. (Cr. ECF No. 93). In its order denying the motion for recusal, the Court stated that it suspected the motion for recusal was because of the Court’s unwillingness to further continue the trial and that Padilla must bear the consequences of his decision to represent himself. (Cr. ECF No. 94). It was not until two days before trial that Padilla submitted a notice of intent to use an expert witness at trial (Cr. ECF No. 95), which was granted despite being filed last minute. (Cr. ECF No. 99). The record shows that Padilla focused his energy on delaying the trial instead of securing an expert and that the Court sufficiently accommodated him. His new arguments in favor of a continuance

⁴ In any event, a defense expert’s finding of the net weight or the purity of a mixture containing a detectable amount of marijuana would not have changed the outcome of the case. The 1,293.1 grams of marijuana were wrapped in cellophane, which would have contributed only a negligible amount to the weight of the drugs. (See Cr. ECF No. 147 at 203). Padilla was charged with possessing a mixture containing a detectable amount of marijuana, not a minimum amount which would have triggered an enhanced penalty. A small variation in the weight measurements would not have affected the outcome. Furthermore, a finding regarding the purity of the substance would not have affected the penalty since both the statute and the Sentencing Guidelines go by the total weight of the mixture without regard to purity. “By measuring the quantity of the drugs according to the ‘street weight’ of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.” *Chapman v. United States*, 500 U.S. 453, 465 (1991).

do little to show that the court acted arbitrarily or abused its discretion. They would have made little difference on appeal. For this reason, appellate counsel was not ineffective for failing to develop additional arguments regarding the continuance. *See Cofske v. United States*, 290 F.3d 437, 444-45 (1st Cir. 2002) (noting how both trial and appellate counsel are often well advised to choose their most promising arguments and are not obliged to raise less promising ones in order to provide effective assistance).

II. Padilla's claim of government and prosecutorial misconduct is procedurally defaulted.

Since Padilla did not raise the issue of government misconduct on direct appeal, this claim is procedurally defaulted. "Under the longstanding procedural default rule, [a] nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." *Damon v. United States*, 732 F.3d 1, 4 (1st Cir. 2013) (internal quotation marks omitted); *see also Bousley v. United States*, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal quotation marks omitted).

A procedurally defaulted claim is usually barred from collateral review, unless the petitioner can show cause for the default and prejudice resulting from it, or he can show that he is actually innocent of the offense. *Oakes v. United States*, 400 F.3d 92, 95 (1st Cir. 2005). Padilla attempts to surpass the procedural bar by claiming that the alleged misconduct resulted in a violation of his due process rights. (Cv. ECF No. 1 at 18). However, this argument is unavailing. Review of prosecutorial misconduct claims on a 2255 petition is "quite limited." *Casas v. United States*, 576 F.Supp.2d. 226 at 232 (D.P.R. 2008) (quoting *Tankleff v. Senkowski*, 135 F.3d 235, 252 (2d Cir. 1998)). In order to prevail on a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the government's conduct "so infected the trial with unfairness as to make

the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Padilla is unable to make this showing as his allegations of misconduct are unsupported by the record.

Padilla accuses the prosecution of eliciting perjured testimony from FBI Agent Tews. (Cv. ECF No. 1 at 19). He cites the evidence logs as proof of this allegation because Tews testified he found the marijuana in Padilla’s closet but the name in the evidence log is that of Hector Cintrón. (*Id.*). The trial transcript, however, explains away this apparent contradiction. When asked by the prosecution what he did after finding the marijuana, Tews testified as follows:

The number was placed on it that was shown in the prior photograph and the photographer came and took a picture of where it was located. Once that was completed, I picked up the marijuana and brought it outside to the evidence collection table where Task Force Officer Hector Cintron took possession of it as the collector and signed the chain of custody accepting the two packages of marijuana.

(Cr. ECF No. 147 at 84, ¶¶ 18-24) (emphasis added). Tews’s testimony at trial reveals that Task Force Officer Hector Cintrón was in charge of collecting evidence at the evidence table and that he filled out the chain of custody and evidence logs. While Tews’s name was not in the evidence forms, this is not proof of misconduct or fabrication. It is clear from the record that Agent Cintrón was in charge of the evidence collection table during the execution of the search warrant. This explains why Agent Cintrón’s name is on the evidence logs even though he did not find the contraband himself.

Padilla also alleges that the 9mm bullet found in the safe where he kept his toy guns was planted by transferring it from a bag of bullets found in another room. (See Cv. ECF No. 1 at 13). He claims that the evidence log proves the fabrication because the bag of bullets was logged before the single bullet. (*Id.*). However, as shown by Agent Tews’s testimony, the evidence log only indicates when Agent Cintrón logged the evidence after it was found by other agents.

Approximately 25 agents participated in the execution of the warrant. (Cr. ECF No. 147 at 72). Therefore, contrary to Padilla's insinuation, multiple pieces of evidence in different rooms could have been found at the same time. Padilla further alleges that the photographs of the scene are evidence that government agents altered the scene, particularly that documents belonging to Padilla were planted because they are not visible in some photographs and claims that his Social Security card, business card, and bills in his name were not photographed where they were found. (Cv. ECF No. 1 at 17). However, this is not evidence of misconduct or fabrication. Per Tews's testimony, the Social Security card and business card in Padilla's name were inside an envelope. (Cr. ECF No. 147 at 80, ¶¶22-24). Therefore, they would not have been visible when the envelope was discovered. Other than Padilla's wishful conjecture, nothing in the evidence logs or photographs suggests that government agents fabricated evidence or altered the crime scene in any way.

As to Padilla's claim that the government delayed disclosure of evidence, his arguments are misleading. Padilla claims that he was unable to review the evidence against him until a week before his trial, on August 19, 2015, and that this entitles him to 2255 relief. (Cv. ECF No. 1 at 21). This is solely attributable to Padilla's decision to dismiss his counsel a week before trial and has nothing to do with actions or omissions on the part of the government. The record shows that the government fully complied with discovery by timely relaying the discovery to Padilla's counsel. The first discovery letter is dated February 11, 2015, over six months before trial. (See Exhibit 1). Along with a second discovery letter, dated March 17, 2015, the government disclosed a video of Padilla's interview with law enforcement agents. (See Exhibit 2). A final discovery letter was sent July 27, 2015. (See Exhibit 3). In all discovery letters, the government represented that

they had not uncovered *Brady* evidence.⁵ The discovery relayed in February and July contained FBI 302 Reports, which were potential *Jencks* evidence.⁶ These disclosures were made well in advance of the *Jencks* deadline, which was 5 days before trial. (Cr. ECF No. 11), and well in advance of the deadline required under the Jencks Act, See 18 U.S.C. § 3500(b) (requiring production of a witness' statement after that witness has testified). In the pretrial conference held on August 7, 2015, the Court noted that standby counsel Vázquez could confer with Padilla's former counsel, that Padilla had access to the discovery documents, and that Vázquez could meet with Padilla as standby counsel. (Cr. ECF No. 145 at 24). Rather than delayed disclosure, the record reflects that the government complied with its discovery obligation and any delay in Padilla personally receiving discovery was a result of his decisions.

Furthermore, absent evidence that the government acted in bad faith, Padilla must prove he suffered prejudice as a result of any alleged delayed disclosure, of which there was none. *See United States v. Kifwa*, 868 F.3d 55, 60–61 (1st Cir. 2017). Padilla has the burden to prove prejudice. *Id.* at 61. He has not made a successful showing that he suffered prejudice as a result of the government's alleged actions. In addition, Padilla has failed to show the government engaged in any misconduct, let alone misconduct “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *United States v. Djokich*, 693 F.3d 37, 43–44 (1st Cir. 2012). Padilla has failed to overcome the procedural bar on his claim of government misconduct and the claim must be dismissed.

⁵ Padilla makes much ado about the government's alleged failure to produce *Brady* material, yet never alleges what specifically the government failed to produce that would constitute *Brady*.

⁶ In his “Motion requesting *Jencks* material” dated August 3, 2015, Padilla admitted to receiving “voluminous discovery” including 302 Reports, which could constitute *Jencks* evidence. (See Cr. ECF No. 57). The motion requested additional disclosure of *Jencks* evidence possibly contained in grand jury materials. (*Id.* at 1). The grand jury materials were not discoverable under *Jencks* because no witness who testified at trial in connection with this case testified before the grand jury.

III. Padilla is not entitled to discovery or an evidentiary hearing.

Padilla's request for discovery of the case agents' disciplinary records (Cv. ECF No. 1 at 20, n 2), amounts to a blatant fishing expedition and should be denied. "[A] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Donald v. Spencer*, 656 F.3d 14, 15-16 (1st Cir. 2011). Rule 6(a) of the Rules Governing § 2255 Proceedings provides that leave of court is required in order to conduct discovery in a 2255 proceeding and that it may be granted for "good cause." Per Rule 6(b), Padilla "must provide reasons for the request." However, Padilla has not specified the reasons why the Court should order the production of discovery. In addition, he has failed to show a basis for his request other than speculation about apparent inconsistencies in the evidence log. "To obtain leave to take discovery a § 2255 petitioner must show some basis for discovery more substantial than [a] purely speculative and hypothetical basis." *Dziurgot v. United States*, No. 90-1347, 1990 U.S. App. LEXIS 20414, at *15 (1st Cir. Nov. 16, 1990). Padilla does not explain how the law enforcement agents' disciplinary records are relevant when there is no evidence of misconduct. In order to demonstrate "good cause", Padilla must present "specific allegations that give a court reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Donald*, 656 F.3d at 16. Padilla has failed to show "good cause". The speculative hope that discovery will unearth evidence that will establish facts that might entitle Padilla to relief is precisely the sort of "fishing expedition" that a § 2255 proceeding is not permitted to become. *See id.*

It is well established that "[e]videntiary hearings on § 2255 petitions are the exception, not the norm, and there is a heavy burden on the petitioner to demonstrate that an evidentiary hearing is warranted." *Moreno-Morales v. United States*, 334 F.3d 140, 145 (1st Cir. 2003) (citing *United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993)). There is no need to hold an evidentiary hearing

when the § 2255 petition “(1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case.” *Id.* (quoting *United States v. DiCarlo*, 575 F.2d 952, 954 (1st Cir. 1978)). Padilla’s petition does not establish the burden necessary to hold an evidentiary hearing. His allegations of ineffective assistance and government misconduct are unsupported by the record. Accordingly, Padilla should not be granted an evidentiary hearing, should he request one.

For the reasons stated above, the Court should dismiss Padilla’s motion to vacate, set aside or correct his sentence. Finally, because Padilla has failed to make a substantial showing of a denial of a constitutional right, the Court should decline to issue a certificate of appealability in the event he makes such a request.

WHEREFORE, in view of the foregoing, the United States of America respectfully requests that this Honorable Court **DENY** Padilla’s petition without the need of an evidentiary hearing and dismiss the case with prejudice.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this October 4, 2019.

W. STEPHEN MULDROW
United States Attorney

/s/ Mariana E. Bauzá-Almonte
Mariana E. Bauzá-Almonte – G00309
Assistant United States Attorney
Chief Appellate Division
United States Attorney's Office
Torre Chardón, Suite 1201
350 Carlos Chardón Ave.
San Juan, Puerto Rico 00918
Tel. (787) 766-5656

CERTIFICATE OF SERVICE

I hereby certify that on this same date, October 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Mariana E. Bauzá-Almonte
Assistant U.S. Attorney
Chief, Appellate Division



U.S. Department of Justice

Rosa Emilia Rodríguez-Vélez
United States Attorney
District of Puerto Rico

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San Juan, Puerto Rico 00918

Alexander L. Alum
Assistant United States Attorney

February 11, 2015

Anita Hill-Adames, Esq.
Anita Hill Law Office
PO Box 9023272
San Juan, Puerto Rico 00918

Re: United States v. Jose Padilla-Galarza
Criminal No. 15-78(JAF)
First Discovery Package

Dear Counsel:

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and by order of the Court, we are providing you with the following discovery in the above-referenced case.

As you are aware, Rule 16 generally entitles you to pretrial disclosures of certain categories of information in possession of the United States. They are as follows:

- a. Recorded and written statements made by a defendant before or after the arrest and the substance of any oral statements made by the defendant to any person known to the government agent;
- b. A defendant's prior criminal record, if any;
- c. Document and tangible objects to be introduced by the United States during its case-in-chief, or taken from the possession of a defendant;
- d. Reports of scientific tests and medical examination; and
- e. A written summary of expert witness(es) testimony.

As to the categories set forth above, the United States recognizes its continuing duty to exercise due diligence in disclosing material which may later become known.

The Rule 16 materials that are being provided with this letter are described below:

Item	DESCRIPTION	Pages of PDF
1	Federal Search Warrant	1-13
2	FBI Property Receipt	14
3	FBI 302 dated January 13, 2015 Describing Arrest of Defendant	15
34	Federal Arrest Warrant	16
65	Prisoner Remand Form	17
76	FBI 302 dated January 21, 2015 Describing Seizure of 1,336 grams of Marihuana from Defendant's Residence	18
87	FBI 302 dated January 21, 2015 Memorializing Execution of Search Warrant	19
98	FBI 302 dated January 21, 2015 Memorializing Processing of Defendant	20
109	Fingerprints	21-22
110	FBI 302 Summarizing Defendant's Post-Arrest Interview (recorded)	23-24
1211	Waiver of Rights Form	25
1312	FBI 302 dated January 21, 2015 Summarizing Post-Arrest Interview (not recorded)	26-30
1411	Waiver of Rights Form	31
1514	Photos Taken during Execution of Search Warrant	32-259
1616	Audio recording of Jose Padilla Galarza's Interview	

The United States intends to use at trial the above-listed discovery materials and information contained therein. Therefore, in accordance with Rule 12(b)(4)(A) of the Federal Rules of Criminal Procedure, the United States designates such materials and information as evidence intended to be used at trial.

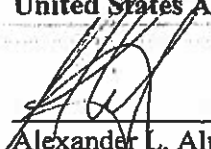
The United States is aware of its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to divulge exculpatory evidence in a timely manner. To date, no exculpatory evidence has been uncovered. However, the United States will provide any exculpatory evidence which may be uncovered in the future.

The United States respectfully reminds you that Rule 16 of the Federal Rules of Criminal Procedure gives the United States a reciprocal right of discovery, compliance upon which we will, of course, insist. Therefore, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, the United States formally requests reciprocal discovery of: (a) all documents and objects in the defense's possession that the defense intends to use at trial, (b) reports of examinations and tests in the defense's possession that the defense intends to use at trial, and (c) notice of any expert witnesses that the defense intends to call at trial.

Further, the United States formally requests that the defendant provide notice to the undersigned Assistant United States Attorney, in writing and according to the terms and conditions specified in Rules 12.1, 12.2, and 12.3 of the Federal Rules of Criminal Procedure, of any potential alibi, insanity, or public-authority defense which the defendant intends to assert. Absent timely disclosure, the defense may be precluded from offering those materials as evidence. See, e.g., United States v. Rodriguez-Cortes, 949 F.2d 532, 546 (1st Cir. 1991) (holding that courts have discretion to exclude evidence for failure to comply with Rule 16). Finally, please note that attached to this letter, there is a page entitled "Acknowledgment" for your review and signature. Thank you for your prompt attention to the requests included in this letter.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

By:



Alexander L. Alum
Assistant United States Attorney

ACKNOWLEDGMENT

I, as attorney of record for the above mentioned defendant, hereby request discovery under Fed. R. Crim. P. 16 and acknowledge receipt of this letter and materials listed therein. It is understood that I reserve the right to file any motion I deem appropriate.

I also hereby acknowledge that it is the official policy of the Office of the United States Attorney for the District of Puerto Rico that "Plea Agreements" between defendant and/or defendant's counsel and the United States are not valid and binding until after they have been approved in writing and signed by the United States Attorney, Rosa Emilia Rodríguez-Vélez, or by AUSA José A. Ruiz, Chief, Criminal Division. The Office of the United States Attorney is neither bound by, nor responsible for, any tentative agreements or representations that legal counsel makes to a defendant prior to such formal agreement.

In the event that this discovery package is retrieved by a third-party representative of Counsel for the defendant, Counsel for the defendant and the defendant hereby expressly waive any and all claims concerning non-receipt of discovery materials. Further, Counsel for the defendant and the defendant agree that they shall be precluded from requesting any remedy from the court based upon a claim that the instant discovery package does not contain all of the discovery materials described herein or that same was not received.

2/18/2015

DATE

Julia Hill

NAME OF PERSON RECEIVING DISCOVERY

Cecilia Hill

SIGNATURE OF PERSON RECEIVING DISCOVERY



U.S. DEPARTMENT OF JUSTICE
ROSA EMILIA RODRÍGUEZ-VÉLEZ
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March 17, 2015

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anitahill88@outlook.com

Counsel for defendant: Jose Padilla-Galarza

Re: United States v. Jose Padilla Galarza
Criminal No. 15-78 (JAF)

Dear Counsel:

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and by order of the Court, we are providing you with the following discovery in the above-referenced case.

As you are aware, Rule 16 generally entitles you to pretrial disclosures of certain categories of information in possession of the United States. They are as follows:

- a. Recorded and written statements made by a defendant before or after the arrest and the substance of any oral statements made by the defendant to any person known to be a government agent;
- b. A defendant's prior criminal record, if any;
- c. Document and tangible objects to be introduced by the United States during its case-in-chief, or taken from the possession of a defendant;
- d. Reports of scientific tests and medical examination; and,
- e. A written summary of expert witness testimony;

As to the category as set out above, the United States of America recognizes its continuing duty to exercise due diligence in disclosing material which may later become known to us before the trial of this case.

Discovery Letter Dated 3/17/2015 Re: U.S. v. Jose Padilla-Galarza CR 15-78 (JAF)

The Rule 16 materials that are being provided with this letter are described below

Item	DESCRIPTION	Page
1	DVD containing the interview of Jose Padilla-Galarza	

The United States intends to use at trial the above-listed discovery materials, exhibits, and information contained therein. Therefore, the United States designates such materials, exhibits, and information as evidence intended to be introduced at trial in accordance with Rule 12(b)(4)(A) of the Federal Rules of Criminal Procedure.

The United States recognizes its obligation under Brady v. Maryland, 373 U.S. 83 (1963) to divulge exculpatory evidence in a timely manner. As of this date, no exculpatory evidence has been uncovered. However, the United States will provide any exculpatory evidence which may be uncovered in the future.

We respectfully remind you that Rule 16 also gives the United States of America a reciprocal right of discovery, compliance with which we will, of course, insist upon. Therefore, pursuant to and to the extent to which is mandated in Rule 16(b) of the Federal Rules of Criminal Procedure, the United States formally requests reciprocal discovery of (a) all documents and objects in the defense's possession that the defense intends to use at trial, (b) reports of examinations and tests in the defense's possession that the defense intends to use at trial, and (c) notice of any expert witnesses that the defense intends to call at trial.

Further, the United States of America formally requests that the defendant provide notice to the undersigned Assistant United States Attorney, in writing and according to the terms and conditions specified in Rules 12.1, 12.2, and 12.3 of the Federal Rules of Criminal Procedure, of any potential alibi, insanity, or public authority defense that the defendant intends to assert.

Finally, please note that attached to and incorporated to the last page of this letter, there is a page entitled acknowledgment statement for your review and signature.

Thank you for your prompt attention to the requests included in this letter.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

By S/ Alexander L. Alum
Alexander L. Alum
Assistant U.S. Attorney

ACKNOWLEDGMENT

I, as attorney of record for the above mentioned defendant, hereby request discovery under F.R.Cr.P. 16 and acknowledge receipt of this letter and materials listed therein. It is understood that I reserve the right to file any motion I deem appropriate.

I also hereby acknowledge that it is the official policy of the Office of the United States Attorney for the District of Puerto Rico that "Plea Agreements" between defendant and/or defendant's counsel and the Government are not valid and binding until after they have been approved in writing and signed by the United States Attorney, Rosa Emilia Rodríguez-Vélez, or by AUSA José A. Ruiz, Chief, Criminal Division. The Office of the United States Attorney is not bound or responsible for any tentative agreements or representations that legal counsel makes to a defendant prior to such formal agreement.

In the event that the instant discovery package is retrieved by a third-party representative of Counsel for the defendant, Counsel for the defendant and the defendant hereby expressly waive any and all claims concerning non-receipt of discovery materials and agree that they shall be precluded from arguing at any court proceeding or requesting any remedy from the court based upon a claim that the instant discovery package does not contain all of the discovery materials described herein or that same was not received.

3-19-15

DATE

William Rodriguez**NAME OF PERSON RECEIVING DISCOVERY**William Rodriguez**SIGNATURE OF PERSON RECEIVING DISCOVERY**



U.S. Department of Justice

Rosa Emilia Rodríguez-Vélez
United States Attorney
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Alexander L. Alum
Assistant United States Attorney

July 27, 2015

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John Connors
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San Juan, Puerto Rico 00918
John_connors@fd.org

Re: United States v. Jose Padilla-Galarza
Criminal No. 15-78 (JAF)
Pre-Trial Discovery Package

Dear Counsel:

As we discussed, the government is reproducing all the discovery that has been already been tendered in connection with this case Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and by order of the Court.

As you are aware, Rule 16 generally entitles you to pretrial disclosures of certain categories of information in possession of the United States. They are as follows:

- a. Recorded and written statements made by a defendant before or after the arrest and the substance of any oral statements made by the defendant to any person known to

- the government agent;
- b. A defendant's prior criminal record, if any;
- c. Document and tangible objects to be introduced by the United States during its case-in-chief, or taken from the possession of a defendant;
- d. Reports of scientific tests and medical examination; and
- e. A written summary of expert witness(es) testimony.

As to the categories set forth above, the United States recognizes its continuing duty to exercise due diligence in disclosing material which may later become known.

The Rule 16 materials that are being provided with this letter are described below:

Item	DESCRIPTION	Pages
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2	FBI Property Receipt	14
3	FBI 302 dated January 13, 2015 Describing Arrest of Defendant	15
4	Federal Arrest Warrant	16
5	Prisoner Remand Form	17
6	FBI 302 dated January 21, 2015 Describing Seizure of Marihuana from Defendant's Residence	18
7	FBI 302 dated January 21, 2015 Memorializing Execution of Search Warrant	19
8	FBI 302 dated January 21, 2015 Memorializing Processing of Defendant	20
9	Fingerprint Card	21-22
10	FBI 302 summarizing Defendant's Post-Arrest Recorded Interview	23-24
11	Defendant's Waiver of Rights Form	25
12	FBI 302 summarizing Defendant's Unrecorded Post-Arrest Interview	26-30
13	Defendant's Waiver of Rights Form	31
14	Photos Taken During Execution of Search Warrant	32-259
15	FBI 302 dated January 21, 2015 Memorializing Transport of Marihuana to FBI Evidence Room	260
16	FBI 302 dated January 21, 2015 Memorializing Interview of Maria Padilla Menendez	261
17	FBI 302 dated January 21, 2015 Memorializing Interview of William Perez-Padilla	262

18	FBI 302 dated January 21, 2015 Memorializing Surveillance of Padilla-Galarza's Residence on December 30, 2014.	263
19	FBI Evidence Log Listing Items Recovered from Padilla-Galarza's Residence	264-287
20	FBI Property Receipt	288
21	FBI 302 dated January 23, 2015 Listing Personnel who Participated in Search of Padilla-Galarza's Residence	289-290
22	FBI 302 dated January 29, 2015 Requesting Drug Analysis from DEA	291-292
23	FBI 302 dated January 31, 2015 Memorializing Witness Interview	293-294
24	FBI 302 dated February 10, 2015 Memorializing Retrieval of Defendant's Certified Judgment of Conviction	295
25	Copy of Certified Judgment of Conviction for Defendant Padilla-Galarza	296-300
26	FBI 302 dated March 3, 2015 Memorializing Transport of Marihuana to Instituto de Ciencias Forenses	301
27	ICF Document Memorializing Request for Drug Analysis	302
28	FBI 302 Dated March 9, 2015 Memorializing Retrieval of Marihuana from ICF	303
29	FBI 302 dated May 14, 2015 Memorializing Request for Firearms Trace for Smith & Wesson Firearm Bearing Serial Number TVF1242	304
30	ATF Firearms Trace for Smith & Wesson Firearm Bearing Serial Number TVF1242	305
31	Translation/Transcription of Jose Padilla-Galarza's Recorded Post-Arrest Interview	306-732
32	Ammunition Chain of Custody Documents	733-742
33	Marihuana Chain of Custody Documents	743-747
34	ATF Report of Investigation Memorializing Interstate Nexus Expert's Finding that Ammunition Seized from Defendant's Residence Traveled in Interstate / Foreign Commerce.	748-749
35	Audio of Defendant's Recorded Post-Arrest Interview	
36	Audio of MDC Calls	

The United States intends to use at trial the above-listed discovery materials and information

contained therein. Therefore, in accordance with Rule 12(b)(4)(A) of the Federal Rules of Criminal Procedure, the United States designates such materials and information as evidence intended to be used at trial.

The United States is aware of its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to divulge exculpatory evidence in a timely manner. To date, no exculpatory evidence has been uncovered. However, the United States will provide any exculpatory evidence which may be uncovered in the future.

The United States respectfully reminds you that Rule 16 of the Federal Rules of Criminal Procedure gives the United States a reciprocal right of discovery, compliance upon which we will, of course, insist. Therefore, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, the United States formally requests reciprocal discovery of: (a) all documents and objects in the defense's possession that the defense intends to use at trial, (b) reports of examinations and tests in the defense's possession that the defense intends to use at trial, and (c) notice of any expert witnesses that the defense intends to call at trial.

Further, the United States formally requests that the defendant provide notice to the undersigned Assistant United States Attorney, in writing and according to the terms and conditions specified in Rules 12.1, 12.2, and 12.3 of the Federal Rules of Criminal Procedure, of any potential alibi, insanity, or public-authority defense which the defendant intends to assert. Absent timely disclosure, the defense may be precluded from offering those materials as evidence. See, e.g., United States v. Rodriguez-Cortes, 949 F.2d 532, 546 (1st Cir. 1991) (holding that courts have discretion to exclude evidence for failure to comply with Rule 16). Finally, please note that attached to this letter, there is a page entitled "Acknowledgment" for your review and signature. Thank you for your prompt attention to the requests included in this letter.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

By: _____

Alexander L. Alum
Assistant United States Attorney

ACKNOWLEDGMENT

I, as attorney of record for the above mentioned defendant, hereby request discovery under Fed. R. Crim. P. 16 and acknowledge receipt of this letter and materials listed therein. It is understood that I reserve the right to file any motion I deem appropriate.

I also hereby acknowledge that it is the official policy of the Office of the United States Attorney for the District of Puerto Rico that "Plea Agreements" between defendant and/or defendant's counsel and the United States are not valid and binding until after they have been approved in writing and signed by the United States Attorney, Rosa Emilia Rodríguez-Vélez, or by AUSA José A. Ruiz, Chief, Criminal Division. The Office of the United States Attorney is neither bound by, nor responsible for, any tentative agreements or representations that legal counsel makes to a defendant prior to such formal agreement.

In the event that this discovery package is retrieved by a third-party representative of Counsel for the defendant, Counsel for the defendant and the defendant hereby expressly waive any and all claims concerning non-receipt of discovery materials. Further, Counsel for the defendant and the defendant agree that they shall be precluded from requesting any remedy from the court based upon a claim that the instant discovery package does not contain all of the discovery materials described herein or that same was not received.

7/28/15
DATE

Elisamar Salas
NAME OF PERSON RECEIVING DISCOVERY

E. Salas
SIGNATURE OF PERSON RECEIVING DISCOVERY

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

JOSE PADILLA-GALARZA

CIVIL NO. 19-cv-01415-DRD

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

REPLY

TO THE HONORABLE COURT:

HEREIN appears petitioner Jose Padilla Galarza through his Court appointed counsel and most respectfully prays and requests:

The Government filed a Response that contains misleading/speculative arguments and it appears when they prepared their motion, failed to study the record which reflects that the arguments they have made concerning their own documentation is false.

1- THE GOVERNMENT'S ARGUMENT THAT PADILLA-GALARZA'S APPELLATE COUNSEL'S INCORRECT REPRESENTATION OF MATERIAL FACTS TO THE COURT OF APPEALS DID NOT AFFECT THEIR DECISION TO SUSTAIN THE SUFFICIENCY OF EVIDENCE ARGUMENT IS FALSE, AND SPECULATES WHEN THEY CLAIM THE APPELLATE COURT WOULD HAVE SUSTAINED THE CONVICTION EVEN IF THE INCORRECT, HIGHLY PREJUDICIAL MISSTATEMENTS HAD NOT BEEN MADE. THE MISREPRESENTATIONS WERE OF SUCH IMPORTANCE AND EVIDENT TO ANY APPELLATE LAWYER THAT

HAD STUDIED THE RECORD THAT A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WARRANTED.

IN ADDITION, CONTRARY TO THE GOVERNMENT'S ARGUMENT THE RECORD REFLECTS APPELLATE COUNSEL WAS SLOPPY; FAILING TO CITE IN HER BRIEF MOTIONS THAT CONTAINED ADDITIONAL REASONS THAT JUSTIFIED GRANTING A CONTINUANCE AS REQUESTED BY PADILLA-GALARZA THAT PREJUDICED HIS CONTINUANCE ASSIGNMENT OF ERROR ON APPEAL; FAILED TO CITE RELEVANT LOCAL LAW THAT HELPED HIS SUFFICIENCY OF EVIDENCE ARGUMENT AND FAILING TO ARGUE THAT THE OPINION THAT THE MARIJUANA WAS WORTH \$9,000.00 ON THE STREET WAS OBJECTIONABLE IN THE ABSENCE OF A NET WEIGHT DRUG TEST.

The Government had the burden to establish beyond a reasonable doubt that Padilla-Galarza knowingly and intentionally possessed the marijuana and bullets found in the messy, unkept, cluttered house that he inherited from his father who had a license to possess and in fact owned several firearms. Merely because Padilla-Galarza stayed there on occasions would have never sufficed to sustain a conviction. Since the marijuana was hidden in some pants in a closet and the bullets were not in the one room he frequented but rather in other cluttered rooms, the location of the illegal contraband and bullets was crucial to any sufficiency argument.

Padilla's defense was that he was unaware of their existence and the bullets were old bullets that belonged to his father and the house had been vandalized and entered by others on various occasions. He was unaware of the existence of the marijuana hidden in some pants that were located in a closet of one of the unkept, cluttered rooms that he did not frequent. Again,

location of the contraband was crucial to the appellate Court's sufficiency argument analysis.

What is clear was that the contraband and the bullets were not located in the one room Padilla-Galarza stayed.

Incredibly Padilla-Galarza's appellate counsel repeatedly made the incorrect, false, highly prejudicial misrepresentations to the appellate Court that the marijuana and the bullets were all located in that room that he frequented. (Docket 1-2; Exh. 1, pages 4-5 and 23, cited in Petitioners Memorandum in Support at page 3).

The appellate Court's opinion reflects that it relied on that material misrepresentation when it denied his sufficiency argument making specific reference to said incorrect reading of the record:

"The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight. In addition, the Government's evidence sufficed to show that the bedroom in which the ammunition and the marijuana were found in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is "entitled to rely on plausible inferences" from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla¹, including: photo identification cards; receipts in his name from the previous year; old correspondence addresses to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies."

In the face of the evidence, Padilla nevertheless contends that the evidence was insufficient to prove that he knowingly possessed the contraband". U.S. v. Padilla-Galarza, 886 F.3d Pg. 1, 5-6 (1st Cir. 2018) (Docket 1,3; Exh. 2, pg. 7).

In its Opposition the Government concedes that "appellate counsel did make the mistake when she stated in the Brief that ammunition and marijuana was found in the more organized room...". (Docket 24, pg. 4) Incredibly, notwithstanding the language of the appellate opinion

¹ It is obvious from the above citation that the Government allowed the appeals Court to be misled by the misstatement and never alerted it to the serious misrepresentation his counsel had made of the record. That could be considered misconduct.

that demonstrates it relied on that material misrepresentation when it denied the sufficiency argument, the Government in its Opposition has the gall to argue that; "*Padilla cannot prove he was prejudiced by appellate counsel's mistake.*" (Govt. Opp. Docket 24, pg. 4). The cited appellate opinion demonstrates otherwise.

Quite the contrary had the facts been properly presented to the appellate Court it could have concluded and applied its precedents where the Court has held:

"If the 'evidence viewed in the light most favourable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,' this Court must reverse the conviction. This is so because... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favourable to the prosecution, 'a reasonably jury must necessarily entertain a reasonable doubt.' U.S.A. v. Sanchez, 961 F.2 1169, 1173 (5th Cir.) (citations omitted), cert. denied, 506 US 918, 113 S. Ct. 330, 121 L. Ed.2nd 248 (1992)" U.S.A. v. Flores-Rivera, 56 F.3rd 319, 323 (1st Cir. 1995); U.S.A. v. Andujar, 49 F.3rd 16, 20 (1st Cir. 1995); U.S.A. v. Fulmer, 108 F.3rd 1486, 1492 (1st Cir. 1997).

Petitioner nor this Court in deciding this issue should speculate as to what the appeals Court would have ultimately done had the record not been misrepresented since the standard of review to determine whether ineffective assistance of counsel has occurred is whether;

"(1) counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's failures, the outcome would likely have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cofsky v. U.S., 290 F.3d 437, 441 (1st Cir. 2002)." U.S. v. Cirilo-Munoz, 404 F.3d 527, 530-(1st Cir. 2005). As Strickland recognizes; "A reasonable probability... is a probability sufficient to undermine confidence in the outcome." Ibid at 694. Said standard includes the appellate courts. Ibid at 695.

In this case there is no doubt both requirements have been met since the failure to correctly cite such an important, obvious factual matter was clear. Thus, counsel's performance; 1- falls below an objective standard of reasonableness, and had she cited the record correctly; 2- it is *likely* the outcome could have been different. The error is of such magnitude it undermines confidence in the outcome. **The Government's argument that Petitioner has to conclusively**

prove a different outcome of the appeal is a misstatement of the law and the level of burden of proof.

The sloppy work of appellate counsel does not end there. Related to the sufficiency issue was appellate counsel's ineffectiveness in failing to cite Puerto Rican law that established that prior to the year 2000 owners of firearms were allowed to own bullets of different calibers from the one's they had a license to possess. (Docket 1-29). Notwithstanding the fact that she was made aware of that law and provided a copy of it prior to submitting her Brief (Docket 1-30), she failed to cite said law, allowing the prosecutor's argument that since some of the bullets found in the residence did not match those of the firearms the father had a license to possess go unchallenged to bolster a finding of guilt without the available explanation that while his father was alive the law permitted said possession all of which could have aided the Court to find reversible error: The Government in its Response tries to get around the error by arguing incorrectly that that was a credibility matter that appellate Courts do not intervene with. (Docket 24 at page 6). Since the law was never cited it never became a credibility issue as the Government argues. It is evidence of ineffective assistance because appellate lawyers are supposed to know the law and cite it when applicable. Her failure to cite the law allowed the prosecutor's argument to stand unchallenged when there was a legal explanation as to why the father could have bullets of different calibers than the weapons he possessed. Her multiple failures in correctly citing the record on crucial matters and citing important law that would have rebutted the prosecutors arguments meets the Strickland standard that her conduct so undermined the proper functioning of the adversarial process that her perfunctory Brief full of errors of significant magnitude cannot be relied on as having produced a just result. Strickland at 686.

In addition, as appears from the Memorandum in Support of the 2255 Petition (Docket 1, pg. 6-7), Padilla-Galarza's appellate counsel failed to study the record that contained multiple pro se motions and one by stand by counsel Vazquez that justified the granting of a continuance that she failed to include in her arguments. As appears from her Brief the first issue raised was that Court's error in failing to grant a continuance. (Docket 1-2, pg. 5). Yet from her Statement of the Case, Statement of Facts, and Argument (Docket 1-2, pg. 6-15), she completely failed to include the two pro se and Vazquez' motions for continuance **nor their content** in support of the failure to grant a continuance error. The appellate Court rejected the continuance error because Padilla-Galarza's counsel *"does not point to any particular reason why longer than twenty days was in fact needed, such as identifying further investigation that the defense would have needed more time to complete."* (Docket 1-3, pg. 10). From a reading of said motions cited in the Memorandum in Support (Docket 1-pg. 6-7), it is clear there were multiple legitimate arguments that should have been raised that justified granting the continuance he requested that could have led the appellate Court to conclude that the District Court had engaged in an *"unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable requests for delay"* citing U.S. v. Maldonado, 708 F.3d 38, 42 (1st Cir. 2013). The Government's Opposition fails to address the specific contents of the pro se and Vazquez' motions of continuance which his appellate counsel failed to include in her argument and statement of facts limiting itself to reciting the appellate opinion that did not have the benefit of the additional arguments that existed and making the conclusory statement that he has failed to establish that the appellate Court would have reversed without specifying why those additional arguments had no persuasive force. Such speculative, conclusory statements without any record development should not have any persuasive value and

should be rejected by the Court. In addition, Padilla-Galarza does not have to prove that the appellate Court would have found reversible error. The issue is whether appellate counsel rendered ineffective assistance in failing to study the record and cite important motions that contained multiple additional reasons that justified the continuance which were never presented in her Brief. Her half-hearted, perfunctory effort of only citing the pre-trial hearings held without going into the contents of the pro se and stand by counsel Vazquez' motions given the language of the Circuit when it denied the issue of continuance warrants a finding of ineffective assistance of counsel since her Brief left out important facts and motions that prejudiced the merits of the appeal. Strickland, supra at 687.

The Government tries to blame Padilla-Galarza as to the continuance claiming he caused the problem when he dismissed counsel Anita Hill shortly before the trial was to begin. Had appellate counsel studied the record she would have discovered that Padilla-Galarza was justified in losing faith in her since she caused him to be sent to Atlanta for a mental examination filing a motion with the Court (Docket 15- Exh. 10), and when he complained to her about it because he was sent there against his will misled him in a telephone conversation claiming it was the Court that had ordered it. (Exh. 11). The breakdown in the attorney/client relationship was entirely justified under those circumstances and the Court should have realized it was legitimate complaint that justified granting the continuance with the assistance of a new lawyer. Padilla-Galarza informed the Court about Hill's actions that caused him to request her removal as his counsel informing he no longer trusted her. (Exh. 12).

If one adds the multitude of material factual/legal errors and omissions committed by appellate counsel in preparing her Brief that affected the reasoning and analysis of the appellate Court a finding of prejudicial ineffective assistance of counsel on appeal should

be found that warrants granting 2255 relief because it could have affected the outcome of the appeal and renders the decision unreliable.

The Government in a footnote (pg. 8, fn. 4) attempts to discredit the issue about the purity of marijuana claiming it would have not affected the outcome. To begin with, its claim that the net weight would have only been affected by the wrapping is incorrect. It is well known that drugs are combined with other substances that can affect the net weight. A lot of marijuana is mixed with oregano and other substances to obtain a higher profit from sales. In addition, in order to establish that the marijuana found was fit for distribution and was worth \$9,000.00 in the street as testified by the agent could have only been established with a net test result. This failure to establish the net weight undermined all of the Government's testimony concerning the cellophane wrapped substance that for some reason was never taken out for testing. The case of Chapman v. U.S., 500 U.S. 453, 468 (1991) clearly establishes that the carrier medium is to be included "*when determining the appropriate sentence...*". It does not apply when the Government is establishing the street value of the drug as it did in this case since such a conclusion necessarily requires a determination of the net weight of the drug. For example, had the net weight of the marijuana been 10 grams it could have never been worth \$9,000.00 as testified by the agent. In this circumstance there was a legitimate argument to be made against the opinion that the drug had a street value of \$9,000.00 when the actual net weight of the drug was never determined. Appellate counsel was clearly ineffective when she failed to include that argument in her Brief since the agent's opinion that the untested marijuana had a street value of \$9,000.00 could have affected the verdict. The issue cannot be considered in isolation but rather taking the totality of failures of appellate counsel which clearly establish ineffective assistance.

II- The Government is incorrect in its argument that Padilla-Galarza procedurally defaulted his claim of Government misconduct.

The Government argues that since Padilla-Galarza failed to raise his Government misconduct claim on direct appeal the same is procedurally defaulted. (Docket 24, pg. 9). To begin with it was impossible for Padilla-Galarza to have raised said claim on direct appeal because the record was not developed as to that issue. It is basic hornbook appellate practice that you cannot include for the first time on appeal documents that are not part of the District Court record. Fed. R. App. P. 10(a); U.S. v. Pagan-Ferrer, 736 F.3d 584 (1st Cir. 2013). The 2255 Petition includes a substantial amount of documents to sustain the governmental misconduct issues that were never presented at trial nor form part of the District Court record. Thus, it was impossible for Padilla-Galarza to have raised the issue on direct appeal.

The impeachment records that constitute Brady materials were not produced by the Government in a timely manner. As appears from Document 24-3 a discovery letter dated 07/25/15 was prepared that included for the first time the Evidence Logs and Chain of Custody documents among the 749 pages of the package and multiple audio recordings provided to Eliomar Solano on 07/28/15 at MDC Guaynabo who did not deliver them to Padilla-Galarza until 08/19/15 (Docket 3-38, Exh. 45), just 6 days prior to trial which made it impossible for him to adequately study them. (Document 3-37, Exh. 44). Said delayed disclosure of Brady materials constitute an exception to the procedural default argument made by the Government and may be raised in a 2255 petition. Conley v. U.S., 415 F.3d 183, 188 (1st Cir. 2005). Here petitioner requested a continuance which was denied which prevented him from having enough time to study all of those documents for effective use at trial which has also been recognized as justification for raising it in a 2255 Petition if the defendant can establish there is a "*reasonable*

probability" the result of the proceeding would have been different if the discovery had been produced in a timely manner. As appears from the Memorandum in Support of 2255 Petition and the exhibits attached (Documents 1 to 3-38) such a standard has been met. The gross misconduct and false testimony that appears from said evidence also rises to the level of a constitutional due process violation also actionable under 2255 which the Government is precluded from trying to avoid through its procedural objection. Darden v. Wainwright, 477 U.S. 168, 181 (1986). What is worse, the Government never alerted Padilla-Galarza that the Chain of Custody and Evidence Logs constituted Brady impeachment materials, providing them in a tardy manner among hundreds of other documents precisely to prevent him from discovering the false testimony and evidence presented at trial.

It is clear from the above that Padilla-Galarza has not waived nor is precluded from raising the Government misconduct issue in this 2255 Petition.

III- The Government's allegations that Padilla-Galarza's claims of Government misconduct in the presentation of perjured testimony and alteration of the crime scene are not supported by the record are false and in fact, constitute additional misconduct on its behalf by presenting blatantly false arguments to this Court in its Response.

The Government's Response begins by falsely stating that Task force Officer Hector Cintron received from Tews the marijuana at the collection table, citing Tews perjured testimony in support of said allegation. The problem is that said testimony of Tews is false and constitutes additional perjured testimony at trial. As appears from the Evidence chain of Custody form the marijuana was collected by agent Hector Cintron who transferred it to agent Miguel Reyes. (Exh. 1). Said evidence, instead of being taken to the collection table was transported by agent Miguel Reyes to the FBI offices at Calle Chardon. (Exh. 2). Tews

never figures in any of the custody forms as having in any way participated in the initial discovery of the marijuana. (Exh. 3, pg. 19; Exh. 4, pg. 15). From the above it is clear that the Government in its response has tried to cover up the perjured testimony of agent Tews at trial by distorting their own chain of custody documents that demonstrate he lied in Court when he said he discovered the marijuana and brought it to agent Cintron at the collection table.

The record reveals that Agent Cintron was not the person receiving the seized evidence at the collection table, it was task force agent Juan Santiago. Agent Cintron was in the group of persons participating in the search of the residence and according to the testimony of participating agents evidence seized would be packaged by the officers making the discovery and was then provided to agent Juan Santiago, who was the person at the collection table who would take it to the storage facility. As appears from the testimony of agent Pieloch:

Q. Agent Pieloch, I'm showing you what has been marked as Government Id 31. Do you recognize that, ma'am?

A. Yes, I do.

Q. And how is it that you are able to recognize it?

A. I'm able to recognize it because the evidence item has my name, as well as my initials on there that I initialed myself.

Q. Okay. And what does that package contain?

A. It contains a pistol box for a Smith & Wesson and ammunition rounds.

Q. Okay. And who packaged that pistol box and those rounds of ammunition?

A. I did.

Q. And what did you do after you packaged it?

A. *After this evidence was packed, we presented this evidence to our task force, Juan Santiago, who then was - - the evidence was then placed into a secured storage. (Docket 147, pg. 118- Exh. 5).*

* * *

... purposes as Government ID 33, do you recognize that, Agent Pieloch?

A. *I do. These are rounds of ammunition.*

Q. *And who packaged those rounds of ammunition?*

A. *Our task force, Hector Cintron, packaged this.*

Q. *And how do you know that?*

A. *Because I recognize his initials on the top of the bag.*

Q. *And where was Mr. Cintron when he packaged them?*

A. *He was in the proximity of where we were all packaging the evidence together.*

Q. *Did you see him package that?*

A. *Yes, among multiple items as well.*

Q. *And what did he do after he packaged that?*

A. *This item as well was also relinquished to Task Force Officer Juan Santiago to be placed in a secure facility. (Docket 147, pg. 123-124 - Exh. 6, pg. 121-122).*

* * *

BY MR. ALUM:

Q. *I'm showing you what's been marked for identification purposes as Government ID 32.*

Do you recognize that?

A. *I do.*

Q. *And how is it, that you're able to recognize it?*

A. *I recognize it because the box has my name, as well as the initials that I wrote on there myself.*

Q. *And what is inside that box?*

A. *Inside of this box is two magazines and rounds of ammunition as well.*

Q. *Who packaged the contents of that box?*

A. *I did.*

Q. *And what did you do after you packaged it?*

A. *After the item was packaged, I provided this evidence to a Task Force officer Juan Santiago who then placed it into a secure storage facility. (Docket 147, pg. 121-122 - Exh. 6, pg. 121-122).*

The Evidence Chain of Custody logs reflect this transfer from the person that collected the evidence to agent Santiago. (Exh.7).

The Government admits in Response that Tews' name does not appear in the evidence forms claiming that it "*is not proof of misconduct or fabrication.*" They go on to falsely allege that Agent Cintron was in charge of the collection table during the execution of the search warrant and "*that explains why Agent Cintron's name is on the evidence logs even though he did not find the contraband himself.*" (Docket 24, pg. 10). The Government conveniently omits from its Response the EVIDENCE LOG "DRAFTED BY ANDREW TEWS" that identifies the agent that initially "Located" an item within Padilla-Galarza's house and where it was found. (Attached hereto as Exh. 3, pg. 1). Contrary to the representations made to the Court several agents such as Deanna Velazquez, Grettel Pieloch, Hector Cintron, and Amy Campanaro were agents that located multiple items within the residence depending on the particular room they were searching. At page 19 of

the Evidence Log Agent Tews recognized that the marijuana was: 1- "Located By: Cintron Negrón Hector; 2-Specific Location: Room K inside plastic bags in pants legs in closet; 3-Receipt number 52." (Exh. 3, pg. 19 and Exh. 4, pg. 15). It is blatantly obvious that if Tews had been the agent that located the marijuana initially he would have placed his name in the Evidence Log that he prepared!

These same findings are reiterated again in the Evidence Recovery Log that in addition contains the name of the agent that observed the recovery. (Exh. 4). These logs exist for the purpose of maintaining a record of who found an item and the place where it was found. The logs prove Tews committed perjury at trial. The Government's argument that the logs only reflect the person that received an item in the collection/packaging room is an absurdity!

The same conclusions can be arrived to as to the other items found in the residence that when compared with the photographic logs establish clearly the crime scene was altered by the agents so as to prejudice Padilla-Galarza as analyzed in the Memorandum of Law.² (Docket 1, pages 13-18 and exhibits referenced therein).

Additionally, the record reflects that the marijuana was tested after it was produced to the grand jury who issued a controlled substance count against Padilla-Galarza without any evidence that it was in fact marijuana. As appears from the chain of custody form the marijuana was taken to the grand jury on 01/29/15. (Exh. 1). However, it wasn't until 02/13/15 that the marijuana was taken to the Institute of Forensic Sciences (Exh. 8, 8a) for testing who rendered its result on

² It should be noted that the Government's argument as to the sufficiency of evidence trying to justify the same because Padilla-Galarza has some mannequins in his father's room where the marijuana and bullets were found is misplaced and misleading since the photographic logs reveal that mannequins, fake guns, and other items used to make films were scattered all around the house, not just in the father's room. (Exh. 13). Their presence there has little evidentiary value when you see that such items were strewn all around the different rooms of the residence. In addition, the father's bedroom had no lighting. (Exh. 14).

03/09/15 (Exh. 9), over a month after the grand jury presentation. What was the basis for the grand jury to determine probable cause without a drug test result?

As appears from the parties' submissions there are serious material factual controversies in this case. Under these circumstances an Evidentiary Hearing is required. See U.S. v. Butt, 731 F2d 75, 78 (1st Cir. 1984) ("*An Evidentiary Hearing is required if the records and files of the case, or an expanded record, cannot conclusively resolve substantial issues of material fact, and when the allegations made, if true, would require relief.*" (Citations omitted); Blackledge v. Allison, 431 U.S. 63 (1977) (Where the record, in view of the allegations made, does not conclusively show that a prisoner is entitled to no relief, 28 U.S.C. 2255, the prisoner **should be given an Evidentiary Hearing.**); Vega-Encarnacion v. U.S., 1993 U.S. APP. LEXIS 10068, pg. 9 (Per Curiam 1st Cir. 1993) (An Evidentiary Hearing is required if the records and files in the case, or an expanded record, cannot conclusively resolve substantial issues of material fact, and when the allegations made, if true, would require relief.) See also 28 U.S.C. 2255(b) which states; "*Unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, to determine the issues and make findings of fact and conclusions of law with respect thereto.*". It is clear that Padilla-Galarza has met this standard and an Evidentiary Hearing is required in this case.

WHEREFORE it is respectfully requested that the Court deny the Government's Response and schedule an Evidentiary Hearing as mandated by law.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties involved.

In San Juan, Puerto Rico, this 4th day of December, 2019.

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FD-1004
Revised
9-16-2009

FEDERAL BUREAU OF INVESTIGATION
EVIDENCE CHAIN-OF-CUSTODY

Evidence Type: <input type="checkbox"/> General <input type="checkbox"/> CART		<input checked="" type="checkbox"/> Drug <input type="checkbox"/> Valuable	<input type="checkbox"/> Firearm/Weapon <input type="checkbox"/> Firearm/Other
Special Handling Instructions		Initial Receipt	Date and Time
<input type="checkbox"/> Batteries <input type="checkbox"/> Biohazard <input type="checkbox"/> FGJ <input type="checkbox"/> HAZMAT <input type="checkbox"/> Latents <input type="checkbox"/> Refrigerate <input type="checkbox"/> Req. Charging <input type="checkbox"/> None <input type="checkbox"/> Other		Signature: <i>[Signature]</i> Printed Name: <i>[Signature]</i> Reason: Collected	1/9/15 3:30pm
Relinquished Custody	Date and Time	Accepted Custody	Date and Time
Signature: <i>[Signature]</i>	1/9/15	Signature: <i>[Signature]</i>	1/9/15
Printed Name: <i>[Signature]</i>	3:30pm	Printed Name: <i>[Signature]</i>	3:30pm
Reason: Transferred to M. Reyes		Reason: <i>[Signature]</i>	
Relinquished Custody	Date and Time	Accepted Custody	Date and Time
Signature: <i>[Signature]</i>	1/9/15	Signature: <i>[Signature]</i>	1/9/15
Printed Name: <i>[Signature]</i>	5:06pm	Printed Name: <i>[Signature]</i>	5:06pm
Reason: Release to ECC		Reason: Storage	
Relinquished Custody	Date and Time	Accepted Custody	Date and Time
Signature: <i>[Signature]</i>	1/11/15	Signature: <i>[Signature]</i>	1/11/15
Printed Name: <i>[Signature]</i>	11:41am	Printed Name: <i>[Signature]</i>	11:41am
Reason: Release to ECC		Reason: <i>[Signature]</i>	
Relinquished Custody	Date and Time	Accepted Custody	Date and Time
Signature: <i>[Signature]</i>	1/13/15	Signature: <i>[Signature]</i>	1/13/15
Printed Name: <i>[Signature]</i>	11:41am	Printed Name: <i>[Signature]</i>	11:41am
Reason: Release to ECC		Reason: <i>[Signature]</i>	
Relinquished Custody	Date and Time	Accepted Custody	Date and Time
Signature: <i>[Signature]</i>	2/13/15	Signature: <i>[Signature]</i>	2/13/15
Printed Name: <i>[Signature]</i>	11:41am	Printed Name: <i>[Signature]</i>	11:41am
Reason: Release to J. L. Santos		Reason: accepted	

Firearms Certification:

Printed Name: _____ Signature: _____ Date: _____

Case ID: 91A-SJ-5808029 IB: 114 Barcode: L56-12436

Item # 52

M. Reyes

M. Reyes

J. L. Santos

FD-302 (Rev. 5-8-10)

- 1 of 1 -

OFFICIAL RECORD

FEDERAL BUREAU OF INVESTIGATION

Date of entry 01/21/2015

El 9 de enero de 2015, hora 3:30 pm los TFO MIGUEL A. REYES-SANTIAGO y RAFAEL A. CRUZ-GARCIA transportaron marihuana ocupada como evidencia en el # 114 de la calle Las flores del barrio macun, Toa Baja, Puerto Rico (PR). Esta evidencia fue entregada por el TFO HECTOR CINTRON de la escuadra de VC para ser transportada al deposito de evidencia del FBI. La evidencia fue transportada en la patrulla de la policia de PR tabiilla SE 2931 hasta las oficinas del FBI en la avenida chardon. La evidencia peso 1336 gramos de aparente marihuana, fue sellada y entregada a ECR a las 5:00pm.

Investigation on 01/09/2015 at Toa Baja , Puerto Rico, United States (In Person)

File # [REDACTED] Date drafted 01/14/2015

by REYES-SANTIAGO MIGUEL ANG

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Certified Translation

FD-302 (Rev. 5-8-10)

**OFFICIAL RECORD**
[Illegible]**FEDERAL BUREAU OF INVESTIGATION**Date of Entry 01/21/2015

On January 9, 2015, at 3:30 pm, TFO's MIGUEL A. REYES-SANTIAGO and RAFAEL A. CRUZ-GARCÍA transported marijuana seized as evidence at #118 Las Flores Street of the Macun Ward, Toa Baja, Puerto Rico (PR). This evidence was handed over by TFO HÉCTOR CINTRÓN of the VC squad to be transported to the evidence depository of the FBI. The evidence was transported in PR Police patrol car, license plate GE 29310, to the offices of the FBI on Chardón Avenue. The evidence weighed 1336 of apparent marijuana, was scaled and delivered to ECR at 5:06 pm.

-CERTIFIED-

To be a correct translation prepared
by me, to the best of my knowledge
and ability.

Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Investigation on 01/09/2015 at Toa Baja, Puerto Rico, United States (In Person)
File # [REDACTED] Date Drafted 01/14/2015
By: REYES-SANTIAGO MIGUEL ANG

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FD-1087 (Rev. 5-8-10)

UNCLASSIFIED

OFFICIAL RECORD

FEDERAL BUREAU OF INVESTIGATION

Evidence Log

Event Title: (U) Search of Barrio Macum, 118
Calles Las Flores, Toa Baja, PR

Date: 01/22/2015

CC: ROMAN SANDRA LIZETTE
SANCHEZ IRIS ELAINE

Approved By: A/SSA GUILLERMO GONZALEZ

Drafted By: Andrew M. Tews

Case ID #: [REDACTED]

(U) [REDACTED];

UNSUB(S);

BANCO POPULAR DE PUERTO RICO (VICTIM);
REXVILLE PLAZA, BAYAMON, PUERTO RICO;
BANK ROBBERY

(U) UNSUBS;

Banco Popular San Francisco Shopping
Center - Victim;
BANK ROBBERY
12/20/2014

CTS. [REDACTED]

VICTIMS

INSTITUTION

Full Investigation Initiated: 12/01/2014

Enclosure(s): Enclosed are the following items:

1. (U) FD-597

Collected By: Amy E. Campanaro on 01/09/2015

Collected From: (U) Jose Padilla-Galarza
Barrio Macum, 118 Calle Las Flores
Toa Baja, Puerto Rico 00949
Puerto Rico

Receipt Given?: Yes

UNCLASSIFIED

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

Holding Office: SAN JUAN

Details:

BANK Robbery

On 11/29/2014, at approximately 10:30 AM, three(3) armed individuals wearing blue construction safety helmets, glasses and construction safety vest entered the Banco Popular de Puerto Rico (PR) branch located at Rexville Plaza in Bayamon, PR and robbed the bank. The individuals arrived and departed the bank on a green Toyota Tercel Vehicle which they abandoned shortly after along with several clothing items similar to the ones used in the bank robbery.

Item Type	Description
1B General	(U) Various business cards Collected On: 01/09/2015 Receipt Number: 1 Located By: VELAZQUEZ DEANNA MARIA Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja Specific Location: Room A on top of tv stand
1B General	(U) Camera case with camera Collected On: 01/09/2015 Receipt Number: 2 Located By: VELAZQUEZ DEANNA MARIA Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja Specific Location: Room A on the floor
* 1B <u>Firearm</u>	(U) Four boxes of ammunition Collected On: 01/09/2015 Receipt Number: 3 Located By: VELAZQUEZ DEANNA MARIA Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja Specific Location: Room A top of chair Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General

(U) Costume supplies and photos
Collected On: 01/09/2015
Receipt Number: 4
Located By: VELAZQUEZ DEANNA MARIA
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room A in a box

1B General

(U) Bail enforcement jackets
Collected On: 01/09/2015
Receipt Number: 5
Located By: VELAZQUEZ DEANNA MARIA
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room B hanging on clothes rack

* 1B Firearm

MAGALINES
REAL/FAKE?

(U) Two magazines and two .38 bullets
Collected On: 01/09/2015
Receipt Number: 6
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H top of table
Firearm Type: Other

1B General

(U) Two magazines
Collected On: 01/09/2015
Receipt Number: 7A
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H inside hamper

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Smith-and Wesson pistol box, 9mm bullets, and 7.62x39mm bullets
Collected On: 01/09/2015
Receipt Number: 7B
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H inside hamper
Firearm Type: Other

1B General (U) Two black air tasers with three cartridges inside a box
Collected On: 01/09/2015
Receipt Number: 8
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H upper cabinets

1B General (U) One magazine
Collected On: 01/09/2015
Receipt Number: 9
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H upper cabinets

1B General (U) Blue face mask
Collected On: 01/09/2015
Receipt Number: 10A
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Black gas mask
Collected On: 01/09/2015
Receipt Number: 10B
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

1B General (U) Two pairs of glasses
Collected On: 01/09/2015
Receipt Number: 11
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H upper cabinets

1B Firearm (U) Model 92 Auto Cal 8mk Italy
Collected On: 01/09/2015
Receipt Number: 12
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of bed
Firearm Type: Other

1B Firearm (U) Voltran model 92, caliber 9mm PA Magnum # F4121395
Collected On: 01/09/2015
Receipt Number: 13
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of bed
Firearm Type: Other

UNCLASSIFIED

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Law enforcement holster belt
Collected On: 01/09/2015
Receipt Number: 14
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room A top of chair.

1B General (U) Two identification cards, notes with telephone
numbers and license plates written down
Collected On: 01/09/2015
Receipt Number: 15
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of night stand

1B General (U) Receipts from cell phone bills
Collected On: 01/09/2015
Receipt Number: 16
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of table

1B General (U) Camouflage clothing and hat
Collected On: 01/09/2015
Receipt Number: 17
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

1B General (U) Belomo lens # 520260
Collected On: 01/09/2015
Receipt Number: 18
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H top of table

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm

(U) Black plastic gun
Collected On: 01/09/2015
Receipt Number: 19
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H top of chair
Firearm Type: Other

1B General

(U) Costume mask and two black gloves
Collected On: 01/09/2015
Receipt Number: 20
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room M on the floor

1B General

* (U) Juan Ortiz Gonzalez driver license
Collected On: 01/09/2015
Receipt Number: 21
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room M on top of storage cabinet

1B Firearm

(U) silver and black air pistol with mag
Collected On: 01/09/2015
Receipt Number: 22A
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L inside drawer
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) sixteen toy pistols, twenty plastic badges, five shoulder patches
Collected On: 01/09/2015
Receipt Number: 22B
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room L inside drawer
Firearm Type: Other

1B Firearm (U) eleven plastic guns and fourteen handcuffs
Collected On: 01/09/2015
Receipt Number: 23
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room L inside drawer
Firearm Type: Other

1B Firearm (U) Black plastic weapons
Collected On: 01/09/2015
Receipt Number: 24
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K
Firearm Type: Other

1B Firearm (U) Black plastic gun with holster
Collected On: 01/09/2015
Receipt Number: 25
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K top of blue container
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Black plastic gun
Collected On: 01/09/2015
Receipt Number: 26A
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

1B Firearm (U) USP .40 S&W
Collected On: 01/09/2015
Receipt Number: 26B
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

1B Firearm (U) Double Eagle M42
Collected On: 01/09/2015
Receipt Number: 26C
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

1B Firearm (U) Cyma air-sport-gun-
Collected On: 01/09/2015
Receipt Number: 26D
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Model .92F caliber .9 Parabellum (3)
Collected On: 01/09/2015
Receipt Number: 26E
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of cv
Firearm Type: Other

1B Firearm (U) Cyma P .815 with accessories
Collected On: 01/09/2015
Receipt Number: 26F
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

1B Firearm (U) Cyma air sport gun (2)
Collected On: 01/09/2015
Receipt Number: 26G
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

1B Firearm (U) Cyma pistol 528
Collected On: 01/09/2015
Receipt Number: 26H
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of tv
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) CM .023 Airsoft spray gun, airsoft uses 6mm BB bullets, MP5 style gun with silencer
Collected On: 01/09/2015
Receipt Number: 27A
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Two well air pistol series 16-A4 1/1 real scale completed high grade Airsoft gun 6mm BB bullet
Collected On: 01/09/2015
Receipt Number: 27B
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Black spring loaded shotgun plastic and metal type construction
Collected On: 01/09/2015
Receipt Number: 27C
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) CM .022 Airsoft gun
Collected On: 01/09/2015
Receipt Number: 27D
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Two GFB-A 068 shotguns
Collected On: 01/09/2015
Receipt Number: 27E
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Hunting Zone toy gun
Collected On: 01/09/2015
Receipt Number: 27F
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) shotgun black and silver
Collected On: 01/09/2015
Receipt Number: 27G
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Five-MP5-SP6-gun-rare-edition-TD-2009-children's
gun
Collected On: 01/09/2015
Receipt Number: 27H
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Two MP5 A6, 1:1 scale high performance assemble
plastic model gun in box
Collected On: 01/09/2015
Receipt Number: 27I
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Electric MP5 replica airsoft gun with silencer
Collected On: 01/09/2015
Receipt Number: 27J
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) M41 series 1:1 scale completed high grade Airsoft
gun uses 6mm BB bullets
Collected On: 01/09/2015
Receipt Number: 27K
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

1B Firearm (U) Land Army commander BB airsoft gun high power bb
airgun series 0-A870 shotgun replica
Collected On: 01/09/2015
Receipt Number: 27L
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on shelves
Firearm Type: Other

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Two plastic guns
Collected On: 01/09/2015
Receipt Number: 28
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K on upper shelves in closet
Firearm Type: Other

1B General (U) Court documents Jose Padilla
Collected On: 01/09/2015
Receipt Number: 29
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of dresser

1B General (U) License plate AEA952
Collected On: 01/09/2015
Receipt Number: 30
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room M top of table

1B General (U) Four uniform pants and two uniform shirts in blue
color
Collected On: 01/09/2015
Receipt Number: 31
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room M on floor

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B Firearm (U) Three revolvers
Collected On: 01/09/2015
Receipt Number: 32
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I in dresser drawer
Firearm Type: Other

1B General (U) Pull/safety pin
Collected On: 01/09/2015
Receipt Number: 33
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room F hallway floor

1B General (U) metal case of a battery backup OPTI UPS backup
time 525 BT
Collected On: 01/09/2015
Receipt Number: 34
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room O on floor

1B General (U) Two metal cylinders with cables
Collected On: 01/09/2015
Receipt Number: 35
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I dresser drawer

1B General (U) Two metal cylinders with cables
Collected On: 01/09/2015
Receipt Number: 36
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I dresser drawer

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) ID maker machine
Collected On: 01/09/2015
Receipt Number: 37
Located By: Amy E. Campanaro
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room 1 top of bed

1B General (U) Electronic device (unknown) with car piece and
receiver type device
Collected On: 01/09/2015
Receipt Number: 38
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room 1 top of table

1B General (U) Brass knuckles
Collected On: 01/09/2015
Receipt Number: 39
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room 1 top of table

1B General (U) Black radio model cannon RX-U500 Gold badge
(American bail bond Investigator 288)
Collected On: 01/09/2015
Receipt Number: 40
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room 1 top of table

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Mini black light
Collected On: 01/09/2015
Receipt Number: 41
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of table

1B General (U) Black plastic magazine
Collected On: 01/09/2015
Receipt Number: 42
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of table

1B General (U) Black and gray Alcatel cellular phone from AT&T
company serial # HQJES1APSMV3GU4, model # OT510A
Collected On: 01/09/2015
Receipt Number: 43
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I inside drawer

1B General (U) Motorola radio, holsters, and POPR ID
Collected On: 01/09/2015
Receipt Number: 44
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I inside drawer

1B General (U) Two letters envelopes
Collected On: 01/09/2015
Receipt Number: 45
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of DVD's

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Applied laser on a box
Collected On: 01/09/2015
Receipt Number: 46
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I top of table

1B General (U) Binoculars
Collected On: 01/09/2015
Receipt Number: 47
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I inside drawer

1B General (U) ID cards/ driver license
Collected On: 01/09/2015
Receipt Number: 48
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room J

1B General (U) Green face mask
Collected On: 01/09/2015
Receipt Number: 49
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

1B General (U) Camera with Cryillic brand name and # 74202312 in
case
Collected On: 01/09/2015
Receipt Number: 50
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H top of chair

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General

(U) Black face mask
Collected On: 01/09/2015
Receipt Number: 51
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

* 1B Drug

(U) two packages of unknown substance wrapped in
plastic (suspected marijuana)
Collected On: 01/09/2015
Receipt Number: 52
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K inside plastic bags in
pants legs in closet
Drug Type: Marijuana
Total Package Weight: 1336 Grams

Where is
Room K?

1B General

(U) Black gloves
Collected On: 01/09/2015
Receipt Number: 53
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

1B General

(U) Misc. paperwork
Collected On: 01/09/2015
Receipt Number: 54
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of dresser

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Black plastic
Collected On: 01/09/2015
Receipt Number: 55
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room I inside drawer

1B General (U) LG model UX3300 Verizon flip phone
Collected On: 01/09/2015
Receipt Number: 56
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

1B General (U) Misc. paperwork
Collected On: 01/09/2015
Receipt Number: 57
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

1B General (U) shell casing
Collected On: 01/09/2015
Receipt Number: 58
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of table

1B General (U) US Polo Assn sneakers size 12
Collected On: 01/09/2015
Receipt Number: 59
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room H

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Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) Holster and police baton
Collected On: 01/09/2015
Receipt Number: 60A
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

1B General (U) Three masks
Collected On: 01/09/2015
Receipt Number: 60B
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

1B General (U) gun holster
Collected On: 01/09/2015
Receipt Number: 61
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

1B General (U) Winnie the Pooh notebook and "DTOP permiso para
vehiculo de motor de arrastre" to Galarza Rosa
Collected On: 01/09/2015
Receipt Number: 62
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

1B General (U) Black scope
Collected On: 01/09/2015
Receipt Number: 63
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room L top of bed

UNCLASSIFIED

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

1B General (U) One pair of black cargo pants; one pair khaki cargo pants
Collected On: 01/09/2015
Receipt Number: 65
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room L top of bed

1B Firearm (U) Starter revolver
Collected On: 01/09/2015
Receipt Number: 66
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room M inside safe
Firearm Type: Other

1B General (U) Six plastic magazines and two plastic gun parts
Collected On: 01/09/2015
Receipt Number: 67
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room M inside safe

1B Firearm (U) Two 16-well air pistol series plastic, Two 6mm caliber BB plastic, one 6mm-caliber-BB-plastic with scope
Collected On: 01/09/2015
Receipt Number: 68
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room M inside safe
Firearm Type: Other

UNCLASSIFIED

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
 Re: [REDACTED], 01/22/2015

1B General (U) Kid walkie-talkie, four transmitters with morse code (toy)
 Collected On: 01/09/2015
 Receipt Number: 69
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K on top of container

1B Firearm (U) Thirty 9mm bullets
 Collected On: 01/09/2015
 Receipt Number: 70
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K inside drawer
 Firearm Type: Other

* (30) 9mm bullets
 Room K?

1B Firearm (U) 9mm bullet
 Collected On: 01/09/2015
 Receipt Number: 71
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room M inside safe
 Firearm Type: Other

* Room M
 inside safe

1B General (U) Documents about airsoft guns
 Collected On: 01/09/2015
 Receipt Number: 72
 Located By: CINTRON NEGRON HECTOR
 Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
 Specific Location: Room K top of dresser

UNCLASSIFIED

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

JOSE PADILLA-GALARZA

CIVIL NO. 19-cv-01415-DRD

Petitioner

Vs.

UNITED STATES OF AMERICA

Respondent

MOTION SUBMITTING ADDITIONAL EVIDENCE IN SUPPORT OF 2255 PETITION

TO THE HONORABLE COURT:

HEREIN appears defendant **Jose Padilla-Galarza** through his Court appointed counsel and most respectfully prays and requests:

1- As appears from the 2255 Petition one of the arguments in support of the same is that FBI agent Tews lied about his involvement in the search of Padilla-Galarza's claimed residence located at Barrio Macun, 118 Las Flores St. in Toa Baja. It is specifically alleged Tews lied under oath when he testified at trial that he was the person that found the marijuana in the closet when the Evidence Recovery logs reflected the marijuana was found by agent Hector Cintron and observed by agent Jeremy Asencio, and the chain of custody form reflected Tews was not even involved in the receipt of the drugs. (Docket 1 pg. 12-13; Exh. 27-28).

2- Agent Tews testified at the trial in Cr.15-079 (DRD) and narrated his participation in the search of said residence. His testimony at said trial corroborates Padilla-Galarza's claim the he perjured himself in the trial of this case:

"Q. All right. Agent Tews, directing your attention now to the date of January 9, 2015, did you execute a search warrant on that date?"

A. *I did.*

Q. *And where did you execute that search warrant?*

A. *It was executed in Barrio McCune, 118 Calle Las flores in Toa Baja.*

Q. *Whose residence was that, sir?*

A. *Jose Padilla-Galarza.*

Q. *And who obtained that search warrant?*

A. *I did.*

Q. *And what did that warrant authorize you to seize?*

A. *It authorizes us to seize any firearms, any rounds of ammunition, disguises, costume, fake facial hair, any clothing that - - evidence of a bank robbery.*

Q. *And did you participate in the execution of that search warrant?*

A. *I did.*

Q. *And about how many agents participated in the execution of that search warrant?*

A. *Approximately 25 agents and task force officers.*

Q. *Agent Tews, would you briefly describe the process by which you went about executing that search warrant.*

A. *Yes. The morning of January 9th, we had a search warrant for the residence of Mr. Padilla-Galarza, as well as an arrest warrant for him. So our S.W.A.T. team entered - - approached that residence in order to apprehend Mr. Padilla-Galarza. No one was home at the residence - -*

Q. *Apprehend him why? I'm sorry. Apprehend him why?*

A. *Because there was an arrest warrant for a bank robbery.*

Q. *Okay.*

A. No one was home at the residence, so after our S.W.A.T. team cleared it, it was turned over to myself as the case agent and our evidence response team leader, and we did a preliminary walk through of the residence to determine what resources were needed and to have a scope of what the house looked like for the search.

Once that was completed, our photographer went in and they take pictures of the outside of the residence, every room of the residence to show the condition of the house prior to the house being searched.

Once that's completed, the search team enters and searches every room for the evidence that we were allowed to seize, which was included in the search warrant.

During their search, if any items they believe to be evidentiary value are located, a yellow number tag is placed next to that item to identify it. Once that has been placed, myself as the case agent and the evidence team leader, we would review all the items that were marked to determine whether or not we were going to seize them or not. And once we determined we were going to seize the, the evidence items are photoed in place to show how they were. They were collected and they're brought out to our evidence table where they're logged in and they're packaged by writing on the bag what date they were recovered, location, who recovered it and who witnessed it with their initials. And then the bags are sealed with evidence tape. At the conclusion of all evidence being collected, the photographers go back into the residence and they take what's called exit it photos to show the condition of the property at the conclusion of the search. And then after that, the search the search is concluded and we leave." (Exh. 1).

3- As appears from the above testimony provided under oath at trial in Cr. 15-079 (DRD), agent Tews did not place himself as being one of the agents conducting the search or for that matter finding any of the evidence. He states unequivocally that we did a "preliminary walk

through of the residence to determine what resources were needed and to have a scope of what the house looked like for the search.” Once that was completed the photographer went in to take pictures of the outside and inside of the residence. Once that was completed; “the search team enters and searches every room for the residence that we were allowed to seize, which was included in the search warrant. During their search, if any items they believe to be evidentiary value are located, a yellow number tag is placed next to that item to identify it. Once that has been placed, myself as the case agent and the evidence team leader, we would review all the items that were marked to determine whether or not we were going to seize them or not. And once we determined we were going to seize them; the evidence items are photoed in place to show how they were.”

4- From the above, it is clear agent Tews perjured himself on a material matter at trial when he testified, he personally had discovered the marijuana when in reality it was the search team that discovered it. This serious misconduct warrants the Court granting Padilla-Galarza 2255 relief including dismissal of the indictment.

WHEREFORE it is respectfully requested that Court take into account the testimony provided herein that supports Padilla-Galarza’s 2255 Petition.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties involved.

In San Juan, Puerto Rico, this 24th day of August, 2020.

S/ Rafael F. Castro Lang
RAFAEL F. CASTRO LANG
USDC-PR#128505
Attorney for Defendant
P O Box 9023222
San Juan PR 00902-3222
Tel: (787) 723-3672 / (787) 723-1809
Fax: (787) - 725-4133
Email: rafacastrolang@gmail.com;
rafacastrolanglaw@gmail.com

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF PUERTO RICO
4

5 THE UNITED STATES OF AMERICA,)
6 Plaintiff,) Criminal Case No.
7 vs.) 3:15-cr-00079-DRD
8 JOSE PADILLA-GALARZA and)
9 JOMAR HERNANDEZ-ROMAN,)
10 Defendants,)

11
12 TRANSCRIPT OF JURY TRIAL - DAY 7
13 THE HONORABLE JUDGE DANIEL R. DOMINGUEZ PRESIDING
14 JOSE V. TOLEDO U.S. COURTHOUSE, SAN JUAN, PUERTO RICO
15 MONDAY, FEBRUARY 12, 2018
16
17
18

19
20
21
22
23 INTERPRETER: Mayra Cardona and Sonia Crescioni
24 CLERK: Ana Romero

25 Proceedings taken by Certified Court Reporter and transcribed
using Computer-Aided Transcription

1 Q. What date, sir?

2 A. November 25, 2014.

3 Q. That person --

4 Stop.

5 The person who appeared behind Mr. Hernandez, do you
6 recognize who that is, sir?

7 A. This individual here [indicating] is Wilfredo
8 Marquez-Rosado.

9 Q. Can we clear the screen, please.

10 Stop it.

11 The person with the blueshirt, who is that, sir?

12 A. Jose Padilla-Galarza.

13 Q. All right. Agent Tews, directing your attention now to
14 the date of January 9, 2015, did you execute a search warrant
15 on that date?

16 A. I did.

17 Q. And where did you execute that search warrant?

18 A. It was executed in Barrio McCune, 118 Calle Las Flores in
19 Toa Baja.

20 Q. Whose residence was that, sir?

21 A. Jose Padilla-Galarza.

22 Q. And who obtained that search warrant?

23 A. I did.

24 Q. And what did that warrant authorize you to seize?

25 A. It authorizes us to seize any firearms, any rounds of

1 ammunition, disguises, costume, fake facial hair, any clothing
2 that -- evidence of a bank robbery.

3 Q. And did you participate in the execution of that search
4 warrant?

5 A. I did.

6 Q. And about how many agents participated in the execution
7 of that search warrant?

8 A. Approximately 25 agents and task force officers.

9 Q. Agent Tews, would you briefly describe the process by
10 which you went about executing that search warrant.

11 A. Yes. The morning of January 9th, we had a search warrant
12 for the residence of Mr. Padilla-Galarza, as well as an arrest
13 warrant for him. So our S.W.A.T. team entered -- approached
14 that residence in order to apprehend Mr. Padilla-Galarza. No
15 one was home at the residence --

16 Q. Apprehend him why? I'm sorry. Apprehend him why?

17 A. Because there was an arrest warrant for a bank robbery.

18 Q. Okay. ---

19 A. No one was home at the residence, so after our S.W.A.T.
20 team cleared it, it was turned over to myself as the case
21 agent and our evidence response team leader, and we did a
22 preliminary walk through of the residence to determine what
23 resources were needed and to have a scope of what the house
24 looked like for the search.

25 Once that was completed, our photographer went in

1 and they take pictures of the outside of the residence, every
2 room of the residence to show the condition of the house prior
3 to the house being searched.

4 Once that's completed, the search team enters and
5 searches every room for the evidence that we were allowed to
6 seize, which was included in the search warrant.

7 During their search, if any items they believe to be
8 evidentiary value are located, a yellow number tag is placed
9 next to that item to identify it. Once that has been placed,
10 myself as the case agent and the evidence team leader, we
11 would review all the items that were marked to determine
12 whether or not we were going to seize them or not. And once
13 we determined we were going to seize them, the evidence items
14 are photoed in place to show how they were. They were
15 collected and they're brought out to our evidence table where
16 they're logged in and they're packaged by writing on the bag
17 what date they were recovered, location, who recovered it and
18 who witnessed it with their initials. And then the bags are
19 sealed with evidence tape. At the conclusion of all evidence
20 being collected, the photographers go back into the residence
21 and they take what's called exit it photos to show the
22 condition of the property at the conclusion of the search.
23 And then after that, the search is concluded and we leave.
24 Q. Agent Tews, would you briefly describe the condition of
25 the residence when you went there on January 9th, 2015.

Certified Translation

2=Change 4=Eliminate 5=Display 7=Comments 8=Historic (DPA)

Licensing Maintenance – Weapons**Lic. Type : 200 TARGET SHOOTING****Lic. No. : 20085172 PEDRO PADILLA MENÉNDEZ**

Opc	Weapon Serial #	Make	Cla.	Cal.	Model	Folio No.	Sit
-	L046516	BUS	RI	223			1A
-	L046516E	BHT	R	223	XH15		1A
-	TVR7523	SW	P	9MM	5906		1A
-	UPI0702	UZI	P	9MM	SM AUTO		1A
-	UPI07020	UZI	P	9MM	MINI UZI		1A
-	95200930	MGN	P	50	DESERT EAGLE		1 7G

Enter Help F3=End F6=Add F12=Return F14=Pr Ready

15/011

[Illegible seal]

-CERTIFIED-To be a correct translation prepared
by me, to the best of my knowledge
and ability.Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Certified Translation**License Registration Display**

Type of License : 200 TARGET SHOOTING
License Number/TP : 20085172

Control Number :

Date of Issue : 07/28/1994 (MM/DD/YEAR)
Expiration Date : 07/27/1997 (MM/DD/YEAR)
License Situation : IIA

Type of Application : WAN ORIGINATES FROM THE WANG SYSTEM
(NOT MODIFIED)
Registration Area : 071
Registration City :
Armory or Dealer : 98998 N/A
Filing Date : 07/28/1994 (MM/DD/YEAR)

Person : 580581727
PEDRO PADILLA
MENÉNDEZ 04/14/1939 MOROVIS

Intro Help P3=End F4=Ready F12=Return

01/001

[Illegible seal]

-CERTIFIED-

To be a correct translation prepared
by me, to the best of my knowledge
and ability.



Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Certified Translation**Person Registration Display**

Soc. Sec.	Name	Ini	Father's Surname	Mother's Surname	Gender
580581727	PEDRO		PADILLA	MENÉNDEZ	M (F,M)

Date of Birth	:	04/14/1939	(MM/DD/YEAR)
Place of Birth	:	MOROVIS	
Nationality	:	PR	PUERTO RICAN
Residence No.	:	NOT APPLICABLE	
Is a Veteran	:	N	Y/N
Belongs to Reserve	:	N	Y/N

Race	Complexion	Eyes	Hair	Height	Weight	Type Person	Minor
L	7	Black	G	5'10"	190	999	N (Y,N)

Residential Address
MACUN WARD 118

CITY	ZIP CODE
171	949 -

Intro	Help	F3=End	F12=Return
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01/001

[Illegible seal]

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To be a correct translation prepared
by me, to the best of my knowledge
and ability.



Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Certified Translation

COMMONWEALTH OF PUERTO RICO

POLICIA

**Auxiliary Superintendency for Criminal Investigations
Bureau of Investigation of Licenses and Inspection
of Firearms
Weapons Registration Division
TELEPHONE 787-793-1234 EXT. 3110-2331**

SAIC-NILIAF-DRAEL-7-36

CERTIFICATION

I certify that Mr. Pedro Padilla Menéndez was issued Firearm License 50949 with date of issue December 10, 2003 to December 9, 2008, and renewed on December 10, 2008, with expiration date December 9, 2013, according to the REAL System (Electronic Registry of Firearms and Licenses) of Law 404. The license is expired.

He has registered the following weapon:

1 – .223 Caliber Bushnell Carbine, Serial No. L046516

Mr. Pedro Padilla Menéndez had a license under Law 17 with the no. 20085172, in which he had the following firearms, according to system AS400:

1 – .223 Caliber Bushnell Rifle, Serial No. L046516

2 – .223 Caliber Bushmaster Rifle, Serial No. L046516E

3 – 9mm Caliber S&W Pistol, Serial No. TVR7523

4 – 9mm Caliber UZI Pistol, Serial No. UP10702

5 – 9mm Caliber UZI Pistol, Serial No. UP107020

6 – 50 Caliber Magnum Research Pistol, Serial No. 95200980

[Illegible seal]

Certified Translation

Page 2

Continuation SAIC-NILLIAF-DRAEL – 7-36

This information was requested by the Hon. Judge José A. Fusté, U.S. District Judge. Said search was carried out by Agt. William Lugo Rodríguez 31843 of the Folio Section, Firearms Registration Division.

This certification is issued today, Wednesday, August 26 2015, in Hato Rey, Puerto Rico, and in witness whereof, the official seal of the Puerto Rico Police is affixed hereto.

Attached are documents related to the case.

[Illegible seal]

[Signed]

1st Lt. Jaime M. Colom Rodríguez 6-13991

Director

Firearms Regulation and Licensing Division

-CERTIFIED-

To be a correct translation prepared by me, to the best of my knowledge and ability.

Annie Flores

Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Certified Translation



LexJuris
Puerto Rico

Law No. 404 of the Year 2000

(H.B. 3447), Law 404, 2000
(Conference)

New Puerto Rico Weapons Act - 2000

Includes amendments to Laws No. 27 and No. 274 of 2002

(To order the book with (CD ROM included free) to make easy searches,

Includes another 5 Special Penal Laws and the amendments)

(For more information, [click here](#))

Law No. 404 of September 11, 2000, effective March 1, 2001

To create the "Puerto Rico Weapons Act" and repeal Laws No. 17 of January 19, 1951, as amended, and No. 75 of June 13, 1953, as amended; in order to unify the requirements for granting the licenses to have, possess and carry arms, and the target shooting and hunting licenses; establish the sanctions and fines to be imposed; provide that the sentences imposed for violating this Law are served consecutively; establish a registry of the sale of ammunition; establish a maximum limit on the amount of ammunition that a firearm holder who does not have a target shooting or hunting license may obtain; limit the amount of weapons that may be authorized to a person who has a firearms license; create an Electronic Registry System in the Puerto Rico Police; and for other purposes.

STATEMENT OF PURPOSE

During the past six years, our Government has been dedicated to establishing a public policy of zero tolerance against crime, through which law enforcement agents ensure strict compliance with the laws that govern the Island. Prior to the beginning of our public administration, all the crime rates were in an unprecedented upward spiral. Corrective measures were taken, which resulted in, for example, that by 1998, there was a 32.5% reduction in Type I crimes and an 8.3% reduction in all crimes in relation to the previous year; statistics that remain in decline during this year. These numbers reaffirm the commitment of our administration to achieve an environment of peace, tranquility and greater public security for our citizens. However, we are aware that we must make specific

Certified Translation
Law No. 404 of the Year 2000

2

efforts within the conceptual framework of the federal laws regarding this matter and, in particular, its [provisions] in the "Firearms Owners Protection Act of 1986", to achieve an effective solution to the problem of the control of firearms in the hands of delinquents in Puerto Rico, which is a direct aspect of the criminal activity.

Law No. 17 of January 19, 1951, as amended, known as the "Puerto Rico Weapons Act", was approved after a historical event. The Government of the Island considered it prudent to create a legislation as a weapons control measure to prevent this type of action from resurfacing within a people that, up to that event, maintained a peaceful tradition. Over the years, Law No. 17, cited above, has been amended with the intention of tempering it to the social reality of Puerto Rico, and using the measure as a tool to control crime. Today, four decades after its approval, and despite its having been extensively amended, it is evident that the Puerto Rico Weapons Act is not the most efficient legal instrument to handle situations related to the management of weapons on the Island.

The criminal activity of the last two decades has been mainly the result of the increase of illegal traffic of controlled substances, which, in turn, has caused a vertiginous increase in the use of illegal firearms. Statistical data collected by the Police during this period, evidence the seriousness of the problem. Firearms whose possession is illegal have been brought clandestinely from other jurisdictions, and some have been acquired during burglaries or robberies in the Government and in the homes or businesses of owners duly authorized to own them in Puerto Rico. These weapons are used during the commission of all types of criminal acts, a situation that makes it necessary to adopt legislative measures whose sanctioning nature constitutes an effective deterrent to the delinquent.

This measure presents innovative provisions that respond to the pressing interest of the Government of Puerto Rico in achieving a law whose implementation allows the law enforcement agencies to be more effective in the fight against crime. To this end, the law guides persons authorized in Puerto Rico to handle firearms to do so responsibly and, in turn, warns the delinquent of the serious consequences of committing criminal acts using firearms.

For the first time in our legal system, that which is related to the possession and use of ammunition for firearms has been regulated. The Law limits the sale of ammunition to the type of ammunition used by the weapons that the buyer has registered in his name.

Consistent with the public policy in Our Children First, this Law typifies as a less

Certified Translation
Law No. 404 of the Year 2000

3

serious offense for a person to leave a weapon within the reach of a minor, in those cases in which the minor takes possession of it, causing harm to himself or to another person.

Furthermore, for the purpose of eradicating the illegal use of weapons with immense destruction potential, this Law regulates in a particular way, the same as the Federal Weapons Act, the possession or use of any semiautomatic assault weapon, its copies or duplicates, of any caliber.

Lastly, an Electronic Registry is created in the Puerto Rico Police Department which, by means of an electronic card, shall centralize in said agency all the Weapons and Ammunition Transactions that are carried out between authorized arms dealers and persons with a license in Puerto Rico.

By virtue of the approval of this Law, the State exercises its inherent power of regulation for the purpose of promoting greater public security and well-being for the People of Puerto Rico.

BE IT DECREED BY THE PUERTO RICO LEGISLATIVE ASSEMBLY:

CHAPTER I

PRELIMINARY PROVISIONS

-CERTIFIED-

To be a correct translation prepared
by me, to the best of my knowledge
and ability.

Annie Flores

Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

Case 3:15-cr-00078-DRD Document 72 Filed 08/04/15 Page 1 of 2
 JOSE PADILLA GALARZA
 # 19158-069
 MDC GUAYNABO
 P.O. BOX 2005
 CATANO, PR. 00963/2005

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

UNITED STATES OF AMERICA)
 PLAINTIFF)

V.)

JOSE PADILLA GALARZA)
 DEFENDANT)

RECEIVED & FILED
 2015 AUG -4
 SAN JUAN

CASE NO. 15-78 (JAF)
 INFORMATIVE MOTIONS

COMES NOW THE DEFENDANT JOSE PADILLA GALARZA PRO SE, AND RESPECTFULLY INFORMS THE HONORABLE COURT THAT IN REFERENCE TO THE PROSECUTOR'S SUBMISSION OF THE UNITED STATES IN COMPLAINT WITH THIS COURT'S ORDER OF JUNE 9, 2015, ON PAGES ONE, THREE, AND FOUR OF SAID DOCUMENT, THE PROSECUTOR REPEATEDLY REQUESTED A HEARING REQUIRING, AND I QUOTE THE DEFENDANT'S PRESENCE FOR THE PURPOSE OF CONFIRMING OR ASCERTAIN THE DEFENDANT'S WISHES, INTENTIONS, PREFERENCE, OR DESIRE REGARDING ATTORNEY ANITA HILL'S LEGAL ASSISTANCE.

FIRST, THE DEFENDANT TRIED TO TELL YOUR HONOR THAT THERE WERE FACTUAL INACCURACIES IN THE LEGALLY FOCUSED INTERVIEW OF THE PSYCHOLOGICAL EVALUATION REPORT WHERE THE DEFENDANT WAS MISUNDERSTOOD AND MISQUOTED BY THE PSYCHOLOGIST WHERE SHE WROTE THAT THE DEFENDANT STATED THAT HE FIRED FOUR LAWYERS AND REPRESENTED HIMSELF AND AGREED TO A FIVE YEAR PLEA AGREEMENT. IN REALITY WHAT THE DEFENDANT SAID AND CAN BE CORROBORATED BY THE CASE RECORD WAS THAT THE DEFENDANT DISMISSED ATTORNEY JOHN WARD, THEN HE FIRED ATTORNEY MARLENE APONTE FOR DECEIVING, BETRAYING, AND RAILROADING THE DEFENDANT INTO A FIVE YEAR PLEA AGREEMENT THEN ABANDONING HIM. BESIDES FILING A PRO SE MOTION INFORMING THAT MARLENE APONTE WAS FIRED, THE DEFENDANT ALSO FILED A COMPLAINT TO THE BAR ASSOCIATION, MISS APONTE FOR HER UNETHICAL PRACTICE AND CLIENT ABANDONMENT. FORTUNATELY MISS MARLENE APONTE WAS ULTIMATELY DISBARRED INDEFINITELY FOR SUCH FILTHY PRACTICE IN SEVERAL OTHER CASES, THEN THE DEFENDANT ASKED ATTORNEY ROBERT MILLAN TO WITHDRAW BECAUSE HE IRRESPONSIBLY ALLOWED A TIME LIMIT TO RUN OUT FOR AN EVIDENCIARY HEARING THAT WAS GRANTED BY MAGISTRATE JUSTO ARENAS. FINALLY, THE DEFENDANT ALSO FILED A PRO SE MOTION TO DISMISS ATTORNEY JUAN LEBRON OF BOSTON DUE TO CONFLICT. THE DEFENDANT ALSO STATED IN THAT INTERVIEW THAT HE ATTACKED THAT FIVE YEAR PLEA AGREEMENT VIA PRO SE MOTION AND ALSO ARGUED AGAINST IT ON ALLOCUTION UPON SENTENCING. SOMEHOW THE PSYCHOLOGIST MISUNDERSTOOD AND MISTAKENLY REARRANGED THESE FACTS TAKING THEM OUT OF CONTEXT. ALSO WHEN THE DEFENDANT VERBATIMLY QUOTED A PAGE ABOUT DUMP TRUCK LAWYERS FROM THE BOOK BUSTED BY THE FEDS WRITTEN BY AUTHOR LARRY FASSLER, SHE ALSO MISQUOTED THE DEFENDANT AGAIN, GIVING THE CREDIT OF SUCH QUOTE TO THE DEFENDANT AND NOT TO THE AUTHOR. SAID PSYCHOLOGIST EVEN WROTE DOWN THE TITLE OF SAID BOOK AND AUTHOR, SAYING SHE WAS GOING TO ACQUIRE IT. SHE ALSO MISUNDERSTOOD TURABO UNIVERSITY FOR TORONTO UNIVERSITY.

Defendant's Motion

SECOND, THE DEFENDANT POLITELY ASKED ATTORNEY JOHN CONNORS TO WITHDRAW FROM HIS CASE BECAUSE DUE TO SAID ATTORNEY'S CASE OVERLOAD HE NEVER DID COME TO MDC GUAYNABO TO PROPERLY AND TIMELY DISCUSS THE CASE. HE WOULD ALWAYS ONLY COME APROXIMATELY A FEW MINUTES BEFORE THE DEFENDANT'S APPEARANCE IN THE COURTROOM AND TRY TO READ AND DISCUSS THE CASE RIGHT THERE AND THEN. IN THE LIGHT OF THESE CIRCUMSTANCES, IT BEGS THE QUESTION, WHAT KIND OF EFFECTIVE LEGAL ARGUMENTS OR STRATEGY CAN ATTORNEY CONNORS PRESENT WITH THIS KIND OF PRACTICE? THE LEGAL VISITING LOG AT MDC GUAYNABO CAN CLEARLY SUSTAIN THE DEFENDANT'S ALLEGATIONS.

THIRD, SINCE DAY ONE OF HER APPOINTMENT, ATTORNEY ANITA HILL WAS REPEATEDLY ASKED ON NUMEROUS OCCASIONS BY THE DEFENDANT TO PLEASE SUPPOENA A COPY OF THE DEFENDANT'S FATHER'S WEAPONS PERMITS FROM THE PUERTO RICO POLICE DEPARTMENT, AND SHE NEVER DID SO UP TO THIS DATE. WHEN SHE WAS ASKED AGAIN ABOUT SAID SUPPOENA SHE WOULD ALWAYS TELL THE DEFENDANT THAT SHE WOULD DO IT THE NEXT DAY. ATTORNEY HILL ONCE ALSO ASKED THE DEFENDANT IF HE WOULD AGREE TO A PSYCHOLOGICAL EVALUATION, AND DESPITE OF THE DEFENDANT'S REFUSAL, SHE FILED FOR ONE REGARDLESSLY KNOWING THAT HER FLAGRANT DISREGARD WOULD CREATE GREAT CONFLICT WITH THE DEFENDANT. ON APRIL 13, 2015 THE DEFENDANT CONTACTED ATTORNEY HILL BY THE MDC INMATE PHONE ACCOUNT, AND SHE STRONGLY SUGGESTED THE DEFENDANT SHOULD LIE AND SAY THAT THE BULLETS IN QUESTION BELONGED TO THE DEFENDANT FROM WHEN HE WAS A POLICE OFFICER SOME TWENTY YEARS AGO. THE AUDIO OF THIS TAPED PHONE CONVERSATION CAN BE OBTAINED AT MDC GUAYNABO BECAUSE IT WAS NOT MADE AS A LEGAL CALL, THEREFORE IT WAS MONITORED, TAPED, AND LOGGED LIKE ALL NORMAL CALLS ARE. ATTACHED TO THIS MOTION IS A PRINTOUT OF SAID LOGGED CALL. IN ONE OF HER PRIOR LEGAL VISITS, ATTORNEY HILL ALSO SAID THAT SHE WAS GOING TO PRESENT THE PHOTOGRAPHS SHOT BY PRIVATE INVESTIGATOR VIZCARRONDO WHICH DEPICTED THE EMPTY CLOSETS OF THE DEFENDANT'S LATE FATHER'S HOUSE AS EVIDENCE THAT NOBODY WAS LIVING IN SAID HOUSE. WHEN THE DEFENDANT REMINDED ATTORNEY HILL THAT SHE ALREADY HAD PREVIOUS DISCOVERY PHOTOS SHOT BY THE F.B.I. THAT DEPICTED SAID CLOSETS FULL OF CLOTHING, SHE SAID THAT THE PROSECUTOR WOULD NOT NOTICE THAT. ATTORNEY HILL'S RIDICULOUS, AND ABSURD DEFENSE STRATEGIES, ARE NOTHING BUT AN INSULT TO THE PROSECUTOR'S AND THE DEFENDANT'S INTELLECT, BESIDES BEING HIGHLY UNETHICAL, INEFFECTIVE, CONFLICTING, AND UNFOUNDED. THE DEFENDANT HAS PROFFERED THE SOURCE THAT CAN PROVE HIS ALLEGATION BEYOND ANY REASONABLE OR POSSIBLE DOUBT REGARDING SAID ATTORNEYS. FOURTH, IN THE LIGHT OF THESE CIRCUMSTANCES, THE DEFENDANT'S CANNOT SEE EYE TO EYE WITH ATTORNEYS CONNORS AND HILL REGARDING THESE INEFFECTIVE, UNETHICAL, UNFOUNDED, AND CONFLICTIVE CASE STRATEGIES. THESE ISSUES HAVE MADE CLIENT-ATTORNEY RELATIONSHIP SUFFER A GREAT LACK OF TRUST, AND HAS CAUSED IRRECONCILABLE CONFLICT AND DIFFERENCES, THEREFORE IT IS HIGHLY IMPOSSIBLE FOR THE DEFENDANT TO ASSIST EITHER OF SAID ATTORNEYS IN HIS DEFENSE. TO BE REPRESENTED BY ANY OF THESE ATTORNEYS, WOULD BE THE EQUIVALENT OF COMMITTING JUDICIAL SUICIDE. FIFTH, MDC GUAYNABO'S PHONE AND LEGAL VISITING LOGS CAN CLEARLY DEMONSTRATE THAT JOHN CONNOR'S LEGAL ASSISTANCE HAS BEEN INEFFECTIVE JUST AS THEY CAN ALSO DEMONSTRATE ATTORNEY ANITA HILL'S INEFFECTIVENESS, PROCRASTINATION, CONFLICT, AND VIOLATION OF ETHICAL CANONS. YOUR HONOR, WITH ALL DUE RESPECT, WHAT WAS HELD IN YOUR COURTROOM ON THE FIRST WEEK OF JULY WAS A MONOLOGUE ON YOUR BEHALF AND NOT A HEARING AS REQUESTED BY THE PROSECUTOR, FOR THE PURPOSES BEFORE MENTIONED. THE DEFENDANT RESPECTFULLY AND REPEATEDLY TRIED TO ADDRESS THE ISSUES REGARDING THE PROSECUTOR'S REQUEST, BUT YOUR HONOR KEPT INTERRUPTING AND DID NOT ALLOW THE DEFENDANT TO BE HEARD, HENCE THE WORD HEARING, AND BY DOING SO, FAILED TO CONDUCT AN INQUIRY REGARDING CLAIMES OF DISSATISFACTION WITH ATTORNEY, DEPRIVING THE DEFENDANT OF A FAIR HEARING. IF YOUR HONOR INSISTS THAT THE DEFENDANT CONTINUE WITH SAID ATTORNEYS WHICH CLEARLY DO NOT MEET THE CRITERIA AND STANDARDS SET FORTH BY THE SIXTH AMENDMENT OF THE CONSTITUTION, THE DEFENDANT WILL BE LEFT WITH NOT OTHER OPTION THAN TO BE INVOLUNTARILY RAILROADED INTO REPRESENTING HIMSELF PRO SE AGAINST HIS WILL

RESPECTFULLY SUBMITTED

T.L. 20th 2015


JOSE PADILLA CALARZA

Certified Translation



COMMONWEALTH OF PUERTO RICO

POLICIA

CITIZEN PROFILE

GENERAL INFORMATION

Name PEDRO PADILLA MENENDEZ
Physical Address MACUN WARD #118, TOA BAJA, PR
 ADJUNTAS PR 00601
Mailing Address PO BOX 51627
 LEVITTOWN PR 009500000
Telephone 7873138550
Driver's License 256407
Social Security No. ***-**-1727
Date of Birth 4/14/1939
Place of Birth 052
Nationality AMERICAN
Gender MALE
Marital Status MARRIED



Weight

220

Height

5'8"

Color of Eyes

BROWN

LICENSE INFORMATION

License Number	Type of License	Status	Issued	Expiration
50949	GUN LICENSE	EXPIRED	12/10/2008	12/9/2013

PERMIT INFORMATION

Permit Number	Type of Permit	Status	Issued	Expiration
---------------	----------------	--------	--------	------------

FIREARMS INFORMATION

#	Serial Number	Brand	Type of Gun	Registration No.	Caliber	Status
1	LO46516	BUSHNELL	CARBINE	737663	.223	LEGALLY IN POSSESSION

-CERTIFIED-

Aug 26/2015

To be a correct translation prepared
by me, to the best of my knowledge
and ability.

Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation

*Certified Translation***Viewing of License Registration**

Type of License : 200 TARGET SHOOTING
License number/TP : 20085172

Control Number :

Date Issued : 28/07/1994 (DD/MM/YYYY)
Expiration Date : 27/07/1997 (DD/MM/YYYY)
License Status : 11A

Type of Application : WAN COMES FROM THE WANG SYSTEM (UNMODIFIED)
Registration Area : 071
City of Registration :
Armory or Dealer : 98998 N/A
Date Filed : 28/07/1994 (DD/MM/YYYY)

Person : 580581727
PEDRO PADILLA
MENENDEZ 1939/04/14 MOROVIS

Intro Help F3=End F4=Ready F12=Return

01/001

-CERTIFIED-

To be a correct translation prepared
by me, to the best of my knowledge
and ability.

Annie Flores

Annie Flores
U.S. Certified Court Interpreter
M.A. in Translation



BARRIO MACUM, 118 CALLE LAS FLORES, TOA BAJA, PR
 JAN 09, 2015 06:28 AM
 91A-SJ-5808029

Administrative Worksheet

Jan 09, 2015 06:28 AM	ERT at scene.
Jan 09, 2015 06:40 AM	SA Campanaro confers with SALT Jonah Burfield regarding findings. Scene cleared by SALTs.
Jan 09, 2015 06:55 AM	Review search warrant with Team. Brief ERT and VC Squad Task Force with SSA Rivera-Esparra. Designate duties.
Jan 09, 2015 07:00 AM	K-9 unit clears scene
Jan 09, 2015 07:01 AM	SA Tews receives authorization from AUSA Alex Alum to search vehicles, shed located on property. SA Tews advised SA Campanaro of vehicles, items to search.
Jan 09, 2015 07:08 AM	SA Campanaro and TFO Irizarry conduct preliminary survey. Entry photos begin.
Jan 09, 2015 07:45 AM	SA Moises Quinones Robles designated as PFI to certify/disarm any firearms found and collected.
Jan 09, 2015 08:00 AM	SA Tews reviews items to be collected with ERT members.
Jan 09, 2015 11:00 AM	SA Campanaro confers with SSA Rivera-Esparra. Search team dispatched to search designated rooms.
Jan 09, 2015 01:06 PM	One of the vehicles located in front yard, 2000 Toyota Tundra, PR License 645-947 towed away by POPR Agents Jose Maldonado, Alejandro Marrero who verify vehicle is stolen.
Jan 09, 2015 04:00 PM	Item #64. Photo taken. Not collected
Jan 09, 2015 04:10 PM	4:00 Final Survey with VC Squad.

No. 22-1889

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JOSE PADILLA-GALARZA,

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

**USDC No. 19-CV-1415 (DRD),
FROM A DENIAL OF MOTION TO VACATE
PURSUANT TO SECTION 2255**

**ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

CERTIFICATE OF APPEALABILITY

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<p>II- The District Court erred in finding that petitioner's claims of Government and prosecutorial misconduct are barred from collateral review and should have been decided the issue on its merits.</p>	
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STATEMENT REGARDING RECORD CITATION

References to the Addendum, transcript, and other parts of the record below will be as follows:

“Add” refers to the Addendum, followed by the page number (e.g. Add. 20)

“Tr” refers to portions of the trial transcript. If they are not followed by an App. or Add. they have not been included in the Appendix nor the Addendum (e.g. Tr. 10/16. pg. 75)

“App” refers to Appendix followed by the page numbers. (e.g. App. 20-30)
(e.g. Tr. 10/16. pg. 75)

**United States Court of Appeals
For the First Circuit
USCA No.: 22-1889**

JOSE PADILLA-GALARZA,

Petitioner

v.

**UNITED STATES,
Respondent - Appellee.**

CERTIFICATE OF APPEALABILITY

**CIVIL No.: 19-1415-DRD
FROM A DENIAL OF MOTION TO VACATE
PURSUANT TO SECTION 2255

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
THE HONRABLE JUDGE DANIEL R. DOMINGUEZ**

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Petitioner, **Jose Padilla Galarza** through his Court appointed counsel Rafael Castro-Lang, hereby moves this Honorable Court for the issuance of a Certificate of Appealability.

JURISDICTIONAL STATEMENT

Federal Rule of Appellate Procedure 4 governs the time an appellant has to file in the District Court a Notice of Appeal. Rule 4(a)(1)(B) governs civil proceedings where the Government is a party and gives appellant 60 days to file a Notice of Appeal.

On 04/30/2019 Padilla-Galarza filed a 28 U.S.C. §2255 petition in the United States District Court for the District of Puerto Rico. [19-cv-1415 (DRD) Docket 1; Cr. 15-078 (DRD) (Docket 157)].

On 09/06/2022, the District Court issued an Opinion denying the 2255 Petition and on its own a Certificate of Appealability (“COA”) that had not been filed [19-cv-1415 (DRD), Dockets 32, 33]. (Add. 1-12). Judgment was entered that day. (Docket 44- Add. 13). Padilla-Galarza, had until 11/05/2022 to file his Notice of Appeal.

Padilla-Galarza filed his timely Notice of Appeal on 11/01/2022. (Docket 45). Pursuant to 28 U.S.C. §2253, Fed. R. App. Pr. 22(b)(1), and First Circuit Rule 22.1, Padilla-Galarza now asks this Court to issue a COA, which was denied by the District Court. (Add. 12).

CERTIFICATE OF APPEALABILITY
STANDARD OF REVIEW

In ruling on a motion for a COA, a District Court must state which issues, if any, satisfy the standard set forth in §2253(c)(2) or the reasons for its denial of the motion. First Cir. Loc. R. 22.1(a). The District Court dismissed Padilla-Galarza's 2255 Application with prejudice and concluded; "If Petitioner files a Notice of Appeal, no Certificate of Appealability shall issue because he has not made a substantial showing of the denial of a constitutional right" and entered Judgment accordingly. [Civ. 19-1415- Add. 12, 13]. This appeal follows.

In order to obtain a COA petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tse v. United States, 290 F.3d 462, 465 (1st Cir. 2002). **In determining whether to grant a COA, the Court of Appeals "look[s] to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason."** Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

Miller-El explained what is required. As mandated by federal statute, a prisoner seeking a *writ of habeas corpus* has no absolute entitlement to appeal a District Court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the District Court must first

seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that “[u]nless a circuit justice or judge issues a Certificate of Appealability, an appeal may not be taken to the Court of appeals....” § 2253(c)(1). As a result, until a COA has been issued Federal Courts of appeal lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. “The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit Court may entertain an appeal.” Slack v. McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595 (2000); Hohn v. United States, 524 U.S. 236, 248, 118 S.Ct. 1969 (1998). Section 2253(c) permits the issuance of a COA only where a petitioner has made a “substantial showing of the denial of a constitutional right.” In Slack, supra, at 483, 120 S.Ct. 1595, the Court recognized that Congress codified the prior judicial certificate of probable cause (“CPC”) standard, announced in Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” 529 U.S., at 484, 120 S.Ct. 1595 (quoting Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the

claims in the habeas petition and a general assessment of their merits. This Court is required to look to the District Court's application of *AEDPA* to the petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a Court of Appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.

The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince the Court that he would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. A prisoner seeking a COA must prove “something more than the absence of frivolity” or the existence of mere “good faith” on his or her part. Barefoot, *supra*, at 893, 103 S.Ct. 3383. It is not required that the petitioner prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

As the Court stated in Slack, “[w]here a District Court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is

straightforward: The petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong.” 529 U.S., at 484, 120 S.Ct. 159.

ISSUES THAT JUSTIFY GRANTING COA

I- The District Court erred in finding that appellate counsel was not ineffective in her representation of Padilla-Galarza on appeal, when her multiple, material errors justified the granting of a COA. His constitutional claims of ineffectiveness of counsel on appeal are debatable amongst jurists of reason and materially prejudiced the merits of his appeal.

PETITIONER'S APPELLATE COUNSEL DEPRIVED PADILLA-GALARZA OF HIS CONSTITUTIONAL 6TH AMMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY MISTATING THE RECORD AS TO WHERE THE MARIJUANA AND AMMUNITION WAS FOUND IN A MANNER THAT MATERIALLY AFFECTED HIS INSUFFICIENCY OF EVIDENCE ARGUMENT THAT WAS RELIED UPON BY THIS COURT IN REJECTING SAID CLAIM.

IN ADDITION, APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CITE P.R. LAW PROVIDED TO HER, THAT WOULD HAVE DEMONSTRATED THAT DURING THE PERIOD PADILLA-GALARZA'S

FATHER WAS ALIVE THE LAW ALLOWED OWNERS OF FIREARMS TO PURCHASE ANY KINDS OF BULLETS THAT DID NOT HAVE TO MATCH THOSE THEY POSSESSED. THE CITATION OF THIS LAW IN THE BRIEF WAS CRUCIAL IN ESTABLISHING ADDITIONAL REASONS THAT SUPPORTED HIS SUFFICIENCY ARGUMENT THAT ALSO REBUTTED THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY.

APPELLATE COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO DEVELOP THE REFUSAL OF THE COURT TO GRANT A CONTINUANCE ISSUE SINCE AT THE TIME OF TRIAL PADILLA-GALARZA HAD REQUESTED AND BEEN GRANTED PERMISSION TO RETAIN AN EXPERT CHEMIST THAT WAS NECESSARY TO REBUT THE GOVERNMENT'S MISLEADING PRESENTATION OF EVIDENCE CONCERNING THE MARIJUANA SEIZED. SAID EXPERT WAS CRUCIAL SINCE THE GOVERNMENT'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH DRUG QUANTITY, WHICH WAS SUBMITTED TO THE JURY FOR A DETERMINATION AND THE QUALITY FOR A DETERMINATION OF INTENT TO DISTRIBUTE.

APPELLATE COUNSEL FAILED TO INCLUDE IN HER ARGUMENT RELATED TO THE FAILURE TO GRANT A CONTINUANCE

ERROR PADILLA-GALARZA'S TWO PRO SE MOTIONS DATED 08/20/2015 AND 08/24/2015, AND STAND BY COUNSEL VAZQUEZ' MOTION FOR RECONSIDERATION OF DENIAL OF CONTINUANCE DATED 08/24/2015 THAT INCLUDED MULTIPLE FACTS THAT SUPPORTED THE GRANTING OF A CONTINUANCE. AS A RESULT, APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY DEVELOP THIS ISSUE ON APPEAL, WHICH WAS ARGUED BY PADILLA-GALARZA AT TRIAL AND DENIED BY THE DISTRICT COURT. HAD SHE DONE SO THE RESULT COULD HAVE BEEN DIFFERENT.

II- PETITIONERS' 5th AMENDMENT CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED, THAT JUSTIFIED GRANTING 2255 RELIEF, AND A COA. THE DISTRICT COURT ERRED IN FINDING THAT PADILLA-GALARZA'S CLAIMS OF GOVERNMENT'S MISCONDUCT, PERJURY, ALTERATION OF CRIME SCENE, WERE BARRED FROM COLLATERAL REVIEW; A CONSTITUTIONAL ISSUE WHOSE RESOLUTION IS DEBATABLE AMONGS JURISTS OF REASON THAT SHOULD HAVE BEEN DECIDED ON ITS MERITS.

III- THE DISTRICT COURT ERRED IN FAILING TO CONDUCT

AN EVIDENTIARY HEARING PRIOR TO DECIDING THE 2255 PETITION, THAT RAISED ISSUES THAT ARE DEBATABLE AMONG JURISTS OF REASON.

STATEMENT OF THE CASE

Padilla-Galarza was indicted on 01/29/2015 in Cr. 15-078 (JAF) in two counts; 1- For being a prohibited person in possession of ammunition in violation of 18 U.S.C. 9223(g)(1) and; 2- Possession of a controlled substance (marijuana), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). (App. 1-2). The evidence to charge him was obtained as a result of a search warrant carried out on 01/09/2015, of Padilla-Galarza's father's residence, which he inherited upon his death.

District Court Judge Fuste was assigned to the case.

His trial began on 08/26/2015, less than 8 months after being indicted.

At trial Padilla-Galarza represented himself. He was convicted by a jury on both counts. Counsel Lenore Glaser was Court appointed to represent him on appeal. She filed her Brief on appeal No. 16-1035. (App. 46-72). This Hon. Court affirmed his conviction of both counts. U.S. v. Jose Padilla-Galarza, 886 F.3d 1 (1st Cir. 2018) (Exh.2-App. 88-105). Counsel Glaser filed a Petition for Rehearing on 04/05/2018. (App. 82-87), which was denied.

Padilla-Galarza filed his timely 2255 Petition on 04/30/2019 (Docket 157- Cr. 15-078-App.3-8), and a Memorandum of Law prepared by appearing Court

appointed counsel (Docket 1- Civil 19-01415-App. 21-43), that same day.

The Government filed an Opposition. (Docket 24- Civil 19-01415 (DRD) (App. 210-237), and petitioner a Reply. (Docket 31- Civil 19-01415- App. 238-284). A Supplemental Motion Submitting Additional Evidence was filed by petitioner. (Docket 36- Civil 19-01415 (DRD)) (App. 280-284), and a Motion requesting an Evidentiary Hearing. (Docket 37- Civil 19-01415).

The 2255 Petition was denied by the District Court on 9/06/2022 and Judgment was entered denying a certificate of appealability. (Dockets 43, 44- Civil 19-01415) (Add. 1-13).

A timely notice of appeal was filed on 11/01/2022. (Docket 45).

STATEMENT OF FACTS

Prior to trial Padilla-Galarza filed two pro se motions for continuance (Dockets 85, Exh. 16a, App. 143-145) and 97, Exh.16b; App.146-147) and his standby counsel Vazquez filed a Motion for Reconsideration (Docket 90, Exh.18- App.152-158), to the Courts denial of the continuance (Cr. 15-078, Docket 89), which the District Court also denied. (Cr. 15-078- Dockets 92, 100).

In his pro se motion of 08/20/2015 (Docket 85, Exh. 16a- App.143-145), he detailed the following facts that justified the granting of a continuance; 1- That since August 7, 2015, his unit had been placed in lockdown due to an unrelated incident where someone was stabbed. This caused his being denied access to obtain legal

matters to prepare for his **pro se defense**; 2- That he lost precious trial preparation time since he was sent on travel for a psychological examination; 3- That counsel Vazquez was assigned as stand by counsel on 08/07/2015 and when he visited him on 08/11/2015 at MDC he concurred with Padilla-Galarza that the 10-day continuance that the Court had granted was insufficient for him to adequately assist him and prepare for trial.

In his 08/24/2015 pro se Renewal for Continuance Motion Padilla-Galarza informed additional grounds for the granting of a continuance; 1- That he had been unable to secure an expert chemist which was essential to defend the drug charge and needed additional time to retain one. (Docket 97- Exh. 16b- App. 146-147). **On that same date he filed a pro se motion notifying his intent to use an expert witness at trial (Docket 95- Exh. 17a- App. 148), which the Court granted on the day the trial began, 08/26/2015. (Docket 99- Exh. 17b- App. 150). Obviously, Padilla-Galarza was prevented from retaining the chemist due to the Court's refusal to grant a continuance.** Said failure to obtain an expert prejudiced him as can be gleaned from his Petition, infra at pgs. 35-36, 42-45; 2- That he had been unable to inspect the tangible evidence in his case and had just recently received voluminous discovery which he had not been able to adequately study; 3- That he still had not received any Brady, Kyles, nor Jencks materials; 4- That he still had not received his deceased father's weapons permits that were necessary for his defense.

His standby counsel Vazquez also filed on 08/24/2015 a Motion for Reconsideration (Docket 90- Exh. 18- App. 152-158), just two days before trial was to begin, where he detailed all of the reasons why a continuance of 2 or 1 months (App. 154) was justified, that had been mentioned by Padilla-Galarza in his pro-se motions. Stand by counsel admitted he had only been able to meet with Padilla-Galarza on 3 occasions for an average of one and a half to two hours and that he needed additional time due to the extensive hundreds of pages of discovery that had just been produced by the Government, that consisted of the transcript of his recorded post arrest interview which was 427 pages long, seven recordings of MDC calls, totaling approximately 127 pages, video clips that appear in the same post arrest interview, and that he had not read all of the Reports of Investigation provided in discovery. (App. 156).

His appellate counsel completely failed to include, nor cite as considered, said motions that would have expanded her factual basis in her Brief that justified granting the continuance requested. (App. Brief pages 3-4- App. 52-53).

Padilla's deceased father had lived in the residence, and he possessed a firearms license since 1994 (Exh. 9c-App. 128, Eng. Tr. at 299). The fact that some of the bullets found during the search did not match the firearms owned by his father was of no consequence since prior to the year 2000 you could purchase in P.R. all types of ammunition even if they weren't of the type for which you had

a license. (Exh. 10- App. 132-133- English Tr. at App. 294-296). Padilla-Galarza through attorney Armenteros provided appellate counsel Glaser a Spanish copy of this law yet she failed to cite it in her Brief. (Exh. 11- App. 134).

During closing argument, the prosecutor highlighted this to the jury:

“But, what’s more telling? Where do you see here that the father had a firearm of 7.62 caliber ammunition? Where do you see here that father had a gun that accepted .38 caliber rounds ammunition? It just doesn’t. Dad did not have registered, at least legally, a .38 caliber handgun, or a firearm for a 7.62 caliber ammunition.” (Tr. April 27, Pg. 68- Exh. 12- App. 135).

The bullets found were old and rusty (Exh. 13- App. 136), consistent with having been there a long time. Other people had broken into the house twice (Exh. 14- App. 137), and there were three licenses of other persons in the house. (Exh. 15a-c- App. 138-140). Petitioner argued this inexcusable failure to cite said law was another instance of ineffective assistance of counsel. (Cr. 19-1415, Docket 1, pg.1-2 5-6- App. 21-22, 25-26).

In her Brief to this Court in the Statement of Facts, Court appointed counsel Lenore Glaser made the following representation: *“FBI agent Tews, the case agent who executed the search warrant, testified at trial. He described the house as generally messy and disorganized with the exception of one-bedroom area, which he described as relatively more organized. The marijuana was found in a bundle of clothes in the closet and some ammunition was found in this room. Items belonging to Padilla-Galarza were also found in this bedroom, including*

mannequins, toy or replica guns, and law enforcement materials.” (Appellant’s Brief at pages 4-5, Exh. 1- App. 53-54).

One of the issues raised in her Brief was that “*The evidence was Insufficient to Demonstrate that Defendant had Knowledge of the Drugs or Ammunition*”. In her argument of said issue she reiterated; “*The house was unkempt, disorganized and full of items in every room, even the bedroom which was more organized and where the contraband items were found.*” (Appellant’s Brief at page 19, Exh. 1- App. 68).

This Court relying on said factual representations denied Padilla-Galarza’s sufficiency of evidence argument:

“*The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight. In addition, the Government’s evidence sufficed to show that the bedroom in which the ammunition and the marijuana were found in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is “entitled to rely on plausible inferences” from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla, including: photo identification cards; receipts in his name from the previous year; old correspondence addresses to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies.)* (App. 94).

The Government in its Opposition admitted that appellate counsel misstated the record when “*she stated in her Brief that ammunition and marijuana was found in the more organized bedroom...*”. (Docket 24- pg. 4- App. 213).

Had she studied the record she would have realized that the marijuana and

bullets were not found in the more organized bedroom (Exh. 3a-d- App. 106-108). The marijuana, ammunition, and mannequins that she made reference to were found in Room K (Docket 1, Exh. 4a-c- App. 106-108), which is a totally different room in the house from where no evidence was presented that he frequented that room, much less slept there. This room had no lighting, bed, and was completely filled with clutter. One bullet was claimed to have been found in Room M, on the floor of a safe that did not contain any real firearms and was totally disorganized. (Docket 1, Exh. 5a-d- App. 116-119). In the kitchen, which was identified as Room H, in the bottom of a hamper that was full at the time of entry (Docket 1, Exh. 6a- App. 121), a box was found of a Smith & Wesson but had no firearm within,¹ and very high on top of a kitchen shelf 2 magazines with 2 old rusty .38 cal. bullets. (Docket 1, Exh. 6a-c- App. 121-123). Other than the one bedroom that was organized where nothing illegal was found; *"The residence was messy, the majority of it was unorganized, there was a lot of clutter, with the exception of one bedroom which was, I'd say, organized and clean compared to the rest of the house."* (Test. case agent Tews, Tr. Pg.10 - Exh. 7- App. 124). Even FBI agent Grettel Pieloch testified that she told Padilla-Galarza; *"But how are you going to know what is in your house also, there was a free for all there."* (Tr. August 26, pg.166- Exh. 8-App. 125).

Padilla-Galarza argued in his 2255 petition, this failure constituted another

¹ Agent Tews testified that inside the box eight 7.62 x 39.8 and 9mm bullets were found there (Docket 1, Exh. 5d- App. 119-120), but the same were never photographed within the hamper.

instance of ineffective assistance of counsel. (Docket 1- Civ. 19-1415 (DRD), pgs. 7-9 - App. 27-29).

Padilla-Galarza also raised a 5th Amendment Constitutional Due Process claim that he was denied a fair trial because; **The Government's trial evidence was plagued with perjured testimony of its agents; the crime scene was altered by the agents conducting a search of the residence and presented at trial; circumstantial evidence that justified the inference that the one bullet found in the safe was placed there by the agents after they found the pack of rusty bullets in another room and misleading evidence concerning the marijuana was presented at trial that justified granting Padilla-Galarza 2255 relief.**

The delayed provision of hundreds of pages of discovery shortly before the trial began that included important impeachment evidence prevented Padilla-Galarza from being able to use it at trial particularly since he had requested a continuance that was denied by the judge. The tardy provision of Brady material deprived Padilla-Galarza of his constitutional due process rights to a fair trial, that reflects that on 08/19/2015, Padilla Galarza received discovery consisting of 2 folders "Binders", just 7 days before trial began on 08/26/2015. (App. 209).

As appears from the trial testimony of FBI agent Tews, he stated under oath when asked; Q. *"Agent Tews, who found the marijuana?"* A. *"I did."* (Tr.

08/26/2015, Pg. 17- Exh. 25- App. 167). He went on to state: **“As I was searching the closet going through the clothes, I was moving the clothes that were in the pile and when I got to the pair of pants, I felt the hard object and it was heavy. And after unfolding the pants and looking inside the pant leg, I discovered the bag which contained the two packages of marijuana.”** (Tr. 08/26/2015, Pg. 18 - Exh. 25- App. 167-168).

This constituted blatant perjured testimony. As appears from the Evidence Log the package of suspected marijuana were; **“Located By: Cintron Negron, Hector”**, in; **“Room K inside plastic bags in pants in closet.”** (Exh. 26- App. 169). See also Evidence Chain of Custody form for the marijuana from where it appears that Tews was not even involved in the receipt of the drugs on the day of the seizure. (Exh. 27- App. 170). The Evidence Recovery Log, also drafted by agent Tews, reiterates that the marijuana was found by Hector Cintron and observed by Jeremy Asencio (Exh. 28- App. 171).

In addition, Padilla-Galarza filed a Motion Submitting Additional Evidence that Tews committed perjury at his trial (Docket 36, pgs.1-4- App. 280-284), which the government never filed a Reply. Agent Tews testified at the trial in Cr.15-079 (DRD) and narrated his participation in the search of said residence. His testimony at said trial corroborates Padilla-Galarza’s claim the he perjured himself in the trial of this case:

“Q. All right. Agent Tews, directing your attention now to the date of January 9, 2015, did you execute a search warrant on that date?”

A. I did.

Q. And where did you execute that search warrant?”

A. It was executed in Barrio McCune, 118 Calle Las Flores in Toa Baja.

Q. Whose residence was that, sir?”

A. Jose Padilla-Galarza.

Q. And who obtained that search warrant?”

A. I did.

Q. And what did that warrant authorize you to seize?”

A. It authorizes us to seize any firearms, any rounds of ammunition, disguises, costume, fake facial hair, any clothing that - - evidence of a bank robbery.

Q. And did you participate in the execution of that search warrant?”

A. I did.

Q. And about how many agents participated in the execution of that search warrant?”

A. Approximately 25 agents and task force officers.

Q. Agent Tews, would you briefly describe the process by which you went about executing that search warrant.”

A. Yes. The morning of January 9th, we had a search warrant for the residence

of Mr. Padilla-Galarza, as well as an arrest warrant for him. So, our S.W.A.T. team entered - - approached that residence in order to apprehend Mr. Padilla-Galarza. No one was home at the residence - -

Q. Apprehend him why? I'm sorry. Apprehend him why?

A. Because there was an arrest warrant for a bank robbery.

Q. Okay.

A. No one was home at the residence, so after our S.W.A.T. team cleared it², it was turned over to myself as the case agent and our evidence response team leader, and we did a preliminary walk through of the residence to determine what resources were needed and to have a scope of what the house looked like for the search.

Once that was completed, our photographer went in and they take pictures of the outside of the residence, every room of the residence to show the condition of the house prior to the house being searched.

Once that's completed, the search team enters and searches every room for the evidence that we were allowed to seize, which was included in the search warrant.

During their search, if any items they believe to be evidentiary value are located, a yellow number tag is placed next to that item to identify it. Once that has

² It should be noted that at 7:00 a.m. a K9 dog cleared the scene without alerting to any drugs or firearms. (App. 301)

been placed, myself as the case agent and the evidence team leader, we would review all the items that were marked to determine whether or not we were going to seize them or not. And once we determined we were going to seize the, the evidence items are photoed in place to show how they were. They were collected and they're brought out to our evidence table where they're logged in and they're packaged by writing on the bag what date they were recovered, location, who recovered it and who witnessed it with their initials. And then the bags are sealed with evidence tape. At the conclusion of all evidence being collected, the photographers go back into the residence and they take what's called exit it photos to show the condition of the property at the conclusion of the search. And then after that, the search is concluded and we leave."

As appears from the above testimony provided under oath at trial in Cr. 15-079 (DRD), agent Tews did not place himself as being one of the agents conducting the search or for that matter finding any of the evidence. He states unequivocally that we did a *"preliminary walk through of the residence to determine what resources were needed and to have a scope of what the house looked like for the search."* Once that was completed the photographer went in to take pictures of the outside and inside of the residence. Once that was completed; *"the search team enters and searches every room for the residence that we were allowed to seize, which was included in the search warrant. During their search, if any items they believe to be evidentiary*

value are located, a yellow number tag is placed next to that item to identify it. Once that has been placed, myself as the case agent and the evidence team leader, we would review all the items that were marked to determine whether or not we were going to seize them or not. And once we determined we were going to seize them; the evidence items are photoed in place to show how they were.”.

It is clear agent Tews perjured himself on a material matter at trial when he testified, he personally had discovered the marijuana, when in reality it was the search team that discovered it.

It should be noted that the District Court, when it rendered its Opinion, never considered said motion in deciding the 2255 Petition, a matter which he never addressed nor the government. (Docket 158- Add. 1-12).

THE CRIME SCENE LOGS ESTABLISH THAT THE 9MM. BULLET ALLEGEDLY FOUND ON THE FLOOR OF THE SAFE IN ROOM M WAS PLACED THERE AFTER MULTIPLE ROUNDS OF 9MM. BULLETS WERE FOUND IN ROOM K, CREATING THE SEQUENCE THAT ONE OF THE BULLETS FOUND IN ROOM K WAS REMOVED AND PLACED THERE.

As appears from the testimony of agent Tews in the same room K where the marijuana and mannequins were found, inside a drawer thirty 9mm. bullets were recovered. (Tr. August 26, Pg. 19 - Exh. 4d- App.114-; Exh. 4a-e- App. 111-115).

He later testified that in another room inside a safe a 9mm. bullet was found on the floor of a safe. (Tr. August 26, Pg. 24-25- Exh. 5d- App. 119). As appears from the Evidence Log and the Evidence Recovery Log both the one 9mm. bullet found in Room M and the bag of 30 9mm. bullets found in Room K were discovered by agent Hector Cintron Negrón, the same agent that located the marijuana. (Exh. 29a-b-App. 172-173). The Evidence Log reflects that the items found in Room M including the fake firearms found inside the safe were numbered sequentially prior to those items found in Room K with the sole exception of the one bullet allegedly found at the bottom of the safe. (Exh. 30- App.175). It is only after the 30 9mm. bullets found in room K are identified with receipt number 70 that they go back to Room K, **a room that had already been searched**, and mark as receipt number 71 the single 9mm. bullet allegedly found on the bottom of the safe and they jump back to room K to continue with the sequence of items found in Room K. (Exh. 30- App.176). The Evidence Chain of Custody Form has agent Hector Cintron finding both the 30 rounds of 9mm. bullets in Room K and the one bullet on the bottom of the safe in Room M at the same time, 3:30 p.m. (Exh. 31a, b- App. 179-180). Agent Cintron was in two different rooms at the same time. (See Exh. 4a- App. 111). The Evidence Recovery Log also corroborates that after the items found in Room M were labelled by number and the labelling began of the items found in Room K, that after item 70, the 30 rounds of 9mm. bullets are identified, the agent identifies as Item 71 the sole

9mm. bullet taken out of sequence as found in room M. (Exh. 29b- App. 173). This sequence of itemization clearly establishes that the single 9mm. bullet allegedly found in room M was transferred there after the bag of 9mm. bullets were discovered in Room K. It contradicts Tews trial testimony that the search was a continuous act. (15-cr-078 Docket 147, pg. 89; App. 175-177). Had the bullet been at the bottom of the safe it would have been discovered when the safe was searched and sequentially itemized. The inference of fabrication can clearly be drawn. The two most important witnesses of the search who discovered the most damaging evidence, agent Hector Cintron and agent Asencio as observer didn't testify at trial.

During closing argument, the prosecutor emphasized the sole 9mm. bullet allegedly found in the bottom of the safe as evidence of Padilla-Galarza's knowing possession of ammunition:

"If he is claiming that the ammunition was his father's, he knew that that ammunition was in that residence. And if he knew that that ammunition was in that residence, he knew that it was there. And if he knew that was there, he was in possession of the ammunition.

Let's talk about this one round of ammunition that was found inside a safe. Exhibit Number 20. This was the same safe where the defendant kept another one of his toy guns.

Now, I want to be very clear, ladies and gentlemen. You heard evidence that this is not a real firearm. Nobody's claiming it was a real firearm. It was not a real firearm. He used it to make movies. But what's clear is that this fake firearm was his, and kept it there.

Look what else was there, a round of ammunition." (Tr. April 27, Pg. 52-Exh. 32-App. 181).

The District Court never addressed the merits of this issue. (Docket 158- Add.

1-12).

PADILLA-GALARZA ALSO ARGUED THAT THE CRIME SCENE WAS ALTERED BY THE AGENTS, AS APPEARS FROM THE RECORD.

The entry photo of Room I, the 'organized room' reflects that no identifications of Padilla-Galarza were on top of the nightstand. (Exh. 3a- App. 106). Agent Tews testified that the photos IDs of Padilla-Galarza were found "*on the nightstand next to the bed in the prior picture, the bedroom.*" (Tr. August 26, Pg. 76 - Exh. 3b- App. 107). Aside from the fact that the ID's were placed on the nightstand by the agents (Receipt 15, Exh. 3c-d- App. 108-109), the same were removed from the drawer and later placed on the nightstand. (See Padilla-Galarza's statement under penalty of perjury- Exh. 44- App. 208).

Receipt 16 (Exh. 3e- App. 110), which was found in Room I (the cleaner room) was also removed from the accordion case and placed on top of the drafting table. (Exh. 35a- App. 184). That was also the product of crime scene alteration. As can be seen from the entry photo of said room neither the accordion nor the two papers identified as Receipt 16 were on top of the drafting table. The accordion case can be seen inside of the closet of Room I. (Exh. 35b- App. 185).

Crime scene alteration also occurred as to Receipt 45 (Exh. 35c- App. 186) located by agent Cintron and witnessed by Asencio as appears from the Evidence Recovery Log, allegedly on top of DVD's (Exh. 35d- App. 187) when the entry photo of the place where the DVDs were photographed shows there were no envelopes on

top of them. (Exh. 35b- App. 185).

The same occurred with Padilla's Social Security and Business card (Exh. 36a, b- App. 188), which agent Tews claimed were found inside an envelope with two billings photographed in Receipt 73. (Exh. 37- App. 190). However, an examination of the photo does not reflect that the social security nor the business card were there. (Exh. 38- App. 191). If they had been, they would have been photographed alongside the PRTC and "Autoridad de Acueductos" (water bill) that were partially removed so they could be seen. The fabrication can be seen from an examination of the Evidence Log from where it appears that the agent that found Receipt 73 was again Hector Negrón Cintrón, not Tews. (Exh. 39- App. 192). The Evidence Recovery Log identifies agent Asencio as allegedly having observed agent Hector Cintrón discover the social security card, **not Tews**. (Exh. 40- App. 193). Notwithstanding the prosecutor during closing argument falsely stated to the jury that the social Security Card was found by agent Tews. (Tr. August 27, Pg. 68-69- Exh. 40a- App. 194-195). **Significantly, neither the Social Security Card nor the business card were ever photographed as being inside the drawer or bills photographed in receipt 73. No photographs of them were taken, only enlarged photocopies that do not reflect the place from where they were allegedly found. (Exh. 36a, b- App. 188-189). No crime scene location photograph of either of them was taken. All of this with the purpose of creating more evidence from where they could tie**

Padilla-Galarza to Room K where the 30 9mm. bullets were found.

For some unexplained reason no photographic logs appear for receipts 69-74.

The District Court never addressed the merits of this argument in its Opinion. (Docket 158- Add. 1-12).

THE GOVERNMENT CONTINUED PRESENTING MISLEADING EVIDENCE CONCERNING THE MARIJUANA ALLEGEDLY FOUND HIDDEN IN SOME CLOTHES IN A CLOSET.

The only lab examination conducted was for the presence of THC that included the weight of the packaging (Tr. August 26, Pg. 200-203- Exh. 41- App. 198-201), without ever establishing the net weight of the actual drug. The purity of the marijuana was never established (Tr. August 26, Pg. 204- Exh. 42- App. 202), yet they had P.R. police DEA task force agent Eddie Vidal provide lay testimony that said marijuana, including the wrapping, was worth in the street an outstanding \$9,000.00 and that definitely it was for 'distribution'. (Tr. August 27, Pg. 20-21, 32 - Exh. 43-App. 204-206). When Padilla-Galarza attempted to question the chemist about the purity of the marijuana the prosecutor incredibly objected to the same on relevancy grounds. (Tr. August 26, Pg. 204 - Exh. 42- App. 202). Without knowing the purity of the marijuana, how could anyone testify about its value on the street or for that matter that it was definitely intended for distribution? It is incredible that the purported marijuana was never taken out of the foil where it was packaged and its net

weight never established, in order to prove it had a street value of \$9,000.00.

ARGUMENT

I- As recognized by this Court in Flores-Rivera v. U.S., 16 F.4th 963, 967-968 (1st Cir. 2021):

“The Strickland standard for ineffective assistance has two prongs: (1) counsel's performance must have been deficient; and (2) the defendant must have been prejudiced by counsel's deficient performance. 466 U.S. at 687, 104 S.Ct. 2052. We address these prongs in reverse order. See id. at 697, 104 S.Ct. 2052 (explaining that a court can address the deficient performance and prejudice prongs in any order).

* * *

Strickland's prejudice prong requires a defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

In Tejada v. Dubois, 142 F.3d 18, 21 (1st Cir. 1998), this Court held that in order to show a violation of a defendant's Sixth Amendment Right to effective assistance of counsel in accordance with Strickland v. Washington, *supra*, the defendant must show that his counsel's performance “fell below an objective standard of reasonableness”, in other words, “that in the light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”; and that there was a reasonable probability that but for counsel's errors the outcome of the trial would have been different; a “reasonable probability” meaning “a probability sufficient to undermine

confidence in the outcome”, thus showing that defendant was prejudiced.

Strickland also applies to representations outside of the trial setting, which includes plea bargains, sentence, and **appeal**. See Missouri v. Frye, 132 S. Ct. 1399, 1408-10, 182 L. Ed. 2d 379 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Hill v. Lockhart, 474 U.S. 52, 57 (1985); Bonneau v. United States, 961 F.2d 17, 20-22 (1st Cir. 1992).

There are 4 material instances of ineffective assistance of counsel on appeal:

The Government had the burden to establish **beyond a reasonable doubt** that Padilla-Galarza **knowingly and intentionally** possessed the marijuana and bullets found in the **messy, unkept, cluttered house** that he inherited from his father who had a license to possess and in fact owned several firearms. Merely because Padilla-Galarza stayed there on occasions would have never sufficed to sustain a conviction, since the marijuana was allegedly hidden in a pile of clothing, in some pants in a closet and the bullets were not in the one room he frequented, but rather in other totally cluttered rooms. **The location of the illegal contraband and bullets was crucial to any sufficiency argument.**

Padilla-Galarza’s defense was that he was unaware of their existence and the bullets were old bullets that belonged to his father and the house had been broken into on 2 occasions and entered by others on various occasions. He was unaware of the existence of the alleged marijuana hidden in some pants that were located in a pile in

a closet of one of the unkept, totally cluttered rooms that he did not frequent.

A basic function of every appellate lawyer is to study the record and to cite it correctly since the Appeals Court will rely as correct admissions made in the Brief that are unfavorable to appellant. **The appellate opinion reflects that it relied on Padilla-Galarza's appellate counsel's representations that the marijuana, ammunition, and mannequins were in the organized room from where the jury could infer that he knowingly possessed them.** Said gross error in her citation of the record led the Court to reject his sufficiency of evidence argument. The truth is no drugs, ammunition, mannequins nor anything illegal were in that room. Counsel's performance was clearly below an objective standard of reasonableness and the outcome could have been different had she cited the record properly.

This Court's opinion reflects that it relied on that material misrepresentation when it denied his sufficiency argument making specific reference to said incorrect reading of the record:

"The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight. In addition, the Government's evidence sufficed to show that the bedroom in which the ammunition and the marijuana were found in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is "entitled to rely on plausible inferences" from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla³,

³ It is obvious from the above citation that the Government allowed the appeals Court to be misled by the misstatement and never alerted it to the serious misrepresentation his counsel had made of the record. That could be considered

including: photo identification cards; receipts in his name from the previous year; old correspondence addresses to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies.

In the face of the evidence, Padilla nevertheless contends that the evidence was insufficient to prove that he knowingly possessed the contraband". U.S. v. Padilla-Galarza, 886 F.3d Pg. 1, 5-6 (1st Cir. 2018) (Docket 1,3; Exh. 2, pg. 7- App. 94).

The District Court's conclusion that the misstated record did not show that counsel's performance was deficient is certainly a debatable issue among reasoned jurists. When one takes out of the sufficiency of record factual analysis the misstatement of appellate counsel, all that is left is evidence that this was a messy, cluttered house, that had previously been owned by his father, who possessed firearms and bullets; that other persons had access to the house, and all the contraband was found in different rooms, concealed, which left the jury with two equal theories of innocence or guilt. Had the facts been properly presented to this Court it could have concluded and applied precedents where this Court has held:

"If the "evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged," this Court must reverse the conviction. This is so because... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, 'a reasonably jury must necessarily entertain a reasonable doubt.' U.S.A. v. Sanchez, 961 F.2 1169, 1173 (5th Cir.) (citations omitted), cert. denied, 506 US 918, 113 S. Ct. 330, 121 L. Ed.2nd 248 (1992)" U.S.A. v. Flores-Rivera, 56 F.3rd 319, 323 (1st Cir. 1995); U.S.A. v. Andujar, 49 F.3rd 16, 20 (1st Cir. 1995); U.S.A. v. Fulmer, 108 F.3rd 1486, 1492 (1st Cir. 1997).

The sloppy work of appellate counsel does not end there. Related to the sufficiency issue was appellate counsel's ineffectiveness in failing to cite Puerto Rican law that established that prior to the year 2000 owners of firearms were allowed to own bullets of different calibers from the one's they had a license to possess. (App.132-133, Eng. Tr. at 294-296). Notwithstanding the fact that she was made aware of that law and provided a copy of it prior to submitting her Brief, she failed to cite said law, allowing the prosecutor's argument that since some of the bullets found in the residence did not match those of the firearms the father had a license to possess go unchallenged to bolster a finding of guilt without the available explanation that while his father was alive the law permitted said possession all of which could have aided the Court to find reversible error. The Government in its Opposition tried to get around the error by arguing incorrectly that that was a credibility matter that appellate Courts do not intervene with. (Docket 24 at page 6-App. 214). Since the law was never cited it never became a credibility issue as the Government argues. **It is evidence of ineffective assistance because appellate lawyers are supposed to know the law and cite it when applicable.** Her failure to cite the law allowed the prosecutor's argument to stand unchallenged when there was a legal explanation as to why the father could have bullets of different calibers than the weapons he possessed. Her multiple failures in correctly citing the record on crucial matters and citing important law that would have rebutted the prosecutor's arguments meets the

Strickland standard that her conduct so undermined the proper functioning of the adversarial process that her perfunctory Brief, full of errors of significant magnitude cannot be relied on as having produced a just result. Strickland at 686.

It should be highlighted, that although mentioned, the District Court never addressed this issue in its opinion denying 2255 relief. (Add. 1-12). This failure undermined his ineffective assistance of counsel analysis on appeal since it is obvious that there was a legal basis for the Court to conclude that his father could have legally possessed the bullets, which was a material factor to consider in the sufficiency of evidence argument on direct appeal. The citation of said law would have disproved the Government's argument that his father was not the possessor of the ammunition because he was prohibited from owning said bullets, that did not match those firearms he had a license to possess.

In addition, as appears from the Memorandum in Support of the 2255 Petition (Docket 1, Exh.1, pg. 6-7- App. 26-27), Padilla-Galarza's appellate counsel failed to study the record that contained multiple pro se motions and one by stand by counsel Vazquez that justified the granting of a continuance that she failed to include in her arguments. As appears from her Brief the first issue raised was that Court's error in failing to grant a continuance. (Docket 1-2, pg. 11- App. 56-60). Yet from her Statement of the Case, Statement of Facts, and Argument (Docket 1-2, pg. 6-15- App. 51-60), she completely failed to include the two pro se and Vazquez' motions for

continuance **nor their content** in support of the failure to grant a continuance error. This Court rejected the continuance error because Padilla-Galarza's counsel "*does not point to any particular reason why longer than twenty days was in fact needed, such as identifying further investigation that the defense would have needed more time to complete.*" (Exh. 2 pg. 10- App. 97). From a reading of said motions cited in the Memorandum in Support (Docket 1-pg. 6-7- App. 26-27, 143-149), it is clear there were multiple legitimate arguments that should have been raised that justified granting the continuance he requested that could have led this Court to conclude that the District Court had engaged in an "*unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable requests for delay*" citing U.S. v. Maldonado, 708 F.3d 38, 42 (1st Cir. 2013). The Government's Opposition fails to address the specific contents of the pro se and Vazquez' motions of continuance which his appellate counsel failed to include in her argument and statement of facts, making the conclusory statement that he has failed to establish that the appellate Court would have reversed, without specifying why those additional arguments had no persuasive force. Such speculative, conclusory statements without any record development should not have any persuasive value and should be rejected by this Court. In addition, Padilla-Galarza does not have to prove this Court would have found reversible error. The issue is whether appellate counsel rendered ineffective assistance in

failing to study the record and cite important motions that contained multiple additional reasons that justified the continuance which were never presented in her Brief. Her half-hearted, perfunctory effort of only citing the pre-trial hearings held without going into the contents of the pro se and stand by counsel Vazquez' motions given the language of the Circuit when it denied the issue of continuance warrants a finding of ineffective assistance of counsel since her Brief left out important facts and motions that prejudiced the merits of the appeal. Strickland, supra at 687.

The Government tries to blame Padilla-Galarza as to the continuance claiming he caused the problem when he dismissed counsel Anita Hill shortly before the trial was to begin. Had appellate counsel studied the record she would have discovered that Padilla-Galarza was justified in losing faith in her since she caused him to be sent to Atlanta for a mental examination filing a motion with the Court (Cr. 15-078, Docket 15), and when he complained to her about it because he was sent there against his will misled him in a telephone conversation claiming it was the Court that had ordered it. (Cr. 15-078-Docket 30). The breakdown in the attorney/client relationship was entirely justified under those circumstances and the Court should have realized it was legitimate complaint that justified granting the continuance with the assistance of a new lawyer. Padilla-Galarza informed the Court about Hill's actions that caused him to request her removal as his counsel informing, he no longer trusted her. (Cr.

15-078, Docket 72 - App. 297-298).

If one adds the multitude of material factual/legal errors and omissions committed by appellate counsel in preparing her Brief that affected the reasoning and analysis of this Court a finding of prejudicial ineffective assistance of counsel on appeal should be found that warrants granting 2255 relief and the COA because it could have affected the outcome of the appeal and renders the decision unreliable.

The Government in a footnote in its Opposition (Civil 19-1415, Docket 24 pg. 8, fn. 4- App. 217), attempted to discredit the issue about the purity of marijuana claiming it would have not affected the outcome. To begin with, its claim that the net weight would have only been affected by the wrapping is incorrect. It is well known that drugs are combined with other substances that can affect the net weight. A lot of marijuana is mixed with oregano and other substances to obtain a higher profit from sales. In addition, in order to establish that the marijuana found was fit for distribution and was worth \$9,000.00 in the street as testified by the agent could have only been established with a net test lab result. This failure to establish the net weight undermined all of the Government's testimony concerning the cellophane wrapped substance that for some reason was never taken out for testing. The case of Chapman v. U.S., 500 U.S. 453, 468 (1991), clearly establishes that the carrier medium is to be included "*when determining the appropriate sentence...*". It does

not apply when the Government is establishing the street value of the drug as it did in this case since such a conclusion necessarily requires a determination of the net weight of the drug. For example, had the net weight of the marijuana been 10 grams it could have never been worth \$9,000.00 as testified by the agent. In addition, an expert could have testified about the age of the marijuana. In this circumstance there was a legitimate argument to be made against the opinion that the drug had a street value of \$9,000.00 when the actual net weight of the drug was never determined. Appellate counsel was clearly ineffective when she failed to include that argument in her Brief since the agent's opinion that the untested marijuana had a street value of \$9,000.00 could have affected the verdict. The issue cannot be considered in isolation but rather taking the totality of failures of appellate counsel which clearly establish ineffective assistance.

When one considers the multiple **material errors** by committed appellate counsel concerning the facts and law, as argued above, this Court should find jurists of reason could differ from the District Court's findings that no ineffective assistance of counsel occurred and issue a COA on appeal.

II- THE DISTRICT COURT ERRED IN FINDING THAT PETITIONER'S CLAIMS OF GOVERNMENT AND PROSECUTORIAL MISCONDUCT ARE BARRED FROM COLLATERAL REVIEW AND SHOULD HAVE BEEN DECIDED THE ISSUE ON ITS MERITS.

As appears from the District Court's opinion (Docket 158, pgs. 9-11- Add. 9-11), it concluded Padilla-Galarza had defaulted on his 2255 claims by not presenting them on direct appeal. **A reading of his opinion demonstrates that this legal analysis parts from a faulty premise, that his claim was 'non-constitutional';** He stated the procedural default rule applied since it should have been raised on direct appeal, which triggered the collateral rule, that prevents such claims in a 2255 proceeding absent exceptional circumstances. **The whole analysis conducted is deficient since petitioner's claim of being deprived of his due process rights to a fair trial under the 5th Amendment was a constitutional claim that could be considered as a matter of course in 28 U.S.C. 2255 proceedings, which establishes that they may proceed when a person under custody seeks a determination that; 1) "*the judgment violates the Constitution or laws of the United States*".** See also Knight v. U.S., 37 F.3d 769, 772 (1st Cir. 1994) (One of the grounds upon which a petitioner may base a claim of relief under 28 U.S.C 2255 is that the sentence was imposed in violation of the U.S. Constitution.) Such is the case here. (See Cr. 15-078 (JAF), Docket 157, pg.6- App. 13, and Civ.19-1415, Docket 1- App. 32). Given that the issue was constitutional in nature the District Court should have decided the issue on its merits rather than skipping it by applying the collateral default rule, which did not apply to said constitutional due process claim raised in ground two of the 2255 Petition.

Although the District Court erred in applying the collateral review bar, Petitioner nevertheless rebutted the conclusion that it was procedurally defaulted, even though it did not apply in his case. As can be seen from his Reply to the Government's Opposition (Docket 31- App. 246-247), Padilla-Galarza justified an exception to the procedural default rule:

"The Government argues that since Padilla-Galarza failed to raise his Government misconduct claim on direct appeal the same is procedurally defaulted. (Docket 24, pg. 9). To begin with it was impossible for Padilla-Galarza to have raised said claim on direct appeal because the record was not developed as to that issue. It is basic hornbook appellate practice that you cannot include for the first time on appeal documents that are not part of the District Court record. Fed. R. App. P. 10(a); U.S. v. Pagan-Ferrer, 736 F.3d 584 (1st Cir. 2013). The 2255 Petition includes a substantial amount of documents to sustain the governmental misconduct issues that were never presented at trial nor form part of the District Court record. Thus, it was impossible for Padilla-Galarza to have raised the issue on direct appeal.

The impeachment records that constitute Brady materials were not produced by the Government in a timely manner. As appears from Document 24-3 a discovery letter dated 07/25/2015 was prepared that included for the first time the Evidence Logs and Chain of Custody documents among the 749 pages of the package and multiple audio recordings provided to Eliomar Solano on

07/28/2015 at MDC Guaynabo who did not deliver them to Padilla-Galarza until 08/19/2015 (Document 3-38, Exh. 45- App. 209), just 6 days prior to trial which made it impossible for him to adequately study them. (Document 3-37, Exh. 44- App. 208). Said delayed disclosure of Brady materials constitute an exception to the procedural default argument made by the Government and may be raised in a 2255 petition. Conley v. U.S., 415 F.3d 183, 188 (1st Cir. 2005). Here petitioner requested a continuance, which was denied, which prevented him from having enough time to study all of those documents for effective use at trial which has also been recognized as justification for raising it in a 2255 Petition if the defendant can establish there is a “*reasonable probability*” the result of the proceeding would have been different if the discovery had been produced in a timely manner. As appears from the Memorandum in Support of 2255 Petition and the exhibits attached (Documents 1 to 3-38- App. 21-43, 44-209) such a standard has been met. The gross misconduct and false testimony that appears from said evidence also rises to the level of a constitutional due process violation also actionable under 2255 which the Government is precluded from trying to avoid through its procedural objection. Darden v. Wainwright, 477 U.S. 168.181(1986). What is worse, the Government never alerted Padilla-Galarza that the Chain of Custody and Evidence Logs constituted Brady impeachment materials, providing them in a tardy manner among hundreds of other documents precisely to prevent him from discovering the false

testimony and evidence presented at trial.

It is clear from the above that Padilla-Galarza has not waived nor is precluded from raising the Government misconduct issue in this 2255 Petition.

The seminal case concerning the presentation of false, perjured testimony at trial by the prosecution is Napue v. Illinois, 360 U.S. 264, 269-270 (1959), where the Court held; “*First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103 (citations omitted). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.... A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows is false and elicit the truth.*”. In U.S. v. Agurs, 427 U.S. 97, 103 (1976) the Court reiterated; “*a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.*” See also ABF Freight Sys. v. NLRB, 510 U.S. 317, 323 (1994) where the Court recognized; “*False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a “flagrant affront” to the truth-seeking function of adversary proceedings. (Citations omitted). If knowingly exploited by a criminal prosecutor, such wrongdoing is so “inconsistent with the*

rudimentary demands of justice” that it can vitiate a judgment even after it has become final. Mooney v. Holohan, 294 U.S. 103, 112 (1935). This Court has repeatedly recognized these settled principles. See U.S. v. Tavares, 93 F.3d 10, 14 (1st Cir.1996), and U.S. v. Carrasquillo-Plaza, 873 F.2d 10, 15 (1st Cir. 1989); “A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” In U.S. v. Babb, 807 F.2d 272, 277 (1st Cir. 1986) the Court emphasized; “In the constitutional process of securing a witness’ testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.”

Deliberate deception of a Court and jurors by the presentation of false evidence is reprehensible and incompatible with “*rudimentary demands of justice.*” Giglio v. U.S., 405 U.S. 150 (1972). The “*touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.*” Smith v. Phillips, 455 U.S. 209, 220 (1982).

The Government under Brady v. Maryland, 373 U.S. 83, 86 (1963) has an affirmative duty to disclose impeachment material in a timely manner. U.S. v. Chaudhry, 850 F.2d 851, 858 (1st Cir. 1988). Failure to do so can entitle a defendant to 2255 relief. Gonley v. U.S., 415 F.3d 183, 188 (1st Cir. 2005). In U.S. v. Kifwa,

868 F.3d 55, 60-61, 63 (1st Cir. 2017), the Court recognized that where a defendant requests a continuance delayed disclosure of discovery without bad faith a new trial will be granted if defendant can demonstrate that there is a “*reasonable probability*” that if he had received the discovery in a timely manner the result of the proceeding would have been different. The conviction will be overturned if the defendant demonstrates prejudice. See also U.S. v. Montoya, 844 F.3d 63, 71 (1st Cir. 2016).

It should be noted that the Government provided perfunctory arguments to the District Court as to the merits of said claims, relying largely on its argument that it was procedurally defaulted. (Docket 24, App. 210-237).

As appears from the statement of facts of this Brief, Tews perjured himself when he testified under oath that he discovered the marijuana. (Supra, at 18-20). This is particularly of concern when the agents that allegedly found and observed when and where the marijuana was found, Cintron and Asencio, never testified at trial.

Sufficient evidence was produced from the crime scene logbooks that permitted an inference that the 9mm. bullet allegedly found on the floor of the safe in room M was placed there after multiple rounds of 9mm. bullets were found in room K, whose sequence of identification in the photographic log was clearly out of place. Supra, at 20-23. This was an issue that justified granting an Evidentiary Hearing since it required record development and involved issues of credibility.

It is obvious that the crime scene was altered during the search when items were not photographed where they were allegedly found, but rather in a different place, prejudicing Petitioner who asserted the documents and identifications were in a different area, not in the incriminating place they verbally claimed they were in. Supra, pgs. 23-25; Padilla's sworn statement, Exh. 44- App. 208).

Misleading evidence was purposely presented to the jury when the Government failed to produce the net weight of the marijuana yet was allowed to provide testimony that it was worth \$9,000.00 on the street, allowing the jury to infer he was a drug trafficker. Supra at 25. **The failure to provide sufficient time for appellant to test the marijuana materially prejudiced Padilla-Galarza since aside from discovering the net weight of the drugs, that could have impeached the agents street value opinion and created a reasonable doubt as to its possession with intent to distribute as alleged in count Two, an expert could have testified as to how old was the marijuana, another fact that could have benefited him.**

The record reflects that Padilla-Galarza had requested and been granted permission to retain a chemist (Docket 99- Exh. 17b- App.150), that was necessary to investigate the adequacy of the Government's chemist's analysis that was limited to having cut a small part of the foil packaging and testing for a positive THC content. As appears from the trial record:

"THE COURT: Okay. Motion denied.

The question now is, is defendant going to present any evidence, before I bring the jury back? Aside the stipulation?

MR. PADILLA-GALARZA: We had asked previously for an expert witness. We never had a chance to get one. We never even had a chance at all in this case.

THE COURT: Expert on What?

MR. PADILLA-GALARZA: Expert witness, that the motion was granted, but never gave us.

THE COURT: Expert on what?

MR. PADILLA-GALARZA: Expert witness in order to refute. An expert chemist would know what he's doing, not based on personal opinions, instead of a scientific method as it should be." (TR. August 27, Pg. 41- Exh. 19- App. 160).

This pending discovery was an important consideration to include within the argument of the issue of the District's Court's failure to grant a continuance that could have led the appellate Court to find error. As was argued by Padilla-Galarza the chemist was necessary to determine net weight and the quality which were all necessary in order for the jury to be in a position to determine the drug quantity he was being held liable for, the quality which was necessary to establish intent to distribute and its age. The District Court during said argument erroneously stated that; *"Even the purity is not even relevant."* (Tr. August 27, Pg. 43- Exh. 20- APP. 161).

Said error can be gleaned by the District Court's instructions to the jury where he stated;

*"Intent to distribute may be inferred from the **quality and quantity** of the drugs, for example. **Quantity** more than anything else. A larger amount of narcotics indicates that it may not be for personal use and that it's for distribution. In other words, if you find that the defendant possessed a quantity of marijuana, more than which would be needed for personal use, then you may make the inference that the defendant intended to distribute that controlled substance." (Tr. April 27, Pg. 77 –*

Exh. 21- App. 162).

The error was augmented when the judge submitted to the jury a drug quantity determination as part of its verdict;

“Then I ask you a question. Question, to be answered only if you find the defendant guilty on the issue of the marijuana. How much marijuana did the defendant possess? I gave you three options. More than one kilo of marijuana. One kilo is 2.2 pounds. Less than one kilo of marijuana. Less than 2.2 pounds. Or the amount certified by the chemist.” (Tr. August 27, Pg. 84 – Exh. 22-App. 163).

Incredibly the jury in its verdict form made a finding of the third choice provided by the judge; *“The amount certified by the chemist.”* (Tr. August 27, Pg. 89 - Exh. 23a-b- App.164-165).

The Government in a footnote of its Opposition (Docket 24, pg. 8- App. 166), attempted to discredit the issue about the purity of the marijuana, claiming erroneously, as demonstrated above, it would not have affected the outcome. The District Court in its opinion, contradicts itself stating that the two pro se and Vazquez’ motions for continuance/reconsideration, where this issue was specifically raised, did not constitute ineffective assistance of counsel because appellate counsel is not required to raise every non-frivolous claim (Add. 7) **yet concluded; ‘these matters needed to be raised by appellate counsel in order to prove that petitioner’s defense “justified the granting of a continuance.”** (Add. at 8). As a reading of the motions reflect, they raised substantial additional arguments in support of the continuance that she should have brought to the attention of the Court and argued in her appellate

Brief. Said failure to develop her argument fully could certainly be considered by jurists of reason that it constituted ineffective assistance and that the Government engaged in misconduct by presenting fabricated, misleading evidence to the jury that could have affected the verdict.

III- THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING.

As appears from the record of this case there were numerous factual controversies that required the celebration of an Evidentiary Hearing, given that the record required development because it could not conclusively resolve the multiple material issues concerning Government misconduct that required making credibility determinations. Petitioner filed a motion requesting the Court celebrate an Evidentiary Hearing (Civ. 19-1415, Docket 37), which the District Court denied. (Add. 11). In U.S. v. Butt, 731 F.3d 75,78 (1st Cir.1984), this Court held:

“An Evidentiary Hearing is required if the records and files of the case, or an expanded record, cannot conclusively resolve substantial issues of material fact, and when the allegations made, if true, would require relief.” (Citations omitted); Blackledge v. Allison, 431 U.S. 63 (1977) (Where the record, in view of the allegations made, does not conclusively show that a prisoner is entitled to no relief, 28 U.S.C. 2255, the prisoner **should be given an Evidentiary Hearing.**); Vega-Encarnacion v. U.S., 1993 U.S. APP. LEXIS 10068, pg. 9 (Per Curiam 1st Cir. 1993)

(An Evidentiary Hearing is required if the records and files in the case, or an expanded record, cannot conclusively resolve substantial issues of material fact, and when the allegations made, if true, would require relief.) See also 28 U.S.C. 2255(b) which states; “*Unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, to determine the issues and make findings of fact and conclusions of law with respect thereto.*”. It is clear that Padilla-Galarza met this standard and an Evidentiary Hearing was required in this case.

The District Court sidestepped the meritorious claims of Government misconduct, perjury, altering the crime scene by concluding erroneously, as argued above, that Padilla-Galarza had waived the issue, applying rules that applied to non-constitutional issues when both of his arguments involved constitutional violations.

Given that the issues of Government misconduct, perjury, altering the crime scene warranted an Evidentiary Hearing; were not decided on their merits; this Court should grant the COA, allow the appeal to proceed; remand the case to the District Court, requiring that it hold an Evidentiary Hearing and decide on its merits the multiple allegations of Government misconduct. **Petitioner incorporates to this argument the discussion made at pages 16-26, 36-45 of this Brief of the multiple valid arguments of governmental misconduct that justified granting an**

Evidentiary Hearing.

CONCLUSION

WHEREFORE, it is respectfully requested that this Hon. Court grant the Certificate of Appealability and allow the appeal to proceed.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that copy of the above has been notified to all parties in the attached Service List through their correspondent method.

In San Juan, Puerto Rico, this 5th day of December 2022.

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

JOSE PADILLA- GALARZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO. 19-1415 (DRD)
(Criminal Case No. 15-0078)

OPINION AND ORDER

Pending before the Court is Petitioner Jose Padilla Galarza's (hereinafter "Petitioner" and/or "Padilla Galarza") *Motion Under 28 U.S.C. § 2255 to vacate, set aside, or correct Sentence by a Person in Federal Custody* (Docket No. 4).¹ Respondent, the United States of America (hereinafter, the "Government") filed its respective response in opposition thereto. (Docket No. 24). On December 4, 2019, Petitioner filed his Reply thereto. (Docket. No. 31).

The Court notes that prior to filing the instant § 2255 Petitioner, appealed his convictions before the First Circuit and the convictions and sentence of the United States District Court for the District of Puerto Rico were affirmed, subject to remand for the limited purpose of striking the child pornography forfeiture order. *See*, Docket No. 150 in Crim. Case No. 15-0078 (DRD).

For the reasons stated herein, the Court **DENIES** Petitioner's Motion to Correct Sentence Under 28 U.S.C. § 2255. (Docket. No. 1).

I. FACTUAL BACKGROUND

On January 2015, federal law enforcement agents executed a search warrant in Toa Baja, Puerto Rico in a house which Padilla Galarza had inherited from his parents. United States v. Padilla-Galarza, 886 F. 3d 1, 4 (1st Cir. 2018) During the search, the agents found ammunition and 1,293.10 grams of marijuana. *Id.* A Grand Jury returned a Two-Count *Indictment* against the

¹ A Memorandum in Support of 2255 Petition was included. *See* Docket. No. 1. On August 24, 2020 petitioner also filed a *Motion Submitting Additional Evidence in Support of 2255 Petition*. (Docket No. 36)

Petitioner for being a prohibited person in possession of ammunition, in violation of 18 U.S.C. §922 (g)(1) (hereinafter, "Count One") and possession of a controlled substance with the intent to distribute, in violation of 21 U.S.C. § 841 (a)(1) and b (1)(D) 1,3 (hereinafter, "Count Two"). *Id.* See also, Crim No. 15-cr-0078 at Docket No. 1.

Petitioner was found guilty on Count One and Count Two of the Indictment on August 27, 2015. See, Crim No. 15-cr-0078 at Docket No. 136. Accordingly, on December 3, 2015, Petitioner was sentenced to forty-six (46) months of imprisonment, to be served consecutively to the sentences imposed in criminal cases 15-079 (DRD) and 15-633 (GAG). Upon release from imprisonment the Petitioner would be on supervised release for the term of three (3) years. *Id.*²

On April 30, 2019, the Petitioner timely initiated the instant matter pursuant to 28 U.S.C. § 2255 (Docket No. 1). In summary, Petitioner claims that: (1) his appellate counsel was ineffective for misstating the record to Petitioner's detriment and not including additional legal arguments in the brief; and (2) alleged government misconduct violated Padilla's due process rights. On October 4, 2019, the Government filed a *Response* (Docket No. 24) in opposition thereto, averring that: (1) Petitioner received effective assistance of counsel on appeal; (2) Petitioner was not prejudiced by appellate counsel's misstatement of the record and (3) that Petitioner's claim of government and prosecutorial misconduct were procedurally defaulted.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2255, a federal prisoner may file a petition to vacate, set aside, or correct his or her sentence by showing 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

² On May 4, 2018, the Court entered and Amended Judgment eliminating the forfeiture order pursuant to 18 U.S.C. §3742(f)(1) and (2) Crim No. 15-cr-0078 at Docket No. 154

subject to collateral attack." The prisoner is entitled to a prompt hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* However, "[r]elief under [§ 2255] is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." Blake v. United States, 723 F.3d 870, 878-79 (7th Cir. 2013) (citations omitted); see Knight v. United States, 37 F.3d 769, 772-73 (1st Cir. 1994).

A. Ineffective Assistance of Counsel Claim

Petitioner asserts that he received ineffective assistance of counsel for various reasons. First, Petitioner states in his *Memorandum in Support of 2255 Petition* that one of the issues raised in his brief before the First Circuit was that "the evidence was insufficient to demonstrate that defendant had knowledge of the drugs or ammunition." (Docket No. 1 at 3) Petitioner alleges that appellate counsel misstated the record in his brief "as to where the marijuana and ammunition was found" (Docket No. 1 at 1). According to Padilla Galarza, said mistake materially affected his insufficiency of evidence argument since the First Circuit allegedly relied on said statement to deny Petitioner's sufficiency of evidence argument. Petitioner alleges that appellate counsel's "incorrect narration of the record in a highly prejudicial manner by representing to the Court that the marijuana, bullets, and mannequins were found in the organized bedroom where it could be inferred that he slept there, led the Court to incorrectly dismiss his sufficiency of evidence argument." (Docket No. 1 at 7)

Second, Petitioner states that appellate counsel was ineffective since she failed to cite a Puerto Rico law that allowed an individual to purchase "all types of ammunition even if they weren't of the type for which you had a license". *Id.* at 5. According to Petitioner, this information was relevant since "the trial evidence showed his father possessed a firearms license since 1994 (Exh. 9c) was within the time period a person could purchase any type of bullets in P.R. (Exh. 10)" *Id.* at 8.

Third, Petitioner alleges that appellate counsel failed to "include in her argument related to the failure to grant a continuance error Padilla's two prose motions... that included multiple facts that supported the granting of a continuance." *Id.* at 2. According to Padilla Galarza, appellate counsel's failure to include this information materially prejudiced him since the appellate Court was "never made aware of the multiple valid additional reasons that existed that justified finding error in the failure to grant the continuance". *Id.* The Court disagrees with these statements and explains.

To prevail on an ineffective assistance of counsel claim, the Petitioner holds the heavy burden of proving his allegations meet and satisfy the *Strickland* standard. See Strickland v. Washington, 466 U.S. 668 (1984). Under *Strickland*, Petitioner must prove that (1) counsel's performance fell below an objective standard of reasonableness, and (2) prejudice, meaning that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466, U.S. 668b (1984)); see Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996); Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994); Lema, 987 F.2d 48, 51 (1st Cir. 1993); López-Nieves v. United States, 917 F.2d 645, 648 (1st Cir. 1990) (citing *Strickland*, 466 U.S. at 687).

The first prong of the *Strickland* test is satisfied when the Petitioner proves that counsel's performance fell under an objective standard of reasonableness. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." *Strickland*, 466 U.S. 687–688. However, it has been recognized that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. In examining whether the Petitioner's representation was below the objective standard of reasonableness Courts should always make a determination as to whether Petitioner received from counsel the constitutional right to an adequate representation. "In all criminal prosecutions, the accused shall enjoy the [right] [. . .] to

have the Assistance of Counsel for his defend[er].” U.S. Const. amend VI. It is further recognized that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 48 U.S. at 690-91. In any ineffectiveness assistance of counsel case, a particular decision “must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* Petitioner could prevail in his claim if he can prove that appellate counsel’s actions were “so patently unreasonable that no competent attorney would have made it.” Knight v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006). There is no doubt that Strickland also applies to representations outside of the trial setting, which includes plea bargains, sentence and appeal. See Missouri v. Frye, 132 S. Ct. 1399, 1408-10, 182 L. Ed. 2d 379 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Hill v. Lockhart, 474 U.S. 52, 57 (1985); Bonneau v. United States, 961 F.2d 17, 20-22 (1st Cir. 1992).

In the case at bar, both Petitioner and the Government, assert that appellate counsel indeed made a mistake when she cited in the brief that the ammunition and marijuana was found in the more organized bedroom. According to Petitioner, “had the correct facts been informed in the brief the insufficiency of evidence argument could have prospered”. (Docket No. 1 at. 4) However, as the Government stated, the First Circuit did in fact have the correct facts for consideration since the Government’s brief did not contain the same mistake and maintained the adequacy of the evidence. The Court considers that Petitioner has failed to show how if it were not for appellate counsel’s error, the result of the appeal would have been different. Even if appellate counsel were to state in the brief that the ammunition and marijuana was found in the disorganized room, where Petitioner did not sleep, this statement could not change the fact that that during the trial, the government introduced “substantial evidence from which a jury could reasonably infer that the house was Padilla’s residence, including his admissions during a

interview with federal agents he owned and frequented the house, the testimony that he was surveilled outside the house, and the evidence that his personal items were found inside the house." Padilla-Galarza, 886 F.3d at 11. Although the First Circuit did indeed state that the "bedroom in which the ammunition and the marijuana were found was in a more organized and clean condition than the rest of the house" Padilla-Galarza, 886 F. 3d at 6, before making such statement, the First Circuit considered the following:

for the purposes of both statutes under which Padilla was convicted, knowing possession of the contraband may be inferred from evidence of actual possession (meaning "immediate, hands-on physical possession") or constructive possession. Guzmán-Montañez, 756 F.3d at 8 (§ 922(g)(1)); accord García-Carrasquillo, 483 F.3d at 130 (§ 841(a)(1)). And, as pertinent here, "[i]n order to show constructive possession, the government must prove that the defendant 'had dominion and control over the area where the contraband was found.'" United States v. Wight, 968 F.2d 1393, 1397 (1st Cir. 1992) (quoting United States v. Barnes, 890 F.2d 545, 549 (1st Cir. 1989)) (discussing constructive possession in the context of both drug offenses and § 922(g)(1)). Thus, the record need show only that the evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Padilla exercised dominion and control "over the area" in which the contraband was found, as a jury may infer from such a finding of constructive possession that he knowingly possessed the contraband if circumstances would make it reasonable for a jury to do so. *Id.*

The evidence in this case more than sufficed to permit a jury to reasonably find as much. To begin with, the jury learned that Padilla had admitted in an interview with federal agents that he was an owner of the house in which the ammunition and marijuana were found, that he had made payments on the mortgage for the house, and that he had installed four surveillance cameras at the house in order to deter break-ins and vandalism. Moreover, a federal agent testified that she conducted drive-by surveillance of the house ten days before the search of the house, and that Padilla was standing outside the house as she drove by it.

The jury further learned that Padilla admitted in the interview with federal agents that he frequented the house during the daytime and that he sometimes slept at the house overnight.

The mere fact that Petitioner's appellate counsel misstated the record does not show that counsel's performance was deficient. Thus, it does not satisfy the Strickland prong that requires objectivity. With regards to the second prong of the test, the Court finds that Petitioner has also failed to prove that appellate counsel's misstatement caused him the prejudice required under the

Strickland test, meaning that he has failed to prove that but for counsel's error, the result of the proceedings would have been different. Considering all of the evidence the First Circuit reviewed, the Court cannot agree with Petitioner that the First Circuit would have ruled upon differently if it were not for counsel's mistake. The additional evidence brought by the Government alone was sufficient to prove that Padilla constructively possessed the ammunition and the marijuana found. Thus, the Court agrees with the Government that "the record is clear that the ammunition was found in a room that while not Padilla's bedroom, he had control over." (Docket No. 24 at 5) It is evident that Appellate counsel's misstatement is not the only statement that the Court of Appeals relied on to reach its conclusion.

The second scenario where Petitioner considers that appellate counsel was ineffective was that she failed to argue before the First Circuit "multiple valid additional reasons that existed that justified finding error in the failure to grant the continuance" (Docket No. 1 at 7). However, the record reflects that appellate counsel did indeed develop and argument as to how the district court's denial of a longer continuance violated Petitioner's Sixth Amendment rights. (Docket No. 1, Exhibit 2, Brief for Appellant at 11-15). Even having these arguments before for consideration, the First Circuit found that the district court did not abuse its discretion in denying the requested continuance. Padilla-Galarza, 886 F. 3d at 8. The fact that counsel did not prevail in her argument is not sufficient grounds for a valid claim of ineffective assistance of counsel. Avila-Rodriguez v. United States 2022 WL 748110 (D.P.R. Mar. 11, 2022). Appellate counsel is not required to raise every non-frivolous claim, but rather selects among them to maximize the likelihood of success on the merits. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)).

However, Petitioner alleges that additional arguments needed to be included that would have led the First Circuit to find that the District Court erred in not granting a continuance of the

trial. Specifically, Petitioner alleges that appellate counsel did not raise important matters regarding that the district's court denial for a continuance prohibited Petitioner from retaining a chemist to determine the net weight and the quality of the drug found and thus, refute the Government's chemist analysis. In summary, these matters needed to be raised by appellate counsel in order to prove that Petitioner's defense "justified the granting of a continuance so that an independent chemist would certify net drug weight and its purity." (Docket No. 1 at 11) Once again, Petitioner makes this argument with he hopes that with a report from a chemist, the outcome would have been different. However, there is little to support petitioner's contention that the result of his appeal would have been different if his appellate counsel had pressed the expert issue on direct appeal. Mostly because an argument with regards to Petitioner's Sixth Amendment right was raised and even said argument was not enough to overrule the district's court determination to deny the continuance of the trial. In summary, Petitioner was obligated to show both that appellate counsel's performance fell below an objective standard of reasonableness, and that prejudice resulted from it, Strickland, 466 U.S. at 687, as to each particular instance in which he claims ineffective assistance of counsel. This Court finds that Petitioner has failed to do so.

B. Petitioner's claims of government and prosecutorial misconduct are barred from collateral review

Additionally, Petitioner argues that "the Government's trial evidence was plagued with perjured testimony of its agents; the crime scene was altered by the agents conducting a search of the residence and presented at trial; circumstantial evidence that justified the inference that the one bullet found in the safe was placed there by the agents after they found the pack of rusty bullets in another room and misleading evidence concerning the marijuana was presented at trial that justifies granting Padilla-Galarza 255 relief." (Docket 1 page 12)

A § 2255 motion is not a substitute for direct appeal; therefore, it carries higher standards which the petitioner must clear in order to bring a valid claim. U.S. v. Frady, 456 U.S. 152, 164,

102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); U.S. v. Addonizio, 442 U.S. 178, 184–85, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). Hence, "[p]ostconviction relief on collateral review is an extraordinary remedy, available only on a sufficient showing of fundamental unfairness." Singleton v. U.S., 26 F.3d 233, 236 (1994) (citing Brecht v. Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Under the "procedural default" rule, "[a] nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." Damon v. United States, 732 F.3d 1, 4 (1st Cir. 2013) (internal citations omitted); see also Oakes v. United States, 400 F.3d 92, 95 (1st Cir. 2005) ("If a federal habeas petitioner challenges his conviction or sentence on a ground that he did not advance on direct appeal, his claim is deemed procedurally defaulted.").

However, in cases of this nature, a district court may entertain the petitioner's request for the first time if defendant can "show cause for the failure and actual prejudice" Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994)); see also Bousley v. United States, 523 U.S. 614, 622 (1998) (In order to overcome the procedural default rule and attack his sentence by way of a habeas petition, Petitioner must first demonstrate "either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") Petitioner alleges that "it was impossible for Padilla-Galarza to have raised said claims on direct appeal because the record was not developed as to that issue." (Docket No. 31 at 9). Specifically, Petitioner argues that his 2255 petition "includes a substantial amount of documents to sustain the governmental misconduct issues that were never presented at trial nor form part of the District Court record. Thus, it was impossible for Padilla-Galarza to have raised the issue on direct appeal." *Id.* Padilla-Galarza argues that the impeachment records that constitute Brady material were not produced in a timely manner. *Id.* However, the Government correctly points out that the record shows that the Government's first discovery letter is dated February 11, 2015 (Docket No.24, Exhibit 1), the second discovery letter is dated March 17, 2015 (Docket No. 24, Exhibit 2) and a final discovery letter was sent on July 27, 2015 (Docket No. 24, Exhibit 3). The trial began on August 26, 2015. (Docket No. 103 at Crim. Case No. 15-0078).

Petitioner argues that "said delayed disclosure of Brady materials constitute an exception to the procedural default argument by the Government and may be raised in a 2255 petition." (Docket No. 31 at 9). The First Circuit has held that to establish a Brady violation, a habeas petitioner must demonstrate: "(1) the evidence at issue is favorable to him because it is exculpatory or impeaching; (2) the Government suppressed the evidence; and (3) prejudice ensued from the suppression (i.e., the suppressed evidence was material to guilt or punishment)." Conley v. United States, 415 F.3d 183, 188 (1st Cir. 2005) However, according to Petitioner's own statement, the Government never suppressed the alleged Brady material since:

As appears from Document 24-3 a discovery letter dated 07/25/15 was prepared that included for the first time the Evidence Logs and Chain of Custody documents among the 749 pages of the package and multiple audio recordings provided to Eliomar Solano on 07/28/15 at MDC Guaynabo who did not deliver them to Padilla-Galarza until 08/19/15 (Docket 3-38, Exh. 45), just 6 days prior to trial which made it impossible for him to adequately study them. (Document 3-37, Exh. 44). Said delayed disclosure of Brady materials constitute an exception to the procedural default argument made by the Government and may be raised in a 2255 petition. Conley v. U.S., 415 F.3d 183, 188 (1st Cir. 2005).

(Docket No. 31 at 9)

According to the above, the Government did indeed produce the documents that Petitioner considers Brady material. Petitioner's allegations that it was impossible to adequately study them prior to trial does not establish a Brady violation by the Government. The Court conducted a hearing prior to trial to determine if Petitioner knowingly and voluntarily waived his right to counsel, the Court found he did. (Crim. Case No. 15-0078, Docket No. 94 at 1) Additionally, the Court tried by various means to "convince defendant that he would be in a better position if counsel represented him. In fact, it is a duty of this court to warn the defendant of the dangers and 14 disadvantages of self-representation in order to determine whether the waiver of counsel 15 is knowing and intelligent. United States v. Francois, 715 F.3d 21, 30 (1st Cir. 2013) 16 (citing United States v. Proctor, 166 F.3d 396, 402 (1st Cir. 1999))." *Id.* Petitioner chose to be represented pro

se, and the documents were available to him prior to trial. Thus, Petitioner is prohibited from bringing procedurally defaulted claims in his 2255 petition.

C. Petitioner is not entitled to discovery nor an evidentiary hearing.

Petitioner has requested the Court to compel the Government to disclose discovery in this proceeding. See, Docket No. 1 at page 20, n 2. Specifically, Petitioner request the case agents' disciplinary records. *Id.* The First Circuit has held that a federal habeas petitioner, "unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course". Donald v. Spencer, 656 F.3d 14, 16 (1st Cir. 2011) Petitioner must have a good cause to request such evidence, specifically since a habeas proceeding "is not a fishing expedition" *Id.* Petitioner has not demonstrated how agents' disciplinary records are relevant to his relief.

Additionally, a prisoner who invokes § 2255 is not entitled to an evidentiary hearing as a matter of right. See David v. United States, 134 F.3d 470, 477 (1st Cir. 1998). Evidentiary hearings are the exception, not the norm. When a petition is brought under § 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. See United States v. McGill, 11 F.3d 223, 226 (1st Cir. 1993); Mack v. United States, 635 F.2d 20, 26-27 (1st Cir. 1980). The First Circuit has turned these principles into a rule that holds a hearing to be unnecessary "when a §2255 motion (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case." United States v. McGill, 11 F.3d at 226. Expressed more succinctly, a § 2255 motion may be denied without a hearing if based on allegations that "need not be accepted as true because they state conclusions instead of facts, contradict the record, or are 'inherently incredible.'" *McGill*, 11 F.3d at 226 (citing Shraiar v. United States, 736 F.2d 817, 818 (1st Cir. 1984)).

III. CONCLUSION

For the reasons elucidated above, the Court **DENIES** Petitioner, Jose Padilla Galarza's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody in Criminal Case No. 15-078 (DRD) (Docket No. 1)*. Judgment of dismissal is to be entered accordingly.

It is further ordered that no certificate of appealability should be issued in the event that Petitioner filed a notice of appeal because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of September, 2022.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge

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Date Filed: 12/05/2022

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Case: 22-1889

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

JOSE PADILLA- GALARZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO. 19-1415 (DRD)
(Criminal Case No. 15-0078)

JUDGMENT

Pursuant to the Court's *Opinion and Order* (Docket No. 43) denying the Petitioner, Jose Padilla Galarza's *Motion Under 28 U.S.C. § 2255 to vacate, set aside, or correct Sentence by a Person in Federal Custody* (Docket No. 4), the Court hereby enters final judgment **DISMISSING THE INSTANT CASE WITH PREJUDICE.**

THIS CASE IS NOW CLOSED FOR ALL ADMINISTRATIVE AND STATISTICAL PURPOSES.

IT IS SO ORDERED, ADJUDGED AND DECREED.

In San Juan, Puerto Rico, this 6th day of September, 2022.

S/Daniel R. Domínguez
Senior U.S. District Judge

United States Court of Appeals For the First Circuit

No. 22-1889

JOSÉ PADILLA-GALARZA,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

Before

Barron, Chief Judge,
Kayatta and Gelpí, Circuit Judges.

JUDGMENT

Entered: October 15, 2024

Petitioner José Padilla-Galarza seeks a certificate of appealability (COA) to appeal from the district court's denial of his petition pursuant to 28 U.S.C. § 2255. After careful review of petitioner's submission and the record below, we conclude that the district court's disposition of the petition was neither debatable nor wrong, and that petitioner has therefore failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, the application for a COA is denied, and the appeal is terminated.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

Jose Padilla-Galarza

Rafael F. Castro Lang

Mariana E. Bauza Almonte

No. 22-1889

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JOSÉ PADILLA-GALARZA,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

TO THE HONORABLE COURT:

Pursuant to Federal Rules 35 and 40 of Appellate Procedure, Petitioner **Jose Padilla Galarza** respectfully submits this Petition for Panel Rehearing and Rehearing En Banc, requesting reconsideration of the denial of a Certificate of Appealability (COA). Petitioner contends that the panel's decision failed to adhere to well-established legal standards under 28 *U.S.C.* § 2253(c) and relevant precedents.

The issues raised in Petitioner's habeas corpus application, including ineffective assistance of appellate counsel, prosecutorial misconduct, and the denial

of an Evidentiary Hearing—are significant, debatable among jurists of reason, and deserving of further judicial consideration. **The denial of the COA undermines the principle that meritorious claims should proceed to a full review when they involve substantial constitutional questions.**

This Petition identifies the legal and factual errors in the panel’s decision and demonstrates that the case warrants reconsideration for the sake of justice, fairness, adherence to constitutional principles and court precedents.

I. STANDARD FOR REHEARING AND REHEARING EN BANC

1. Rehearing En Banc (Rule 35)

Under Rule 35, rehearing en banc is warranted if:

- The proceeding involves a question of exceptional importance; or
- The panel decision conflicts with decisions of the Supreme Court or other Circuit Courts.

The issues raised in this case are of exceptional importance because they concern the fundamental constitutional rights of criminal defendants to effective legal representation, fair trials, meaningful appellate review and obfuscation of judicial precedents.

2. Panel Rehearing (Rule 40)

Rehearing by the panel is warranted when the Court has overlooked or misapprehended points of law or fact that are material to the disposition of the

appeal. Here, the panel's decision to deny a COA misapplied the governing standards for issuance and overlooked critical factual and legal issues that establish "a substantial showing of the denial of a constitutional right".

II. GROUND FOR REHEARING

1. Misapplication of the Certificate of Appealability Standard (Slack v. McDaniel)

In Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court established that a Certificate of Appealability (COA) must issue when:

1. **Reasonable jurists could debate** whether the petition states a valid claim of the denial of a constitutional right; or
2. The issues presented are adequate to deserve encouragement to proceed further.

The Slack standard is intended to serve as a safeguard, ensuring that petitioners are not prematurely denied access to appellate review for claims that raise substantial constitutional questions. The panel failed to apply this standard correctly, as evidenced by its summary denial of the Petitioner's COA despite the presence of clear constitutional claims that meet this threshold.

Debatable Constitutional Claims Ignored

The Petitioner presented compelling evidence of:

1- **Ineffective Assistance of Appellate Counsel:** Jurists of reason could debate whether appellate counsel's failure to address critical trial errors, misstating and failing to argue material facts, including discrepancies in evidence handling, and to properly develop her argument when discussing the final denial of a trial continuance, by failing to mention the late delivery of 749 pages of discovery six days prior to commencement of the trial (App. 208), that included Brady evidence logs, and the need to have a defense expert examine the drugs to determine the net weight and quality of the marihuana seized, all of which would affect the value of the marijuana if sold in the streets. Appellate counsel failed to challenge material misstatements in the government's narrative, including the false testimony of FBI Agent Tews that he was the person that discovered marijuana when the government's inventory records (drafted by Tews- App. 257), reflect it was agent Cintron Negron Hector who located it. (See Docket 31-3- App. 275). This perjury was never corrected by the prosecution. On the contrary, it presented it during its direct presentation of evidence.

Appellate counsel failed to study the record and incorrectly informed in her Brief that the marijuana and rusty bullets were found in the 'more organized' room where Padilla-Galarza stayed occasionally. (App. 53-54). This Court relied heavily on said misrepresentation on 2 occasions in its opinion (U.S. v. Padilla Galarza, F.3d 1, 7- App. 94), when it denied the sufficiency of

evidence argument raised, since such a factual assertion greatly reinforced the inference of constructive possession of contraband and ammunition. The fact that the Court relied on said misrepresentations negates any argument that the Government in their Brief correctly informed where they were found. Had the Court been aware of the misrepresentation of such crucial facts it would not have emphasized nor reiterated it on 2 occasions in its opinion:

"In addition, the government's evidence sufficed to show that the bedroom in which the ammunition and the marijuana were found was in a more organized and clean condition than the rest of the house, from which a jury could have reasonably inferred that Padilla slept in that bedroom when he stayed overnight at the house. See United States v. Matthews, 498 F.3d 25, 31 (1st Cir. 2007) (stating that a jury is "entitled to rely on plausible inferences" from circumstantial evidence). And, as Padilla concedes, the contraband was found in that bedroom together with personal items that indisputably belonged to Padilla, including: photo identification cards; receipts in his name from the previous year; old correspondence addressed to him; and mannequins, decorations, and toy guns that Padilla admitted were his for the purpose of making movies.

In the face of this evidence, Padilla nevertheless contends that the evidence was insufficient to prove that he knowingly possessed the contraband. He points out that there was no evidence of his fingerprints on the contraband and that the house was "unkempt, disorganized and full of items." But neither of those facts suffices to show that the jury was compelled to find in his favor regarding whether he knew the contraband was in the bedroom, given the government's ample evidence of his dominion and control over that area. In particular, Padilla acknowledges that the evidence showed that the bedroom was relatively "more organized" than the rest of the house, and that the contraband was found in that bedroom "with items belonging to [Padilla]." A jury could reasonably infer from those facts that Padilla exercised dominion and control over the area where the contraband was found."

2- Prosecutorial Misconduct: The Petitioner's claim that FBI Agent

Tews committed perjury raises serious questions about whether the trial was

conducted in accordance with the Fifth Amendment's guarantee of due process. Jurists of reason could debate whether the introduction of materially false testimony, combined with discrepancies in the chain of custody, undermined the fairness of the trial.

3- Heightened Burden Imposed at the COA Stage: The panel improperly required the Petitioner to demonstrate the ultimate success of his claims rather than their debatability. This approach is contrary to the low threshold established in Slack, which ensures that claims raising legitimate constitutional issues are not dismissed without full appellate consideration. By prematurely adjudicating the merits of the Petitioner's claims, the panel denied him a meaningful opportunity to vindicate his constitutional rights.

4- Improper Resolution of the Merits at the COA Stage (Miller-El v. Cockrell): The Supreme Court in Miller-El v. Cockrell, 537 U.S. 322 (2003), emphasized that the COA stage requires only a **threshold determination** of whether the claims raised are **debatable** or deserving of further judicial scrutiny. The Court expressly warned against resolving the merits of the claims at this preliminary stage, as doing so undermines the purpose of habeas corpus review.

Premature Adjudication of the Claims

The panel violated the principles set forth in Miller-El by resolving the merits of the Petitioner's claims at the COA stage:

- **Ineffective Assistance of Counsel:** It can be inferred the panel dismissed the ineffective assistance claim by concluding that appellate counsel's performance did not meet the Strickland v. Washington, 466 U.S. 668 (1984), standard. This determination requires a thorough review of the factual record, which is inappropriate at the COA stage.
- **Prosecutorial Misconduct:** The panel summarily rejected the claim of perjury by FBI Agent Tews without assessing whether his perjured testimony and the chain of custody records that established it warranted further inquiry.

5- Denial of Evidentiary Hearing Conflicts with Precedent: The denial of an Evidentiary Hearing in this case contradicts established legal principles requiring hearings when **material factual disputes exist**. The Supreme Court and the First Circuit have consistently held that evidentiary hearings are necessary to resolve such disputes in habeas proceedings. See Flores-Rivera v. United States, 16 F.4th 963 (1st Cir. 2021); Townsend v. Sain, 372 U.S. 293 (1963).

Material Factual Disputes Requiring Resolution

The Petitioner presented significant factual disputes that warranted an Evidentiary Hearing, including:

- **Contradictions in Evidence Handling:** The chain of custody records and testimony from FBI Agent Tews conflict regarding the discovery and handling of marijuana and ammunition. These discrepancies raise questions

about the integrity of the evidence and the credibility of government witnesses.

- **Perjury Allegations:** The Petitioner alleged that Agent Tews falsely testified he was the person that discovered the marijuana which was contradicted by the evidence logs he prepared. An Evidentiary Hearing was necessary to examine the veracity of this testimony and its impact on the trial's outcome.
- **Impact of Denied Continuances:** The trial Court's refusal to grant continuances deprived the defense of critical preparation time to address late-disclosed evidence and retain an expert witness. A hearing was required to explore how these procedural denials affected the Petitioner's ability to mount a defense.

6- Procedural Errors Denied the Petitioner a Fair Trial: The panel overlooked significant procedural errors that compromised the Petitioner's right to a fair trial. These errors include:

- **Late Disclosure of Evidence:** The Government disclosed critical impeachment materials only six days before the trial. This late disclosure violated the principles established in Brady v. Maryland, 373 U.S. 83 (1963), and deprived the defense of adequate time to review and utilize the evidence.
- **Denial of Continuances:** The trial Court's refusal to grant continuances forced the defense to proceed without sufficient preparation. This decision

impaired the Petitioner's ability to challenge the Government's evidence and present an effective defense, violating his due process rights under Ungar v. Sarafite, 376 U.S. 575 (1964).

- **Lack of Expert Witness Testimony:** The denial of continuances prevented the Petitioner from retaining an expert chemist to challenge the government's valuation of the seized marijuana, its purity and net weight. The absence of expert testimony left the government's claims unchallenged, prejudicing the Petitioner's case. See U.S. Ellis, 2008 U.S. App. LEXIS (4TH Cir.)¹ (Court reversed appellant's conviction due to the District Court's failure to grant a continuance so that defendant could retain a voice expert.).

Impact on the Fairness of the Trial

These procedural errors raise substantial constitutional questions about the fairness and reliability of the trial. **Jurists of reason could debate whether these errors, individually or cumulatively, violated the Petitioner's Fifth and Sixth Amendment rights, warranting further judicial review.**

III. FACTUAL AND LEGAL ISSUES

1. Allegations of Perjured Testimony by FBI Agent Tews

A central claim in Petitioner's argument of prosecutorial misconduct involves the allegation that FBI Agent Tews provided false testimony during the trial. His

¹ This unpublished opinion is cited for its persuasive value.

statements, which implicated Petitioner in possession of marijuana, were contradicted by official chain of custody records and the Evidence Recovery Log that he prepared. This perjury raises serious due process concerns and directly impacts the fairness of the trial.

Agent Tews's Testimony at Trial

Agent Tews testified in great detail about his alleged discovery of marijuana at the Petitioner's residence. Specifically, he claimed:

- 1) While searching the closet in the Petitioner's residence, he noticed a pair of pants that felt unusual.
- 2) Upon feeling a hard object inside the pants, he investigated further.
- 3) He unfolded the pants and discovered two packages of marijuana.

Direct Testimony Excerpt:

"While searching the closet, I found a pair of pants with a hard object inside. I unfolded them and found two bags of marijuana." (Trial Transcript, 08/26/2015, Pg. 17-18; Document 25, Pg. 167-168).

This testimony was pivotal in connecting the Petitioner to the marijuana and formed the basis of the prosecution's narrative.

Contradictions in the Evidence Recovery Log

The official Evidence Recovery Log tells a materially different story about the discovery of marijuana:

The log identifies **Agent Hector Cintron Negrón** as the individual who located the marijuana, with **Agent Jeremy Asencio** listed as the witness. Agent Tews is not mentioned in connection with the marijuana's discovery.

Relevant Record Citations:

- **"Located By: Cintron Negrón, Hector.** Witnessed By: Asencio, Jeremy."
(*Evidence Recovery Log, Exh. 26, Pg. 169; Exh. 30, Pg. 176*).

This glaring discrepancy directly undermines Tews's credibility and raises significant doubts about the veracity of the prosecution's evidence.

Analysis of Perjured Testimony

Why the Testimony Matters

- **Central Role in the Prosecution's Case:** Agent Tews's testimony was critical in establishing a direct link between the marijuana and Petitioner. His detailed account likely carried significant weight with the jury.
- **Credibility Undermined:** The contradiction between Tews's testimony and the official records suggests that Tews may have fabricated his involvement in discovering the marijuana to strengthen the Government's case.

Pattern of Discrepancies

The alleged fabrication by Agent Tews fits within a broader pattern of irregularities in the handling and presentation of evidence:

- **Chain of Custody Irregularities:** The records reveal mislabeling, sequential errors, and conflicting accounts regarding the discovery and handling of evidence.
- **Unaddressed Inconsistencies:** The Government failed to reconcile these irregularities or disclose their significance to the jury.

Prosecution's Failure to Address or Correct False Testimony

The prosecution is obligated to ensure the accuracy of the testimony it presents. Under Napue v. Illinois, 360 U.S. 264 (1959), it is a violation of due process for the prosecution to knowingly use false testimony or fail to correct it upon discovery. In this case:

- The prosecution did not address or correct the contradiction between Agent Tews's testimony and the Evidence Recovery Log.
- By allowing this testimony to go unchallenged, the prosecution knowingly presented false evidence to the jury.

Prosecutorial Duty and Failures

- **Heightened Duty:** The Government's obligation to ensure accurate testimony is heightened when the credibility of a key government witness is in question.

- **Negligence or Complicity:** The failure to address or correct Tews's false testimony suggests either negligence or active complicity in presenting unreliable evidence to the jury.

Impact on the Petitioner's Case

Effect on the Jury

- Agent Tews's testimony likely carried significant weight due to his status as a federal law enforcement officer.
- The jury was deprived of the opportunity to evaluate the credibility of Tews's statements in light of the contradictory official records.

Prejudice to the Petitioner

- The introduction of false testimony created an unfair advantage for the prosecution, violating the Petitioner's Fifth Amendment right to due process.
- If the jury had been aware of the contradiction, it may have reached a different conclusion regarding Petitioner's guilt.

Need for Evidentiary Hearing

- An Evidentiary Hearing was necessary to resolve the contradictions between Tews's testimony and the official records.
- Testimony from Agents Cintron Negrón and Asencio, as well as a review of the chain of custody, is critical to determining whether perjury occurred and whether it impacted the outcome of the trial.

The allegations of perjured testimony by Agent Tews are central to the Petitioner's claim of prosecutorial misconduct. The contradictions in the record, coupled with the prosecution's failure to address these discrepancies, undermine the fairness of the trial and the reliability of the verdict. These issues warrant further judicial scrutiny and the issuance of a Certificate of Appealability.

2. Chain of Custody and Evidence Handling Issues

- The chain of custody records contain significant inconsistencies and procedural violations that undermine the reliability of the evidence presented at trial. These discrepancies raise substantial questions about whether the evidence was properly handled, documented, and connected to Petitioner. The Government's failure to ensure an unbroken and accurate chain of custody further implicates the integrity of the trial and the reliability of the verdict. The evidence numbering is inconsistent, suggesting potential tampering or mishandling of items post-discovery.

Record Citations

- **Sequential Numbering Errors:** The single 9mm bullet found in Room M (safe) was assigned a higher evidence number than bullets recovered earlier from Room K. This discrepancy suggests that the bullet may have been moved or handled improperly after its initial discovery. (*Exh. 30, Pg. 176*).

- **Chain of Custody Form:** The chain of custody for marijuana includes conflicting accounts of the discovery sequence, with multiple agents listed as handlers without clear documentation of the handoffs. (*Exh. 31b, Pg. 180*).

Expanded Analysis

Procedural Violations

Standard evidence handling protocols are designed to ensure the integrity and authenticity of evidence in criminal cases. In this case:

- **Failure to Maintain Accurate Documentation:** The discrepancies in the chain of custody logs suggest procedural lapses that compromise the reliability of the evidence.
- **Risk of Tampering:** The irregular sequencing and mislabeling of evidence indicate a heightened risk of tampering, contamination, or substitution.

Impact on Credibility

The Government's reliance on evidence with documented handling irregularities undermines the credibility of its case. These discrepancies create reasonable doubt about whether:

1. The evidence was properly secured.
2. The evidence was genuinely linked to the Petitioner.
3. The evidence presented at trial was unaltered from the time of its collection.

3. Late Disclosure of Impeachment Evidence

The Government's late disclosure of critical impeachment evidence significantly prejudiced the Petitioner's ability to prepare a defense. This failure violated the Petitioner's constitutional rights under the Fifth and Sixth Amendments. Despite its obligation to disclose exculpatory and impeachment materials in a timely manner, the Government provided **749 pages of discovery, including critical impeachment evidence, just six days before trial**. This timeline deprived the defense of a meaningful opportunity to investigate, analyze, and incorporate the disclosed materials into its trial strategy. The trial Court's refusal to grant a continuance to address these late disclosures compounded the prejudice to Petitioner.

Details of the Late Disclosure

Timeline of Disclosure

- **Date of Disclosure:** On August 19, 2015, the Government disclosed 749 pages of evidence, **including chain of custody records**, witness statements, and other documents critical to the defense.
- **Trial Date:** The trial commenced on August 26, 2015, providing the defense only six days to analyze and respond to the newly disclosed materials, and to prepare for trial.

Critical Evidence Disclosed

The late-disclosed evidence included:

1. **Chain of Custody Records:** Revealed discrepancies in the handling and labeling of evidence, raising questions about its authenticity.
2. **Witness Statements:** Contained information that could impeach the credibility of key government witnesses, including FBI Agent Tews.
3. **Procedural Irregularities:** Highlighted inconsistencies in the recovery and documentation of evidence, such as conflicting accounts of who discovered the marijuana and where it was found.

Record Citations

- **Disclosure Timeline:** "749 pages of discovery delivered to defense counsel on August 19, 2015, six days before trial." (*Document 3-38, Exh. 45, Pg. 209*).
- **Defense's Motion for Continuance:** Padilla-Galarza informed the Court he had been in lockdown since 08/07/2015 and did not have access to his legal materials to prepare for trial. (*Motion for Continuance, Docket 85, Exh. 16a, Pg. 143-145*).

1. Inadequate Time for Review

- **Complexity of Materials:** The 749 pages of discovery included extensive documentation requiring detailed analysis to identify contradictions and impeachment opportunities.

- **Limited Resources:** With only six days before trial, the defense was unable to investigate the implications of the evidence or consult with experts.

2. Missed Opportunities for Cross-Examination

The late disclosure directly impacted the defense's ability to cross-examine Government witnesses, particularly FBI Agent Tews. For example:

- **Chain of Custody Discrepancies:** These could have been used to challenge the reliability of Tews's testimony and the authenticity of the evidence.
- **Inconsistencies in Witness Statements:** These statements contained contradictions that could have undermined the credibility of the government's narrative.

3. Denied Ability to Develop Alternative Theories

The defense was unable to develop, or present alternative narratives based on the disclosed materials. This left the prosecution's version of events unchallenged in key respects.

Under Brady v. Maryland, 373 U.S. 83 (1963), the Government has a constitutional obligation to disclose exculpatory and impeachment evidence in a **timely manner** to ensure the defense can use it effectively at trial. **The timing of disclosure is as critical as the disclosure itself.**

Violation of Brady Standards

The Government's disclosure of impeachment evidence just six days before trial violated these standards:

- **Prejudice to the Defense:** The defense was deprived of a meaningful opportunity to incorporate the disclosed materials into its trial strategy.
- **Egregiousness of Delay:** The significance of the late-disclosed evidence magnified the harm, as it included key materials that directly challenged the prosecution's case.

Failure to Mitigate Prejudice

The prosecution exacerbated the harm caused by the late disclosure by opposing the defense's motion for a continuance. This refusal to allow time for preparation demonstrated a disregard for the Petitioner's right to a fair trial.

Defense's Request for Continuance

- On August 20 and 24, 2015, Padilla-Galarza filed pro se motions for continuance, citing his inability to access his discovery files due to his being in lockdown since 08/07/2015, the need to review and analyze the late-disclosed discovery and to retain a chemist expert to challenge the marijuana evidence. (*Motions for Continuance; Docket 85, Exh. 16a-App 143-145; Docket 97, Exh. 16 b, App. 146-147*).

1. The trial Court denied the motion, stating that the trial schedule could not be altered. (*TR. 08/27/2015, Pg. 41, Exh. 19, Pg. 160-161*).

2. . Impact of the Denial of Continuances

The trial Court's refusal to grant additional preparation time had the following detrimental effects:

1. Inability to Secure Expert Witnesses

- The Government relied heavily on its assertion that the packages contained marijuana seized that had a street value of \$9,000.00. This valuation was central to the prosecution's case and likely influenced the jury's perception of the charges.
- The denial of continuances prevented the defense from obtaining an expert chemist to independently analyze the marijuana's existence, net weight, quality and value², leaving the government's claims unchallenged.

Legal Authorities Supporting the Need for Continuances

1. Ungar v. Sarafite, 376 U.S. 575 (1964)

The Supreme Court held that the denial of a continuance may violate due process when it prevents a defendant from adequately preparing for trial.

Relevance:

² Assuming it was marijuana, the quality could have affected the street value.

The trial Court's denial of continuances in this case forced the defense to proceed under conditions that impaired its ability to address late-disclosed evidence and prepare a complete defense, directly compromising the fairness of the trial. Ake v. Oklahoma, 470 U.S. 68 (1985).

In Powell v. Alabama, 287 U.S. 45 (1932) the Supreme Court held that denying defendants sufficient time to prepare their defense violates the Sixth Amendment right to effective assistance of counsel.

In United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010), the First Circuit held that the denial of a continuance can amount to an abuse of discretion when it prevents the defense from addressing late-disclosed evidence or adequately preparing for trial.

In United States v. Rodriguez-Soler, 773 F.3d 289 (1st Cir. 2014), the First Circuit emphasized the importance of granting the defense adequate time to respond to late-disclosed evidence, particularly when such evidence significantly impacts the trial, as occurred here.

Relevance:

The Government's late disclosure of impeachment evidence in this case necessitated additional time for review and preparation, which the trial court unreasonably denied.

Legal Implications of Denial of Continuances

1. Due Process Violation

The denial of continuances, in conjunction with the government's late disclosure of evidence, violated the Petitioner's Fifth Amendment right to due process. The lack of preparation time deprived the Petitioner of a fair opportunity to challenge the prosecution's case.

2. Sixth Amendment Violation

The refusal to grant continuances impaired the effectiveness of counsel by forcing the defense to proceed without adequate preparation, violating the Petitioner's Sixth Amendment right to a fair trial.

3. Abuse of Discretion

The trial Court's decision to prioritize expediency over fairness constitutes an abuse of discretion under Agosto-Vega and Rodriguez-Soler, as it prevented the defense from addressing critical evidentiary issues and preparing a meaningful defense.

4. Ineffective Assistance of Appellate Counsel

Appellate counsel failed to meet the constitutional standard for effective assistance by omitting critical issues on appeal and misstating the trial evidence concerning critical factual issues. These omissions, which included challenges to prosecutorial misconduct, trial court errors, misstating the record, and procedural irregularities, deprived the Petitioner of a meaningful opportunity to have significant

errors reviewed. This failure undermined the fairness and reliability of the appellate process and violated the Petitioner's rights under the Sixth Amendment.

Specific Failures of Appellate Counsel

Appellate counsel's performance fell below the objective standard of reasonableness established by Strickland v. Washington, 466 U.S. 668 (1984). Key omissions included the failure to raise the following issues:

1. Discrepancies in Evidence Handling

Appellate counsel failed to challenge irregularities in the chain of custody, which directly impacted the reliability and admissibility of the evidence used to convict the Petitioner and evidences her failure to adequately study the discovery provided.

Relevant Records and Legal Authorities:

- **Evidence Recovery Log:** Documented discrepancies in chain of custody for marijuana and 9mm bullet (*Exh. 30, Pg. 176; Exh. 31b, Pg. 180*).
- **Legal Relevance:** Counsel's failure to address these irregularities violated the Petitioner's right to challenge unreliable evidence under Brady v. Maryland, 373 U.S. 83 (1963), undermining the integrity of the prosecution's case and rise to the level of ineffective assistance of counsel.

Impact on Appeal:

By failing to challenge these trial court errors, appellate counsel left significant procedural and constitutional violations unaddressed, precluding meaningful appellate review.

2. Failure to Address False Testimony

Appellate counsel failed to argue that FBI Agent Tews's testimony constituted perjury and failed to challenge its centrality to the prosecution's case.

- **Contradicted by Evidence Recovery Log:** Agent Tews testified that he personally discovered marijuana in the Petitioner's closet. However, the Evidence Recovery Log identifies another agent as the individual who discovered the marijuana.
- **Prosecutorial Misconduct:** The introduction of false testimony violated the Petitioner's due process rights under Napue v. Illinois, 360 U.S. 264 (1959).

Impact on Appeal:

The omission of this argument prevented the appellate court from considering whether the use of perjured testimony violated the Petitioner's constitutional rights, leaving an egregious error unexamined that warranted reversal of the conviction and granting a new trial.

Legal Significance of Appellate Counsel's Failures

Strickland v. Washington Test

Under Strickland v. Washington, a claim of ineffective assistance of counsel requires two prongs:

1. **Deficient Performance:** Counsel's performance fell below an objective standard of reasonableness.
2. **Prejudice:** There is a **reasonable probability** that, but for counsel's errors, the result of the proceeding would have been different.

Application to this Case

- **Deficient Performance:** Appellate counsel's failure to raise critical issues—such as discrepancies in evidence handling, adequate development of multiple factual grounds that should have led this court finding reversible error in the denial of continuances, refusal to hold evidentiary hearings, and the use of false testimony—demonstrates a clear deviation from reasonable professional standards. This failure reflects that she failed to study the case file.
- **Prejudice:** These omissions deprived the appellate court of the opportunity to review significant constitutional violations. There is a reasonable probability that addressing these issues would have resulted in a different appellate outcome.

Prejudicial Effect on the Petitioner

1. Denial of Full Review of Constitutional Claims

Appellate counsel's failure to raise these material issues deprived the Petitioner of meaningful appellate review. These omissions allowed substantial errors, including prosecutorial misconduct and trial court abuses, to go unexamined.

2. Compromised Confidence in the Verdict

The cumulative effect of appellate counsel's deficiencies undermines confidence in the fairness and reliability of the trial. The issues left unaddressed directly impacted the Petitioner's ability to challenge the government's case effectively.

IV. JURISTS OF REASON COULD DEBATE THESE ISSUES

Across issues 1 through 5, the Petitioner has presented substantial claims of constitutional violations that undermine the fairness and integrity of the trial and appellate processes. **Jurists of reason could debate the following:**

1. Allegations of Perjured Testimony by FBI Agent Tews

The direct contradiction between Agent Tews's testimony and the official Evidence Recovery Log raises significant questions about the integrity of the trial. Jurists of reason could debate whether the use of false testimony violated the Petitioner's Fifth Amendment due process rights under Napue v. Illinois, and whether an evidentiary hearing was necessary to resolve these discrepancies.

2. Chain of Custody and Evidence Handling Issues

The chain of custody records are rife with procedural irregularities, including mislabeling, conflicting accounts of evidence discovery, and numbering errors. These issues raise serious doubts about the reliability of the evidence presented at trial. Jurists of reason could debate whether the mishandling of evidence compromised the fairness of the trial and whether the Government's failure to maintain proper chain of custody records violated the Petitioner's rights under Brady v. Maryland.

3. Late Disclosure of Impeachment Evidence

The Government's disclosure of 749 pages of critical discovery materials just six days before trial prevented the defense from meaningfully using this information. Jurists of reason could debate whether the late disclosure, coupled with the trial court's denial of continuance, violated Petitioner's constitutional rights under Brady v. Maryland and due process principles. An Evidentiary Hearing is warranted to assess the scope and impact of this prejudicial disclosure.

4. Denial of Continuances and Lack of Expert Testimony

The trial Court's denial of continuances deprived the defense of adequate preparation time to address late-disclosed evidence and to secure expert testimony. **Jurists of reason could debate** whether these denials violated the Petitioner's Fifth and Sixth Amendment rights to due process and effective assistance of counsel, and

whether the Court's actions constituted an abuse of discretion under Ungar v. Sarafite, and other binding precedents.

5. Ineffective Assistance of Appellate Counsel

Appellate counsel's failure to raise critical issues—such as prosecutorial misconduct, chain of custody issues, trial court errors, misstating in her brief the trial evidence concerning material issues of fact and procedural irregularities—deprived the Petitioner of meaningful appellate review. Jurists of reason could debate whether counsel's omissions violated Petitioner's Sixth Amendment right to effective assistance under Strickland v. Washington, and whether these deficiencies prejudiced the appeal, thereby undermining confidence in the crypt Judgment rendered by the panel.

The issues raised by the Petitioner demonstrate profound procedural and constitutional violations that undermine the fairness of the trial and appellate processes. From the introduction of perjured testimony to the mishandling of evidence, late disclosures, denial of continuances, and ineffective assistance of appellate counsel, the cumulative effect of these errors calls into question the integrity of the verdict and the effectiveness of the appeal.

Under Slack v. McDaniel, 529 U.S. 473 (2000), jurists of reason could debate whether these claims are debatable among reasonable minds or deserving of further judicial scrutiny. **The threshold for issuing a Certificate of Appealability (COA)**

is met, as the claims involve substantial constitutional questions that merit appellate review.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this Honorable Court grant the Petition for Panel Rehearing and Rehearing En Banc, issue a COA, and remand the case for further proceedings to address the constitutional violations identified herein. These actions are essential to ensure justice, fairness, and adherence to the constitutional principles that protect the rights of criminal defendants.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the above has been notified to all parties in the attached Service List through their correspondent method.

In San Juan, Puerto Rico, this 27th day of November 2024.

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Service List for Case: 22-1889 Padilla-Galarza v. US

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Jose Padilla-Galarza USP Coleman II PO Box 1034 Coleman, FL 33521-0000	<u>22-1889</u>	US Mail	

No. 22-1889

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JOSÉ PADILLA-GALARZA,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

MOTION REQUESTING PERMISSION TO ENLARGE APPENDIX

TO THE HONORABLE COURT:

HEREIN appears petitioner **Jose Padilla-Galarza** through his Court appointed counsel and most respectfully prays and requests:

1- One of the issues presented in the Petition for Rehearing/En Banc was that the Government had altered the crime scene to bolster its case. (Pgs. 14-16- Pet. Reh./En Banc).

2- An additional instance of altering the crime scene can be found when agent Grettel Pieloch, after finding a Smith & Wesson pistol box in the bottom of a hamper full of clothes (new Appendix pages 302-304, attached hereto), after

processing it, was removed and placed the same pistol box on top of dresser where 9mm. bullets were found and agent Hector Cintron claimed to have found the same box in Room K on top of dresser (new App. pg. 305-306, attached hereto), yet when the photos of the 9mm bullets were taken, the empty pistol box was not there. (new App. pg . 307-308, attached hereto).

3- Only one empty pistol box was found in the messy house, yet the agents claimed to have found it in 2 different places! Obviously, after finding the pistol box in the bottom of the hamper it was placed on top of the dresser where 9mm. bullets were found to create the impression they were related.

4- This additional manipulation of the crime scene should be taken into consideration by the Court.

WHEREFORE, it is respectfully requested that the Court allow the Appendix be enlarged to include pages 302-308, which have been attached to this motion.

RESPECTFULLY SUBMITTED.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the above has been notified to all parties in the attached Service List through their correspondent method.

In San Juan, Puerto Rico, this 18th day of December 2024.

S/Rafael F. Castro-Lang

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Federal Circuit Bar #26074

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Jose Padilla-Galarza USP Coleman II PO Box 1034 Coleman, FL 33521-0000	<u>22-1889</u>	US Mail	

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

- 1B Firearm (U) Smith and Wesson pistol box, 9mm bullets, and 7.62x39mm bullets
Collected On: 01/09/2015
Receipt Number: 7B
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H inside hamper
Firearm Type: Other
- 1B General (U) Two black air tasers with three cartridges inside a box
Collected On: 01/09/2015
Receipt Number: 8
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H upper cabinets
- 1B General (U) One magazine
Collected On: 01/09/2015
Receipt Number: 9
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H upper cabinets
- 1B General (U) Blue face mask
Collected On: 01/09/2015
Receipt Number: 10A
Located By: Grettel F. Pieloch
Location Area: Barrio Macum, 118 Calle Las Flores, Toa Baja
Specific Location: Room H

UNCLASSIFIED

303

01415 DRD Document 118 Filed 11/30/09

Entry ID: 6688558

Date Filed: 12/18/2024

Page: 3

Document: 00118227247

Case: 22-1889

106 PHOTO #28



PART OF KITCHEN ROOM H

(28)



305

UNCLASSIFIED

Title: (U) Search of Barrio Macum, 118 Calles Las Flores, Toa Baja, PR
Re: [REDACTED], 01/22/2015

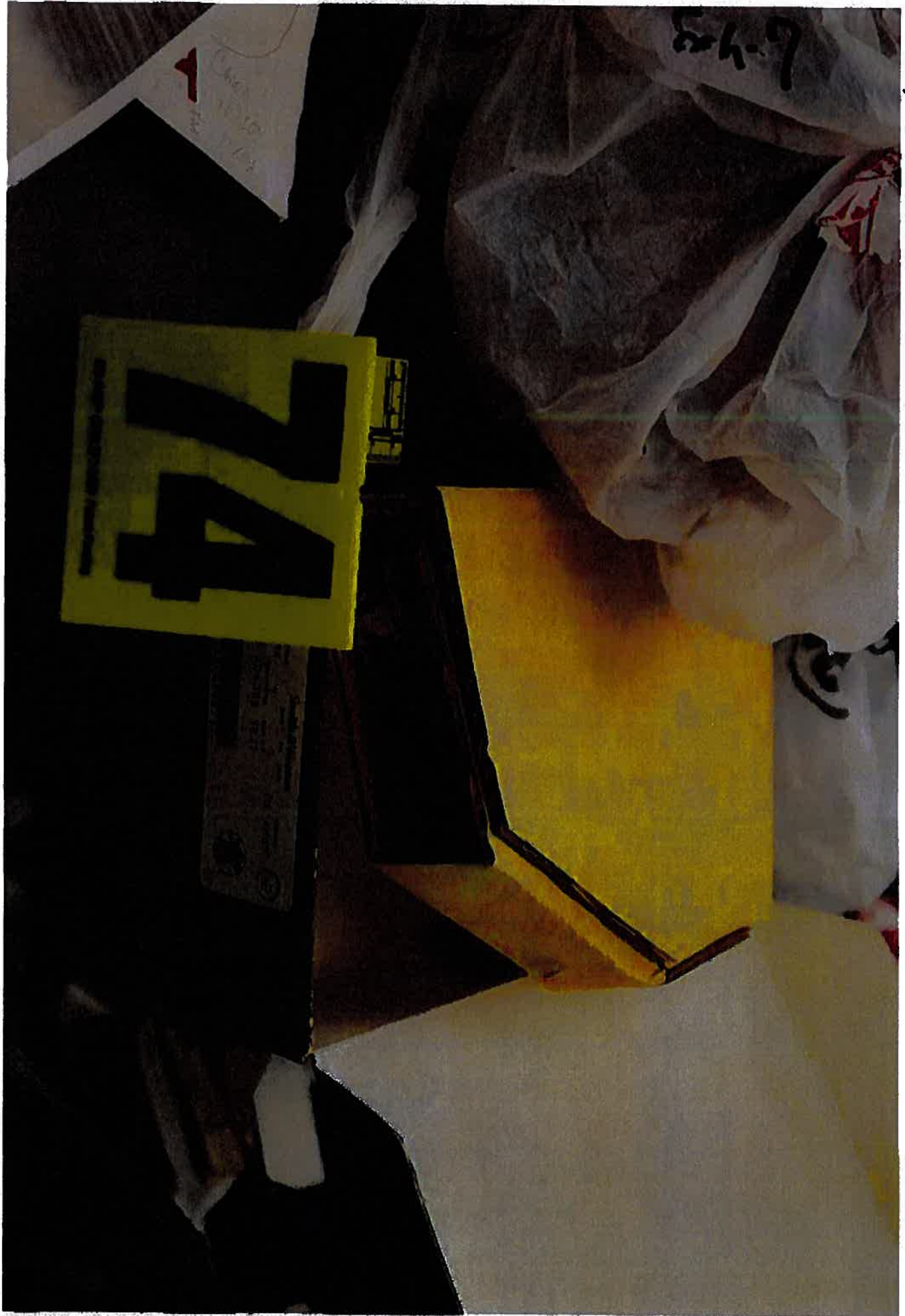
1B General

(U) Letter (PRTC), social security card Jose Padilla,
and more documents
Collected On: 01/09/2015
Receipt Number: 73
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K inside dresser

1B General

(U) Empty box of a S&W 9mm model 5906 (not included)
Collected On: 01/09/2015
Receipt Number: 74
Located By: CINTRON NEGRON HECTOR
Location Area: Barrio Macum, 118 Calle Las Flores,
Toa Baja
Specific Location: Room K top of dresser

UNCLASSIFIED



306



412
301



United States Court of Appeals For the First Circuit

No. 22-1889

JOSÉ PADILLA-GALARZA,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

Before

Barron, Chief Judge,
Kayatta, Gelpí, Montecalvo,
Rikelman, and Aframe, Circuit Judges.

ORDER OF COURT

Entered: January 21, 2025

Petitioner's motion to enlarge appendix is denied.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

José Padilla-Galarza

Rafael F. Castro Lang

Mariana E. Bauzá-Almonte

