
**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff/Appellee

V.

DENNIS REINALDO PERALTA,

Defendant/Appellant

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

**Hon. Judge Stephen Michael Doyle
No. 1:18-cr-00011-RWG-SMD-4**

BRIEF OF DEFENDANT-APPELLANT DENNIS REINALDO PERALTA

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellant Dennis Reinaldo Peralta (“Peralta”) does not request oral argument.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was based on 18 U.S.C. §3231, as Peralta was charged with offenses against the laws of the United States. Judgment was entered against him on July 1, 2019. Doc. 534. Peralta filed a timely Notice of Appeal on July 10, 2019. Doc. 573. The Court’s jurisdiction is based on 28 U.S.C. §1291, which provides for jurisdiction over a final judgment from a United States District Court for [federal appellate attorneys](#).

STATEMENT OF ISSUES

1. Whether denial of defendant’s requested jury instruction no. 10 was improper and failure to give the requested instruction seriously impaired the defendant’s ability to present an effective defense.
2. Whether a Judgment of Acquittal is proper when the Government failed to prove that a defendant in a conspiracy case is not involved with anyone charged in the indictment and a defendant’s criminal activity took place in a different state than the other individuals charged in the indictment.

3. Whether a defendant must be found not guilty because of improper venue after all material events took place in Georgia, and the Government failed to prove that a crime occurred in the Middle District of Alabama.

STATEMENT OF THE CASE

A. The course of proceedings and dispositions in the court below

On January 10, 2018, Mr. Peralta and eight other defendants were charged with Conspiracy to Distribute Controlled Substances (methamphetamine), a violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (Superseding Indictment). PSR 1. Peralta plead not guilty to his charges. Doc. 82 On March 27, 2019, Peralta submitted a motion for Judgment of Acquittal, and on that same day, his motion for Judgment of Acquittal was denied. On March 28, 2019, the jury rendered a guilty verdict. Doc. 483.

On June 26, 2019, a sentencing hearing was held in which Peralta was sentenced to imprisonment for a term of 155 months, with a recommendation that he should be incarcerated in or near Norcross, Georgia so that his friends and family could visit him. Additionally, Peralta shall participate in a program approved by the United States probation office for substance abuse and submit to a search of his person, residence, office, or vehicle. The lower court also held that following imprisonment, Peralta is to be placed on supervised release for a term of five years. Notably, during the sentencing hearing on June 26, 2019, the lower

court granted Peralta's Motion to Dismiss from Forfeiture Allegation-1 of the Superseding Indictment. Doc. 565; Doc. 526-1.

B. Statement of the facts

The Criminal Information alleged, *inter alia*:

The Superseding Indictment in this action charges Dennis Renaldo Peralta ("Peralta") and others, with conspiring to distribute and possess with intent to distribute a controlled substance. Those charges arise from a Federal Bureau of Investigation ("FBI") investigation of members of a drug-trafficking organization supplied from the Atlanta, Georgia area, which was thereafter transported to the Middle District of Alabama.

No later than March 2017, FBI agents monitoring wiretaps began intercepting conversations between a supplier of controlled substances based in the United Mexican States ("Mexico") and a local drug dealer that resided in Coffee County, Alabama. Intercepts and further investigation showed that once an agreement was reached with the supplier, the local drug dealer, Bryant Pouncy ("Pouncy"), would travel to the Atlanta, Georgia area to obtain the controlled substances. Upon receipt, Pouncy would return to the Middle District of Alabama and distribute the controlled substances.

Subsequently, a confidential informant introduced an undercover employee of the FBI, "Paul Roberts," to the same Mexico based controlled substance supplier. During 2017 the undercover employee made 4 controlled purchases from members of the conspiracy, including Peralta. The controlled substances were purchased in a similar fashion as to those previously conducted by Pouncy.

Doc. 469, ¶2.

On August 23, 2017, Peralta was stopped by a Georgia state trooper in the Atlanta-metropolitan area because he did not have a Peach Pass. Doc. 565 at 35.

Ultimately, Peralta and eight other defendants¹ were charged in a ten-count

¹ Rogello Israel Pimental, Santos Rivera-Fernandez, Bryant Pouncy, Antonio Pouncy, Kimberly Pouncy, Ervin Bradham, and Lynn Donaldson.

indictment with conspiracy to distribute and possess with intent to distribute controlled substances in the Middle District of Alabama. Peralta was charged with one count. Seven of the other defendants entered a guilty plea, and the remaining defendant² has not been arrested. Doc. 511 at 1,2.

On February 13, 2018, the lower court issued an Order on Arraignment detailing that the government's discovery and Notice of Expert Testimony were due on the date of arraignment or on a date determined by the court for good cause. Doc. 87. Additionally, all pretrial motions and defendant's discovery were to be due by February 20, 2018. Id.

On November 12, 2018, Peralta requested 15 jury charges. One of the 15 jury charges included:

If you believe the evidence in this case did nothing more than create a suspicion, a possibility, speculation, or a guess that the defendant is guilty of the criminal act(s) he is charged with, then that is an insufficient basis for conviction. Circumstances merely causing a suspicion of guilt are not sufficient to justify a conviction of crime.

Doc. 290 at 12.

This requested jury instruction was ultimately ignored, and Peralta objected to such at trial. Doc. 481. The jury instruction the lower court's charge to the simply stated that the jury must hold the prosecution to the beyond a reasonable doubt standard and briefly defined such standard. Doc. 481 at 3. Moreover, the lower court

² Jose Rubalaca.

explained the consideration of arguments and types of evidence that will be proffered by counsel. Doc. 481 at 4.

3. Definition of “Reasonable Doubt”

The Government's burden of proof is heavy, but it does not have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you have carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

4. Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court.

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and is not binding on you.

You should not assume from anything I have said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters. In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness. Direct evidence may also be a document or item that actually demonstrates a certain fact.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

Id. at 3 ,4.

During the discovery process, there three Motions in Limine filed by Peralta. Doc. 451; 452; 453. All of which were denied. Doc. 455. Ultimately, given the government's attempt to name Peralta as a conspirator, despite being arrested in Georgia, the trial was set to be held on March 25, 2019. Doc. 458.

During the trial and the sentencing hearing, it was noted that there were several transactions regarding the sale of methamphetamine involving the other defendants dating back to July 2018 in Enterprise, Alabama. PSR at ¶ 7.

During the course of the investigation, officers conducted a traffic stop on July 28, 2016, which led to the recovery of a firearm and an unknown amount of methamphetamine. The driver of the vehicle advised officers that he/she purchased the methamphetamine from B. Pouncy for \$40.

On October 7, 2016, FBI Central Alabama Safe Streets Task Force (SSTF) assisted EPD in the arrest of J. Connolly who was found in possession of approximately seven and one half grams of methamphetamine and a digital scale. Connolly advised EPD Sergeant Phillips that she purchased the methamphetamine from B. Pouncy with the intent to distribute it.

J. Connolly was interviewed by FBI SA VanHoose and provided information regarding B. Pouncy, aka "Fifty." She reported that B. Pouncy fronted her several grams of crystal methamphetamine. She further advised that "Deandre" brought methamphetamine to B. Pouncy from Georgia, and

that she witnessed one delivery of approximately three ounces of methamphetamine from “Deandre” to B. Pouncy.

Between the dates of November 2, 2016, and February 16, 2017, investigators completed several controlled purchases of crystal methamphetamine from B. Pouncy. Four of the purchases were for 3.5 grams of crystal methamphetamine each (November 2, 2016, December 8, 2016, December 20, 2016, and January 12, 2017). One purchase was for two ounces of crystal methamphetamine (January 25, 2017), and the final purchase on February 16, 2017, was for 81 grams of crystal methamphetamine.

Between March 2, 2017, and March 28, 2017, the FBI conducted a T-III intercept of B. Pouncy’s cellular telephone. The analyzed information confirmed that B. Pouncy was a methamphetamine supplier throughout the Enterprise, Alabama, area, as well as in Panama City, Florida. The information also confirmed that B. Pouncy’s source of supply was Rubalcava, an individual determined to reside in Mexico, but who directed the drug transactions that occurred in Georgia via others who worked for him/her.

The T-III intercept revealed conversations that B. Pouncy distributed methamphetamine to Lynn Donaldson. In a three-day time period, Donaldson had multiple conversations regarding the purchase of methamphetamine and suboxone from B. Pouncy. The total amount of methamphetamine discussed between the Donaldson and B. Pouncy was two ounces. B. Pouncy also said during discussions with Donaldson that he sold eight ounces of methamphetamine in one day. In an unrelated investigation, a search warrant was executed at the residence of Donaldson. DEA members recovered an unknown amount of methamphetamine and a ledger from her residence. Subsequently, Donaldson admitted to DEA Special Agent (SA) Thompson that she was involved in distributing controlled substances for B. Pouncy.

Facebook messages intercepted during the investigation revealed that between March 3 and 5, 2017, B. Pouncy and Rubalcava discussed the purchase of two kilograms of crystal methamphetamine for \$9,000 each. The two also discussed “a job” detailing that an individual robbed an uncle of Rubalcava’s in Alabama. Rubalcava confirmed that B. Pouncy left the payment of \$18,000 after the transaction. Throughout the conversation the

two also insinuated causing harm to the individual by stating things such as, “We can erase the problem for good,” and “take ur soldiers.” Additional messages from B. Pouncy and Rubalcava between March 12 and 15, 2017, discussed the purchase of three kilograms of crystal methamphetamine. The two went back and forth until the price of \$29,000 for all three kilograms was negotiated.

Investigators conducted surveillance of B. Pouncy traveling to the Atlanta, Georgia, area to obtain methamphetamine from Rubalcava based on the intercepted Facebook messages. On both occasions, the T-III intercept revealed that Rubalcava provided B. Pouncy with the code word “alazan” to use when arranging a meeting location. It was determined that Rubalcava provided each purchaser with a code word and a telephone number for individual(s) in the Atlanta, Georgia, area in order to finalize the narcotics transaction.

On March 22, 2017, investigators with the FBI and EPD interviewed May Yu Tatil regarding Rubalcava’s drug trafficking organization. According to Tatil, she was involved in some “bad deals” and was indebted to Rubalcava’s Mexican organization for \$20,000 at one time. She reported that this debt happened while she worked for Rubalcava distributing crystal methamphetamine in the Enterprise, Alabama, area. Tatil stated that she never met Rubalcava in person, but communicated with him through Facebook messenger and by telephone. She provided information about a brick and mortar business possibly being opened by Rubalcava in Enterprise, Alabama, as a front for his drug distribution. Tatil conveyed that she introduced Rubalcava to B. Pouncy in order for B. Pouncy to use Rubalcava as a source of supply for crystal methamphetamine. She said that B. Pouncy had a lot of “soldiers” that helped protect his drug trafficking operation. Tatil also reported that she recently sold 20 Lortab pills to B. Pouncy.

The FBI introduced an undercover employee (UCE) to Rubalcava in May 2017 with the first reported communication between the two on May 24, 2017. The first purchase on August 23, 2017, between Rubalcava and the UCE was for one kilogram of crystal methamphetamine for \$10,500. On the day of the scheduled transaction, Rubalcava provided the UCE with the code word “alazan” in order to arrange a meeting location. This was the same code word previously provided to B. Pouncy which confirmed that Rubalcava was the same supplier that B. Pouncy used for his narcotics

supply. An unidentified Hispanic male completed the transaction with the UCE at the direction of Rubalcava.

A second purchase for one kilogram of crystal methamphetamine was arranged with Rubalcava by the UCE for the same price of \$10,500. On the day of the transaction, July 27, 2017, Rubalcava provided the UCE with the code word “lacho.” The UCE met with an unidentified Hispanic male and completed the transaction as directed by Rubalcava.

PSR at ¶ 8-18.

At trial, it was confirmed that on August 23, 2017, UCE attempted to contact the person delivering the drugs using the code word “talacho” to arrange the drop. However, there was no response. Subsequently, UCE used the code word “larama” and finally got a response. Peralta denies delivering 999.5 grams of methamphetamine to a UCE. PSR at ¶ 19. Following the transaction, Peralta was followed by law enforcement agencies. *Id.* Notably, there was a short period of time where Peralta was not under surveillance. Nonetheless, a Georgia State Patrol officer conducted a traffic stop. Doc. 565 at 36. During the traffic stop, the officer did not find any money in the vehicle. *Id.* It was later learned that the vehicle Peralta was driving was registered to him and phone records indicate that a phone call was made to someone in the vehicle; however, it was established that for at least a short period of time prior to delivery, there were at least two people in the vehicle. *Id.* at 37. Moreover, the testimony from the custodian records indicated that the phone was not registered to Peralta. *Id.* After the traffic stop on August 23,

2017, government investigators began to research Peralta's connection with the other defendants. PSR at ¶ 22.

The government presented evidence of the aforementioned phone records and wire transfers through Western Union. Testimony from custodian from Western Union revealed that checks and balances on sending money is only as good as the person working the counter and that on several occasions, Peralta's name was misspelled on the paperwork. Doc. 565 at 38. Nonetheless, the transactions that detailed Peralta's name, correctly or incorrectly, amounted to \$68,425.77. PSR at ¶ 22. Additionally, the transactions were sent to Mexico in fewer than \$1,000 increments. *Id.* Moreover, Peralta seemingly bought a \$45,000 Mercedes. Doc. 565 at 45. The jury at the lower court concluded that Peralta was sending these transactions at the direction of Rubalcava given that Rubalcava was located in the two cities in Mexico where the wire transfers were sent. *Id.* at 42. Notably, the government argued this connection because Rubalcava's Facebook profile was registered in the two relevant cities. *Id.*

At the sentencing hearing, Agent VanHoose testified that:

Q. If you look at the July 27, 2017 transaction, now, according to that chart, the person who was involved in that transaction is unknown; is that correct?

A. The person that delivered it, yes, sir.

Q. Yes, sir. And when we say "deliver," we're talking about a courier or a mule or someone who's delivering the drugs for purchase, is that correct, or sale?

A. That's correct.

Q. And that person would have been a courier or a mule?

A. Yes, sir.

Q. Okay. And so up to that point in time, you as the case agent, you didn't have the name Peralta on your radar, did you?

A. No, sir, I did not.

Q. Nobody had ever heard of him before?

A. No, sir.

Q. No connection with Mr. Peralta before that date?

A. No, sir. We had not heard that name before that day, no, sir.

Q. Okay.

Doc. 565 at 34.

Additionally, Agent VanHoose's testimony at the sentencing hearing confirmed that other defendants made agreements with the government to give truthful information regarding the case. *Id.* at 41.

Q. And as the case agent, there were proffers made, and I assume you were present at the proffers of Mr. Rivera-Fernandez and Mr. Pimentel; is that correct?

A. That's correct.

Q. And at no time in any of those proffers did either one of those ever say that Mr. Peralta was involved?

A. No, sir, they did not.

Q. And both Mr. Rivera-Fernandez and Mr. Pimentel had plea agreements with the Government to give truthful information; is that correct?

A. That's correct.

Id.

There was one proffer, by B. Pouncy, that did identify Peralta. Id. at 52. However, the court found that proffer to be unreliable.

Evidence submitted to the Court yesterday also reveals one additional transaction for methamphetamine that may be attributed to Mr. Peralta. Allegedly, co-defendant Bryant Pouncy made a proffer to the Government that identified Mr. Peralta as the person Mr. Pouncy met with to conduct the transaction for one kilogram of ice near a Baskin-Robbins in Union City. Government sentencing -- see Government sentencing memorandum Exhibit D. It is the Court's duty to determine the credibility of evidence admitted at sentencing that may be used as part of the sentencing calculation. *United States versus Glinton* 154 F.3d 1245.

The Court finds the identifying proffer from Mr. Bryant not to be credible. First of all, the Government is relying exclusively on hearsay evidence to tie Mr. Peralta to this additional transaction. Although the Court is permitted to rely on hearsay evidence during sentencing, hearsay evidence must still be reliable. *United States versus Waylon* 20 Federal Appendix 681.

The Court finds nothing to corroborate Mr. Bryant Pouncy's alleged identification. There were no other witnesses that would support Mr. Pouncy's identification for that purchase. Additionally, it is striking to the Court how Mr. Pouncy could immediately identify Mr. Peralta as the supplier at the Union City transaction and not definitely identify Mr. Peralta as the supplier in the separate purchase on March the 3rd, 2017.

During the March 3rd, 2017 transaction where Mr. Pouncy said he met with an unknown Hispanic male, Mr. Pouncy was taken to some type of maintenance room where Mr. Pouncy waited, presumably for quite a while, while the unknown Hispanic male counted every bill of money to ensure it was all there. Exhibit D to the Government's sentencing memorandum. Presumably, Mr. Pouncy would have been able to identify Mr. Peralta if he previously spent a significant amount of time with him alone in a maintenance room, and yet Mr. Pouncy was allegedly able to identify with some degree of certainty that he met with Mr. Peralta during the Union City Baskin-Robbins transaction. This inconsistency is worrisome to the Court and speaks to Mr. Bryant Pouncy's credibility. Coupled with the inherent credibility concern that Mr. Pouncy has an interest in providing as much

information as possible to the Government in exchange for a lesser sentence, the Court is reluctant to rely on Mr. Pouncy's statements to tie Mr. Peralta to the additional two kilogram transactions.

Therefore, in light of the fact that there is no evidence to corroborate Mr. Pouncy's identification, the inconsistency between Mr. Pouncy's identifications of the defendant, and the inherent credibility concerns attached to the cooperating co-defendant, the Court will not attribute any additional methamphetamine exchange to Mr. Peralta beyond those transactions in which he directly participated.

Mr. Peralta was a participant in the methamphetamine transaction on August the 23rd, 2017, and evidence adduced at trial demonstrated that Mr. Peralta was a part of the general conspiracy. But while evidence demonstrates Mr. Peralta's involvement in the overall conspiracy from wire transfers to Mexico throughout the 2017 year, the Government has failed to meet its burden that the remaining drug transactions listed in the PSI can be attributed to Mr. Peralta. That is, despite being found guilty of conspiracy to distribute controlled substance, the conviction alone does not adequately establish that each individual transaction that was a part of the conspiracy as reasonably foreseeable to Mr. Peralta.

Id. at 52-54.

On March 28, 2019, the jury at the lower court found Peralta guilty of Conspiracy to Distribute a Controlled Substance. On June 26, 2019, Peralta was sentenced to 151 months in prison. He remains incarcerated.

C. Standard of Review

This Court reviews the legal correctness of a jury charge de novo. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). Notably, a contested “supplemental jury instruction is review as part of the entire jury charge, in light of the indictment, evidence presented and argument of counsel to determine whether the jury was misled and whether the jury understood the issues. *United States v.*

Lopez, 590 F.3d 1238, 1248 (11th Cir. 2009). “We will not reverse a conviction on the basis of a jury charge unless ‘the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process.’” *United States v. Isnadin*, 742 F.3d 1278, 1296 (11th Cir. 2014) (citing *Prather*, 205 F.3d at 1270). Of course, where a party did not object to a jury instruction in the district court, we review that instruction for plain error. *Id.* (citing Fed. R. Crim. P. 30, 52(b)).

This Court reviews de novo whether there is sufficient evidence to support a conviction. *United States v. Toler*, 144 F.3d 1423 (11th Cir. 1998); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010); *United States v. Diaz*, 248 F.3d 1065 (11th Cir. 2001); *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010). This Court must “examine the evidence in the light most favorable to the government to determine whether a reasonable jury could have concluded beyond a reasonable doubt that the defendant was guilty of the crimes charged”. *United States v. Toler*, 144 F.3d at 1428. A guilty verdict can only stand if there is “substantial evidence to support it”. *Toler*, 144 F.3d at 1426, 1428.

This court reviews the dismissal of a lawsuit for improper venue under the standard of abuse of discretion. *Dynes v. Army Air Force Exchange Serv.*, 720 F.2d 1495, 1499 (11th Cir. 1983); *Roofing & Sheet Metal Services, Inc. v. La Quinta*

Motor Inns, Inc., 689 F.2d 982 (11th Cir. 1982); *Stephens v. Entre Computer Centers, Inc.*, 696 F. Supp. 636 (N.D.Ga. 1988).

SUMMARY OF THE ARGUMENT

Peralta's requested jury instruction no. 10 is substantially correct. In *U.S. v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) it was held that: "Where the government's case is based on circumstantial evidence, 'reasonable inferences, and not mere speculation, must support the jury's verdict.'" The lower court's failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense.

Peralta's criminal activity was not connected with the other defendants in this matter. The government presented no evidence which remotely proves the conspiracy charged in the indictment. The event in which the government says Peralta participated occurred in Georgia, not Alabama. Moreover, an FBI agent testified that the drug deals were set up by an FBI agent and his confidential informant and that the Pouncy gang had nothing to do with criminal activity which led to Peralta's arrest. It is established law that one cannot conspire with the government or a government agent. Notably, the lower court charged the jury that Peralta could not be convicted of if the conspiracy charged was not the same as the conspiracy proven. Given that all material events and criminal activity occurred in Georgia, the Middle District of Alabama is not the proper venue.

Accordingly, Peralta should be released until the proceeding in the court has concluded and must be found not guilty.

ARGUMENT

I. THE DISTRICT COURT COMMITTED CLEAR ERROR IN DENYING PERALTA'S REQUEST FOR JURY INSTRUCTION NO. 10.

The requested jury instruction in question was substantially correct under *In re Winship*, 397 U.S. 358 (1970) and *Charles*, 313 F.3d 1278 (11th Cir. 2002).

This Court has held that when "the government's case is based on circumstantial evidence, reasonable inferences, and not mere speculation, must support the jury's verdict." *Charles*, 313 F.3d at 1284. To that end, "[T]he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364.

However, the constitution neither requires nor prohibits courts from defining reasonable doubt to juries. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). "Rather, 'taken as a whole, the instruction [must] correctly convey the concept of reasonable doubt to the jury.'" *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954)). When ascertaining the validity of a jury instruction, "the appropriate standard is whether there exists a 'reasonable likelihood' that the jury read [or understood] the instruction to lower the required threshold." *Johnson v. Alabama*, 256 F.3d 1156, 1192 (11th Cir. 2001)

(citing, e.g., *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)) (bracketed alteration added).

In *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984), an inmate was sentenced to death for the murder of his ex-wife. Ultimately, his habeas corpus petition was granted because the inmate's Eighth and Fourteenth Amendment rights were violated by the trial court's jury instructions. *Id.* In *Dix*, the trial court failed to explain the considerations and effect of mitigating circumstances, and a reasonable jury could have assumed that the defendant had the burden of persuasion. *Id.* at 1064. Similar to *Dix*, without explaining that suspicion or a mere guess is insufficient for conviction, the jury, in this case, assumed that Peralta was required to rebut the government's far-reaching connections.

A District Court abuses its discretion in failing to give a requested instruction if (1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by the charge actually given, and (3) its subject matter dealt with an issue in the trial court that was so important that the failure to give it seriously impaired the defendant's ability to defend himself. *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008). Notably, Peralta is not arguing that an improper standard was charged to the jury. Rather, the lower court's denial of his requested jury instruction disallowed the jury to have a clear

understanding of how to apply the reasonable doubt burden of proof standard, which was objected to at trial.

Even if the underlying evidence supports a conviction, it is up to a jury to weigh the evidence and render a verdict. The court's charge to the jury did not explain that speculation, suspicion, or a guess is an insufficient basis for conviction. Subsequently, there was a more than reasonable likelihood that the jury would lower the required threshold; thus, Peralta's ability to present an effective defense was seriously impaired. It is clear that the requested jury instruction was a correct statement of the law, its subject matter was not covered in the jury charge, and its subject matter was paramount to Peralta's defense. *Id.*

Charles strongly established that mere speculation does not establish beyond a reasonable doubt that a defendant in a conspiracy case should be found guilty, *Charles*, 313 F.3d at 1284. Considering Peralta's limited criminal history and the lack of evidence connecting him to his co-defendant's, he was entitled to requested jury instruction no. 10. The court's inexplicable refusal to inform the jury of this notion constitutes a clear error, impaired Peralta's case and requires a reversal of his conviction.

II. THE DISTRICT COMMITTED ERROR WHEN DENYING PERALTA'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

The district court erred in denying Peralta's motion for judgment of acquittal after the government failed to establish, beyond a reasonable doubt, that Peralta was guilty of conspiring with the listed co-defendants. The government's argument is founded on unreliable and far-reaching assumptions. Therefore, the district court should have granted Peralta's motion for judgment of acquittal per Federal Rule of Criminal Procedure 29(b). Given that Peralta timely moved for judgment of acquittal, this Court shall review the sufficiency of evidence de novo. *United States v. McCrimmon*, 362 F.3d 725 (11th Cir. 2004).

A conspiracy case requires the court to find "substantial evidence" connecting a defendant to the conspiracy charged in the indictment. *United States v. Clavis*, 977 F.2d 538 (11th Cir. 1992). Specifically, as the government noted in their trial brief, establishing a conspiracy requires evidence that two or more people had an agreement to violate relevant drugs statutes and knowingly participated in accomplishing such ends. *United States v. Elledge*, 723 F.2d 864, 865-66 (11th Cir. 1984). Moreover, proving a drug conspiracy does not rest on the substantive act, but instead, on the agreement to violate the law. *United States v. Iannielli*, 420 U.S. 770, 777 (1975).

“[T]he elements of the offense of conspiracy under 21 U.S.C. §846 are: (1) an agreement between the defendant and one or more persons, (2) the object of which is to do either an unlawful act or a lawful act by unlawful means.” *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998). Although the government may prove a conspiracy by circumstantial evidence, “[o]nce the existence of the conspiracy is established there must be substantial evidence that each alleged conspirator knew of, intended to join and participated in the conspiracy”. *United States v. Avila Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980).

Here, it is undisputed that Peralta was arrested and charged after committing a crime in Georgia. Notably, the record indicates that none of the other co-defendant’s named Peralta in their proffers. Moreover, the confidential informant in the case admitted that the deal which led to an investigation of Peralta was independent of any ongoing matters involving the Pouncy gang and the other defendants.

The government failed to show that Peralta came to an agreement with one of the other co-defendants to distribute methamphetamine. The evidence at trial merely proves that Peralta distributed methamphetamine to a UCE. Furthermore, the idea that Peralta was sending money to Mexico on behalf of another defendant is mere speculation. There was no evidence or testimony that clearly proves beyond a reasonable doubt that Peralta was voluntarily involved in the charged

conspiracy. In fact, when Peralta was pulled over by the state patrol officer, there was no money or drugs in his possession. The wire transfers and phone records do not establish wrongdoing as it relates to this conspiracy as the wire transfers are admittedly unreliable and the phone records only give grounds for tangential inferences.

Moreover, the conduct which birthed the underlying investigation of Peralta stemmed from transactions with a government agent. Under *United States v. Wright*, 63 F.3d 1067, 1072 (11th Cir. 1995), one cannot conspire with a government agent. Moreover, a transaction alone cannot support a conspiracy conviction. *United States v. Bascara*, 742 F.2d 1335, 1359 (11th Cir. 1984). There is ample evidence which shows that the other co-defendants conspired with each other, as evidenced by their guilty pleas. However, as the admitted proffers show, Peralta was not involved in the charged conspiracy. Additionally, it is worth noting that FBI Agent's were unaware of Peralta for over a year of investigating before his unrelated arrest. Thereby showing Peralta's lack of involvement. The only evidence of Peralta being involved in the conspiracy is an unreliable wire transfer records and unaccounted for drug money.

The government must show, beyond a reasonable doubt that Peralta was aware of the conspiracy and knowingly intended to participate in the charged conspiracy. *United States v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). However,

only speculation and insufficient circumstantial evidence tie Peralta to his co-defendants. Therefore, Peralta's conviction must be vacated.

III. THE MIDDLE DISTRICT OF ALABAMA IS AN IMPROPER VENUE.

For the Middle District of Alabama to be a proper venue, the government must prove that Peralta committed a crime in the Middle District of Alabama. However, all material events testified to in court involving Peralta occurred in Georgia. Moreover, the FBI Agent who set up the illegal transaction, which led to Peralta's arrests was in Mobile, Alabama, not the Middle District of Alabama. Lastly, the FBI Agent handling this case admitted that Peralta's illegal conduct has no connection to his co-defendants in Coffee County, Alabama, as charged in the indictment.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the . . . district wherein the crime shall have been committed . . ." U.S. CONST., amend. XI Additionally, Federal Rule of Criminal Procedure 18 explains that the government must prosecute an offense in the district where the crime was committed. *See also United States v. Brietweiser*, 357 F. 3d 1249, 1253 (11th Cir. 2004). Importantly, the burden of establishing venue rests with the government. *United States v. Schlei*, 122 F. 3d 944, 974 (11th Cir. 1997).

In light of these legal standards, proper venue was in the Northern District of Georgia. First, as noted earlier, Peralta cannot conspire with a government agent. Therefore, the fact that the FBI Agent that set up the deal was in Mobile is irrelevant when determining venue. Moreover, all overt criminal acts were committed in Georgia.

The government asserted in its trial brief and will likely contend once again that the conspiracy in the indictment took place in the Middle District of Alabama; therefore, it is a proper venue. However, this assertion forgets a key fact. The government's own witness admitted that Peralta had zero connection with anyone in the Middle District of Alabama. The only connection made by the government to the conspiracy was with Rebulcava, who was allegedly in Mexico at the time.

Subsequently, the Middle District of Alabama is an improper venue. Viewing the evidence in a light most favorable to the prosecution, the government failed to meet its burden of proving venue by a preponderance of the evidence. Peralta's convictions should therefore be reversed.

CONCLUSION

Because the District Court erred in refusing to instruct the jury on the degree of circumstantial evidence required for conviction, in denying Peralta's motion for judgment of acquittal, and the case was tried in an improper venue, Peralta should be found not guilty.

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Dated: _____ 2019.

CERTIFICATE OF SERVICE

I hereby certify that on this _____, I electronically filed the within document with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 5,983 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14.

/s/ Robert L. Sirianni, Jr.
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