

United States of America  
First Circuit Court of Appeals

NO. 2012-2041

UNITED STATES OF AMERICA

Appellee,

v.

EDDIE ALEJANDRO-MONTANEZ

Defendant/Appellant.

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APPEAL FROM PUERTO RICO FEDERAL DISTRICT COURT

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BRIEF OF EDDIE ALEJANDRO-MONTANZ

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## STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On February 23, 2011 Eddie Alejandro-Montanez was found guilty by a jury in the United States District Court for the District of Puerto Rico of conspiracy to possess with intent to distribute more than five kilograms of cocaine, and conspiracy to import more than five kilograms of cocaine, contrary to 21 U.S.C. §§ 841(a)(1), 952(a), 960(a)(1), 960(b)(1)(B), and 963.

On July 30, 2012, the court (*Daniel R. Domínguez, J.*), sentenced Mr. Alejandro-Montanez to 240 months committed on each charge, to be served concurrently, plus five years of supervised release, to be served concurrently.

A notice of appeal was filed on August 8, 2012.

## STATEMENT OF ISSUES

- I. Mr. Alejandro-Montanez is not guilty of any crime because he did not knowingly join any conspiracy.
- II. The district court erred in denying the defendant's Rule 29 motion because the evidence presented by the government was insufficient to prove beyond a reasonable doubt that the defendant was a participant in the single lengthy conspiracy charged in the indictment.
- III. The district court abused its discretion under 18 U.S.C. § 3553(a) by: (1) neglecting to explain and justify the extreme disparity between the defendant's sentence and those of his co-defendants, and, (2) ordering a sentence that created an unwarranted disparity in sentences between the defendant and similarly-situated co-defendants.
- IV. The district court's application of the two-level enhancement for gun possession after the jury found the defendant not guilty of gun possession was clearly erroneous.
- V. The defendant is entitled to a new trial under *Alleyne* because the government presented insufficient evidence to prove the amount of cocaine involved in the alleged conspiracy beyond a reasonable doubt and the district court failed to properly instruct the jury regarding the amount of cocaine in the alleged conspiracy.
- VI. The defendant is guilty of no crime or was improperly sentenced because the government did not prove any "detectable" quantity of contraband.
- VII. The defendant's Sixth Amendment right to a public trial were violated when the courtroom doors were locked during jury instructions and his family were not permitted access to the courtroom.
- VIII. The defendant should get the benefit of proposed reductions in the sentencing guidelines for drug offenders.
- IX. The defendant joins all other issues raised by his co-defendants.

## STATEMENT OF FACTS

### I. First Conspiracy

In mid-2008 the government lured several suspected drug traffickers into an agreement to purchase counterfeit drugs. *Trial Day 10* at 9. The scheme employed one Marco Torres, a drug convict who made a substantial living as a paid informant. *Trial Day 3* at 54-57, 68-70, 84-88; *Trial Day 9* at 23, 42-43, 62-64.

In June 2008, Torres met with Raul Feliciano-Lopez (“Fora”) to discuss a possible deal. *Trial Day 2* at 42; PSI ¶7. Fora introduced Torres to Victor Esquilin-Rosa, a corrupt police officer, and several others. *Trial Day 3* at 92; *Trial Day 4* at 27. There were meetings in June and August, and a demonstration of sham cocaine in the trunk of Torres’s car. *Trial Day 3* at 109; *Trial Day 4* at 9. Torres, Fora, and Esquilin discussed moving enormous quantities of cocaine – up to 1,500 kilograms. *Trial Day 2* at 42-45; *Trial Day 3* at 28; *Trial Day 4* at 39; *Trial Day 9* at 82. They discussed moving it from Columbia to Puerto Rico and from Puerto Rico to Miami. *Trial Day 3* at 28, 106, 147; *Trial Day 9* at 120-21. And they discussed moving it by air cargo because someone knew someone at the airport. *Trial Day 3* at 147; PSI ¶ 7.

None of this Summer 2008 activity involved the defendant Eddie Alejandro-Montanez or his brother Josue. *Trial Day 4* at 16 (court recognizes Eddie not involved); *Trial Day 10* at 12 (testimony of Torres).

## **II. First Conspiracy Disbanded**

These arrangements fell apart possibly because Torres left the country, *Trial Day 4* at 23-25, 42, or because either Fora or Esquilin grew wary of the large quantities Torres was purportedly peddling. *Trial Day 3* at 147; *Trial Day 10* at 20-24; *Change of Plea Hrg.* (May 17, 2011) at 39. In any event, five months passed, which the government suggests was just a break for the holidays. *Trial Day 5* at 7-8.

## **III. Second Conspiracy – Decisions on Quantity and Price**

In February 2009 Torres again contacted Fora and Esquilin-Rosa. In February and March there were numerous phone conversations and meetings at restaurants and in cars, *Trial Day 5* at 29-30, 33, 35-36, 39-40, 43, 47, among Torres, an unknown man with a Cuban accent, Fora, Esquilin, and co-defendant Julio Severino-Batista. *Trial Day 3* at 114; *Trial Day 4* at 44-45, 58, 63, 68, 76, 78, 87-88; *Trial Day 5* at 4-7, 11, 14, 16, 35-36, 39-40, 60-69, 69-72, 77; *Trial Day 6* at 42-43, 56; *Trial Day 10* at 20, 30-31; *Exh. 12A* at 6; *Exh. 13A* passim; *Exh. 14A* at 6, 10, 15; *Exh. 15A* at 23, 31, 37; *Exh. 17A* at 1, 36. There were many hours of phone calls, and Torres estimated a total of 10 hours of meetings. *Trial Day 4* at 70. The content of these conversations concerned quality, quantity, and price. *Exh. 14A* at 24, 26, 28-29, 36-38; *Exh. 15A* passim; *Exh. 17A* at 42, 110-11; *Exh. 18A* at 15, 18-19.

Although quantity was always in flux and ultimately determined by the government, *Trial Day 10* at 23-24, 41-45, discussions in Spring 2009 were for much smaller amounts than Torres, Fora and Esquilin had been contemplating the summer before. Now they discussed quantities in the range of 20 or 200 kilograms, not the 1,000



or 1,500 kilos of the earlier conspiracy. *Trial Day 5* at 9, 49-50, 54, 63. Their new plans were to move drugs from the Dominican Republic to Puerto Rico, involving neither Columbia nor Miami. *Trial Day 9* at 123; *Exh. 14A* at 27; *Exh. 17A* at 77. And they decided transport via boat, not air cargo. *Trial Day 5* at 55-57, 63, 65, 84, 89-90; *Exh. 15A* at 12, 13, 15; *Exh. 17A* at 48, 61, 85, 103-04, 105-09; *Exh. 18A* at 32-34.

#### **IV. Second Conspiracy – Decisions on Details of the Drop**

After those major decisions, the group of four – Torres, Fora, Esquilin, and Severino-Batista – made detailed plans for every aspect of the importation.

They deliberated various Puerto Rico beaches as the best spots for the drop. *Trial Day 5* at 53, 77; *Trial Day 6* at 6, 46-47; *Trial Day 10* at 31; *Exh. 17A* at 49, 51, 53, 74; *Exh. 18A* at 27, 30. They considered El Corcho beach in Humacao, and went there to scope it. *Trial Day 5* at 103-04, 106, 108; *Trial Day 6* at 3, 6. Fora suggested a friend's house in Cataño which had a pier, but rejected it because the Coast Guard was based nearby. *Trial Day 5* at 80. The group of four finally decided on the beach in Dorado because, after taking a walk on it, they decided it was "quite a lonely beach." *Trial Day 5* at 65, 73, 81; *Exh. 18A* at 9.

They talked about hiding out on the hill behind the beach to await the delivery. *Exh. 17A* at 90-91. They talked about shipping methods, types of boats, and how fast they travel. *Exh. 15A* at 12, 13, 15; *Exh. 18A* at 27-29. The group discussed problems of a transfer at sea, *Trial Day 5* at 55, 56, *Exh. 17A* at 48, 61, 85, 103-04, and put Severino-Batista in charge of addressing it because he claimed he was "raised in the sea." *Trial Day 5* at 65; *Exh. 17A* at 105-06. They talked about the weather, how it mattered to their

operation, and how to avoid getting wet. *Trial Day 6* at 57; *Exh. 17A* at 106-09.

Torres, Fora, Esquilin, and Severino-Batista discussed the surveillance and protection issues posed by the watery transfer, *Trial Day 5* at 63, 84, 89-90, and put Esquilin in charge of security because he was a cop. *Trial Day 5* at 61; *Exh. 8B* at 27. They discussed how many weapons would be necessary for security, *Trial Day 5* at 62, 84, 89-90; *Trial Day 6* at 49-51; *Exh. 17A* at 96; *Exh. 18A* at 8, and how many cars would be necessary for transfer. *Exh. 17A* at 62.

The four determined that, including security and off-loading, *Trial Day 5* at 53, it was a six-person job, *Trial Day 5* at 50, 53, 84, 89-90; *Exh. 17A* at 35, and put Fora in charge of hiring two additional helpers. *Trial Day 5* at 54, 61, 63, 92; *Exh. 17A* at 80-82.

Finally, they discussed a stash house for the drugs after receipt, *Trial Day 5* at 60-61; *Exh. 17A* at 56, 94, how the drugs would be distributed, *Exh. 17A* at 89-90, 93, and how the profits would be split. *Exh. 8B* at 31; *Exh. 17A* at 55, 61, 92.

Eddie and Josue Alejandro-Montanez were not present for and had nothing to do with any of this. *Trial Day 6* at 41; *Exh. 12A* at 2; *Exh. 14A* at 4, 6, 10, *passim*.

## **V. Eddie and Josue Alejandro-Montanez Appear on Eve of Shipment**

The two hired hands Fora found were Alejandro-Montanez brothers, Eddie and Josue. *Trial Day 6* at 53; *Exh. 17A* at 37-39, 45, 53-54, 69. On March 10, 2009, a week before the shipment, they were introduced by Fora to the four promoters of the conspiracy at a Burger King, given the others' phone numbers, and told what their job would be. *Trial Day 6* at 17, 25, 29-30; *Trial Day 9* at 87; *Trial Day 10* at 12; *Exh. 20*. The brothers were taken to view the drop-spot, and were told to be equipped with cars and

weapons. *Trial Day 6* at 29. Over the next several days Torres instructed them by phone that they should be prepared to serve as lookouts, drivers, and off-loaders. *Trial Day 6* at 51, 54, 59; *Exh. 21A* at 14, 40.

During the evening of March 15, Fora called everybody, checking in, making sure they were ready for tomorrow's tasks, and giving pep-talks. *Trial Day 6* at 52-53, 75; *Trial Day 7* at 4-7, 12; *Trial Day 10* at 15; *Exh. 21A* at 48; *Exh. 22A* at 28-29, 62-63, 72-75. During the early morning of March 16, they all met and drove over to the drop-point. *Trial Day 7* at 14, 58; *Trial Day 10* at 47; *Trial Day 12* at 82.

## **VI. Sham Shipment and Arrest**

The government went forward with the fake drug shipment on March 16, 2009. Torres unexpectedly indicated the amount would be 300 kilograms, rather than the agreed-on 200 kilos, surprising Fora, who demanded an adjusted payment. *Trial Day 7* at 38; *Trial Day 10* at 23. Torres and Josue then flashed a signal light out to sea and approached the government's ship. *Trial Day 7* at 38, 84-85.

Eddie was told to stay back with the car, which contained a "clavo" (hidden compartment) containing several weapons. *Trial Day 7* at 41, 61; *Trial Day 10* at 16; *Trial Day 12* at 47-48, 104-105. Josue, Severino-Batista, and others unloaded the fake drugs. *Trial Day 7* at 61, 89, 102; *Trial Day 12* at 82-83. When Josue went to get another sham sack, the entire group was arrested. While others ran and hid, Eddie Alejandro-Montanez peacefully submitted with a weapon in his pocket. *Trial Day 7* at 48; *Trial Day 12* at 46-49, 60.

## STATEMENT OF THE CASE

The indictment charged seven defendants with several crimes. The charges and sentences are summarized in the table below:

Defendant	Defendant Name	<b>Count 1</b> Conspiracy to possess with intent to dist.	<b>Count 2</b> Conspiracy to import	<b>Count 3</b> Carrying firearm in drug traffic crime	<b>Count 4</b> Carrying firearm in drug traffic crime	<b>Count 5</b> Attempt to possess with intent to dist.	Sentence
1	Victor Esquilin-Rosa	Plead	Dismissed			Dismissed	150 months
2	Raul Feliciano-Lopez (Fora)	Plead	Dismissed	Dismissed			144 months
3	<i>Eddie Alejandro-Montanez</i>	<i>Guilty</i>	<i>Guilty</i>		<i>Acquitted</i>		<i>240 months</i>
4	Josue Alejandro-Montanez	Guilty	Guilty		Acquitted		240 months
5	Julio Severino-Batista	Guilty	Guilty				192 months
6	Edwin Marte-Viera	Plead	Dismissed				37 months
7	Manuel Gonzalez-Allen	Plead	Dismissed				57 months

Eddie Alejandro-Montanez was charged by indictment with conspiracy to possess with intent to distribute a controlled substance, contrary to 21 U.S.C. § 846, and § 841(a)(1) and (b)(1)(A)(ii) (count 1), with conspiracy to import a controlled substance, contrary to 21 U.S.C. § 952(a), § 960(a)(1) and (b)(1)(B), and § 963 (count 2), and with carrying a firearm in relation to a drug trafficking crime, contrary to 18 U.S.C. § 924(c)(1)(A) and (c)(2) (count 4). INDICTMENT (Mar. 24, 2009), see *Josue Alejandro-Montanez's addendum* at 32.

Eddie Alejandro-Montanez was tried by a jury (*Daniel R. Domínguez, J.*) with co-defendants Julio Severino-Batista and (his brother) Josue Alejandro-Montanez.

On February 22, 2011, the defendant filed a Rule 29 motion for a judgment of

acquittal. On February 23, 2011, the jury returned its verdicts, found Eddie Alejandro-Montanez guilty of the drug conspiracies, but acquitted him of the gun crime. On March 25, 2011 the Mr. Alejandro-Montanez filed a second Rule 29 motion for a judgment of acquittal. On August 11, 2011 the court heard arguments on the motion and also discussed with the parties the allegation that the defendant's family had been excluded from the courtroom during jury selection. AUG. 11, 2011 TRN. at 82-95. The court denied the motions on July 3, 2012. OPINION AND ORDER (July 3, 2012), see *Josue Alejandro-Montanez's addendum* at 52, *Julio Severino-Batista's appendix* at 41.

The court (*Daniel R. Domínguez, J.*), sentenced Mr. Alejandro-Montanez to 240 months committed on each charge, plus five years of supervised release, all to be served concurrently. JUDGMENT IN A CRIMINAL CASE (Aug. 8, 2012), *Addendum*.

## **SUMMARY OF ARGUMENT**

Eddie Mr. Alejandro-Montanez first points out that because he was a hired hand brought on at the last moment in a pre-existing conspiracy, and knew nothing about the purpose of the conspiracy, he is not guilty of the crime of conspiracy. He also points that there were two separate conspiracies, separated by time and purpose, and that therefore he is not guilty of the conspiracy charged.

Mr. Alejandro-Montanez notes that although he is the least culpable of any defendant, his sentence was the greatest, and that it was unreasonable. He argues that the sentencing court used several facts either rejected or not found by the jury – the use of a weapon, and the quantity of the sham drugs. He then argues that because the indictment charged him with a “detectable” amount of contraband, but that no cocaine was detected, he is guilty of no crime.

He adds that his trial was tainted because the courtroom was closed to his family during jury selection, and finally, that he should benefit from a proposed revamp of the sentencing guidelines.

## ARGUMENT

### I. No Evidence that Eddie Alejandro-Montanez Was Part of Any Conspiracy

“The essence of conspiracy is an agreement to commit a crime.” *United States v. Portela*, 167 F.3d 687, 695 (1st Cir. 1999) (quotations and citations omitted). “To secure a conspiracy conviction ... the government must prove that: (1) a conspiracy existed; (2) the defendant had knowledge of the conspiracy; and (3) the defendant knowingly and voluntarily participated in the conspiracy.” *United States v. Delgado-Marrero*, \_\_\_ F.3d \_\_\_, Slip Op. 11-1660, 2014 WL 522462 (1st Cir. Feb. 11, 2014) (quotations omitted). “[T]he requisite intent needed for a conspiracy conviction is that the defendant intended to join in the conspiracy and intended the substantive offense to be committed.” *United States v. Gonzalez*, 570 F.3d 16, 24 (1st Cir. 2009) (quotations omitted). This Court “must affirm unless the evidence, viewed in the light most favorable to the government, could not have persuaded any trier of fact of the defendant's guilt beyond a reasonable doubt.” *United States v. Cortes-Caban*, 691 F.3d 1, 12 (1st Cir. 2012) *cert. denied*, 133 S. Ct. 2765 (U.S. 2013).

The government offered no proof that Mr. Alejandro-Montanez joined any conspiracy. There is no evidence that he knew why he was hired to appear at the beach in Dorado on March 16. There is no evidence that he knew of any plans for anything of an illegal nature. There is no evidence that he was ever included in the plans or told of them. He was merely a hired hand, employed at the last moment. Thus there is no proof

of his knowledge of a conspiracy, that he intended to join in it, or that he intended anything of substance to be accomplished. He was told only to show up with a gun and a car. While he might have surmised that lawful activities do not occur on dark beaches with guns in the middle of the night, that is not proof of guilt. *United States v. Perez-Melendez*, 599 F.3d 31, 43 (1st Cir. 2010) (“[K]nowledge that one is guilty of some crime is not the same as knowledge that one is guilty of the crime *charged*.”) (emphasis in original). Because on the day of the sham shipment he was told to stay in the car, and thus never eyed even an iota of the ersatz opiate, he never had any reason to know the nature of the conspiracy or its object.

Accordingly the Court should have granted Mr. Alejandro-Montanez’s motion for judgment of acquittal, and this court should determine him innocent of any crime.



## **II. One Conspiracy, Not Two**

To the extent that Eddie Alejandro-Montanez was part of any conspiracy, it was a second one, commencing in February 2009.

Mr. Alejandro-Montanez incorporates the legal argument made in his co-defendants' briefs, regarding the existence of two conspiracies rather than one as the government charged. BRIEF OF JULIO SEVERINO-BATISTA § 1 at 11-20; BRIEF OF JOSUE ALEJANDRO-MONTANEZ § II at 19-23. He adds, moreover, that while Severino-Batista participated at least to some degree in the arrangements regarding the conspiracy, Mr. Alejandro-Montanez came in even later, and did not participate in the arrangements to any degree.

### III. Sentence Unreasonable Compared to Co-Defendants

Mr. Alejandro-Montanez and his brother Josue got 240 months – the highest sentence of all the defendants. Yet they were the least culpable.

Mr. Alejandro-Montanez did not participate in any planning, and knew nothing of the existence or purpose of any conspiracy. He was recruited by Fora just a week before the sham shipment, had no special skills, expertise, or gumption, and was interchangeable with any hired hand who did a job the way he was told.

Mr. Alejandro-Montanez was not higher in the distribution chain, was not the target of the government's sting, and was a less – not more – valuable catch for the government. Beyond some bluster, there is no evidence he ever committed a crime before in his life, and had a clean record.

Moreover, the jury acquitted him of possessing a firearm, which the judge nonetheless used as a key sentencing factor. SENT. TRN. at 67 (“The Court also finds that he possessed a weapon during the transaction.”).

Fora, who was the prime conspirator, who took part from the beginning, did the planning, and hired Mr. Alejandro-Montanez, received a sentence of 144 months, *eight years less* than Mr. Alejandro-Montanez. Julio Severino-Batista, who because he was at meetings during the planning phase and thus more likely to know of the conspiracy and its purpose, and who was found guilty by the same jury of the same crimes as Mr. Alejandro-Montanez, was sentenced to 192 months, *four years less* than Mr. Alejandro-

Montanez.

Eddie Alejandro-Montanez understands that “a defendant’s sentence is not unreasonable simply because his co-defendant agreed to help the government in exchange for a reduced sentence.” *United States v. Cirilo-Munoz*, 504 F.3d 106, 142 (1st Cir. 2007) (quotations and brackets omitted). This sentencing disparity here is nonetheless unreasonable, *see United States v. Riquinha*, 328 F. App’x 665, 667 (1st Cir. 2009) (“appellant must explain not why a desired sentence would be reasonable but why the imposed sentence was unreasonable”), 18 U.S.C. § 3553(a), because the court sentenced the least culpable to the most time, and the most culpable to the least time. The court turned backward the purposes of sentencing, the guidelines, and the goal of consistent sentencing. Accordingly Mr. Alejandro-Montanez’s case should be remanded for re-sentencing.

Further, Mr. Alejandro-Montanez incorporates the legal argument regarding sentencing made in his co-defendant’s brief. BRIEF OF JOSUE ALEJANDRO-MONTANEZ § III at 23-27.

#### IV. Court Elevated Sentence Beyond Mandatory Minimum Without Finding by Jury

In 2013, during the pendency of this appeal, the United States Supreme Court decided *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151 (2013).<sup>1</sup> There it determined that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. *Alleyne*, 133 S. Ct. at 2155.

Here Mr. Alejandro-Montanez faced a 120 month (10-year) minimum mandatory sentence. The sentencing court, however, explicitly used the fact that there were guns found on Mr. Alejandro-Montanez’s person and in the car he was driving to add two points and increase his sentence beyond 10 years.<sup>2</sup> The jury, however, specifically rejected the firearms count, thus preventing the court from using the fact to increase Mr. Alejandro-Montanez’s sentence beyond the mandatory-minimum. Accordingly, the court imposed an unconstitutional sentence, and Mr. Alejandro-Montanez’s case must be remanded for re-sentencing.

Further, Mr. Alejandro-Montanez incorporates the legal argument made in his co-

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<sup>1</sup>*Alleyne* applies retroactively here. *United States v. Delgado-Marrero*, \_\_\_ F.3d. \_\_\_, Slip Op. 11-1660, 2014 WL 522462 (1st Cir. Feb. 11, 2014).

<sup>2</sup>The Court expounded:

The Court also finds that he possessed a weapon during the transaction. And he had also the knowledge that other weapons were being produced, because he was driving a car where there was what is known as a *clavo*, which that’s in Spanish, but in English it means a nail. And a nail is something that is hidden within a car. And what was hidden within the car were three weapons: One was an AK-47, and the others were two short barrel weapons. In between – so he produced three weapons and he was carrying a third. So that warrants a two-point enhancement under guidelines 2D1.1(b)(1).

SENT. TRN. at 67.

defendants' briefs, regarding the possession of guns. BRIEF OF JULIO SEVERINO-BATISTA (*PRO SE*) § IV at 16-18; BRIEF OF JOSUE ALEJANDRO-MONTANEZ § V at 33-36.

## V. Court Elevated Sentence by Finding a Quantity Greater Than Found by the Jury

In 2013, during the pendency of this appeal, the United States Supreme Court decided *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151 (2013).<sup>3</sup> There it determined that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. *Alleyne*, 133 S. Ct. at 2155. In *United States v. Delgado-Marrero*, \_\_\_ F.3d \_\_\_, Slip Op. 11-1660, 2014 WL 522462 (1st Cir. Feb. 11, 2014), this Court applied *Alleyne*, and held that the sentence was tainted because the quantity of (sham) drugs was neither found by the jury nor obvious from the evidence.

This case relies on the same statute as *Delgado*, which provides:

For an indeterminate quantity of cocaine, there is no mandatory minimum term of imprisonment, and the maximum term is twenty years. If the violation involves 500 grams or more of a substance containing cocaine, the permissible prison terms range from a minimum of five years to a maximum of forty years. If the violation ... involves five kilograms or more of a substance containing cocaine, as charged in the indictment here, then the highest statutory range of sentences applies: the mandatory minimum is ten years' imprisonment, and the maximum term is life in prison.

*Delgado-Marrero*, \_\_\_ F.3d. at \_\_\_. In *Delgado*, the sentencing court believed it could determine the quantity of sham drugs because video-evidence showed some of the phony packets. This Court pointed out that because there was no evidence of the weight of the packets, the quantity was unknown and could have been below the statutory thresholds. Here, there is even less evidence of quantity, because the government produced neither

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<sup>3</sup>*Alleyne* applies retroactively here. *United States v. Delgado-Marrero*, \_\_\_ F.3d. \_\_\_, Slip Op. 11-1660, 2014 WL 522462 (1st Cir. Feb. 11, 2014).

a count of the packets nor the quantity contained in any particular packet of sham drugs. Torres said the amount of purported drugs was always in flux, and actually surprised Fora on the date of the shipment. The lower court admitted it could not arrive at a sentencing quantity with any precision. *Sent. Trn.* at 64-66, 67 (“So the Court chooses 150 kilos.”).

Accordingly, the quantity here is “indeterminate” and Mr. Alejandro-Montanez’s jeopardy cannot, by statute, include any mandatory-minimum.

The sentencing court nonetheless sentenced Mr. Alejandro-Montanez to a quantity of something other than “indeterminate,” including a mandatory-minimum when there was no proof of quantity. Thus the sentence cannot stand, and Mr. Alejandro-Montanez must be either re-tried or re-sentenced. *Delgado*, \_\_ F.3d at \_\_ (citing *United States v. Collins*, 415 F.3d 304 313-15 (4th Cir. 2005)) (“[S]ince the district court sentenced [defendant] to the enhanced mandatory minimum sentence of ten years—based on an aggravating fact (drug quantity) that was not found beyond a reasonable doubt, and for which scant evidence was presented—the error affected [defendant’s] substantial rights and the outcome of his case.”).

Further, Mr. Alejandro-Montanez incorporates the legal argument made in his co-defendants’ briefs, regarding the possession of guns. BRIEF OF JULIO SEVERINO-BATISTA (*PRO SE*) §§ I, 2 at 1-9; BRIEF OF JOSUE ALEJANDRO-MONTANEZ § I at 10-19.

## **VI. No “Detectable” Amount of Cocaine**

Mr. Alejandro-Montanez recognizes that reverse sting operations using fake drugs can lead to drug conspiracy convictions. *See, e.g., United States v. Sanchez-Berrios*, 424 F.3d 65(1st Cir. 2005).

In both counts I and II of the indictment on which Mr. Alejandro-Montanez was convicted, the government charged a conspiracy involving “a mixture or substance containing a *detectable* amount of cocaine.” INDICTMENT (Mar. 24, 2009), *see Josue Alejandro-Montanez’s addendum* at 32 (emphasis added). The government thus alerted the defendant and promised the jury it would produce proof of some “detectable” real drugs. Yet there was no actual cocaine anywhere in this case.

A variance between indictment and proof warrants reversal, *Stirone v. United States*, 361 U.S. 212 (1960), when there is prejudice to the defendant. *United States v. Mueffelman*, 470 F.3d 33, 38 (1st Cir. 2006).



## **VII. Defendant's Family Not Allowed in Courtroom During Jury Selection**

Eddie Alejandro-Montanez incorporates the legal argument made in his co-defendant's brief, regarding the closure of the courtroom. BRIEF OF JOSUE ALEJANDRO-MONTANEZ § IV at 27-33.

## **VIII. Reduction in Sentence for Drug Offenders**

On Thursday, March 13, 2014, Attorney General Eric Holder testified to the Federal Sentencing Commission supporting reduction of sentences for drug offenders by lowering the guidelines drug table by 2 levels. Insofar as the proposal becomes law, Mr. Alejandro-Montanez seeks remand for re-sentencing pursuant to the new guidelines.

## **IX. Joinder of Co-Defendants' Briefs**

Eddie Alejandro-Montanez joins any additional arguments set forth in the briefs of his co-defendants to the extent they do not conflict with his interests. *See generally* BRIEF OF JULIO SEVERINO-BATISTA (*PRO SE*); BRIEF OF JULIO SEVERINO-BATISTA; BRIEF OF JOSUE ALEJANDRO-MONTANEZ.

### **CONCLUSION**

For the foregoing reasons, this Court should determine Eddie Alejandro-Montanez is not guilty of the crimes charged, vacate his convictions and remand for a new trial, or in the alternative, vacate his sentence and remand for re-sentencing.

Respectfully submitted,

Eddie Alejandro-Montanez  
By his Attorney,

**Law Office of Joshua L. Gordon**

/s/

Dated: April 4, 2014

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Joshua L. Gordon, Esq.

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**REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Eddie Alejandro-Montanez requests that Attorney Joshua L. Gordon be allowed oral argument.

I certify that on April 4, 2014, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney, and by the same method to counsel for co-defendants.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 4,976 words, exclusive of those portions of the brief which are exempted

Dated: April 4, 2014

*/s/*

\_\_\_\_\_  
Joshua L. Gordon, Esq.

**ADDENDUM**

JUDGMENT IN A CRIMINAL CASE (Aug. 8, 2012), ..... 23

# UNITED STATES DISTRICT COURT

## JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

v.

Eddie ALEJANDRO-MONTAÑEZ

### JUDGMENT IN A CRIMINAL CASE

Case Number: 3:09-CR-107-003 (DRD)

USM Number: 33598-069

Jason Gonzalez-Delgado, Esq.

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 (1), and Two (2) on February 23, 2011  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), and 846	Conspiracy to possess with intent to distribute more than five (5) kilograms of cocaine.	March 16, 2009	One (1)
21 U.S.C. § 963,952(a), and 960(a)(1), and (b)(1)(B)	Conspiracy to import more than five (5) kilograms of cocaine.	March 16, 2009	Two (2)

The defendant is sentenced as provided in pages 2 through 4 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) Four (4)

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.

July 30, 2012

Date of Imposition of Judgment

S/ Daniel R. DOMÍNGUEZ

Signature of Judge

Daniel R. DOMÍNGUEZ, U.S. District Judge

Name and Title of Judge

August 8, 2012

Date

DEFENDANT: **Eddie ALEJANDRO-MONTAÑEZ**  
CASE NUMBER: 3:09-CR-107-003 (DRD)

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Two Hundred and Forty (240) months** as to count One (1), and Two (2) to be served concurrently with each other. Time served shall be credited.

The court makes the following recommendations to the Bureau of Prisons:  
It is recommended that this defendant be designated to serve the term of imprisonment at Fort Dix, New Jersey. It is further recommended that this defendant be provided while incarcerated the 500 hours of drug treatment program, vocational training, and English courses.

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

DEFENDANT: **Eddie ALEJANDRO-MONTAÑEZ**  
CASE NUMBER: 3:09-CR-107-003 (DRD)

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of : Five (5) years as to each of counts 1 and 2 to be served concurrently with each other. Under the following terms and conditions.

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 refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release; thereafter, submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year 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 an in-patient or out-patient substance abuse treatment 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.

- 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: **Eddie ALEJANDRO-MONTAÑEZ**  
CASE NUMBER: 3:09-CR-107-03 (DRD)

### **ADDITIONAL SUPERVISED RELEASE TERMS**

- 1. 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 Title 18, U.S. Code § 3563(a)(9).*
- 2. The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release, and thereafter submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any such samples detect substance abuse, the defendant shall participate in an in-patient or out-patient substance abuse treatment program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until fully 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 participate in a vocational training and/or job placement program recommended by the U.S. Probation Officer.*
- 4. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.*

DEFENDANT: **Eddie ALEJANDRO-MONTAÑEZ**  
CASE NUMBER: 3:09-CR-107-003 (DRD)

**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>
<b>TOTALS</b>	<b>\$ 200.00</b>	<b>\$ Not imposed</b>	<b>\$ Not imposed</b>

Assessment to be paid while incarcerated.

- 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>
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<b>TOTALS</b>	\$ _____	\$ _____
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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.