No. 13-1474

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

FAUSTINO ARRELLANO,
Defendant/Appellant.

On Appeal From A Final Judgment Of The United States District Court
For The Northern District Of Illinois, Chicago Division
Case No. 1:10-cr-00802-3
The Honorable Matthew F. Kennelly

OPENING BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT FAUSTINO ARRELLANO

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ORAL ARGUMENT REQUESTED

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July 17, 2013

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 13-1474

Short Caption: USA v. Faustino Arrellano

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Faustino Arrellano

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ John M. Gore Date: 07/17/2013

Attorney's Printed Name: John M. Gore

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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N/A

Attorney's Signature: s/ Brian J. Murray Date: 07/17/2013

Attorney's Printed Name: Brian J. Murray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Faustino Arrellano respectfully requests oral argument. This case presents several complex legal and factual issues, including issues of constitutional and evidentiary law. Oral argument will assist the Court in resolving these difficult issues and in navigating the voluminous record evidence.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because this case involves allegations of offenses against the laws of the United States, *see* 18 U.S.C. § 3231, including 21 U.S.C. §§ 843 and 846. The jury returned its verdict against Mr. Arrellano on May 16, 2012. (R.128.)[1] Mr. Arrellano moved for judgment of acquittal and a new trial on June 29, 2012 (R.132), which the district court denied on February 6, 2013 (R.190).

The district court entered final judgment on February 14, 2013. (R.197; RSA.1.) Mr. Arrellano filed notices of appeal on February 15, 2013 (R.193) and March 4, 2013 (R.201). These notices timely invoked the jurisdiction of this Court. *See* Fed. R. App. P. 4(b). This Court has jurisdiction to review the final judgment of the district court. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it admitted into evidence a cell phone discovered through a warrantless night-time search supported only by

[1] (R.__) citations refer to docket entries in the trial court; (RSA.__) citations refer to the attached Required Short Appendix.

invalid consent given by an individual who had submitted to the searching agents' authority, was illegally detained, and was under duress?

2. Did the district court err in admitting into evidence purported co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E) when the evidence failed to show that Mr. Arrellano ever joined a conspiracy?

3. Did the district court err in denying Mr. Arrellano's motions for judgment of acquittal when the evidence was insufficient to support any of the counts of conviction?

STATEMENT OF THE CASE

A. Nature Of The Case

Faustino Arrellano was convicted of one count of conspiracy to possess with intent to distribute controlled substances and two counts of use of a communication facility to facilitate a drug trafficking offense based on unconstitutionally obtained, inadmissible, and insufficient evidence. The bulk of the government's evidence at trial focused on another individual, Moises Villalobos, whom the government alleged was the kingpin of a major drug conspiracy. The government alleged that Mr. Arrellano joined the tail end of that conspiracy around August 17, 2010, and played a "minor role" in it for approximately one week. (R.186:5.)

The government's evidence, however, at best showed that Mr. Arrellano knew and spoke to members of the alleged conspiracy and performed menial tasks at their bidding. Indeed, the *only* physical evidence that the government presented at trial to connect Mr. Arrellano to the alleged conspiracy was a cell

phone seized during a warrantless night-time search of a home in which Mr. Arrellano was staying as an overnight guest. But Mr. Arrellano never consented to the search of his bedroom where the phone was found, and the putative consent that the searching agents secured from the occupant of the house was invalid because he had submitted to the agents' authority, was illegally detained, and was under duress. The district court therefore erred in denying Mr. Arrellano's motion to suppress and in permitting the government to present the phone to the jury.

The government also presented to the jury purported co-conspirator statements consisting of recordings and translations of 35 wiretapped phone calls involving Villalobos and individuals other than Mr. Arrellano. Yet most of the calls predated Mr. Arrellano's alleged joining of the conspiracy, and the government failed to show, even by a preponderance of the evidence, that Mr. Arrellano ever joined the conspiracy. The district court, however, denied Mr. Arrellano's motion to exclude the calls, and admitted them into evidence in violation of Mr. Arrellano's substantial rights.

The government's failure to prove by a preponderance of the evidence its allegation that Mr. Arrellano joined a conspiracy, without more, foreclosed it from proving that allegation beyond a reasonable doubt. The government, moreover, failed to prove the other counts against Mr. Arrellano because it adduced no evidence that the words he used on the handful of wiretapped calls with Villalobos were coded references to narcotics dealing. The district court therefore erred in denying Mr. Arrellano's motions for a judgment of acquittal.

As explained below, these errors, individually and collectively, warrant reversal of the district court's judgment.

B. Proceedings And Disposition Below

A grand jury returned a multi-count indictment against Villalobos, Adan Moreno, Mr. Arrellano, and Rosa Fernandez on December 15, 2010. (R.36.) Moreno remains at large. Villalobos pleaded guilty pursuant to a plea agreement and did not appear or testify at trial. (R.92.)

Following Villalobos's guilty plea, the government amended the indictment to charge three counts each against Mr. Arrellano and Ms. Fernandez. (R.127.) Count I charged that the defendants "did conspire with Moises Villalobos, each other and others known and unknown to knowingly and intentionally possess with intent to distribute and to distribute" one kilogram or more "of mixtures and substances containing a detectable amount of heroin" and five kilograms or more "of mixtures and substances containing a detectable amount of cocaine." (*Id.*:1.)

Count III related to a phone call between Mr. Arrellano and Villalobos on August 17, 2010, and charged Mr. Arrellano with using a cell phone "in committing and causing and facilitating the commission of [the] conspiracy to possess with intent to distribute and to distribute a controlled substance, as charged in Count One." (*Id.*:3.)

Count V related to a phone call between Mr. Arrellano and Villalobos on August 18, 2010, and charged Mr. Arrellano with another instance of using a

cell phone to "caus[e] and facilitat[e] the commission of" the conspiracy charged in Count I. (*Id.*:5.)

Counts II and IV charged Ms. Fernandez with using a cell phone to facilitate the conspiracy charged in Count I. (*Id.*:2, 4.)

The case proceeded to trial in May 2012. On May 16, 2012, the jury convicted Mr. Arrellano and Ms. Fernandez on all counts against them. (R.221:927–28.) Mr. Arrellano moved for judgment of acquittal and a new trial on June 29, 2012 (R.132), which the district court denied on February 6, 2013 (R.190).

The district court entered final judgment on February 14, 2013. (R.197; RSA.1.) The district court sentenced Mr. Arrellano to 120 months on Count I and 48 months each on Counts III and V, to run concurrently. (RSA:3.) Mr. Arrellano's timely notices of appeal followed. (R.193; R.201.)

STATEMENT OF FACTS

A. Investigation Of Moises Villalobos.

A joint task force of the FBI, DEA, and Chicago Police Department began investigating Moises Villalobos in April or May of 2010. (R.219:263.) At that time, the FBI secured wiretaps on a number of target phones used by Villalobos and intercepted dozens of phone calls. (*Id.*:264–270.) Agents also conducted surveillance of two residences in northwest Chicago associated with Villalobos, one located on North Long ("Long house") and the other on North McVicker ("McVicker house"). (*Id.*:272.) That surveillance frequently "was

initiated based on calls . . . indicat[ing] that some activity was going to take place at one or both of these locations." (*Id.*:275, 312.)

Through their surveillance, agents frequently saw Villalobos driving or riding in a green Honda Accord. (*Id.*:276.) They ultimately concluded that Villalobos headed a significant conspiracy to distribute heroin and cocaine throughout the Chicago area. (*Id.*:300.)

Despite their ongoing surveillance of Villalobos, investigators never observed Mr. Arrellano at the Long or McVicker houses. (*Id.*:301, 463; R.222:562.) They also never observed Mr. Arrellano driving or riding in Villalobos's Honda Accord, or recovered any physical evidence connecting Mr. Arrellano to that car. (R.222:667.)

B. The Long House

The joint task force did not receive any information regarding Mr. Arrellano until mid-August 2010. (R.219:300.) On August 17 and 18, investigators intercepted nine phone calls conducted in Spanish between Villalobos and Mr. Arrellano. (*Id.*:277–80.) Five of those calls occurred on August 17, when Mr. Arrellano was in Kenosha, Wisconsin, where co-defendant Rosa Fernandez resided. (R.220:424–27, 440–46, 448–49; R.222:540–42.) Four more calls occurred on August 18, when Mr. Arrellano was in the neighborhood of the Long house in Chicago. (R.220:458; R.222:546–47, 551–53, 557–59.)

The government presented English translations of these calls at trial. (R.220:424–25, 440, 445, 448, 458; R.222:551, 557.) It also presented

testimony of the FBI agent who had monitored the calls and translated them from Spanish to English. (R.219:318–63; R.220:366–67.) That agent acknowledged that she did not participate in the conversations and did not attempt to discern the speakers' meaning from any of the words used in the conversations. (R.220:367.)

The government also presented putative expert testimony from Officer Robert Coleman of the Will County Sheriff's Office. (R.223:717–63.) Officer Coleman testified generally that individuals involved in drug trafficking may communicate in "coded language." (*Id.*:739.) But Officer Coleman does not speak Spanish, did not listen to recordings of the conversations between Villalobos and Mr. Arrellano, and was not familiar with this case. (*Id.*:743, 748–49.) Officer Coleman therefore did not give examples of or identify any specific code words, and did not opine that Mr. Arrellano or anyone else in this case had communicated in code. (*Id.*:739–42.)

The government nonetheless argued at trial that Villalobos and Mr. Arrellano had used code words to arrange for Mr. Arrellano to travel to Chicago with Ms. Fernandez on August 18, to remove items from the Long house, and to report back to Villalobos. (R.218:223–24; R.223:835–39.) In particular, the government contended that "it is a little hot" and "impossible to work" (R.220:425), "goats," and "tools" (R.220:440–41) were all coded references to drug-related activities (R.223:836–38).

The joint task force set up surveillance at the Long house at approximately 7:30 a.m. on August 18. (R.220:463.) At around 8:50 a.m., the

agents on the scene observed Villalobos, Ms. Fernandez, and an unidentified male arrive in the alley behind the house. (R.222:474–478; 501–02.) The two men loaded bags into the trunk of Ms. Fernandez's car; Ms. Fernandez then drove away with Villalobos and a woman but without the unidentified man. (*Id.*) The agents followed Ms. Fernandez's car but did not pursue the man. (*Id.*) None of the agents on the scene identified Mr. Arrellano as having been present at the Long house on August 18. (*Id.*)

The final two calls between Villalobos and Mr. Arrellano occurred later on August 18. In the first call, at 10:15 a.m., Mr. Arrellano told Villalobos that it was not "hot" and "[e]verything came out well," and Villalobos told Mr. Arrellano to "close up" and gave him instructions to meet up with someone else. (R.222:552.) In the second call, at 6:26 p.m., Villalobos recounted that individuals had taken money from him, and Mr. Arrellano told Villalobos to "be alert" and "careful." (*Id.*:557–58.) Mr. Arrellano agreed not to "say anything" and told Villalobos that the "tools" had been put "into the little truck." (*Id.*:559.)

C. Villalobos Arrest And Search Of Long And McVicker Houses

The investigators who trailed Ms. Fernandez's car followed it to the Marriott hotel on North Michigan Avenue. (R.222:478–83.) Villalobos and a woman exited the car and entered the hotel; Ms. Fernandez drove away. (*Id.*) Mr. Arrellano was never present at the Marriott. (R.223:776.)

The following day, investigators arrested Villalobos and conducted a consent search of his hotel room. (R.222:563–64.) Investigators did not

discover any drugs or paraphernalia in the hotel room. (*Id.*:564–65.) Instead, they found cash, cell phones, and "miscellaneous paperwork." (*Id.*) Among that paperwork was a list Villalobos maintained with phone numbers of his associates. (*Id.*:567–68.) That phone list did not contain any reference to Mr. Arrellano. (*Id.*:569–70.)

Investigators also searched the Long house and garage on August 19, but did not find any drugs or paraphernalia there. (*Id.*:571–78.) They found only "a few miscellaneous items" (*id.*:575) and did not conduct a canine sniffing for traces or evidence of drugs (*id.*:581). A search of the McVicker house the same day uncovered cash, narcotics, and paraphernalia in a hidden compartment under the floor of a bedroom closet. (*Id.*:582–612.)

D. Harvey House Search And Mr. Arrellano's Arrest

Investigators began receiving GPS information regarding the location of the phone registered to Mr. Arrellano on August 19, 2010. (R.219:280.) That information showed that Mr. Arrellano had returned to and was present at his home in Georgia from August 19 through August 23, traveled out of Georgia on August 24, and arrived at a house on Carol Avenue in Harvey, Illinois ("Harvey house") that evening. (*Id.*:285–87.)

The government did not have a wiretap on Mr. Arrellano's phone at that time. (R.222:648.) Thus, while it introduced records of calls on those dates between Mr. Arrellano's phone, Villalobos's phone, and numbers listed on Villalobos's phone list (*id.*:624–26), it did not present recordings of those calls, did not know the identity of the speakers, and did not know the purpose or

content of those calls (*id.*:648–50). The calls between Mr. Arrellano's phone and Villalobos's phone on those dates occurred after Villalobos had been arrested. (*Id.*: 650.)

Agents conducted a LexisNexis search on the Harvey house and determined that Adan Moreno—who they suspected was a courier for Villalobos—had two vehicles registered to that address. (R.124:11, 53.) The agents suspected that Moreno was inside and therefore set up surveillance around the house by 9:00 or 9:30 p.m. on the evening of August 24. (R.222:632–33.) At least eight or nine agents surrounded the house and participated in the surveillance. (R.124:43, 69–70.) At around 10 p.m., they saw the green Honda Accord associated with Villalobos arrive at the house and park in the detached garage. (R.222:632–33.)

The agents never obtained a search warrant for the home, garage, or car. (R.124:24–25.) Instead, at approximately 10:30 p.m., "several" agents began knocking on the doors and windows of the house, announcing that they were law enforcement agents, and asking to speak to someone inside. (R.222:633–34.) In their own words, the agents continued knocking on the front door, "yell[ing], scream[ing], knock[ing] on windows, knock[ing] on the back door" on and off for "[a]lmost an hour." (*Id.*:634.) Among other things, the agents screamed Moreno's name. (R.124:43, 80.)

The Harvey Police Department arrived on the scene during this hour. (*See* R.222:634.) They also "knock[ed] on the door very loudly" and then left when no one answered. (*Id.*:636.)

No one answered the knocking for approximately one hour. (*See id.*:633–36, 654.) Around 11:40 p.m., an individual named Alfredo Avilla Anzures opened the door. (R.124:64–65.) DEA Agent Fergus approached the door and began conversing with Mr. Avilla. (*Id.*) At that time, FBI Agent Ostrow entered the house, "saw Special Agent Fergus speaking to one of the occupants," and with "several"—approximately six or seven—"other[] [agents] conducted a protective sweep of the residence." (*Id.*:80.) Word of this entry spread among the agents outside, and the agents abandoned their efforts to secure a search warrant. (*Id.*:24–25.)

Then, in response to Agent Fergus's questioning, Mr. Avilla stated that he lived at the Harvey house and acquiesced in agents "look[ing] around." (*Id.*:66.) Agent Fergus did not advise Mr. Avilla that he had a right to refuse consent. (*Id.*:66–68.) Agent Fergus also had a written consent form available in his car but did not ask Mr. Avilla to sign it. (*Id.*)

Agent Ostrow encountered a rear bedroom with a closed door, "knocked on the door, announced police, [and] opened the door." (*Id.*:81.) "The lights were off," and Agent Ostrow "could see that there was an individual laying in a bed." (*Id.*) The individual was Mr. Arrellano, who was sleeping. (*Id.*:81, 94, 103, 105.) Agent Ostrow got Mr. Arrellano out of bed, "did a quick pat down and brought him into the living room with the other occupants of the residence," who included two other men and one woman. (*Id.*:82–83.) Moreno was not found at the house. (*Id.*:83.)

Neither Agent Ostrow nor any of the other agents ever asked Mr. Arrellano for consent to search the bedroom. (*Id.*:48–49, 82–83, 95.) The agents also did not advise Mr. Arrellano of his *Miranda* rights while he was at the Harvey house. (*Id.*:50.)

FBI Agent Roecker entered the house and discovered Mr. Arrellano and other individuals in the living room, but did not speak to any of those individuals. (*Id.*:25.) Rather, he spoke to other agents, who told him that Mr. Avilla had given consent to search the house. (*Id.*) Agent Roecker then conducted a search of the house, including the bedroom in which Mr. Arrellano had been sleeping. (*Id.*:27–28.) He discovered a cell phone on top of a wooden shelf in the room, scrolled through the settings, and then placed a call to a 1-800 number to determine the number of the phone. (*Id.*:28.)

Agent Roecker then took the phone into the living room and asked the individuals collected there "who the phone belonged to." (*Id.*:29.) Mr. Arrellano raised his hand. (*Id.*) Agent Roecker then called an FBI linguist who had monitored the wiretapped conversations between Villalobos and Mr. Arrellano, "told him to review those calls [and] make sure that he knew [Mr. Arrellano's] voice well." (*Id.*:30.) Agent Roecker elaborated that he "was going to put someone on the phone, and [he] would instruct [the linguist] just to ask basic background information just long enough [to] hear this individual's voice." (*Id.*)

The linguist called Agent Roecker back ten minutes later and said he had familiarized himself with the voice on the wiretaps. (*Id.*:30–31.) With the assistance of another agent, Agent Roecker "asked Mr. Arrellano if he could

talk to someone on the phone just to get some background information concerning himself." (*Id.*:31.) Mr. Arrellano conversed with the linguist in Spanish for about a minute. (*Id.*) Agent Roecker took the phone back from Mr. Arrellano, and the linguist indicated to Agent Roecker that Mr. Arrellano was the individual on the wiretaps. (*Id.*:32.) Agent Roecker did not have the linguist talk to any of the other individuals in the living room. (*Id.*:61–62.)

At around the same time, agents conducted a search of the garage and the car. (R.222:657–58.) The keys to the garage and car were provided by someone other than Mr. Arrellano. (*Id.*:667–68.) Agent Ostrow searched the car and discovered concealed compartments underneath the cup holders on either side of the back seat. (*Id.*:660–61.) Agents removed 24 taped packages from the compartments. (*Id.*:661–62.) The packages contained mixtures containing heroin. (*Id.*:662.)

The FBI later conducted a "thorough" fingerprint analysis of the car and all of the parts—such as door handles, the gear shift, mirrors, and seat belt buckles—where it is "[t]ypical" to find "latent prints." (*Id.*:692.) The FBI found four fingerprints matching Villalobos's fingerprints. (*Id.*:682.) It found no fingerprints matching Mr. Arrellano's fingerprints. (*Id.*:682, 694.)

E. Indictment

The magistrate judge signed a criminal complaint against Villalobos, Moreno, Mr. Arrellano, and Ms. Fernandez on September 27, 2010. (R.2.) A grand jury returned a multi-count indictment against those four individuals on December 15, 2010 (R.36), which was later reduced to three counts each

against Mr. Arrellano and Ms. Fernandez (R.127). Count I charged Mr. Arrellano and Ms. Fernandez with conspiring with Villalobos to possess with intent to distribute heroin and cocaine. (*Id.*:1.) Count III charged Mr. Arrellano with using a cell phone to facilitate the conspiracy and related to the call between Mr. Arrellano and Villalobos at 8:30 p.m. on August 17, 2010 (*id.*:3) in which Villalobos referred to "goats" and Mr. Arrellano referred to "tools" (R.220:440–41). Count V charged Mr. Arrellano with another count of using a cell phone to facilitate the conspiracy and related to the call between Mr. Arrellano and Villalobos at 6:26 p.m. on August 18, 2010. (R.127:5.)

Counts II and IV charged Ms. Fernandez with using a cell phone to commit the conspiracy offense charged in Count I. (R.127:2, 4.)

F. Suppression Rulings

Mr. Arrellano moved to suppress the FBI's voice identification at the Harvey house and the cell phone discovered in his bedroom. (R.65.) With respect to the voice identification, the district court concluded that "Mr. Arrellano was in custody for purposes of Miranda," that "Miranda warnings were required, and they were not given." (RSA.26.) Thus, "[t]he statements he made to the agents at the house and over the phone were the fruits of impermissible questioning by the police," and "Mr. Arrellano's rights under Miranda were violated." (*Id.*) The district court therefore "exclude[d] [Mr. Arrellano's statements] from evidence, as well as the evidence obtained from those statements, including the voice identification." (*Id.*)

Turning to the cell phone, the district court held that Mr. Arrellano "was an invited overnight guest" in the home and therefore "ha[d] standing to challenge the search." (RSA.19.) Applying this Court's decision in *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997), the district court concluded that Mr. Avilla "was submitting to the officers' show of authority" when he opened the door after an hour of nighttime knocking and screaming by the agents. (RSA.20–21.) "[A] reasonable person" in that situation "would not have felt free to ignore the officers and continue about their business and would have believed that the officers would just stay there unless and until they opened the door." (*Id.*:21.) Accordingly, the district court held that the people in the house "had been seized within the meaning of the Fourth Amendment by the time [Mr. Avilla] came to the door." (*Id.*:20.)

The district court did not specify whether the agents' seizure of Mr. Avilla was an arrest or a *Terry* stop. (*See id.*) The district court also never addressed whether that seizure was lawful. (*See id.*)

The district court nonetheless reasoned that "[t]he fact that [Mr. Avilla] had been seized, however, does not mean that he could not voluntarily consent," and concluded that "the consent [Mr. Avilla] gave to Agent Fergus to come in was voluntary." (*Id.*:21.) The district court acknowledged that, by the time Mr. Avilla gave "consent" to Agent Fergus to look around the house, "other agents had already entered and were looking around, and so a reasonable argument could be made that [Mr. Avilla] was simply submitting to authority in this situation as well." (*Id.*) The district court further acknowledged that

"there's no indication . . . that [Mr. Avilla] was told that he had the right to refuse." (*Id.*:22.) Yet the district court held that the consent to search was "voluntary" under the circumstances. (*Id.*:22–23.) It therefore denied Mr. Arrellano's motion to suppress the cell phone. (*Id.*:23.)

G. The Government's *Santiago* Proffer

Prior to trial, the government proffered several statements made by alleged coconspirators in furtherance of the conspiracy charged in Count I. (R.95.) These statements included recordings and translations of 35 wiretapped calls between Villalobos and individuals other than Mr. Arrellano, the majority of which predated Mr. Arrellano's alleged joining of the conspiracy. The defendants opposed the government's motion because the government had not proven by a preponderance of the evidence that they ever joined a conspiracy with the declarants. (R.104.) The district court provisionally granted the government's motion subject to the evidence at trial. (R.112.)

H. Trial

The case proceeded to trial in May 2012. (R.217.) The government alleged that Mr. Arrellano joined the conspiracy on or about August 17, 2010, and did "four things" in furtherance of the conspiracy: (1) "he gave Villalobos advice"; (2) "he agreed to help Villalobos clear out" the Long house; (3) "he did clear out" the Long house; and (4) "he came back for Villalobos' heroin a few days later" at the Harvey house. (*Id.*:218.)

The government presented its evidence against Mr. Arrellano in "six broad categories" (*id.*:221):

- "[W]iretap recordings" (*id.*): These included the 35 phone conversations between Villalobos and individuals other than Mr. Arrellano and the 9 conversations between Villalobos and Mr. Arrellano on August 17 and 18 (R.220:372–458; R.222:551–559);
- "Code" allegedly used by Villalobos and others, including Mr. Arrellano (R.217:223);
- "[L]aw enforcement surveillance" that detected Villalobos at the Long and McVicker houses and Ms. Fernandez at the Long house, but that never detected Mr. Arrellano (*id.*:224);
- "[S]earches" of the Long house, the McVicker house, and the Harvey house that did not uncover any evidence connecting Mr. Arrellano to any drugs or Villalobos's car (*id.*:225);
- "[C]ell phone records" documenting the location and calls made from Mr. Arrellano's cell phone (*id.*); and
- Mr. Arrellano's "phone" recovered from the Harvey house (*id.*:225–26).

The defendants moved at the close of the government's evidence and after trial to exclude the recordings and translations of the 35 telephone conversations involving Villalobos and individuals other than Mr. Arrellano. (R.223:804; R.132.) The district court denied those motions. (R.223:804; R.190.)

Mr. Arrellano also moved at the close of the government's evidence, at the close of all evidence, and after trial for judgment of acquittal due to the

insufficiency of the government's evidence. (R.223:804; R.132.) The district court denied these motions. (R.223:804; R.190.)

The jury convicted Mr. Arrellano and Ms. Fernandez on all counts against them on May 16, 2012. (R.221:927–28.)

I. Sentencing

Mr. Arrellano was a first-time offender whom the government agreed played at most a "minor role" in the charged offenses. (R.186:5.) The guideline range for Mr. Arrellano's offense was 120 to 135 months, and the statutory minimum on Count I was 120 months. (*Id.*:24–25.) The district court found that Mr. Arrellano was "fairly far down on the chain" in any conspiracy and performed "what I think probably you would describe as menial tasks." (*Id.*:26–27.) The district court therefore sentenced Mr. Arrellano to the statutory minimum 120 months on Count I and 48 months on each cell phone count, to run concurrently. (*Id.*:28.) Mr. Arrellano faces deportation upon his release from prison. (*Id.*:28–29.)

SUMMARY OF THE ARGUMENT

I. The district court erred when it denied Mr. Arrellano's motion to suppress the cell phone discovered during the warrantless night-time search of the Harvey house. Mr. Arrellano never consented to the search of his bedroom in which the phone was found. Mr. Avilla's purported consent to that search was involuntary because he had submitted to the authority of the agents, who surrounded the house at night and knocked on the doors and windows, screamed and yelled at the occupants, and refused to leave for approximately

one hour. Mr. Avilla's purported consent also was involuntary because it was tainted by the agents' illegal, warrantless detention of him in his home, and because it was the product of duress. The cell phone was the *only* physical evidence connecting Mr. Arrellano to the alleged conspiracy and formed a principal part of the government's case. The erroneous admission of the cell phone therefore harmed Mr. Arrellano's defense, and the Court should reverse the judgment below.

II. The district court erred when it admitted into evidence purported co-conspirator statements between Villalobos and individuals other than Mr. Arrellano—many of which predated Mr. Arrellano's alleged joining of the conspiracy—because the government failed to prove by a preponderance of the evidence that Mr. Arrellano ever joined the conspiracy. Instead, at best, the government showed that Mr. Arrellano knew and spoke to members of the conspiracy and performed menial tasks at their bidding. The admission of the statements was therefore erroneous, and the Court should reverse the judgment below.

III. The district court erred when it denied Mr. Arrellano's motions for judgment of acquittal because the government's evidence was insufficient to support the counts of conviction. The government's failure to prove that Mr. Arrellano joined the conspiracy by a preponderance of the evidence, without more, means that the government's evidence was insufficient to support conviction on the conspiracy count beyond a reasonable doubt. And because the government provided no evidence that any of the words Mr. Arrellano used

in his conversations with Villalobos were coded terms, the government's evidence was insufficient to support the convictions on Counts III and V. The Court should reverse the judgment below and enter a judgment of acquittal.

STANDARD OF REVIEW

This Court reviews legal questions de novo and factual questions for clear error when reviewing a district court's denial of a motion to suppress evidence. *United States v. Cellitti*, 387 F.3d 618, 621 (7th Cir. 2004).

This Court reviews a district court's evidentiary rulings for abuse of discretion, and any subsidiary factual findings for clear error. *United States v. Westmoreland*, 312 F.3d 302, 309 (7th Cir. 2002). "A [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

In reviewing the sufficiency of the evidence to support a criminal conviction, this Court reviews whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Curtis*, 324 F.3d 501, 505 (7th Cir. 2003).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO SUPPRESS THE CELL PHONE.

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Because Mr. Arrellano "was an invited overnight guest" in the Harvey house, he "has standing to challenge the search"

that uncovered the cell phone. (RSA.19); *see also Minnesota v. Olson*, 495 U.S. 91 (1990). Mr. Arrellano never consented to the search of the bedroom in which he was sleeping. Thus, the government's warrantless night-time search of the bedroom was constitutional only if Mr. Avilla gave voluntary consent. *See Olson*, 495 U.S. at 97–100.

A warrantless search of a person's home is presumptively unconstitutional. *See Payton v. New York*, 445 U.S. 573, 586 (1980). Where, as here, "the validity of a search rests on consent," the government "has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given." *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality op.). "[T]he question whether a consent to a search was in fact 'voluntary'" is "to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Mr. Avilla's purported consent to search the Harvey house was not voluntary for at least three reasons. *First*, Mr. Avilla gave that consent only after submitting to the authority of the searching agents, who surrounded his home at night, knocked on the doors and windows, yelled and screamed, and refused to leave for nearly a full hour. *Second*, Mr. Avilla's consent was tainted by his unlawful, warrantless detention in his own home. *Third*, Mr. Avilla's putative consent was the product of duress. For each of these reasons, both individually and in concert, the district court's denial of the motion to suppress the cell phone was erroneous, and the judgment should be reversed.

A. The Purported Consent Resulted From Submission To The Agents' Show Of Authority

1. An Individual's Submission To Law Enforcement Agents' Authority Renders A Later Purported Consent Invalid

The government cannot satisfy its burden to prove that Mr. Avilla's consent was voluntary "by showing a mere submission to a claim of lawful authority." *Royer*, 460 U.S. at 497; *see also Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) ("This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."). At least two circuits have concluded that where an individual "open[s] the door" to a dwelling place "in response to a show of official authority" by law enforcement agents, the individual "cannot be deemed to have consented to the agents' entry or to have voluntarily consented to the search." *United States v. Tovar-Rico*, 61 F.3d 1529, 1536 (11th Cir. 1995); *see also United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997) ("The district court . . . correctly determined that an unconstitutional search occurs when officers gain visual or physical access to a motel room after an occupant opens the door not voluntarily, but in response to a demand under color of authority.").

The Eleventh Circuit's decision in *Tovar-Rico* is on point. The defendant in that case "was first confronted by police officers . . . when at least five officers knocked loudly at her door, announced their identity as police officers through the closed door, and requested permission to enter." 61 F.3d at 1535. The defendant "did not have any understanding of her right to refuse entry and

demand a warrant," so she "then opened the door and the officers entered quickly with guns drawn to do the protective sweep." *Id.*

The defendant "appeared to be calm" during the protective sweep. *Id.* After the protective sweep turned up no evidence, the officers requested consent to search the apartment. *See id.* at 1535–36. The defendant "agreed to the search and signed a written consent form." *Id.* at 1536. The Eleventh Circuit held that this consent was involuntary, reasoning: "We entertain no doubt that [the defendant] opened the door in response to a 'show of official authority' and cannot be deemed to have consented to the agents' entry or to have voluntarily consented to the search." *Id.*

This Court applied the doctrine of submission to authority in *Jerez*, 108 F.3d 684. The question there was whether two defendants sleeping overnight in a motel room had been seized within the meaning of the Fourth Amendment. *See id.* at 692. The officers approached the motel room late at night, knocked on the door for "three minutes," issued "commands and requests to open the door," knocked on the window at the back of the motel room for "one-and-a-half to two minutes," and shined a flashlight "through the small opening in the window's drapes onto the face of [one of the defendants] as he lay in bed." *Id.* One of the defendants then opened the door and consented to the officers' entry and search of the motel room. *See id.*

The Court held that, under the circumstances, "a seizure took place" because "a reasonable person in the position of [the defendants] would [not] have felt free to ignore the deputies and to continue about their business." *Id.*

at 693. Indeed, when the defendant opened the door, "he was submitting to the deputies' show of authority." *Id.* at 692.

2. Mr. Avilla Submitted To The Agents' Authority Before He Gave Purported Consent To Search The Harvey House

The district court found that Mr. Avilla and the others in the Harvey house had "submit[ed] to the officers' authority" when Mr. Avilla opened the door, concluding that the facts of this case are far more "serious than those in" *Jerez*. (RSA.20–21.) The facts here also are far more serious than those in *Tovar-Rico*. Indeed, "[i]n this case a period of knocking and calling out on both doors and windows by a large number of officers went on for much of an hour" rather than the three minutes in *Jerez*, "and it also occurred at nighttime." (*Id.*:20.) The agents themselves testified that they knocked on the front door, "yelled, screamed, knocked on windows, [and] knocked on the back door" on and off for "[a]lmost an hour" starting around 10:30 p.m. (R.222:634.)

Moreover, before Mr. Avilla even gave his purported consent, Agent Ostrow and "several" other agents swarmed inside the house and began "conduct[ing] a protective sweep." (R.124:80.) Neither Agent Fergus nor any other agent advised Mr. Avilla of his right to refuse consent, or secured a written consent form from him. (*Id.*:66–68.) In these circumstances, Mr. Avilla "did not have any understanding of h[is] right to refuse entry and demand a warrant." *Tovar-Rico*, 61 F.3d at 1535. And because Mr. Avilla "opened the door in response to a 'show of official authority,'" he "cannot be deemed to have consented to the agents' entry or to have voluntarily consented to the search." *Id.*; *see also Conner*, 127 F.3d at 666. The district court therefore should have

suppressed the cell phone. *See Tovar-Rico*, 61 F.3d at 1536; *Conner*, 127 F.3d at 666; *see also Royer*, 460 U.S. at 497; *Bumper*, 391 U.S. at 548–49.

The district court went so far as to acknowledge that when Mr. Avilla "gave consent to search" to Agent Fergus, "other agents had already entered and were looking around, and so a reasonable argument could be made that [Mr. Avilla] was simply submitting to authority in this situation as well." (RSA.21.) The district court thus rested its denial of the motion to suppress on the premise that "[t]he fact that [Mr. Avilla] had been seized, however, does not mean that he could not voluntarily consent." (*Id.*) But that premise is flawed because a submission to authority like Mr. Avilla's renders the later purported consent involuntary. *See supra* Part I.A.1; *Tovar-Rico*, 61 F.3d at 1536; *Conner*, 127 F.3d at 666; *see also Royer*, 460 U.S. at 497; *Bumper*, 391 U.S. at 548–49.

Moreover, the district court identified no facts to suggest that, during the period from when Mr. Avilla opened the door until he "voluntarily" consented to the search, the circumstances had so dramatically changed that he was no longer submitting to the agents' authority. (RSA.21.) Nor could the district court have done so: during that period, other agents had entered the home and already begun to conduct a protective sweep (*id.*), further underscoring that Mr. Avilla did not feel free to terminate the encounter and demand a warrant, *see Tovar-Rico*, 61 F.3d at 1536.

The district court sought refuge in two prior cases (*see* RSA.22), but both are distinguishable and come nowhere close to supporting denial of Mr. Arrellano's motion to suppress. In the Second Circuit's unpublished decision

in *United States v. Rico Beltran*, there was no finding that the consenting individual had submitted to officers' authority, and that individual "was not in custody at the time of consent." 409 F. App'x 441, 443 (2d Cir. 2011).

The searches at issue in this Court's unpublished decision in *United States v. Gutierrez* occurred during the daytime and did not involve any submission to authority. 221 F. App'x 446, 449 (7th Cir. 2007). To the contrary, this Court concluded, on plain-error review, that the defendant had not been seized because "a reasonable person . . . would have felt free to terminate" the non-threatening daytime encounter with police. *Id.* And to top it all off, the agents in *Gutierrez* carefully explained the difference between a protective sweep and a consent search to the defendant, and secured a signed written consent form from him. *Id.* at 448.

Here, by contrast, the district court found that the individuals in the Harvey house, including Mr. Avilla, had submitted to the agents' authority and been "seized" precisely because "a reasonable person" in their situation "*would not have felt free* to ignore the officers and continue about their business and would have believed that the officers would just stay there unless and until they opened the door." (RSA.21 (emphasis added).) *Rico Beltran* and *Gutierrez* therefore do not apply here, and the district court erred in failing to suppress Mr. Arrellano's cell phone. *See Tovar-Rico*, 61 F.3d at 1536; *Conner*, 127 F.3d at 666; *see also Royer*, 460 U.S. at 497; *Bumper*, 391 U.S. at 548–49.

B. The Putative Consent Was Tainted By An Unlawful Detention

The fact that Mr. Avilla submitted to the agents' authority, without more, rendered his putative consent involuntary and required suppression of the cell phone. *See supra* Part I.A. Mr. Avilla's putative consent also was invalid for the independent reason that it was tainted by the agents' unlawful detention of him.

"Consent given during an illegal detention is presumptively invalid." *Cellitti*, 387 F.3d at 622; *see also Jerez*, 108 F.3d at 695 & n.13. In fact, such consent is valid only in the rare case where the government proves that the consent "is sufficiently attenuated from the illegal police action to dissipate the taint." *Cellitti*, 387 F.3d at 623; *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). "When consent to search is given by a person who remains illegally detained, the government is unlikely to meet its burden of showing that the consent was sufficiently attenuated from the illegality." *Cellitti*, 387 F.3d at 623.

The district court did not address either whether the warrantless seizure of Mr. Avilla was an arrest or a *Terry* stop or whether it was lawful. (RSA.21.) The facts demonstrate, however, that the agents lacked probable cause or reasonable suspicion to seize Mr. Avilla, and therefore that the detention was illegal. Thus, because the government cannot show that Mr. Avilla's consent was untainted by that detention, the search was invalid and Mr. Arrellano's cell phone should have suppressed.

1. Mr. Avilla Was Placed Under Arrest Inside His Home Without A Warrant, Probable Cause, Or Exigent Circumstances

This Court has left open the question "whether police may seize a person inside his own home without a warrant or at least probable cause coupled with exigent circumstances." *United States v. Johnson*, 427 F.3d 1053, 1057 (7th Cir. 2005). Other courts, however, have held that a seizure of a person within his home must be supported by either a warrant or probable caused coupled with exigent circumstances. *See, e.g.*, *Payton*, 445 U.S. 573; *United States v. Saari*, 272 F.3d 804, 809 (6th Cir. 2001).

The Sixth Circuit's decision in *Saari* is instructive. Acting on a tip that the defendant had a gun, two officers approached the defendant's home with guns drawn and began knocking on the door. 272 F.3d at 806–07. The officers ordered the defendant to come out of his house, and he complied. *See id.* at 807. "Because it was dark, neither officer was able to see" whether the defendant had a weapon, and they asked him whether he had one. *See id.* The defendant answered that he had a gun in the waistband of his pants, which the officers took. *See id.* The officers led the defendant inside, placed him in handcuffs, and searched his apartment. *See id.*

The Sixth Circuit affirmed the district court's ruling that the seizure of the defendant and the search of his home were unlawful. *See id.* at 808–09. The Sixth Circuit agreed that "as a practical matter defendant was under arrest from the inception of his encounter with the officers." *Id.* at 808. Indeed, "the officers here summoned Defendant to exit his home and acted with such a

show of authority that Defendant reasonably believed that he had no choice but to comply." *Id.* at 809. Thus, the defendant's "warrantless arrest was accomplished while he was in his home, in violation of the Fourth Amendment." *Id.*

The government did not argue in the district court that it had probable cause and exigent circumstances to detain Mr. Avilla. Nor could it have done so: as discussed below, the agents did not even have reasonable suspicion to detain Mr. Avilla or the Harvey house occupants, so they could not have had probable cause. *See infra* Part I.B.2.; *Johnson*, 427 F.3d at 1057 ("put[ting] aside" the issue of probable cause where the officers "lacked even reasonable suspicion to seize" the defendant). Moreover, there were no exigent circumstances because the agents had the Harvey house surrounded, were content to wait (and to continue knocking and screaming) for nearly an hour, and did not seek to enter the house without consent. (R.222:634.)

As the district court found, the agents acted with "such a show of authority" that Mr. Avilla and the other occupants "believed that [they] had no choice but to comply." (RSA.20–21.) Indeed, in light of the agents' knocking, yelling, and screaming for nearly an hour, Mr. Avilla, "as a practical matter," was "under arrest from the inception of his encounter with the officers." *Saari*, 272 F.3d at 808. Because there was no exigent circumstance, this "warrantless arrest was accomplished while he was in his home, in violation of the Fourth Amendment." *Id.* at 809.

2. Any *Terry* Stop Of Mr. Avilla Was Conducted Without Reasonable Suspicion

The government argued below that the agents' detention of Mr. Avilla was a valid investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968). (R.124:142.) That argument fails because, on the totality of the circumstances, the agents lacked "reasonable suspicion supported by articulable facts that criminal activity may have been afoot." *Jerez*, 108 F.3d at 693.

This Court addressed an analogous factual scenario in *Jerez*. The officers in that case identified four facts that, in their view, gave rise to reasonable suspicion that the defendants were involved in narcotics dealing: (1) the defendants were traveling in "a two-door vehicle, a 'target' vehicle" for narcotics investigations; (2) the vehicle "had a license plate from Florida, a source state"; (3) the vehicle "was parked near an airport and an interstate"; and (4) a criminal history check revealed that one of the defendants "had a suspended driver's license and an arrest or conviction for smuggling some type of contraband into a Florida jail." *Id.* This Court held that these facts were "not . . . enough to give rise to a reasonable suspicion" against the defendants because the first three are "true of innocent travelers" and the fourth does not necessarily indicate drug-related activity. *Id.*

Here as well, the facts available to the agents were "not . . . enough to give rise to a reasonable suspicion" against Mr. Avilla or the occupants of the Harvey house. *Id.* The agents had only three pieces of evidence: (1) GPS data tracking Mr. Arrellano's phone to the house; (2) LexisNexis records indicating that Moreno had registered two cars at that address; and (3) the presence of

Villalobos's car in the detached garage. (R.219:280–87; R.124:53; R.222:632–33.) These facts, however, are entirely consistent with "innocent" activities, and did not establish that "criminal activity may have been afoot." *Jerez*, 108 F.3d at 693. Indeed, the agents had no information suggesting that Mr. Arrellano or anyone else at the Harvey house was involved in drug-related activities that evening; that Moreno was present at the house (which he was not); or that the car was carrying or concealing drugs. Instead, they at most knew that Mr. Arrellano was present; that Moreno had some connection to the house; and that Villalobos's car was parked in the garage. Because these facts did not give rise to reasonable suspicion, the agents' warrantless detention of Mr. Avilla in his home—even if categorized as a *Terry* stop—was illegal. *See id.*

3. The Government Did Not Show Any Attenuation Of The Taint

The government did not attempt to show that Mr. Avilla's purported consent was "sufficiently attenuated from the illegal police action" of his unlawful detention "to dissipate the taint." *Cellitti*, 387 F.3d at 623; *Wong Sun*, 371 U.S. at 487–88. Nor could it have done so, had it tried. "When analyzing whether consent is valid despite unlawful police conduct," this Court considers "(1) the time elapsed between the illegal conduct and the discovery of the evidence; (2) the existence of intervening circumstances; and (3) the nature of the official misconduct." *Johnson*, 427 F.3d at 1056. Each of these factors demonstrates that Mr. Avilla's putative consent was tainted by his illegal detention.

First, *no* time had elapsed between the illegal conduct and the discovery of the evidence because "the unlawful seizure was ongoing when [Mr. Avilla] voiced his consent, foreclosing the possibility that the consent was sufficiently attenuated from the unlawful conduct as to purge the taint." *Id.* at 1057.

Second, the *only* intervening circumstances between the agents' unlawful detention of Mr. Avilla and the putative consent was Agent Ostrow and six or seven other agents swarming into his home to begin a protective sweep. *Cf. Cellitti*, 387 F.3d at 623 (concluding that consent was invalid even though "there was no intervening event of significance.").

Finally, the agents' misconduct "had a quality of purposefulness" because they persisted in knocking, screaming, and projecting their authority for nearly an hour. *Jerez*, 108 F.3d at 695. Thus, Mr. Avilla's consent was tainted by his unlawful detention. For this reason as well, the district court erred in denying the motion to suppress the cell phone, and the judgment should be reversed.

C. The Putative Consent Was The Product Of Duress

Finally, Mr. Avilla's putative consent also was invalid because it was the product of duress. "[S]everal factors ordinarily are relevant in determining whether consent was given voluntarily" or was the product of duress or coercion. *Cellitti*, 387 F.3d at 622. Those factors include "(1) the age, intelligence, and education of the person who gave consent; (2) whether she was advised of her constitutional rights; (3) how long she was detained before consenting; (4) whether she consented immediately or only after repeated

requests by authorities; (5) whether physical coercion was used; and (6) whether she was in police custody at the time she gave her consent." *Id.*

Mr. Avilla's putative consent was the product of duress under these factors. *First*, Mr. Avilla was never advised of his constitutional rights, much less his right to refuse consent even in the face of the agents' show of authority. *Second*, the agents' show of authority placed Mr. Avilla in police custody in his own home without a warrant, exigent circumstances, or even probable cause. *See supra* Part I.B. *Third*, Mr. Avilla was detained in his home for nearly an hour before consenting. *Fourth*, Mr. Avilla did not consent immediately, but "only after repeated requests by authorities" seeking to enter the premises and conduct a search. *Cellitti*, 387 F.3d at 622. *Finally*, a reasonable person in Mr. Avilla's position "would not have felt free to ignore the officers" (RSA.21), or to refuse their requests to enter and to search the home. Mr. Avilla's consent therefore was the product of duress, and the district court erred in denying the motion to suppress the cell phone.

D. The Erroneous Denial Of The Motion To Suppress Devastated Mr. Arrellano's Defense

The district court's erroneous denial of the motion to suppress—and subsequent admission of the cell phone into evidence—had devastating consequences for Mr. Arrellano. The cell phone was the *only* physical evidence that the government produced to connect Mr. Arrellano to the alleged conspiracy. (R.223:801–03.) The government did not present *any* evidence of drugs seized in Mr. Arrellano's possession, or any fingerprints or other physical evidence connecting Mr. Arrellano to any drugs, the Long or McVicker houses,

or Villalobos's car. (*Id.*) The government therefore highlighted the phone as a significant piece of evidence (R.222:638; R.223:803, 828), and insisted that it be sent back with the jury during deliberations (R.223:803). The erroneous admission of the phone therefore harmed Mr. Arrellano and warrants reversal of the judgment below. *See, e.g.*, *Jerez*, 108 F.3d at 695; *Johnson*, 427 F.3d at 1058.

II. THE DISTRICT COURT ERRED IN ADMITTING ALLEGED COCONSPIRATOR STATEMENTS

The judgment below also should be reversed for the independent reason that the district court erred in admitting alleged co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Rule 801(d)(2)(E) provides that a "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). To admit statements under this rule, the government must establish by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and the declarant were members of the conspiracy; and (3) the statements were made during the course and in furtherance of the conspiracy or joint venture. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *Westmoreland*, 312 F.3d at 309.

The court may examine the purported coconspirator statements, but the content of such statements is not "alone sufficient" to establish the existence of a conspiracy or the defendant's membership in it. Fed. R. Evid. 801(d)(2)(E). The court also must consider "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was

made, or evidence corroborating the contents of the statement." Fed. R. Evid. 801, Advisory Committee Notes (1997 Amendment).

The district court erred in admitting alleged coconspirator statements—which took the form of recordings and translations of 35 telephone conversations between Villalobos and individuals other than Mr. Arrellano—because the evidence was insufficient to demonstrate that Mr. Arrellano ever joined any conspiracy. *See Bourjaily*, 483 U.S. at 175. The evidence adduced by the government fell into the following categories:

1. Wiretap recordings of the 35 alleged coconspirator statements, most of which predated Mr. Arrellano's alleged joining of the conspiracy. (R.220:372–458; R.222:551–559.) But those statements suggested at most that a conspiracy existed, not that Mr. Arrellano was a member of it. And, of course, those statements are not "alone sufficient" to discharge the government's burden. Fed. R. Evid. 801(d)(2)(E).
2. Wiretap recordings of the 9 conversations between Villalobos and Mr. Arrellano and their alleged use of "code." (R.217:223.) The government, however, did not adduce any evidence that the terms used by Villalobos and Mr. Arrellano were code at all, much less that they were coded references to narcotics dealing. Indeed, the government's code expert, Officer Coleman, did not identify any code words and could not have: he does not speak Spanish, did not listen to recordings of the conversations between Villalobos and Mr. Arrellano, and was not familiar with this case. (R.223:739–49.)

3. "[L]aw enforcement surveillance" that detected Villalobos at the Long and McVicker houses and Ms. Fernandez at the Long house, but that never detected Mr. Arrellano. (R.217:224.)
4. "[S]earches" of the Long house, the McVicker house, and the Harvey house that did not uncover any evidence connecting Mr. Arrellano to any drugs, the Long or McVicker houses, or Villalobos's car. (*Id.*:225.)
5. "[C]ell phone records" documenting the location and calls made from Mr. Arrellano's cell phone. (*Id.*)
6. Mr. Arrellano's "phone" recovered from the Harvey house (*id.*:225–26), which should have been excluded from evidence, *see supra* Part I.

This evidence at most proves that Villalobos was involved in a conspiracy and that Mr. Arrellano knew, spoke to, and was in the presence of individuals involved in that conspiracy. Indeed, the majority of the alleged coconspirator statements were made *before* August 17, 2010, the date on which the government alleged that Mr. Arrellano joined the conspiracy. (R.219:372–423.)

Moreover, significant countervailing evidence undercut the government's allegation that Mr. Arrellano joined the Villalobos conspiracy. For example, despite their ongoing surveillance of Villalobos, investigators never observed Mr. Arrellano at the Long or McVicker houses or driving or riding in Villalobos's car. (*Id.*:301, 463; R.222:562.) Furthermore, despite a "through" search for fingerprints, investigators never recovered any physical evidence connecting Mr. Arrellano to Villalobos's car. (R.222:682–94.) They likewise did not present *any* evidence of drugs seized in Mr. Arrellano's possession or any

physical evidence to connect him to any drugs. (R.223:801–03.) And Mr. Arrellano was never present at the Marriott hotel where Villalobos was arrested and was not named on the phone list agents recovered there. (R.222:563–70; 223:776.)

In all events, Mr. Arrellano's mere presence at the scene, any knowledge of the conspiracy, and any association with the conspirators are insufficient to prove his participation or membership in the conspiracy. *See, e.g.*, 7th Cir. Pattern Jury Instructions—Criminal 5.10; *United States v. Taylor*, 600 F.3d 863, 868 (7th Cir. 2010). The district court therefore erred in concluding that Mr. Arrellano had joined a conspiracy and, thus, in admitting the alleged coconspirator statements.

This error warrants reversal of the judgment below. The alleged coconspirator statements formed a significant portion of the government's evidence, and allowed the government to cast Mr. Arrellano's association and conversations with Villalobos in a nefarious light. The erroneous admission of these statements therefore affected Mr. Arrellano's "substantial rights." *See, e.g.*, *United States v. Byrd*, 208 F.3d 592, 596 (7th Cir. 2000).

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. ARRELLANO'S CONVICTIONS

The judgment below also should be reversed because the evidence is insufficient to support Mr. Arrellano's convictions. This Court will reverse a jury's finding on an essential element of a crime where no rational trier of fact could have reached the same conclusion beyond a reasonable doubt. *See Curtis*, 324 F.3d at 505. Even under this deferential standard, Mr. Arrellano's

convictions cannot stand.

A. The Evidence Was Insufficient To Show That Mr. Arrellano Knowingly Joined A Conspiracy

To convict a defendant of conspiracy, the government must prove that "(1) two or more people agreed to commit an unlawful act, and (2) the defendant knowingly and intentionally joined in the agreement." *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010). "A drug distribution conspiracy under 21 U.S.C. § 846 requires proof that the defendant knowingly agreed—either implicitly or explicitly—with someone else to distribute drugs." *Id.*

The fact that the government could not prove by a preponderance of the evidence that Mr. Arrellano joined a conspiracy, *see supra* Part II, without more, means that it failed to prove that allegation beyond a reasonable doubt. Indeed, the evidence established no more than that Mr. Arrellano was present at the scene and spoke to and associated with members of the conspiracy. But such presence and association—even if they ripened into knowledge of the conspiracy—are insufficient to convict Mr. Arrellano of conspiracy. *See, e.g.*, *Taylor*, 600 F.3d at 868.

Nor can Mr. Arrellano's conviction on Count I be sustained on a theory of aiding and abetting liability. To prevail on such a theory, the government must show that the defendant "'in some sort associate[d] himself with the venture, that he participate[d] in it as something that he wishes to bring about, that he seek[s] by his action to make it succeed.'" *United States v. Irwin*, 149 F.3d 565, 569 (7th Cir. 1998) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)). Yet the evidence adduced at trial that Mr. Arrellano knew

members of the alleged conspiracy did not demonstrate that he "participate[d] in it as something that he wishes to bring about." *Id.* For this reason as well, his conviction cannot stand.

B. The Evidence Was Insufficient To Show That Mr. Arrellano Knowingly Used A Telephone To Conduct Drug Transactions

To prove its allegations in Counts III and V, the government was required to demonstrate that Mr. Arrellano's "use of the telephone was part of the [knowing or intentional] commission of, or causing or facilitating the commission of, the specific conspiracy alleged in Count One." *United States v. Are*, 590 F.3d 499, 514 (7th Cir. 2009). This Court has suggested that "one cannot utter drug code into a telephone without knowingly using the phone to conduct drug transactions." *Id.* at 513.

The evidence against Mr. Arrellano, however, failed to prove these facts. Counts III and V rested on two calls between Mr. Arrellano and Villalobos: one at 8:30 p.m. on August 17, 2010, and one at 6:26 p.m. on August 18, 2010. (R.127:3, 5.) The government's theory was that Mr. Arrellano could be convicted of those counts because he and Villalobos had allegedly communicated in code regarding drug activities during those calls. (R.217:223.) But the government adduced *no* evidence that any particular word used on those calls was drug-related code, as its own expert stopped well short of offering any examples of coded terms or any case-specific testimony whatsoever. (R.223:739–49.) And, of course, the government failed to prove that Mr. Arrellano ever participated in "the specific conspiracy alleged in Count One." *Are*, 590 F.3d at 514; *see supra* Part III.A. The record therefore lacked

sufficient evidence to convict Mr. Arrellano of Counts III and V, and those convictions should be reversed.

CONCLUSION

The Court should reverse the judgment below.

Dated: July 17, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Petitioner certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 10,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) 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), as supplemented by Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Bookman Old Style.

Dated: July 17, 2013

/s/John M. Gore
John M. Gore

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the Required Short Appendix bound with the brief.

Dated: July 17, 2013

/s/John M. Gore
John M. Gore

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/John M. Gore
John M. Gore

TABLE OF CONTENTS OF THE REQUIRED SHORT APPENDIX (RSA)

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
Faustino Arrellano

JUDGMENT IN A CRIMINAL CASE

Case Number: 10 CR 802

USM Number: 42649-424

Joseph Lopez
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, Sixteen, and Eighteen. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC 846	Conspiracy to Possess with Intent to Distribute Controlled Substances.	8/24/2010	1
21 USC 843	Use of a Communication Facility to Facilitate a Drug	8/24/2010	16

The defendant is sentenced as provided in pages 2 through 7 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.

2/14/2013
Date of Imposition of Judgment

Signature of Judge

Matthew F. Kennelly — U. S. District Court
Name of Judge — Title of Judge

3-1-13
Date

RSA1

DEFENDANT: Faustino Arrellano
CASE NUMBER: 10 CR 802

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
	Trafficking Offense.		
21 USC 843(b)	Use of a Communication Facility to Facilitate a Drug	8/24/2010	18
	Trafficking Offense.		

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Faustino Arrellano
CASE NUMBER: 10 CR 802

IMPRISONMENT

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

120 months on Count 1; 48 months on each of Counts 16 and 18. All terms are to be served concurrently.

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

☑ 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 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Faustino Arrellano
CASE NUMBER: 10 CR 802

Judgment—Page 4 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Five years on Count 1; 1 year on each of Counts 16 and 18. All terms are to be served concurrently.

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: Faustino Arrellano
CASE NUMBER: 10 CR 802

ADDITIONAL SUPERVISED RELEASE TERMS

Defendant is to be turned over to the proper immigration authorities for deportation proceedings. If deported, defendant is to remain outside the United States and is not to return without the written consent of the Secretary of the U.S. Department of Homeland Security.

DEFENDANT: Faustino Arrellano
CASE NUMBER: 10 CR 802

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 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: Faustino Arrellano
CASE NUMBER: 10 CR 802

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 $ _____ 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 imposes 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:

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.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	No. 10 CR 802
Plaintiff,	Chicago, Illinois
v.	October 12, 2011
FAUSTINO ARRELLANO, et al.	1:22 p.m.
Defendants.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Government: UNITED STATES ATTORNEY'S OFFICE, by
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THE CLERK: 10 CR 802, U.S.A. versus Arrellano, et al.

MR. LEE: Good afternoon, your Honor. Stephen Lee and Angela Krull for the United States.

MR. MADDEN: Good afternoon, Judge. Matthew Madden on behalf of Miss Fernandez, who's present.

MR. SPECTOR: Neil Spector and Thomas Bennett on behalf of Moises Villalobos, who's present before the Court.

MR. LOPEZ: Good afternoon, your Honor. Joseph Lopez for Mr. Arrellano, who's present.

THE COURT: And can the interpreter give your name.

THE INTERPRETER: Good afternoon, your Honor. Roberto Mendoza, Spanish court interpreter.

THE COURT: Okay. Let me just talk first about the trial date. So I've started the trial that if it goes through to its conclusion is going to wipe out this trial date. There is I guess I would say at this point at least a ghost of a chance that it may settle within the next few days, so I'm not moving the trial date yet. I'm going to have you come in the first of the week. I will know for sure by then. In other words, Monday. I'm going to set it over to Monday.

And then the only other thing I'm going to do today is rule on Mr. Villalobos's motions. And so I'm going to set the case for a status on the 17th of October at 1:30, and I'll see you then.

I don't need anybody to remain -- in terms of the defendants, I don't need anybody to remain other than Mr. Villalobos, obviously, his attorney. The others can stay if you want to, or you can take off.

MR. SPECTOR: I think you have the wrong defendant.

THE COURT: Arrellano. I blew that. Sorry. It's Mr. Arrellano's motion.

Mr. Lopez is halfway behind my screen here. My mistake. Let me start over.

I'm going to rule on Mr. Arrellano's motion in a few minutes. I need him and his lawyer to be here. The others I'm going to excuse. The lawyers can stay if they want.

Thanks, Mr. Spector, for catching me on that.

MR. SPECTOR: Thank you, your Honor. Have a good day.

THE COURT: The only person I need is Mr. -- is this Mr. Arrellano?

MR. LOPEZ: Yes, your Honor, right here next to me.

THE COURT: And you might as well just have a seat because I've got a ruling. I'm going to read it.

Okay. The defendant in this case, Faustino Arrellano Vega, has filed two motions to suppress evidence. One is a motion to suppress the fruits of the search and seizure of his person in a bedroom in a home in Harvey, Illinois, and the other is a motion to suppress statements that Mr. Arrellano

made after he allegedly invoked his right to counsel.

An evidentiary hearing was conducted on September 16th, 2011, at which several witnesses testified, including government agents and Mr. Arrellano. I've made judgments regarding the credibility of the witnesses, and these are my findings of fact and conclusions of law.

The relevant events arise from an investigation regarding a proposed narcotics transaction or transactions in August 2010. Pursuant to a court ordered wiretap, the investigating agents received information about shipments of heroin to the Chicago area and in particular about moving a large quantity of heroin from one place to another.

One of the telephones involved in several of the intercepted calls about moving the heroin was a cellphone with the last four digits 2268. Pursuant to court order, the agents obtained information indicating that the defendant was the subscriber of that phone and that the phone was in Georgia at that point.

Through information that they obtained from the same court authorization, the agents tracked the phone as travelling from Georgia and eventually to a home in Harvey, Illinois. The agents established surveillance in the area of the home.

At a particular point after 10 p.m. on August 24th of 2010, the agents observed a car arriving and several people

getting out of the car and entering the home. The car was one that the agents had previously seen being used by persons other than the defendant to deliver narcotics.

Around 10:45 p.m. the agents started knocking on doors and windows announcing that they were law enforcement and saying that they needed to talk to someone inside. No one responded despite repeated efforts that extended for as much as 60 minutes despite the fact that the agents saw lights on inside the home.

At some point Harvey police officers came, possibly in response to a call that had been made from inside the house. After the investigating agents introduced themselves to the officers, one or more of the Harvey police officers also knocked on the door, but still no one responded.

One of the agents who testified, FBI Agent Roecker, R-o-e-c-k-e-r, stated that he contacted an assistant U.S. attorney about getting a search warrant. He testified that while he was sitting in his car on the phone with the AUSA, he was advised by another agent that they had obtained consent to enter the home. He told the AUSA this and hung up the phone. There was no additional testimony or evidence provided about the conversation with the prosecutor, and specifically there was no testimony about what the agent told the AUSA or about what the AUSA told the agent.

The most significant events at issue on the

defendant's motions are those that surround the agents' entry into the home and what occurred after the entry. The government's primary contentions are that the agents entered and searched the home without -- excuse me -- that the agents entered and searched the home without the consent of its owner and that Mr. Arrellano was -- excuse me. I flipped that. The government's primary contentions are that the agents entered and searched the home with the consent of its owner and that Mr. Arrellano was not in custody when he made the statements that are at issue in the case.

Agent Roecker had no direct knowledge about the issue of consent. He testified simply that he had been advised that others, specifically, DEA Agent Robert Fergus, F-e-r-g-u-s, had obtained the consent. Agent Fergus testified that a little under an hour after the agents started knocking on the house and after a very significant period of continued knocking, the front door opened while he was standing in front of the house outside the door. He testified that no one was knocking immediately before that.

Agent Fergus testified that he went up the steps and showed his badge to a man that had opened the door and said, I'm with the police and I'd like to speak to you. He testified that the man said yes. Agent Fergus then testified that he said that he would like to come in and the man said that he could come in.

Agent Fergus testified that he then went into the living room and spoke with the man there after patting him down and looking in the immediate area for weapons. He asked if the man lived there and if they could look around, and he said that the man responded yes to both of those questions. He testified that the man appeared relatively calm.

Agent Fergus said that he did not seek at any point in time to obtain a written consent to search although he had a consent form that was available to him at the scene. He testified that he stayed with the man in the living room at all times except for a good deal later when he left to go to the garage next to the house.

FBI Agent David Ostrow, O-s-t-r-o-w, testified that when the door opened, he went inside and saw Agent Fergus speaking to the man from the house. Agent Ostrow and six or seven other agents then did what he referred to as a protective sweep of the residence. He arrived at a bedroom. He testified the door was closed but not locked. He knocked and said either police or FBI and then entered the room immediately. The lights in the room were off. Agent Ostrow saw Mr. Arrellano lying on a bed, though it's possible that this may have just been a mattress sitting on the floor -- a mattress lying on the floor rather.

Agent Ostrow testified that he, quote, got him out of bed, did a quick pat-down and brought him into the living room

with the other agents -- or with the other residents. And that's pretty close to an exact quote.

Agent Roecker also testified that Mr. Arrellano, quote, was brought into the living room by an agent, close quote. Two other men and one woman were all brought to the living room by other agents. The man that Agent Fergus had encountered at the front door was also in the living room.

Agent Roecker testified that by the time he got into the house the occupants, including Mr. Arrellano and perhaps some children, were all in the living room seated or standing with several agents standing in the room with them. The evidence reflected that there were eight or nine agents altogether who entered the house.

Agent Roecker testified that he conducted a search to attempt to find a phone. He went into a bedroom, and the evidence indicates that this is the same bedroom where Mr. Arrellano had been lying down. Agent Roecker saw a mobile phone on the shelf. He picked it up, and he checked the settings to identify the phone number, and it was the 2268 cellphone.

Agent Roecker testified that he knew the user of the phone had been intercepted talking about heroin, and he testified that he wanted to find out who had been using the phone. Agent Roecker then went into the living room and said to the people who were there, who does this belong to, holding

up the phone. He testified that Mr. Arrellano, who was seated on a couch, raised his hand. Agent Roecker then asked Mr. Arrellano, is this yours. The defendant nodded yes.

Agent Ostrow testified that after Mr. Arrellano raised his hand he asked Mr. Arrellano, where were you travelling -- or where were you before you traveled to Chicago, and that Mr. Arrellano responded Atlanta.

Agent Roecker then contacted another agent who had listened to recorded conversations and asked that agent to re-review the conversations so that he could get familiar with the voice of the person who had been using the 2268 phone. After a short time the other agent did so. Agent Roecker testified that he then handed the phone to Mr. Arrellano and said a man was going to ask him some background questions. He did not tell Mr. Arrellano that the person on the phone was an agent. Mr. Arrellano then had a one or two-minute conversation with the agent on the phone. There is no evidence regarding what exactly was said in that conversation.

The agent then told Agent Roecker over the phone that he thought this was the same person who had been recorded using the 2268 phone. Agent Roecker testified that he did not force Mr. Arrellano to take the phone and that Mr. Arrellano was not handcuffed and that he seemed calm.

Agent Roecker said that he decided to take Mr. Arrellano back to the agents' office after this to give

him his rights and interview him.

There's no evidence that Mr. Arrellano asked to talk to an attorney while he was at the home. To be clear, however, there was no evidence that he was told at the home that he had the right to an attorney. In fact, the evidence, specifically the testimony of Agent Roecker, showed that Mr. Arrellano was not advised of his rights before he was asked, along with the others in the living room, whose phone it was or before he was asked the more pointed question whether it was his phone or before he was asked to talk to the other agent over the telephone while still at the house.

Agent Roecker testified that later when Mr. Arrellano was advised of his rights after being taken to the agents' office, he invoked his right to counsel.

Agents eventually obtained the key to the garage from the man who appeared to be the owner or lessee of the house. They found the keys to the car in the house. The agents searched the car and found heroin concealed inside.

Mr. Arrellano testified that he was an overnight guest at the house and that he had been given permission to stay there overnight by the man who lived there. He met -- he said he had met the man at a restaurant in the area and asked him where he could find work. After some conversation, according to Mr. Arrellano, the man said that he could stay the night at his place. They then went to the house and then

left at some point to go get some food. After returning to the house, Mr. Arrellano fell asleep inside a bedroom. The door was not locked, and there was no furniture in the room other than a bed. Mr. Arrellano said he had a phone with him. He heard noise, but the owner told him not to worry.

Later when he was again asleep, he testified that an agent came into the room where he was sleeping. The agent did not ask his permission to enter. Mr. Arrellano testified that they got him out of bed, quote, arrested him, close quote, searched him, asked his name and he responded, took him to the living room and told him to sit down. Later he said someone came in with the phone and asked whose phone it was. He said no one advised him of his right to remain silent. He replied that the phone was his.

It's undisputed that Mr. Arrellano didn't give the agents permission to seize the phone and that they didn't ask for his consent to seize or search it.

As an overnight guest in the home, Mr. Arrellano had a legitimate expectation of privacy, and thus has standing under the Fourth Amendment to challenge the search of the room, Minnesota versus Olson, O-l-s-o-n, 495 U.S. 91, 1990. The government relies on a case in which a man who was in an apartment for a short period for the purpose of conducting a narcotics transaction and not as an overnight guest was held to lack standing to challenge the search of an apartment.

That's Terry versus Martin, 120 F3d 661, Seventh Circuit 1997. The Terry case does not govern this case. This is not a case in which Mr. Arrellano was in the home for a brief period simply to do a drug deal. Rather, the evidence, including Mr. Arrellano's testimony, which I found credible, shows that he was an invited overnight guest and he was there for the legitimate purpose of sleeping even if that was arguably in addition to other illegal purposes. The case is governed by Olson, and as a result Mr. Arrellano has standing to challenge the search.

The parties have agreed that if Mr. Arrellano has standing, he can challenge the validity of the consent that the government contends the agents were given by the apparent owner or lessee of the house. So back to the evidence on that point.

It appears to me that Agent Ostrow testified that when he went inside he saw Agent Fergus already inside speaking to the man who had come to the door. This indicates that Agent Fergus had already had his initial exchange with the man outside the house before Agent Ostrow and the others entered the house. There's no contrary evidence. As I said earlier, Agent Fergus testified that when the man opened the door, the man agreed to speak to him and then allowed Agent Fergus to come inside. Agent Fergus then went inside, patted down the man and asked if they could look around. His

testimony was unrebutted, and I find it credible. It reflects that the owner or lessor of the house had given Agent Fergus permission to enter before Agent Ostrow and the others came in. All of this occurred, according to the agents, after over a half dozen agents and later the Harvey police had been outside the house banging on doors and windows and calling out to the occupants for the better part of an hour. Given those facts, the law in this circuit, specifically a case called United States versus Jerez, J-e-r-e-z, 108 F3d 684, Seventh Circuit 1997, makes it relatively clear that the man who came to the door and the others in the house had been seized within the meaning of the Fourth Amendment by the time the man came to the door.

Without discussing in detail Judge Ripple's analysis for the Court in the Jerez case, the facts are far less serious than those in this case. In Jerez the officers had been knocking on the door of a dwelling, in that case a hotel room, for a few minutes calling out requests and arguably commands to open the door, all during the nighttime, before a man came to the door and opened it. In this case a period of knocking and calling out on both doors and windows by a large number of officers went on for as much an hour, and it also occurred at nighttime.

The Court ruled in Jerez and I find that the same is true here that when the man opened the door, quote, he was

submitting to the officers' show of authority, close quote. That's Page 692 of the Jerez case. As in Jerez, a reasonable person in the position of a man who came to the door in this case or in the position of others in the house who were aware of what had been going on outside would not have felt free to ignore the officers and continue about their business and would have believed that the officers would just stay there unless and until they opened the door.

The fact that the man had been seized, however, does not mean that he could not voluntarily consent to entry and search of the house. Based on the testimony of Agent Fergus and in the absence of any countervailing testimony, I can't say that the consent that the man gave to Agent Fergus to enter the house was anything other than voluntary. Though other agents then came in to perform the sweep of the house, that was, in my view, within the scope of the voluntary consent to enter that the man gave to Agent Fergus.

The government proved by a preponderance of the evidence that the consent to enter the house and the consent that the man then gave to search the house were both voluntary. It is true that when the man gave consent to search that other agents had already entered and were looking around, and so a reasonable argument could be made that the man was simply submitting to authority in this situation as well. I find that the circumstances reflect, however, that

the man acted voluntarily.

In this regard the case is virtually identical to a Second Circuit case from earlier this year called United States versus Rico Beltran, B-e-l-t-r-a-n, 409 Federal Appendix 441. In that case agents obtained permission to enter a residence, conducted a protective sweep and then requested and received permission to conduct a search. The Court found the second consent was voluntary. In United States versus Guttierez, 221 Federal Appendix 446, Seventh Circuit 2007, an agent went to the door of the defendant's apartment, asked to speak with him. He invited the agent in, and then other agents then entered to do a sweep. The Court found the consent to search voluntary. The defendant in that case did not raise arguments similar to those in this case, but I think the case is nonetheless instructive.

There are numerous cases that indicate that if an initial entry into a house is illegal, that's a significant factor tending to show that a later given consent was not voluntary. But in this case the initial entry was legal because it was consented to.

To summarize, the consent that the man gave to Agent Fergus to come in was voluntary. Though there's no indication that the man he was told -- that the man was told that he had the right to refuse, the only evidence is that the question was asked in a nonthreatening and noncoercive manner.

The protective sweep was appropriate and within the scope of the original consent to enter.

The consent to search that the man gave after the agents were inside the house was also voluntary. In this regard it's significant that the original entry to the home was not illegal. As I indicated earlier, under the Jerez case the man had been subjected to a seizure within the meaning of the Fourth Amendment, but the particulars of the encounter that he had with Agent Fergus in the living room was nonthreatening, at least based on the evidence that was presented at the hearing, and the evidence reflects that the man consented immediately. Indeed, it's possible that he consented even before the sweep started. And there's no evidence indicating that the man thought that the search of the home was a fait accompli or that he had no practical right to refuse.

So for those reasons the search of the home, including the rooms in it, was legal, and thus there's no basis to suppress the cellphone that the agents found when they were searching the home.

The next issue concerns the questioning of Mr. Arrellano about where he had been before coming to Chicago and whether the phone was his and whatever questions the agent asked him over the phone would form the basis for the voice identification. Mr. Arrellano's argument is that those

statements and the evidence obtained from them is inadmissible because the statements were elicited in violation of Miranda versus Arizona. It's undisputed that Miranda warnings were not given to Mr. Arrellano before he made any of those statements, so the question is whether Miranda warnings were required.

Miranda warnings were required if Mr. Arrellano was in custody. A person is in custody for purposes of Miranda if a reasonable person in his position would conclude that he could not leave. One case that sets that forth is United States versus Thompson, 496 F3d 807 at page 810, Seventh Circuit 2007. And the analysis is based on a totality of the circumstances. Courts consider whether the encounter occurred in a public place, whether the person consented to speak with the officers, whether the officers told the person he was not under arrest or that he was free to go, whether the person was moved to a different area, whether there was a threatening presence of several officers, whether there was a display of weapons or physical force, whether the officers deprived the person of documents or things that he needed to go on his way, and whether the officers' tone was such that their requests likely would be obeyed, United States versus Barker, 467 F3d 625, Pages 628 to 29, Seventh Circuit 2006.

This encounter was not in public place. Although others were present, it was in a -- it was a confined space

that was under the firm control of the agents at that point. All of the persons in the home had been taken, or to put it another way, escorted to the living room, and they had all been seated. Several agents were there with them standing, all of which would lead a reasonable person to believe that he couldn't simply get up and leave. Other agents were fanned out throughout the house searching, another factor that supports a finding that the occupants were in custody.

It appears to be the case that Mr. Arrellano responded right away to Agent Roecker, but there's no indication that he had any clue or understanding that he didn't have to do so. In addition, the tenor of Agent Roecker's inquiry, based on his own testimony, was that he entered his room, put his question in what I would refer to as a commanding way, suggesting that there had to be an answer, holding up the phone and saying who does this belong to. No weapons were displayed, but there was, in my view, a display of force in the sense that the people in the living room, including Mr. Arrellano, were all being physically guarded by the agents, and, significantly, the evidence is quite clear that all of the occupants in the house, and specifically Mr. Arrellano, had been physically taken to the living room. He was already under the physical control of the agents when Agent Ostrow took him there.

Based on all the circumstances, I conclude that

Mr. Arrellano was in custody for purposes of Miranda. Miranda warnings were required, and they were not given. The questioning was not general background questions, but rather was pointed questioning designed, based on Agent Roecker's own testimony, to elicit incriminating information, specifically who owned the phone, whether Mr. Arrellano in particular owned the phone, where he had been before coming to Chicago, all of which was evidence that the agents knew would link him to the incriminating calls. The same is true of the questioning that was done by the other agent over the phone.

I add as an aside that the evidence is clear that once Mr. Arrellano was told that he had the right to an attorney later, he specifically invoked his right to counsel. Although it's not necessary to my decision in this case, I think it's reasonable to infer that if he had been read his rights while he was in custody at the home, he similarly would have invoked his right to counsel, which would have required immediate termination of the questioning.

For these reasons I conclude that Mr. Arrellano's rights under Miranda were violated. The statements he made to the agents at the house and over the phone were the fruits of impermissible questioning by the police, and I therefore exclude them from evidence, as well as the evidence obtained from those statements, including voice identification.

So in summary, the motion quash arrest and suppress

evidence is granted in part. It's denied as to the seizure of the phone, but it's granted with regard to the statements Mr. Arrellano made at the home in Harvey. And the motion to suppress the voice identification is granted.

So that's the ruling, and I'll see you next Monday.

MR. LEE: Can I just clarify one point?

THE COURT: Yes.

Hang on. Mr. Lopez just -- oh, he's right there. Okay. I thought I saw you going out the door.

MR. LEE: If I understand your ruling correctly --

THE COURT: Don't ask me -- Mr. Lee, look. It's seven pages single paced. I'm not going to characterize it. If you got a problem, file a motion.

Take care.

It says what it says. Okay. I'm not going to go back and fly spec it at this point. If you have something you're not clear on, file a motion. I'll deal with it when I get it.

Take care.

Calling the next case.

MR. LEE: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

/s/ Valarie M. Ramsey 05-23-2013

Court Reporter Date