No. 01-1184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 258 F.3d 1069.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2000, and amended on July 31, 2001. A petition for rehearing was denied on October 30, 2001 (App., *infra*, 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, both respondents were convicted in the United States District Court for the District of Idaho of conspiring to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A), and 21 U.S.C. 846. Lopez-Meza C.A. E.R. 1-2. Respondent Recio was sentenced to 126 months' imprisonment, to be followed by five years' supervised release. Recio C.A. E.R. 7-8. Respondent Lopez-Meza was sentenced to 132 months' imprisonment, to be followed by five years' supervised release. Lopez-Meza C.A. E.R. 67-68. The court of appeals reversed respondents' conspiracy convictions for insufficient evidence. App., *infra*, 1a-10a.

1. On November 18, 1997, at approximately 1 a.m., a Nevada police officer stopped a northbound flatbed truck occupied by Manuel Sotelo and Ramiro Arce. The police seized 369 pounds of marijuana and 14.8 pounds of cocaine. The drugs were worth between $10 and $12 million. Sotelo and Arce claimed ignorance of the drugs but said they had agreed to drive the truck to Nampa, Idaho, where they were supposed to leave the truck parked at the Karcher Mall. App., *infra*, 2a, 4a, 19a, 23a.

Arce decided to cooperate, and government agents set up a sting. The following day the government transported the truck to Idaho and parked it at the Karcher Mall. Arce called an Arizona pager number. When someone returned the page, Arce mentioned the truck's location to the caller, who stated that he would "call a muchacho to come and get the truck." App., *infra*, 2a, 5a, 19a.

About three hours later, respondents drove into the mall parking lot in a blue car and pulled up to the truck.

Recio got out of the car and into the truck. Both Recio and Lopez-Meza drove west on different back roads. The agents ultimately decided to stop the vehicles, and they arrested Recio and Lopez-Meza. App., *infra*, 2a, 4a, 19a.

Recio and Lopez-Meza each made false statements to the agents to explain their actions. App., *infra*, 4a. Recio denied ever being dropped off at the Karcher Mall. He said he had been shopping and that he ran into a man who offered him $250 to drive the truck to Recio's house, where the man would pick it up later. Recio explained that he decided to take back roads instead of a much more direct route because "[he] just like[d] to drive in the country." *Id.* at 22a. Recio was carrying a pager, a phone card, and a "'non-owner' driver's insurance" policy, which covers the named insured for operation of a vehicle owned by another. *Id.* at 4a, 5a. Recio had renewed the policy shortly before the seizure. *Id.* at 5a.

When the police stopped Lopez-Meza, they smelled marijuana in the car. App., *infra*, 19a. The police recovered two pagers and two phone cards from him. *Id.* at 4a, 5a, 27a. Lopez-Meza told the police that he had been "out driving around" and that he was going to see his girlfriend, whose last name and address he could not recall. *Id.* at 26a-27a.

2. On January 16, 1998, a federal grand jury returned a superseding indictment charging Recio and Lopez-Meza with conspiracy to possess with intent to distribute cocaine and marijuana and possession of cocaine and marijuana with the intent to distribute them. App., *infra*, 69a-70a. They were each found guilty on both counts. *Id.* at 60a. Respondents filed post-trial motions for judgment of acquittal in which they argued that their conspiracy convictions were

invalid under *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998). See App., *infra*, 59a-68a.

In *Cruz*, the government prosecuted a conspiracy charge against Billy Cruz, a drug courier who agreed to deliver 210.7 grams of methamphetamine after the original courier, Peter Balajadia, had, unbeknownst to Cruz, been arrested with the drugs. The Ninth Circuit held that Cruz was innocent of the charged conspiracy because he joined it *after* the government had seized the drugs, even though Cruz, the seller, and the buyer were all unaware of the seizure. The *Cruz* court reasoned that "it was factually impossible for Cruz to have been a member of th[e] conspiracy because Balajadia and [his companion] had been arrested and the drugs seized before he was even invited to join," 127 F.3d at 795 n.4, and that the seizure had "terminat[ed] the conspiracy," *id.* at 794 n.1.

The district court in this case denied respondents' motion for judgment of acquittal, holding that there was sufficient evidence that Recio and Lopez-Meza had joined the conspiracy before the drugs were seized. The district court nevertheless decided to grant respondents a new trial on the conspiracy count, because no *Cruz* instruction was given, creating a risk that the jury found respondents guilty based solely on their post-seizure actions.[1] App., *infra*, 64a. The jury found respondents guilty of conspiracy at the second trial.

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[1] The district court granted Lopez-Meza a new trial on the possession count as well, App., *infra*, 67a, but the government dismissed that count before the second trial. See *id.* at 10a n.6. Recio, who was driving the drug-laden truck, did not file a motion for judgment of acquittal on the possession count. *Id.* at 60a n.1.

3. a. A divided panel of the Ninth Circuit reversed. App., *infra*, 1a-10a. The majority held that the evidence presented at the second trial was insufficient. *Id.* at 10a. Relying on *Cruz*, the court viewed the question before it as "whether any rational jury could find, beyond a reasonable doubt, that [respondents] were involved in the conspiracy prior to the initial seizure of the drugs on November 18, 1998." *Id.* at 3a. The majority was unable to find any evidence that unequivocally demonstrated respondents' *pre*-seizure participation in the conspiracy. For example, the majority dismissed as irrelevant the evidence that respondents lied to the police officers upon their arrest, because their false statements "provide[] no basis for concluding that [respondents] were involved in the conspiracy *beforehand*." *Id.* at 4a (emphasis added); see also *ibid.* ("Nothing [respondents] said or did on November 18, 1998 directly links them to the pre-seizure conspiracy."). The majority also found respondents' possession of pagers irrelevant to the timing of their involvement, reasoning that

> one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 5a. The panel majority concluded that the evidence suggested that respondents "were simply drivers hired at the last minute." *Id.* at 5a-6a.

The panel majority rejected the government's contention that respondents had participated in other goals of the conspiracy involving other drug shipments, even if they became involved in the November 18 shipment

only after the government had seized the drugs. The court reasoned that "the limited role [respondents] played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads." App., *infra*, 6a. The majority observed that "[t]he strongest evidence" of respondents' involvement in a broader conspiracy was Recio's multiple receipts for expired non-owner insurance policies, from which it could be inferred that Recio "regularly drove drug trucks for the conspiracy." *Id.* at 7a. But the majority "remain[ed] unpersuaded," because the "insurance can also be accounted for by alternative explanations," including the possibility that Recio worked as a driver for legitimate businesses. *Ibid.* The majority was also unpersuaded by the evidence indicating that Lopez-Meza lived at Nu Acres, the delivery point for the drugs, and the evidence of his links to his uncle Jose Meza, who was implicated in the conspiracy and lived at Nu Acres also. The majority reasoned that Lopez-Meza's "presence [at Nu Acres] and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute." *Id.* at 8a.

b. Judge Gould dissented. He stated his disagreement with the court's prior holding in *Cruz*:

> [F]or the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

App., *infra*, 21a n.2. Nonetheless, applying *Cruz*'s rule that a defendant cannot join a conspiracy after the seizure of the drugs in question, Judge Gould concluded that there was "unmistakably more than sufficient evidence in the second trial" linking defendants to a conspiracy *before* police officers seized the drugs on November 18, 1997. *Id.* at 18a; see *id.* at 21a-28a. Judge Gould also concluded that the government presented sufficient evidence of respondents' involvement in a larger conspiracy involving more loads than the one seized on November 18, based on their "possession and use of sophisticated drug-trafficking communication devices" and "the quantity, quality and value of the drugs seized." *Id.* at 34a; see *id.* at 29a-34a.

c. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 45a-46a. Judge O'Scannlain, joined by eight other active circuit judges, dissented from that decision. *Id.* at 46a-58a. Judge Hall, a senior judge who authored the dissenting opinion in *Cruz*, stated that she also "agree[d]" with Judge O'Scannlain's dissent. *Id.* at 58a. Judge O'Scannlain traced the court's mistake to its decision in *Cruz*:

> By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter principles of conspiracy law set out for us by the U.S. Supreme Court.

Id. at 46a. Judge O'Scannlain explained that, "[i]n holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge." *Id.* at 51a.

Judge O'Scannlain stated (App., *infra*, 51a-52a) that the court of appeals' recognition of factual impossibility as a defense to conspiracy conflicts with decisions of this Court, including *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court had explained that "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense[,]" because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 64, 65. He also stated that the rule of *Cruz* and this case conflicts with decisions of other courts of appeals, including the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941, 944 (1995). See App., *infra*, 52a. In Judge O'Scannlain's view, "the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely *legitimate* intervention by law enforcement agents." *Id.* at 50a. Applying the "fundamental principle" that the duration of a conspiracy is determined by "'the scope of the conspiratorial agreement' itself," *id.* at 57a (quoting *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957)), Judge O'Scannlain found that respondents were clearly guilty of the charged conspiracy, because the agreement to transport the drugs, to which they were a party, survived the government's seizing the drugs, *ibid.*

REASONS FOR GRANTING THE PETITION

In *United States* v. *Cruz*, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998), the Ninth Circuit held that a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective. Applying that rule, the court of appeals in this case reversed respondents' conspiracy convictions despite overwhelming evidence of their agreement to transport 369 pounds of marijuana and 14.8 pounds of cocaine and their commission of acts in furtherance of that agreement. The rule of law announced in *Cruz* and applied here conflicts with black-letter principles of conspiracy law consistently followed by this Court. It also conflicts with the decisions of other circuits rejecting factual impossibility as a defense to conspiracy liability. The conflict merits this Court's review because the Ninth Circuit's rule exonerates culpable defendants and needlessly complicates the prosecution of conspiracy cases. Moreover, it discourages legitimate law enforcement methods that can be of vital importance not only in drug cases, but also in violent crime, terrorism, and other contexts in which prosecution of the conspirators and frustration of their goals are both crucial objectives.

1. The Ninth Circuit in *Cruz* held that, when a conspiracy's objectives have become factually impossible, the conspiracy necessarily terminates. See, *e.g.*, 127 F.3d at 795 & n.4 ("Here, the conspiracy * * * had been terminated by the government's seizure of the methamphetamine before Cruz became involved. * * * [I]t was factually impossible for Cruz to have been a member of th[e] conspiracy because [two conspirators] had been arrested and the drugs seized before he was even invited to join."). By holding that a conspiracy

terminates automatically when the government frustrates its objective, the *Cruz* court created a rule at odds with the fundamental principle that the duration and scope of a conspiracy is defined by the agreement, not by the attainability of its goals. See App., *infra*, 51a-53a (O'Scannlain, J., dissenting from denial of rehearing en banc).

As this Court explained in *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957), it is the conspiratorial agreement that "determines * * * the duration of the conspiracy." See *United States* v. *Shabani*, 513 U.S. 10, 16 (1994) ("[T]he criminal agreement itself is the *actus reus*."); *United States* v. *Felix*, 503 U.S. 378, 389-390 (1992) ("[T]he 'essence' of a conspiracy offense is in the agreement or confederation to commit a crime.") (internal quotation marks omitted); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). The conspiracy endures as long as the agreement endures. The impossibility of achieving the conspiratorial object is irrelevant; "a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas* v. *United States*, 522 U.S. 52, 65 (1997).

The *Cruz/Recio* rule cannot be reconciled with this Court's rejection of the factual impossibility defense in *Osborn* v. *United States*, 385 U.S. 323 (1966). The defendant there contended that his endeavor to bribe a juror, in violation of 18 U.S.C. 1503, was "impossible of accomplishment," because the individual whom he enlisted to contact the juror was cooperating with the Federal Bureau of Investigation (FBI). This Court rejected the defendant's contention, observing that

"[w]hatever continuing validity the doctrine of 'impossibility,' with all its subtleties, may continue to have in the law of criminal attempt, that body of law is inapplicable here." 385 U.S. at 332, 333 (footnote omitted). The Court explained that, by proscribing an "endeavor" to obstruct justice, the statute "is not directed at success in corrupting a juror." *Id.* at 333 (quoting *United States* v. *Russell*, 255 U.S. 138, 143 (1921)). Because laws prohibiting conspiracy are similarly not directed at the successful commission of the crime, see, *e.g.*, *Salinas*, 522 U.S. at 64 ("A person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense."); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942), the *Osborn* rationale for rejecting the impossibility defense applies equally to conspiracy cases such as *Cruz* and this case.

The *Cruz* court justified its application of factual impossibility not by reference to the defendant's culpability under traditional conspiracy law, but because "liability for the original conspiracy on the basis posited by the government could be endless." 127 F.3d at 795. The court speculated that "[i]t is not difficult to picture [the conspirator who had been arrested with the drugs] sitting in the Honolulu Airport Police Station with a copy of the * * * telephone directory in hand, following the detectives' instructions to call all of his acquaintances * * * to come to Honolulu to help him." *Id.* at 795 n.3. That concern relates not to whether a defendant may be guilty of conspiracy when the crime may, in fact, be impossible to accomplish. Rather, it relates to misgivings about law enforcement techniques involving "sting" operations. This Court, however, has squarely rejected expanding the entrapment defense to exonerate defendants in cases where the traditional

requirements of that defense—government inducement and lack of predisposition—are missing. See *United States* v. *Russell*, 411 U.S. 423 (1973). The Court in *Russell* explained that

> the defense of entrapment * * * was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

Id. at 435. The *Cruz* court exercised precisely the kind of "veto" that *Russell* prohibits, by exonerating respondents in order to place limits on what it believed would be improper government law enforcement techniques.

2. *Cruz* and the decision in this case create a circuit conflict. The conflict with the First Circuit is particularly sharp, because that circuit rejected the factual impossibility defense to a conspiracy charge in circumstances directly analogous to those presented in *Cruz* and this case. In *United States* v. *Belardo-Quiñones*, 71 F.3d 941 (1995), the First Circuit held that the defendant could not defend against a drug importation conspiracy charge by claiming that Venezuelan authorities had seized the drug-laden boat before he joined in the scheme. The court explained that "a culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit." *Id.* at 944. That is so because "[e]ven if intervening events had made the accomplishment of the criminal purpose impossible[,] all

the elements of a criminal conspiracy were present." *Ibid.* Relying on authority that a conspiracy may exist even though its object could never have been achieved, the court explained that "[t]here is no basis for making a distinction between those who start a conspiracy that is impossible from the beginning and one who joins in a conspiracy that has become impossible due to intervening events unknown to the conspirators." *Ibid.* The court concluded that a conspiracy continues as long as some of the conspirators "are continuing to actively pursue the original criminal goal." *Ibid.* Accord *United States* v. *Giry*, 818 F.2d 120, 125 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

The Ninth Circuit's embrace of factual impossibility as a defense to conspiracy liability is also at odds with decisions of the other courts of appeals. See, *e.g.*, *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[W]e are persuaded by the views of our district courts, and by the decisions of our sister circuits, that the impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996) (affirming conviction for conspiracy to defraud bank, even though bank was never at risk of losing anything, because "[t]hat the conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant"); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989) (affirming conviction for conspiracy to steal U.S. bonds, despite absence of proof that bonds were stolen, because "defendants can be found guilty of criminal conspiracy even though the object of their conspiracy is unattainable from the very beginning"); *United States* v. *Petit*, 841 F.2d 1546, 1549-1550 (11th Cir.) (affirming conviction for conspiracy to receive stolen goods despite the fact that goods at issue had

never been stolen), cert. denied, 487 U.S. 1237 (1988); *United States* v. *Seelig*, 498 F.2d 109, 112 (5th Cir. 1974) (impossibility of achieving objective of Section 846 conspiracy not a defense); see also *United States* v. *Jones*, 765 F.2d 996, 1002 (11th Cir. 1985) (stating that "sheer impossibility is no defense" to drug conspiracy charge).[2] As a leading treatise summarizes, "the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense." 2 Wayne R. LaFave & Austin Scott, Jr., *Substantive Criminal Law* § 6.5, at 92 (1986) (citing cases).

3. The court of appeals' decisions in *Cruz* and this case undermine the effective administration of justice. As Judge O'Scannlain demonstrates (App., *infra*, 49a-50a), the *Cruz*/*Recio* rule requires courts and juries to conduct an exacting review of the evidence to determine whether the defendant's participation in an agreement to distribute drugs predated or postdated

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[2] The courts of appeals have similarly held that impossibility is not a defense to attempt charges under 21 U.S.C. 846. See *United States* v. *Sobrilski*, 127 F.3d 669, 674 (8th Cir. 1997), cert. denied, 522 U.S. 1134, 1152 (1998); *United States* v. *Pennell*, 737 F.2d 521, 525 (6th Cir. 1984) (same), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Everett*, 700 F.2d 900, 904 (3d Cir. 1983) ("We are convinced that Congress intended to eliminate the defense of impossibility when it enacted section 846."). State courts have similarly concluded that factual impossibility is not a defense to conspiracy charges. See, *e.g.*, *State* v. *Houchin*, 765 P.2d 178, 179-180 (Mont. 1988) (factual impossibility, which exists "when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators," not a defense to conspiracy charge); *State* v. *Moretti*, 244 A.2d 499, 503-504 (N.J.) ("We hold that when the consequences sought by a defendant are forbidden by the law as criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances unknown to him."), cert. denied, 393 U.S. 952 (1968).

the government's seizure of the drugs—a determination that has nothing to do with the defendant's culpability. The rule led the majority in this case to reverse respondents' convictions despite the panel's recognition that they had undoubtedly agreed to participate in the distribution of drugs. For example, the court accepted that respondents' false statements at the time of arrest "point[] * * * to knowledge that they were involved in illicit activity at that time." *Id.* at 4a. The court also accepted that respondents' possession of pagers was incriminating when it noted that "one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade" and that "the main conspirators would want to stay in especially close communication with their drivers." *Id.* at 5a. See also *id.* at 5a-6a (accepting evidence "that [respondents] were simply drivers hired at the last minute"). The panel held, however, that because the evidence of the false statements "provides no basis for concluding that they were involved in the conspiracy *beforehand*," *id.* at 4a (emphasis added), and their possession of the pagers was not evidence of "*pre-seizure* involvement in the conspiracy," *id.* at 5a (emphasis added), the evidence did not support their conviction.

Although the court of appeals in this case did not address the possibility that respondents may be liable for a post-seizure conspiracy, the Ninth Circuit in *Cruz* suggested that the defendant there, though innocent of the charged conspiracy, "at most, * * * may have been a member of a *new* conspiracy" formed after the seizure. 127 F.3d at 795 n.4. In his dissent from the denial of rehearing en banc, however, Judge O'Scannlain doubted that any liability for a post-seizure conspiracy would be possible under the logic for *Cruz*; if

the government's seizure of the drugs terminated the original conspiracy, the government's seizure would also arguably preclude the formation of a new conspiracy to distribute the same drugs. App., *infra*, 53a-56a (opinion of O'Scannlain, J.).

If the *Cruz/Recio* rule precludes all conspiracy liability for defendants in respondents' position, the rule would have serious and deleterious consequences. It would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objectives for fear that such action will compromise the government's ability to prosecute all of the guilty participants. In the analogous context of rejecting a claim that impossibility is a defense to an attempt charge under Section 846, the Third Circuit has explained:

> Allowing the [impossibility] defense [under Section 846] would also gut law enforcement efforts to infiltrate drug supply chains. The government goes undercover not only as a purchaser, as in the instant case, but as seller, or as middleman. * * * Given the horrendous difficulties confronted by law enforcement authorities in dealing effectively with the burgeoning drug traffic, it is difficult to assume that Congress intended to deprive them of flexibility adequate to counter effectively such criminal activity.

United States v. *Everett*, 700 F.2d 900, 907-908 n.16 (1983) (internal quotation marks and citations omitted). Moreover, the vital need for undercover government efforts both to apprehend conspirators and to prevent their planned offenses from actually occurring extends far beyond drug cases; similar legitimate law enforce-

ment tactics are crucial in violent crime, terrorism and other contexts.

Even if the *Cruz*/*Recio* rule would permit those in respondents' position to be held liable for a post-seizure conspiracy, it would nonetheless cause unnecessary complications in the framing of indictments. A prosecutor in a case like this would have to decide whether the evidence supported charging a single conspiracy spanning the pre- and post-seizure periods. Charging a single conspiracy would be in the interest of logic and judicial economy, but it would require the prosecutor to determine whether, for each defendant, the evidence would ultimately be held sufficient under the Ninth Circuit's exacting standards to support a conclusion of pre-seizure participation in the conspiracy. A mistaken determination by the prosecutor on that point would risk the result obtained in *Cruz* and this case: acquittal for at least some defendants. If the prosecutor instead chose to charge multiple conspiracies, one ending with the seizure and the second beginning thereafter, other complications would arise. Such charges may elicit double jeopardy and multiplicity challenges by the defendants who participated both before and after the government frustrated the "original" conspiracy's objective. The charges may also elicit challenges to the joinder in a single indictment of the pre- and post-seizure conspirators, see Fed. R. Crim. P. 8, and to the conduct of a joint trial involving all defendants, see Fed. R. Crim. P. 14.

The *Cruz*/*Recio* regime thus threatens to entangle conspiracy prosecutions in complex challenges to the indictment, to the admissibility and sufficiency of evidence, and to jury instructions. All of those consequences arise from the *Cruz*-imposed centrality of the *seizure date* to the proof of the relevant conspiracy—a

fact that is unrelated to the defendants' culpability under traditional conspiracy law. In cases where those challenges are successful, as they were here and in *Cruz*, guilty defendants may escape conviction and punishment. The conflict that the Ninth Circuit has created with this Court's decisions and those of several circuits merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-30135, 99-30145
D.C. No. CR-97-00103-BLW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANCISCO JIMENEZ RECIO, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ADRIAN LOPEZ-MEZA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding.

Argued and Submitted: March 6, 2000
Filed: Sept. 27, 2000
Amended: July 31, 2001

Before: JAMES R. BROWNING, B. FLETCHER, and RONALD M. GOULD, Circuit Judges.

Opinion by Judge JAMES R. BROWNING; Concurrence by Judge BETTY B. FLETCHER; Dissent by Judge RONALD M. GOULD

ORDER AND AMENDED OPINION

JAMES R. BROWNING, Circuit Judge:

ORDER

This court's opinion and the accompanying dissent filed September 27, 2000, are hereby amended. The amended opinions are filed simultaneously with this order, along with a separate concurrence by Judge B. Fletcher.

OPINION

Francisco Jimenez Recio and Adrian Lopez-Meza appeal their convictions of conspiracy to possess with intent to distribute a controlled substance. Jimenez Recio also appeals his conviction for possession with intent to distribute.

Jimenez Recio and Lopez-Meza were arrested for their part in transporting a truck load of marijuana and cocaine, valued at an estimated $12 million. The original driver of the truck had been arrested earlier that day, along with a companion, Arce. Arce agreed to cooperate with the police and contacted other members of the drug conspiracy to have someone sent to retrieve the truck, which had been parked at a mall in Nampa, Idaho. Jimenez Recio and Lopez-Meza appeared at the mall a few hours later. They left separately, with Jimenez Recio driving the truck and Lopez-Meza driving the car that had brought them.

Both argue the district court should have granted their motion for judgment of acquittal after both the first and second trials under *United States v. Cruz*, 127 F.3d 791, 795 (9th Cir. 1997), in which we ruled that a

defendant could not be charged with conspiracy to distribute illegal drugs when the defendant was brought into the drug scheme only after law enforcement authorities had already intervened, and defendant's involvement was prompted by the intervention.

In *Cruz*, two individuals on their way to Guam to deliver methamphetamine were arrested, and their drugs confiscated. *Id.* at 794. Because Cruz was lured into taking over the delivery through a government "sting," we held the evidence was insufficient for a rational jury to have found, beyond a reasonable doubt, that Cruz's involvement was part of the original, pre-seizure smuggling conspiracy. *Id.* at 796.

Viewing the evidence in the light most favorable to the government as we must, *see United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999), we must determine whether any rational jury could find, beyond a reasonable doubt, that Jimenez Recio and Lopez-Meza were involved in the conspiracy prior to the initial seizure of the drugs on November 18, 1998. We focus on the evidence presented at their second trial. [1]

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[1] The second trial included substantially all the evidence at the first trial as well as additional testimony analyzing telephone records and the opinion of a government expert that the conspiracy was a large operation. Because we conclude this evidence was insufficient, the same would apply *a fortiori* to the evidence at the first trial. In fact, it is unclear whether we could properly review the sufficiency of the evidence at the first trial. *Cf. United States v. Sarkisian*, 197 F.3d 966, 985 n. 7 (9th Cir. 1999) (reserving the question of whether the sufficiency of evidence in an initial mistrial is reviewable on appeal from conviction at second trial); *compare United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984) (suggesting in dicta evidence would be reviewable), *with*

The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Jimenez Recio]'s words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jimenez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.

This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jimenez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls on Lopez-Meza's card *were* made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations. The phone numbers called are not probative of a conspiracy: The Idaho calls were to "Nu Acres," where the drugs were apparently destined, but the number called was a communal telephone at a migrant camp where Lopez-Meza lived. The Chicago calls were all to different telephone numbers.

United States v. Kimberlin, 805 F.2d 210, 231 (7th Cir. 1986) (suggesting the contrary).

The other evidence of Defendants' pre-seizure involvement in the conspiracy is also insufficient. The government argues that Jimenez Recio's renewal of his "non-owner" driver's insurance shortly before his arrest demonstrates his anticipation of driving the drug-laden truck; yet, the government expert testified that Jimenez Recio would not have been involved in the delivery the following day absent the government "sting," and thus could not have anticipated being called on to drive. As for the pagers they carried, one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.[2]

On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers

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[2] The dissent draws from this and other evidence a series of inferences that reasonable jurors could reach. Review of the evidence in the light most favorable to the government must still meet the requirement of proof beyond a reasonable doubt. Where, as here, the evidence is inherently ambiguous, it is not enough that a jury could reasonably reach certain inferences if reasonable doubt as to a different conclusion cannot be dismissed.

hired at the last minute.[3] Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jimenez Recio retrieved the truck—the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendants were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.

The government also relied on an additional broader conspiracy theory to circumvent *Cruz* on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. *Cf. United States v. Umagat*, 998 F.2d 770, 773-774 (9th Cir. 1993) (minor role of defendants in single transaction does not permit imputed liability for the broader

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[3] The government expert credited Arce's testimony that Arce had been similarly recruited at the last minute. Therefore, the general inference drawn by the dissent "that co-conspirators would not entrust such a large value of drugs to a person not integrally involved in the conspiracy" would seem less applicable to this conspiracy. In any case, Lopez-Meza's familial ties to his uncle "Raul," a seemingly central figure in the case, provide an equally plausible explanation for the apparent trust placed in Lopez-Meza (and by extension Jimenez Recio).

conspiracy). Therefore, this theory too hinges on proof of prior involvement.

The strongest evidence that Defendants might be repeat players in drug trafficking were the multiple receipts for expired non-owner insurance policies found on Jimenez Recio. This suggests he habitually drove vehicles he did not own, from which a jury could further infer that Jimenez Recio regularly drove drug trucks for the conspiracy. It is a close question as to whether this inference, in conjunction with the other circumstantial evidence, could suffice to eliminate reasonable doubts among rational jurors as to Jimenez Recio's guilt (and by extension, perhaps Lopez-Meza's as well).

Ultimately, however, we remain unpersuaded. The insurance can also be accounted for by alternative explanations. For example, Jimenez Recio might work as a driver for legitimate businesses. The trafficking conspirators might naturally have turned to such an individual once Sotello was arrested (assuming alternate drivers within the conspiracy were unavailable).[4] Jimenez Recio was also an illegal immigrant. As such, he would be reluctant to testify as to his legitimate work, lest he jeopardize his employers and his own future employment; this could explain the defense's silence on the matter.[5]

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[4] Although the record is not clear as to size of the truck in this case, it is described variously as a "flat-bed" or "construction truck," suggesting that it is at least somewhat larger than the average consumer vehicle. If so, the need for a driver with a particular expertise in driving such trucks would be evident.

[5] Testimony from the immigration agent that he had never seen such a policy carried by an illegal immigrant before is irrelevant. The government expert on drug trafficking notably omitted any mention of the insurance as common in that context either. If, as

As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

We need now only address those claims relevant to Jimenez Recio's conviction at the first trial of possession with intent to distribute a controlled substance.

The district court did not err by allowing evidence of the odor of burned marijuana in Lopez-Meza and Jimenez Recio's blue Mazda. The evidence was relevant to the charge that Jimenez Recio possessed marijuana with intent to distribute. *See United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994). One of the primary issues was whether Jimenez Recio knew there were narcotics in the flatbed truck when he and Lopez-Meza retrieved it. The fact that their own car reeked of marijuana makes it more likely that Jimenez Recio was familiar with the odor and knew they were in possession of marijuana.

The district court did not err by denying Defendants' motion for a mistrial based on the prosecutor's reference to a "stash house." Since the government had referred to the Nu Acres residence as the ultimate destination of the drugs without objection, it was not

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the dissent observes "[e]ven drug-trafficking conspirators, it seems, want insurance," the same can be said of illegal immigrants, and for the same reason.

particularly prejudicial for the prosecutor to refer to that residence as a "stash house." Although the prosecutor violated the court's instruction not to use the term, the prosecutor's misconduct does not require reversal since nothing in the record suggests the jury's verdict was affected by its use.

The district court did not abuse its discretion in admitting the expert testimony of Special Agent Hinton. It did not exceed the boundaries set by the district court or by Federal Rules of Evidence Rule 702.

Finally, Jimenez Recio's counsel's failure to move for acquittal on Count Two, possession with intent to distribute, after the first trial constituted ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Ordinarily, we do not reach claims of ineffective assistance of counsel on direct appeal, and only do so in habeas corpus proceedings. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000). However, we review ineffective assistance claims where the record is "sufficiently developed to permit review and determination of the issue" or where "the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *Id.* (quoting *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir. 1992)).

The government's concession in its brief regarding the motion for judgment of acquittal provides such a record: "The Government agrees with the first premise, namely, that had Appellant's trial counsel made the motion for judgment of acquittal as to Count Two, the trial judge would have granted sua sponte the new trial as to both counts, as he did for codefendant Lopez." This concession makes a sufficient record to find

prejudice since all parties agree that Jimenez Recio would have been granted a new trial but for the actions of his counsel. Although the government may not have dismissed the possession with intent to distribute count against Jimenez Recio before the second trial, [6] the fact that Jimenez Recio was denied a new trial constitutes prejudice in its own right.

The conspiracy convictions are reversed and dismissed with prejudice because of insufficient evidence.

AFFIRMED IN PART, REVERSED IN PART.

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[6] The circumstances suggest the government dismissed Count Two against Lopez-Meza only to avoid the incongruity of charging both defendants with conspiracy, but only Jimenez Recio with possession, although both basically engaged in the same conduct.

BETTY B. FLETCHER, Circuit Judge, concurring:

I concur in the majority opinion but write separately to make the point that even if the evidence presented at the second trial, when taken in the light most favorable to the government, could (in the view of the dissent) suffice to convict the defendants on the broader conspiracy charge, their convictions should be overturned based on the insufficiency of the evidence at the first trial. At the first trial, the government argued and presented evidence relating solely to the single load conspiracy.[1] It was only after a mistrial was declared that the government argued and presented additional evidence at the second trial relating to the alleged existence of a broader conspiracy. As I explain below, the evidence presented at the first trial was plainly insufficient to support a conspiracy conviction under the single load theory in light of our controlling case law.

As the Supreme Court stated in *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978), "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Although it is evident that the defendants' conspiracy convictions were not final (and hence unreviewable by this court) until after the conclusion of their second trial, *see Richardson v. United States*, 468 U.S. 317, 326 n. 6, 104 S. Ct. 3081, 82 L.Ed.2d 242 (1984), the defendants moved for acquittal in the district court following each trial based on insufficiency of the evidence. Accord-

[1] Indeed, the defendants were indicted for conspiracy based only on this theory.

ngly, although our circuit has yet to decide whether the sufficiency of the evidence at the first trial is reviewable after the second trial's conclusion, *cf. United States v. Sarkisian*, 197 F.3d 966, 985 n. 7 (9th Cir. 1999), I conclude that Jimenez Recio and Lopez-Meza now raise cognizable claims for acquittal based on the insufficiency of the evidence at both their first and second trials.

As the Court stated in *Burks*, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18, 98 S. Ct. 2141. Otherwise, "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Id.* at 17, 98 S. Ct. 2141. Indeed, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16, 98 S. Ct. 2141.

In *Burks*,[2] the Court further held that "[i]t cannot be meaningfully said that a person 'waives' his right to a

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[2] *Richardson* did not overrule *Burks* with respect to the ability of an appellate court to review the sufficiency of the evidence at the first trial. *Richardson* held only that the Double Jeopardy Clause does not bar a retrial after the first trial ends in a hung jury. *Richardson*, 468 U.S. at 325-26, 104 S. Ct. 3081. Indeed, the *Richardson* Court took pains to distinguish the procedural posture of that case from the one in *Burks*, and to reconcile the two holdings. *See, e.g., id.* at 324, 104 S. Ct. 3081 ("We are entirely unwilling to . . . extend[ ] the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict *following a jury verdict of guilty*, to a situation where the jury is unable to agree on a verdict.") (emphasis added); *id.* at 326, 104 S. Ct. 3081 ("a trial court's declaration of a mistrial *following a hung jury* is not an event that terminates the original jeopardy to which petitioner was subjected") (emphasis added). The *Richardson*

judgment of acquittal by moving for a new trial." *Id.* at 17, 98 S. Ct. 2141. Moreover, "it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient. . . . [Such an] appellate decision unmistakably mean[s] that the District Court . . . erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in [the defendants'] position and others who would enjoy the benefit of a correct decision by the District Court." *Id.* at 11, 98 S. Ct. 2141 (emphasis original). It would be similarly irrational to conclude here that because Jimenez Recio and Lopez-Meza were barred until now from appealing the district court's denial of their motion for acquittal after the first trial, they have somehow "waived" their right to mount such a challenge.

I would therefore recognize and decide this case on the defendants' respective claims that the government presented insufficient evidence at the first trial. As the majority opinion aptly reasons,[3] the government's case with respect to the single load conspiracy cannot withstand *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997). Critically, the government's own expert, Agent Hinton, as well as its star witness, Arce, testified that but for the government's intervention, Arce and Sotelo would have driven the truck themselves to the putative "stash house" at Nu Acres. Furthermore, the only evidence in the record of any pre-seizure involvement

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holding is therefore inapposite to the present case, since here the jury returned guilty verdicts against Jimenez Recio and Lopez-Meza at their first trial, prior to the district court's declaration of a mistrial.

[3] Such reasoning with respect to the single load theory applies to both the first and second trials.

on the part of Jimenez Recio and Lopez-Meza consisted of a handful of phone calls, for which there was uncontroverted evidence that some of the calls made on the phone card possessed by Lopez-Meza could not possibly have been made by him. The conclusion is therefore inescapable that the defendants would almost certainly not have been involved in the transaction were it not for the government's intervention.

Put another way, any communication which may have taken place between Jimenez Recio, Lopez-Meza, and the central traffickers before the drug seizure could not have contemplated a role for them in delivering these drugs. If anything, such evidence may be probative of involvement in a broader conspiracy (as argued by the government at the second trial), but not in the single transaction. The government's *post*-seizure evidence notwithstanding (e.g., more phone and pager calls to and from Jimenez Recio and Lopez-Meza; the defendants' behavior at the Karcher Mall and at the time of arrest; and Jimenez Recio's purchase of non-owner insurance), this does not amount to evidence beyond a reasonable doubt of *pre*-seizure involvement on the part of the defendants, at least with respect to the single load transaction.

In sum, the unavoidable inference that Jimenez Recio and Lopez-Meza would not have been involved in the transaction had the original delivery proceeded as planned precludes a finding of conspiracy beyond a reasonable doubt. Inasmuch as we are bound by *Cruz*, as the dissent concedes, *see infra* Dissenting Op. 1079 n.2, we have no choice but to reverse.[4] I therefore would

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[4] Tellingly, apart from a brief footnote, the dissent's analysis avoids any mention of *Cruz* whatsoever.

overturn the defendants' convictions based on the insufficiency of the government's case at the first trial alone.

Having said this, however, I also concur in the majority holding that the evidence presented at the second trial was again insufficient to convict the defendants beyond a reasonable doubt. To be sure, in my opinion, this is a closer call; the dissent correctly notes that the government presented more detailed evidence of phone and pager calls that may have involved Lopez-Meza, Jimenez Recio, Jose Meza (a.k.a.Raul), and others. Other circumstantial evidence —such as Jimenez Recio's purchase of non-owner's insurance, Lopez-Meza's connection to his uncle Raul, the value of the drugs transported, and Agent Hinton's testimony as to the likely sophistication and complexity of the drug operation—could militate in favor of a finding that the defendants may have been involved in an ongoing drug trafficking scheme. However, as the majority opinion properly reasons, precedent again prevents our finding the defendants guilty beyond a reasonable doubt of participation in a broader conspiracy. *See United States v. Umagat*, 998 F.2d 770 (9th Cir. 1993).

Under *Umagat*, the relatively minor role played by "mules" such as Jimenez Recio and Lopez-Meza does not justify imputing to them knowledge of and responsibility for a broader conspiracy. Notably, in *Umagat*, the government identified and proved the existence of four separate drug transactions; here, the government could not identify any transactions beyond the single load, much less demonstrate knowledge or participation in them by either defendant. Indeed, the bulk of the evidence presented by the government speaks only to

the likelihood that a complex operation existed. It says nothing about whether bit players like Jimenez Recio and Lopez-Meza knew of and should be held responsible for involvement in other trafficking offenses. Significantly, the dissent omits virtually any discussion of *Umagat*.

Accordingly, I concur in the majority opinion.

RONALD M. GOULD, Circuit Judge, dissenting:

I. PROCEDURAL BACKGROUND

Jimenez Recio and Lopez-Meza proceeded to trial ("first trial") on counts of (1) conspiracy to distribute cocaine and/or marijuana, and (2) possession with intent to distribute cocaine and/or marijuana. The jury returned guilty verdicts on both counts. Lopez-Meza moved for judgment of acquittal on both the conspiracy count and the possession count under Federal Rule of Criminal Procedure 29(c). Jimenez Recio moved for judgment of acquittal on the conspiracy count also pursuant to Rule 29(c).[1] Both defendants argued that the evidence presented at trial was insufficient for a reasonable jury to reach a finding of guilt beyond a reasonable doubt. The district court denied the

[1] The court today in part holds that Jimenez Recio's counsel was ineffective for failure to move for acquittal on Count Two after the first trial. I conclude that we should not reach Jimenez Recio's claim of ineffective assistance of counsel in the first trial. We ordinarily do not reach ineffective assistance of counsel claims on direct appeal. See *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988). Such claims normally should be raised in habeas corpus proceedings, which permit counsel "to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." *Id.* There are two exceptions to this general rule: (1) if the record is sufficiently developed to permit review and determination of the issue, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000). Here, the record lacks any mention of Jimenez Recio's lawyer's reasons for failing to make the motion. Also, Jimenez Recio's legal representation was not so inadequate that it obviously denied him a Sixth Amendment right to counsel. I would not reach Jimenez Recio's ineffective assistance of counsel claim. But if reached on this record, I would deny it.

motions, but found sufficient error in the proceedings *sua sponte* to convert the Rule 29(c) motions into motions for a new trial pursuant to Federal Rule of Criminal Procedure 33. The district court then granted the motions for a new trial, vacated the convictions from the first trial, and ordered a second trial on the conspiracy count for both Jimenez Recio and Lopez-Meza, a second trial on the possession count for Lopez-Meza, and sentencing on the possession count for Jimenez Recio.

The case proceeded to trial again ("second trial"). Jimenez Recio and Lopez-Meza were re-tried on the conspiracy count. The government dropped the possession count against Lopez-Meza. The jury returned guilty verdicts, and Jimenez Recio and Lopez-Meza again moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), contending that the evidence presented in the second trial was insufficient for a reasonable jury to reach a finding of guilt. The district court denied the motions.

The court today reverses the convictions from the second trial, holding that the government presented insufficient evidence in the second trial. I respectfully dissent because I take a different view of the evidence, under the proper legal standards. This case poses an important issue concerning the scope of reasonable inferences that may be drawn by a jury from evidence of criminal conspiracy. I respectfully dissent because I would hold that there was unmistakably more than sufficient evidence in the second trial to uphold the jury's verdict. The majority today errs on this crucial issue, and then does not reach the other issues presented by the parties regarding the second trial. Having also reviewed these other issues, I would affirm the

district court's decision to deny the defendants' motions for a judgment of acquittal after the second trial, and let the jury verdict stand.

II. FACTUAL BACKGROUND

On November 18, 1997, a Nevada police officer stopped a white flatbed truck occupied by Manuel Sotelo ("Sotelo") and Ramiro Arce ("Arce"). After a consent search the police found 369 pounds of marijuana and 14.8 pounds of cocaine. When questioned, Sotelo and Arce indicated that they did not know about the drugs and were merely driving the truck to Idaho where they had been instructed to leave it parked at the Karcher Mall.

The government's law enforcement agents then permissibly set up a sting. On November 19, 1997, the government placed the truck, still containing most of the drugs, at the Karcher Mall. Arce used a cellular phone to call a pager number that he had previously used to make arrangements for the pickup of the truck. When someone called back, Arce described the truck's location to the unknown caller. The unknown caller stated that "he was going to call a muchacho to come and get the truck."

About three hours later, a blue car driven by Lopez-Meza pulled up to the truck and stopped. Jimenez Recio left the car and entered the truck. Both vehicles proceeded to drive west on different back roads. The police then stopped each vehicle, whereupon each occupant told the police a different and fabulously incredible story. The police smelled marijuana in the car that Lopez-Meza had been driving. The police also found cell phones, phone cards and pagers on both

defendants. The police then arrested Jimenez Recio and Lopez-Meza.

Subsequently, Arce pled guilty and testified against Jimenez Recio and Lopez-Meza at trial.

III. DISCUSSION

A. Sufficiency of the evidence

We must review the evidence that was presented at the second trial against Jimenez Recio and Lopez-Meza in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Yossunthorn,* 167 F.3d 1267, 1270 (9th Cir. 1999). "Once a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy." *United States v. Bautista-Avila,* 6 F.3d 1360, 1362 (9th Cir. 1993) (citations and quotation marks omitted).

At the second trial, the government presented evidence pursuant to two different conspiracy theories. First, the government argued that Jimenez Recio and Lopez-Meza were involved in a conspiracy to ship the one load of drugs in their possession upon arrest. The government had the burden to establish beyond a reasonable doubt that Jimenez Recio and Lopez-Meza joined or became members of this single-load conspiracy before police officers seized the drugs from Arce and Sotelo at 1:18 a.m. on November 18, 1997. *United States v. Cruz,* 127 F.3d 791, 795 (9th Cir. 1997) (conspiracy to distribute illegal drugs ends when law

enforcement authorities confiscate the drugs).[2] The government also argued that Jimenez Recio and Lopez-Meza were involved in a broader conspiracy, a conspiracy that was not limited to a single load. Regarding the broader conspiracy, the government bore the burden to prove that Jimenez Recio and Lopez-Meza knew or had reason to know of the broader conspiracy, whether before or after November 18, 1997, and that Jimenez Recio and Lopez-Meza had knowledge or constructive knowledge of the scope of the broader conspiracy and embraced its objectives. *United States v. Umagat*, 998 F.2d 770, 772-773 (9th Cir. 1993)

When we view the evidence here in the light most favorable to the government, a reasonable jury could have found, beyond a reasonable doubt, that there was sufficient evidence linking Jimenez Recio and Lopez-Meza to a conspiracy that ended when police officers seized the drugs from Arce and Sotelo at 1:18 a.m. on November 18, 1997. Moreover, a reasonable jury could have found evidence sufficient to show constructive knowledge on the part of Jimenez Recio and Lopez-Meza of a broader conspiracy involving more loads than that seized on November 18, 1997.

SINGLE-LOAD CONSPIRACY:

The following evidence was presented at trial from which a jury reasonably could conclude that Jimenez Recio and Lopez-Meza were involved in a single-load

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[2] This panel is bound by *Cruz* as authoritative precedent. However, for the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

conspiracy that ended when the drugs were seized on November 18, 1997:

Jimenez Recio:

Jimenez Recio told a totally fanciful and incredible story upon his arrest, from which a reasonable jury could draw an inference of guilt. Although police watched Lopez-Meza drop Jimenez Recio off at the mall where he picked up the truck, Jimenez Recio stated that he did not know how he got to the mall. When asked what he had been doing at the mall, Jimenez Recio said that he was shopping, and that he ran into a man who asked him to drive the truck to Jimenez Recio's house for $250, and the man would pick it up later. Although Jimenez Recio's house was a thirty-five to forty-minute drive from the mall on the interstate, Jimenez Recio's explanation for taking a longer back-road route was "I just like to drive in the country." Moreover, while Jimenez Recio told the arresting officer that he was going to his house, when asked the address he first gave one address, then another, then stated that he could not remember the address where he lived. The arresting officer testified that he did not believe that Jimenez Recio told the truth when he was arrested and further testified that based in part on Jimenez Recio's fanciful story, the officer believed that Jimenez Recio knew of the contents of the truck. This story is so unbelievable that a reasonable jury would almost certainly view it as an implied admission of guilt. Although the majority casually assumes that this implied admission related only to Jimenez Recio's post-seizure crimes without crediting or even discussing all pertinent evidence, the government presented evidence from which a reasonable jury might conclude beyond a reasonable doubt that Jimenez Recio was involved in

the conspiracy before the seizure. Thus the majority improperly invades the jury's province.

The government presented evidence that Jimenez Recio was arrested driving a truckload of marijuana and cocaine with a retail value of between $10 and $12 million.[3] An expert on drug trafficking conspiracies testified that the quantity and the value of the drugs found in the truck driven by Jimenez Recio indicated that someone trusted Jimenez Recio enough to let him drive. From this evidence and testimony, a jury might reasonably infer that co-conspirators would not entrust such a large value of drugs to a person not integrally involved in the conspiracy. It is unlikely that the unidentified conspirator on the phone who stated that he would send a "muchacho" would send an outsider to transport such valuable cargo. While there may be other theoretical possibilities, a jury reasonably could infer that the conspirators would send someone highly trusted, familiar with the conspiracy's scope and involved in the plan of illicit drug distribution.

Moreover, Jimenez Recio carried a pager with him when he was arrested driving the truck, and Arce and Sotelo, co-conspirators arrested on November 18, 1997 at 1:18 a.m., were found carrying two pagers and a cell phone. A government expert witness testified that lots of communication is necessary to move drugs, and the way traffickers use communications demonstrates how communications can be kept secret, and secrecy is necessary. The expert testified that communication de-

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[3] One witness testified that the drugs were valued between $10 and $12 million while another witness placed value between $1 and $2 million. Because a reasonable jury could have credited the testimony valuing the drugs between $10 and $12 [million], I refer to these amounts in support of the verdict.

vices typically used by complex drug organizations are cell phones and pagers because the users of these devices can be physically located anywhere, untraceable by the authorities. When viewed in the light most favorable to the government, a jury reasonably might conclude that, because Jimenez Recio was found in possession of more than $10 million worth of marijuana and cocaine, Jimenez Recio's pager is evidence that he was involved in a drug conspiracy insofar as testimony demonstrated that the mode of communication among the conspirators in this larger conspiracy was via pagers and telephone calls.

It is one thing to say that ubiquitous pagers used by messengers, executives, workers, and professionals are not in themselves evidence of participation in a drug conspiracy when found in usual settings, but it is quite another thing to say that multiple pagers in the hands of persons found astride a truckload of marijuana and cocaine valued beyond $10 million by one witness are irrelevant, particularly where coconspirators Arce and Sotelo were also found with pagers. A key point ignored by the majority is the expert testimony linking pagers to drug conspiracies, testimony that a jury could have properly given weight. To disparage the pager testimony from an appellate distance is merely to argue about the weight of the evidence. This we cannot do because we must view the evidence in the light most favorable to the government.

Perhaps more importantly, Jimenez Recio carried a non-owned named operator insurance policy in his jacket pocket when he was arrested. Such a policy insures vehicle operation by a non-owner of that vehicle. An agent testified that during his 25-year career as an immigration agent which involved several thousands of

arrests, he had never encountered a policy like the one Jimenez Recio owned. The government presented evidence demonstrating that Jimenez Recio renewed the policy between November 2, 1997 and the date of Jimenez Recio's arrest, at most two weeks before the drugs were seized and at most two weeks before he was arrested driving a truck he did not own loaded with more than $10 million of marijuana and cocaine. In the light most favorable to the government, a reasonable jury might infer that this was not "coincidence," and, instead, that Jimenez Recio purchased the insurance policy in the days leading up to the seizure because he knew then that his job in the conspiracy was to drive a truck that he did not own carrying the marijuana and cocaine. Even drug-trafficking conspirators, it seems, want insurance.

Finally, and perhaps most importantly, the government presented evidence that a pin number associated with a telephone card that Jimenez Recio carried when he was arrested had called a number associated with a place called "Nu Acres" on November 15th and 17th. The government also presented evidence that the Nu Acres number was associated with a cell phone used by Lopez-Meza and a man named Raul. Co-defendant Arce, who had turned on the conspiracy by cooperating in the government sting, testified that Sotelo mentioned the name "Raul"[4] during a phone conversation about the drug shipment before the seizure. The

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[4] There is testimony in the second trial from which the jury easily could conclude that "Raul, aka" "Jose Meza" was a key player in the larger conspiracy. This included evidence that he was the uncle of Lopez-Meza, that he resided at Nu Acres, the destination for the drugs, and that his name was mentioned by co-conspirator Sotelo while discussing the drugs.

government presented evidence that a phone card that Lopez-Meza carried when he was arrested also called Nu Acres on November 14 and 17. Finally, the government presented evidence from which a jury could reasonably infer that the Nu Acres residence was the destination of the drug shipment, in part because of geographical location and in part because the Nu Acres number was the number called right before the sting. An agent testified that the fact that Jimenez Recio's phone card was used to call Nu Acres before the seizure and that the same number was called right before the sting, suggests that Jimenez Recio knew the people living at Nu Acres, the destination of the drugs. From this evidence, a jury reasonably could infer that Jimenez Recio made these two calls to Nu Acres and possessed knowledge of the conspiracy and its members before the date the drugs were seized.

The evidence of the phone calls to Nu Acres and the non-owner operator insurance policy combined with probative evidence of Jimenez Recio's incredible story upon arrest, the use of pagers and the very high value of the drugs in the truck, is solid evidence when viewed in the light most favorable to the government; it is clearly sufficient for a reasonable jury to have found beyond a reasonable doubt that Jimenez Recio was involved in the conspiracy before the seizure of the drugs.

Lopez-Meza:

The situation with Lopez-Meza is much the same as with Jimenez Recio. Lopez-Meza told a different but equally bizarre and incredible story upon arrest. He told the police that he lived with his girlfriend, but he did not know her last name. When asked what he was

doing that night, Lopez-Meza denied that he had been to the mall, and said he was "out driving around" and that he was going to see his girlfriend. When asked where she lived, however, Lopez-Meza stated that he did not even know the location of the city where his girlfriend lived. An officer testified that he did not believe that Lopez-Meza told the truth. Again, the majority apparently concludes that this implied admission of guilt merely evidences post-seizure guilt, but the government presented sufficient evidence that Lopez-Meza, like Jimenez Recio, was involved in the conspiracy before the seizure. Lopez-Meza was arrested carrying two pagers and two phone cards, and with Jimenez Recio was involved transporting an exceptionally high value of marijuana and cocaine. Again, given the expert testimony demonstrating the significance of these communication devices and the high value of the drugs, it seems almost certain, and at least a jury reasonably could infer, that the conspirators sent Lopez-Meza because he was trusted and involved.

The government also put forth evidence connecting Lopez-Meza to a man named Raul, a man who, during the time-frame at issue in this case, lived at Nu Acres, the place proffered by the government as the destination of the drugs and the target of the conspirators' frequent cell phone calls. Mireya Alvarez testified that Lopez-Meza'[s] uncle was named Jose Meza, and an agent testified that Jose Meza was also known as Raul. Mireya Alvarez also testified that Lopez-Meza and Jose Meza sometimes lived under the same roof and shared use of a cell phone in her possession. The government presented evidence that this cell phone was the Nu Acres number. Arce testified that Sotelo mentioned "Raul" in a cell phone conversation regarding the drug

shipment before the sting. Arce also testified that after the sting, Arce, Sotelo, Lopez-Meza and Jimenez Recio spoke while in jail and Lopez-Meza mentioned Raul "as a part of this case." When this connection between Lopez-Meza and Raul and Nu Acres is viewed in the light most favorable to the government, a reasonable jury certainly could connect Lopez-Meza to the conspiracy before the seizure of the drugs.

Beyond Lopez-Meza's connection to Raul, the government presented through phone-toll records and testimony regarding those records, that Lopez-Meza, like Jimenez Recio, was connected to and had knowledge of the other conspirators before the seizure of the drugs. A phone card found in Lopez-Meza'[s] possession when he was arrested called Nu Acres on November 14, again on November 15, again on November 17, 6 minutes before Jimenez Recio called the same number, and again on November 18. For the same reasons Jimenez Recio's two calls to Nu Acres preceding the sting demonstrate Jimenez Recio's prior knowledge of the conspiracy and its members, Lopez-Meza'[s] four calls preceding the sting demonstrate his.

The connection between Lopez-Meza, Raul and Nu Acres, the drug's destination, the evidence of Lopez-Meza's implausible story, his two pagers and two phone cards, and his participation in the transportation of more than $10 million of marijuana and cocaine, together demonstrate that a reasonable jury could determine Lopez-Meza's participation in the pre-seizure conspiracy beyond a reasonable doubt, and in my view this evidence is more than sufficient to permit a jury verdict of conviction in the second trial.

BROADER CONSPIRACY:

Moreover, the government presented more than ample evidence from which a reasonable jury could have found constructive knowledge on the part of Jimenez Recio and Lopez-Meza of a conspiracy involving more loads than the one seized on November 18, 1997. This evidence, not surprisingly, is circumstantial, but of course, conspirators do not often explicitly proclaim their knowledge of covert illegal operations. The majority does not even discuss this evidence.

Special Agent Anthony Hinton ("Agent Hinton") of the DEA, qualified by the government as an expert on identifying and investigating drug organization, testified about factors that characterize complex drug organizations. He testified that the drug organization involving Jimenez Recio and Lopez-Meza was large, complex and involved more transactions than the one load of drugs seized by the government. Agent Hinton's testimony was thorough and specific.

First, Agent Hinton testified that the quantity of drugs involved in a drug transaction indicates the level of sophistication of a drug operation: the larger the organization the larger the amount of drugs moved. A large load of marijuana weighs between 100 pounds and a ton. A large load of cocaine weighs between 100 and 200 kilos.

Agent Hinton also testified that when the drug shipped is cocaine, the quality of the cocaine indicates the sophistication level of a drug operation: the closer to the top of the organization and the drug production the drug traffickers are, the purer the cocaine. For example, if the cocaine is produced and packaged in Columbia, when it comes directly from Columbia it is

still packaged in a pure form and the bricks are not broken up. Agent Hinton noted that the value of narcotics relates directly to purity.

Agent Hinton also testified that the number of players involved in a particular organization indicates the sophistication level of a drug operation: the more players involved, the larger the organization. Further, Agent Hinton testified that the number of transactions indicates the sophistication level of the drug operation: the more transactions, the larger the organization. These factors are linked: the more people involved in an organization, the more capable the organization is to complete more transactions. Also, the agent testified that the purity and quantity of drugs in a given transaction together indicate the complexity of a drug organization: the purer the drugs, the larger the quantity, the more complex the organization.

Further, Agent Hinton testified that the geographic reach of a drug trafficking organization indicates its level of complexity: "[A] smaller organization may have people that can only move drugs to one part of the country but not others. In a larger organization, you will have more people that can specialize in different areas of the country." Agent Hinton explained:

> One of the most difficult parts of the drug trafficking organization is moving its product from the producers to the user. And the most dangerous part of that is actually moving the drugs geographically from one part of the country to another. In that respect, you need people that know what they are doing, how to move drugs from one place to another, and that means you need people that know different parts of the country so that they can move those drugs to different parts of the country.

Agent Hinton also testified that knowledge of individual players in a drug organization varies depending on the size of the organization: In a smaller organization, the players know one another because trafficking involves fewer transactions and fewer people and roles are strictly defined. In a larger drug organization, it would be uncommon for people at the top to know all of the people in the organization, especially those near the bottom.

Further, Agent Hinton testified that communication among players in a drug trafficking organization indicates the size and nature of the organization:

> To move drugs, there has to be a lot of communication as to when the drugs are moved, how they are moved, quantities that are moved, because, obviously, in a drug organization, their whole purpose is to move an illegal substance. And to be successful at that, they have to be very secret. And the way that they use their communication shows you how they can be secret.

Agent Hinton then testified that the communication devices in the investigation of the drugs seized in this case were phones, cellular telephones, and pagers. Agent Hinton testified that these devices are important indications of the size and scope of the drug trafficking organization here because of the secrecy that such devices provide.

> "The individual using a cell phone can be anywhere at any time when they make the call. When they give out orders, they can be anywhere and nobody else will know where thy are when they are making those calls. They can make a call into a pager. And using the out-of-state area code, for example, to,

> say, Chicago, they don't have to be in Chicago necessarily, they can be in any area of the country when they make their call into the pager and when a person calls back at that number. [Moreover, with] the use of cellular phones nowadays, you don't have to have real identification to obtain a phone. And the telephone is not in a particular spot that you can trace it back to. Nowadays, you can buy a cellular telephone like you can a phone card [with a certain number of minutes on it, and] when the time's up, you just toss it, and nobody can trace it back to you."

Agent Hinton further explained that pay telephones are used in the same way as cellular telephones because people do not know where the traffickers live. "If you use pay phones, you can drop in anywhere you want, page someone to your cell phone, page them to the pay phone, they call you back, and you're gone."

After explaining the factors that go into a determination regarding the size and scope of a complex drug trafficking operation, Agent Hinton testified that, in his opinion, the conspiracy here was "a large, complex drug organization . . . [t]hat was involved in other loads." The factors that lead him to draw this conclusion, he testified, were

> first . . . the fact that the load car was found with [drug] residue in it that did not come from the packages that we seized. They were not open. They had not been cut open or anything. The planks on the back of the truck had been used before. There were numerous other holes in the sides of the truck. Also, because of the fact that there was such a large amount of drugs that were seized in this investigation, because I know that when involved in drug

> organizations, getting to that quantity of loads is very difficult because it is based on trust, and trust is built over time.

Agent Hinton's opinion that this case, with its massive drug seizure, involved a drug organization that extended beyond the single load seized on November 18, 1997 is not merely common sense; it also is corroborated by other evidence in the record. Strikingly, Lopez-Meza was the nephew of key conspiracy figure Raul. And Jimenez Recio was arrested carrying non-owners vehicle operation insurance, not just covering the time period of the load seized, but also an earlier period of such insurance coverage that ended on October 2, 1997. Further, Jimenez Recio was arrested carrying twelve receipts corresponding to non-owners operation insurance payments. A jury perhaps might infer from these receipts that Jimenez Recio regularly insured himself while making nefarious deliveries of drugs. But, if more is needed to prove that Jimenez Recio and Lopez-Meza were involved in a larger conspiracy, there was much more including the size and quality of the captured drug shipment; the use of cell phones, pagers, pay phones and phone cards for purposes of coordinated stealth; the geographic reach of the participants in the conspiracy; the truck modifications and marijuana residue suggesting prior illicit shipments; and the expert testimony linking the above evidence to the prototype for major drug conspiracy and suggesting that the conspirators would not entrust $10 million of drugs to persons they did not trust. There was ample evidence for the jury to conclude beyond a reasonable doubt that Lopez-Meza and Jimenez Recio knew of and engaged in the broader conspiracy.

Based on the evidence presented at trial, particularly the expert testimony of Agent Hinton, a reasonable jury could determine beyond a reasonable doubt that the drug trafficking operation here involved more than the single load that was seized. The evidence also demonstrates that Jimenez Recio and Lopez-Meza had actual or constructive knowledge of the conspiracy and its scope. A jury was permitted to credit testimony regarding trust that builds over time, trust among scoundrels necessary for illicit transport of drugs; Jimenez Recio and Lopez-Meza's possession and use of sophisticated drug-trafficking communication devices; and the quantity, quality and value of the drugs seized. This evidence is more than sufficient to permit a jury beyond reasonable doubt to find Jimenez Recio and Lopez-Meza guilty of knowledge and participation in a broad conspiracy.

B. Other alleged errors

In addition to arguing that the evidence was insufficient to convict, Jimenez Recio and Lopez-Meza make several other arguments to support their contention that the district court erred by denying their motions for judgment of acquittal after they were convicted in a second trial by jury. The majority concludes that evidence of conspiracy was insufficient and does not reach these other issues. Because I view the evidence of conspiracy as more than sufficient, I reach these other arguments, but find them unpersuasive.

Initially, Jimenez Recio and Lopez-Meza assert three grounds of error regarding jury instructions. The first ground is that the district court gave alternative jury instructions, the first for the pre-seizure conspiracy, the second for an alternative larger conspiracy. Lopez-

Meza and Jimenez Recio argue that the district court erred by giving two separate conspiracy instructions because, while it gave the jury a general unanimity instruction, it did not instruct the jury that it must unanimously agree on one of the two conspiracy theories.

We review a district court's formulation of jury instructions for abuse of discretion. *See United States v. Beltran-Garcia*, 179 F.3d 1200, 1204 (9th Cir. 1999). In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *See* id. at 1205. The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982). Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that the district court abused its discretion. *See United States v. de Cruz*, 82 F.3d 856, 864-65 (9th Cir. 1996). In *de Cruz*, where the defendant failed to demonstrate prejudice from an imperfect instruction, we held that the district court did not abuse its discretion, *id.* Further, "the jury must be presumed to have followed [a] unanimity instruction and all agreed to at least one of several possible conspiracies even though no specific instruction was given to that effect." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (citing *United States v. Friedman*, 445 F.2d 1076, 1084-85 (9th Cir. 1971)). Only when there appears to be a genuine possibility that the jury was confused or that a conviction resulted from different jurors concluding that a defendant committed different acts, general unanimity instructions do not suffice. *See Echeverry*, 719 F.2d at 975 (concluding that potential for such

confusion exists when the jury presents questions indicating their confusion concerning multiple conspiracies).

Here, Jimenez Recio and Lopez-Meza assert nothing more than the existence of alternative conspiracy instructions to demonstrate the possibility of genuine jury confusion. The presumption that jurors have followed a general unanimity instruction when several possible conspiracies were proffered holds absent evidence that there is "a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice." *Echeverry*, 719 F.2d at 975. Here, Jimenez Recio and Lopez-Meza have not with any specificity shown true potential for juror confusion. Speculation is inadequate to defeat a presumption that a jury verdict is based on jurors following instructions. Further, Jimenez Recio and Lopez-Meza have not demonstrated prejudice from the lack of a more particularized jury instruction. The district court did not abuse its discretion by failing to give a more particularized jury instruction.

Jimenez Recio and Lopez-Meza also claim that, while the superceding indictment in this case alleges that they conspired to violate the narcotics law "from on or about a date uncertain, but by November 19, 1997," the district court's jury instruction indicated that the jurors could find Jimenez Recio and Lopez-Meza guilty of the larger conspiracy, "whether [they joined] before or after November 19, 1997." Jimenez Recio and Lopez-Meza argue that because the indictment limits proof to pre-seizure evidence, the alternative larger conspiracy theory was never brought before the grand jury, thus

they contend that to instruct on the larger theory constituted an impermissible variance.

Although it appears that Jimenez Recio and Lopez-Meza objected to the jury instruction for the larger conspiracy, they failed to make a variance argument to the district court. We review only for plain error. *See United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). We may exercise our discretion to correct such an error only when (1) the error is obvious; (2) the error affects substantial rights; and (3) a miscarriage of justice would otherwise result. *See United States v. Sayetsitty*, 107 F.3d 1405, 1411-12 (9th Cir. 1997) (quoting *United States v. Olano*, 507 U.S. 725, 734-736, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993)). An error is "clear" or "obvious" only if "a competent district judge should be able to avoid it without benefit of objection." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997).

The Fifth Amendment grants a defendant the right to be tried only on the grand jury's indictment. *See United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991). Sometimes divergence of trial proof from an indictment is harmless error; other times such divergence constitutes an amendment that broadens the indictment, requiring per se reversal. *See id.* When time is not a material element of an offense, however, the court may constructively amend the indictment without violating the Fifth Amendment at all. *See United States v. Laykin*, 886 F.2d 1534, 1544 (9th Cir. 1989) (requiring only that the defendants had adequate notice of the charges against them); *United States v. Echeverry*, 698 F.2d 375, 377 (9th Cir. 1983) (dictum) (conspiracy conviction could be affirmed if the jury

agreed upon a conspiracy of some duration even if not the time frame as charged in the indictment).

This variance issue might have presented a close question if Jimenez Recio and Lopez-Meza had properly objected. However, they did not do so. In review for plain error it is significant that even if the indictment time frame differed from the jury instruction time frame in the second trial, the end date of the conspiracy was not an element of the crime charged against Jimenez Recio and Lopez-Meza. *See Laykin*, 886 F.2d at 1545. Furthermore, because Jimenez Recio and Lopez-Meza were tried on the larger conspiracy theory in the first trial, they cannot claim that they lacked notice of the larger conspiracy theory in the second trial. Under such circumstances, any variance did not rise to the level of plain error.

Jimenez Recio and Lopez-Meza also make a cumbersome and complex argument that the wording of the jury instruction concerning the larger conspiracy impermissibly placed the burden on them affirmatively to prove the termination of the smaller conspiracy by demonstrating that no other loads of drugs existed. Again, because Jimenez Recio and Lopez-Meza did not raise this argument before the district court, we review only for plain error.

There was no plain error from burden shifting. Every paragraph of Instruction No. 24 places the burden on the government to prove the defendants' involvement in the conspiracy, whether the small or the large, "beyond a reasonable doubt." Any lack of clarity in the instructions does not rise to the level of plain error because a competent district judge cannot be expected to avoid this alleged complex burden shifting error without benefit of objection.

Fourth, Jimenez Recio and Lopez-Meza argue that the district court erred by allowing the jury to hear evidence over objection regarding the odor of burned marijuana in the car that Lopez-Meza was driving when he was arrested. Jimenez Recio and Lopez-Meza rely on *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012, 1013 (9th Cir. 1995), to argue that the odor evidence should not have been admitted as an exception to Federal Rule of Evidence 404(b), and in any event, should have been excluded pursuant to Federal Rule of Evidence 403. Their argument lacks merit.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *See United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997). An appellate court will only reverse for abuse of discretion if an evidentiary error more likely than not affected the verdict. *See United States v. Karterman*, 60 F.3d 576, 579 (9th Cir. 1995). "Other act" evidence can be admitted as an exception to Rule 404(b) if (1) the evidence is "inextricably intertwined" with the charged crime, or (2) if the evidence is necessary "to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Vizcarra-Martinez*, 66 F.3d at 1012, 1013 (excluding personal use methamphetamine in a case involving possession of a chemical precursor). Here, the district court did not abuse its discretion by concluding that the evidence could be admitted as "inextricably intertwined" and going to show knowledge, intent and the absence of mistake. For the same reasons, the district court did not abuse its discretion in finding the odor evidence relevant under Rule 403.

Jimenez Recio and Lopez-Meza also argue that the district court erred by denying a motion for a mistrial

due to prosecutorial misconduct and by failing to give a curative instruction regarding prosecutorial misconduct. I disagree. During trial, the prosecutor referred to a place that the government argued was the intended destination of the drugs as a "stash house." Jimenez Recio and Lopez-Meza objected to the use of this term. The district court sustained the objection, but allowed the government to refer to the residence as the destination of the drugs. At closing argument, the prosecutor again referred to the residence as a "stash house." The defendants objected, moved for a mistrial and requested a limiting instruction. The court sustained the objection, denied the motion for a new trial to allow more leeway because the prosecutor was engaged in argument, and did not give a limiting instruction.

The district court's denial of a motion for a mistrial is reviewed for abuse of discretion. *See United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999). A district court's refusal to give a limiting instruction also is reviewed for abuse of discretion. *See United States v. Soliman*, 813 F.2d 277, 278 (9th Cir. 1987). To determine whether alleged prosecutorial misconduct requires reversal, this court must consider, in the context of the entire trial, whether the conduct appears likely to have affected the jury's ability to judge the evidence fairly. *See United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985). Reversal is only required if it is more probable than not that the alleged misconduct affected the jury's verdict. *See United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990).

Here, the prosecutor's reference to the alleged drug destination as a "stash house" during closing argument may have gone a bit beyond spirited advocacy, as the district court acknowledged by sustaining the defen-

dants' objections. The court, however, instructed the prosecutor to refrain from referring to the alleged destination as the "stash house," and the prosecutor so refrained. Considering the weight of the evidence against Jimenez Recio and Lopez-Meza, and the relatively benign nature of the prosecutor's statement in the context of the rest of the trial, the district court did not abuse its discretion by refusing to grant a motion for a mistrial or by refusing to give a limiting instruction to the jury.

Finally, Jimenez Recio and Lopez-Meza argue that the district court improperly admitted expert testimony under Federal Rules of Evidence 702 and 704 when Agent Hinton, after being qualified as an expert, opined over objection that (1) the conspiracy involved a large and complex organization, and (2) the conspiracy was involved in other prior loads of drugs.

This court reviews for abuse of discretion a district court's decision to admit expert testimony. *See United States v. Campos*, 217 F.3d 707, 710 (9th Cir. 2000). Federal Rule of Evidence 702 provides that a qualified expert may testify if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Federal Rule of Evidence 704 allows a qualified expert to state an opinion regarding an ultimate issue, provided that the ultimate issue does not pertain to the mental state or condition of a defendant in a criminal case.

Here, the district court qualified Hinton as an expert based on his knowledge, experience, training and education. Hinton's testimony that the organization "was involved in other loads," while helping establish the existence of a larger conspiracy, was the agent's

opinion, based on his expertise, of whether the facts and circumstances of this group of people and their activities demonstrated a conspiracy larger than just the one load of marijuana and cocaine. Because Hinton's testimony at all times remained within boundaries set by Rules 702 and 704, the district court did not abuse its discretion by admitting the testimony.

IV. CONCLUSION

The majority correctly is concerned that proof be made of criminal conspiracy beyond a reasonable doubt, but the majority incorrectly invades the province of a jury when it holds that evidence in the second trial was insufficient. The legal test to determine if a second trial was permissible requires us to assess the boundaries of permissible inferences that a jury reasonably could have drawn when viewing all of the evidence in the light most favorable to the government. In this light, the evidence was sufficient to permit the jury to determine, beyond a reasonable doubt, that there was a serious criminal conspiracy in which Jimenez Recio and Lopez-Meza were involved before the drugs were seized. Moreover, the evidence was sufficient for a jury to conclude beyond a reasonable doubt that there existed a broader conspiracy—involving more than one load—in which Jimenez Recio and Lopez-Meza had actual or constructive knowledge and for which Jimenez Recio and Lopez-Meza took deliberate steps. Jimenez Recio and Lopez-Meza sought to advance the conspiracy's unlawful aims by their own unlawful acts.

The majority addresses only a part of the evidence, ignoring key proof considered herein. The majority takes no heed of the fact that a jury was properly instructed to find guilt only if proven beyond a

reasonable doubt. In returning its verdict, the jury said that it had no reasonable doubt. The evidence in the second trial is sufficient to support the jury's decision.[5]

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[5] I also conclude that the evidence at the first trial was sufficient to support a jury verdict of Jimenez Recio and Lopez-Meza's guilt beyond a reasonable doubt in conspiring before the seizure, contrary to the position of the concurring opinion. Because the first trial's evidence was sufficient to convict, I need not address the appellants' contention, credited in the concurrence over the government's opposing view, that double jeopardy barred a second trial.

The majority, in footnote 1, mistakenly urges that the "second trial included all the evidence at the first trial as well as additional testimony analyzing telephone records and the opinion of a government expert that the conspiracy was a large operation." The majority is correct in part in detailing some of the new evidence presented in the second trial. But it is not correct that all evidence at the first trial was presented in the second trial. For example, while evidence in the second trial shows "Raul" as a key conspirator, evidence in the first trial disclosed more, indeed that he was the owner of the drugs. While evidence in the second trial shows that Raul's nephew Lopez-Meza had a very close relationship with Raul, living under the same roof and sharing use of a cell phone, evidence in the first trial included a jail house confrontation, which a jury might have considered threatening to co-conspirator Arce, in which Lopez-Meza said that "He [Lopez-Meza] was the one that helped his Uncle Raoul."

This showing in the first trial, along with the other evidence presented that was substantially similar to that in the second trial, unmistakably was sufficient for a jury to convict beyond a reasonable doubt. The concurrence argues contrary to the great weight of evidence that Jimenez Recio and Lopez-Meza were merely "mules" but the evidence reviewed above shows, to the contrary, both their probable involvement in conspiracy before the drug seizure and their probable participation in a broader conspiracy. As the concurrence sees it, Lopez-Meza might be viewed as a mere "mule" even though he is the nephew of the owner of the drugs seized, the "one who helps" his uncle Raul, and one who shares a cell phone and roof with Raul, and even though he was

I would affirm the district court's correct decision to let the jury verdict stand after the second trial.

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entrusted with an immense truckload of drugs with a value exceeding ten million dollars. The position that Lopez-Meza, or for that matter Jimenez Recio, can be viewed as "mules," unthinking beasts of burden, does not accord with common sense. The evidence in the first trial was sufficient to convict both Jimenez Recio and Lopez-Meza beyond a reasonable doubt. In that trial, as well as in the second trial, the weighing of a mass of damaging evidence was in the jury's province; it is not properly within ours.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-30135, 99-30145
D.C. No. CR-97-00103-BLW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANCISCO JIMENEZ RECIO, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ADRIAN LOPEZ-MEZA, DEFENDANT-APPELLANT

[Filed: Oct. 30, 2001]

Before: BROWNING, B. FLETCHER, and GOULD, Circuit Judges.

ORDER

Judges BROWNING and B. FLETCHER have voted to reject the petition for rehearing. Judge GOULD would have granted the petition.

Judges BROWNING and B. FLETCHER recommended denial of the petition for rehearing en banc. Judge Gould voted to grant the en banc hearing.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R.App. P. 35(b).

The petition for rehearing and for rehearing en banc are DENIED.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, T.G. NELSON, TROTT, KLEINFELD, WARDLAW, GOULD, TALLMAN, and RAWLINSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

With respect, I believe that our court took a wrong turn in the law of conspiracy in *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997), and today's order demonstrates how far off course we have ventured. By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter principles of conspiracy law set out for us by the U.S. Supreme Court. I respectfully dissent from the order denying rehearing en banc.

I

To convict Recio and Lopez-Meza of conspiracy under 21 U.S.C. § 846, the government bore the burden of proving (1) that there was an agreement to possess the truck load of cocaine and marijuana in question with intent to distribute; and (2) that Recio and Lopez-Meza knew of the agreement's objectives and intended to help further them. *See United States v. Gil*, 58 F.3d 1414, 1423 n. 5 (9th Cir. 1995); *United States v. Shabani*, 513 U.S. 10, 16, 115 S. Ct. 382, 130 L.Ed.2d 225 (1994). Most surprisingly, the panel majority concluded that there was insufficient evidence to convict.

Even a cursory review of the facts demonstrates the startling nature of the majority's conclusion. Recio and Lopez-Meza were caught red-handed transporting a truck load of cocaine and marijuana worth over $12 million. An unidentified co-conspirator sent them to retrieve the truck from a shopping mall parking lot after police, unbeknownst to Lopez-Meza and Recio, intervened and arrested the original driver Sotelo and passenger Arce, and obtained their cooperation. Police observed Lopez-Meza drive Recio to the mall parking lot and drop him off. Recio drove away in the truck heading west on various back roads, with Lopez-Meza following.

Upon their arrest, both were found with phone cards, pagers, and cell phones. The government introduced expert testimony linking such devices to drug conspiracies; moreover, the particular phone cards and cell phones which they were caught carrying were linked to a "stash house" where the drugs were destined. In addition, both gave highly incriminating statements to police. Recio denied outright that he had been dropped

off; ludicrously, he "stated that he did not know how he got to the mall." 258 F.3d at 1079 [Pet. App. 22a]. He claimed he had been shopping when an unknown man offered him $250 to drive a truck to Recio's own residence, where the man would later pick it up. When asked where he lived, Recio "first gave one address, then another, then stated that he could not remember the address where he lived." *Id.* Judge Gould's dissent aptly observes that "[t]his story is so unbelievable that a reasonable jury would almost certainly view it as an implied admission of guilt." *Id.* at 1079-80. Lopez-Meza gave similarly incriminating statements to police. He explained that he was just "out driving around" and that he was going to see his girlfriend. Although he told police that he lived with his girlfriend, Lopez-Meza could not recall her last name or even the city in which she resided. *Id.* at 1081-82 [Pet. App. 26a-27a].

Without considering the rest of the circumstantial evidence against Recio and Lopez-Meza, which Judge Gould meticulously recites in his pellucid dissent, these facts alone would be more than sufficient to support the conspiracy convictions. There was undoubtedly an agreement to ship the truck load of cocaine and marijuana with intent to distribute, and Recio and Lopez-Meza were obviously knowingly acting in furtherance of this agreement. Indeed, I would go so far as to say that the defendants' sufficiency of the evidence challenge borders on the frivolous.

Nevertheless, the majority reversed, on the strength of *United States v. Cruz,* 127 F.3d 791 (9th Cir. 1997). In that case, Cruz was recruited as a substitute drug courier in a methamphetamine distribution conspiracy after police, unbeknownst to the rest of the conspirators, arrested the original courier and seized the drugs.

A divided panel held that a conspiracy ends when its "objective ha[s] been defeated" by government intervention. *Id.* at 795. There, the majority reversed a § 846 conspiracy conviction because the conspiracy for which he was charged "had been terminated by the government's seizure of the methamphetamine before Cruz became involved." *Id.* Applying *Cruz*, the panel majority in *Recio* required the government to demonstrate that there was sufficient evidence linking Recio and Lopez-Meza to the conspiracy *prior to* the government's initial seizure of the truck and arrest of Sotelo and Arce, which, astoundingly, they held ended the conspiracy.

II

One would think that the contradictory and incriminating statements made by Recio and Lopez-Meza would have been relevant to the sufficiency of the evidence of a conspiracy to deliver the multi-million dollar load of cocaine contained in the truck which Recio was caught, red-handed, driving. Rather, according to the majority, the inconsistent and transparently mendacious fables that the defendants concocted to explain their actions "point[ ] only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand." 258 F.3d at 1071 [Pet. App. 4a].

The majority similarly jettisons the incriminating inferences to be drawn from the telecommunication devices that the defendants carried because such evidence is not probative of defendants' *pre-seizure* involvement in the conspiracy—notwithstanding the fact that the majority itself concedes that such evidence

is probative of the defendants' general involvement in the scheme to transport the truck load of drugs:

> As for the pagers they carried, one would expect that whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 1072 [Pet. App. 5a]. But isn't that exactly the point?

In short, the majority purports to examine whether sufficient evidence supports Recio and Lopez-Meza's conspiracy convictions even as it closes its eyes to the most probative evidence of their guilt. It could hardly be more apparent that the *Cruz*/*Recio* decisions constitute a de facto evidentiary exclusionary rule. Unlike the exclusionary rule familiar from the Fourth and Fifth Amendment contexts, however, the *Cruz*/*Recio* corollary is not triggered by, nor does it deter, wrongful conduct on the part of law enforcement officers. Indeed, the reverse is true: the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely *legitimate* intervention by law enforcement agents.

With respect, there is simply no principled basis for *Cruz*'s promulgation of an arbitrary and unprecedented limitation on the duration of a conspiracy, nor its extension by the *Recio* majority to exclude evidence *highly* probative of an ongoing conspiracy to distribute a large quantity of illegal drugs. As a result, Recio and Lopez-Meza receive an undeserved windfall, entirely legitimate law enforcement efforts are compromised,

and, as I discuss below, fundamental black letter principles of the law of conspiracy are distorted.

III

The source of the problem is *Cruz*, an ill-advised precedent, which we should have reconsidered en banc and overruled. I respectfully suggest that *Cruz*, and now *Recio*, conflict with our prior and subsequent precedent, with precedent from our sister circuits, and with black letter principles of the law of conspiracy set down for us by the Supreme Court.

A

Cruz reasons that the drug shipment conspiracy had terminated prior to Cruz's involvement because the government's seizure of the drugs, unbeknownst to the remaining conspirators, "defeated the object" of the conspiracy. But the fact that the government's secret intervention in a conspiracy renders the conspirators' subsequent efforts Sisyphean is immaterial because "the criminal agreement itself is the actus reus" of the offense of conspiracy. *Shabani*, 513 U.S. at 16, 115 S. Ct. 382. Indeed, "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 139 L.Ed.2d 352 (1997).

In holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge. The Supreme Court and our own Court have made this very point many times before. *See, e.g.*, *Salinas*, 522 U.S. at 65, 118 S. Ct. 469

("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable itself."); *United States v. Rabinowich*, 238 U.S. 78, 86, 35 S. Ct. 682, 59 L.Ed. 1211 (1915) ("The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable."); *United States v. Fleming*, 215 F.3d 930, 936 (9th Cir. 2000) ("Factual impossibility is not a defense to an inchoate offense" such as conspiracy or attempt.); *United States v. Bosch*, 914 F.2d 1239, 1241 (9th Cir. 1990) (legal impossibility is no defense to conspiracy charge); *United States v. Everett*, 692 F.2d 596, 599 (9th Cir. 1983) (same); *United States v. Rueter*, 536 F.2d 296, 298 (9th Cir. 1976) (rejecting impossibility defense to conspiracy charge, holding that "[t]he accomplishment of the conspiracy's goal is immaterial to the crime").

Other circuits have also had occasion to hold that impossibility is not a defense to conspiracy liability. *See, e.g., United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) (impossibility is not a defense to conspiracy); *United States v. Sobrilski*, 127 F.3d 669, 674-75 (8th Cir. 1997) (same); *United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir. 1995) (conspiracy may exist even if the object of the conspiracy cannot be achieved); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (factual impossibility is not a defense to conspiracy).

Particularly instructive is *Belardo-Quinones*, in which the First Circuit, in a factually analogous context, expressly rejected the very rule adopted in *Cruz:*

> Appellant's argument resembles the one made by appellants in *United States v. Giry*, 818 F.2d 120 (1st Cir. 1987) that because the persons who were to import the cocaine were agents of the Drug Enforcement Agency [DEA] the importation could never actually occur. The court rejected "the faulty assumption that an expressed conspiratorial objective is negated by its factual impossibility." 818 F.2d at 126. Here appellant joined in a conspiracy and performed an essential role in obtaining a boat and crew needed to accomplish the crime. Even if intervening events had made the accomplishment of the criminal purpose impossible all the elements of a criminal conspiracy were present. *There is no basis for making a distinction between those who start a conspiracy that is impossible from the beginning and one who joins in a conspiracy that has become impossible due to intervening events unknown to the conspirators.*

71 F.3d at 944 (emphasis added). The court observed that Belardo-Quinones failed to cite a single case which "support[s] a proposition that conspiracies end because of impossibility when the conspirators are continuing to actively pursue the original criminal goal." *Id.*

B

The majority in *Cruz* concedes that the defendant may have been involved in some *other* conspiracy. The majority reasons that, while it was "factually impossible for Cruz to have been a member of [the charged] conspiracy," that is, a "five-member conspiracy" which included the two co-conspirators arrested prior to Cruz's involvement, "Cruz may have been a member of

a *new* [three-member] conspiracy" between himself and the two remaining co-conspirators. 127 F.3d at 795 n. 4.

But if the so-called "original" conspiracy is deemed to have ended because the government "defeated its objective" by seizing the methamphetamine, how could it be that a *new* conspiracy would spring to life whose objective was foiled *ab initio?* What baffling logic! If the "original" conspiracy had been terminated because the government's seizure of the drugs defeated its objective, then *ipso facto*, no "new" conspiracy to distribute the same seized drugs could possibly come into existence.

Let us temporarily suspend disbelief and entertain the *Cruz* majority's hypothesis that Cruz may not have been involved in the "original" five-member conspiracy, but rather in some "new" conspiracy that did not include the two arrested former co-conspirators. At *most*, this would merely suggest that there was a variance between the indictment and proof adduced at trial. Such a variance would warrant reversal only if it "affect[ed] the substantial rights of the parties." *U.S. v. Duran*, 189 F.3d 1071, 1081 (9th Cir. 1999) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946)).

As it is, courts have regularly held variances relating merely to the number of individuals alleged to have participated in a conspiracy to be non-prejudicial and thus not fatal to the indictment. *See, e.g., U.S. v. Johnston*, 146 F.3d 785, 791 (10th Cir. 1998) (no fatal variance when evidence at trial did not prove defendant conspired with all named codefendants in indictment so long as it proved he conspired "with others"); *U.S. v. Gaviria*, 116 F.3d 1498, 1533 (D.C. Cir. 1997) (no fatal variance when evidence at trial proved different

number of conspirators than alleged in indictment because no prejudice to defendant); *U.S. v. Twitty*, 72 F.3d 228, 231 (1st Cir. 1995) (no fatal variance between indictment charging conspiracy involving five persons and proof that only four were involved because indictment did not cause unfair prejudice); *U.S. v. Schurr*, 775 F.2d 549, 555 (3d Cir. 1985) (no fatal variance between indictment charging conspiracy involving five persons and proof that only three were involved).

Perhaps the *Cruz* majority advanced the notion that Cruz was involved in some "new" conspiracy because it, too, was somewhat discomfited by the absurdity of concluding that Cruz was not involved in *any* drug distribution conspiracy. But it tendered its hypothesis without so much as a glancing reference to the factors that we have found relevant to the task of distinguishing multiple conspiracies from a single conspiracy. *See, e.g., United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) (relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals). Under long-standing principles of conspiracy law—not to mention plain common sense—a scheme to transport a single shipment of drugs on a single occasion does not morph into two conspiracies simply because some of the original conspirators withdraw upon their arrest and cooperation with police.

This latter point bears emphasis. As Judge Hall observed in her excellent dissent in *Cruz*, its majority confused the question of the withdrawal of a co-conspirator with the question of the duration of a conspiracy. 127 F.3d at 803. While a co-conspirator may terminate his own *participation* in a conspiracy by

taking affirmative acts to "defeat the object of the conspiracy," such withdrawal does not terminate the *conspiracy* itself. *Id.* Quite obviously, it makes no sense at all "to allow remaining conspirators to avoid culpability for acts in furtherance of a conspiracy simply because one or more of their associates have withdrawn or taken steps to defeat the object of the conspiracy." *Id.* Doing so flips the law of co-conspirator withdrawal on its head. Here, paradoxically, thanks to *Cruz*, Recio and Lopez-Meza become the beneficiaries of Arce's own withdrawal and cooperation with police!

C

At bottom, *Cruz*'s distortion of the law of conspiracy appears to have been prompted by policy concerns over the use of government "sting" operations. The majority in *Cruz* opined that "liability for the original conspiracy on the basis posited by the government could be endless," explaining that "[i]t is not difficult to picture Balajadia [the arrested co-conspirator cooperating with police] sitting in the Honolulu Airport Police Station with a copy of the Guam telephone directory in hand, following the detectives' instructions to call all of his acquaintances in Guam to come to Honolulu to help him." 127 F.3d 795 & n. 3.

The *Cruz* majority's concern that government agents will "let their fingers do the walking" is both improper and misplaced. It certainly cannot justify throwing the law of conspiracy into disarray premised upon subjective qualms with perfectly legal law enforcement practices. In any event, we have already recognized a limitation to conspiracy liability in the police sting context. In *United States v. Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984), we held that there is "neither

a true agreement nor a meeting of minds"—and hence no conspiracy liability—"when an individual 'conspires' to violate the law *with only one other person and that person is a government agent.*" 742 F.2d at 1199 (emphasis added). This principle is a sound one, and follows from the nature of the offense of conspiracy itself, but, of course, had no bearing in either *Cruz* or *Recio*. Instead, both *Cruz* and *Recio* represent back-door attempts to expand the *Escobar* rule in a manner fundamentally inconsistent with *Escobar*'s conceptual foundation. Manifestly, when an individual conspires to violate the law with at least one other "true" conspirator, there *is* a meeting of the minds and hence conspiracy liability, notwithstanding the subsequent intervention of government agents.

IV

It is time that we reinstate the fundamental principle that the duration of a conspiracy is determined by "the scope of the conspiratorial agreement" itself. *Grunewald v. United States*, 353 U.S. 391, 397, 77 S. Ct. 963, 1 L.Ed.2d 931 (1957). With our inquiry properly focused on the agreement to transport the truck load of drugs, it is simply irrelevant that Recio and Lopez-Meza may have joined the conspiracy *after* the government arrested Sotelo and Arce. Manifestly, the conspirators' agreement continued apace following the government's initial intervention—an intervention of which the remaining co-conspirators were not even aware. Equally obviously, Recio and Lopez-Meza intended to further the objectives of this conspiracy, notwithstanding the fact that the *goal* of the conspiracy (unbeknownst to them) became incapable of fulfillment. Under long-established principles of conspiracy law,

these are the *only* elements the government was required to prove in order to convict Recio and Lopez-Meza.

Recio and *Cruz* create intra and inter-circuit conflicts concerning the law of conspiracy and are contrary to Supreme Court precedent. We should have reheard *Recio* en banc so we could overrule *Cruz*.

I respectfully dissent from the regrettable order denying rehearing en banc.

CYNTHIA HOLCOMB HALL, Senior Circuit Judge:

I agree with the views expressed by Judge O'Scannlain.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR. No. 97-00103-S-BLW

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANCISCO JIMINEZ AND ADRIAN LOPEZ, DEFENDANTS

[Filed: July 27, 1998]

MEMORANDUM DECISION AND ORDER

The Court has before it a Motion by Defendant Francisco Jiminez (hereinafter "Jiminez") for Judgment of Acquittal as to Count I of his conviction, and a Renewed Motion by Defendant Adrian Lopez (hereinafter "Lopez") for Judgment of Acquittal as to both Counts I and II of his conviction. Both Defendants make their motions pursuant to Fed. R. Crim. P. 29(c).

Procedural Background

On January 16, 1998, a Superseding Indictment was filed against Jiminez and Lopez, along with codefendants Ramiro Arce and Manuel Sotelo, alleging one count of conspiracy to distribute controlled substances, and one count of possession with intent to distribute controlled substances as to each Defendant. Prior to trial, Arce entered a plea of guilty to the charges and

agreed to testify against the other Defendants. The case proceeded to trial on March 16, 1998, and on March 23, 1998, a jury returned verdicts of guilty on all counts against all Defendants. Jiminez now moves for judgment of acquittal on Count I, the conspiracy count, an Lopez moves for judgment of acquittal on both counts.[1]

Factual Background

Evidence introduced at trial indicated that the Nevada Highway Patrol stopped Sotelo and Arce as they drove a white Nissan flatbed truck near Las Vegas, Nevada on November 18, at 1:18 a.m. After receiving consent to inspect the vehicle, the officers discovered over 5 kilograms of cocaine and over 375 pounds of marijuana in a hidden compartment under the bed of the truck. Sotelo and Arce were arrested. Upon receiving cooperation from Arce, the authorities discovered that Sotelo and Arce intended to drive the truck to a parking lot in Nampa, Idaho, after which they were to call a phone number and inform the party on the phone that the truck had been "delivered." The authorities decided to transport the truck to Idaho and

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[1] The Court would note that many of the same issues considered in evaluating Lopez's motion for judgment of acquittal on his possession with intent to deliver charge, may well apply to Jiminez, as well. However, Jiminez did not file a motion for judgment of acquittal on his possession with intent to deliver charge. District Courts do not have "inherent supervisory power" to grant sua sponte an untimely motion for review of a jury's verdict of guilt, since such action would contradict the plain language of the Federal Rule of Criminal Procedure's filing limits. *See Carlisle v. United States*, 517 U.S. 416, 417 (1996). Thus the Court will not review the conviction of Jiminez on the charge of possession with intent to deliver. *Id.*

deliver the truck as planned in order to catch others that may be involved in this scheme.

The authorities transported the truck to Idaho and delivered it to a parking lot in the Karcher Mall at Nampa, Idaho on the evening of November 19. Upon delivery of the truck the authorities had Arce make the phone call announcing that the truck had arrived. This call was recorded.

The phone recording indicates the party on the telephone agreed to send someone to pick up the truck. A short time later, Defendants Jiminez and Lopez arrived at the parking lot area in a blue Mazda and observed the area for some time. Jiminez then dropped Lopez off at the truck and Jiminez drove away in the blue Mazda, with Lopez driving off separately in the truck. A short time later both were stopped and arrested. Although they were traveling on separate roads they were stopped in close proximity to each other and appeared to be traveling to the same destination.

At trial Arce testified that he had neither seen nor met Lopez or Jiminez prior to his November 18 arrest. Evidence was introduced of phone calls made by Defendants Sotelo, Lopez and Jiminez prior to the Government's seizure of the drugs on November 18 at 1:18 a.m. However, there was no evidence regarding the substance of the telephone calls. In addition, the only connection between the calls made by Sotelo and calls made by either Jiminez or Lopez was that they had all recently called different numbers in the Chicago metropolitan area and they had all called a number attributed to a communal phone used by migrant workers at a work camp in Idaho.

Analysis

The Conspiracy Charge

On review of a motion for acquittal this Court must decide whether, after viewing the evidence in a light most favorable to the jury's verdict, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994); *United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993); *United States v. Kaplan*, 895 F.2d 618, 620 (9th Cir. 1990). Given this standard, Jiminez and Lopez base their motions for acquittal on the recent decision of the Ninth Circuit in *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997). This case held that a conspiracy to distribute and to possess with intent to deliver drugs ends when the government seizes the drugs. *Id.* at 795 (citing *United States v. Castro*, 972 F.2d 1107, 1112 (9th Cir. 1992)). Thus, the principal question for the Court in determining the validity of the Defendants' motions for acquittal is whether there was sufficient evidence introduced at trial for a rational trier of fact to find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.

In *Cruz*, Defendants Balajadia and Taitano were en route to Guam when authorities arrested them in Honolulu and confiscated methamphetamine they were carrying. *See Cruz*, 127 F.3d at 794. Balajadia subsequently agreed to aid the police. The police had Balajadia call his boss in Guam and tell him Taitano had been arrested with Balajadia's ticket. Balajadia also claimed he had no money to get to Guam and deliver the drugs. Defendant Cruz was dispatched to pick up

the methamphetamine, which the authorities had replaced with rock salt. The Government conceded Cruz was not brought into the drug scheme until after the seizure of the methamphetamine. *Id.* at 795. The Court held that the conspiracy ended, by virtue of the defeat of its object, when the authorities seized the drugs. *Id.* at 795-96. Cruz, therefore, could not be convicted of possession with intent to deliver under a theory of conspirator liability, because he was not a member of the conspiracy when the methamphetamine was possessed by Taitano and Balajadia. *Id.* at 796.

In the present case, Jiminez and Lopez argue that since there is no evidence tying them to the conspiracy prior to the seizure of the drugs in Nevada, an acquittal should be granted on the conspiracy. They point out that Arce testified he had met neither Lopez nor Jiminez prior to his arrest, and no witness testified as to Jiminez's or Lopez's involvement prior to 1:18 a.m. November 18, the point at which the authorities seized the drugs.

The Government maintains there was sufficient evidence for a reasonable jury to convict Lopez and Jiminez on a conspiracy charge because Lopez's and Jiminez's words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge. The Government further attempts to demonstrate the Defendant's link to the conspiracy from evidence of phone calls made prior to 1:18 a.m. on November 18. *See United States' Response to Defendants' Motions for Judgement of Acquittal* at 5. Although there is no evidence of the substance of the phone calls, the telephone records admitted into evidence at trial indicate that, prior to

the drug seizure, Sotelo, Jiminez, and Lopez called the same number in Idaho, and all three had called different numbers in the Chicago area. Evidence of these calls and of their conduct in picking up the truck in Nampa, construed in a light most favorable to the Government, is sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs.

However, in instructing the jury, the Court did not specify that the jury must find that Jiminez and Lopez became members of the conspiracy prior to seizure of the drugs in Nevada. Although it is possible that the jury found that Jiminez and Lopez had joined the conspiracy prior to 1:18 a.m. on November 18, based upon the evidence discussed above, it is also possible that the jury found the Defendants guilty on a theory that they joined the conspiracy after the seizure in Nevada. Thus, the Defendants are entitled to some relief, although, as discussed below, the entry of a judgment of acquittal is not warranted.

The Possession with Intent to Deliver Charge

Lopez also moves for a judgement of acquittal on his possession with intent to deliver charge, arguing that there was insufficient evidence of actual possession of the drugs by him, and that if he can not be found guilty of the conspiracy charge, a possession with intent to deliver conviction can not be held as well. However, this argument ignores the substantial evidence presented at trial which tied him directly to the drugs. Unrefuted evidence introduced at trial demonstrated that he drove the drug-laden truck from the Karcher Mall parking lot followed closely by a number of police

officers. A person who knowingly has direct physical control over a thing at a given time is in actual possession. *See United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir.). A person who, although not in actual possession, has the power and intention at a given time to exercise dominion or control over a thing is in constructive possession. *See Batimana* at 1369; *see also United States v. Terry*, 911 F.2d 272, 279 (9th Cir. 1990). A jury could find the element of possession present if the Defendant had actual or constructive possession either alone or jointly with others. *See Juvera v. United States*, 378 F.2d 433 (9th Cir. 1967); *see also United States v. Restrepo*, 930 F.2d 705, 709 (9th Cir. 1991) (holding that to prove Defendant was guilty of possession with intent to distribute, the Government was required to prove that Defendant knowingly possessed cocaine, either actually or constructively, and that he possessed it with intent to deliver it to another person).

However, the Court instructed the jury that they could also find Lopez guilty of possession with intent to deliver based upon the actions of co-conspirators during the course and in further of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946). This raises the specter that the jury convicted Lopez of the possession with intent to deliver charge, not because of his physical possession of the truck containing the drugs while under the watchful eye of the Government agents, but because of the actions of his alleged co-conspirators, Arce and Sotelo, in transporting the drugs from Arizona to the site of their arrest in Nevada. If the latter was the case, the court's failure to instruct the jury that Lopez could only have joined the conspiracy prior to the seizure of the drugs would call into

question Lopez's conviction for possession with intent to deliver, as well as his conspiracy conviction. *See Cruz*, 127 F.3d 796.

From the evidence presented at trial, a rational trier of fact could have found the essential elements of conspiracy and possession with intent to deliver beyond a reasonable doubt. For this reason, the Defendants' motions for judgment of acquittal cannot be granted. However, because of the Court's error in instructing the jury, the granting of a new trial is, "required in the interest of justice." Fed. R. Crim. P. 33.

The Court is mindful that the Defendants did not move for a new trial. Ordinarily, a District Court lacks the power to sua sponte convert a motion for acquittal to a motion for a new trial. *See* Advisory Committee Notes to Fed. R. Crim. P. 29(c), 1966 Amendments. The Supreme Court has explained that this is because to order a new trial in a case where a court has already determined the evidence to be insufficient would invoke principles of Double Jeopardy. *See Burks v. United States*, 437 U.S. 1 (1978). However, "[d]ouble jeopardy principles do not bar a retrial if a conviction is reversed because of error at the trial if the evidence was sufficient to support the verdict." 2 Charles A. Wright, Federal Practice and Procedure: Criminal, § 470, at 679 (2d ed. 1982) (citing *Greene v. Massey*, 437 U.S. 19, 26 (1978). Indeed, at least one other District Court has converted a motion for acquittal to a motion for a new trial when the basis of the challenge is something other than sufficiency of the evidence. *See United States v. Carter*, 966 F. Supp. 336, 340 (E.D. Pa. 1997).

Therefore, in accordance with the above memorandum decision,

Order

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Francisco Jiminez's Motion for Judgement of Acquittal (Docket No. 100) and Defendant Adrian Lopez's Renewed Motion for Judgment of Acquittal (Docket No. 101) are converted to Motions for New Trial pursuant to Fed. R. Crim. P. 33 and said motions shall be, and the same are hereby, GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the present date for sentencing for the Defendants of July 29, 1998, be VACATED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that a jury trial for Francisco Jiminez on Count I of the Superseding Indictment and for Adrian Lopez on Counts I and II of the Superseding Indictment shall be set for **September 21, 1998 at 1:30 p.m.,** in the Federal Courthouse in Boise, Idaho.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that sentencing for Francisco Jiminez on Count II of the Superseding Indictment shall be re-set for **August 12, 1998 at 9:00 a.m.,** in the Federal Courthouse in Boise, Idaho. The United States Probation officer assigned to this case is further directed to supplement Francisco Jiminez's Presentence Report within seven days of this decision, as to the effect of this decision on that Presentence Report.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to 18 U.S.C. § 3161(e), the

time allowed for this case to proceed to trial shall run from the date of this Order.

Dated this 27th day of July, 1998.

/s/ B. LYNN WINMILL
B. LYNN WINMILL
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR. No. 97-0103-S-BLW

UNITED STATES OF AMERICA

v.

MANUEL SOTELO, RAMIRO ARCE,
FRANCISCO JIMINEZ AND ADRIAN LOPEZ

[Filed: Jan. 16, 1998]

SUPERSEDING INDICTMENT

(Vio. 21 U.S.C. § 846; 21 U.S.C. § 841(a) (1);
21 U.S.C. § 841 (b) (1) (A))

THE GRAND JURY CHARGES:

COUNT ONE

21 U.S.C. § 846; 21 U.S.C. § 841(a) (1);
21 U.S.C. § 841 (b) (1) (A)

From on or about a date uncertain, but by November 18, 1997, within the District of Idaho, **MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ** and **ADRIAN LOPEZ**, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the

Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute and/or distribute cocaine, a Schedule II Controlled Substance, and/or marijuana, a Schedule I Controlled Substance, all in violation of Title 21, United States Code, Sections 846, 841 (a) (1), and 841 (b) (1) (A).

COUNT TWO

21 U.S.C. § 841(a) (1) and
21 U.S.C. § 841 (b) (1) (A)

On or about November 18, 1997, within the District of Idaho and elsewhere, **MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ** and **ADRIAN LOPEZ**, defendants herein, did knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance, and/or marijuana, a Schedule I Controlled Substance, or did aid and abet the same, in violation of Title 21, United States Code, Sections 841 (a) (1) and 841(b) (1) (A).

Dated this 16 day of January, 1998.

A TRUE BILL

/s/ DAVID R. BECK
DAVID R. BECK
Foreperson

Betty H. Richardson
United States Attorney

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
ASSISTANT UNITED STATES ATTORNEY

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO. 97-103-S-BLW

VOLUME IV

PAGES 741 THROUGH 854

UNITES STATES OF AMERICA, PLAINTIFF

v.

FRANCISCO JIMENEZ, ADRIAN LOPEZ, DEFENDANTS

JURY TRIAL

HELD BEFORE THE HONORABLE B. LYNN WINMILL

AT BOISE, IDAHO

JANUARY 15, 1999

A P P E A R A N C E S:

For the Plaintiff:	Office of United States Attorney BY: KIM R. LINDQUIST, ESQ. First Interstate Center, Suite 201 Boise, Idaho 83702
For the Defendant Francisco Jimenez:	Pike Shurtliff BY: M. KARL SHURTLIFF, ESQ. Post Office Box 1652 Boise, Idaho 83701-1652
For the Defendant Adrian Lopez:	Wiebe & Fouser, P.A. BY: THOMAS A. SULLIVAN, ESQ. 702 Chicago Street Post Office Box 606 Caldwell, Idaho 83606-0606
Court Reporter:	JOSEPH RODEN, C.S.R. Boise, Idaho

[Instruction 24 as given to Jury]

* * * * *

[754] A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to the other defendant.

All of the instructions apply to each defendant unless a specific instruction states that it applies to only a specific defendant.

I will now set forth the elements of the offense charged in the superseding indictment:

The defendants are charged in the superseding [755] indictment with conspiring to possess with intent to distribute and/or distribute cocaine and/or marijuana in violation of 21 U.S. Code, Section 846. In order for a defendant to be found guilty of that charge, the Government must prove each of the following beyond a reasonable doubt:

First, beginning on or about a date uncertain, but by November 18, 1997, there was an agreement between two or more persons to possess with the intent to distribute and/or distribute cocaine and/or marijuana; and

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or

more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or [756] perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the superseding indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details

of the unlawful scheme or the names, identities, or locations [757] of all the other members.

Even though a defendant did not directly conspire with the other conspirators in the overall scheme, the defendant has in effect agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that:

First, the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy.

Second, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired.

And three, the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

You must decide whether the conspiracy charged in the superseding indictment existed and, if it did, who at least some of its members were. If you find that the conspiracy charge did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant [758] may have been a member of some other conspiracy.

A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the

conspiracy at a time when it was possible to achieve the objective of that conspiracy.

Therefore, if you find beyond a reasonable doubt that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or the delivery of the controlled substances seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that conspiracy only if you find beyond a reasonable doubt that the defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18, 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

[759] An act is done knowingly if the defendant is aware of the act and does not act or fails to act through ignorance, mistake, or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that a defendant committed the

crime of conspiracy, unless you find that a defendant was a participant and not merely a knowing spectator. A defendant's presence may be considered by the jury along with other evidence in the case.

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